

ORIGINAL

In the
Supreme Court of Ohio

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| POWELL MEASLES, et al., | : | Case No. 2010-0393 |
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| Plaintiffs-Appellees, | : | On Appeal from the |
| | : | Cuyahoga County |
| v. | : | Court of Appeals, |
| | : | Eighth Appellate District |
| INDUSTRIAL COMMISSION, et al., | : | |
| | : | Court of Appeals Case |
| Defendants-Appellants. | : | No. CA-09-093071 |
| | : | |

**MERIT BRIEF OF DEFENDANTS-APPELLANTS INDUSTRIAL
COMMISSION AND BUREAU OF WORKERS' COMPENSATION**

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INTRODUCTION

The question at the heart of this dispute is a simple matter of jurisdiction: When a plaintiff seeks money from the State under R.C. 4123.64, which governs lump-sum advancements for permanently injured workers, does he raise a claim for equitable relief—which he can pursue in a common pleas court—or legal relief—which he must bring in the Court of Claims? Two years ago, in *Cristino v. Ohio Bureau of Workers' Compensation*, 118 Ohio St. 3d 151, 2008-Ohio-2013, this Court decided that such claims are *legal*.

The sole issue in *Cristino* was whether a plaintiff's claim for restitution under R.C. 4123.64(A) sought legal or equitable relief. *Id.* at ¶ 1. Several years after he executed a lump-sum settlement agreement with the State, plaintiff, an injured worker, sued to recover money he alleged the State had wrongfully withheld from his settlement by incorrectly calculating the “present value” of his benefits. The *Cristino* Court determined that because plaintiff was not statutorily entitled to the damages he sought, his claim for relief necessarily arose from his settlement contract, and was *legal*, not equitable. *Id.* at ¶ 16.

Cristino resolves this case. At their core, the claims brought by Plaintiffs-Appellees—Powell Measles, Vada Measles, and Ann Pocaro (collectively, “Plaintiffs”)—are identical to those at issue in *Cristino*. Plaintiffs seek money they allege the State wrongfully withheld under contracts they signed over fifteen years ago. But the Eighth District ignored *Cristino*'s holding and deemed Plaintiffs' claims equitable, determining that jurisdiction was proper in the court of common pleas. The Eighth District's decision upending *Cristino* has muddied the jurisdictional waters for workers' compensation litigants, and it should be reversed for several reasons.

First, the decision below conflicts directly with *Cristino*'s binding precedent, which squarely holds that a plaintiff seeking restitution under R.C. 4123.64 brings a claim arising in contract, which is legal, not equitable, and must be pursued in the Court of Claims. The facts at

issue here are functionally indistinguishable from those in *Cristino*, and the Eighth District was bound by this Court's determination.

Second, the Eighth District misapplied the appropriate standard of review for a claim for lack of subject matter jurisdiction under Civ. R. 12(H)(3). The resolution of the merits of Plaintiffs' claims requires a court to interpret the terms of the parties' binding R.C. 4123.64 lump-sum advancement agreements. The Eighth District, however, based its decision that Plaintiffs' claims were equitable squarely on the plain language of Plaintiffs' "Complaint for Only Equitable Relief," and ignored the significance of the parties' contracts.

Such cursory analysis allows any plaintiff to plead himself out of the Court of Claims and into a court of common pleas based solely on his own self-serving allegations that his claims are equitable rather than legal, in conflict with both R.C. Chapter 2743 as well as this Court's interpretations of the Court of Claims' authority. This Court, along with the United States Supreme Court and courts in other jurisdictions, has long deemed such "artful pleading" improper.

If Plaintiffs want to dispute the deal they lawfully struck with the State over fifteen years ago, *Cristino* directs them to do so in the Court of Claims. The Eighth District's decision to the contrary should be reversed.

STATEMENT OF THE CASE AND FACTS

A. Plaintiffs signed contracts agreeing to a lump-sum advancement of part of their permanent total disability awards and a corresponding commutation of their weekly disability payments "for the life of the claim."

