

ORIGINAL

IN THE SUPREME COURT OF OHIO

State of Ohio ex rel.
FedEx Ground Package System, Inc.,

Appellant,

v.

Industrial Commission of Ohio, et al.
Appellees.

* Case No. 2009-0918
* On Appeal from the Franklin County Court
of Appeals, Tenth Appellate District
*
* Court of Appeals Case No. 07AP-959
*
*

MERIT BRIEF OF APPELLEE, CHRISTOPHER J. ROPER

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FILED
NOV 13 2009
CLERK OF COURT
SUPREME COURT OF OHIO

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CLERK OF COURT
SUPREME COURT OF OHIO



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I. STATEMENT OF THE CASE

This matter originated pursuant to a work injury suffered by Appellee, Christopher Roper on October 24, 2006. Appellee's claim for lumbar sprain/strain and L4-5 disc protrusion was allowed. Appellee's average weekly wage (AWW) was set at \$417.05 by the DHO pursuant to a hearing held on 5/15/2007. Appellant appealed that order. The SHO affirmed the AWW of \$417.05 pursuant to a hearing held on 6/29/2007.

Appellant filed an appeal. In an Order dated July 25, 2007, the Industrial Commission refused Appellant's appeal. The matter went before the Court of Appeals pursuant to Appellant's Complaint for Writ of Mandamus filed on, or about, November 19, 2007. The Court of Appeals refused Appellant's request for a writ of mandamus. This matter is now before this Court pursuant to the Appellant's appeal of the Court of Appeals ruling.

II. STATEMENT OF FACTS

The Appellee, Christopher J. Roper ("Appellee"), began working for the Appellant, Fed Ex Ground ("Appellant"), on December 7, 2004. (Stipulated Record, 15.) Appellee worked 20-25 hours per week for Appellant as a package handler. (Stipulated Record, 15, 27.) Appellee's job duties included lifting objects weighing anywhere from 2 pounds to 180 or more pounds. (Stipulated Record, 15.)

Concurrent to his employment with Appellant, Appellee was employed by Integrated Pest Control as a Wildlife Control Operator. (Stipulated Record, 16, 40-41.) Appellee began working for Integrated Pest Control on April 15, 2006. (Stipulated Record, 40-41.) His job duties for Integrated Pest Control generally involved spraying floors and baseboards. (Stipulated Record, 16.) In the year prior to his industrial injury, Appellee also operated his own business, Affordable Animal Removal. (Stipulated Record, 7-8, 40.)

Appellee suffered an industrial injury in the course of and arising out of his employment with Appellant on, or about, October 24, 2006. Appellee injured his lower back when he lifted a box onto the top shelf of a van. As he stepped up into the trailer, he stumbled, lost his balance and fell forward because his leading foot went into the hole in the trailer floor. As he turned his trunk and elevated his hands in order to place the box on the second shelf, he felt something move in his lower back. (Stipulated Record, 17.)

On the date of injury James Andonian, M.D. evaluated Appellee at St. Luke's Occupational Health Services. (Stipulated Record, 18.) Dr. Andonian memorialized work restrictions for Appellee on November 30, 2006 which included no lifting or carrying more than 20 pounds and performing only occasional trunk bending or twisting. (Stipulated Record, 21.) Michael K. Riethmiller, M.D., J.D., performed an Independent Medical Examination of Appellee on December 15, 2006 and, in a report dated December 18, 2006, agreed with the restrictions articulated by Dr. Andonian. (Stipulated Record, 21.)

Appellant certified Appellee's claim for "lumbar sprain/strain with L4-5 disc protrusion" on December 19, 2006. (Stipulated Record, p. 23.) On December 26, 2006, the administrator for Appellant's workers' compensation claims, Crawford & Company, sent Appellee a letter which provided, in pertinent part, "In order to correctly calculate your wage rates, we need 52 weeks of gross wages, prior to your injury from *any* previous employers that you worked for." (Stipulated Record, p. 24, emphasis added.) It is interesting that at the time the claim was certified, the Employer's position was that all wages from the prior 52 weeks needed to be included in order to correctly calculate the AWW.

