

In the  
**Supreme Court of Ohio**

STATE OF OHIO ex rel. : Case No. 2007-0210  
GENERAL MOTORS CORPORATION, :  
 :  
Appellee, :  
 :  
On Appeal from the :  
Franklin County :  
Court of Appeals, :  
v. : Tenth Appellate District :  
 : Court of Appeals Case :  
INDUSTRIAL COMMISSION OF OHIO, : No. 06AP-373 :  
and CHESTER STEPHAN, et al., :  
 :  
Appellants. :

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**MERIT BRIEF OF APPELLANT  
INDUSTRIAL COMMISSION OF OHIO**

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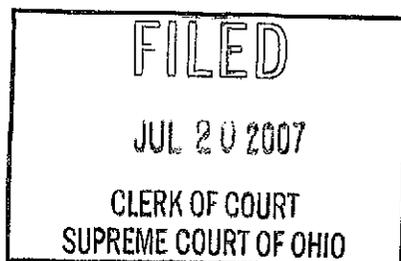
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## INTRODUCTION

This case is about who should shoulder the burden of accounting for taxable insurance benefits and non-taxable workers' compensation benefits: (1) an employer, with the advantage of an accounting system and the obligation to withhold taxes only from taxable benefits, or (2) a disabled worker, with none of these advantages or obligations. Equally important, the case is about whether mandamus or declaratory judgment is the appropriate vehicle to request the legal interpretation of an arguably ambiguous statute.

The Ohio Industrial Commission ("Commission") first urges the Court to dismiss the case for lack of subject-matter jurisdiction because mandamus is an inappropriate remedy in this matter. Second, if the Court reaches the substantive issue, the Commission joins Appellant Chester Stephan ("Stephan") in urging the Court to hold that an employer must pay an injured worker the taxes withheld for non-taxable workers' compensation benefits, rather than forcing the injured worker to wait out the tax year to receive benefits meant to sustain him while unable to work.

The Court should reverse the decision below, and instruct the lower courts to dismiss for lack of subject-matter jurisdiction. Mandamus, an extraordinary writ, is an inappropriate vehicle for requesting the legal interpretation of an ambiguous statute when the real relief requested is a declaratory judgment and an injunction. Here, GM is not asking the Commission to perform any act or grant any benefits; rather, GM asks the court to interpret a law in the way GM prefers—in other words, to declare its rights and obligations under the statute, but not to perform a statutorily-mandated act such as processing an application. This claim should have been brought as a declaratory judgment and not under mandamus, and the Court should dismiss for that reason alone.

If the Court reaches the merits here, it should reverse. The tax-withholding issue arises because workers' compensation benefits are non-taxable, while non-workers' compensation health benefits are taxable. When an employee is totally disabled from a work-related injury, but expects eventually to recover and return to work, he claims a form of benefit known as temporary total ("TT"). If the worker's claim for TT is in dispute, the employer may pay the injured worker taxable health benefits (called sickness and accident or "S&A" benefits) while it disputes whether it owes the injured worker non-taxable TT benefits. Revised Code 4123.56(A) provides that, if the injury is ultimately determined to be work-related so that workers' compensation benefits are eventually paid, the taxable benefits may be set off against the workers' compensation benefits.

The question here is whether the set-off includes the employer's obligation to pay back to the worker the taxes it withheld while the worker was under the taxable S&A policy. The Commission asserts that the correct interpretation of R.C. 4123.56(A) ensures that non-taxable workers' compensation benefits are fully repaid to a disabled worker. A recent change in GM's accounting practices means that an injured GM employee now has to seek tax refunds. GM now withholds taxes for the S&A benefits, and pays them to the taxing authorities rather than its former practice of holding the taxes in escrow and paying them to the injured worker once his claim is allowed.

The Court should reverse for two reasons. First, R.C. 4123.95 requires that Chapter 4123 be "liberally construed in favor of employees." The paragraph at issue here in R.C. 4123.56(A) is silent on the issue of taxes and tax withholding, but the statute as a whole indicates that the set-off should be interpreted to exclude the taxes withheld under an S&A policy. The Commission

correctly construed the law “in favor of employees” by holding that the employer must pay back to the injured worker the taxes it withheld for S&A benefits.

Second, the fundamental purpose of TT compensation is to ensure an injured worker—and particularly a low-income injured worker—the benefit of an after-tax income while he recuperates from his injuries. This policy is especially important to the poorest workers. Allowing employers such as GM to withhold taxes from TT benefits will undermine one of the main purposes of TT compensation, because instead of getting a weekly stream of after-tax income on which to live while recuperating, the injured worker must wait months to file a return to get his wrongly-withheld money back.

The Court should reverse and hold that when an employer withholds taxes during a dispute over a TT claim, once the dispute is resolved, the employer must immediately pay the worker those withheld taxes if the dispute is resolved in the worker’s favor.

#### **STATEMENT OF THE CASE AND FACTS**

**A. Revised Code 4123.56(A) permits employers to offset payments made under sickness and accident insurance against temporary total workers’ compensation benefits for the same time period.**

When a worker is injured on the job and totally disabled for a time while his injuries heal, he is entitled to TT compensation. Benefits for TT are not taxable. R.C. 4123.56(A). However, if the employer disputes that an injury is work-related, it may give the worker benefits under its non-occupational sickness and accident (“S&A”) insurance policy until the dispute is resolved. Benefits under an S&A policy are taxable. 26 U.S.C. § 3402(a)(1); 26 U.S.C. § 105(a).

Revised Code 4123.56(A) permits the employer to offset the payments made under the S&A insurance against the workers’ compensation benefits:

If any compensation under this section has been paid for the same period or periods for which temporary nonoccupational accident and sickness insurance is or has been paid . . . compensation paid under this section for the period or periods 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.

R.C. 4123.56 (A). Thus, the employer may pay an injured worker under its S&A policy when a TT claim is in dispute and offset the S&A payments against the owed workers' compensation benefits once it is determined that the injury was indeed work-related.

**B. GM disputed Stephan's workers' compensation claim and paid him benefits under its non-occupational sickness and accident policy.**

In May 1998, Stephan hurt his back working for GM. Five days later, he applied directly to GM, a self-insured employer, for workers' compensation benefits. GM refused to certify the claim, and Stephan applied for non-occupational benefits under GM's S&A. His application reiterated that the injury was work-related. Supplement at 28. ("Supp. 28.") He was temporarily totally disabled from work for sixteen weeks and six days due to his back injury. Stephan applied for workers' compensation with the Ohio Bureau of Workers' Compensation. On February 18, 1999, at the first commission hearing, GM changed its position and certified the claim for a herniated disc. Supp. 2, 30.

**C. GM changed its accounting practices, and no longer keeps taxed amounts in escrow until a disputed claim is resolved.**

Shortly before Stephan's injury, GM changed its accounting procedure for disputed work-injury claims. For some time before Stephan's 1998 injury, GM had made what it called "disability advances," withholding "the potential income tax to be deducted from S&A benefits until such time as the claim was determined to be compensable or noncompensable." Supp. 32.

GM's 1996 Claims Manual describes "disability advances" as follows:

GM Disability Advances (GMDA) are treated as loans to employees for Federal income tax purposes until such time as they are resolved to be Sickness and Accident Benefits. An amount equal to the potential Federal income tax is to be withheld from all GMDA payments.

GMDA payments resolved to be Sickness and Accident benefits are subject to Federal income tax. If GMDA is resolved to be Sickness and Accident benefits, the Federal income tax withheld must be paid and reported to the Internal Revenue Service as if GMDA were a lump-sum Sickness and Accident benefit payment on the date of resolution. No attempt should be made to collect additional Federal income taxes if the cumulative amount withheld does not equal or exceed the amount that should be withheld on the date of resolution

If GMDA is resolved to be Workers' Compensation, the amount withheld for potential Federal income tax liability is to be paid to the employee as a Workers' Compensation benefit.

Supp. 32. In other words, under its prior bookkeeping system, GM withheld potential income taxes from S&A benefits and placed them into escrow until the status of the claim was determined. The amounts withheld were not paid to the various taxing authorities when the S&A checks issued. If the injury was later determined to be compensable under workers' compensation, the withholdings were then paid to the injured worker as part of his workers' compensation benefits. If the injury was found non-compensable, then GM paid the withholdings to the various taxing authorities.

But at the time of Stephan's injury, GM had altered its accounting policy. GM now pays disputed workers' compensation claims under the S&A policy and sends tax withholdings to the various taxing authorities with each S&A check. Injured workers must seek refunds from those authorities if the injuries are later found compensable. A letter from GM's "National Benefit Center" states:

[W]e are only able to give Social Security tax credit. We do issue a W2-C so the employee can file an amended return to lower his taxable income, and allow the employee to receive a refund for the overwithheld income taxes.

Supp. 31. In other words, now all GM employees involved in disputed workers' compensation claims have taxes withheld from each S&A check, and must later file for income tax refunds to recoup any portion of the withheld taxes.

**D. GM withheld taxes on Stephan's sickness and accident benefits, and it did not return the tax amounts when the sickness and accident benefits were set off against Stephan's workers' compensation benefits.**

The amounts involved in this case are undisputed. Under R.C. 4123.56(A), Stephan was entitled to \$9,119.71 in temporary total compensation for the days he was off work. He had received a gross amount of \$7,091.30 under the S&A policy. GM withheld approximately \$1,189.00 in federal, state and local taxes from the \$7,091.30 in S&A payments. (Supp. 7-8, 11, 14-15, 31, 34-35.)

Once Stephan's claim was determined to be work-related, GM paid Stephan an additional amount under R.C. 4123.56(A). However, GM refused to pay Stephan the entire difference between TTC and the net S&A payments he had actually received. Instead, GM paid the difference between TTC (\$9,119.71) and the gross amount under S&A (\$7,091.30), or \$2,028.41, claiming Stephan should attempt to recover the tax withholdings (\$1,189.00) from the various taxing authorities. Supp. 31. GM paid the last part of the \$2,028.41 on January 31, 1999. Supp. 43, 44.

**E. The Industrial Commission ruled for Stephan.**

On May 7, 1999, Stephan asked the Commission to order GM to pay him the amounts withheld from S&A payments. The district hearing officer ("DHO") ruled for Stephan, finding "the claimant is entitled to the \$9,119.71 [TT] for the period as a "net" or "take home" amount" Supp. 9. GM appealed, and the staff hearing officer ("SHO"), without analysis of the words "paid or payable" in R.C. 4123.56(A), ruled for GM, finding "the employer paid the correct amount of temporary total compensation and sickness and accident benefits" Supp. 16. Stephan appealed and, by unanimous vote, on January 6, 2000, the commissioners ordered GM to pay Stephan \$1189.00—the difference between the net S&A payments (after taxes were withheld)

and the TT due—so that Stephan would be wholly compensated Supp. at 18-19. The commissioners reiterated the DHO’s order, stating that he should have been paid the full amount:

The claimant’s weekly rate for temporary total compensation is \$541.00. The claimant was entitled to temporary total compensation for sixteen and six sevenths (16 6/7) weeks. This amounts to \$9,119.71. The claimant is to be paid said amount as a net, rather than a lesser amount after deduction from the figure above. This figure may be composed of all temporary total disability benefits, all sickness and accident benefits in lieu of temporary total, or a combination of the two.

Supp. 18. Thus, the Commission held that GM could not deduct taxes from the final amount paid to Stephan.

**F. GM filed for a writ of mandamus, but asked for relief only in the form of a declaration of the interpretation of a statute.**

GM filed for a writ of mandamus in Franklin County Common Pleas Court. GM’s complaint<sup>1</sup> alleges that the Commission’s decision is “contrary to state and federal law.” The request for relief asks that the Commission “vacate its order and properly credit to [GM] all sums paid for and on behalf of [Stephan] in the form of withholding taxes . . .” Supp. 40 ¶12.

**G. The Court of Common Pleas denied the writ of mandamus, but the Court of Appeals reversed.**

In common pleas court, Judge Sadler granted the writ GM requested, but the entry was not file-stamped until the day after she took office in the Tenth District Court of Appeals. Appendix pp. 18-25 (“App. 18-25”). Stephan challenged the validity of Judge Sadler’s ruling, and the Tenth District Court of Appeals returned the matter to Common Pleas Court. App. 26-33.

On remand, Judge Reese denied the writ, reasoning that a liberal construction of R.C. 4123.56(A), as required by R.C. 4123.95, validated the Commission’s ruling. GM appealed, and on December 19, 2006, the Court of Appeals issued a Decision and filed an Entry granting the

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<sup>1</sup> The complaint contains only two paragraphs that could be considered claims. The first, paragraph 11, alleges abuse of discretion under *State ex rel. Noll v. Indus. Comm.* (1991), 57 Ohio St. 3d 203. GM has never argued this claim, thus it has been waived and is no longer at issue here.

writ. The court held (1) that because there was no appeal from the Commission's ruling, GM had no adequate remedy at law, and therefore mandamus is appropriate here and (2) that R.C. 4123.56(A) is clear and unambiguous, and that therefore GM was entitled to the writ.

## ARGUMENT

### **Appellant Industrial Commission's Proposition of Law No. 1:**

*A writ of mandamus should not issue in a dispute asking only for the interpretation of a statute because a relator does not have a "clear legal right" to a mere declaration of a particular construction of the statute.*

This case turns on its head the purpose of a writ of mandamus—to enforce a *clear* duty in favor of someone who has a *clear* legal right to the execution of that duty. Instead, this case merely asks the courts to interpret an arguably ambiguous statute. Accordingly, because the relator never has a clear right to a particular construction of a statute, without more, this case is not properly brought as an action in mandamus.

Mandamus is an extraordinary legal remedy commanding the performance of an act the law specially enjoins as a duty. R.C. 2731.01; *State ex rel. Haylett v. Ohio Bureau of Workers' Comp.* (1999), 87 Ohio St.3d 325, 334. Entitlement to a writ of mandamus requires: (1) a clear legal right to the requested relief; (2) a corresponding clear legal duty on the part of the respondent; and (3) the lack of an adequate remedy in the ordinary course of the law. *State ex rel. Moore v. Malone* (2002), 96 Ohio St.3d 417, 420.

GM can point to no "clear legal duty" on the part of the Commission to interpret and apply R.C. 4123.56(A) in GM's favor, nor a "clear legal right" on GM's part to its preferred interpretation. Of course, a court may interpret a statute—even an ambiguous statute—in the course of deciding whether to grant a writ of mandamus. But mandamus requires more—the relief requested must include a clear legal right to some positive action on the part of a government agency or employee; for example, a relator could properly allege in mandamus that

it has a right to reconsideration of a rate adjustment denied by a state agency. See, e.g., *Ohio Academy of Nursing Homes v. Ohio Dept. of Job and Family Servs.*, 114 Ohio St.3d 14, 2007-Ohio-2620, ¶5. Or, a relator could properly allege in mandamus that it has a right for an agency to process his licensure application. *State ex rel. Huntington Ins. Agency v. Duryee* (1995), 73 Ohio St. 3d 530. But here, GM asks only that the Commission interpret a statute in a certain way, not to process an application or reconsider a rate adjustment. Without more, mandamus is inappropriate.

Nor is there a lack of an adequate remedy at law. This Court has explained that litigants may seek judicial review of Commission rulings “by direct appeal to the courts of common pleas under R.C. 4123.519 [the predecessor to R.C. 4123.512], by filing a mandamus petition, or by an action for declaratory judgment pursuant to R.C. Chapter 2721.” *Felty v. AT&T Technologies, Inc.* (1992), 65 Ohio St.3d 234, 237. The proper procedural mechanism for judicial review “depends entirely on the nature of the decision issued by the commission.” *Id.* “Each of the three avenues for review is strictly limited; if the litigant seeking judicial review does not make the proper choice, the reviewing court will not have subject matter jurisdiction and the case must be dismissed.” *Id.*

And, as the Court has explained, when a declaratory judgment and injunction action will provide relief, mandamus is inappropriate: “It is axiomatic that ‘if the allegations of a complaint for a writ of mandamus indicate that the real objects sought are a declaratory judgment and a prohibitory injunction, the complaint does not state a cause of action in mandamus and must be dismissed for want of jurisdiction.’” *State ex rel. U.A.W. v. Bur. of Workers’ Comp.*, 108 Ohio St. 3d 432; 2006-Ohio-1327 ¶ 41, quoting *State ex rel. Grendell v. Davidson* (1999), 86 Ohio St.3d 629, 634.

Moreover, several workers' compensation cases have been filed in declaratory judgment where, as here, a party is seeking only a declaration of its rights or obligations under a particular statute. See, e.g., *Arth Brass & Aluminum Castings, Inc. v. Conrad*, 104 Ohio St. 3d 547, 2004 Ohio 6888 (self-insured company filed declaratory judgment to reverse a charge to its risk account based on an unconstitutional Bureau policy); *Northwestern Ohio Bldg. & Constr. Trades Council v. Conrad*, 92 Ohio St. 3d 282, 2001 Ohio 190 (challenging the constitutionality of aspects of the Health Partnership Program); *Columbus & Southern Ohio Electric Co. v. Industrial Com. of Ohio*, 64 Ohio St. 3d 119 (asking for clarification of employer's right to handicap reimbursement); *Wean, Inc. v. Industrial Comm. of Ohio*, 52 Ohio St. 3d 266 (seeking declaration of rights and obligations under Disabled Workers' Relief Fund); *Ohio State Chiropractic Ass'n v. Ohio Bureau of Workers' Comp.*, 1993 Ohio App. Lexis 262 (10<sup>th</sup> dist. 1993) (seeking declaratory judgment and injunction to prevent enforcement of a policy where Bureau had not complied with rulemaking procedures); *Ohio Hosp. Ass'n v. Ohio Bureau of Workers' Comp.*, 2007 Ohio 1499 (10<sup>th</sup> Dist. 2007)(same). In addition, the Court has dismissed cases brought in mandamus that should have been brought in declaratory judgment instead. See *State ex rel. U.A.W.*; *State ex rel. Marks v. Industrial Com. of Ohio*, 63 Ohio St. 3d 184.

GM's complaint in this case illustrates that the relief it is really seeking is in declaratory judgment and not mandamus. In the claim at issue, GM alleges only that the Commission's decision is "contrary to state and federal law." GM's request for relief asks only that the Commission "vacate its order and properly credit to [GM] all sums paid for and on behalf of [Stephan] in the form of withholding taxes . . . ." Supp. 40 ¶12. This is similar to the relief claimed in *Arth Brass*—that the Bureau declare a policy unconstitutional and remove a charge to its risk account based on that policy.

Thus, GM does not claim that the Commission abused its discretion, nor does it ask the Commission to perform any statutorily-required act such as to process an application or adjust a rate; rather, GM asks the court only to interpret a law the way GM prefers. As in *U.A.W.* and *Grendell*, “[a]lthough the allegations of [GM’s] complaint are couched in terms of compelling affirmative duties, i.e., to “follow the law” . . . , the manifest objectives of relator’s complaint are (1) a declaratory judgment that [R.C. 4123.56(A) allows a gross instead of a net set-off] and (2) a prohibitory injunction preventing the [Commission from applying the law otherwise]. Thus, GM’s relief lies with a declaratory judgment and injunction action, not in mandamus.

Accordingly, GM has an adequate remedy at law: a declaratory judgment action coupled, perhaps, with a prohibitory injunction. Because this controversy is properly a declaratory judgment action masquerading as mandamus, this Court should dismiss this case for lack of subject matter jurisdiction.

**Appellant Industrial Commission’s Proposition of Law No. 2:**

*Any ambiguity in the workers’ compensation statutes is liberally construed in favor of the injured employee under R.C. 4123.95, so that the set-off language in R.C. 4123.56(A) requires full payment of the allowed workers’ compensation benefit without withholding taxes.*

As shown below in Proposition of Law No. 3, the language at issue in R.C. 4123.56(A) is properly interpreted to require full payment of the allowed workers’ compensation benefit without withholding taxes. But even if the statutory language is ambiguous, R.C. 4123.95 requires that Chapter 4123 be “liberally construed in favor of employees.” See, e.g., *Hutchinson v. Ohio Ferro Alloys Corp.*, 70 Ohio St. 3d 50, 52. In this case, that requires that the undefined set-off language of R.C. 4123.56(A) be interpreted to require full payment of all TT benefits to an injured worker, without any tax withheld.

The set-off paragraph in R.C. 4123.56(A) is completely silent as to taxes. The statute does not say “paid or payable by the employer,” but only “paid or payable.” It could just as easily mean “paid or payable *to the employee*.” In other words, the statute might mean that GM can set off only those amounts actually paid (in the past) and payable (currently) *to the employee* under the S&A policy—that is, that GM still must pay Stephan the amounts withheld for taxes. Or, the statute might mean that GM may set off amounts paid or payable *by the employer* to both the employee and the taxing authorities—that is, that GM need not pay the amounts withheld to the injured worker.

Indeed, the various tribunals in this case have struggled with the words “paid or payable” in R.C. 4123.56(A). Three (the DHO, the Commission and Judge Reese) have found in favor of Stephan’s position and three (the SHO, Judge Sadler and the Court of Appeals) for GM’s. The Court of Appeals held that the statute is unambiguous and therefore not amenable to “liberal construction.” But the court below had to write in the words “by the employer” after “paid and payable” in the set-off paragraph to make it “unambiguous.” App. at 21.

As explained more fully below, TT is intended to provide an injured worker with an after-tax income during the time he is disabled and unable to work. In this case, the employee Stephan was not paid promptly or fully when he was found eligible for TT as is required by R.C. 4123.511(H)(4), but was forced into the uncertainty and delay of seeking tax refunds. Therefore, the proper construction of the statute “liberally . . . in favor of employees” requires employers to directly pay injured workers the full benefit, including any taxes withheld under an S&A policy.

**Appellant Industrial Commission's Proposition of Law No. 3:**

*Indirectly taxing temporary total disability compensation impermissibly diminishes and delays compensation intended to replace take-home earnings, interrupting the cash flow intended to maintain the disabled worker until he can return to work*

TT compensation is intended to provide a cash flow to maintain the disabled employee (and his family) during recuperation until he is capable of returning to his former job or alternative light-duty work. It is calculated as a percentage of averaged weekly wages ("AWW") approximating the injured employee's post-tax, take-home earnings. Taxes are not withheld partly *because* TT is supposed to approximate after-tax income.

Specifically, the first twelve weeks of TT are capped at the "lesser of the statewide average weekly wage" or "the employee's net take-home weekly wage." Thereafter, TT is capped at the lesser of two-thirds of the employee's AWW or the statewide AWW. After the initial twelve weeks of TT, indemnity for Ohio's wage earners making less than the statewide AWW is capped at two-thirds of their gross earnings, approximating a week-to-week cash flow of their take-home pay. After the initial twelve weeks, employees earning more than the statewide AWW have their indemnity capped at the statewide AWW. R.C. 4123.56(A).