This workers' compensation case arises out of the lump-sum payments of permanent total disability ("PTD") benefits Plaintiffs contracted for in the 1980s and mid-1990s. An award for PTD benefits under R.C. 4123.58 is designed to compensate a permanently injured worker for a complete loss of earning capacity by guaranteeing him an income stream for life, usually in the

form of weekly payments set at a percentage of his previous average weekly wage at the time of injury. See *State ex rel. GMC v. Indus. Comm'n* (1975), 42 Ohio St. 2d 278, 282. The statute provides that, “[i]n cases of permanent total disability, the employee shall receive an award to continue until the employee’s death” in an amount based on a set percentage of an employee’s income while he was working. R.C. 4123.58(A) (setting forth the maximum amount of compensation to be awarded for PTD claims).

Because an injured worker collecting PTD often has few alternate income sources to pay bills, he may request all or part of his PTD income stream as one or more lump-sum advancements (“LSAs”) under R.C. 4123.64. See *Ohio Workers’ Compensation Law Handbook Resolution R90-1-10* (Sept. 5, 1990). “Such a claimant receives presently the equivalent of what he or she would have received over a future time span.” *State ex rel. Manns v. Indus. Comm’n* (1988), 39 Ohio St. 3d 188, 191.

The Industrial Commission (“Commission”) and the Bureau of Workers’ Compensation (“Bureau”) (collectively, “Defendants”) have the sole discretionary authority to determine whether to grant an injured worker his requested LSA. R.C. 4123.64(A) (“The administrator of workers’ compensation . . . *may* commute payments of compensation or benefits to one or more lump-sum payments”) (emphasis added). Before 1993, the Commission considered all LSAs. But in 1993, H.B. 107 moved the administration of numerous functions of the Commission to the Bureau. See 1993 Ohio Laws File 47 (H.B. 107). Now the Bureau considers all applications for LSAs save those seeking money to pay attorney fees, which only the Commission reviews. See also R.C. 4123.06 (providing that the Commission shall adjudicate workers’ requests for LSAs to pay attorney fees). Because Plaintiffs Powell and Vada Measles applied for and were granted

LSAs before 1993, and Plaintiff Pocaro applied for and received an LSA for attorney fees only, only the Commission handled their claims.

If Defendants exercise their authority to grant an injured worker's requested LSA, they "commute" all or a part of his lifetime PTD benefits into an LSA, and reduce his corresponding bi-weekly PTD payments according to a mathematical formula, actuarially calculated to account for each individual's likely life span and other factors. R.C. 4123.64(A); see *State ex rel. Funtash v. Indus. Comm'n* (1951), 154 Ohio St. 2d 497, 499 (noting that the Oxford English Dictionary defines "commute" as "to change (one kind of payment) *into* or *for* another; *esp.* to substitute a single payment for a number of payments"); see also Matthew Bender, 1-10 Ohio Workers' Compensation Law § 10.5 (2009).

R.C. 4123.64(B)(6) requires the administrator to "[s]pecify procedures to make a claimant aware of the reduction in amount of compensation which will occur." Before 2004, the Commission's LSA procedures were contained in O.A.C. 4121-3-10. The regulation provided that "[p]rior to considering an application for lump sum advancement, the commission will ascertain the reduction in the rate of compensation which would be caused should the application be granted, and advise the claimant as to this." O.A.C. 4121-3-10(B)(1)(g) (1978). Accordingly, after the Commission reviewed and granted a worker's requested LSA, it issued an Order certifying the grant and setting forth the amount of the LSA, the total pre-LSA PTD payment, the reduction, and the reduced weekly rate. If the worker or his representative objected to the Order, the Commission would hold a hearing to resolve the parties' dispute. See R.C. 4123.64(C) ("An

order of the administrator issued under this section is appealable pursuant to section 4123.511 of the Revised Code but is not appealable to court under Section 4123.512 of the Revised Code.”¹

Here, the Commission awarded Plaintiffs, all permanently injured workers, PTD benefits under R.C. 4123.58. Each Plaintiff later applied for and received one or more LSAs for a portion of his or her PTD benefits under R.C. 4123.64—Plaintiff Powell Measles in 1986, Plaintiff Vada Measles in 1984 and 1985, and Plaintiff Pocaro in 1995. See Defs.’ Reply to Pls.’ Br. in Opp. to Summary Judgment, Ex. 1.