Appellee performed restricted work duties until January of 2007 when Appellant could no longer accommodate his restrictions. Appellant began paying temporary total disability

compensation (“TTD”) for the period beginning January 24, 2007. Appellee continued to treat with Dr. Andonian who updated his work restrictions, beginning January 22, 2007, to include: no excessive bending or stooping; no prolonged standing, walking or sitting; and frequent position changes. The 20 pound weight limit remained in effect with respect to lifting and carrying. (Stipulated Record, 34-35.) Appellee underwent a lumbar epidural steroid injection, performed by Patrick Schafer, M.D. at St. Luke’s Hospital, on March 7, 2007. (Stipulated Record, 36-37.) Dr. Andonian indicated that Appellee’s work restrictions would continue after the injections and at least until April 21, 2007. (Stipulated Record 38-39.)

Appellee changed physicians of record on April 25, 2007 and began treating with Michael A. Poitinger, D.C. Dr. Poitinger submitted a MEDCO-14 work ability report on that date which indicated that Appellee’s industrial injury rendered him temporarily and totally disabled through May 25, 2007. (Stipulated Record, 44.) On June 25, 2007, Dr. Poitinger opined that Appellee could return to restricted duty. (Stipulated Record, 65.) Appellee, though, remained on TTD as Appellant could not provide work within his restrictions.

The issue central to this case, however, does not turn on a battle of medical reports. The Employer has never disputed that the Claimant is entitled to TTD compensation. It is important to recall that the Employer certified the claim. (Stipulated Record p. 23.) Then, at a hearing held on 6/29/2007, FedEx, through its counsel, withdrew its opposition to Claimant/Appellee’s C-86 Motion requesting TTD compensation and certified the Claimant/Appellee’s request for TTD compensation from April 25, 2007 forward. (Stipulated Record, 68.) Thus, there is no question that the Claimant suffered an injury in the course of and arising out of his employment with FedEx. Moreover, there is no dispute that said injury

rendered him temporarily totally disabled. The sole issue in this case is calculation of the Claimant's average weekly wage (AWW) and full weekly wage (FWW.)

When Appellant certified Appellee's claim, it initially set his FWW and AWW at the state minimums of \$234.67 and \$260.45 respectively, based on \$250.80 in earnings from FedEx Ground for the two weeks prior to the date of injury. (Stipulated Record, 2.) However on April 11, 2007 Appellee filed a motion requesting that his FWW and his AWW be reset to include earnings from his concurrent employers, Integrated Pest Control and Affordable Animal Removal. (Stipulated Record, 40, 42.)

The motion filed by Appellee on April 11, 2007 requested that the Bureau of Workers' Compensation ("BWC") reset his FWW to \$457.36 and AWW to \$542.89 on the basis that all wages from the previous year should be included in calculating benefits. (Stipulated Record, 40, 42.) At this point, Appellant objected to the request and asked for a hearing as to Appellee's FWW and AWW. No other issues were presented at that hearing. (Stipulated Record, 52, 66.)

The matter went before a District Hearing Officer ("DHO") on May 15, 2007 who granted Appellee's motion and set his FWW and AWW at the requested amounts. In support of her decision, the DHO relied upon the "special circumstances" provision of O.R.C. § 4123.61. Specifically, the DHO found that the wages from Integrated Pest Control should be combined with the earnings from FedEx Ground in order to afford "substantial justice" to the Claimant/Appellee as directed by R.C. 4123.61. (Stipulated Record, 52.) The DHO did not include wages earned with Affordable Animal Removal for the reason that Appellee operated that business at a loss.

Appellant appealed the DHO Order and the matter proceeded to a Staff Hearing on June 29, 2007. In her decision, the Staff Hearing Officer (“SHO”) similarly found that Appellee’s concurrent employment amounted to “special circumstances” thus compelling an aggregation of earnings from both FedEx Ground and Integrated Pest Control to do “substantial justice”. (Stipulated Record, 66.) Importantly, the SHO noted that resetting the FWW and AWW to include wages from both part-time employers would not provide the injured worker with a windfall. (Stipulated Record, 66.) Ultimately, the SHO set Appellee’s FWW at \$457.36 and his AWW at \$417.05.

