

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, EX REL. :
GENERAL MOTORS CORPORATION, : Case No. 07-0210
: :
Appellee, : On Appeal from the Franklin County
: Court of Appeals, Tenth Appellate
: District
v. :
: Court of Appeals
CHESTER STEPHAN and : Case No. 06AP-373
THE INDUSTRIAL COMMISSION :
OF OHIO, et al., :
: :
Appellants. :

MERIT BRIEF OF APPELLANT,
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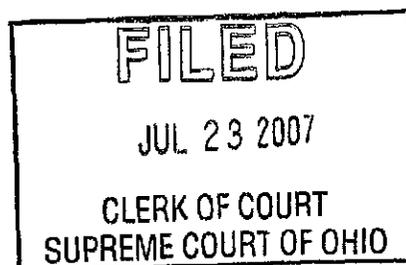


TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	iv
STATEMENT OF THE CASE AND FACTS.....	1
ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW.....	5
<u>Proposition of Law # 1:</u>	
The Industrial Commission of Ohio did not abuse its discretion by ordering GM to pay the full amount of temporary total disability benefits due without any unlawfully superimposed deductions.....	5
<u>Proposition of Law #2:</u>	
The Statutory Mandates concerning payment of temporary total disability benefits are not ambiguous and must be applied, not interpreted. Where any ambiguity in a statute exists, the law is to be construed in favor of injured workers.....	7
CONCLUSION.....	15
CERTIFICATE OF SERVICE.....	16
APPENDIX	<u>Appendix Page</u>
Notice of Appeal of Appellant, Chester Stephan.....	1
Judgment Entry of the Franklin County Court of Appeals (December 19, 2006).....	4
Nunc Pro Tunc Opinion of the Franklin County Court of Appeals (December 21, 2006).....	5
Franklin County Court of Common Pleas Decision (July 1, 2007).....	17

Judgment Entry of the Franklin County Court of Appeals (February 3, 2005).....	25
Opinion of the Franklin County Court of Appeals (February 3, 2005).....	26
Franklin County Court of Common Pleas Decision (February 16, 2007).....	33
26 U.S.C. 6501.....	44

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>State ex rel. Allerton v. Indus. Comm.</i> (1982), 69 Ohio St.2d 396.....	6
<i>State ex rel. Brady v. Indus. Comm.</i> (1986). 28 Ohio St.3d 241.....	5,6
<i>State ex rel. Burley v. Coil Packaging, Inc.</i> (1987), 31 Ohio St. 18.....	5
<i>State ex rel. Commercial Lovelace Motor Freight, Inc. v. Lancaster</i> (1986), 22 Ohio St.3d 191.....	6
<i>State ex rel. Crosset Co., Inc. v. Conrad</i> (2000), 87 Ohio St.3d 467.....	9
<i>State ex rel. Elliott v. Indus. Comm.</i> (1986), 26 Ohio St.3d 76.....	5,6
<i>State ex rel. Gerspacher v. Coffinberry</i> (1952), 157 Ohio St. 32.....	5
<i>State ex rel. Goodyear Tire & Rubber Co. v. Indus. Comm.</i> (1974), 38 Ohio St. 2d 57.....	6
<i>State ex rel. Hutton v. Indus. Comm.</i> (1972), 29 Ohio St.2d 9.....	6
<i>State ex rel. Pressley v. Indus. Comm.</i> (1967), 11 Ohio St.2d 141.....	5
<i>State ex rel. Rouch v. Eagle Tool and Machine Company</i> (1986), 26 Ohio St.3d 197.....	5
<i>State ex rel. Sayre v. Indus. Comm.</i> (1969), 17 Ohio St.2d 57.....	8
<i>State ex rel. Stephenson v. Indus. Comm.</i> (1987), 31 Ohio St.3d 167.....	5

Statutes

Page

U.S.C. 6501(a).....	10
R.C. 4123.511(H).....	10
R.C. 4123.56(A).....	passim
R.C. 4123.95.....	passim

STATEMENT OF THE CASE AND FACTS

This is a case of first impression and its importance must not be diminished. Beside the fact that this issue has never been before the courts in Ohio is the fact that General Motors (“G.M.”) has changed its accounting procedures with the potential impact of affecting tens of thousands of injured workers. Viewing this as the first of many lawsuits which could emanate as other self-insuring employers follow suit easily demonstrates the “snowball effect” this could have on the court system in Ohio.