For the very poorest Ohio workers—those earning less than one-third of the statewide AWW—TT is pre-tax, full wages. The language of R.C. 4123.56(A) as a whole makes clear that maintaining an adequate cash flow for the recuperating injured worker—particularly the lowest-paid injured worker—is the critical concern of TT. Post-tax, net earnings are taken into account in calculating TT, particularly for those workers most likely to be living paycheck to paycheck. Taxes are not withheld from TT, in part, because the approximation of after-tax income is part of the indemnity calculation. In other words, the formula already puts the worker in the place he would be after taxes were he still working. Any further reductions due to tax withholding leave

the worker with much less than he would receive if working. That violates the fundamental idea that the worker be kept whole during the period he is disabled and unable to work.

Thus, allowing GM and other employers to withhold taxes on non-taxable income would defeat the purpose of TT during the period of disability, and the eventual recoupment of the missing money as a tax refund does not adequately alleviate that harm. True, the worker might eventually get his money through a tax return, but this may take several months or even years. In this case the claim was resolved fairly quickly, as GM agreed that the injury was work-related at the first hearing. However, many claims are disputed and litigated for years before final resolution. In addition, while Stephan was disabled for about six months, other injured workers can be on TT for much longer periods of time. An individual's tax return is filed only once a year, with the refund coming in a lump sum. For example, in Stephan's case, he would have had to wait almost a year to recoup the tax money, as the Commission hearing at which the claim was resolved occurred in February of 1999. If he had applied immediately at that time for the tax refund, he might have received it in April or May 1999, close to a year after his injury. Even worse, in a case where the litigation drags on for years, it is possible that the worker may never be able to recoup the withheld amounts at all, because the time limit for an amended return is three years.

TT is intended to give an injured worker a stream of after-tax income on a weekly basis, so that he and his family can pay basic expenses and bills on a weekly basis. If the worker has taxes withheld from what is supposed to be an after-tax benefit, his ability to support himself and his family is impaired, even if months later he can get back the amounts withheld in a lump sum. As an illustration, Stephan was supposed to get a weekly after-tax TT benefit of \$541. Instead, under

GM's S&A policy he got only \$350.14 per week.<sup>2</sup> GM eventually agreed that he should get an additional \$120.33 per week, leaving him with only \$470.47 per week to live on while he was disabled—still short \$70.53 per week of the after-tax TT amount. While a worker in Stephan's position might eventually get the tax money back in a lump sum months later, it is not available on a weekly basis to pay the grocery, rent and electric bills.

GM's accounting practices originally dealt realistically with the uncertainty of disputed workers' compensation claims and the competing interests of proper withholding of taxes from S&A benefits and the purposes of TT. GM made what it called "disability advances," escrowing "the potential income tax to be deducted from S&A benefits until such time as the claim was determined to be compensable or noncompensable" Employees received the escrowed funds when the injury was found to be compensable under workers' compensation, without having to file a tax return. Only if the injury was non-compensable under workers' compensation, did GM pay the escrowed withholdings to the various taxing authorities. While GM is required to withhold taxes for S&A benefits, they have never argued that those taxes must be immediately paid to taxing authorities if the claim might eventually be non-taxable workers' compensation.

In short, if GM's interpretation of the statute is followed, the injured worker, instead of being assured the ability to pay his bills while recuperating, will be forced to apply for tax refunds to get his whole benefit. The delays and uncertainties of tax refunds are incongruous with the fundamental purpose of TT—to ensure an injured worker the present ability to support himself while recuperating from his injuries.

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<sup>2</sup> Amounts are for illustrative purposes and calculated using the agreed-upon total amounts listed in the Statement of Facts, divided by 16 6/7 weeks of TT. The amounts in actual checks may vary.

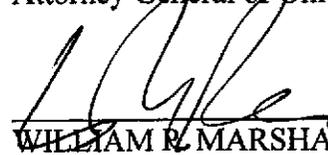
Revised Code 4123.56(A), construed as a whole, requires that an injured worker receive his full, after-tax benefit on a weekly basis. The employer should not withhold part of that non-taxable benefit for taxes, and if withheld under an S&A policy, should return the withheld amounts when the claim is found to be non-taxable TT benefits.

### CONCLUSION

For the above reasons, this Court should overrule the court below and deny the writ.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing Merit Brief of Appellant Industrial Commission of Ohio was served by U.S. mail this 20<sup>th</sup> day of July, 2007, upon the following counsel:

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ELISE W. BORTER  
Deputy Solicitor

## APPENDIX

In the  
**Supreme Court of Ohio**

STATE OF OHIO, ex rel. GENERAL  
MOTORS CORPORATION,

Appellee,

v.

INDUSTRIAL COMMISSION OF OHIO,  
and CHESTER STEPHAN, *et al.*,

Appellants.

Case No. 2007-0210

On Appeal from the  
Franklin County  
Court of Appeals,  
Tenth Appellate District

Court of Appeals Case  
No. 06AP-373

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CLERK OF COURT

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**NOTICE OF APPEAL OF  
APPELLANT INDUSTRIAL COMMISSION OF OHIO**

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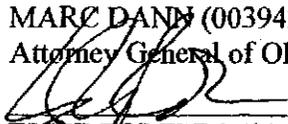
Counsel for Appellant  
Chester Stephan

**NOTICE OF APPEAL OF APPELLANT INDUSTRIAL COMMISSION OF OHIO**

Appellant Industrial Commission of Ohio hereby gives notice of its discretionary appeal to this Court, pursuant to Ohio Supreme Court Rule II(A)(3), from a Judgment Entry of the Franklin County Court of Appeals, Tenth Appellate District, journalized in Case No. 06AP-373 and filed on December 19, 2006. Reasons for this discretionary appeal, including the great public interest involved in this case, are fully set forth in the accompanying Memorandum in Support of Jurisdiction.

Respectfully submitted,

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---

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**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing Notice of Appeal of Appellant Industrial Commission of Ohio was served by U.S. mail this 2/12/07 day of February, 2007, upon the following counsel:

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Elise Porter  
Acting Solicitor General

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FRANKLIN COUNTY  
2006 DEC 19 11:43  
CLERK OF COURTS

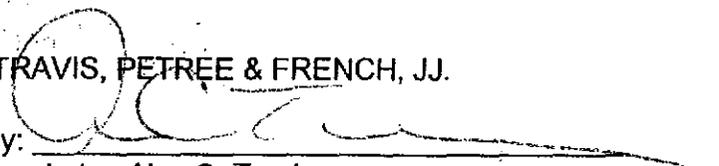
IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

State ex rel. General Motors Corporation, :  
Appellant, :  
v. :  
Industrial Commission of Ohio et al., :  
Appellees. :

No. 06AP-373  
(C.P.C. No. 00CVH-11-10211)  
(REGULAR CALENDAR)

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

ON OCT 11 2006

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IN THE COURT OF APPEALS OF OHIO

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WORKERS-COMPENSATION TENTH APPELLATE DISTRICT

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FRANKLIN COUNTY  
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State ex rel. General Motors Corporation, :

Appellant, :

v. :

Industrial Commission of Ohio et al., :

Appellees. :

No. 06AP-373  
(C.P.C. No. 00CVH-11-10211)  
(REGULAR CALENDAR)

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NUNC PRO TUNC<sup>1</sup>

O P I N I O N

Rendered on December 21, 2006

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*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.*

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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.

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<sup>1</sup> 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.

{12} 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.<sup>2</sup>

{13} 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,

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<sup>2</sup> 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).<sup>3</sup>

{¶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"

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<sup>3</sup> 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.<sup>4</sup>

{¶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.<sup>5</sup> 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

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<sup>4</sup> 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).

<sup>5</sup> 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.<sup>6</sup>

{¶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.

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<sup>6</sup> 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. \* \* \* However, that standard of review is not relevant here since the commission made no factual determination \* \* \* .

*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.<sup>7</sup>

{¶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

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<sup>7</sup> 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.<sup>8</sup>

{¶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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<sup>8</sup> 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.

# FINAL APPEALABLE ORDER

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

State, ex rel., :  
 General Motors Corporation, :  
 Relator, :  
 -v- :  
 Industrial Commission of Ohio, :  
 et al., :  
 Respondents. :

Case No. 00CVH11-10211

**TERMINATION NO. 18**  
**BY SG**

Judge L. Sadler

## DECISION AND ENTRY GRANTING WRIT OF MANDAMUS

Rendered this 30<sup>th</sup> day of June, 2003.

SADLER, JUDGE

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 COMMON PLEAS COURT  
 FRANKLIN CO. OHIO

This is an original action for a writ of mandamus filed by Relator, General Motors Corporation (hereinafter, "Relator"). Relator seeks issuance of the writ ordering Respondent, Industrial Commission of Ohio (hereinafter, "the Commission") to vacate its January 6, 2000 Order, a copy of which is filed of record in the parties' Stipulated Evidence, and bears Bates Number 00024-00025.

The Commission's Order requires Relator to pay to Respondent, Chester Stephan (hereinafter, "Stephan") the difference between the following: (1) the amount of temporary total disability (hereinafter, "TTD") benefits to which Stephan was entitled under his workers' compensation claim minus the gross amount Stephan was paid during his period of disability through an employer-funded sickness and accident program; and (2) the amount of TTD benefits to which Stephan was entitled under his workers' compensation claim minus the net (after-tax) amount Stephan was paid during his period of disability through the employer-funded sickness and accident program.

Relator argues that the Commission's Order is not supported by any evidence and is contrary to law. Specifically, Relator argues that the Commission is without authority to order a self-insured employer to pay TTD to a claimant in a total amount which exceeds the amount payable under any claim pursuant to R.C. 4123.56(A).

The following facts are not in dispute. Stephan filed his claim with Relator for a back injury he sustained while in the course and scope of his employment. Initially, Relator refused to certify the claim. During the pendency of proceedings in the Ohio Bureau of Workers' Compensation, Stephan received disability benefits through a non-occupational sickness and accident disability program funded by Relator. Benefits paid through such a program are taxable pursuant to applicable federal statutes. Relator withheld federal, state and local taxes from the benefits paid to Stephan through the non-occupational disability program. The total amount paid by Relator for Stephan's temporary disability, through the disability program, is \$7,091.30.

Stephan was absent from work due to his injury for a total of sixteen weeks and six days. Pursuant to R.C. 4123.56(A), based upon the amount of time Stephan was absent from work due to his injury, Stephan is entitled to TTD in the amount of \$9,119.71. After Stephan returned to work, and during the pendency of the administrative determination of whether Stephan's claim would be allowed, Relator certified Stephan's claim. Upon Relator's certification of Stephan's claim, Relator became legally obligated to pay Stephan the amount of TTD to which he was statutorily entitled.

R.C. 4123.56(A) allows an employer to offset the amount of TTD paid, "to the extent by which the payment or payments exceeds the amount of the non-occupational

[sickness and accident disability] \* \* \* program paid or payable." R.C. 4123.56(A).

Accordingly, in paying Stephan his TTD benefits, Relator deducted the gross amount paid under its sickness and accident disability program.

Thereafter, Stephan filed a motion requesting the Commission to order Relator to pay directly to Stephan those amounts which had been paid to taxing authorities, representing withholding for the monies payable through the sickness and accident disability program. The District Hearing Officer issued an order granting the motion. On appeal, the Staff Hearing Officer issued an order reversing the order of the District Hearing Officer. Upon appeal to the Commission, and after a hearing, the Commission reversed the order of the Staff Hearing Officer. The Commission found and ordered as follows:

The claimant's weekly rate for temporary total disability compensation is \$541.00. The claimant was entitled to temporary total compensation for sixteen and six sevenths (16 6/7) weeks. This amount is \$9,119.71. The claimant is to be paid said amount as a net, rather than a lesser amount after deduction from the figure above. This figure may be composed of all temporary total disability benefits, all sickness and accident benefits in lieu of temporary total, or a combination of the two.

January 6, 2000 Order of the Commission.

Relator then filed the instant action for a writ of mandamus, requesting that this Court order the Commission to vacate its Order and issue an Order affirming the order of the Staff Hearing Officer. The basis for Relator's request is its contention that the Commission's Order compels Relator to pay Stephan sums in excess of those required to be paid to him pursuant to R.C. 4123.56(A).

In order for the writ of mandamus to issue, Relator must demonstrate that the Commission abused its discretion. *Krupa v. Indus. Comm.* (10<sup>th</sup> Dist. 1984), 20 Ohio

App.3d 238, 485 N.E.2d 839. The Commission abused its discretion only if there is no evidence upon which the Commission's could have based its decision. *Id.* If there is "some evidence" to support the Commission's decision, the writ will not issue. *State ex rel. Burton v. Indus. Comm.* (1989), 46 Ohio St.3d 170, 545 N.E.2d 1216. Relator must show that it has a clear legal right to the performance by the Commission of a clearly defined legal duty. *State ex rel. Mansfield v. Mahoning County Bd. of Elections* (1988), 40 Ohio St.3d 16, 530 N.E.2d 1327.

In its Brief, Relator argues that the Commission has a clear legal duty not to order payment of TTD benefits in excess of the maximum amount allowable by statute. Relator points out that it has paid Stephan a total of \$9,119.71, the amount to which he is undisputedly entitled pursuant to R.C. 4123.56(A). Relator argues that the Commission's Order, which requires it to offset Stephan's TTD award by the net amount of Stephan's sickness and accident disability benefits (in other words, the amount actually received by Stephan) as opposed to the gross amount of these benefits (the amount paid to Stephan plus the amount withheld and remitted to taxing authorities) essentially requires Relator to pay Stephan the difference between a net setoff and a gross setoff, or, the amount of the taxes Relator withheld from Stephan's sickness and accident disability benefits. Put another way, Relator is being ordered to pay Stephan's income taxes on his non-occupational disability benefits. This, Relator argues is contrary to the express language of R.C. 4123.56(A) and is unsupported by any evidence the Commission had before it.

Relator argues that nowhere in R.C. 4123.56 did the General Assembly indicate that TTD claimants are to receive TTD payments to the extent they exceed the net non-

occupational insurance or sickness and accident disability payments the claimant received. Furthermore, Relator argues it has done nothing other than what it is obligated to do pursuant to both Ohio workers' compensation statutes and applicable tax codes. To require Relator to set off its TTD award by the net sickness and accident disability benefits paid to Stephan, Relator argues, results in Stephan receiving more than he is due pursuant to R.C. 41213.56, to Relator's detriment. Relator argues that this result finds no support in the statute or the evidence before the Commission.

In its Brief, the Commission argues that Relator simply "mistakenly" withheld amounts from Stephan's TTD payments, and has wrongfully treated Stephan's TTD benefits as taxable income. The Commission argues that, if R.C. 4123.56 is read to mean TTD benefits are to be offset to the extent they exceed the gross amount of non-occupational disability benefits, this "would conflict with the federal and state laws that provide that workers' compensation payments are not taxable." Brief of Commission, page 5.

For support of its position, the Commission cites the case of *State ex rel. Boyd v. Frigidaire Div., General Motors Corp.* (1984), 11 Ohio St.3d 243, 465 N.E.2d 83. The Commission states that this case stands for the proposition that TTD benefits cannot be offset by the amount of non-occupational permanent, total disability payments made to a claimant. This is the holding of *Boyd*; however, it is inapposite to the instant case. First, *Boyd* dealt with non-occupational permanent, total disability benefits, not benefits for temporary, total disability. Second, the Court's holding was predicated upon the distinction between the language of R.C. 4123.56 before and after the General Assembly amended that statute in 1979. The Court pointed out that the former version

of the statute was ambiguous as to whether TTD benefits could be offset by permanent, total benefits paid for the same period, whereas the amended version clearly prohibited such a setoff. The focus of the decision was the mutually exclusive nature of permanent and temporary benefits. Nowhere in *Boyd* does the Court discuss the difference between net and gross setoffs.

Finally, the Commission argues that, owing to the broad discretion afforded the Commission, Relator cannot demonstrate that the Commission abused its discretion in issuing its January 6, 2000 Order, and thus the writ should be denied.

In his Brief, Stephan also characterizes Relator's withholding of taxes from Stephan's non-occupational disability benefits as erroneous. Brief of Stephan, page 7. Stephan argues that the statute vests discretion in the Commission with respect to setoffs of TTD benefits, and this Court cannot and should not interfere in that discretion, or substitute its own discretion for that of the Commission.

There is no question that the Commission's Order would result in actual receipt by Stephan of aggregate TTD benefits in an amount in excess of that set forth in R.C. 4123.56(A). The issue in this case is whether the Commission abused its discretion in so ordering, and whether it has a clear legal duty not to do so.

Section 4123.56(A) provides, in pertinent part:

(A) 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, \* \* \*

\* \* \*

If any compensation under this section has been paid for the same period or periods for which temporary nonoccupational accident and sickness insurance is or has been paid pursuant to an insurance policy or program to which the employer has made the entire contribution or payment for

providing insurance or under a nonoccupational accident and sickness program fully funded by the employer, compensation paid under this section for the period or periods 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.

\*\*\*

R.C. 4123.56(A). (Emphasis added.)

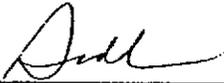
Nowhere in the language of this statute does the Legislature mandate that setoffs of TTD benefits be limited to setoffs of "net" benefits paid to a claimant through an employer-funded non-occupational temporary disability program. Thus, the Commission's Order finds no support in R.C. 4123.56(A). Further, the statute does not specify that the only amounts the employer may use to offset TTD benefits are those paid to the claimant (in other words, net or after-tax payments). The fact that the General Assembly chose not to limit setoffs in this manner is in harmony with the express language of the statute prescribing the exact formula for calculation of the total amount of TTD benefits payable to an eligible claimant. If gross setoffs are permissible, as they are under R.C. 4123.56(A), then an employer will never be forced to pay more TTD benefits to a claimant than is expressly prescribed by statute.

In the present case, however, the Commission abused its discretion in ordering Relator to pay to Stephan aggregate TTD benefits in excess of the maximum amount allowable by statute. The Commission abused its discretion by impermissibly qualifying the language of R.C. 4123.56(A). That statute allows a setoff for all amounts "paid or payable" through an employer-funded non-occupational temporary disability program: the Commission apparently concluded that the statute specifies that setoffs may only be made of amounts "paid or payable to the claimant" through such programs. This was

an unlawful exercise of the Commission's discretion and this Court finds Relator has a clear legal right to a writ of mandamus ordering the Commission to vacate its Order.

Accordingly, the Petition for Writ of Mandamus is hereby **GRANTED**. **IT IS HEREBY ORDERED** that the Industrial Commission of Ohio **VACATE** its Order of January 6, 2000.

**IT IS SO ORDERED.**

  
\_\_\_\_\_  
Lisa L. Sadler, Judge

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IN THE COURT OF APPEALS OF OHIO

WORKERS COMP

TENTH APPELLATE DISTRICT

State ex rel. General Motors Corporation, :

Relator-Appellee, :

v. :

Industrial Commission of Ohio and  
Chester Stephan, :

Respondents-Appellants. :

Nos. 03AP-782 x

and

04AP-259

(C.P.C. No. 00CVH-11-10211)

(REGULAR CALENDAR)

JUDGMENT ENTRY

For the reasons stated in the opinion of this court rendered herein on February 3, 2005, appellant Chester Stephan's first and eighth assignments of error are sustained, and assignments of error two through seven are overruled as moot. Appellant Industrial Commission's two assignments of error are overruled as moot and we dismiss the appeal in case No. 03AP-782. It is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is reversed in case No. 04AP-259 and we remand for further proceedings in accordance with law consistent with said opinion. Costs assessed against appellee.

LAZARUS & PETREE, JJ.

By: Cynthia C. Lazarus  
Judge Cynthia C. Lazarus

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. General Motors Corporation, :  
Relator-Appellee, : Nos. 03AP-782  
v. : and  
Industrial Commission of Ohio and : 04AP-259  
Chester Stephan, : (C.P.C. No. 00CVH-11-10211)  
Respondents-Appellants. : (REGULAR CALENDAR)

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O P I N I O N

Rendered on February 3, 2005

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

*Jim Petro, Attorney General, and William J. McDonald, for respondent Industrial Commission of Ohio.*

*Stephan E. Mindzak, for respondent Chester Stephan.*

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APPEALS from the Franklin County Court of Common Pleas.

LAZARUS, J.

{¶1} Respondents-appellants, Chester Stephan ("Stephan") and the Ohio Industrial Commission ("Industrial Commission"), appeal from two judgments of the Franklin County Court of Common Pleas that were consolidated by this court. The first judgment is the July 1, 2003 decision and entry of the Franklin County Court of Common Pleas granting a writ of mandamus to relator-appellee, General Motors Corporation

("General Motors"), ordering the Industrial Commission to vacate its order of January 6, 2000. Appellants also appeal from the February 6, 2004 judgment entry of the Franklin County Court of Common Pleas overruling Stephan's motion to strike or alternatively a motion for relief from judgment pursuant to Civ.R. 60(B)(5). For the reasons that follow, we reverse and remand the matter to the trial court.

{¶2} The underlying issue in this case involves compensation for a back injury Stephan sustained while in the course and scope of his employment. The Industrial Commission ordered General Motors (a self-insured employer) to pay Stephan the difference between: (1) the amount of temporary total disability benefits to which he was entitled under his workers' compensation claim minus the gross amount Stephan was paid during his period of disability through an employer-funded accident and sickness program; and (2) the amount of temporary total disability payments to which he was entitled under his workers' compensation claim minus the net (after-tax) amount Stephan was paid during his period of disability through the employer-funded sickness and accident program.

{¶3} General Motors sought a writ of mandamus in the court of common pleas ordering the court to vacate the Industrial Commission's order. On June 30, 2003, the trial court judge signed a decision and entry granting the writ of mandamus. Crucial to our determination here is the date of filing or journalization of the judge's decision and entry. The entry was journalized on July 1, 2003, the first day of the trial judge's newly undertaken duties as a member of this court. In other words, the entry was journalized after the judge had left the bench of the Franklin County Court of Common Pleas.

{¶4} On July 30, 2003, Stephan filed a motion to strike or, in the alternative, motion for relief pursuant to Civ.R. 60(B)(5). On July 31, 2003, Stephan then filed his notice of appeal to the common pleas court's July 1, 2003 decision and entry. Afterwards, on July 31, 2003, Stephan filed a motion to remand to common pleas court for purposes of addressing the previously filed motion to strike or, in the alternative, motion for relief pursuant to Civ.R. 60(B)(5). On August 12, 2003, this court issued a journal entry stating that Stephan's motion to grant the trial court leave to address a pending Civ.R. 60(B)(5) motion was granted. This court then stayed the proceedings in the appeal filed on July 31, 2003 until the pending Civ.R. 60(B)(5) motion was resolved.