Appellant filed an appeal from the Industrial Commission on July 23, 2007 requesting that Appellee’s April 11, 2007 motion be denied in its entirety. (Stipulated Record, 70.) In an Order dated July 25, 2007, the Industrial Commission refused Appellant’s appeal. (Stipulated Record, 87.) The matter went before the Court of Appeals pursuant to Appellant’s Complaint for Writ of Mandamus filed on, or about, November 19, 2007. The Court of Appeals refused Appellant’s request for a Writ of Mandamus. This matter is now before this Court pursuant to the Appellant’s appeal of the Court of Appeals ruling. The Appellee, Christopher J. Roper, respectfully requests that this Court DENY the Appellant’s requested relief for the reason the orders entered by the Industrial Commission are supported by “some evidence” of record.

III. LAW AND ARGUMENT

Standard for mandamus relief

It has long been recognized that the extraordinary writ of mandamus will only issue where an Appellant has a clear legal right to such relief predicated upon the demonstration of an abuse of discretion by the Industrial Commission as established by an absence of “some evidence” to support the Commission’s order. State ex rel. Elliott v. Industrial Commission of

Ohio, (1986) 26 Ohio St. 3d 76, 78. Therefore, a writ of mandamus cannot issue where the order of the Industrial Commission is supported by “some evidence.” The facts demonstrate that there is “some evidence” sufficient to support the Commission’s order. As such, Appellant’s request for a writ of mandamus must be denied.

Proposition of Law No. 1: Wages from concurrent employment are to be included in the computation of Average Weekly Wage in order to do substantial justice to the claimant.

1. Appellant’s reliance on *Smith* is misplaced.

Appellant’s entire argument is based upon *State ex rel. Smith v. Indus. Comm.* (1933), 127 Ohio St. 217. However, Appellant’s reliance on *Smith* is misplaced. It is important to remember that *Smith* was decided in 1933 and pursuant to a statute very different than R.C. 4123.61. In the years since the *Smith* decision, significant changes have been made to the relevant statute. The most significant of those changes, for purposes of this case, was the change which provided a method for calculating an injured worker’s average weekly wage.

The *Smith* Court construed AWW calculation under Section 1465-84 of the General Code, the predecessor to R.C. § 4123.61, to mean that AWW does not include wages earned in “distinct and separate” employment. *Smith*, 127 Ohio St. at 22.

The statute which the *Smith* Court analyzed provided, *in toto*:

The average weekly wage of the injured person at the time of the injury shall be taken as the basis upon which to compute the benefits.
G.C. 1465-84 (1930); *see also* G.C. 1465-84 (1937)

It is undisputed that the General Assembly amended G.C. 1465-84 in 1937. The revised statute, effective as of July 22, 1937, provides, in pertinent part:

In death claims, permanent total disability claims, permanent partial disability claims, and claims for impairment of earnings, the claimant's or the decedent's average weekly wage for the year preceding the injury shall be the weekly wage upon which compensation shall be based....

G.C. 1465-84 (1940)

The differences between the 1937 statute (which is very similar to the current statute) and the statute analyzed by the *Smith* Court are both dramatic and significant. First, the 1933 statute provided that AWW would be calculated based upon a “snapshot” of the injured worker’s wages *at the time of injury*. The 1937 statute provides that AWW would be based upon the average of the injured worker’s wages for the 52 weeks prior to the injury. This change in method of calculation changed the definition of AWW. It went from a “snapshot” to an average of the injured worker’s earning history for the year prior to injury. This is a profound change.

The original statute was simply a mechanical application of the wage from the employer when the injury occurred. The 1937 statute requires the Commission to consider the “whole picture” when determining AWW. Among other things, it prevents sudden windfalls (or shortfalls) based upon a recent change in employment. Instead it provides a genuine average of all the wages earned in the previous year.

In addition, there is absolutely no language in the 1937 statute (or the current version) which limits AWW to the employer of record. Nor is there any language which provides for the exclusion of any wages actually earned in the 52 weeks prior to the date of injury. Simply put, the Appellant would have this Court read into the statute words which it manifestly does not contain. Appellant invites the Court to add a clause limiting AWW to wages earned from the employer of record only. However, long-standing and well-established Ohio law requires the Court to decline Appellant’s invitation and read the statute as it is written. *e.g. Sears v. Weimer*, (1944) 143 Ohio St. 312, SYLLABUS, ¶ 5; *Lake Hospital System, Inc. v. Ohio Insurance Guaranty Association*, (1994) 69 Ohio St. 3d 521, 524.