Every working man and woman in Ohio has a constitutionally protected right under Article II Section 35 of the Ohio Constitution to have laws enacted to...provide compensation...to workmen...for...injuries...occasioned in the course of such workmen’s employment... Section 4123 of the Ohio Revised Code was enacted to do just that. The worker’s compensation statute was enacted as a trade-off for preventing employers from being sued by their employees for workplace injuries. Consequently, Section 4123.56(A) bestowed upon Ohio’s disabled workers the right to be compensated for such injuries. This right was never to be fettered with the additional burden of having injured workers now being forced to chase monies that may ultimately never be paid to them.

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

“Offset of the compensation shall be made **only** upon prior order of the bureau or industrial commission or agreement of the claimant.” (emphasis added).

Thus, the General Assembly squarely placed the offset provisions within the Industrial Commission's ("commission") purview and discretion. This was not addressed in the court of appeals decision below. By doing so, the chilling effect would be to force the courts in Ohio to assume the impermissible position of acting as a "super-commission".

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

As a prelude to the underlying facts in this case, it must be clear that the central issue does not revolve around any obligations, supposed or otherwise, as they may relate to federal, state, and/or city taxes. Instead it must be remembered that this is a workers' compensation case and further noted that workers' compensation benefits are **not** taxable income.

On October 5, 1998, Stephan injured himself arising out of and while in the course of his employment for GM. Supplement at page 1 (hereinafter "S. 1."). Stephan filed for workers' compensation benefits on October 10, 1998. S. 1. While waiting for GM to respond to his application, Stephan also filed for Sickness & Accident Benefits (hereinafter "S & A") on October 27, 1998, and clearly noted on this application that his disability was caused by his work for GM. S. 88. After initially rejecting Stephan's claim on November 16, 1998, GM subsequently approved the same in early 1999. By its order mailed March 31, 2000 (from a hearing held before it on January 6, 2000), the

Industrial Commission found that Stephan was disabled from work due to his work-related injury for sixteen and six-sevenths (16 6/7) weeks and noted the correct weekly amount of benefits due. S. 24-25. There is no dispute over this matter. What is at issue is how GM handled the payments for these periods.

Prior to Stephan's injury, G.M. decided to change its accounting methods for disputed workplace injuries. For the lengthy period prior to this "new" accounting method, G.M. had previously made what it termed "disability advances". From these, **pursuant to the requirements of the various taxing authorities**, G.M. properly withheld taxes, but did not send the amounts to the taxing authorities until a final determination on compensability was made. In essence, G.M. had a long-standing bookkeeping method of withholding potential income taxes from sickness & accident benefits and placing them in "escrow" until the compensability of the claim was final. If the injury was determined to be a valid workers' compensation claim, then the withholdings were paid to the injured worker. However, if the injury was found not to be compensable under workers' compensation, then G.M. would pay the withholdings to the proper taxing authorities. This method stood the test of time and was never challenged by the various taxing authorities.

Rather than following their long-standing procedure of paying "disability advances" (S. 75), GM instead chose to pursue a new bookkeeping method. S. 67. As a result, Stephan filed a motion asking that the correct benefit amounts be paid to him. S. 52. After a series of hearings, the commission itself, by unanimous vote, issued its order on January 6, 2000, which is the subject of this action. S. 24. Following the law,

the commission ordered GM to pay Stephan the net amount of temporary total disability (TTD) without any superimposed deductions. S. 24.

GM chose to pay S & A benefits from which they withheld taxes. G.M.'s election to withhold taxes from benefits it deemed to be "substitute" workers' compensation benefits was of its own doing. They now seem willing to place some affirmative onus on Stephan to "chase" monies that were properly payable when so ordered by the commission.

