IN THE SUPREME COURT OF OHIO

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

MERIT BRIEF OF APPELLEE GENERAL MOTORS CORPORATION

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The set-off requirement of R.C. 4123.56(A) does not "indirectly tax" or "impermissibly diminish and delay" the receipt of workers' compensation benefits; without that requirement, employers would not provide wage replacement insurance and injured workers would not receive any benefits until their workers' compensation claims were determined.

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STATEMENT OF FACTS

A. The relevant facts

The Court of Appeals noted in its Opinion below that "[t]he material facts of this case are not in dispute." 2006-Ohio-6786, ¶ 2. Only four of those undisputed facts are relevant to the appellants' propositions of law:

1. When appellant Chester Stephan injured his back and could not work, his employer, appellee-relator General Motors Corporation, paid him wage replacement insurance benefits for approximately four months while his workers' compensation claim for the injury was pending. (Supplement of Industrial Commission, at 13-15.)

2. Because wage replacement insurance benefits are taxable income, General Motors paid a portion of Mr. Stephan's insurance benefits to governmental taxing authorities on his behalf, as required by federal and state law. (Supp. 6-8.)

3. Appellant-respondent Industrial Commission of Ohio later approved Mr. Stephan's workers' compensation claim and recognized its legal duty under R.C. 4123.56(A) to offset his workers' compensation benefits by the amount of wage replacement insurance benefits that were "paid or payable" by General Motors for the same wage loss; however, the Commission did not offset the portion of the insurance benefits that General Motors had paid to the taxing authorities on Mr. Stephan's behalf. (Order, Mar. 31, 2000, Supp. 18.)

4. Finally, because Mr. Stephan's nontaxable workers' compensation benefits were substituted retroactively for his taxable wage replacement insurance benefits, he was entitled to a tax credit or refund for the portion of the insurance benefits that General Motors paid to the taxing authorities. (Supp. 34-35.)

B. The course of proceedings

After its District Hearing Officer and its Staff Hearing Officer reached contradictory conclusions (Record of Proceedings, Sept. 20, 1999, Supplement of Industrial Commission at 9-10; and Record of Proceedings, Nov. 18, 1999, Supp. 16-17), the Industrial Commission ruled without explanation that Mr. Stephan's workers' compensation benefits would not be offset under R.C. 4123.56(A) by the amount of his wage replacement insurance benefits that General Motors had paid on his behalf to the taxing authorities. (Order, Mar. 31, 2000, Supp. 18-19.)

General Motors filed this mandamus proceeding in the Court of Common Pleas and requested a writ ordering the Industrial Commission to perform its legal duty under R.C. 4123.56(A) to offset the full amount of wage replacement insurance benefits "paid or payable" by General Motors against the workers' compensation benefits that were awarded to Mr. Stephan for the same wage loss. (Complaint, Nov. 30, 2000.) Judge Sadler agreed with General Motors and granted the writ:

> R.C. 4123.56(A) allows an employer to offset the amount of TTD [temporary-total disability workers' compensation benefits] paid "to the extent by which the payment or payments exceeds the amount of the non-occupational insurance or program paid or payable." R.C. 4123.56(A).
>
> * * * *
>
> Nowhere in the language of this statute does the Legislature mandate that setoffs of TTD benefits be limited to setoffs of "net" benefits . . . . 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.

(Decision and Entry Granting Writ of Mandamus, June 30, 2003, at 2-3, 7.)

Judge Sadler's ruling was not entered until the following day, July 1, 2003, when she joined the Tenth District Court of Appeals and was no longer a Common Pleas judge. Mr. Stephan and the Industrial Commission argued that her ruling was therefore null and void and appealed on that basis. The Court of Appeals agreed and reversed Judge Sadler's Entry granting the writ of mandamus to General Motors "[d]espite what may appear to be a misuse or waste of judicial resources." (Opinion and Judgment Entry, Feb. 3, 2005, 2005-Ohio-356, ¶ 10.)

The case was assigned to Judge Reece upon remand. He considered the same record, the same statutory language, and the same question of law that Judge Sadler had considered, but he reached the opposite legal conclusion. (Decision and Entry Denying Writ of Mandamus, Feb. 16, 2006.) R.C. 4123.56(A) provides that workers' compensation benefits are paid "only to the extent by which [they] exceed the amount of the nonoccupational insurance or program <u>paid or payable</u>" (emphasis added), but Judge Reece concluded that the statute "does not specify whether the amount to be offset [for insurance benefits] is the net amount <u>received</u> or the gross amount <u>paid</u>." (Id., at 9; emphasis added.) Judge Reece decided that the statute should be "liberally construed in favor of [Mr. Stephan]" and denied the writ after concluding that the Industrial Commission's interpretation of the statutory language was "within its discretion." (Decision and Entry, supra, at 9.)