Moreover, it is important to recall that this Court has already fully addressed this issue in both *State ex rel. Logan v. Indus. Comm.* and *State ex rel. Powell v. C.R. O'Neil & Co.* (see below). This Court has held that *all* wages earned during the year preceding the injury are to be considered when calculating average weekly wage. *Smith* is simply not applicable. The statute it analyzed (as well as the harsh analysis used) has long been discarded.

The construction suggested by Appellant would, on the facts of this case, result in an AWW setting which excluded from consideration a large percentage of claimant's actual wages during the year prior to the injury. This would in turn result in a compensation rate which would fall far short of compensating claimant for the actual loss of wages incurred due to his injury. Such a construction runs afoul of the plain language of the statute.

Moreover, to the extent that such language admits of any room for interpretation, R.C. 4123.95 mandates that the statute be construed in the manner most favorable to the injured worker. As such, the construction suggested by Appellant runs afoul of R.C. 4123.95 as well as R.C. 4123.61.

2. Appellee's AWW was calculated correctly.

It is uncontested that the Appellee was working two jobs at the time of his injury. Furthermore, it is uncontested that the injury occurred in the course of and arose out of Appellee's employment with Appellant FedEx based on the Appellant's decision to certify Appellee's claim. (Stipulated Record, 23.) Finally, based on Appellant's decision to certify TTD compensation for Appellant (Stipulated Record, 68), it is uncontested that the work injury temporarily totally disabled Claimant/Appellee from his employment with both Appellant FedEx and his second employer Integrated Pest Control.

Thus, there is no dispute that the Appellee was earning wages from a second job and that he was disabled from both jobs as a result of his work injury. There is no dispute that the relevant statute, R.C. 4123.61, gives the Industrial Commission discretion to calculate the AWW in a manner which includes the wages from both of Appellee's jobs. As a result, the issue is whether the Industrial Commission abused that discretion by using both of Appellee's sources of wages when calculating his AWW. Under Ohio law, the Industrial Commission did not abuse its discretion.

The controlling section of the Ohio Revised Code in this dispute is 4123.61 which provides, in pertinent part:

The average weekly wage of an injured employee at the time of the injury...is the basis upon which to compute benefits.

In cases of temporary total disability the compensation for the first twelve weeks for which compensation is payable shall be based on the full weekly wage of the claimant at the time of the injury....

Compensation for all further temporary total disability shall be based as provided for permanent disability claims.

In death, permanent total disability claims, permanent partial disability claims, and impairment of earnings claims, the claimant's or the decedent's average weekly wage for the year preceding the injury or the date the disability due to the occupational disease begins is the weekly wage upon which compensation shall be based....

In cases where there are special circumstances under which the average weekly wage cannot justly be determined by applying this section, the administrator of workers' compensation...shall use such method as will enable the administrator to do substantial justice to the claimants....

R.C. § 4123.61.

Pursuant to the statute, it is well understood that the "standard formula for establishing AWW is to divide claimant's earnings for the year preceding injury by fifty-two weeks." *State*

ex rel. Clark v. Indus. Comm. (1994), 69 Ohio St.3d 563, 565. see also, *State ex rel. Baker Concrete Construction, Inc. v. Indus. Comm.* (2004), 102 Ohio St.3d 149, 150.

It is important to recall that the Appellee was employed at two jobs. This is important because this Court has repeatedly held that the “average weekly wage is designed to ‘find a fair basis for award for the loss of future compensation.’... In calculating this figure, two considerations dominate. First, the AWW must do substantial justice to the claimant. Second, it should not provide a windfall.” *State ex rel. Wireman v. Indus. Comm.* (1990), 49 Ohio St.3d 286, 287 (internal citations omitted); *State ex rel. Logan v. Indus. Comm.* (1995), 72 Ohio St.3d 599, 600.

On the facts of this case, and on the authority of *Wireman*, it would be substantially unjust to set Appellee’s AWW and, by extension, the rate of TTD, on a basis which would account for less than half of his actual earnings for the year prior to his injury. Moreover, since the Industrial Commission premised AWW on Appellee’s actual earnings, using that figure as a basis for calculating TTD cannot, *a fortiori*, result in a windfall.