{¶5} On February 6, 2004, the successor judge issued a judgment entry overruling Stephan's motions. On March 8, 2004, Stephan appealed from the February 6, 2004 judgment entry, and this court subsequently consolidated the appeals for purposes of record filing, briefing, and oral argument.

{¶6} On appeal, Stephan has assigned the following eight assignments of error:

1. The underlying Decision and Entry is a nullity and without effect because Judge Sadler was not a common pleas court judge when it was journalized on July 1, 2003.
2. The court erred by finding that the Industrial Commission abused its discretion.
3. The court erred by failing to read R.C. 4123.56 (A) *in pari material* with other statutes that workers' compensation benefits are not taxable; namely, 26 U.S.C. § 104 (a) and R.C. 5747.01
4. The court erred by failing to read R.C. 4123.56 (A) in accordance with the directive of R.C. 4123.95 which states that the workers' compensation statutes shall be liberally construed in favor of employees.

5. The court erred wherein it made a finding of fact that was unproven and unsupported anywhere in the record.

6. The court erred by failing to find the entire amount of an injured worker's temporary total compensation award is non-taxable.

7. The court by failing to find that General Motors' method of setting off the tax payments it had made pursuant to its non-occupational Sickness and Accident Policy placed an intolerable burden on the injured worker to correct the employer's mistake.

8. The court erred by failing to grant Stephan's motions for relief due to the fact that the underlying Decision and Entry issued by Judge Sadler was a nullity and without effect because Judge Sadler was not a common pleas court judge when it was journalized on July 1, 2003.

{¶7} The Industrial Commission has assigned the following two assignments of error:

1. The court below erred by finding that the Industrial Commission abused its discretion and by failing to find that an employer may not treat workers' compensation as taxable income.

2. The court below erred by failing to find that Relator did not establish a clear legal right to the extraordinary writ of mandamus.

{¶8} In denying Stephan's motion for relief pursuant to Civ.R. 60(B)(5), the trial court indicated that there are times when a court does not speak only through its journal and, accordingly, the prior judge's decision remains valid because only the formality of journalizing the entry remained to be done. We reluctantly disagree that journalization of the court's entry was a mere formality in this case. It is well established that as a general rule, a court speaks only through its journal. *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, at ¶6 citing, *Kaine v. Marion Prison Warden* (2000), 88 Ohio St.3d 454, 455;

*Schenley v. Kauth* (1953), 160 Ohio St. 109, paragraph one of the syllabus ("A court of record speaks only through its journal and not by oral pronouncement or mere written minute or memorandum"). "Were the rule otherwise it would provide a wide field for controversy as to what the court actually decided." *Indus. Comm. v. Musselli* (1921), 102 Ohio St. 10, 15. See, also, *State v. Dudley*, Franklin App. No. 03AP-744, 2004-Ohio-5661, at ¶2 (failure to journalize sexual predator determination renders trial court's determination interlocutory and therefore not a final appealable order).

¶9 Here, Judge Sadler's term on the Franklin County Court of Common Pleas ended on June 30, 2003. "The term of a common pleas judge is set for a fixed amount of time and, once that time expires, the judge is without authority to act in an official capacity." *Vergon v. Vergon* (1993), 87 Ohio App.3d 639, 642. In *Faralli Custom Kitchen & Bath, Inc. v. Bailey* (1995), 107 Ohio App.3d 598, the Eighth District Court of Appeals held that even though the judge properly issued a ruling before leaving the bench, the delay in journalization resulted in the opinion and ruling being void.

¶10 We agree with the reasoning and the holdings of the court in *Vergon* and *Faralli*. For that reason, the July 1, 2003 decision and entry signed by the trial court judge is void. *Id.* Because the judgment is void, the parties will have to submit their evidentiary material to the successor judge for a determination on the merits. Despite what may appear to be a misuse or waste of judicial resources, we are without jurisdiction to pass upon the merits of the underlying decision and entry.

¶11 Based on the foregoing, we sustain Stephan's first and eighth assignments of error, we overrule as moot assignments of error two through seven, we overrule as moot the Industrial Commission's two assignments of error, we dismiss the appeal in

case No. 03AP-782, and we reverse the judgment of the trial court in case No. 04AP-259, and remand for further proceedings in accordance with this opinion.

*Appeal dismissed in case No. 03AP-782;  
judgment reversed and remanded in case No. 04AP-259.*

PETREE, J., concurs.  
BRYANT, J., dissents.

BRYANT, J., dissenting,

{¶12} Being unable to agree with the majority opinion, I respectfully dissent.

{¶13} Neither party disputes that, during the trial judge's term of office, the trial judge determined the matter through a decision and then signed a judgment entry consistent with the decision. The majority opinion concludes the trial court's judgment is ineffective because the trial judge's term of office ended the day before the judgment entry was filed. I instead conclude the administrative or ministerial act of filing the judgment entry was appropriately handled by the clerk and the successor judge, rendering the judgment effective on the day it was filed.

{¶14} Without question, "[a] judgment is effective only when entered by the clerk upon the journal." Civ.R. 58(A). I do not contend to the contrary: the judgment was not effective until the clerk filed it. The issue, however, is whether the clerk could file a judgment entry, signed while the trial judge still was in office, on the day following expiration of the trial judge's term of office. Civ.R. 63(B) is instructive in addressing that issue.

{¶15} Civ.R. 63(B) governs "[t]he substitution of one judge for another after the verdict or findings have been rendered." *Oakwood Mgt. Co. v. Young* (Oct. 27, 1992),

Franklin App. No. 92AP-207. Consistent with Civ.R. 63(B), "[r]educing the verdict or decision to judgment may properly be performed by the administrative judge or another judge designated by the administrative judge \*\*\*." *Id.* Thus, in *Young*, the court concluded that "the administrative judge properly performed the duties of the judge before whom the action was tried by signing the final judgment entry and causing it to be filed for journalization." *Id.* See, also, *Ingalls v. Ingalls* (July 12, 1993), Cuyahoga App. No. 62781 (concluding that "[r]educing the verdict or decision to judgment may properly be performed by a successor judge"); *Wesney v. Bellan* (Nov. 12, 1992), Franklin App. No. 92AP-203.

{¶16} Here, the trial judge not only rendered the decision, but signed the judgment entry as well. If Civ.R. 63(B) allows the successor judge to sign a judgment entry and have it filed, then in this case, which requires no action from the successor judge, the trial judge's entry, signed while the judge was still in office, properly may be filed the day following expiration of the trial judge's term of office. Because the majority does not reach that conclusion, I dissent.

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IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO  
GENERAL DIVISION

STATE EX REL. GENERAL MOTORS CORP., :

Relator, :

v. :

INDUSTRIAL COMMISSION OF OHIO  
AND CHESTER STEPHAN, :

Respondents. :

Case No. 00 CVH-11-10211

Judge: Guy L. Reece, II

DECISION AND ENTRY  
DENYING WRIT OF MANDAMUS

This matter is before the Court upon remand by the Tenth District Court of Appeals, pursuant to its February 3, 2005 opinion, Franklin App. Nos. 03AP-782 and 04AP-259.

Originally, this matter was initiated by Relator General Motors Corporation (hereinafter "General Motors"), who filed an action for a writ of mandamus, seeking a writ ordering Respondent Industrial Commission of Ohio (hereinafter "the Commission") to vacate its January 6, 2000 Order. Said Order instructed General Motors to pay Respondent Chester Stephan (hereinafter "Stephan"), as part of the total amount constituting Stephan's non-taxable temporary total disability benefits, amounts previously withheld from Stephan's taxable sickness and accident benefits, which General Motors forwarded to the appropriate taxing authorities.

Predecessor Judge Sadler granted General Motor's request for mandamus relief via a Decision and Entry Granting Writ of Mandamus, dated June 30, 2003. However, as the same was not journalized until July 1, 2003, one day after the predecessor judge's term on the Franklin County Court of Common Pleas had expired, the Tenth District Court of Appeals found the judgment to be void and remanded the matter for a determination on the merits. The Court of Appeals

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declined to review the merits of Judge Sadler's decision, stating that, "[d]espite what may appear to be a misuse or waste of judicial resources," it was without jurisdiction to do so.

15th For the reasons that follow, the Court DENIES Relator's Complaint in Mandamus on this day of February 2006.

### **BACKGROUND**

On October 10, 1998, Stephan, an employee of General Motors, submitted a FROI-1 application for workers' compensation benefits, alleging he injured his lower back on October 5, 1998, while moving brakes from one pallet to another. The application was also filed with the Bureau of Workers' Compensation on November 23, 1998. On account of the same injury, on October 27, 1998, Stephan also submitted to General Motors an application for sickness and accident (non-industrial) wage replacement benefits for the time period during which he was absent from work.

On November 16, 1998, General Motors rejected the FROI-1 application for workers' compensation benefits, questioning the injury's causal relationship to Stephan's employment. However, General Motors paid Stephan sickness and accident wage replacement benefits for the 16 weeks and 6 days during which Stephan was absent from work, from October 6, 1998 to January 30, 1999. Although General Motors paid Stephan a total of \$7,091.30 in taxable non-industrial sickness and accident wage replacement benefits, a portion of that amount was withheld for federal, state and local taxes in 1998. The record reveals a discrepancy with respect to what that amount actually was; while General Motors maintains \$1,204.25 was withheld for tax purposes, the Commission and Stephan maintain the amount withheld was \$1,189.00.

In February 1999, following an investigation into Stephan's workers' compensation claim, General Motors concluded the injury was compensable and notified the Commission that

it would voluntarily recognize Stephan's workers' compensation claim. General Motors then paid Stephan \$2,028.41 in temporary total disability benefits, which represents the difference between the \$9,119.71 in temporary total disability benefits Stephan was statutorily entitled to, and the \$7,091.30 in sickness and accident wage replacement benefits that General Motors had already paid to him.

However, as General Motors did not pay out to Stephan a net amount of \$7,091.30 in sickness and accident benefits, but rather withheld approximately \$1,189.00 (or \$1,204.25) of that amount for federal, state and local taxes, Stephan argued the \$2,028.41 in temporary total disability benefits he received from General Motors did not fully compensate him for his workers' compensation injury. Accordingly, on May 7, 1999, Stephan filed a motion requesting that the Commission order General Motors to pay to him the amounts previously withheld from the sickness and accident wage replacement benefits. The District Hearing Officer who heard the matter granted the motion on September 20, 1999. That decision was then appealed to a Staff Hearing Officer, who reversed the same on November 18, 1999. Upon appeal to the full Commission, the Commission reversed the Staff Hearing Officer's decision, reiterating the findings of the District Hearing Officer that Stephan was entitled to temporary total disability benefits in the amount of \$9,119.71, and that the amount was to be paid, "as a net, rather than a lesser amount after deduction from the figure above." (January 6, 2000 Order.) The Commission further held that the amount "may be composed of all temporary total disability benefits, all Sickness and Accident benefits in lieu of temporary total, or a combination of the two." (Id.)

On November 30, 2000, General Motors filed the instant mandamus action, seeking a writ from the Court ordering the Commission to vacate its decision, which requires General

Motors to pay to Stephan the amounts previously withheld from his sickness and accident benefits that have been forwarded to the appropriate taxing authorities. As discussed above, although a writ was granted by the predecessor judge via a decision and entry filed on July 1, 2003, the Tenth District Court of Appeals declared that decision void and remanded the matter to this Court for a determination of its merits.

Subsequent to the remand, the parties submitted their respective briefs addressing the issues raised by this mandamus action. General Motors filed its Relator's Brief on June 15, 2005, wherein it maintains the Commission abused its discretion in ordering it to pay directly to Stephan amounts previously paid on his behalf, as required by law, to various taxing authorities. General Motors maintains there was no evidence before the Commission establishing General Motors' ability to "legally delay, circumvent or otherwise postpone its duty to deliver the withheld taxes to the taxing authorities on behalf of Stephan." (General Motors' June 15, 2005 Brief, at 8.) General Motors maintains additional payments to Stephan would constitute overpayment, as Stephan can simply, in addition to receiving those amounts from General Motors, request from the taxing authorities a refund of the amounts withheld from his sickness and accident wage replacement benefits.

In its July 15, 2005 Respondent's Brief, the Commission maintains the issue herein is not whether General Motors was legally required to withhold amounts from Stephan's taxable sickness and accident wage replacement benefits, but rather whether the Commission abused its discretion in ordering General Motors to pay Stephan the full amount of non-taxable workers' compensation benefits that he is entitled to receive. The Commission maintains General Motors did not always handle disputed workers' compensation claims in this manner, and cites to its 1996 Claims Manual, wherein General Motors treats "disability advances" to employees during

periods of contested claims as “loans to employees,” withholding from the same an amount equal to the employee’s potential federal income tax, and holding onto the amount in an escrow manner. (Commission’s July 15, 2005 Brief, at 4.) The Commission maintains General Motors used to hold onto the withheld “potential income tax to be deductible from [sickness and accident] benefits until such time as the claim was determined to be compensable or noncompensable.” (Id.) If the disability advance was found to be a sickness and accident benefit, the amounts withheld were paid and reported to the Internal Revenue Service; if the advance was found to be a workers’ compensation benefit, “the amount withheld for the potential Federal income tax liability [was] to be paid to the employee” as his/her workers’ compensation benefit. (Id.)

The Commission further maintains General Motors cannot treat Stephan’s workers’ compensation benefits as taxable income simply because it initially chose to pay out the benefit as a taxable sickness and accident benefit. Rather, it insists General Motors’ “position as to whether the claim is compensable or not cannot unilaterally determine the taxability of the compensation owed to the employee.” (Id. at 7.) The Commission maintains General Motors’ unexplained change in policy with respect to its treatment of disputed claim compensation, and its bookkeeping convenience under its new policy, cannot “override the law that workers’ compensation benefits are not taxable, and that the injured worker has a right to receipt of those benefits without the deduction of taxes.” (Id.) The Commission contends Stephan should not have the burden of filing amended income tax returns, as it was General Motors who erroneously decided the compensability of Stephan’s claim, and then erroneously withheld money based on that determination. The Commission thus maintains General Motors has failed to meet its burden of establishing an abuse of discretion with respect to the January 6, 2000 Order.

In his July 29, 2005 Respondent's Brief, Stephan maintains the central issue herein "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." (Stephan's July 29, 2005 Brief, at 1.) Stephan maintains the Commission did not abuse its discretion in ordering General Motors to pay him "the full amount of temporary total disability benefits due without any unlawfully superimposed deductions." (Id. at 3.)

## **LAW & ANALYSIS**

### **I. WRIT OF MANDAMUS**

For a writ of mandamus to issue, a relator must establish 1.) the existence of a clear legal right to the relief prayed for; 2.) the respondent is under a clear legal duty to perform the act requested; and 3.) there is no plain and adequate remedy at law available to the relator. *State ex rel. Sekemestrovich v. City of Akron* (2001), 90 Ohio St.3d 536, 537, 740 N.E.2d 252; *State ex rel. Berger v. McMonagle* (1983), 6 Ohio St.3d 28, 29, 451 N.E.2d 225; *State ex rel. Stanley v. Cook* (1946), 146 Ohio St. 348, 364, 66 N.E.2d 207. A writ will not issue "where the relator has or had available a clear, plain and adequate remedy in the ordinary course of the law." *State ex rel. Berger*, 6 Ohio St.3d at 30, citing *State ex rel. Sibarco Corp. v. City of Berea* (1966), 7 Ohio St.2d 85, paragraph one of the syllabus, 218 N.E.2d 428.

However, mandamus "will not lie to control the discretion confided in an officer, commission, or inferior tribunal, unless it clearly appears that such discretion has been abused." *State ex rel. Breno v. Industrial Commission* (1973), 34 Ohio St.2d 227, 230, 298 N.E.2d 150, citing *State ex rel. Coen v. Industrial Commission of Ohio* (1933), 126 Ohio St. 550, 553-554, 186 N.E. 398. Thus, a relator's demonstration of a clear legal right to the relief sought "is

predicated upon an abuse of discretion by the Industrial Commission which, in turn, may be established only if the record is devoid of some evidence to support the commission's order."

*State ex rel. Elliott v. Industrial Commission* (1986), 26 Ohio St.3d 76, 78-79, 497 N.E.2d 70, citing *State ex rel. Hutton v. Industrial Commission* (1972), 29 Ohio St.2d 9, 13, 278 N.E.2d 34.

The Ohio Supreme Court has defined abuse of discretion as implying "not merely error of judgment, but perversity of will, passion, prejudice, partiality, or moral delinquency." *State ex rel. Commercial Lovelace Motor Freight, Inc. v. Lancaster* (1986), 22 Ohio St.3d 191, 193, 489 N.E.2d 288, citing *State ex rel. Shafer v. Ohio Turnpike Commission* (1953), 159 Ohio St. 581, 590, 113 N.E.2d 14. Thus, "[a]n 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.*, 22 Ohio St.3d at 193, citing *State ex rel. Morris v. Industrial Commission* (1984), 14 Ohio St.3d 38, 39, 471 N.E.2d 465; *State ex rel. GF Business Equip., Inc. v. Industrial Commission* (1981), 66 Ohio St.2d 446, 447, 423 N.E.2d 99.

## **II. TEMPORARY TOTAL DISABILITY BENEFITS**

Ohio Revised Code §4123.56 governs payment of temporary disability benefits and sets forth the amounts payable, provided the amounts fall within certain minimum and maximum percentages based on the employee's applicable average weekly wages and/or statewide average weekly wages. The statute further provides that, "[i]f any compensation under this section has been paid for the same period or periods for which temporary nonoccupational accident and sickness insurance is or has been paid pursuant to an insurance policy or program to which the employer has made the entire contribution or payment for providing insurance or under a nonoccupational accident and sickness program fully funded by the employer, compensation paid under this section for the period or periods 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.*

Offset of the compensation shall be made only upon the prior order of the bureau or industrial commission or agreement of the claimant.” (Emphasis added.) O.R.C. §4123.56(A).

The parties do not dispute that temporary total disability benefits paid pursuant to a workers’ compensation injury are non-taxable. The parties likewise do not dispute that benefits paid pursuant to a sickness and accident program are taxable, as per applicable federal and state statutes. The central issue herein is whether the Commission abused its discretion in ordering General Motors, in the course of paying Stephan the full amount of workers’ compensation benefits he is entitled to, i.e., \$9,119.71, to pay Stephan those amounts General Motors withheld from his sickness and accident benefits as taxes. The Court notes that, while O.R.C. §4123.56(A) states that any temporary total disability benefits are to be offset against compensation paid pursuant to a sickness and accident policy or program, it does not specify whether the amount to be offset is the net sickness and accident benefit amount received by the employee or the gross sickness and accident benefit amount paid by the employer.

The Commission found that “[t]he claimant’s weekly rate for temporary total compensation is \$541.00. The claimant was entitled to temporary total compensation for sixteen and six sevenths (16 6/7) weeks. This amounts to \$9,119.71. The claimant is to be paid said amount as a net, rather than a lesser amount after deduction from the figure above. This figure may be composed of all temporary total disability benefits, all sickness and accident benefits in lieu of temporary total, or a combination of the two.” (January 6, 2000 Order.) Thus, the Commission ordered General Motors to pay Stephan the net amount of temporary total compensation without deductions for taxes, as workers’ compensation benefits are not taxable.

The Court finds that the Commission's decision does not exhibit "perversity of will, passion, prejudice, partiality, or moral delinquency." *State ex rel. Commercial Lovelace Motor Freight, Inc*, 22 Ohio St.3d at 193. While O.R.C. §4123.56(A) allows for an offset, it does not specify whether the amount to be offset is the net amount received or the gross amount paid. With a statute that does not specify net or gross but leaves the door open to two different interpretations, General Motors has a heavy burden to establish the Commission abused its discretion in choosing one of those two interpretations, especially in light of the non-taxable nature of workers' compensation benefits. Indeed, as workers' compensation benefits are not taxable, allowing for an offset of the gross amount paid would be tantamount to treating temporary total disability compensation as taxable, and would result in underpayment of Stephan's workers' compensation benefits. As O.R.C. §4123.95 instructs that "[s]ections 4123.01 to 4123.94, inclusive, of the Revised Code shall be liberally construed in favor of employees and the dependents of deceased employees," the Court finds the Commission did not abuse its discretion in ordering General Motors to pay to Stephan the amounts withheld from his sickness and accident benefits.

O.R.C. §4123.56(A) further provides that "[o]ffset of the compensation shall be made *only upon the prior order of the bureau or industrial commission or agreement of the claimant.*" (Emphasis added.) Stephan does not agree to an offset of the gross amount paid. The Commission has likewise not ordered an offset of the gross amount paid, as its January 6, 2000 Order specifies that the \$9,119.71 is to be paid to Stephan as a net amount. Its decision is based on the fact that workers' compensation benefits are not taxable. Thus, the Court finds General Motors has failed to satisfy its burden of establishing abuse of discretion with respect to the

Commission's order, as the same is based on some evidence and is not indicative of perversity of will, passion or prejudice.

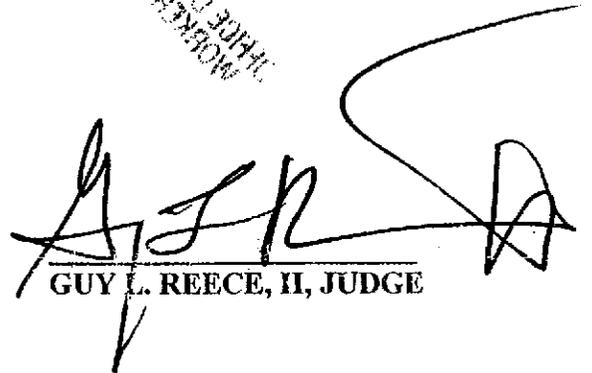
General Motors maintains Stephan was given a corrected W-2 form, which he could have then used to obtain a refund from Internal Revenue Service of the amounts withheld from his sickness and accident benefits. The Court notes, however, that there is no proof that Stephan would actually receive the entire amount withheld, if a refund is still even possible despite the passage of time. Furthermore, ordering Stephan to obtain the money he is entitled to by seeking a refund from the government would not comport with the liberal construction policy in favor of employees set forth in O.R.C. §4123.95.

The Court notes that the central issue herein is not who should try to obtain a refund, but rather whether Stephan is entitled to workers' compensation benefits in the untaxed amount of \$9,119.71. Since pursuant to O.R.C. §4123.56(A) Stephan is entitled to temporary total disability compensation in the amount of \$9,119.71, and as such workers' compensation benefits are non-taxable, not ordering General Motors to pay Stephan the amounts previously withheld from the sickness and accident benefits that are used to make up a portion of the \$9,119.71 would deprive Stephan of the full benefit of the workers' compensation program. Simply ordering the payment of the difference between the gross amount paid by General Motors and the net amount Stephan is entitled to, does not adequately compensate Stephan for his workers' compensation injury in light of the non-taxable nature of workers' compensation benefits.