C. <u>The ruling below</u>

The Court of Appeals reversed Judge Reece's ruling. (Opinion, Dec. 21, 2006, 2006-Ohio-6786.) It found that "the language of R.C. 4123.56(A) is clear and unambiguous" and that General Motors indisputably "paid" Mr. Stephan's wage

replacement insurance benefits, including the portion that it paid to governmental taxing authorities on his behalf:

> As written, the statute clearly provides that the setoff is based upon the amount "paid or payable" by the employer . . . . 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 . . . .

(Id., 2006-Ohio-6786, ¶¶ 20-21.) The Court of Appeals noted that both the Industrial Commission and Mr. Stephan agreed that the language of R.C. 4123.56(A) is unambiguous. (Id.) It therefore concluded that judicial construction of the statute is not "necessary or proper"; the "liberal construction" accorded workers' compensation statutes "cannot justify recovery of more [workers' compensation benefits] than a statute plainly states is recoverable." (Id., ¶ 21.)

The Court of Appeals also noted that the plain language of R.C. 4123.56(A) leads to the fairest result. General Motors was required by law to pay a portion of Mr. Stephan's insurance benefits to the taxing authorities on his behalf, and only Mr. Stephan had the legal right to recoup the payments from those taxing authorities when his nontaxable workers' compensation benefits were substituted retroactively for his taxable insurance benefits. "The monies belong to Stephan, not [General Motors]." (Id., ¶¶ 23, 26.) If payments to taxing authorities were not offset against workers' compensation benefits under R.C. 4123.56(A),

> . . . 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 the trial court [i.e., Judge Reece] provide appellee Stephan with more TTD compensation than he is entitled to . . . .

(Id., ¶ 23.)

The Court of Appeals accordingly instructed the trial court "to issue the requested writ of mandamus ordering the Industrial Commission to set off the full amount paid by [General Motors] under the . . . insurance program, including those amounts withheld for the employee's taxes." (Id., ¶ 27.)

Mr. Stephan and the Industrial Commission appealed from that ruling, and the Court exercised its discretionary jurisdiction over one proposition of law asserted by Mr. Stephan and three propositions of law asserted by the Commission. (Entry, May 2, 2007, 2007-Ohio-1986.)

ARGUMENT

I. Appellant Chester Stephan's Proposition of Law No. 1:

> The Industrial Commission of Ohio did not abuse its discretion by ordering GM to pay the full amount of temporary total disability benefits due without any unlawfully superimposed deductions.
>
> Response of appellee-relator General Motors Corporation:
>
> General Motors paid the full amount of benefits due under R.C. 4123.56(A), and the Industrial Commission's erroneous application of the statute is not shielded from judicial review by the "abuse of discretion" standard.

In his Proposition of Law No. 1, appellant Chester Stephan argues that a ruling by the Industrial Commission on a question of law cannot be reviewed and corrected by the courts unless the Commission's legal error also constitutes an abuse of its discretion. (Merit Brief of Appellant Stephan, at 5.) He then argues that it is impossible to demonstrate an abuse of discretion in the present case because there is "some evidence to support the commission's order." (Id., at 6.) This Proposition of Law has not been asserted or supported by appellant-respondent Industrial Commission, and it should be rejected by this Court.

Stephan's argument is based upon his erroneous premise that the Industrial Commission resolved some (unidentified) dispute of fact in this case and General Motors is challenging that (unidentified) factual finding. The Commission did not resolve any factual dispute or make any factual finding that is relevant to this appeal. Even the Commission itself admits that the parties are "asking only for the interpretation of a statute." (Merit Brief of Appellant Industrial Commission, at 8.) The issue at each stage of these proceedings has been the purely legal question of whether the reference in R.C. 4123.56(A) to insurance benefits that are "paid or payable" by an employer

includes the portion of the insurance benefits that the employer must pay to taxing authorities on behalf of its employee.

The Court of Appeals specifically rejected Stephan's contention that the Industrial Commission's legal interpretation of this statutory language should be reviewed under an "abuse of discretion" standard:

> If this case involved a factual determination by the commission [Stephan] 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. [Citation omitted.] However, that standard is not applicable where the commission does not determine facts
>
> * * * *
>
> 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.

(Opinion, 2006-Ohio-6786, ¶¶ 17, 18; emphasis added.)

Stephan's Merit Brief completely ignores the Court of Appeals' explanation of its ruling. He continues to claim that there is a determinative factual dispute in this case as to which the Commission exercised its fact-finding discretion, but he again fails to identify any such factual dispute or factual finding. He also continues to claim that there is "some evidence" that purportedly supports the unidentified factual finding, but he again fails to describe that evidence.

All of the parties in this case have always agreed that General Motors paid a portion of Stephan's taxable wage replacement insurance benefits to governmental taxing authorities on his behalf. The only issue in this case is whether the language in R.C. 4123.56(A) that refers to "paid or payable" insurance benefits includes the benefits

paid to the taxing authorities. The Industrial Commission's ruling on that issue presents a question of law, not a question of fact.