The issue in this matter is not Appellee’s earning capacity; rather, the issue concerns his earnings during the base period for AWW calculation. The SHO analyzed that issue under *Wireman* by aggregating the part-time wages Appellee earned at both FedEx Ground and Integrated Pest Control for total earnings of \$21,686.43. That figure divided by 52 weeks amounts to an AWW of \$417.05. Therefore, Appellant’s argument that the Industrial Commission abused its discretion by aggregating wages from allegedly dissimilar employment must fail for want of legal support.

The Court of Appeals cited two cases which are instructive in this matter. The first is *Logan*, which was decided in 1995, and the second is *Powell*, was decided twelve years later in 2007.

The primary issue in *Logan* concerned disputed periods of unemployment and part-time employment which the claimant argued should have been excluded from the calculations used to determine his AWW. However, there are several findings in *Logan* which are germane to the instant matter.

First, the Court noted that the claimant did not dispute the finding of the DHO that “‘from 6/3/89--9/6/89 claimant worked at Genesis earning \$ 5058.28. It is also found that claimant was employed by Beulah Park *also* over this period as it is a seasonal summer job’”. *Logan*, 72 Ohio St at 602 (emphasis in original). Thus, the claimant’s “part-time status was due to claimant’s contemporaneous full-time job with Genesis that precluded more hours at Beulah. Accordingly, the commission’s decision to include this period in the AWW was not an abuse of discretion.” *Id.* The second significant finding is that the *Logan* Court did “not find ‘special circumstances’ in this case.” *Id.*

Thus, when the two findings are put together, *Logan* teaches that there does not need to be a finding of ‘special circumstances’ to allow the Commission to utilize the wages from two concurrent jobs when calculating AWW. Moreover, *Logan* teaches that using the wages from two concurrent jobs in order to calculate a claimant’s AWW is *not* an abuse of discretion.

Logan is directly on point with the issue at hand. In both cases the claimants had two jobs. In both cases there was an injury at one of the jobs. In both cases the Commission determined that AWW needed to be calculated based on the earnings from both jobs. In

Logan this Court found that it was proper for the Commission to use the earnings from both jobs to calculate AWW. Based on the teachings of *Logan*, the Commission's decision to use the wages from both of Appellee's employers to calculate his AWW is not an abuse of discretion.

Twelve years after *Logan*, this Court decided *Powell*. The primary issue in *Powell* concerned whether it was an abuse of discretion for the Commission to exclude evidence of the claimant's self-employment income which was submitted after the hearing when calculating his AWW. *State ex rel. Powell v. C.R. O'Neil & Co.*, (2007) 116 Ohio St. 3d 22, 23; 2007 Ohio 5504, ¶¶ 6-7. However, as in *Logan*, the claimant in *Powell* was working two jobs when he was injured. He was working C.R. O'Neil & Company while he was concurrently self-employed as a carpenter. *Powell*, 2007 Ohio 5504 at ¶¶ 2-3.

Regarding the primary issue, the *Powell* Court held that it was not an abuse of discretion for the Commission to reject evidence submitted after the hearing, but that it was an abuse of discretion for the Commission to reject materials which clarified evidence submitted at the time of the hearing. *Id.* at ¶¶ 7-9. Pertinent to matter *sub judice* however, was the Court's holding that it was an abuse of discretion for the Commission to reject evidence of concurrent wages from self-employment which were submitted at the time of the hearing.

The *Powell* Court held, "[t]here is no dispute that evidence of Powell's self-employment income for the relevant periods of 1999 and 2000 was not considered. There is also no dispute that the evidence is material, since *R.C. 4123.61* bases the average weekly wage on earnings for the year prior to injury." *Id.* at ¶ 7. Based upon these holdings the *Powell* Court concluded "that the commission abused its discretion in refusing to consider the 1999 Schedule C for purposes of determining Powell's average weekly wage." *Id.* at ¶ 9.

Powell teaches that it is not an abuse of discretion for the Commission to consider both the wages from the employer of record and earnings from concurrent self-employment. If, as Appellant suggests, it is always an abuse of discretion for the Commission to include wages from an employer of record *and* a concurrent employer, then there would be no reason for this Court to have done the analysis regarding the timing of the submissions of the evidence regarding Mr. Powell's self-employment income. Instead, the *Powell* Court could have disposed of the matter by simply finding that only wages from the employer of record were to be used to calculate AWW.

However, because the *Powell* Court **did not** dispose of the matter by simply finding that only wages from the employer of record were to be used to calculate AWW, then the use of wages from a concurrent employer as well as the employer of record must be proper. Instead, the *Powell* Court specifically held that evidence of Powell's self-employment income was material.