G.M. then filed an action in mandamus in the Franklin County Common Pleas Court challenging the commission's order. After submitting evidence and briefs, a decision and entry was filed on July 1, 2003, signed by Judge Lisa Sadler (attached hereto – Appendix--pg. 17). Since Sadler was not a common pleas court judge on July 1, 2003, Stephan appealed this issue to the Franklin County Court of Appeals. After oral argument, the Tenth District Court of Appeals agreed with Stephan and vacated the trial court's order and remanded the case back to this court for further proceeding. (See Appendix—pgs. 25 & 26). Upon remand, Common Please Court Judge Guy Reece issued his decision denying Appellee's requested writ. (See Appendix—pg.33). From that decision, Appellee appealed to the Tenth District Court of Appeals. The Court of Appeals issued its decision granting Appellee's writ of mandamus. (See Appendix—pgs. 4 & 5). From that decision, Appellant, Stephan, has filed his appeal to this honorable Court. (See Appendix—pg. 1).

LAW AND ARGUMENT

PROPOSITION OF LAW # 1:

THE INDUSTRIAL COMMISSION OF OHIO DID NOT ABUSE ITS DISCRETION BY ORDERING G.M. TO PAY THE FULL AMOUNT OF TEMPORARY TOTAL DISABILITY BENEFITS DUE WITHOUT ANY UNLAWFULLY SUPERIMPOSED DEDUCTIONS.

It is well-settled under Ohio Law that the extraordinary remedy in the form of a writ of mandamus will not be issued from a determination of the Commission unless the Relator establishes that there is a clear legal right to the relief sought and that the Commission has a clear legal duty to provide such relief. *State ex rel. Pressley v. Indus. Comm* (1967), 11 Ohio St.2d 141. The Relator has the burden of proof in this regard. *State ex rel. Rouch v. Eagle Tool and Machine Company* (1986), 26 Ohio St.3d 197, 198. A clear legal right to a writ of mandamus exists where the Relator shows that the Commission abused its discretion by entering an order which is not supported by **any** evidence in the record. *State ex rel. Elliott v. Indus. Comm.* (1986), 26 Ohio St.3d 76. In an action in mandamus, an order of the commission will be upheld absent a finding that the commission abused its discretion, and no abuse of discretion will be found if there is "some evidence" to support the decision. *State ex rel. Stephenson v. Indus. Comm.* (1987), 31 Ohio St.3d 167, 170; *State ex rel. Burley v. Coil Packaging, Inc.* (1987), 31 Ohio St. 18, 20.

In *Elliott*, this Court stated, "[I]t must be assumed, absent evidence to the contrary, that the Commission acted in good faith and properly performed its function in reviewing the evidence before it." *Elliott, supra*, at 79. See, also, *State ex rel. Gerspacher v. Coffinberry* (1952), 157 Ohio St. 32. Also, in *State ex rel. Brady v. Indus.*

Comm. (1986), 28 Ohio St.3d 241, 242, this Court stated, "...because decisions that come to us from the Commission have a presumption of regularity..., [this Court] will not compel the Commission to specifically and expressly disprove every potential basis for compensation, either real or imagined, before [this Court] allow[s] a Commission decision to stand."

Thus, the Court may not usurp the discretionary function vested with the Commission where the Commission has exercised its discretion soundly and within legal bounds. *State ex rel. Goodyear Tire & Rubber Co. v. Indus. Comm.* (1974), 38 Ohio St.2d 57. This Court has defined abuse of discretion as follows: "**An abuse of discretion implies not merely error in judgment, but perversity of will, passion, prejudice, partiality or moral delinquency** (emphasis added). An abuse of discretion will be found only where there exists no evidence upon which the Commission could have based its decision." *State ex rel. Commercial Lovelace Motor Freight, Inc. v. Lancaster* (1986), 22 Ohio St.3d 191, 193.