Based on the foregoing, the Court finds General Motors has failed to establish abuse of discretion on the part of the Industrial Commission of Ohio. Accordingly, the Court hereby **DENIES** Relator's Complaint in Mandamus.

Counsel for Respondent Industrial Commission of Ohio and Counsel for Respondent Chester Stephan are hereby **ORDERED** to submit an appropriate entry within twenty (20) days of the date of filing of this decision, pursuant to Loc.R. 25.

**IT IS SO ORDERED.**

PROCESSED BY THE CLERK OF THE COURT  
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GUY L. REECE, II, JUDGE

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## LEXSTAT 26 U.S.C. 104

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\*\*\* CURRENT THROUGH P.L. 110-46, APPROVED 7/5/2007 \*\*\*

TITLE 26. INTERNAL REVENUE CODE  
 SUBTITLE A. INCOME TAXES  
 CHAPTER 1. NORMAL TAXES AND SURTAXES  
 SUBCHAPTER B. COMPUTATION OF TAXABLE INCOME  
 PART III. ITEMS SPECIFICALLY EXCLUDED FROM GROSS INCOME

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26 USCS § 104

§ 104. Compensation for injuries or sickness.

(a) In general. Except in the case of amounts attributable to (and not in excess of) deductions allowed under section 213 [26 USCS § 213] (relating to medical, etc., expenses) for any prior taxable year, gross income does not include--

- (1) amounts received under workmen's compensation acts as compensation for personal injuries or sickness;
- (2) the amount of any damages (other than punitive damages) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal physical injuries or physical sickness;
- (3) amounts received through accident or health insurance (or through an arrangement having the effect of accident or health insurance) for personal injuries or sickness (other than amounts received by an employee, to the extent such amounts (A) are attributable to contributions by the employer which were not includible in the gross income of the employee, or (B) are paid by the employer);
- (4) amounts received as a pension, annuity, or similar allowance for personal injuries or sickness resulting from active service in the armed forces of any country or in the Coast and Geodetic Survey or the Public Health Service, or as a disability annuity payable under the provisions of section 808 of the Foreign Service Act of 1980 [22 USCS § 4048]; and
- (5) amounts received by an individual as disability income attributable to injuries incurred as a direct result of a terroristic or military action (as defined in section 692(c)(2) [26 USCS § 692(c)(2)]).

For purposes of paragraph (3), in the case of an individual who is, or has been, an employee within the meaning of section 401(c)(1) [26 USCS § 401(c)(1)] (relating to self-employed individuals), contributions made on behalf of such individual while he was such an employee to a trust described in section 401(a) [26 USCS § 401(a)] which is exempt from tax under section 501(a) [26 USCS § 501(a)], or under a plan described in section 403(a) [26 USCS § 403(a)], shall, to the extent allowed as deductions under section 404 [26 USCS § 404], be treated as contributions by the employer which were not includible in the gross income of the employee. For purposes of paragraph (2), emotional distress shall not be treated as a physical injury or physical sickness. The preceding sentence shall not apply to an amount of damages not in excess of the amount paid for medical care (described in subparagraph (A) or (B) of section 213(d)(1) [26 USCS § 213(d)(1)]) attributable to emotional distress.

(b) Termination of application of subsection (a)(4) in certain cases.

- (1) In general. Subsection (a)(4) shall not apply in the case of any individual who is not described in paragraph (2).

## LEXSTAT 26 USCS 105

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TITLE 26. INTERNAL REVENUE CODE  
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 PART III. ITEMS SPECIFICALLY EXCLUDED FROM GROSS INCOME

**Go to the United States Code Service Archive Directory**

*26 USCS § 105*

§ 105. Amounts received under accident and health plans.

(a) Amounts attributable to employer contributions. Except as otherwise provided in this section, amounts received by an employee through accident or health insurance for personal injuries or sickness shall be included in gross income to the extent such amounts (1) are attributable to contributions by the employer which were not includible in the gross income of the employee, or (2) are paid by the employer.

(b) Amounts expended for medical care [Caution: For provisions applicable to taxable years beginning on or before December 31, 2004, see 2004 amendment note below.]. Except in the case of amounts attributable to (and not in excess of) deductions allowed under section 213 [26 USCS § 213] (relating to medical, etc., expenses) for any prior taxable year, gross income does not include amounts referred to in subsection (a) if such amounts are paid, directly or indirectly, to the taxpayer to reimburse the taxpayer for expenses incurred by him for the medical care (as defined in section 213(d) [26 USCS § 213(d)]) of the taxpayer, his spouse, and his dependents (as defined in section 152 [26 USCS § 152], determined without regard to subsections (b)(1), (b)(2), and (d)(1)(B) thereof). Any child to whom section 152(e) [26 USCS § 152(e)] applies shall be treated as a dependent of both parents for purposes of this subsection.

(c) Payments unrelated to absence from work [Caution: For provisions applicable to taxable years beginning on or before December 31, 2004, see 2004 amendment note below.]. Gross income does not include amounts referred to in subsection (a) to the extent such amounts--

(1) constitute payment for the permanent loss or loss of use of a member or function of the body, or the permanent disfigurement, of the taxpayer, his spouse, or a dependent (as defined in section 152 [26 USCS § 152], determined without regard to subsections (b)(1), (b)(2), and (d)(1)(B) thereof), and

(2) are computed with reference to the nature of the injury without regard to the period the employee is absent from work.

(d) Repealed.

(e) Accident and health plans. For purposes of this section and section 104 [26 USCS § 104]--

(1) amounts received under an accident or health plan for employees, and

(2) amounts received from a sickness and disability fund for employees maintained under the law of a State or the

District of Columbia,

shall be treated as amounts received through accident or health insurance.

(f) Rules for application of section 213. For purposes of section 213(a) [26 USCS § 213(a)] (relating to medical, dental, etc., expenses) amounts excluded from gross income under subsection (c) or (d) shall not be considered as compensation (by insurance or otherwise) for expenses paid for medical care.

(g) Self-employed individual not considered an employee. For purposes of this section, the term "employee" does not include an individual who is an employee within the meaning of section 401(c)(1) [26 USCS § 401(c)(1)] (relating to self-employed individuals).

(h) Amount paid to highly compensated individuals under a discriminatory self-insured medical expense reimbursement plan.

(1) In general. In the case of amounts paid to a highly compensated individual under a self-insured medical reimbursement plan which does not satisfy the requirements of paragraph (2) for a plan year, subsection (b) shall not apply to such amounts to the extent they constitute an excess reimbursement of such highly compensated individual.

(2) Prohibition of discrimination. A self-insured medical reimbursement plan satisfies the requirements of this paragraph only if--

(A) the plan does not discriminate in favor of highly compensated individuals as to eligibility to participate; and

(B) the benefits provided under the plan do not discriminate in favor of participants who are highly compensated individuals.

(3) Nondiscriminatory eligibility classifications.

(A) In general. A self-insured medical reimbursement plan does not satisfy the requirements of subparagraph (A) of paragraph (2) unless such plan benefits--

(i) 70 percent or more of all employees, or 80 percent or more of all the employees who are eligible to benefit under the plan if 70 percent or more of all employees are eligible to benefit under the plan; or

(ii) such employees as qualify under a classification set up by the employer and found by the Secretary not to be discriminatory in favor of highly compensated individuals.

(B) Exclusion of certain employees. For purposes of subparagraph (A), there may be excluded from consideration--

(i) employees who have not completed 3 years of service;

(ii) employees who have not attained age 25;

(iii) part-time or seasonal employees;

(iv) employees not included in the plan who are included in a unit of employees covered by an agreement between employee representatives and one or more employers which the Secretary finds to be a collective bargaining agreement, if accident and health benefits were the subject of good faith bargaining between such employee representatives and such employer or employers; and

(v) employees who are nonresident aliens and who receive no earned income (within the meaning of section 911(d)(2) [26 USCS § 911(d)(2)]) from the employer which constitutes income from sources within the United States (within the meaning of section 861(a)(3) [26 USCS § 861(a)(3)]).

(4) Nondiscriminatory benefits. A self-insured medical reimbursement plan does not meet the requirements of subparagraph (B) of paragraph (2) unless all benefits provided for participants who are highly compensated individuals are provided for all other participants.

(5) Highly compensated individual defined. For purposes of this subsection, the term "highly compensated individual" means an individual who is--

(A) one of the 5 highest paid officers,

(B) a shareholder who owns (with the application of section 318 [26 USCS § 318]) more than 10 percent in value of the stock of the employer, or

(C) among the highest paid 25 percent of all employees (other than employees described in paragraph (3)(B) who are not participants).

(6) Self-insured medical reimbursement plan. The term "self-insured medical reimbursement plan" means a plan of an employer to reimburse employees for expenses referred to in subsection (b) for which reimbursement is not provided under a policy of accident and health insurance.

(7) Excess reimbursement of highly compensated individual. For purposes of this section, the excess reimbursement of a highly compensated individual which is attributable to a self-insured medical reimbursement plan is--

(A) in the case of a benefit available to highly compensated individuals but not to all other participants (or which otherwise fails to satisfy the requirements of paragraph (2)(B)), the amount reimbursed under the plan to the employee with respect to such benefit, and

(B) in the case of benefits (other than benefits described in subparagraph (A)) paid to a highly compensated individual by a plan which fails to satisfy the requirements of paragraph (2), the total amount reimbursed to the highly compensated individual for the plan year multiplied by a fraction--

(i) the numerator of which is the total amount reimbursed to all participants who are highly compensated individuals under the plan for the plan year, and

(ii) the denominator of which is the total amount reimbursed to all employees under the plan for such plan year.

In determining the fraction under subparagraph (B), there shall not be taken into account any reimbursement which is attributable to a benefit described in subparagraph (A).

(8) Certain controlled groups, etc. All employees who are treated as employed by a single employer under subsection (b), (c), or (m) of section 414 [26 USCS § 414] shall be treated as employed by a single employer for purposes of this section.

(9) Regulations. The Secretary shall prescribe such regulations as may be necessary to carry out the provisions of this section.

(10) Time of inclusion. Any amount paid for a plan year that is included in income by reason of this subsection shall be treated as received or accrued in the taxable year of the participant in which the plan year ends.

(i) Sick pay under Railroad Unemployment Insurance Act. Notwithstanding any other provision of law, gross income includes benefits paid under section 2(a) of the Railroad Unemployment Insurance Act for days of sickness; except to the extent such sickness (as determined in accordance with standards prescribed by the Railroad Retirement Board) is the result of on-the-job injury.

#### **HISTORY:**

(Aug. 16, 1954, ch 736, 68A Stat. 30; Oct. 10, 1962, P.L. 87-792, § 7(e), 76 Stat. 829; Feb. 26, 1964, P.L. 88-272, Title II, § 205(a), 78 Stat. 38; Oct. 4, 1976, P.L. 94-455, Title V, § 505(a), Title XIX, § 1901(c)(2), 90 Stat. 1566, 1803; Nov. 6, 1978, P.L. 95-600, Title III, § 366(a), Title VII, § 701(c)(1), 92 Stat. 2855, 2899; April 1, 1980, P.L. 96-222, Title I, § 103(a)(13)(B), (C), 94 Stat. 213; Dec. 28, 1980, P.L. 96-605, Title II, § 201(b)(1), 94 Stat. 3527; Dec. 28, 1980, P.L. 96-613, § 5(b)(1), 94 Stat. 3581; Aug. 13, 1981, P.L. 97-34, Title I, §§ 103(c)(2), 111(b)(4), 95 Stat. 188, 194; Sept. 3, 1982, P.L. 97-248, Title II, § 202(b)(3)(C), 96 Stat. 421; April 20, 1983, P.L. 98-21, Title I, § 122(b), 97 Stat. 87; Aug. 12, 1983, P.L. 98-76, Title II, § 241(a), 97 Stat. 430; July 18, 1984, P.L. 98-369, Div A, Title IV, § 423(b)(2), 98 Stat. 800; Oct. 22, 1986, P.L. 99-514, Title XI, § 1151(c)(2), Title XIII, § 1301(j)(9), 100 Stat. 2503, 2658; Nov. 8, 1989, P.L. 101-140, Title II, § 203(a)(1), 103 Stat. 830; Oct. 4, 2004, P.L. 108-311, Title II, § 207(9), 118 Stat. 1177.)

#### **HISTORY; ANCILLARY LAWS AND DIRECTIVES**

#### **Amendments:**

In 2004, P.L. 108-311, Sec. 207(9) (applicable to taxable years beginning after 12/31/2004, as provided by Sec. 208 of P.L. 108-311, which appears as a note to Code Sec. 2), amended subsecs. (b) and (c)(1) by inserting ", determined without regard to subsections (b)(1), (b)(2), and (d)(1)(B) thereof".

## LEXSTAT 26 USCS 3402

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\*\*\* CURRENT THROUGH P.L. 110-46, APPROVED 7/5/2007 \*\*\*

TITLE 26. INTERNAL REVENUE CODE  
SUBTITLE C. EMPLOYMENT TAXES AND COLLECTION OF INCOME TAX  
CHAPTER 24. COLLECTION OF INCOME TAX AT SOURCE  
SUBCHAPTER A. WITHHOLDING FROM WAGES

**Go to the United States Code Service Archive Directory**

*26 USCS § 3402*

§ 3402. Income tax collected at source [Caution: See prospective amendment note below.].

(a) Requirement of withholding.

(1) In general. Except as otherwise provided in this section, every employer making payment of wages shall deduct and withhold upon such wages a tax determined in accordance with tables or computational procedures prescribed by the Secretary. Any tables or procedures prescribed under this paragraph shall--

(A) apply with respect to the amount of wages paid during such periods as the Secretary may prescribe, and

(B) be in such form, and provide for such amounts to be deducted and withheld, as the Secretary determines to be most appropriate to carry out the purposes of this chapter [26 USCS §§ 3401 et seq.] and to reflect the provisions of chapter 1 [26 USCS §§ 1 et seq.] applicable to such periods.

(2) Amount of wages. For purposes of applying tables or procedures prescribed under paragraph (1), the term "the amount of wages" means the amount by which the wages exceed the number of withholding exemptions claimed multiplied by the amount of one such exemption. The amount of each withholding exemption shall be equal to the amount of one personal exemption provided in section 151(b) [26 USCS § 151(b)], prorated to the payroll period. The maximum number of withholding exemptions permitted shall be calculated in accordance with regulations prescribed by the Secretary under this section, taking into account any reduction in withholding to which an employee is entitled under this section.

(b) Percentage method of withholding.

(1) If wages are paid with respect to a period which is not a payroll period, the withholding exemption allowable with respect to each payment of such wages shall be the exemption allowed for a miscellaneous payroll period containing a number of days (including Sundays and holidays) equal to the number of days in the period with respect to which such wages are paid.

(2) In any case in which wages are paid by an employer without regard to any payroll period or other period, the withholding exemption allowable with respect to each payment of such wages shall be the exemption allowed for a miscellaneous payroll period containing a number of days equal to the number of days (including Sundays and holidays) which have elapsed since the date of the last payment of such wages by such employer during the calendar year, or the date of commencement of employment with such employer during such year, or January 1 of such year, whichever is the later.

(3) In any case in which the period, or the time described in paragraph (2), in respect of any wages is less than one week, the Secretary, under regulations prescribed by him, may authorize an employer to compute the tax to be deducted

## 26 USCS § 3402

and withheld as if the aggregate of the wages paid to the employee during the calendar week were paid for a weekly payroll period.

(4) In determining the amount to be deducted and withheld under this subsection, the wages may, at the election of the employer, be computed to the nearest dollar.

(c) Wage bracket withholding.

(1) At the election of the employer with respect to any employee, the employer shall deduct and withhold upon the wages paid to such employee a tax (in lieu of the tax required to be deducted and withheld under subsection (a)) determined in accordance with tables prescribed by the Secretary in accordance with paragraph (6).

(2) If wages are paid with respect to a period which is not a payroll period, the amount to be deducted and withheld shall be that applicable in the case of a miscellaneous payroll period containing a number of days (including Sundays and holidays) equal to the number of days in the period with respect to which such wages are paid.

(3) In any case in which wages are paid by an employer without regard to any payroll period or other period, the amount to be deducted and withheld shall be that applicable in the case of a miscellaneous payroll period containing a number of days equal to the number of days (including Sundays and holidays) which have elapsed since the date of the last payment of such wages by such employer during the calendar year, or the date of commencement of employment with such employer during such year, or January 1 of such year, whichever is the later.

(4) In any case in which the period, or the time described in paragraph (3), in respect of any wages is less than one week, the Secretary, under regulations prescribed by him, may authorize an employer to determine the amount to be deducted and withheld under the tables applicable in the case of a weekly payroll period, in which case the aggregate of the wages paid to the employee during the calendar week shall be considered the weekly wages.

(5) If the wages exceed the highest wage bracket, in determining the amount to be deducted and withheld under this subsection, the wages may, at the election of the employer, be computed to the nearest dollar.

(6) In the case of wages paid after December 31, 1969, the amount deducted and withheld under paragraph (1) shall be determined in accordance with tables prescribed by the Secretary. In the tables so prescribed, the amounts set forth as amounts of wages and amounts of income tax to be deducted and withheld shall be computed on the basis of table for an annual payroll period prescribed pursuant to subsection (a).

(d) Tax paid by recipient. If the employer, in violation of the provisions of this chapter [26 USCS §§ 3401 et seq.], fails to deduct and withhold the tax under this chapter [26 USCS §§ 3401 et seq.], and thereafter the tax against which such tax may be credited is paid, the tax so required to be deducted and withheld shall not be collected from the employer; but this subsection shall in no case relieve the employer from liability for any penalties or additions to the tax otherwise applicable in respect of such failure to deduct and withhold.

(e) Included and excluded wages. If the remuneration paid by an employer to an employee for services performed during one-half or more of any payroll period of not more than 31 consecutive days constitutes wages, all the remuneration paid by such employer to such employee for such period shall be deemed to be wages; but if the remuneration paid by an employer to an employee for services performed during more than one-half of any such payroll period does not constitute wages, then none of the remuneration paid by such employer to such employee for such period shall be deemed to be wages.

(f) Withholding exemptions.

(1) In general. An employee receiving wages shall on any day be entitled to the following withholding exemptions:

(A) an exemption for himself unless he is an individual described in section 151(d)(2) [26 USCS § 151(d)(2)];

(B) if the employee is married, any exemption to which his spouse is entitled, or would be entitled if such spouse were an employee receiving wages, under subparagraph (A) or (D), but only if such spouse does not have in effect a withholding exemption certificate claiming such exemption;

(C) an exemption for each individual with respect to whom, on the basis of facts existing at the beginning of such day, there may reasonably be expected to be allowable an exemption under section 151(c) [26 USCS § 151(c)] for the taxable year under subtitle A [26 USCS §§ 1 et seq.] in respect of which amounts deducted and withheld under this

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chapter [26 USCS §§ 3401 et seq.] in the calendar year in which such day falls are allowed as a credit;

(D) any allowance to which he is entitled under subsection (m), but only if his spouse does not have in effect a withholding exemption certificate claiming such allowance; and

(E) a standard deduction allowance which shall be an amount equal to one exemption (or more than one exemption if so prescribed by the Secretary) unless (i) he is married (as determined under section 7703 [26 USCS § 7703]) and his spouse is an employee receiving wages subject to withholding or (ii) he has withholding exemption certificates in effect with respect to more than one employer.

For purposes of this title, any standard deduction allowance under subparagraph (E) shall be treated as if it were denominated a withholding exemption.

(2) Exemption certificates.

(A) On commencement of employment. On or before the date of the commencement of employment with an employer, the employee shall furnish the employer with a signed withholding exemption certificate relating to the number of withholding exemptions which he claims, which shall in no event exceed the number to which he is entitled.

(B) Change of status. If, on any day during the calendar year, the number of withholding exemptions to which the employee is entitled is less than the number of withholding exemptions claimed by the employee on the withholding exemption certificate then in effect with respect to him, the employee shall within 10 days thereafter furnish the employer with a new withholding exemption certificate relating to the number of withholding exemptions which the employee then claims, which shall in no event exceed the number to which he is entitled on such day. If, on any day during the calendar year, the number of withholding exemptions to which the employee is entitled is greater than the number of withholding exemptions claimed, the employee may furnish the employer with a new withholding exemption certificate relating to the number of withholding exemptions which the employee then claims, which shall in no event exceed the number to which he is entitled on such day.

(C) Change of status which affects next calendar year. If on any day during the calendar year the number of withholding exemptions to which the employee will be, or may reasonably be expected to be, entitled at the beginning of his next taxable year under subtitle A [26 USCS §§ 1 et seq.] is different from the number to which the employee is entitled on such day, the employee shall, in such cases and at such times as the Secretary may by regulations prescribe, furnish the employer with a withholding exemption certificate relating to the number of withholding exemptions which he claims with respect to such next taxable year, which shall in no event exceed the number to which he will be, or may reasonably be expected to be, so entitled.

(3) When certificate takes effect.

(A) First certificate furnished. A withholding exemption certificate furnished the employer in cases in which no previous such certificate is in effect shall take effect as of the beginning of the first payroll period ending, or the first payment of wages made without regard to a payroll period, on or after the date on which such certificate is so furnished.

(B) Furnished to take place of existing certificate.

(i) In general. Except as provided in clauses (ii) and (iii), a withholding exemption certificate furnished to the employer in cases in which a previous such certificate is in effect shall take effect as of the beginning of the 1st payroll period ending (or the 1st payment of wages made without regard to a payroll period) on or after the 30th day after the day on which such certificate is so furnished.

(ii) Employer may elect earlier effective date. At the election of the employer, a certificate described in clause (i) may be made effective beginning with any payment of wages made on or after the day on which the certificate is so furnished and before the 30th day referred to in clause (i).

(iii) Change of status which affects next year. Any certificate furnished pursuant to paragraph (2)(C) shall not take effect, and may not be made effective, with respect to any payment of wages made in the calendar year in which the certificate is furnished.

(4) Period during which certificate remains in effect. A withholding exemption certificate which takes effect under this subsection, or which on December 31, 1954, was in effect under the corresponding subsection of prior law, shall continue in effect with respect to the employer until another such certificate takes effect under this subsection.

(5) Form and contents of certificate. Withholding exemption certificates shall be in such form and contain such information as the Secretary may by regulations prescribe.

(6) Exemption of certain nonresident aliens. Notwithstanding the provisions of paragraph (1), a nonresident alien

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individual (other than an individual described in section 3401(a)(6)(A) or (B) [26 USCS § 3401(a)(6)(A) or (B)]) shall be entitled to only one withholding exemption.