The Court of Appeals simply followed long-settled legal authority when it held that the Industrial Commission has no "discretion" to misinterpret Ohio statutes. The Supreme Court of Ohio has specifically addressed this precise issue and has explained that the "abuse of discretion" and "some evidence" standards apply only to factual findings by the Commission. See, e.g., *State ex rel. Zito v. Industrial Commission of Ohio* (1980), 64 Ohio St. 2d 53, 55:

> 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." [Citation omitted.] However, that standard of review is not relevant here since the commission made no factual determination when it considered appellee's application . . . The commission applied the wrong legal standard . . . .

(Emphasis added.) See also *State ex rel. Rouch v. Eagle Tool & Machine Co.* (1986), 26 Ohio St. 3d 197, 213, where this Court reiterated that the "some evidence" standard is "the rule to be applied in determining whether there has been an abuse of discretion by the commission with respect to factual matters." (Emphasis added.)

The "abuse of discretion" standard of review does not apply to the present case because the Industrial Commission made no factual determination. It ruled on a purely legal question of statutory interpretation that was independent of any factual disputes. The Court should reject Stephan's Proposition of Law No. 1 and hold that the Industrial Commission has no "discretion" to make erroneous rulings of law.

II. Appellant Chester Stephan's Proposition of Law No. 2:

> The statutory mandates concerning payment of temporary total disability benefits are not ambiguous and must be applied, not interpreted. Where any ambiguity exists, the law is to be construed in favor of injured workers.

Response of appellee-relator General Motors Corporation:

> The liberal construction afforded ambiguous workers' compensation statutes does not allow the Industrial Commission to increase a worker's benefits in violation of the unambiguous set-off provisions of R.C. 4123.56(A).

Appellant Chester Stephan's Proposition of Law No. 2 was not mentioned in his Memorandum in Support of Jurisdiction, and this Court has not granted jurisdiction to review it in this appeal. Moreover, although the other appellant, the Industrial Commission of Ohio, formerly agreed with Stephan's Proposition that R.C. 4123.56(A) is "not ambiguous," it has now abandoned that position in this Court. See Merit Brief of Industrial Commission, at 12 (arguing that R.C. 4123.56(A) can be interpreted in two different ways, and that the Court of Appeals "had to write in words" to make the statute appear "unambiguous "). Nevertheless, General Motors must respond to Stephan's Proposition of Law in case the Court chooses to consider it.

The caption of Stephan's second Proposition of Law correctly states the law of Ohio: (1) the language of R.C. 4123.56(A) requiring the Industrial Commission to offset workers' compensation benefits by the amount of insurance benefits "paid or payable" by the employer is not ambiguous; and (2) the statutory language cannot be liberally "construed" or interpreted by the Commission (or the courts) in favor of workers unless it is ambiguous. Indeed, this is exactly what the Court of Appeals held in the ruling below that Stephan now asks this Court to reverse:

> We find that the language of R.C. 4123.56(A) is clear and unambiguous. A setoff is available for [insurance] funds "paid or payable." There is no need for statutory construction of a clear and unambiguous statute.

(Opinion, supra, 2006-Ohio-6786, ¶ 21.)

Notwithstanding the caption of Stephan's second Proposition of Law, the text of his argument under that caption asserts the opposite: that R.C. 4123.56(A) is ambiguous and therefore needs judicial interpretation.

> [T]his 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." [Citation omitted.]

(Merit Brief of Appellant Stephan, at 8.) In successive sentences, Stephan first asks the Court to interpret the statute on the basis of the "underlying tenets" of the workers' compensation system, and then tells the Court that doing so would violate Ohio law (and the Proposition of Law that he is asking the Court to adopt):

> [W]e ask this honorable Court to rule in favor of Mr. Stephan and upholding [sic] 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." [Citation omitted.]

(Merit Brief of Appellant Chester Stephan, at 8.)

The caption of Stephan's Proposition of Law No. 2 is correct; R.C. 4123.56(A) is clear and unambiguous and therefore is not susceptible to interpretation. Stephan nevertheless makes several policy arguments in an attempt to convince the Court to

interpret the statute in his favor. A court has no legal authority to "interpret" a statute when the statute has no ambiguous or conflicting language. *Kroff v. Amrhein* (1916), 94 Ohio St. 282, 285 ("to interpret what is already plain is . . . legislation, no matter by what name it may be called"). See *State ex rel. Savarese v. Buckeye Local School Dist. Bd. of Education*, 74 Ohio St.3d 543, 545, 1996-Ohio-291 ("[i]f the meaning of the statute is unambiguous and definite, it must be applied as written and no further interpretation is necessary"); *Sears v. Weimer* (1944), 143 Ohio St. 312, syllabus paragraph 5 ("[a]n unambiguous statute is to be applied, not interpreted").