Only where the record is devoid of some evidence to support the commission's order will an abuse of discretion exist. *State ex rel. Elliott v. Indus. Comm.* (1986), 26 Ohio St.3d 76, 79; *State ex rel. Hutton v. Indus. Comm.* (1972), 29 Ohio St.2d 9, 13. The weight to be assigned to conflicting evidence is in the province of the Industrial Commission, not this court. *State ex rel. Elliott*, supra, at 79. Insofar as some evidence was presented to support the commission's decision, it will not be overturned. *State ex rel. Allerton v. Indus. Comm.* (1982), 69 Ohio St.2d 396, 397. Thus, the commission clearly acted within its province and the lower court and this Court should

not act as a “super-commission” by trying to supplant its judgment for that of the commission.

Given the foregoing standard of review, G.M. has not met its burden of proof to allow a writ of mandamus to issue from this Court. Pursuant to long-standing legal precedent, the commission is merely charged with the duty to act as the trier of fact and issue its order and state which evidence was relied upon, thus giving a basis for its decision. As long as the decision is supported by **some evidence** (emphasis added), no reviewing court(s) may disturb the same. Reviewing courts are not to re-weigh the evidence, they are charged with the duty to uphold the commission’s order if it is supported by some evidence. Instead of adhering to this established mandate, G.M. is essentially asking this Court to affirm the decision of the Court of Appeals wherein it essentially acted as a form of a “super commission”, re-heard the evidence, and came to a different result. As noted, this is clearly impermissible. Thus, this Court should find that the commission’s order was supported by some evidence, whether or not G.M. agrees with the commission’s analyses and application of the salient facts and law.

PROPOSITION OF LAW # 2:

THE STATUTORY MANDATES CONCERNING PAYMENT OF TEMPORARY TOTAL DISABILITY BENEFITS ARE NOT AMBIGUOUS AND MUST BE APPLIED, NOT INTERPRETED. WHERE ANY AMBIGUITY IN A STATUTE EXISTS, THE LAW IS TO BE CONSTRUED IN FAVOR OF INJURED WORKERS.

For the reasons noted above, Stephan asserts that G.M. cannot meet the requisite standard needed for this Court to affirm mandamus relief. As noted from the

commission's order, G.M. was ordered to pay the "net" amount of benefits calculated to be payable to Stephan. S. 24-25. Turning to the relevant workers' compensation statutes at hand, we look first to R.C. 4123.95 which states,

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

Rather than accepting Appellee's interpretation of the bounds of R.C. 4123.95, this Court should follow its previously explicit holding that "...where a section of the Workmen's Compensation Act will bear two reasonable but opposing interpretations, the one favoring the claimant must be adopted." *State ex rel. Sayre v. Indus. Comm.* (1969), 17 Ohio St.2d 57, 62.

G.M. implemented a program which was not approved by the Bureau of Workers' Compensation (hereinafter "BWC"), the Industrial Commission (hereinafter "IC"), or Mr. Stephan. As previously noted, G.M.'s new program was in derogation of the specific proviso provided for by the General Assembly when addressing offsets of compensation. This program is where all of G.M.'s arguments originate. What G.M. is trying to do, in essence, is to make a round peg fit into a square hole. Because the statutes and policy of the Ohio Workers' Compensation system are the rules of the land and should not have to conform to G.M.'s programs, we ask this honorable Court to rule in favor of Mr. Stephan and upholding the underlying tenets which form the Ohio Workers' Compensation System.

This would clearly violate the mandates set forth by this Court. R.C. 4123.56(A) is a plain and unambiguous statute. This Court recently reaffirmed that "[w]here the language of a statute is plain and unambiguous and conveys a clear and definite meaning there is no occasion for * * * [resort] to rules of statutory interpretation." *State ex rel.*

Crossett Co., Inc. v. Conrad (2000), 87 Ohio St.3d 467, 471. This Court went on to state that an unambiguous statute is to be applied, not interpreted.