(7) Exemption where certificate with another employer is in effect. If a withholding exemption certificate is in effect with respect to one employer, an employee shall not be entitled under a certificate in effect with any other employer to any withholding exemption which he has claimed under such first certificate.

(g) Overlapping pay periods, and payment by agent or fiduciary. If a payment of wages is made to an employee by an employer--

(1) with respect to a payroll period or other period, any part of which is included in a payroll period or other period with respect to which wages are also paid to such employee by such employer, or

(2) without regard to any payroll period or other period, but on or prior to the expiration of a payroll period or other period with respect to which wages are also paid to such employee by such employer, or

(3) with respect to a period beginning in one and ending in another calendar year, or

(4) through an agent, fiduciary, or other person who also has the control, receipt, custody, or disposal of, or pays, the wages payable by another employer to such employee,

the manner of withholding and the amount to be deducted and withheld under this chapter [26 USCS §§ 3401 et seq.] shall be determined in accordance with regulations prescribed by the Secretary under which the withholding exemption allowed to the employee in any calendar year shall approximate the withholding exemption allowable with respect to an annual payroll period.

(h) Alternative methods of computing amount to be withheld. The Secretary may, under regulations prescribed by him, authorize--

(1) Withholding on basis of average wages. An employer--

(A) to estimate the wages which will be paid to any employee in any quarter of the calendar year,

(B) to determine the amount to be deducted and withheld upon each payment of wages to such employee during such quarter as if the appropriate average of the wages so estimated constituted the actual wages paid, and

(C) to deduct and withhold upon any payment of wages to such employee during such quarter (and, in the case of tips referred to in subsection (k), within 30 days thereafter) such amount as may be necessary to adjust the amount actually deducted and withheld upon the wages of such employee during such quarter to the amount required to be deducted and withheld during such quarter without regard to this subsection.

(2) Withholding on basis of annualized wages. An employer to determine the amount of tax to be deducted and withheld upon a payment of wages to an employee for a payroll period by--

(A) multiplying the amount of an employee's wages for a payroll period by the number of such payroll periods in the calendar year,

(B) determining the amount of tax which would be required to be deducted and withheld upon the amount determined under subparagraph (A) if such amount constituted the actual wages for the calendar year and the payroll period of the employee were an annual payroll period, and

(C) dividing the amount of tax determined under subparagraph (B) by the number of payroll periods (described in subparagraph (A)) in the calendar year.

(3) Withholding on basis of cumulative wages. An employer, in the case of any employee who requests to have the amount of tax to be withheld from his wages computed on the basis of his cumulative wages, to--

(A) add the amount of the wages to be paid to the employee for the payroll period to the total amount of wages paid by the employer to the employee during the calendar year,

(B) divide the aggregate amount of wages computed under subparagraph (A) by the number of payroll periods to which such aggregate amount of wages relates,

(C) compute the total amount of tax that would have been required to be deducted and withheld under subsection (a) if the average amount of wages (as computed under subparagraph (B)) had been paid to the employee for the number of payroll periods to which the aggregate amount of wages (computed under subparagraph (A)) relates,

(D) determine the excess, if any, of the amount of tax computed under subparagraph (C) over the total amount of tax

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deducted and withheld by the employer from wages paid to the employee during the calendar year, and

(E) deduct and withhold upon the payment of wages (referred to in subparagraph (A)) to the employee an amount equal to the excess (if any) computed under subparagraph (D).

(4) **Other methods.** An employer to determine the amount of tax to be deducted and withheld upon the wages paid to an employee by any other method which will require the employer to deduct and withhold upon such wages substantially the same amount as would be required to be deducted and withheld by applying subsection (a) or (c), either with respect to a payroll period or with respect to the entire taxable year.

(i) **Changes in withholding.**

(1) In general. The Secretary may by regulations provide for increases in the amount of withholding otherwise required under this section in cases where the employee requests such changes.

(2) **Treatment as tax.** Any increased withholding under paragraph (1) shall for all purposes be considered tax required to be deducted and withheld under this chapter [26 USCS §§ 3401 et seq.].

(j) **Noncash remuneration to retail commission salesman.** In the case of remuneration paid in any medium other than cash for services performed by an individual as a retail salesman for a person, where the service performed by such individual for such person is ordinarily performed for remuneration solely by way of cash commission an employer shall not be required to deduct or withhold any tax under this subchapter [26 USCS §§ 3401 et seq.] with respect to such remuneration, provided that such employer files with the Secretary such information with respect to such remuneration as the Secretary may by regulation prescribe.

(k) **Tips.** In the case of tips which constitute wages, subsection (a) shall be applicable only to such tips as are included in a written statement furnished to the employer pursuant to section 6053(a) [26 USCS § 6053(a)], and only to the extent that the tax can be deducted and withheld by the employer, at or after the time such statement is so furnished and before the close of the calendar year in which such statement is furnished, from such wages of the employee (excluding tips, but including funds turned over by the employee to the employer for the purpose of such deduction and withholding) as are under the control of the employer; and an employer who is furnished by an employee a written statement of tips (received in a calendar month) pursuant to section 6053(a) [26 USCS § 6053(a)] to which paragraph (16)(B) of section 3401(a) [26 USCS § 3401(a)] is applicable may deduct and withhold the tax with respect to such tips from any wages of the employee (excluding tips) under his control, even though at the time such statement is furnished the total amount of the tips included in statements furnished to the employer as having been received by the employee in such calendar month in the course of his employment by such employer is less than \$ 20. Such tax shall not at any time be deducted and withheld in an amount which exceeds the aggregate of such wages and funds (including funds turned over under section 3102(c)(2) [26 USCS § 3102(c)(2)] or section 3202(c)(2) [26 USCS § 3202(c)(2)]) minus any tax required by section 3102(a) [26 USCS § 3102(a)] or section 3202(a) [26 USCS § 3202(a)] to be collected from such wages and funds.

(l) **Determination and disclosure of marital status.**

(1) **Determination of status by employer.** For purposes of applying the tables in subsections (a) and (c) to a payment of wages, the employer shall treat the employee as a single person unless there is in effect with respect to such payment of wages a withholding exemption certificate furnished to the employer by the employee after the date of the enactment of this subsection [enacted March 15, 1966] indicating that the employee is married.

(2) **Disclosure of status by employee.** An employee shall be entitled to furnish the employer with a withholding exemption certificate indicating he is married only if, on the day of such furnishing, he is married (determined with the application of the rules in paragraph (3)). An employee whose marital status changes from married to single shall, at such time as the Secretary may by regulations prescribe, furnish the employer with a new withholding exemption certificate.

(3) **Determination of marital status.** For purposes of paragraph (2), an employee shall on any day be considered--

(A) as not married, if (i) he is legally separated from his spouse under a decree of divorce or separate maintenance, or (ii) either he or his spouse is, or on any preceding day within the calendar year was, a nonresident alien; or

(B) as married, if (i) his spouse (other than a spouse referred to in subparagraph (A)) died within the portion of his taxable year which precedes such day, or (ii) his spouse died during one of the two taxable years immediately preceding the current taxable year and, on the basis of facts existing at the beginning of such day, the employee reasonably expects, at the close of his taxable year, to be a surviving spouse (as defined in section 2(a)).

(m) Withholding allowances. Under regulations prescribed by the Secretary, an employee shall be entitled to additional withholding allowances or additional reductions in withholding under this subsection. In determining the number of additional withholding allowances or the amount of additional reductions in withholding under this subsection, the employee may take into account (to the extent and in the manner provided by such regulations)--

(1) estimated itemized deductions allowable under chapter 1 [26 USCS §§ 1 et seq.] (other than the deductions referred to in section 151 [26 USCS § 151] and other than the deductions required to be taken into account in determining adjusted gross income under section 62(a) [26 USCS § 62(a)] (other than paragraph (10) thereof)),

(2) estimated tax credits allowable under chapter 1 [26 USCS §§ 1 et seq.], and

(3) such additional deductions (including the additional standard deduction under section 63(c)(3) [26 USCS § 63(c)(3)] for the aged and blind) and other items as may be specified by the Secretary in regulations.

(n) Employees incurring no income tax liability. Notwithstanding any other provision of this section, an employer shall not be required to deduct and withhold any tax under this chapter [26 USCS §§ 3401 et seq.] upon a payment of wages to an employee if there is in effect with respect to such payment a withholding exemption certificate (in such form and containing such other information as the Secretary may prescribe) furnished to the employer by the employee certifying that the employee--

(1) incurred no liability for income tax imposed under subtitle A [26 USCS §§ 1 et seq.] for his preceding taxable year, and

(2) anticipates that he will incur no liability for income tax imposed under subtitle A [26 USCS §§ 1 et seq.] for his current taxable year.

The Secretary shall by regulations provide for the coordination of the provisions of this subsection with the provisions of subsection (f).

(o) Extension of withholding to certain payments other than wages.

(1) General rule. For purposes of this chapter [26 USCS §§ 3401 et seq.] (and so much of subtitle F [26 USCS §§ 6001 et seq.] as relates to this chapter [26 USCS §§ 3401 et seq.]--

(A) any supplemental unemployment compensation benefit paid to an individual,

(B) any payment of an annuity to an individual, if at the time the payment is made a request that such annuity be subject to withholding under this chapter [26 USCS §§ 3401 et seq.] is in effect, and

(C) any payment to an individual of sick pay which does not constitute wages (determined without regard to this subsection), if at the time the payment is made a request that such sick pay be subject to withholding under this chapter [26 USCS §§ 3401 et seq.] is in effect,

shall be treated as if it were a payment of wages by an employer to an employee for a payroll period.

(2) Definitions.

(A) Supplemental unemployment compensation benefits. For purposes of paragraph (1), the term "supplemental unemployment compensation benefits" means amounts which are paid to an employee, pursuant to a plan to which the employer is a party, because of an employee's involuntary separation from employment (whether or not such separation is temporary), resulting directly from a reduction in force, the discontinuance of a plant or operation, or other similar conditions, but only to the extent such benefits are includible in the employee's gross income.

(B) Annuity. For purposes of this subsection, the term "annuity" means any amount paid to an individual as a pension or annuity.

(C) Sick pay. For purposes of this subsection, the term "sick pay" means any amount which--

(i) is paid to an employee pursuant to a plan to which the employer is a party, and

(ii) constitutes remuneration or a payment in lieu of remuneration for any period during which the employee is

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temporarily absent from work on account of sickness or personal injuries.

(3) Amount withheld from annuity payments or sick pay. If a payee makes a request that an annuity or any sick pay be subject to withholding under this chapter [26 USCS §§ 3401 et seq.], the amount to be deducted and withheld under this chapter [26 USCS §§ 3401 et seq.] from any payment to which such request applies shall be an amount (not less than a minimum amount determined under regulations prescribed by the Secretary) specified by the payee in such request. The amount deducted and withheld with respect to a payment which is greater or less than a full payment shall bear the same relation to the specified amount as such payment bears to a full payment.

(4) Request for withholding. A request that an annuity or any sick pay be subject to withholding under this chapter [26 USCS §§ 3401 et seq.]--

(A) shall be made by the payee in writing to the person making the payments and shall contain the social security number of the payee,

(B) shall specify the amount to be deducted and withheld from each full payment, and

(C) shall take effect--

(i) in the case of sick pay, with respect to payments made more than 7 days after the date on which such request is furnished to the payor, or

(ii) in the case of an annuity, at such time (after the date on which such request is furnished to the payor) as the Secretary shall by regulations prescribe.

Such a request may be changed or terminated by furnishing to the person making the payments a written statement of change or termination which shall take effect in the same manner as provided in subparagraph (C). At the election of the payor, any such request (or statement of change or revocation) may take effect earlier than as provided in subparagraph (C).

(5) Special rule for sick pay paid pursuant to certain collective-bargaining agreements. In the case of any sick pay paid pursuant to a collective-bargaining agreement between employee representatives and one or more employers which contains a provision specifying that this paragraph is to apply to sick pay paid pursuant to such agreement and contains a provision for determining the amount to be deducted and withheld from each payment of such sick pay--

(A) the requirement of paragraph (1)(C) that a request for withholding be in effect shall not apply, and

(B) except as provided in subsection (n), the amounts to be deducted and withheld under this chapter [26 USCS §§ 3401 et seq.] shall be determined in accordance with such agreement.

The preceding sentence shall not apply with respect to sick pay paid pursuant to any agreement to any individual unless the social security number of such individual is furnished to the payor and the payor is furnished with such information as is necessary to determine whether the payment is pursuant to the agreement and to determine the amount to be deducted and withheld.

(6) Coordination with withholding on designated distributions under section 3405. This subsection shall not apply to any amount which is a designated distribution (within the meaning of section 3405(e)(1) [26 USCS § 3405(e)(1)]).

(p) Voluntary withholding agreements.

(1) Certain federal payments.

(A) In general. If, at the time a specified Federal payment is made to any person, a request by such person is in effect that such payment be subject to withholding under this chapter [26 USCS §§ 3401 et seq.], then for purposes of this chapter [26 USCS §§ 3401 et seq.] and so much of subtitle F [26 USCS §§ 6001 et seq.] as relates to this chapter [26 USCS §§ 3401 et seq.], such payment shall be treated as if it were a payment of wages by an employer to an employee.

(B) Amount withheld. The amount to be deducted and withheld under this chapter [26 USCS §§ 3401 et seq.] from any payment to which any request under subparagraph (A) applies shall be an amount equal to the percentage of such payment specified in such request. Such a request shall apply to any payment only if the percentage specified is 7 percent, any percentage applicable to any of the 3 lowest income brackets in the table under section 1(c), or such other percentage as is permitted under regulations prescribed by the Secretary.

(C) Specified federal payments. For purposes of this paragraph, the term "specified Federal payment" means--

(i) any payment of a social security benefit (as defined in section 86(d) [26 USCS § 86(d)]),

(ii) any payment referred to in the second sentence of section 451(d) [26 USCS § 451(d)] which is treated as insurance proceeds,

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(iii) any amount which is includible in gross income under section 77(a) [26 USCS § 77(a)], and  
 (iv) any other payment made pursuant to Federal law which is specified by the Secretary for purposes of this paragraph.

(D) Requests for withholding. Rules similar to the rules that apply to annuities under subsection (o)(4) shall apply to requests under this paragraph and paragraph (2).

(2) Voluntary withholding on unemployment benefits. If, at the time a payment of unemployment compensation (as defined in section 85(b) [26 USCS § 85(b)]) is made to any person, a request by such person is in effect that such payment be subject to withholding under this chapter [26 USCS §§ 3401 et seq.], then for purposes of this chapter [26 USCS §§ 3401 et seq.] and so much of subtitle F [26 USCS §§ 6001 et seq.] as relates to this chapter [26 USCS §§ 3401 et seq.], such payment shall be treated as if it were a payment of wages by an employer to an employee. The amount to be deducted and withheld under this chapter [26 USCS §§ 3401 et seq.] from any payment to which any request under this paragraph applies shall be an amount equal to 10 percent of such payment.

(3) Authority for other voluntary withholding. The Secretary is authorized by regulations to provide for withholding--

(A) from remuneration for services performed by an employee for the employee's employer which (without regard to this paragraph) does not constitute wages, and

(B) from any other type of payment with respect to which the Secretary finds that withholding would be appropriate under the provisions of this chapter [26 USCS §§ 3401 et seq.],

if the employer and employee, or the person making and the person receiving such other type of payment, agree to such withholding. Such agreement shall be in such form and manner as the Secretary may by regulations prescribe. For purposes of this chapter [26 USCS §§ 3401 et seq.] (and so much of subtitle F [26 USCS §§ 6001 et seq.] as relates to this chapter [26 USCS §§ 3401 et seq.]), remuneration or other payments with respect to which such agreement is made shall be treated as if they were wages paid by an employer to an employee to the extent that such remuneration is paid or other payments are made during the period for which the agreement is in effect.

(q) Extension of withholding to certain gambling winnings.

(1) General rule. Every person, including the Government of the United States, a State, or a political subdivision thereof, or any instrumentalities of the foregoing, making any payment of winnings which are subject to withholding shall deduct and withhold from such payment a tax in an amount equal to the product of the third lowest rate of tax applicable under section 1(c) and such payment.

(2) Exemption where tax otherwise withheld. In the case of any payment of winnings which are subject to withholding made to a nonresident alien individual or a foreign corporation, the tax imposed under paragraph (1) shall not apply to any such payment subject to tax under section 1441(a) [26 USCS § 1441(a)] (relating to withholding on nonresident aliens) or tax under section 1442(a) [26 USCS § 1442(a)] (relating to withholding on foreign corporations).

(3) Winnings which are subject to withholding. For purposes of this subsection, the term "winnings which are subject to withholding" means proceeds from a wager determined in accordance with the following:

(A) In general. Except as provided in subparagraphs (B) and (C), proceeds of more than \$ 5,000 from a wagering transaction, if the amount of such proceeds is at least 300 times as large as the amount wagered.

(B) State-conducted lotteries. Proceeds of more than \$ 5,000 from a wager placed in a lottery conducted by an agency of a State acting under authority of State law, but only if such wager is placed with the State agency conducting such lottery, or with its authorized employees or agents.

(C) Sweepstakes, wagering pools, certain parimutuel pools, jai alai, and lotteries. Proceeds of more than \$ 5,000 from--

(i) a wager placed in a sweepstakes, wagering pool, or lottery (other than a wager described in subparagraph (B)), or

(ii) a wagering transaction in a parimutuel pool with respect to horse races, dog races, or jai alai if the amount of such proceeds is at least 300 times as large as the amount wagered.

(4) Rules for determining proceeds from a wager. For purposes of this subsection--

(A) proceeds from a wager shall be determined by reducing the amount received by the amount of the wager, and

(B) proceeds which are not money shall be taken into account at their fair market value.

(5) Exemption for bingo, keno, and slot machines. The tax imposed under paragraph (1) shall not apply to winnings

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from a slot machine, keno, and bingo.

(6) **Statement by recipient.** Every person who is to receive a payment of winnings which are subject to withholding shall furnish the person making such payment a statement, made under the penalties of perjury, containing the name, address, and taxpayer identification number of the person receiving the payment and of each person entitled to any portion of such payment.

(7) **Coordination with other sections.** For purposes of sections 3403 and 3404 [26 USCS §§ 3403 and 3404] and for purposes of so much of subtitle F [26 USCS §§ 6001 et seq.] (except section 7205 [26 USCS § 7205]) as relates to this chapter [26 USCS §§ 3401 et seq.], payments to any person of winnings which are subject to withholding shall be treated as if they were wages paid by an employer to an employee.

(r) **Extension of withholding to certain taxable payments of Indian casino profits.**

(1) **In general.** Every person, including an Indian tribe, making a payment to a member of an Indian tribe from the net revenues of any class II or class III gaming activity conducted or licensed by such tribe shall deduct and withhold from such payment a tax in an amount equal to such payment's proportionate share of the annualized tax.

(2) **Exception.** The tax imposed by paragraph (1) shall not apply to any payment to the extent that the payment, when annualized, does not exceed an amount equal to the sum of--

(A) the basic standard deduction (as defined in section 63(c) [26 USCS § 63(c)]) for an individual to whom section 63(c)(2)(C) [26 USCS § 63(c)(2)(C)] applies, and

(B) the exemption amount (as defined in section 151(d) [26 USCS § 151(d)]).

(3) **Annualized tax.** For purposes of paragraph (1), the term "annualized tax" means, with respect to any payment, the amount of tax which would be imposed by section 1(c) [26 USCS § 1(c)] (determined without regard to any rate of tax in excess of the fourth lowest rate of tax applicable under section 1(c) [26 USCS § 1(c)]) on an amount of taxable income equal to the excess of--

(A) the annualized amount of such payment, over

(B) the amount determined under paragraph (2).

(4) **Classes of gaming activities, etc.** For purposes of this subsection, terms used in paragraph (1) which are defined in section 4 of the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.), as in effect on the date of the enactment of this subsection [enacted Dec. 8, 1994], shall have the respective meanings given such terms by such section.

(5) **Annualization.** Payments shall be placed on an annualized basis under regulations prescribed by the Secretary.

(6) **Alternate withholding procedures.** At the election of an Indian tribe, the tax imposed by this subsection on any payment made by such tribe shall be determined in accordance with such tables or computational procedures as may be specified in regulations prescribed by the Secretary (in lieu of in accordance with paragraphs (2) and (3)).

(7) **Coordination with other sections.** For purposes of this chapter [26 USCS §§ 3401 et seq.] and so much of subtitle F [26 USCS §§ 6001 et seq.] as relates to this chapter [26 USCS §§ 3401 et seq.], payments to any person which are subject to withholding under this subsection shall be treated as if they were wages paid by an employer to an employee.

(s) **Exemption from withholding for any vehicle fringe benefit.**

(1) **Employer election not to withhold.** The employer may elect not to deduct and withhold any tax under this chapter [26 USCS §§ 3401 et seq.] with respect to any vehicle fringe benefit provided to any employee if such employee is notified by the employer of such election (at such time and in such manner as the Secretary shall by regulations prescribe). The preceding sentence shall not apply to any vehicle fringe benefit unless the amount of such benefit is included by the employer on a statement timely furnished under section 6051 [26 USCS § 6051].

(2) **Employer must furnish W-2.** Any vehicle fringe benefit shall be treated as wages from which amounts are required to be deducted and withheld under this chapter [26 USCS §§ 3401 et seq.] for purposes of section 6051 [26 USCS § 6051].

(3) **Vehicle fringe benefit.** For purposes of this subsection, the term "vehicle fringe benefit" means any fringe benefit--

(A) which constitutes wages (as defined in section 3401 [26 USCS § 3401]), and

(B) which consists of providing a highway motor vehicle for the use of the employee.

## LEXSTAT 26 U.S.C. 6501(A)

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TITLE 26. INTERNAL REVENUE CODE  
SUBTITLE F. PROCEDURE AND ADMINISTRATION  
CHAPTER 66. LIMITATIONS  
SUBCHAPTER A. LIMITATIONS ON ASSESSMENT AND COLLECTION

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§ 6501. Limitations on assessment and collection.

(a) General rule. Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) or, if the tax is payable by stamp, at any time after such tax became due and before the expiration of 3 years after the date on which any part of such tax was paid, and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period. For purposes of this chapter [26 USCS §§ 6501 et seq.], the term "return" means the return required to be filed by the taxpayer (and does not include a return of any person from whom the taxpayer has received an item of income, gain, loss, deduction, or credit).

(b) Time return deemed filed.

(1) Early return. For purposes of this section, a return of tax imposed by this title, except tax imposed by chapter 3, 21, or 24 [26 USCS §§ 1441 et seq., 3101 et seq., or 3401 et seq.], filed before the last day prescribed by law or by regulations promulgated pursuant to law for the filing thereof, shall be considered as filed on such last day.