Logan and *Powell* teach that wages from all concurrent employment as well as wages earned from the employer of record need to be considered when determining a claimant's AWW. Moreover, in neither case did this Court have to find that special circumstances existed in order to reach that result. Rather, the Court simply applied the statute, as written, to arrive at the correct result.

This is also what the Industrial Commission did in this matter. The Court of Appeals held that although the Commission "abused its discretion in seemingly declaring part-time employment to be a special circumstance *per se*,"¹ because the AWW calculation is nonetheless in accord with *R.C. 4123.61*, issuing a writ of mandamus is not warranted in this

¹ Appellee disagrees with the Court of Appeals inasmuch as the SHO order does not hold that part-time employment is a special circumstance *per se*.

instance.” *State ex rel. FedEx v. Industrial Comm.*, (10th App. Dist.) 182 Ohio App. 3d 152, 158; 2009 Ohio 1708, ¶ 18. The bottom line is this: whether the Commission found Appellee’s part-time concurrent employment to be a special circumstance is moot because Ohio law requires that Appellee’s wages from *both* FedEx and his other employment be used to calculate his AWW.

3. Appellant is attempting to litigate through the “backdoor.”

The Appellant is attempting to litigate an issue which is not properly before the Court. It is important to recall that the “Self-Insured Employer has certified the request for Temporary Total Disability Compensation from 4/25/2007 forward as requested on the C-86 dated 5/11/2007.” (Stipulated Record, 68.) Thus, there is no question before this Court regarding whether or not Appellee is entitled to TTD compensation. The Appellant certified the request for TTD compensation and cannot now, at this late date, attempt to argue that Appellee is not entitled to TTD compensation. That issue is closed and any argument brought forth by Appellant is moot.

Nevertheless, Appellant is trying to litigate the issue of TTD through the “backdoor.” Unfortunately, in its attempt to improperly litigate this issue Appellant has misrepresented both the facts and the law.

For example the Appellant’s statement that “[t]he record indicates that Roper could have continued working for his other employer but presumably quit so that he could collect TTC [sic]” (*Merit Brief of FedEx Ground Package System, Inc.*, p. 11) is factually incorrect. The record is clear--*the Employer/Appellant certified the Appellee’s C-86 request for TTD compensation.* (Stipulated Record p. 68.) Thus, it was the Appellant itself, through its counsel, who determined that Appellee was entitled to TTD compensation--i.e. FedEx itself

found Appellee to be injured to the extent that TTD compensation was required. As such, the Appellant has waived the right to retroactively litigate the issue of TTD compensation. Christopher Roper was injured *and according to the facts of record* was unable to work.

Furthermore, this attempt at “backdoor” litigation is clearly contrary to well-established Ohio law. This Court has previously held:

“Ordinarily, reviewing courts do not consider questions not presented to the court whose judgment is sought to be reversed.”...Nor do appellate courts have to consider an error which the complaining party could have called, but did not call, to the trial court’s attention at a time when such an error could have been avoided or corrected by the trial court.”...The employer, however, essentially seeks a dispensation or relaxation of these rules in proceedings before the commission. However, there is nothing about the purpose of workers’ compensation legislation or the character of proceedings before the commission that would justify such action.

State ex rel. Quarto Mining Company v. Foreman, (1997) 79 Ohio St. 3d 78, 81 (internal citations omitted).

Like the employer in *Quarto*, the Appellant/Employer in this matter is essentially asking this Court to consider an issue which it waived over two years ago. *Quarto* teaches that an issue which may be raised before the Commission cannot be raised for the first time during the appellate process. Thus, FedEx is precluded, as a matter of law, from any argument that Appellee is not entitled to receive TTD compensation. FedEx waived the right to make that argument when it certified Appellee’s request for TTD compensation.

Finally, this attempt to litigate an issue not properly before the Court in many ways helps to illustrate the weakness of Appellant’s argument regarding AWW. Appellant has suggested that the Court of Appeals misread *Logan* and *Powell*. *Merit Brief of FedEx*, p. 7. However, Appellant fails to specifically state how the Court of Appeals misread and misapplied those cases--this is because the Court of Appeals properly read and properly

applied both cases and properly found that AWW must be calculated pursuant to all wages earned during the year prior to injury.