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

Further, there is nothing in the record whatever that would indicate that Stephan would receive the equivalent amount of benefits due from the Internal Revenue Service. Relator makes the assertion that the form W-2c contained on page 73 of the Supplement would entitle Stephan to a return of monies (arguably in the amount that the commission found he was shorted), although no offer of proof has been made in this regard other than pure speculation. Yet, one needs only look to the four corners of the document to note that nowhere on the form does it indicate how much monies were withheld from federal taxes! There were also no amounts listed in the state and local taxes withheld. Should Stephan file an amended return with this document, it could very easily result in an audit. Besides trying to force Stephan to wait well past the required time to receive his workers' compensation benefits, is GM really trying to purport that it is reasonable, given the workers' compensation statute, that Stephan should also be forced to be burdened with the expense of filing an amended return and the possibility of further costs associated

with an audit. Indeed, GM's assertion that Stephan should claim his monies from the Internal Revenue Service would violate the timely payment requirement contained within R.C. 4123.511(H).

G.M.'s argument to the Court of Appeals contended that "the trial court erred when it failed to apply the plain language of R.C. 4123.56(A)." G.M. attempted to "cloak" the true issue at hand via their interpretation of 4123.56(A). What G.M. didn't explain in their argument was that: 1) Via their program, they were attempting to tax workers' compensation benefits, and, 2) via their program, even though GM may have paid the requisite amount of money under the statute, they **did not pay the requisite amount to Mr. Stephan** (emphasis added). This is the first of many examples of G.M.'s attempt to cause the tail to wag the dog. If not for G.M.'s new program, they would not have been in the situation of an "overpayment", because they wouldn't have paid Mr. Stephan's money to the IRS; instead they would have paid Mr. Stephan the full, untaxed amount directly to Mr. Stephan, as dictated by the Ohio Laws of Workers' Compensation. This is erroneously supported by the Court of Appeals' decision wherein it incorrectly **assumed** that injured workers would receive the exact amount of their entitled disability payments from the various taxing authorities in some form of "rebate". Nothing could be further from the truth. The time constraints in this case alone would indicate that Stephan, upon receiving his first unfavorable decision (from the court of appeals), would now be barred from applying for or receiving any refunds due to I.R.S. regulations which prohibit filing an amended return beyond three (3) years from the initial filing date. See U.S.C 6501(a).

G.M.'s next presented to the court of appeals its assertion that "the trial court erred when it concluded that R.C. 4123.56(A) was ambiguous and required judicial interpretation." G.M. cited to the plain language of R.C. 4123.56(A) which states that "Compensation paid under this section...shall be paid only to the extent by which the payment or payments exceeds the amount of non-occupational insurance or program paid or payable." What G.M. assumed from this reading was that "paid or payable" meant "what the Employer paid", and as long as G.M. paid someone or something the requisite amount, they were in accordance with the statute. Therefore, G.M. contends that because they paid Mr. Stephan AND the IRS the requisite amount of money (combined), they are in accordance with the statute, and Mr. Stephan must fend for himself and attempt to retrieve the money G.M. owed to him from the IRS.

Once again, it must be remembered that disabled workers have a constitutionally protected right to have replacement wages timely paid to them as a result of their workplace injuries. Nowhere can it be found in any statutory provision, nor would any reasonable person presume, that an injured worker should have to wait for months, even years, to receive benefits for a validly determined workplace injury. To date, no court has addressed the situation in which an individual's particular tax situation would not warrant a return of any withheld taxes by an employer.

The trial court, however, properly found that R.C. 4123.56(A) was correctly interpreted by the commission, and that G.M.'s interpretation of 4123.56(A) ended in an absurd result. How could G.M. be permitted to 1) tax workers compensation benefits, and 2) pay a workers' compensation claimant less money than they were owed? The result of G.M.'s interpretation not only is the improper plain language reading of R.C.

4123.56(A), it goes against many of the rules, policy, and spirit of the Ohio Workers' Compensation system. Consequently, the court of appeals' decision flies in the face of long-standing law and policy.

G.M. further contended that "the trial court erred when it held that GM underpaid Mr. Stephan's benefits." G.M. was essentially contending that they can completely change the way that claimants receive their rightful benefits, by paying some of the benefits to a middle man (here the IRS), have the benefits taxed, and then have the claimant jump through hoops to get what is owed to them. The laws can not, and will not change, simply because a large employer like G.M. implements their own program that doesn't fit with the Ohio Workers' Compensation System. Here, even though G.M. may have paid the requisite amount, THEY DID NOT PAY IT ALL TO MR. STEPHAN.