(2) Return of certain employment taxes and tax imposed by chapter 3. For purposes of this section, if a return of tax imposed by chapter 3, 21, or 24 [26 USCS §§ 1441 et seq., 3101 et seq., or 3401 et seq.] for any period ending with or within a calendar year is filed before April 15 of the succeeding calendar year, such return shall be considered filed on April 15 of such calendar year.

(3) Return executed by Secretary. Notwithstanding the provisions of paragraph (2) of section 6020(b) [26 USCS § 6020(b)], the execution of a return by the Secretary pursuant to the authority conferred by such section shall not start the running of the period of limitations on assessment and collection.

(4) Return of excise taxes. For purposes of this section, the filing of a return for a specified period on which an entry has been made with respect to a tax imposed under a provision of subtitle D [26 USCS §§ 4001 et seq.] (including a return on which an entry has been made showing no liability for such tax for such period) shall constitute the filing of a return of all amounts of such tax which, if properly paid, would be required to be reported on such return for such period.

(c) Exceptions.

(1) False return. In the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time.

(2) Willful attempt to evade tax. In case of a willful attempt in any manner to defeat or evade tax imposed by this title

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TITLE 27. COURTS -- GENERAL PROVISIONS -- SPECIAL REMEDIES  
CHAPTER 2721. DECLARATORY JUDGMENTS

**Go to the Ohio Code Archive Directory**

*ORC Ann. 2721.02 (2007)*

§ 2721.02. Force and effect of declaratory judgments; action or proceeding against insurer

(A) Subject to division (B) of this section, courts of record may declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding is open to objection on the ground that a declaratory judgment or decree is prayed for under this chapter. The declaration may be either affirmative or negative in form and effect. The declaration has the effect of a final judgment or decree.

(B) A plaintiff who is not an insured under a particular policy of liability insurance may not commence against the insurer that issued the policy an action or proceeding under this chapter that seeks a declaratory judgment or decree as to whether the policy's coverage provisions extend to an injury, death, or loss to person or property that a particular insured under the policy allegedly tortiously caused the plaintiff to sustain or caused another person for whom the plaintiff is a legal representative to sustain, until a court of record enters in a distinct civil action for damages between the plaintiff and that insured as a tortfeasor a final judgment awarding the plaintiff damages for the injury, death, or loss to person or property involved.

(C) In an action or proceeding for declaratory relief that a judgment creditor commences in accordance with divisions (A) and (B) of this section against an insurer that issued a particular policy of liability insurance, the insurer has and may assert as an affirmative defense against the judgment creditor any coverage defenses that the insurer possesses and could assert against the holder of the policy in an action or proceeding under this chapter between the holder and the insurer.

If, prior to the judgment creditor's commencement of the action or proceeding for declaratory relief, the holder of the policy commences a similar action or proceeding against the insurer for a determination as to whether the policy's coverage provisions extend to the injury, death, or loss to person or property underlying the judgment creditor's judgment, and if the court involved in that action or proceeding enters a final judgment with respect to the policy's coverage or noncoverage of that injury, death, or loss, that final judgment shall be deemed to also have binding legal effect upon the judgment creditor for purposes of the judgment creditor's action or proceeding for declaratory relief against the insurer. This division shall apply notwithstanding any contrary common law principles of res judicata or adjunct principles of collateral estoppel.

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TITLE 27. COURTS -- GENERAL PROVISIONS -- SPECIAL REMEDIES  
CHAPTER 2721. DECLARATORY JUDGMENTS

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*ORC Ann. 2721.03 (2007)*

§ 2721.03. Construction or validity of instrument or legal provision

Subject to division (B) of *section 2721.02 of the Revised Code*, any person interested under a deed, will, written contract, or other writing constituting a contract or any person whose rights, status, or other legal relations are affected by a constitutional provision, statute, rule as defined in *section 119.01 of the Revised Code*, municipal ordinance, township resolution, contract, or franchise may have determined any question of construction or validity arising under the instrument, constitutional provision, statute, rule, ordinance, resolution, contract, or franchise and obtain a declaration of rights, status, or other legal relations under it.

The testator of a will may have the validity of the will determined at any time during the testator's lifetime pursuant to *sections 2107.081 [2107.08.1] to 2107.085 [2107.08.5] of the Revised Code*.

**HISTORY:**

GC § 12102-2; 115 v 495, § 2; Bureau of Code Revision, 10-1-53; 129 v 343 (Eff 10-6-61); 137 v H 505 (Eff 1-1-79); 144 v H 77 (Eff 9-17-91); 148 v H 58. Eff 9-24-99.

**NOTES:**

Section Notes

See provisions, § 4 of HB 58 (148 v --), following RC § 2721.02.

Related Statutes & Rules

LEXSTAT ORC 4123.511

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TITLE 41. LABOR AND INDUSTRY  
CHAPTER 4123. WORKERS' COMPENSATION  
JURISDICTION OF COMMISSION

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*ORC Ann. 4123.511 (2007)*

§ 4123.511. Notice to claimant and employer; information from other persons; investigations; orders; administrative appeals; repayment schedule; immediate allowance of certain medical conditions

(A) Within seven days after receipt of any claim under this chapter, the bureau of workers' compensation shall notify the claimant and the employer of the claimant of the receipt of the claim and of the facts alleged therein. If the bureau receives from a person other than the claimant written or facsimile information or information communicated verbally over the telephone indicating that an injury or occupational disease has occurred or been contracted which may be compensable under this chapter, the bureau shall notify the employee and the employer of the information. If the information is provided verbally over the telephone, the person providing the information shall provide written verification of the information to the bureau according to division (E) of *section 4123.84 of the Revised Code*. The receipt of the information in writing or facsimile, or if initially by telephone, the subsequent written verification, and the notice by the bureau shall be considered an application for compensation under *section 4123.84 or 4123.85 of the Revised Code*, provided that the conditions of division (E) of *section 4123.84 of the Revised Code* apply to information provided verbally over the telephone. Upon receipt of a claim, the bureau shall advise the claimant of the claim number assigned and the claimant's right to representation in the processing of a claim or to elect no representation. If the bureau determines that a claim is determined to be a compensable lost-time claim, the bureau shall notify the claimant and the employer of the availability of rehabilitation services. No bureau or industrial commission employee shall directly or indirectly convey any information in derogation of this right. This section shall in no way abrogate the bureau's responsibility to aid and assist a claimant in the filing of a claim and to advise the claimant of the claimant's rights under the law.

The administrator of workers' compensation shall assign all claims and investigations to the bureau service office from which investigation and determination may be made most expeditiously.

The bureau shall investigate the facts concerning an injury or occupational disease and ascertain such facts in whatever manner is most appropriate and may obtain statements of the employee, employer, attending physician, and witnesses in whatever manner is most appropriate.

The administrator, with the advice and consent of the bureau of workers' compensation board of directors, may

adopt rules that identify specified medical conditions that have a historical record of being allowed whenever included in a claim. The administrator may grant immediate allowance of any medical condition identified in those rules upon the filing of a claim involving that medical condition and may make immediate payment of medical bills for any medical condition identified in those rules that is included in a claim. If an employer contests the allowance of a claim involving any medical condition identified in those rules, and the claim is disallowed, payment for the medical condition included in that claim shall be charged to and paid from the surplus fund created under *section 4123.34 of the Revised Code*.

(B) (1) Except as provided in division (B)(2) of this section, in claims other than those in which the employer is a self-insuring employer, if the administrator determines under division (A) of this section that a claimant is or is not entitled to an award of compensation or benefits, the administrator shall issue an order no later than twenty-eight days after the sending of the notice under division (A) of this section, granting or denying the payment of the compensation or benefits, or both as is appropriate to the claimant. Notwithstanding the time limitation specified in this division for the issuance of an order, if a medical examination of the claimant is required by statute, the administrator promptly shall schedule the claimant for that examination and shall issue an order no later than twenty-eight days after receipt of the report of the examination. The administrator shall notify the claimant and the employer of the claimant and their respective representatives in writing of the nature of the order and the amounts of compensation and benefit payments involved. The employer or claimant may appeal the order pursuant to division (C) of this section within fourteen days after the date of the receipt of the order. The employer and claimant may waive, in writing, their rights to an appeal under this division.

(2) Notwithstanding the time limitation specified in division (B)(1) of this section for the issuance of an order, if the employer certifies a claim for payment of compensation or benefits, or both, to a claimant, and the administrator has completed the investigation of the claim, the payment of benefits or compensation, or both, as is appropriate, shall commence upon the later of the date of the certification or completion of the investigation and issuance of the order by the administrator, provided that the administrator shall issue the order no later than the time limitation specified in division (B)(1) of this section.

(3) If an appeal is made under division (B)(1) or (2) of this section, the administrator shall forward the claim file to the appropriate district hearing officer within seven days of the appeal. In contested claims other than state fund claims, the administrator shall forward the claim within seven days of the administrator's receipt of the claim to the industrial commission, which shall refer the claim to an appropriate district hearing officer for a hearing in accordance with division (C) of this section.

(C) If an employer or claimant timely appeals the order of the administrator issued under division (B) of this section or in the case of other contested claims other than state fund claims, the commission shall refer the claim to an appropriate district hearing officer according to rules the commission adopts under *section 4121.36 of the Revised Code*. The district hearing officer shall notify the parties and their respective representatives of the time and place of the hearing.

The district hearing officer shall hold a hearing on a disputed issue or claim within forty-five days after the filing of the appeal under this division and issue a decision within seven days after holding the hearing. The district hearing officer shall notify the parties and their respective representatives in writing of the order. Any party may appeal an order issued under this division pursuant to division (D) of this section within fourteen days after receipt of the order under this division.

(D) Upon the timely filing of an appeal of the order of the district hearing officer issued under division (C) of this section, the commission shall refer the claim file to an appropriate staff hearing officer according to its rules adopted under *section 4121.36 of the Revised Code*. The staff hearing officer shall hold a hearing within forty-five days after the filing of an appeal under this division and issue a decision within seven days after holding the hearing under this division. The staff hearing officer shall notify the parties and their respective representatives in writing of the staff

hearing officer's order. Any party may appeal an order issued under this division pursuant to division (E) of this section within fourteen days after receipt of the order under this division.

(E) Upon the filing of a timely appeal of the order of the staff hearing officer issued under division (D) of this section, the commission or a designated staff hearing officer, on behalf of the commission, shall determine whether the commission will hear the appeal. If the commission or the designated staff hearing officer decides to hear the appeal, the commission or the designated staff hearing officer shall notify the parties and their respective representatives in writing of the time and place of the hearing. The commission shall hold the hearing within forty-five days after the filing of the notice of appeal and, within seven days after the conclusion of the hearing, the commission shall issue its order affirming, modifying, or reversing the order issued under division (D) of this section. The commission shall notify the parties and their respective representatives in writing of the order. If the commission or the designated staff hearing officer determines not to hear the appeal, within fourteen days after the filing of the notice of appeal, the commission or the designated staff hearing officer shall issue an order to that effect and notify the parties and their respective representatives in writing of that order.

Except as otherwise provided in this chapter and Chapters 4121., 4127., and 4131. of the Revised Code, any party may appeal an order issued under this division to the court pursuant to *section 4123.512 [4123.51.2] of the Revised Code* within sixty days after receipt of the order, subject to the limitations contained in that section.

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

(G) All of the following apply to the proceedings under divisions (C), (D), and (E) of this section:

(1) The parties shall proceed promptly and without continuances except for good cause;

(2) The parties, in good faith, shall engage in the free exchange of information relevant to the claim prior to the conduct of a hearing according to the rules the commission adopts under *section 4121.36 of the Revised Code*;

(3) The administrator is a party and may appear and participate at all administrative proceedings on behalf of the state insurance fund. However, in cases in which the employer is represented, the administrator shall neither present arguments nor introduce testimony that is cumulative to that presented or introduced by the employer or the employer's representative. The administrator may file an appeal under this section on behalf of the state insurance fund; however, except in cases arising under *section 4123.343 [4123.34.3] of the Revised Code*, the administrator only may appeal questions of law or issues of fraud when the employer appears in person or by representative.

(H) Except as provided in *section 4121.63 of the Revised Code* and division (K) of this section, payments of compensation to a claimant or on behalf of a claimant as a result of any order issued under this chapter shall commence upon the earlier of the following:

(1) Fourteen days after the date the administrator issues an order under division (B) of this section, unless that order is appealed;

(2) The date when the employer has waived the right to appeal a decision issued under division (B) of this section;

(3) If no appeal of an order has been filed under this section or to a court under *section 4123.512 [4123.51.2] of the Revised Code*, the expiration of the time limitations for the filing of an appeal of an order;

(4) The date of receipt by the employer of an order of a district hearing officer, a staff hearing officer, or the industrial commission issued under division (C), (D), or (E) of this section.

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TITLE 41. LABOR AND INDUSTRY  
CHAPTER 4123. WORKERS' COMPENSATION  
JURISDICTION OF COMMISSION

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*ORC Ann. 4123.512 (2007)*

§ 4123.512. Appeal to court of common pleas; cost; fees

(A) The claimant or the employer may appeal an order of the industrial commission made under division (E) of *section 4123.511 [4123.51.1] of the Revised Code* in any injury or occupational disease case, other than a decision as to the extent of disability to the court of common pleas of the county in which the injury was inflicted or in which the contract of employment was made if the injury occurred outside the state, or in which the contract of employment was made if the exposure occurred outside the state. If no common pleas court has jurisdiction for the purposes of an appeal by the use of the jurisdictional requirements described in this division, the appellant may use the venue provisions in the Rules of Civil Procedure to vest jurisdiction in a court. If the claim is for an occupational disease the appeal shall be to the court of common pleas of the county in which the exposure which caused the disease occurred. Like appeal may be taken from an order of a staff hearing officer made under division (D) of *section 4123.511 [4123.51.1] of the Revised Code* from which the commission has refused to hear an appeal. The appellant shall file the notice of appeal with a court of common pleas within sixty days after the date of the receipt of the order appealed from or the date of receipt of the order of the commission refusing to hear an appeal of a staff hearing officer's decision under division (D) of *section 4123.511 [4123.51.1] of the Revised Code*. The filing of the notice of the appeal with the court is the only act required to perfect the appeal.

If an action has been commenced in a court of a county other than a court of a county having jurisdiction over the action, the court, upon notice by any party or upon its own motion, shall transfer the action to a court of a county having jurisdiction.

Notwithstanding anything to the contrary in this section, if the commission determines under *section 4123.522 [4123.52.2] of the Revised Code* that an employee, employer, or their respective representatives have not received written notice of an order or decision which is appealable to a court under this section and which grants relief pursuant to *section 4123.522 [4123.52.2] of the Revised Code*, the party granted the relief has sixty days from receipt of the order under *section 4123.522 [4123.52.2] of the Revised Code* to file a notice of appeal under this section.

(B) The notice of appeal shall state the names of the claimant and the employer, the number of the claim, the date of the order appealed from, and the fact that the appellant appeals therefrom.

The administrator of workers' compensation, the claimant, and the employer shall be parties to the appeal and the court, upon the application of the commission, shall make the commission a party. The party filing the appeal shall serve a copy of the notice of appeal on the administrator at the central office of the bureau of workers' compensation in Columbus. The administrator shall notify the employer that if the employer fails to become an active party to the appeal, then the administrator may act on behalf of the employer and the results of the appeal could have an adverse effect upon the employer's premium rates.

(C) The attorney general or one or more of the attorney general's assistants or special counsel designated by the attorney general shall represent the administrator and the commission. In the event the attorney general or the attorney general's designated assistants or special counsel are absent, the administrator or the commission shall select one or more of the attorneys in the employ of the administrator or the commission as the administrator's attorney or the commission's attorney in the appeal. Any attorney so employed shall continue the representation during the entire period of the appeal and in all hearings thereof except where the continued representation becomes impractical.

(D) Upon receipt of notice of appeal the clerk of courts shall provide notice to all parties who are appellees and to the commission.

The claimant shall, within thirty days after the filing of the notice of appeal, file a petition containing a statement of facts in ordinary and concise language showing a cause of action to participate or to continue to participate in the fund and setting forth the basis for the jurisdiction of the court over the action. Further pleadings shall be had in accordance with the Rules of Civil Procedure, provided that service of summons on such petition shall not be required and provided that the claimant may not dismiss the complaint without the employer's consent if the employer is the party that filed the notice of appeal to court pursuant to this section. The clerk of the court shall, upon receipt thereof, transmit by certified mail a copy thereof to each party named in the notice of appeal other than the claimant. Any party may file with the clerk prior to the trial of the action a deposition of any physician taken in accordance with the provisions of the Revised Code, which deposition may be read in the trial of the action even though the physician is a resident of or subject to service in the county in which the trial is had. The bureau of workers' compensation shall pay the cost of the stenographic deposition filed in court and of copies of the stenographic deposition for each party from the surplus fund and charge the costs thereof against the unsuccessful party if the claimant's right to participate or continue to participate is finally sustained or established in the appeal. In the event the deposition is taken and filed, the physician whose deposition is taken is not required to respond to any subpoena issued in the trial of the action. The court, or the jury under the instructions of the court, if a jury is demanded, shall determine the right of the claimant to participate or to continue to participate in the fund upon the evidence adduced at the hearing of the action.

(E) The court shall certify its decision to the commission and the certificate shall be entered in the records of the court. Appeals from the judgment are governed by the law applicable to the appeal of civil actions.

(F) The cost of any legal proceedings authorized by this section, including an attorney's fee to the claimant's attorney to be fixed by the trial judge, based upon the effort expended, in the event the claimant's right to participate or to continue to participate in the fund is established upon the final determination of an appeal, shall be taxed against the employer or the commission if the commission or the administrator rather than the employer contested the right of the claimant to participate in the fund. The attorney's fee shall not exceed forty-two hundred dollars.

(G) If the finding of the court or the verdict of the jury is in favor of the claimant's right to participate in the fund, the commission and the administrator shall thereafter proceed in the matter of the claim as if the judgment were the decision of the commission, subject to the power of modification provided by *section 4123.52 of the Revised Code*.

(H) An appeal from an order issued under division (E) of *section 4123.511 [4123.51.1] of the Revised Code* or any action filed in court in a case in which an award of compensation or medical benefits has been made shall not stay the payment of compensation or medical benefits under the award, or payment for subsequent periods of total disability or medical benefits during the pendency of the appeal. If, in a final administrative or judicial action, it is determined that

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TITLE 41. LABOR AND INDUSTRY  
CHAPTER 4123. WORKERS' COMPENSATION  
COMPENSATION; BENEFITS

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*ORC Ann. 4123.56 (2007)*

§ 4123.56. Temporary total disability benefits; wage loss compensation

(A) 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*, and not less than a minimum amount of compensation which is equal to thirty-three and one-third per cent of the statewide average weekly wage as defined in division (C) of *section 4123.62 of the Revised Code* unless the employee's wage is less than thirty-three and one-third per cent of the minimum statewide average weekly wage, in which event the employee shall receive compensation equal to the employee's full wages; provided that for the first twelve weeks of total disability the employee shall receive seventy-two per cent of the employee's full weekly wage, but not to exceed a maximum amount of weekly compensation which is equal to the lesser of the statewide average weekly wage as defined in division (C) of *section 4123.62 of the Revised Code* or one hundred per cent of the employee's net take-home weekly wage. In the case of a self-insuring employer, payments shall be for a duration based upon the medical reports of the attending physician. If the employer disputes the attending physician's report, payments may be terminated only upon application and hearing by a district hearing officer pursuant to division (C) of *section 4123.511 [4123.51.1] of the Revised Code*. Payments shall continue pending the determination of the matter, however payment shall not be made for the period when any employee has returned to work, when an employee's treating physician has made a written statement that the employee is capable of returning to the employee's former position of employment, when work within the physical capabilities of the employee is made available by the employer or another employer, or when the employee has reached the maximum medical improvement. Where the employee is capable of work activity, but the employee's employer is unable to offer the employee any employment, the employee shall register with the director of job and family services, who shall assist the employee in finding suitable employment. The termination of temporary total disability, whether by order or otherwise, does not preclude the commencement of temporary total disability at another point in time if the employee again becomes temporarily totally disabled.

After two hundred weeks of temporary total disability benefits, the medical section of the bureau of workers' compensation shall schedule the claimant for an examination for an evaluation to determine whether or not the

temporary disability has become permanent. A self-insuring employer shall notify the bureau immediately after payment of two hundred weeks of temporary total disability and request that the bureau schedule the claimant for such an examination.

When the employee is awarded compensation for temporary total disability for a period for which the employee has received benefits under Chapter 4141. of the Revised Code, the bureau shall pay an amount equal to the amount received from the award to the director of job and family services and the director shall credit the amount to the accounts of the employers to whose accounts the payment of benefits was charged or is chargeable to the extent it was charged or is chargeable.

If any compensation under this section has been paid for the same period or periods for which temporary nonoccupational accident and sickness insurance is or has been paid pursuant to an insurance policy or program to which the employer has made the entire contribution or payment for providing insurance or under a nonoccupational accident and sickness program fully funded by the employer, compensation paid under this section for the period or periods 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. Offset of the compensation shall be made only upon the prior order of the bureau or industrial commission or agreement of the claimant.

As used in this division, "net take-home weekly wage" means the amount obtained by dividing an employee's total remuneration, as defined in *section 4141.01 of the Revised Code*, paid to or earned by the employee during the first four of the last five completed calendar quarters which immediately precede the first day of the employee's entitlement to benefits under this division, by the number of weeks during which the employee was paid or earned remuneration during those four quarters, less the amount of local, state, and federal income taxes deducted for each such week.

(B) (1) If an employee in a claim allowed under this chapter suffers a wage loss as a result of returning to employment other than the employee's former position of employment due to an injury or occupational disease, the employee shall receive compensation at sixty-six and two-thirds per cent of the difference between the employee's average weekly wage and the employee's present earnings not to exceed the statewide average weekly wage. The payments may continue for up to a maximum of two hundred weeks, but the payments shall be reduced by the corresponding number of weeks in which the employee receives payments pursuant to division (B) of *section 4121.67 Of the Revised Code*.

(2) If an employee in a claim allowed under this chapter suffers a wage loss as a result of being unable to find employment consistent with the employee's disability resulting from the employee's injury or occupational disease, the employee shall receive compensation at sixty-six and two-thirds per cent of the difference between the employee's average weekly wage and the employee's present earnings, not to exceed the statewide average weekly wage. The payments may continue for up to a maximum of fifty-two weeks. The first twenty-six weeks of payments under division (B)(2) of this section shall be in addition to the maximum of two hundred weeks of payments allowed under division (B)(1) of this section. If an employee in a claim allowed under this chapter receives compensation under division (B)(2) of this section in excess of twenty-six weeks, the number of weeks of compensation allowable under division (B)(1) of this section shall be reduced by the corresponding number of weeks in excess of twenty-six, and up to fifty-two, that is allowable under division (B)(1) of this section.