The liberal construction favored by R.C. 4123.95 is thus inapplicable here. As this Court explained in *State ex rel. Sayre v. Industrial Commission of Ohio* (1969), 17 Ohio St.2d 57, 62, "where a section of the Workmen's Compensation Act <u>will bear two reasonable but opposing interpretations</u>, the one favoring the claimant must be adopted." (Emphasis added.) "Liberal construction" is not possible when statutory language has only one reasonable interpretation. See *State ex rel. Williams v. Colasurd*, 71 Ohio St.3d 642, 644, 1995-Ohio-236, ¶ 4 (the "liberal construction directive [of R.C. 4123.95] does not empower us to read into a statute something that cannot reasonably be implied from the statute's language"). In other words, "the liberal construction provision of R.C. 4123.95 does not necessarily equate with giving an individual claimant what he thinks is best . . . ." *Swallow v. Industrial Commission of Ohio* (1988), 36 Ohio St.3d 55, 57.

Even though Stephan himself contends in this Proposition of Law that R.C. 4123.56(A) is unambiguous and that unambiguous statutes cannot be interpreted, he then argues that the Court should "interpret[ ]" this statute to "favor[ ] the claimant." (Id., at 8.) He contends that it is "onerous" to require workers to obtain a tax credit or

refund from taxing authorities, and that it would be better to make General Motors "pay[ ] extra" workers' compensation benefits to Stephan. (Id., at 9-10, 14). These arguments are not relevant unless R.C. 4123.56(A) is ambiguous, and Stephan insists that it is not. Accordingly, they are not properly considered here.

Stephan's policy arguments are also misleading. He claims that the Court of Appeals improperly allowed General Motors to "tax workers' compensation benefits" (Merit Brief of Chester Stephan, at 11), but it is undisputed that no taxes were paid for workers' compensation benefits. The tax payments at issue in this case were made from his taxable wage replacement insurance benefits, and they were paid before his workers' compensation claim had even been approved.

Similarly, Stephan claims that the Court of Appeals' ruling allows General Motors to "pay a workers' compensation claimant less money than they were owed." (Id.) But it is undisputed that the tax payments made for the insurance benefits were available to Stephan as a credit or refund after his workers' compensation claim was approved, and that his total award was equal to the maximum statutory amount of TTD benefits awarded to all injured workers with a similar wage history.

Stephan devotes almost six pages of his Merit Brief to his contention that R.C. 4123.56(A) should be "interpreted" to exclude insurance benefits paid to taxing authorities because of the purported uncertainty, untimeliness, and general inconvenience of tax credits and refunds. (Id., at 9-14.) For example, Stephan complains that "there is no guarantee" the IRS will pay "the full amount" of his credit or refund, but that is true only if he neglects to request the credit or refund.

In any event, Stephan then <u>repudiates</u> his own policy arguments in the concluding two sentences of his Argument:

> 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.

(Id., at 15.) General Motors agrees with Stephan. Policy arguments about the inconvenience or delays of tax credits and refunds are irrelevant here because the language of R.C. 4123.56(A) is unambiguous and, thus, is not subject to judicial interpretation.

Of course, General Motors disagrees with Stephan's claim that the statutory words "paid or payable" unambiguously exclude insurance benefits that are paid to taxing authorities on behalf of injured workers. His contention ignores an alternative reading of the statutory language that is eminently reasonable: "paid" means "paid." Stephan's contention that the statute "unambiguously" excludes the insurance benefits General Motors paid for Stephan's taxes must be rejected in light of this alternative reasonable reading of the statutory language. See *Bailey v. Republic Engineered Steels, Inc.*, 91 Ohio St.3d 38, 40, 2001-Ohio-236, ¶ 10.

By contrast, Stephan's interpretation of the language of R.C. 4123.56(A) – that "paid" means "received" – is not reasonable. Stephan is correct that the statute does not state "that somehow an additional onerous burden should now be placed on Stephan's back" to "wait for months" to obtain his tax credit or refund (Merit Brief of Appellant Stephan, at 9, 11), but the statute does plainly state that the Commission must offset the amount of insurance benefits "paid or payable" without further exceptions, conditions, or qualifications. Stephan criticizes General Motors for contending "that 'paid or payable' means 'what the Employer paid' " (id., at 11), but that

is the only possible reading of the statutory language because only employers pay this type of insurance benefits.

Despite Stephan's claim that R.C. 4123.56(A) is unambiguous and, thus, is not susceptible to judicial interpretation, he asks this Court to add requirements to the statutory language. As enacted, R.C. 4123.56(A) requires the Industrial Commission to offset a workers' compensation award "to the extent by which [it] exceeds the amount of nonoccupational insurance or program paid or payable." R.C. 4123.56(A). Stephan's interpretation of the statutory language would provide an offset for only the amount of the insurance benefits "paid immediately and directly to the worker."