In accordance with R.C. 4123.64 and the terms of Plaintiffs’ LSAs, the Commission adjusted the remaining bi-weekly installments of Plaintiffs’ PTD payments according to the Bureau’s calculated rate. These LSAs were memorialized in the form of a notarized executory contract between the Bureau and each injured worker entitled “Application for Lump Sum Payment,” which listed the claim number for each Plaintiff’s PTD claim. At the bottom of each contract, the following statement appeared in bold print directly above the signature line: **“In the event this Lump Sum Payment is granted it will result in a permanent reduction of weekly benefits which shall continue for the life of the claim.”** Each Plaintiff initiated and executed his respective LSA contract with the assistance of counsel.

Shortly thereafter, the Commission sent each Plaintiff an LSA Order providing the present rate of their weekly payment, the amount of the reduction, and the reduced weekly rate of payment. See, e.g., Exs. A-G to Dep. of Powell Measles, Defs.’ Motion for Summary Judgment, Ex. 4; Exs. H-I to Dep. of Ann M. Pocaro, Defs.’ Motion for Summary Judgment, Ex. 5; see

¹ The Bureau’s pre-2004 procedures were contained in the “Claims Management Resources Guide” (“Resources Guide”) (Feb. 28, 1997). Defs.’ Motion for Summary Judgment, Ex. 3. After the Bureau granted a worker an LSA, it sent him a copy of an order setting forth the specific amount of the agreed-upon commutation, from which the worker had fourteen days to appeal to the Commission. *Id.* at III.A.4 & A.5; see also R.C. 4123.64(C); R.C. 4123.511.

supra note 1. No hearings were held to review the grants because the Plaintiffs did not object to the terms in their LSA Orders.

On December 1, 2004, the Bureau promulgated a new regulation that codified revisions to its LSA policies, which now govern the process. First, O.A.C. 4123-3-37 recognizes that the Commission has exclusive jurisdiction over an application for an LSA for the payment of attorney fees, while the Bureau considers all other LSA applications. See *id.* at (A)(3). To implement the rule, the Bureau adopted a policy under which injured workers who apply for and are granted LSAs under R.C. 4123.64 choose a set time period over which they will repay their LSAs by completing a Repayment Options for LSAs form and selecting a weekly reduction and a reduction period. See *id.* at (B)(3). Once a worker repays his LSA, the Bureau stops commuting amounts from his bimonthly PTD claims and restores his original compensation rate. After 2004, the Commission began forwarding injured workers' LSA claims for attorney fees to the Bureau for a claims service specialist to complete and send the Repayment Options for LSA forms.

B. Plaintiffs sued the Defendants in the Cuyahoga County Court of Common Pleas, asserting that because they had repaid their lump-sum advancements, the Defendants owed them the amounts subtracted from their bi-weekly permanent total disability payments following the completion of that repayment.

In 2007, Plaintiffs sued the Defendants in the Cuyahoga County Court of Common Pleas, seeking a declaratory judgment, injunctive relief, and “equitable disgorgement” of funds they claimed Defendants had wrongfully withheld from their bi-weekly PTD awards. Specifically, Plaintiffs argued that they had outlived the expectancy factor Defendants had used to calculate the agreed-upon reductions of their PTD benefits, and that Defendants had illegally continued deducting money from Plaintiffs' bi-weekly PTD awards when they had already repaid the full amounts of their LSAs. Compl. at ¶ 18. Plaintiffs sought to certify a class of all injured workers

receiving PTD awards who had both applied for and received an LSA from the Defendants and were subject to deductions of their bi-weekly PTD payments in excess of the total amount of that LSA. *Id.* at ¶¶ 4-5. The Defendants moved for summary judgment on the merits, and Plaintiffs opposed. The motion is still pending in the trial court.