(3) The number of weeks of wage loss payable to an employee under divisions (B)(1) and (2) of this section shall not exceed two hundred and twenty-six weeks in the aggregate.

(C) In the event an employee of a professional sports franchise domiciled in this state is disabled as the result of an injury or occupational disease, the total amount of payments made under a contract of hire or collective bargaining agreement to the employee during a period of disability is deemed an advanced payment of compensation payable under *sections 4123.56 to 4123.58 of the Revised Code*. The employer shall be reimbursed the total amount of the advanced payments out of any award of compensation made pursuant to *sections 4123.56 to 4123.58 of the Revised Code*.

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TITLE 41. LABOR AND INDUSTRY  
CHAPTER 4123. WORKERS' COMPENSATION  
SUBROGATION

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*ORC Ann. 4123.95 (2007)*

§ 4123.95. Liberal construction

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

**HISTORY:**

128 v 743(771). Eff 11-2-59.

**NOTES:**

**ALR**

Jurors as within coverage of workers' compensation acts. *13 ALR5th 444.*

**Law Reviews & Journals**

Blankenship v. Cincinnati Milacron Chemicals, Inc. :69 OS2d 608 (1982): some fairness for Ohio workers and some uncertainty for Ohio employers. Note. *15 ToledoLRev 403 (1983).*

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## LEXSTAT ORC 5747.01

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\*\*\* CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY AND FILED  
 WITH THE SECRETARY OF STATE THROUGH JUNE 24, 2007 \*\*\*

\*\*\* ANNOTATIONS CURRENT THROUGH APRIL 1, 2007 \*\*\*

\*\*\* OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH JUNE 4, 2007 \*\*\*

TITLE 57. TAXATION  
 CHAPTER 5747. INCOME TAX

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*ORC Ann. 5747.01 (2007)*

§ 5747.01. Definitions

Except as otherwise expressly provided or clearly appearing from the context, any term used in this chapter that is not otherwise defined in this section has the same meaning as when used in a comparable context in the laws of the United States relating to federal income taxes or if not used in a comparable context in those laws, has the same meaning as in *section 5733.40 of the Revised Code*. Any reference in this chapter to the Internal Revenue Code includes other laws of the United States relating to federal income taxes.

As used in this chapter:

(A) "Adjusted gross income" or "Ohio adjusted gross income" means federal adjusted gross income, as defined and used in the Internal Revenue Code, adjusted as provided in this section:

(1) Add interest or dividends on obligations or securities of any state or of any political subdivision or authority of any state, other than this state and its subdivisions and authorities.

(2) Add interest or dividends on obligations of any authority, commission, instrumentality, territory, or possession of the United States to the extent that the interest or dividends are exempt from federal income taxes but not from state income taxes.

(3) Deduct interest or dividends on obligations of the United States and its territories and possessions or of any authority, commission, or instrumentality of the United States to the extent that the interest or dividends are included in federal adjusted gross income but exempt from state income taxes under the laws of the United States.

(4) Deduct disability and survivor's benefits to the extent included in federal adjusted gross income.

(5) Deduct benefits under Title II of the Social Security Act and tier 1 railroad retirement benefits to the extent included in federal adjusted gross income under *section 86 of the Internal Revenue Code*.

(6) In the case of a taxpayer who is a beneficiary of a trust that makes an accumulation distribution as defined in *section 665 of the Internal Revenue Code*, add, for the beneficiary's taxable years beginning before 2002, the portion, if

any, of such distribution that does not exceed the undistributed net income of the trust for the three taxable years preceding the taxable year in which the distribution is made to the extent that the portion was not included in the trust's taxable income for any of the trust's taxable years beginning in 2002 or thereafter. "Undistributed net income of a trust" means the taxable income of the trust increased by (a)(i) the additions to adjusted gross income required under division (A) of this section and (ii) the personal exemptions allowed to the trust pursuant to *section 642(b) of the Internal Revenue Code*, and decreased by (b)(i) the deductions to adjusted gross income required under division (A) of this section, (ii) the amount of federal income taxes attributable to such income, and (iii) the amount of taxable income that has been included in the adjusted gross income of a beneficiary by reason of a prior accumulation distribution. Any undistributed net income included in the adjusted gross income of a beneficiary shall reduce the undistributed net income of the trust commencing with the earliest years of the accumulation period.

(7) Deduct the amount of wages and salaries, if any, not otherwise allowable as a deduction but that would have been allowable as a deduction in computing federal adjusted gross income for the taxable year, had the targeted jobs credit allowed and determined under *sections 38, 51, and 52 of the Internal Revenue Code* not been in effect.

(8) Deduct any interest or interest equivalent on public obligations and purchase obligations to the extent that the interest or interest equivalent is included in federal adjusted gross income.

(9) Add any loss or deduct any gain resulting from the sale, exchange, or other disposition of public obligations to the extent that the loss has been deducted or the gain has been included in computing federal adjusted gross income.

(10) Deduct or add amounts, as provided under *section 5747.70 of the Revised Code*, related to contributions to variable college savings program accounts made or tuition units purchased pursuant to Chapter 3334. of the Revised Code.

(11) (a) Deduct, to the extent not otherwise allowable as a deduction or exclusion in computing federal or Ohio adjusted gross income for the taxable year, the amount the taxpayer paid during the taxable year for medical care insurance and qualified long-term care insurance for the taxpayer, the taxpayer's spouse, and dependents. No deduction for medical care insurance under division (A)(11) of this section shall be allowed either to any taxpayer who is eligible to participate in any subsidized health plan maintained by any employer of the taxpayer or of the taxpayer's spouse, or to any taxpayer who is entitled to, or on application would be entitled to, benefits under part A of Title XVIII of the "Social Security Act," 49 Stat. 620 (1935), 42 U.S.C. 301, as amended. For the purposes of division (A)(11)(a) of this section, "subsidized health plan" means a health plan for which the employer pays any portion of the plan's cost. The deduction allowed under division (A)(11)(a) of this section shall be the net of any related premium refunds, related premium reimbursements, or related insurance premium dividends received during the taxable year.

(b) Deduct, to the extent not otherwise deducted or excluded in computing federal or Ohio adjusted gross income during the taxable year, the amount the taxpayer paid during the taxable year, not compensated for by any insurance or otherwise, for medical care of the taxpayer, the taxpayer's spouse, and dependents, to the extent the expenses exceed seven and one-half per cent of the taxpayer's federal adjusted gross income.

(c) For purposes of division (A)(11) of this section, "medical care" has the meaning given in *section 213 of the Internal Revenue Code*, subject to the special rules, limitations, and exclusions set forth therein, and "qualified long-term care" has the same meaning given in *section 7702B(c) of the Internal Revenue Code*.

(12) (a) Deduct any amount included in federal adjusted gross income solely because the amount represents a reimbursement or refund of expenses that in any year the taxpayer had deducted as an itemized deduction pursuant to *section 63 of the Internal Revenue Code* and applicable United States department of the treasury regulations. The deduction otherwise allowed under division (A)(12)(a) of this section shall be reduced to the extent the reimbursement is attributable to an amount the taxpayer deducted under this section in any taxable year.

(b) Add any amount not otherwise included in Ohio adjusted gross income for any taxable year to the extent

that the amount is attributable to the recovery during the taxable year of any amount deducted or excluded in computing federal or Ohio adjusted gross income in any taxable year.

(13) Deduct any portion of the deduction described in *section 1341(a)(2) of the Internal Revenue Code*, for repaying previously reported income received under a claim of right, that meets both of the following requirements:

(a) It is allowable for repayment of an item that was included in the taxpayer's adjusted gross income for a prior taxable year and did not qualify for a credit under division (A) or (B) of *section 5747.05 of the Revised Code* for that year;

(b) It does not otherwise reduce the taxpayer's adjusted gross income for the current or any other taxable year.

(14) Deduct an amount equal to the deposits made to, and net investment earnings of, a medical savings account during the taxable year, in accordance with *section 3924.66 of the Revised Code*. The deduction allowed by division (A)(14) of this section does not apply to medical savings account deposits and earnings otherwise deducted or excluded for the current or any other taxable year from the taxpayer's federal adjusted gross income.

(15) (a) Add an amount equal to the funds withdrawn from a medical savings account during the taxable year, and the net investment earnings on those funds, when the funds withdrawn were used for any purpose other than to reimburse an account holder for, or to pay, eligible medical expenses, in accordance with *section 3924.66 of the Revised Code*;

(b) Add the amounts distributed from a medical savings account under division (A)(2) of *section 3924.68 of the Revised Code* during the taxable year.

(16) Add any amount claimed as a credit under *section 5747.059 [5747.05.9] of the Revised Code* to the extent that such amount satisfies either of the following:

(a) The amount was deducted or excluded from the computation of the taxpayer's federal adjusted gross income as required to be reported for the taxpayer's taxable year under the Internal Revenue Code;

(b) The amount resulted in a reduction of the taxpayer's federal adjusted gross income as required to be reported for any of the taxpayer's taxable years under the Internal Revenue Code.

(17) Deduct the amount contributed by the taxpayer to an individual development account program established by a county department of job and family services pursuant to *sections 329.11 to 329.14 of the Revised Code* for the purpose of matching funds deposited by program participants. On request of the tax commissioner, the taxpayer shall provide any information that, in the tax commissioner's opinion, is necessary to establish the amount deducted under division (A)(17) of this section.

(18) Beginning in taxable year 2001 but not for any taxable year beginning after December 31, 2005, if the taxpayer is married and files a joint return and the combined federal adjusted gross income of the taxpayer and the taxpayer's spouse for the taxable year does not exceed one hundred thousand dollars, or if the taxpayer is single and has a federal adjusted gross income for the taxable year not exceeding fifty thousand dollars, deduct amounts paid during the taxable year for qualified tuition and fees paid to an eligible institution for the taxpayer, the taxpayer's spouse, or any dependent of the taxpayer, who is a resident of this state and is enrolled in or attending a program that culminates in a degree or diploma at an eligible institution. The deduction may be claimed only to the extent that qualified tuition and fees are not otherwise deducted or excluded for any taxable year from federal or Ohio adjusted gross income. The deduction may not be claimed for educational expenses for which the taxpayer claims a credit under *section 5747.27 of the Revised Code*.

(19) Add any reimbursement received during the taxable year of any amount the taxpayer deducted under

division (A)(18) of this section in any previous taxable year to the extent the amount is not otherwise included in Ohio adjusted gross income.

(20) (a) (i) Add five-sixths of the amount of depreciation expense allowed by subsection (k) of *section 168 of the Internal Revenue Code*, including the taxpayer's proportionate or distributive share of the amount of depreciation expense allowed by that subsection to a pass-through entity in which the taxpayer has a direct or indirect ownership interest.

(ii) Add five-sixths of the amount of qualifying section 179 depreciation expense, including a person's proportionate or distributive share of the amount of qualifying section 179 depreciation expense allowed to any pass-through entity in which the person has a direct or indirect ownership. For the purposes of this division, "qualifying section 179 depreciation expense" means the difference between (I) the amount of depreciation expense directly or indirectly allowed to the taxpayer under *section 179 of the Internal Revenue Code*, and (II) the amount of depreciation expense directly or indirectly allowed to the taxpayer under *section 179 of the Internal Revenue Code* as that section existed on December 31, 2002.

The tax commissioner, under procedures established by the commissioner, may waive the add-backs related to a pass-through entity if the taxpayer owns, directly or indirectly, less than five per cent of the pass-through entity.

(b) Nothing in division (A)(20) of this section shall be construed to adjust or modify the adjusted basis of any asset.

(c) To the extent the add-back required under division (A)(20)(a) of this section is attributable to property generating nonbusiness income or loss allocated under *section 5747.20 of the Revised Code*, the add-back shall be situated to the same location as the nonbusiness income or loss generated by the property for the purpose of determining the credit under division (A) of *section 5747.05 of the Revised Code*. Otherwise, the add-back shall be apportioned, subject to one or more of the four alternative methods of apportionment enumerated in *section 5747.21 of the Revised Code*.

(d) For the purposes of division (A) of this section, net operating loss carryback and carryforward shall not include five-sixths of the allowance of any net operating loss deduction carryback or carryforward to the taxable year to the extent such loss resulted from depreciation allowed by *section 168(k) of the Internal Revenue Code* and by the qualifying section 179 depreciation expense amount.

(21) (a) If the taxpayer was required to add an amount under division (A)(20)(a) of this section for a taxable year, deduct one-fifth of the amount so added for each of the five succeeding taxable years.

(b) If the amount deducted under division (A)(21)(a) of this section is attributable to an add-back allocated under division (A)(20)(c) of this section, the amount deducted shall be situated to the same location. Otherwise, the add-back shall be apportioned using the apportionment factors for the taxable year in which the deduction is taken, subject to one or more of the four alternative methods of apportionment enumerated in *section 5747.21 of the Revised Code*.

(c) No deduction is available under division (A)(21)(a) of this section with regard to any depreciation allowed by *section 168(k) of the Internal Revenue Code* and by the qualifying section 179 depreciation expense amount to the extent that such depreciation resulted in or increased a federal net operating loss carryback or carryforward to a taxable year to which division (A)(20)(d) of this section does not apply.

(22) Deduct, to the extent not otherwise deducted or excluded in computing federal or Ohio adjusted gross income for the taxable year, the amount the taxpayer received during the taxable year as reimbursement for life insurance premiums under *section 5919.31 of the Revised Code*.

(23) Deduct, to the extent not otherwise deducted or excluded in computing federal or Ohio adjusted gross income for the taxable year, the amount the taxpayer received during the taxable year as a death benefit paid by the adjutant general under *section 5919.33 of the Revised Code*.

(24) Deduct, to the extent included in federal adjusted gross income and not otherwise allowable as a deduction or exclusion in computing federal or Ohio adjusted gross income for the taxable year, military pay and allowances received by the taxpayer during the taxable year for active duty service in the United States army, air force, navy, marine corps, or coast guard or reserve components thereof or the national guard. The deduction may not be claimed for military pay and allowances received by the taxpayer while the taxpayer is stationed in this state.

(B) "Business income" means income, including gain or loss, arising from transactions, activities, and sources in the regular course of a trade or business and includes income, gain, or loss from real property, tangible property, and intangible property if the acquisition, rental, management, and disposition of the property constitute integral parts of the regular course of a trade or business operation. "Business income" includes income, including gain or loss, from a partial or complete liquidation of a business, including, but not limited to, gain or loss from the sale or other disposition of goodwill.

(C) "Nonbusiness income" means all income other than business income and may include, but is not limited to, compensation, rents and royalties from real or tangible personal property, capital gains, interest, dividends and distributions, patent or copyright royalties, or lottery winnings, prizes, and awards.

(D) "Compensation" means any form of remuneration paid to an employee for personal services.

(E) "Fiduciary" means a guardian, trustee, executor, administrator, receiver, conservator, or any other person acting in any fiduciary capacity for any individual, trust, or estate.

(F) "Fiscal year" means an accounting period of twelve months ending on the last day of any month other than December.

(G) "Individual" means any natural person.

(H) "Internal Revenue Code" means the "Internal Revenue Code of 1986," 100 Stat. 2085, *26 U.S.C.A. 1*, as amended.

(I) "Resident" means any of the following, provided that division (I)(3) of this section applies only to taxable years of a trust beginning in 2002 or thereafter:

(1) An individual who is domiciled in this state, subject to *section 5747.24 of the Revised Code*;

(2) The estate of a decedent who at the time of death was domiciled in this state. The domicile tests of *section 5747.24 of the Revised Code* are not controlling for purposes of division (I)(2) of this section.

(3) A trust that, in whole or part, resides in this state. If only part of a trust resides in this state, the trust is a resident only with respect to that part.

For the purposes of division (I)(3) of this section:

(a) A trust resides in this state for the trust's current taxable year to the extent, as described in division (I)(3)(d) of this section, that the trust consists directly or indirectly, in whole or in part, of assets, net of any related liabilities, that were transferred, or caused to be transferred, directly or indirectly, to the trust by any of the following:

(i) A person, a court, or a governmental entity or instrumentality on account of the death of a decedent, but only if the trust is described in division (I)(3)(e)(i) or (ii) of this section;

(ii) A person who was domiciled in this state for the purposes of this chapter when the person directly or indirectly transferred assets to an irrevocable trust, but only if at least one of the trust's qualifying beneficiaries is domiciled in this state for the purposes of this chapter during all or some portion of the trust's current taxable year;

(iii) A person who was domiciled in this state for the purposes of this chapter when the trust document or instrument or part of the trust document or instrument became irrevocable, but only if at least one of the trust's qualifying beneficiaries is a resident domiciled in this state for the purposes of this chapter during all or some portion of the trust's current taxable year. If a trust document or instrument became irrevocable upon the death of a person who at the time of death was domiciled in this state for purposes of this chapter, that person is a person described in division (I)(3)(a)(iii) of this section.

(b) A trust is irrevocable to the extent that the transferor is not considered to be the owner of the net assets of the trust under *sections 671 to 678 of the Internal Revenue Code*.

(c) With respect to a trust other than a charitable lead trust, "qualifying beneficiary" has the same meaning as "potential current beneficiary" as defined in *section 1361(e)(2) of the Internal Revenue Code*, and with respect to a charitable lead trust "qualifying beneficiary" is any current, future, or contingent beneficiary, but with respect to any trust "qualifying beneficiary" excludes a person or a governmental entity or instrumentality to any of which a contribution would qualify for the charitable deduction under *section 170 of the Internal Revenue Code*.

(d) For the purposes of division (I)(3)(a) of this section, the extent to which a trust consists directly or indirectly, in whole or in part, of assets, net of any related liabilities, that were transferred directly or indirectly, in whole or in part, to the trust by any of the sources enumerated in that division shall be ascertained by multiplying the fair market value of the trust's assets, net of related liabilities, by the qualifying ratio, which shall be computed as follows:

(i) The first time the trust receives assets, the numerator of the qualifying ratio is the fair market value of those assets at that time, net of any related liabilities, from sources enumerated in division (I)(3)(a) of this section. The denominator of the qualifying ratio is the fair market value of all the trust's assets at that time, net of any related liabilities.

(ii) Each subsequent time the trust receives assets, a revised qualifying ratio shall be computed. The numerator of the revised qualifying ratio is the sum of (1) the fair market value of the trust's assets immediately prior to the subsequent transfer, net of any related liabilities, multiplied by the qualifying ratio last computed without regard to the subsequent transfer, and (2) the fair market value of the subsequently transferred assets at the time transferred, net of any related liabilities, from sources enumerated in division (I)(3)(a) of this section. The denominator of the revised qualifying ratio is the fair market value of all the trust's assets immediately after the subsequent transfer, net of any related liabilities.

(iii) Whether a transfer to the trust is by or from any of the sources enumerated in division (I)(3)(a) of this section shall be ascertained without regard to the domicile of the trust's beneficiaries.

(e) For the purposes of division (I)(3)(a)(i) of this section:

(i) A trust is described in division (I)(3)(e)(i) of this section if the trust is a testamentary trust and the testator of that testamentary trust was domiciled in this state at the time of the testator's death for purposes of the taxes levied under Chapter 5731. of the Revised Code.

(ii) A trust is described in division (I)(3)(e)(ii) of this section if the transfer is a qualifying transfer described in any of divisions (I)(3)(f)(i) to (vi) of this section, the trust is an irrevocable inter vivos trust, and at least one of the trust's qualifying beneficiaries is domiciled in this state for purposes of this chapter during all or some portion of the trust's current taxable year.

(f) For the purposes of division (I)(3)(e)(ii) of this section, a "qualifying transfer" is a transfer of assets, net of any related liabilities, directly or indirectly to a trust, if the transfer is described in any of the following:

(i) The transfer is made to a trust, created by the decedent before the decedent's death and while the decedent was domiciled in this state for the purposes of this chapter, and, prior to the death of the decedent, the trust became irrevocable while the decedent was domiciled in this state for the purposes of this chapter.

(ii) The transfer is made to a trust to which the decedent, prior to the decedent's death, had directly or indirectly transferred assets, net of any related liabilities, while the decedent was domiciled in this state for the purposes of this chapter, and prior to the death of the decedent the trust became irrevocable while the decedent was domiciled in this state for the purposes of this chapter.

(iii) The transfer is made on account of a contractual relationship existing directly or indirectly between the transferor and either the decedent or the estate of the decedent at any time prior to the date of the decedent's death, and the decedent was domiciled in this state at the time of death for purposes of the taxes levied under Chapter 5731. of the Revised Code.

(iv) The transfer is made to a trust on account of a contractual relationship existing directly or indirectly between the transferor and another person who at the time of the decedent's death was domiciled in this state for purposes of this chapter.

(v) The transfer is made to a trust on account of the will of a testator.

(vi) The transfer is made to a trust created by or caused to be created by a court, and the trust was directly or indirectly created in connection with or as a result of the death of an individual who, for purposes of the taxes levied under Chapter 5731. of the Revised Code, was domiciled in this state at the time of the individual's death.

(g) The tax commissioner may adopt rules to ascertain the part of a trust residing in this state.

(J) "Nonresident" means an individual or estate that is not a resident. An individual who is a resident for only part of a taxable year is a nonresident for the remainder of that taxable year.

(K) "Pass-through entity" has the same meaning as in *section 5733.04 of the Revised Code*.

(L) "Return" means the notifications and reports required to be filed pursuant to this chapter for the purpose of reporting the tax due and includes declarations of estimated tax when so required.

(M) "Taxable year" means the calendar year or the taxpayer's fiscal year ending during the calendar year, or fractional part thereof, upon which the adjusted gross income is calculated pursuant to this chapter.

(N) "Taxpayer" means any person subject to the tax imposed by *section 5747.02 of the Revised Code* or any pass-through entity that makes the election under division (D) of *section 5747.08 of the Revised Code*.

(O) "Dependents" means dependents as defined in the Internal Revenue Code and as claimed in the taxpayer's federal income tax return for the taxable year or which the taxpayer would have been permitted to claim had the taxpayer filed a federal income tax return.

(P) "Principal county of employment" means, in the case of a nonresident, the county within the state in which a taxpayer performs services for an employer or, if those services are performed in more than one county, the county in which the major portion of the services are performed.

(Q) As used in *sections 5747.50 to 5747.55 of the Revised Code*:

(1) "Subdivision" means any county, municipal corporation, park district, or township.

(2) "Essential local government purposes" includes all functions that any subdivision is required by general law to exercise, including like functions that are exercised under a charter adopted pursuant to the Ohio Constitution.

(R) "Overpayment" means any amount already paid that exceeds the figure determined to be the correct amount of the tax.