No such limiting language was included in the statute when it was enacted by the General Assembly. Indeed, limiting the statutory offset to insurance benefits that are "paid immediately and directly to a worker" would be inconsistent with the General Assembly's expressed intention in R.C. 4123.56(A) to offset "payable" insurance benefits as well as those that were "paid." See *State ex rel. Moorehead v. Industrial Commission of Ohio*, 112 Ohio St.3d 27, 29, 2006-Ohio-6364, ¶ 15:

> We have long recognized that neither administrative agencies nor this court may legislate to add a requirement to a statute enacted by the General Assembly . . . . [I]t is the duty of this Court to give effect to the words used, not to delete words used or to insert words not used.

(Citations and internal punctuation omitted.)

The Court of Appeals properly rejected Stephan's contention that the words "paid or payable" should be interpreted to mean "paid immediately and directly to the worker." The only reasonable interpretation of R.C. 4123.56(A) is that the words "paid or payable" mean "paid or payable." Accordingly, the Court should adopt the caption of

Stephan's Proposition of Law No. 2, reject the arguments he makes under that caption, and affirm the decision of the Court of Appeals.

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

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

Response of appellee-relator General Motors Corporation:

> General Motors is entitled to a writ of mandamus requiring the Industrial Commission to perform its clear legal duty under R.C. 4123.56(A) to offset Mr. Stephan's workers' compensation benefits by the amount of insurance benefits General Motors paid for the same wage loss.

In its first Proposition of Law, the Industrial Commission argues that mandamus is not the proper way to enforce its legal duty under R.C. 4123.56(A) to offset "paid or payable" insurance benefits against workers' compensation benefits. (Merit Brief of Commission, at 8.) The Commission's Proposition of Law pretends that General Motors is not "ask[ing] the Commission to perform any statutorily-required act" and is instead seeking a declaratory judgment on a question of statutory interpretation. (Id., at 11.) This is incorrect as a matter of record. General Motors requested a writ of mandamus to force the Industrial Commission to perform its statutory duty under R.C. 4123.56(A) and offset all insurance benefits paid by General Motors, including the portion it paid to taxing authorities on Stephan's behalf. The Commission's Proposition of Law No. 1 should therefore be rejected.

"Mandamus is a writ, issued in the name of the state to an inferior tribunal . . . commanding the performance of an act which the law specifically enjoins as a duty resulting from an office, trust, or station." R.C. 2731.01 (emphasis added).

General Motors is entitled to a writ of mandamus in this case because (1) it has a clear legal right under R.C. 4123.56(A) to an offset for the amount of insurance benefits that it paid; (2) the Industrial Commission has a clear legal duty to make the offset under R.C. 4123.56(A); and (3) General Motors has no adequate remedy at law. See, e.g., *State ex rel. Boccuzzi v. Cuyahoga Cty. Bd. of Commrs.*, 112 Ohio St.3d 438, 440, 2007-Ohio-323, ¶ 13.

The Industrial Commission's Proposition of Law No. 1 ignores both the specific relief requested by General Motors and the specific relief granted by the Court of Appeals. It argues that "this case merely asks the courts to interpret an arguably ambiguous statute" and that "mandamus requires more – the relief requested must include [sic] a clear legal right to some positive action on the part of a government agency." (Merit Brief of Industrial Commission, at 8.) According to the Commission, General Motors "is seeking only a declaration of its rights or obligations." (Id., at 9, 10.)

The Commission is mistaken. General Motors requested a writ ordering the Commission <u>to perform a positive act in fulfillment of its statutorily required duty</u>, i.e., to offset all insurance benefits paid by General Motors in this case when it calculates the amount of workers' compensation benefits General Motors must pay Stephan. Indeed, the Commission concedes in its brief that General Motors' Complaint sought a writ requiring the Commission "to vacate its order and properly credit to [General Motors] all sums paid" for wage replacement insurance benefits. (Merit Brief of Industrial Commission, at 10, quoting Complaint, ¶ 12, Supp. ___.) This relief cannot be obtained in a declaratory judgment.

This Court has expressly rejected the contention that mandamus is inappropriate when a legal dispute requires the interpretation of a statute. In *State ex rel. Rouch v.*

Eagle Tool & Machine Co. (1986), 26 Ohio St.3d 197, 200, the Court observed that the "traditionally established concerns" of mandamus actions include cases in which the Industrial Commission is "misinterpreting a statute." 26 Ohio St.3d at 200, fn. 3 (emphasis added). In *State ex rel. Gassman v. Industrial Commission* (1975), 41 Ohio St.2d 64, this Court specifically held that a writ of mandamus is the proper remedy to challenge a ruling by the Industrial Commission that misinterprets statutory language describing its legal duties:

> If the loss of one's legs, within the meaning of R.C. 4123.58, includes only loss by severance, then the commission's [order denying compensation] was proper. If, on the other hand, such a loss includes both loss by severance and loss of use, relator is entitled to compensation for permanent total disability. A mandatory writ [of mandamus] may issue against the Industrial Commission if the Commission has incorrectly interpreted Ohio law.

41 Ohio St.2d at 65 (emphasis added). See also *State ex rel. Toledo Edison Co. v. City of Clyde*, 76 Ohio St.3d 508, 1996-Ohio-376 (granting a writ of mandamus based upon this Court's interpretation of ambiguous statutory language).