While G.M. argued that Mr. Stephan will receive the rest of his money in time, Mr. Stephan loses out in all aspects. There is no guarantee that Mr. Stephan will see the full amount of his tax dollars from the IRS. Also, Mr. Stephan loses out on the present value of money. What if Mr. Stephan wanted to use that money in some way such as investing it? Finally, Mr. Stephan is made to jump through hoops to get his rightful money. Who will ensure Mr. Stephan's return? Will G.M. pay for an accountant to ensure that Mr. Stephan receives the rest of his money? These are just examples of the many problems that GM is asking this honorable Court to allow them to get away with. Because the appeals court improperly ruled on this issue, we ask that this honorable Court reverse and properly uphold the trial court's decision.

R.C. 4123.95 not only mandates that workers' compensation statutes be read in a certain way in certain instances, it also permeates a policy throughout the workers'

compensation statutes and system, to wit, "WORKERS' COMPENSATION IS FOR THE INJURED WORKER." Allowing the court of appeals' decision to stand would ignore the mandates set forth by the General Assembly.

The underlying decision and previous arguments make reference to some mysterious "double recovery". There is indication that Stephan somehow would get "extra" benefits. However, Mr. Stephan is guaranteed no "extra" benefits. Even though G.M. had previously asserted that Stephan was somehow unjustly enriched, it has not offered even a scintilla of evidence to support its allegation that Stephen would have received all of the taxes withheld as some kind of a "tax refund". Without this, G.M. has no basis to make the argument that Stephan would receive a "double benefit". A mere boilerplate incantation by GM of some imagined refund to Stephan cannot suffice. The onus is not shifted to Stephen to first go through any relevant tax filings to determine what portion, if any, of the taxes withheld he would actually receive back. G.M.'s previous system made accommodation for this and it is G.M. who must bear the brunt of any shortcoming within its new system. Assuming Stephan's actual tax filings within his particular bracket only returned a large portion of the taxes withheld to be returned to him, he still would have to seek the remaining monies from G.M. after all of the "tax-jockeying" was completed. Should this take even the normal time allotted for the filings, Stephan may well be outside the statutory time frames established under the Workers' Compensation Act for requesting the balance from G.M. Such a result should never be permissible. To allow the same would be to allow employers in this state to ignore legislative mandates at the injured workers' expense.

If Mr. Stephan wants what is rightfully his to begin with, under G.M.'s new program, he must wait for those benefits to come from the IRS. Because G.M. paid the IRS instead of Mr. Stephan, Mr. Stephan is not guaranteed to receive those benefits in any way, shape, or form. Also, if Mr. Stephan were to receive "extra" benefits, it would not be because of the trial court's decision, it would be because of G.M.'s program. G.M. implemented this program without the consent of the BWC, the IC, or Mr. Stephan. GM's program clearly does not fit in with the Ohio Workers' Compensation system. Why should Mr. Stephan suffer, or the laws of the Ohio Workers' Compensation system change? The resounding answer should be that they should not. Under Ohio law G.M.'s two options should be to a) change their program to fit within the rules of the Ohio Workers' Compensation system, or b) pay their injured workers what they are rightfully owed under the Ohio Workers' Compensation system, and keep paying extra to the IRS in the form of taxed insurance benefits.

A specific statutory proscription is in place for handling payments as in the instant case. The statute is unambiguous and therefore not open to interpretation. Simply put, the statute says what it says. And the relevant portion of the statute vests the power regarding offsets of compensation to the commission itself. The commission has spoken through its order and there is no statutory violation in the same. Everyone agrees that workers' compensation benefits are non-taxable income. The workers' compensation act also sets forth the exact procedures for obtaining compensation for work-related injuries and the time frames associated with the same. Any attempt to change this statutory framework must fail, as would any attempt to place an additional burden on injured workers to seek their just compensation from someone other than those set forth in the

workers' compensation statute. The fact that G.M. chose to erroneously withhold monies by mistakenly believing they have the right to do so does not change the specific statutory mandates set forth by the General Assembly. G.M. should be precluded from seeking redress for their perception of what they believe the statute should say. The statutory mandates are to be followed. There is no need to attempt to confuse wholly unrelated issues (tax refunds, etc.) with the clear language of the workers' compensation law.