(S) "Taxable income" or "Ohio taxable income" applies only to estates and trusts, and means federal taxable income, as defined and used in the Internal Revenue Code, adjusted as follows:

(1) Add interest or dividends, net of ordinary, necessary, and reasonable expenses not deducted in computing federal taxable income, on obligations or securities of any state or of any political subdivision or authority of any state, other than this state and its subdivisions and authorities, but only to the extent that such net amount is not otherwise includible in Ohio taxable income and is described in either division (S)(1)(a) or (b) of this section:

(a) The net amount is not attributable to the S portion of an electing small business trust and has not been distributed to beneficiaries for the taxable year;

(b) The net amount is attributable to the S portion of an electing small business trust for the taxable year.

(2) Add interest or dividends, net of ordinary, necessary, and reasonable expenses not deducted in computing federal taxable income, on obligations of any authority, commission, instrumentality, territory, or possession of the United States to the extent that the interest or dividends are exempt from federal income taxes but not from state income taxes, but only to the extent that such net amount is not otherwise includible in Ohio taxable income and is described in either division (S)(1)(a) or (b) of this section;

(3) Add the amount of personal exemption allowed to the estate pursuant to *section 642(b) of the Internal Revenue Code*;

(4) Deduct interest or dividends, net of related expenses deducted in computing federal taxable income, on obligations of the United States and its territories and possessions or of any authority, commission, or instrumentality of the United States to the extent that the interest or dividends are exempt from state taxes under the laws of the United States, but only to the extent that such amount is included in federal taxable income and is described in either division (S)(1)(a) or (b) of this section;

(5) Deduct the amount of wages and salaries, if any, not otherwise allowable as a deduction but that would have been allowable as a deduction in computing federal taxable income for the taxable year, had the targeted jobs credit allowed under *sections 38, 51, and 52 of the Internal Revenue Code* not been in effect, but only to the extent such amount relates either to income included in federal taxable income for the taxable year or to income of the S portion of an electing small business trust for the taxable year;

(6) Deduct any interest or interest equivalent, net of related expenses deducted in computing federal taxable income, on public obligations and purchase obligations, but only to the extent that such net amount relates either to income included in federal taxable income for the taxable year or to income of the S portion of an electing small business trust for the taxable year;

(7) Add any loss or deduct any gain resulting from sale, exchange, or other disposition of public obligations to the extent that such loss has been deducted or such gain has been included in computing either federal taxable income or income of the S portion of an electing small business trust for the taxable year;

(8) Except in the case of the final return of an estate, add any amount deducted by the taxpayer on both its Ohio

estate tax return pursuant to *section 5731.14 of the Revised Code*, and on its federal income tax return in determining federal taxable income;

(9) (a) Deduct any amount included in federal taxable income solely because the amount represents a reimbursement or refund of expenses that in a previous year the decedent had deducted as an itemized deduction pursuant to *section 63 of the Internal Revenue Code* and applicable treasury regulations. The deduction otherwise allowed under division (S)(9)(a) of this section shall be reduced to the extent the reimbursement is attributable to an amount the taxpayer or decedent deducted under this section in any taxable year.

(b) Add any amount not otherwise included in Ohio taxable income for any taxable year to the extent that the amount is attributable to the recovery during the taxable year of any amount deducted or excluded in computing federal or Ohio taxable income in any taxable year, but only to the extent such amount has not been distributed to beneficiaries for the taxable year.

(10) Deduct any portion of the deduction described in *section 1341(a)(2) of the Internal Revenue Code*, for repaying previously reported income received under a claim of right, that meets both of the following requirements:

(a) It is allowable for repayment of an item that was included in the taxpayer's taxable income or the decedent's adjusted gross income for a prior taxable year and did not qualify for a credit under division (A) or (B) of *section 5747.05 of the Revised Code* for that year.

(b) It does not otherwise reduce the taxpayer's taxable income or the decedent's adjusted gross income for the current or any other taxable year.

(11) Add any amount claimed as a credit under *section 5747.059 [5747.05.9] of the Revised Code* to the extent that the amount satisfies either of the following:

(a) The amount was deducted or excluded from the computation of the taxpayer's federal taxable income as required to be reported for the taxpayer's taxable year under the Internal Revenue Code;

(b) The amount resulted in a reduction in the taxpayer's federal taxable income as required to be reported for any of the taxpayer's taxable years under the Internal Revenue Code.

(12) Deduct any amount, net of related expenses deducted in computing federal taxable income, that a trust is required to report as farm income on its federal income tax return, but only if the assets of the trust include at least ten acres of land satisfying the definition of "land devoted exclusively to agricultural use" under *section 5713.30 of the Revised Code*, regardless of whether the land is valued for tax purposes as such land under *sections 5713.30 to 5713.38 of the Revised Code*. If the trust is a pass-through entity investor, *section 5747.231 [5747.23.1] of the Revised Code* applies in ascertaining if the trust is eligible to claim the deduction provided by division (S)(12) of this section in connection with the pass-through entity's farm income.

Except for farm income attributable to the S portion of an electing small business trust, the deduction provided by division (S)(12) of this section is allowed only to the extent that the trust has not distributed such farm income. Division (S)(12) of this section applies only to taxable years of a trust beginning in 2002 or thereafter.

(13) Add the net amount of income described in *section 641(c) of the Internal Revenue Code* to the extent that amount is not included in federal taxable income.

(14) Add or deduct the amount the taxpayer would be required to add or deduct under division (A)(20) or (21) of this section if the taxpayer's Ohio taxable income were computed in the same manner as an individual's Ohio adjusted gross income is computed under this section. In the case of a trust, division (S)(14) of this section applies only to any of the trust's taxable years beginning in 2002 or thereafter.

(T) "School district income" and "school district income tax" have the same meanings as in *section 5748.01 of the Revised Code*.

(U) As used in divisions (A)(8), (A)(9), (S)(6), and (S)(7) of this section, "public obligations," "purchase obligations," and "interest or interest equivalent" have the same meanings as in *section 5709.76 of the Revised Code*.

(V) "Limited liability company" means any limited liability company formed under Chapter 1705. of the Revised Code or under the laws of any other state.

(W) "Pass-through entity investor" means any person who, during any portion of a taxable year of a pass-through entity, is a partner, member, shareholder, or equity investor in that pass-through entity.

(X) "Banking day" has the same meaning as in *section 1304.01 of the Revised Code*.

(Y) "Month" means a calendar month.

(Z) "Quarter" means the first three months, the second three months, the third three months, or the last three months of the taxpayer's taxable year.

(AA) (1) "Eligible institution" means a state university or state institution of higher education as defined in *section 3345.011 [3345.01.1] of the Revised Code*, or a private, nonprofit college, university, or other post-secondary institution located in this state that possesses a certificate of authorization issued by the Ohio board of regents pursuant to Chapter 1713. of the Revised Code or a certificate of registration issued by the state board of career colleges and schools under Chapter 3332. of the Revised Code.

(2) "Qualified tuition and fees" means tuition and fees imposed by an eligible institution as a condition of enrollment or attendance, not exceeding two thousand five hundred dollars in each of the individual's first two years of post-secondary education. If the individual is a part-time student, "qualified tuition and fees" includes tuition and fees paid for the academic equivalent of the first two years of post-secondary education during a maximum of five taxable years, not exceeding a total of five thousand dollars. "Qualified tuition and fees" does not include:

(a) Expenses for any course or activity involving sports, games, or hobbies unless the course or activity is part of the individual's degree or diploma program;

(b) The cost of books, room and board, student activity fees, athletic fees, insurance expenses, or other expenses unrelated to the individual's academic course of instruction;

(c) Tuition, fees, or other expenses paid or reimbursed through an employer, scholarship, grant in aid, or other educational benefit program.

(BB) (1) "Modified business income" means the business income included in a trust's Ohio taxable income after such taxable income is first reduced by the qualifying trust amount, if any.

(2) "Qualifying trust amount" of a trust means capital gains and losses from the sale, exchange, or other disposition of equity or ownership interests in, or debt obligations of, a qualifying investee to the extent included in the trust's Ohio taxable income, but only if the following requirements are satisfied:

(a) The book value of the qualifying investee's physical assets in this state and everywhere, as of the last day of the qualifying investee's fiscal or calendar year ending immediately prior to the date on which the trust recognizes the gain or loss, is available to the trust.

(b) The requirements of *section 5747.011 [5747.011] of the Revised Code* are satisfied for the trust's taxable year in which the trust recognizes the gain or loss.

Any gain or loss that is not a qualifying trust amount is modified business income, qualifying investment income, or modified nonbusiness income, as the case may be.

(3) "Modified nonbusiness income" means a trust's Ohio taxable income other than modified business income, other than the qualifying trust amount, and other than qualifying investment income, as defined in *section 5747.012 [5747.01.2] of the Revised Code*, to the extent such qualifying investment income is not otherwise part of modified business income.

(4) "Modified Ohio taxable income" applies only to trusts, and means the sum of the amounts described in divisions (BB)(4)(a) to (c) of this section:

(a) The fraction, calculated under *section 5747.013 [5747.01.3]*, and applying *section 5747.231 [5747.23.1] of the Revised Code*, multiplied by the sum of the following amounts:

(i) The trust's modified business income;

(ii) The trust's qualifying investment income, as defined in *section 5747.012 [5747.01.2] of the Revised Code*, but only to the extent the qualifying investment income does not otherwise constitute modified business income and does not otherwise constitute a qualifying trust amount.

(b) The qualifying trust amount multiplied by a fraction, the numerator of which is the sum of the book value of the qualifying investee's physical assets in this state on the last day of the qualifying investee's fiscal or calendar year ending immediately prior to the day on which the trust recognizes the qualifying trust amount, and the denominator of which is the sum of the book value of the qualifying investee's total physical assets everywhere on the last day of the qualifying investee's fiscal or calendar year ending immediately prior to the day on which the trust recognizes the qualifying trust amount. If, for a taxable year, the trust recognizes a qualifying trust amount with respect to more than one qualifying investee, the amount described in division (BB)(4)(b) of this section shall equal the sum of the products so computed for each such qualifying investee.

(c) (i) With respect to a trust or portion of a trust that is a resident as ascertained in accordance with division (I)(3)(d) of this section, its modified nonbusiness income.

(ii) With respect to a trust or portion of a trust that is not a resident as ascertained in accordance with division (I)(3)(d) of this section, the amount of its modified nonbusiness income satisfying the descriptions in divisions (B)(2) to (5) of *section 5747.20 of the Revised Code*, except as otherwise provided in division (BB)(4)(c)(ii) of this section. With respect to a trust or portion of a trust that is not a resident as ascertained in accordance with division (I)(3)(d) of this section, the trust's portion of modified nonbusiness income recognized from the sale, exchange, or other disposition of a debt interest in or equity interest in a *section 5747.212 [5747.21.2]* entity, as defined in *section 5747.212 [5747.21.2] of the Revised Code*, without regard to division (A) of that section, shall not be allocated to this state in accordance with *section 5747.20 of the Revised Code* but shall be apportioned to this state in accordance with division (B) of *section 5747.212 [5747.21.2] of the Revised Code* without regard to division (A) of that section.

If the allocation and apportionment of a trust's income under divisions (BB)(4)(a) and (c) of this section do not fairly represent the modified Ohio taxable income of the trust in this state, the alternative methods described in division (C) of *section 5747.21 of the Revised Code* may be applied in the manner and to the same extent provided in that section.

(5) (a) Except as set forth in division (BB)(5)(b) of this section, "qualifying investee" means a person in which a trust has an equity or ownership interest, or a person or unit of government the debt obligations of either of which are owned by a trust. For the purposes of division (BB)(2)(a) of this section and for the purpose of computing the fraction described in division (BB)(4)(b) of this section, all of the following apply:

(i) If the qualifying investee is a member of a qualifying controlled group on the last day of the qualifying investee's fiscal or calendar year ending immediately prior to the date on which the trust recognizes the gain or loss, then "qualifying investee" includes all persons in the qualifying controlled group on such last day.

(ii) If the qualifying investee, or if the qualifying investee and any members of the qualifying controlled group of which the qualifying investee is a member on the last day of the qualifying investee's fiscal or calendar year ending immediately prior to the date on which the trust recognizes the gain or loss, separately or cumulatively own, directly or indirectly, on the last day of the qualifying investee's fiscal or calendar year ending immediately prior to the date on which the trust recognizes the qualifying trust amount, more than fifty per cent of the equity of a pass-through entity, then the qualifying investee and the other members are deemed to own the proportionate share of the pass-through entity's physical assets which the pass-through entity directly or indirectly owns on the last day of the pass-through entity's calendar or fiscal year ending within or with the last day of the qualifying investee's fiscal or calendar year ending immediately prior to the date on which the trust recognizes the qualifying trust amount.

(iii) For the purposes of division (BB)(5)(a)(iii) of this section, "upper level pass-through entity" means a pass-through entity directly or indirectly owning any equity of another pass-through entity, and "lower level pass-through entity" means that other pass-through entity.

An upper level pass-through entity, whether or not it is also a qualifying investee, is deemed to own, on the last day of the upper level pass-through entity's calendar or fiscal year, the proportionate share of the lower level pass-through entity's physical assets that the lower level pass-through entity directly or indirectly owns on the last day of the lower level pass-through entity's calendar or fiscal year ending within or with the last day of the upper level pass-through entity's fiscal or calendar year. If the upper level pass-through entity directly and indirectly owns less than fifty per cent of the equity of the lower level pass-through entity on each day of the upper level pass-through entity's calendar or fiscal year in which or with which ends the calendar or fiscal year of the lower level pass-through entity and if, based upon clear and convincing evidence, complete information about the location and cost of the physical assets of the lower pass-through entity is not available to the upper level pass-through entity, then solely for purposes of ascertaining if a gain or loss constitutes a qualifying trust amount, the upper level pass-through entity shall be deemed as owning no equity of the lower level pass-through entity for each day during the upper level pass-through entity's calendar or fiscal year in which or with which ends the lower level pass-through entity's calendar or fiscal year. Nothing in division (BB)(5)(a)(iii) of this section shall be construed to provide for any deduction or exclusion in computing any trust's Ohio taxable income.

(b) With respect to a trust that is not a resident for the taxable year and with respect to a part of a trust that is not a resident for the taxable year, "qualifying investee" for that taxable year does not include a C corporation if both of the following apply:

(i) During the taxable year the trust or part of the trust recognizes a gain or loss from the sale, exchange, or other disposition of equity or ownership interests in, or debt obligations of, the C corporation.

(ii) Such gain or loss constitutes nonbusiness income.

(6) "Available" means information is such that a person is able to learn of the information by the due date plus extensions, if any, for filing the return for the taxable year in which the trust recognizes the gain or loss.

(CC) "Qualifying controlled group" has the same meaning as in *section 5733.04 of the Revised Code*.

(DD) "Related member" has the same meaning as in *section 5733.042 [5733.04.2] of the Revised Code*.

(EE) (1) For the purposes of division (EE) of this section:

(a) "Qualifying person" means any person other than a qualifying corporation.

(b) "Qualifying corporation" means any person classified for federal income tax purposes as an association taxable as a corporation, except either of the following:

(i) A corporation that has made an election under subchapter S, chapter one, subtitle A, of the Internal Revenue Code for its taxable year ending within, or on the last day of, the investor's taxable year;

(ii) A subsidiary that is wholly owned by any corporation that has made an election under subchapter S, chapter one, subtitle A of the Internal Revenue Code for its taxable year ending within, or on the last day of, the investor's taxable year.

(2) For the purposes of this chapter, unless expressly stated otherwise, no qualifying person indirectly owns any asset directly or indirectly owned by any qualifying corporation.

(FF) For purposes of this chapter and Chapter 5751. of the Revised Code:

(1) "Trust" does not include a qualified pre-income tax trust.

(2) A "qualified pre-income tax trust" is any pre-income tax trust that makes a qualifying pre-income tax trust election as described in division (FF)(3) of this section.

(3) A "qualifying pre-income tax trust election" is an election by a pre-income tax trust to subject to the tax imposed by *section 5751.02 of the Revised Code* the pre-income tax trust and all pass-through entities of which the trust owns or controls, directly, indirectly, or constructively through related interests, five per cent or more of the ownership or equity interests. The trustee shall notify the tax commissioner in writing of the election on or before April 15, 2006. The election, if timely made, shall be effective on and after January 1, 2006, and shall apply for all tax periods and tax years until revoked by the trustee of the trust.

(4) A "pre-income tax trust" is a trust that satisfies all of the following requirements:

(a) The document or instrument creating the trust was executed by the grantor before January 1, 1972;

(b) The trust became irrevocable upon the creation of the trust; and

(c) The grantor was domiciled in this state at the time the trust was created.

#### HISTORY:

134 v H 475 (Eff 12-20-71); 134 v S 472 (Eff 9-22-72); 134 v S 464 (Eff 10-16-72); 135 v H 95 (Eff 7-20-73); 135 v H 971 (Eff 9-23-74); 138 v H 653 (Eff 5-29-80); 139 v H 694 (Eff 11-15-81); 140 v H 291 (Eff 7-1-83); 140 v H 250 (Eff 7-30-84); 140 v S 307 (Eff 9-26-84); 141 v S 121 (Eff 1-1-86); 141 v H 428 (Eff 12-23-86); 142 v H 171 (Eff 7-1-87); 142 v S 386 (Eff 3-29-88); 143 v H 61 (Eff 10-2-89); 143 v H 111 (Eff 7-1-89); 143 v H 286 (Eff 11-8-90); 143 v S 223 (Eff 4-10-91); 144 v H 478 (Eff 1-14-93); 145 v H 152 (Eff 7-1-93); 145 v S 123 (Eff 10-29-93); 145 v S 74 (Eff 7-1-94); 146 v H 179 (Eff 10-1-96); 146 v H 627 (Eff 12-2-96); 147 v H 215 (Eff 9-29-97); 147 v H 408 (Eff 10-1-97); 147 v H 770 (Eff 9-16-98); 148 v H 282 (Eff 9-28-99); 148 v H 4 (Eff 10-14-99); 148 v S 161, § 1 (Eff 6-8-2000); 148 v H 471 (Eff 7-1-2000); 148 v S 161, § 3 (Eff 7-1-2000); 149 v S 261 (Eff 6-5-2002); 149 v H 675 (Eff 12-13-2002); 149 v S 266 (Eff 4-3-2003); 150 v H 95, § 1, eff. 6-26-03; 150 v H 127, § 1, eff. 12-11-03; 150 v H 362, § 1, eff. 12-30-04; 151 v H 66, § 101.01, eff. 6-30-05, 9-29-05; 151 v H 530, § 101.01, eff. 3-30-06; 151 v H 73, § 1, eff. 4-4-07.

#### NOTES:

LEXSTAT OHIO CIV. R. 12

OHIO RULES OF COURT SERVICE  
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\*\*\* ANNOTATIONS CURRENT THROUGH OCTOBER 1, 2006 \*\*\*

OHIO RULES OF CIVIL PROCEDURE  
TITLE III. PLEADINGS AND MOTIONS

*Ohio Civ. R. 12 (2006)*

Rule 12. DEFENSES AND OBJECTIONS -- WHEN AND HOW PRESENTED -- BY PLEADING OR MOTION --  
MOTION FOR JUDGMENT ON THE PLEADINGS

(A) *When answer presented.*

(1) Generally. The defendant shall serve his answer within twenty-eight days after service of the summons and complaint upon him; if service of notice has been made by publication, he shall serve his answer within twenty-eight days after the completion of service by publication.

(2) Other responses and motions. A party served with a pleading stating a cross-claim against him shall serve an answer thereto within twenty-eight days after the service upon him. The plaintiff shall serve his reply to a counterclaim in the answer within twenty-eight days after service of the answer or, if a reply is ordered by the court, within twenty-eight days after service of the order, unless the order otherwise directs. The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court: (a) if the court denies the motion, a responsive pleading, delayed because of service of the motion, shall be served within fourteen days after notice of the court's action; (b) if the court grants the motion, a responsive pleading, delayed because of service of the motion, shall be served within fourteen days after service of the pleading which complies with the court's order.

(B) *How presented.* --Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19 or Rule 19.1. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. When a motion to dismiss for failure to state a claim upon which relief can be granted presents matters outside the pleading and such matters are not excluded by the court, the motion shall be treated as a motion for summary judgment and disposed of as provided in Rule 56. Provided, however, that the court shall consider only such matters outside the pleadings as are specifically enumerated in Rule 56. All parties shall be given reasonable opportunity to present all materials made pertinent to such a motion by Rule 56.

(C) *Motion for judgment on the pleadings.* --After the pleadings are closed but within such times as not to delay

the trial, any party may move for judgment on the pleadings.

(D) *Preliminary hearings.* --The defenses specifically enumerated (1) to (7) in subdivision (B) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (C) of this rule shall be heard and determined before trial on application of any party.

(E) *Motion for definite statement.* --If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within fourteen days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(F) *Motion to strike.* --Upon motion made by a party before responding to a pleading, or if no responsive pleading is permitted by these rules, upon motion made by a party within twenty-eight days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleading an insufficient claim or defense or any redundant, immaterial, impertinent or scandalous matter.

(G) *Consolidation of defenses and objections.* --A party who makes a motion under this rule must join with it the other motions herein provided for and then available to him. If a party makes a motion under this rule and does not include therein all defenses and objections then available to him which this rule permits to be raised by motion, he shall not thereafter assert by motion or responsive pleading, any of the defenses or objections so omitted, except as provided in subdivision (H) of this rule.

(H) *Waiver of defenses and objections.*

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (a) if omitted from a motion in the circumstances described in subdivision (G), or (b) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(A) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(A), or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

**HISTORY:** Amended, eff 7-1-83

**NOTES:**

STAFF NOTES Rule 12 continues the "service" policy established in Rule 4 and Rule 5. Service upon the opposing party rather than filing with the court is the key function. See, Staff Notes to Rule 4 and Rule 5. Rule 12(A)(1) and Rule 12(A)(2) concern the time in which a party must serve a responsive pleading. Rule 12(A)(1) is designed for Ohio practice and has no exact federal counterpart. Rule 12(A)(2) is based on Federal Rule 12(a). **RULE 12(A) WHEN ANSWER PRESENTED.** Rule 12(A)(1) changes the current Ohio practice which is generally keyed to the issuance of summons and adopts the federal practice which is keyed to the receipt of the summons and the complaint by the party. *Section 2309.41, R.C.*, states that an "answer... shall be filed on or before the third Monday... after the return day of the summons or service by publication." *Section 2703.05, R.C.*, defines return day. It states that "When the time for bringing parties into court is not fixed by statute, the summons shall be returnable on the second Monday after its date...." Federal Rule 12(a) and Rule 12(A)(1) have no return day. They state that "... defendant shall serve his answer within... days after the service of the summons and complaint upon him...." See, Staff Note to Rule 5(A). Rule 12(A)(1)