The Commission also argues that a writ of mandamus is improper in this case because General Motors purportedly has an adequate remedy at law. The Commission initially implies that General Motors could have taken a direct appeal to the Court of Common Pleas pursuant to R.C. 4123.519(A). (Merit Brief of Industrial Commission, at 9.) This is incorrect as a matter of settled Ohio law. See *Felty v. AT&T Technologies, Inc.*, 65 Ohio St.3d 234, 238, 240, 1992-Ohio-60:

> The only decisions of the commission that may be appealed to the courts of common pleas under R.C. 4123.519 are those that . . . resolve an employee's right to participate or to continue to participate in the State Insurance Fund.
>
> * * * *

> An order determining the employer's right to offset disability payments against future compensation is not appealable. *State ex rel. McGinnis v. Industrial Commission of Ohio* (1991), 58 Ohio St.3d 81 (mandamus held to be the proper remedy).

(Emphasis added.)

The Commission then argues that General Motors has an adequate remedy at law because it purportedly could file a declaratory judgment action. (Merit Brief of Industrial Commission, at 11.) This is also incorrect as a matter of settled Ohio law. See, e.g., *State ex rel. Mill Creek Metropolitan Park District Board of Commissioners v. Tablack*, 86 Ohio St.3d 293, 297, 1999-Ohio-103:

> In general, if declaratory judgment would not be a complete remedy unless coupled with extraordinary ancillary relief in the nature of a mandatory injunction, the availability of declaratory judgment does not preclude a writ of mandamus.

See also *State ex rel. Ohio General Assembly v. Brunner*, --- Ohio St.3d ---, 2007-Ohio-3780, ¶ 25, amended on other grounds, -- Ohio St.3d --, 2007-Ohio-4460 (same).

R.C. 4123.56(A) provides that an offset of insurance benefits against workers' compensation benefits "shall be made only upon the prior order of the bureau or industrial commission or agreement of the claimant." The Commission itself recognizes that General Motors would need an injunction in addition to a declaratory judgment in order to obtain the relief it seeks. See Merit Brief of Industrial Commission, at 11) ("GM has an adequate remedy at law: a declaratory judgment action coupled, perhaps, with a prohibitory injunction") (emphasis added). A declaratory judgment is not an adequate legal remedy in this case.

Accordingly, a writ of mandamus is the proper remedy to enforce the Industrial Commission's clear statutory duty to offset insurance benefits paid by General Motors

against Stephan's workers' compensation benefits. General Motors has no remedy at law that would require the Commission to perform that positive act. The Court should therefore reject the Commission's Proposition of Law No. 1.

IV. Appellant Industrial Commission's Proposition of Law No. 2:

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

Response of appellee-relator General Motors Corporation:

> The unambiguous language of R.C. 4123.56(A) forecloses "liberal construction" of the statutory language and requires the Industrial Commission to offset all wage replacement insurance benefits paid or payable by an employer against workers' compensation benefits paid for the same wage loss.

In its second Proposition of Law, the Industrial Commission argues that R.C. 4123.56(A) is ambiguous and should therefore be "liberally construed" in favor of Stephan. According to the Commission, a liberal construction of R.C. 4123.56(A) would support its contention that the statute, which offsets workers' compensation benefits by the amount of insurance benefits "paid or payable" by the employer, does not offset insurance benefits paid by the employer unless (1) they are paid directly to the employee, rather than to governmental taxing authorities on behalf of the employee; and (2) they are paid immediately to the employee, without any delay or inconvenience. (Merit Brief of Industrial Commission, at 11-12.)

Prior to the time that it appealed to this Court, the Commission had argued throughout this litigation that R.C. 4123.56(A) is unambiguous. The Court of Appeals expressly noted that "neither appellant [i.e., the Industrial Commission and Stephan]

considers R.C. 4123.56(A) ambiguous. See brief of Stephan at 12, and brief of the commission, at 2." (Opinion, supra, 2006-Ohio-6786, ¶ 20.) The Commission changed its position when it realized that it could not prevail unless it convinced the Court to "interpret" the words used by the General Assembly. No party ever argued in the lower courts that the statute is ambiguous. Nevertheless, this Court exercised its discretionary jurisdiction over the Commission's Proposition of Law No. 2, so General Motors must assume that it was not waived below.

The Commission only briefly tries to explain why it (now) believes the word "paid" is ambiguous. It observes that the statute "is completely silent as to taxes," and it argues that the word "paid" might not mean "paid by the employer" – even though the employer is the only entity who pays these wage replacement insurance benefits – and instead might mean "actually paid . . . to the employee." (Merit Brief of Industrial Commission, at 12.) However, the Commission does not explain why the absence of any express exception to the word "paid" renders that word ambiguous and in need of judicial interpretation. The Commission cannot make the unambiguous words in R.C. 4123.56(A) ambiguous by adding hypothetical language to the statute that does not appear there.