CONCLUSION

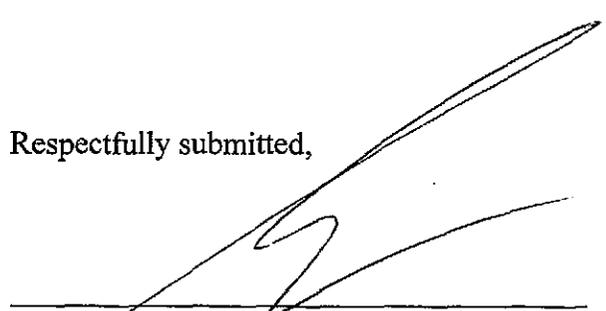
This Court should overrule the decision of the Tenth District Court of Appeals and re-instate the decision of the Common Pleas Court. There was no basis for the Court of Appeals to disturb the underlying commission decision.

Workers' compensation benefits are not taxable, even though an employer may wish this to be so. This is addressed in the statute addressed above. Since the commission acted in a manner consistent with the statutory dictates, there can be no evidence of an abuse of discretion. As such, mandamus relief is precluded.

In addition, the relevant statutory proscriptions are clear and unambiguous. As such, they must be followed and not interpreted. If any ambiguity would exist, it would need to be determined in a manner that would benefit the injured worker.

Consequently, Respondent, Chester L. Stephan, respectfully requests that the underlying commission order be upheld and that the Tenth District Court of Appeals Decision be overturned, thus denying G.M.'s request for a writ of mandamus.

Respectfully submitted,



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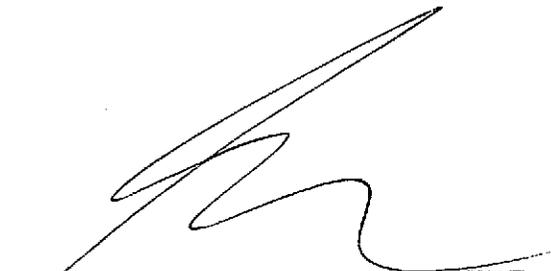
CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Merit Brief of Appellant, Chester Stephan, was mailed to the parties listed below by regular U.S. Mail, postage prepaid, this 23rd day of July, 2007.

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APPENDIX

IN THE SUPREME COURT OF OHIO

07-0210

STATE OF OHIO, EX REL.
GENERAL MOTORS CORPORATION,

Case No. _____

Appellee,

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

v.

Court of Appeals
Case No. 06AP-373

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

(Originated in the Common Pleas Court)
(C.P.C. No. 00CVH-11-10211)

Appellants.

NOTICE OF APPEAL OF
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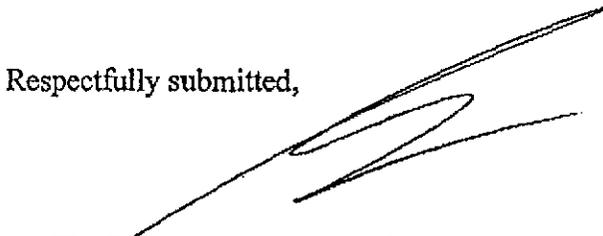
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MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

NOTICE OF APPEAL OF APPELLANT, CHESTER STEPHAN

Appellant, Chester Stephan, hereby gives notice of his appeal to the Supreme Court from the judgment of the Franklin County Court of Appeals, Tenth Appellate District, entered in Court of Appeals Case No. 06AP-373 on December 19, 2006.

This case raises a substantial constitutional question and is one of public or great general interest.