Proposition of Law No. 2: FWW can be calculated pursuant to Joint Resolution No. R80-7-48 pursuant to the Industrial Commission's discretion.

The Court of Appeals held, “[t]he General Assembly did not define FWW but reserved to the commission the task of calculating it. To calculate FWW in cases where no special circumstances exist, the commission may, in its discretion, utilize joint resolution No. R80-7-48, which it promulgated jointly with the Ohio Bureau of Workers’ Compensation. Having done so in this case, the commission did not abuse its discretion.” *FedEx*, at ¶ 19 (internal citations omitted).

The Appellant’s entire argument is based upon a misreading of *State ex rel. Taylor v. Industrial Comm.*, (10th App. Dist.) 2006 Ohio 4781 and repeated use of the term “adjust” instead of “calculate.” The Appellant first suggests that *Taylor* stands for the proposition that the Industrial Commission cannot use joint resolution No. R80-7-48 to calculate a claimant’s FWW. That is simply incorrect. *Taylor* actually provides:

we find nothing in (1993) Am.Sub.H.B. No. 107 that abrogates the computation of FWW as contained in Joint Resolution No. R80-7-48. We also cannot conclude that the commission’s recognition that Joint Resolution No. R80-7-48 was superseded to a limited extent, as applied to the commission, altered the formula for determining FWW. Furthermore, the commission’s recognition that the joint resolution was superseded to a limited extent did not necessarily prohibit the commission from relying, in part, upon Joint Resolution No. R80-7-48 when it exercised its discretion in determining Appellant’s FWW.

Taylor, 2006 Ohio, at ¶ 14.

Thus, the case cited by Appellant actually stands for the proposition that the Industrial Commission **can**, in its discretion, use joint resolution No. R80-7-48 to determine a

claimant's FWW. That is what the Commission did in this instance. As such, this part of Appellant's argument must be rejected as it stands upon an incorrect reading of the law.

Appellant then attempts to infer, by using the term "adjust" and its derivatives repeatedly, that the Commission is without authority to calculate FWW. That, of course, is simply incorrect. As seen in the cases cited above, the Commission has the authority to calculate a claimant's FWW and it may do so based upon joint resolution No. R80-7-48.

IV. CONCLUSION

The salient points continue to be that the Industrial Commission set Appellee's FWW and AWW to reflect the *actual* wages he earned prior to the date of injury in an effort to determine the wages that would be lost due to disability. Recalling *Wireman*, because it would be substantially unjust to disregard verifiable wages and in light of the fact that no windfall would result from considering his actual wages, there is no basis upon which Appellant can assert an abuse of discretion. Particularly in light of the liberal construction in favor of employees mandated by O.R.C. § 4123.95, Appellee would submit that the decision of the Industrial Commission is both legally sound and factually supported by "some evidence".

Other than its attempt to improperly argue an issue which was waived over two years ago, the only argument the Appellant makes to refute the holding of the Court of Appeals and the law upon which that holding is based is by asking this Court to add language to R.C. 4123.61 and utilize the out-dated analysis in *Smith*. *Smith* however, was superseded by the General Assembly so as to "enable the Bureau to avoid the harsh impact of the rule in the *Smith* case." JAMES L. YOUNG, *YOUNG'S WORKMEN'S COMPENSATION LAW OF OHIO*, § 7.4 (2D ED. 1971).

The application of *Smith* for which Appellant cries would do nothing but unjustly injure, not only this Claimant, but any claimant who had the misfortune to be injured at a second, part-time, job by virtue of denying him an AWW based upon his *actual* earnings during the year prior to injury. Such a ruling would contravene R.C. 4123.61 and R.C. 4123.95.

Based on the foregoing, and because Appellant has failed to demonstrate a clear legal right to the requested relief, this Court must deny Appellant's request for a writ of mandamus and affirm the decision of the court of appeals.

Respectfully submitted,

GALLON, TAKACS, BOISSONEAULT
& SCHAFFER CO., L.P.A.

A handwritten signature in black ink, appearing to read 'T. A. Bowman', written over a horizontal line.

Theodore A. Bowman

CERTIFICATION

This is to certify that the foregoing **Merit Brief of Appellee, Christopher Roper** was served this 13th day of November, 2009 by regular US mail, postage prepaid to:

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