Moreover, even if R.C. 4123.56(A) actually said "paid to the employee," the portion of the insurance benefits that General Motors paid to the taxing authorities on Stephan's behalf was paid to him. The common and ordinary meaning of the word "paid" in the employment setting includes the amount of wages that an employer withholds and pays to taxing authorities on behalf of its employees. Otherwise, employees who entered into employment contracts providing that they would be "paid" a specified dollar amount on a weekly or annual basis could successfully sue their

employer for damages for breach of contract with respect to the portion of their wages that was withheld and paid to taxing authorities. (Indeed, by the Commission's reasoning, the employer could also recover all tax credits or refunds resulting from the employers' tax payments as additional compensation in excess of the agreed amount of wages.) The Commission's view that an employer does not "pay" the portion of an employee's taxable income that it pays to governmental taxing authorities is not reasonable. See *Bailey v. Republic Engineered Steels, Inc.* 91 Ohio St.3d 38, 40, 2001-Ohio-236, ¶ 10 ("[a]mbiguity exists [only] if the language of the statute is susceptible of more than one reasonable interpretation").

The portion of Stephan's insurance benefits that General Motors forwarded to the taxing authorities on his behalf was "paid to him" because he received the benefit of a tax credit or refund in his name in the exact amount of the withheld taxes. The Commission does not dispute the Court of Appeals' finding that Stephan – and only Stephan – had a legal right to that tax credit or refund. See 26 U.S.C. 6414 ("refund or credit [of tax overpayments] shall be made to the employer ... only to the extent that the amount of such overpayment was not deducted and withheld by the employer"). Instead, it claims that the word "paid" in R.C. 4123.56(A) should be interpreted to mean "paid to the claimant <u>immediately</u>," without any delays or inconvenience associated with tax credits and refunds. But if the General Assembly had intended to impose that requirement, it would have included those words in the statute, and it would <u>not</u> have included "payable" insurance benefits that, by definition, were not "paid to the claimant immediately." A tax payment made to taxing authorities is "paid" to the taxpayer who is entitled to the tax credit or refund created by the tax payment.

The Industrial Commission was right the first time: the words "paid or payable" in R.C. 4123.56(A) are unambiguous and therefore immune to "liberal interpretation" by the Commission or the courts. See, e.g., *Szekely v. Young* (1963), 174 Ohio St. 213, 218 ("[a] direction to liberally construe a [workers' compensation] statute will not authorize a court to read into the statute something which cannot reasonably be implied from the language of the statute"). The Commission's Proposition of Law No. 2 accordingly should be rejected.

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

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

Response of appellee-relator General Motors Corporation:

> The set-off requirement of R.C. 4123.56(A) does not "indirectly tax" or "impermissibly diminish and delay" the receipt of workers' compensation benefits; without that requirement, employers would not provide wage replacement insurance and injured workers would not receive any benefits until their workers' compensation claims were determined.

In its final Proposition of Law, the Industrial Commission contends that a "liberal construction" of the word "paid" in R.C. 4123.56(A) results in an interpretation that requires employers to pay extra workers' compensation benefits, in excess of statutory maximums, if they paid wage replacement insurance benefits while the employee's workers' compensation claim was pending. The Commission argues that the portion of the insurance benefits that is sent to governmental taxing authorities should not be offset against workers' compensation benefits because the alleged delay in obtaining a tax credit or refund would "interrupt the cash flow intended to maintain the disabled

worker." (Merit Brief of Industrial Commission, at 13.) The Commission's Proposition of Law misstates the purpose and design of the workers' compensation system, and it should be rejected by this Court.

As set forth above, R.C. 4123.56(A) is not ambiguous and, thus is not susceptible to judicial interpretation, liberal or otherwise. In addition, the workers' compensation system is not designed to make benefits immediately available to "maintain" an injured worker. No workers' compensation benefits are paid to an injured worker until the validity of the claim has been determined, and compensation is often delayed even for valid claims for a host of administrative and other lawful reasons. The Commission insists that workers' compensation benefits are "intended to give an injured worker a stream of after-tax income on a weekly basis, so that he [sic] and his family can pay basic expenses and bills on a weekly basis," but it acknowledges that "many [workers' compensation] claims are disputed and litigated for years." (Merit Brief of Industrial Commission, at 14; emphasis added.)

The Commission notes that "[i]n this case the claim was resolved fairly quickly, as GM agreed that the injury was work-related at the first hearing" (id.), but that still left a four month period before Mr. Stephan could receive any workers' compensation benefits for weekly expenses and bills. When the Commission describes a four-month delay in receiving any amount of workers' compensation benefits as "fairly quick[ ]" (id.), it cannot simultaneously pretend that the purpose of the system is to make funds available immediately "to maintain the disabled worker." (Id.)