Respectfully submitted,



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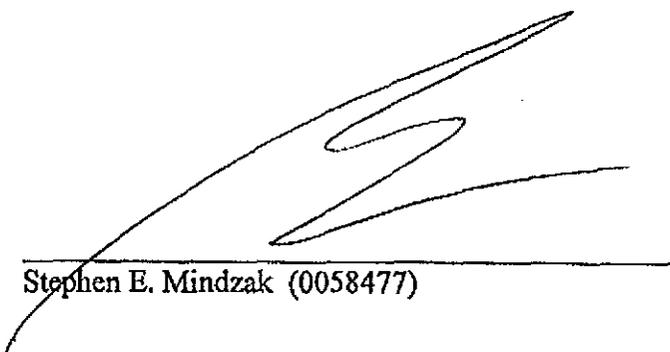
Counsel for Appellant,
Chester Stephan

CERTIFICATE OF SERVICE

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

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FILED
COURT OF APPEALS
FRANKLIN COUNTY

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

2006 DEC 19 12:43
CLERK OF COURTS

State ex rel. General Motors Corporation, :

Appellant, :

v. :

Industrial Commission of Ohio et al., :

Appellees. :

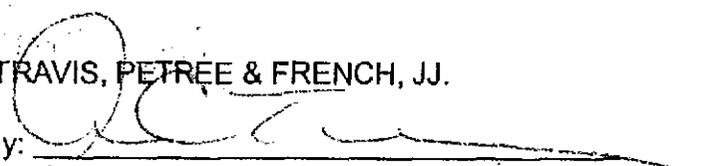
No. 06AP-373
(C.P.C. No. 00CVH-11-10211)
(REGULAR CALENDAR)

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, PETRÉE & FRENCH, JJ.

By:


Judge Alan C. Travis

ON 12/19/06

RECEIVED

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IN THE COURT OF APPEALS OF OHIO

OFFICE OF ATTORNEY GENERAL
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)

NUNC PRO TUNC¹

O P I N I O N

Rendered on December 21, 2006

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

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

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

APPEAL from the Franklin County Court of Common Pleas.

TRAVIS, J.

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

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

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

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

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

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

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

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

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

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.⁴

{¶10} Stephan and the commission appealed to this court. See *State ex rel. General Motors Corp. v. Indus. Comm.*, 159 Ohio App.3d 644, 2005-Ohio-356.⁵ On February 9, 2005, in a split decision, this court reversed the judgment of the trial court on procedural grounds. A majority of the panel concluded that although the original trial judge had signed the decision and entry before leaving office, because the signed entry was not file-stamped in the clerk of courts until the next day, the ruling was void. The case was remanded to the trial court for further proceedings. The panel did not reach the merits of the decision authored by the original trial judge.

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

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

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

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

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

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.⁶

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

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

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

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

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.⁷

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

{¶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

⁷ 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.⁸

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

*Judgment reversed; cause remanded
with instructions.*

PETREE and FRENCH, JJ., concur.

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

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

Judge L. Sadler

TERMINATION NO. 18
BY SG

DECISION AND ENTRY GRANTING WRIT OF MANDAMUS

Rendered this 30th day of June, 2003.

SADLER, JUDGE

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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 ($16 \frac{6}{7}$) 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.* (10th 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.)

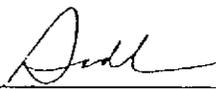
Nowhere in the language of this statute does the Legislature mandate that setoffs of TTD benefits be limited to setoffs of "net" benefits paid to a claimant through an employer-funded non-occupational temporary disability program. Thus, the Commission's Order finds no support in R.C. 4123.56(A). Further, 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)

O P I N I O N

Rendered on February 3, 2005

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.

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.

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

STATE EX REL. GENERAL MOTORS CORP., :

Relator, : Case No. 00 CVH-11-10211

v. : Judge: Guy L. Reece, II

INDUSTRIAL COMMISSION OF OHIO :
AND CHESTER STEPHAN, :

Respondents. :

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.

APR 11 11 17 AM '11
GUY C. REECE, II, JUDGE

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

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

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26 USCS § 6501

§ 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