Ironically, the only funds that were available to Stephan during that four-month period were the wage replacement insurance benefits provided by General Motors outside the workers' compensation system. Tragically, employers will no longer make

those insurance benefits available to injured workers with pending workers' compensation claims if they must then pay more in total benefits (i.e., the full amount of workers' compensation benefits plus the amount of insurance benefits paid to the taxing authorities) than they would pay if they did not provide the insurance benefits.

If the Court adopts the Industrial Commission's Proposition of Law No. 3, employers will be punished financially if they provide insurance benefits to injured workers while their workers' compensation claims are pending. Employers thus will have a powerful incentive to discontinue the insurance benefits. Without those insurance benefits, Stephan – who now complains about having to wait for a tax credit or refund to obtain a small portion of his workers' compensation benefits – would have had to wait four months to receive any benefits. The Court of Appeals decision thus advances the social policy of providing money to a worker on an ongoing basis for basic expenses and bills on a weekly basis far better than the Industrial Commission's Proposition of Law No. 3.

Thus, even if it were true that "the fundamental purpose" of workers' compensation is "to ensure an injured worker the present ability to support himself [sic] while recuperating from his injuries" (Merit Brief of Industrial Commission, at 15), the Court should not interpret R.C. 4123.56(A) to impose financial penalties on employers who voluntarily pay wage replacement insurance benefits to injured workers during the months or years that they must wait for their workers' compensation benefits. Moreover, "the goal of the workers' compensation system is not payment for all injuries sustained by an employee; rather, the goal of the system is proper payment . . . ." *Barber v. Buckeye Masonry & Construction Co.* (11th Dist.), 146 Ohio App.3d 262, 273, 2001-Ohio-4301, ¶ 14 (original emphasis), appeal denied, 94 Ohio St.3d 1453.

The Commission suggests, finally, that General Motors should simply refuse to pay income taxes on taxable insurance benefits until a workers' compensation claim is determined, so that the employee will not be "burdened" by the inconvenience of requesting a tax credit or refund. See Merit Brief of Industrial Commission, at 15 ("[w]hile GM is required to withhold taxes for [insurance] benefits, they have never argued that those taxes must be immediately paid to taxing authorities"). In fact, General Motors has repeatedly explained that it formerly held tax payments on insurance benefits until an employee's workers' compensation claim was resolved but discontinued that practice because it violated tax laws. See, e.g., Memorandum in Opposition to Jurisdiction, at 14 ("federal and state tax law impose mandatory withholding obligations on employers who pay wage replacement insurance benefits . . . . General Motors can no longer escrow tax payments"). Stephan's wage replacement insurance benefits were taxable income. 26 U.S.C. 105(a); 26 C.F.R. 104(a)(1); R.C. 5747.01; R.C. 5747.06. Employers are required to withhold taxes for all taxable income. 26 U.S.C. 3402(a)(1). They are also required to deposit that money with the taxing authorities on a monthly or semi-weekly basis. See 26 C.F.R. 31.6302-1. General Motors cannot simply hold the money until a workers' compensation claim is determined.

The Court of Appeals' ruling does <u>not</u> "indirectly tax[ ] workers' compensation benefits." (Merit Brief of Industrial Commission, at 13.) Only <u>insurance</u> benefits are taxed, and the alleged inconvenience or delay in obtaining a tax credit or refund when workers' compensation benefits are substituted for the taxable insurance benefits is also experienced by all other employees who have more income taxes withheld from their earnings than they owe at the end of the year.

Even a "liberal construction" of the word "paid" in R.C. 4321.56(A) would not support the Commission's interpretation, which requires employers to either (1) violate mandatory tax withholding laws; or (2) pay more than the statutory maximum amount of workers' compensation benefits; or (3) stop paying wage replacement insurance benefits to injured workers while their workers' compensation claims are pending. See also Merit Brief of Chester Stephan, at 14 ("G.M.'s two options should be to (a) change their program [by not sending taxes on insurance benefits to taxing authorities] . . . or (b) pay their injured workers [workers' compensation benefits] . . . and keep paying extra to the IRS . . . ."). Stephan, like the Commission, fails to recognize that employers will no longer be inclined to provide wage replacement insurance benefits if doing so means that they must pay an employee twice for the amount of benefits that must be sent to taxing authorities. The Commission's Proposition of Law No. 3 would be bad for workers, bad for employers, and bad for Ohio, and it should be rejected by the Court.

CONCLUSION

For the reasons set forth above, the Propositions of Law asserted by appellant Chester Stephan and appellant-respondent Industrial Commission of Ohio should be rejected. The word "paid" in R.C. 4123.56(A) is not ambiguous and cannot be "liberally interpreted" by the Commission or the courts to give workers more workers' compensation benefits than they are allowed by statute. The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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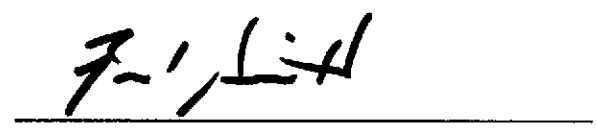
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