C. After this Court decided *Cristino*, the Court of Common Pleas granted the Defendants' motion to dismiss for lack of subject matter jurisdiction.

Following this Court's decision in *Cristino*, 2008-Ohio-2013, the Defendants moved to dismiss Plaintiffs' case for lack of subject matter jurisdiction under Civ. R. 12(H)(3). The Defendants argued that Plaintiffs had no statutory right to a lump-sum payment under the permissive language of R.C. 4123.64(A), which states that the administrator "may" grant an LSA. As such, Plaintiffs' claims for "equitable disgorgement" of amounts allegedly wrongfully withheld from their PTD payments arose from their respective LSAs, and, under *Cristino*, their case could proceed only in the Court of Claims. The trial court agreed and dismissed the case. Order, *Measles v. Indus. Comm'n*, CV-07-623468 (Cuyahoga Ct. of Com. Pls. Mar. 13, 2009).

D. The Eighth District Court of Appeals reversed and held that Plaintiffs' claims were equitable and therefore properly brought in a common pleas court.

A majority of the Eighth District Court of Appeals reversed. *Measles v. Indus. Comm'n* ("App. Op.") (8th Dist.), 2010-Ohio-161. Plaintiffs argued that *Cristino* did not apply because they did not seek relief based on their LSAs; rather, they sought the return of funds that Defendants had allegedly withheld in violation of Plaintiffs' statutory right to a set amount of lifetime PTD payments under R.C. 4123.58. The court agreed and determined that Plaintiffs' suit was equitable rather than legal because Plaintiffs claimed "title or a right to possession of particular 'property,' i.e., the funds they were entitled to as permanently injured workers in Ohio that they believe the Bureau has kept from them." *Id.* at ¶ 17.

The Eighth District did not consider the impact of the parties' LSA contracts, in which Plaintiffs each agreed to the commutation of their benefits "for the life of the claim." Instead, the court based its determination solely on the plain language of Plaintiffs' "Complaint for Equitable Relief Only," seeking "declaratory judgment, injunctive relief, and finally, equitable disgorgement of property they believe is rightfully theirs." *Id.* at ¶ 18. And based on the complaint, the court found that, "[a]t this stage of the proceedings, appellants have not exclusively pled claims for money due and owing under a contract, and so have not made what is 'quintessentially an action at law.'" *Id.* at ¶ 16 (quoting *Cristino*, 2008-Ohio-2013, at ¶ 9).

Defendants' timely appeal followed.

ARGUMENT

Proposition of Law of Defendants-Appellants the Industrial Commission and the Bureau of Workers' Compensation:

When an injured worker contracts to receive a lump-sum advancement in lieu of part of his permanent total disability income stream and later seeks to recover funds commuted from that income stream, that claim is for money due under a contract, which must be brought in the Court of Claims. Cristino v. Ohio Bureau of Workers' Compensation, 118 Ohio St. 3d 151, 2008-Ohio-2013, ¶ 16, followed.

The merits of the underlying dispute are not at issue here. The sole consideration for this Court is whether Plaintiffs' claims are legal or equitable. If they are legal, Plaintiffs must pursue them in the Court of Claims. If they are equitable, they may be heard by a common pleas court. But the answer is already clear. *Cristino* establishes that Plaintiffs' claims are legal, not equitable, and the lower court's opinion to the contrary should be reversed.

A. This Court twice defined the line dividing legal and equitable claims in the workers' compensation context in *Santos v. Ohio Bureau of Workers' Compensation*, 101 Ohio St. 3d 74, 2004-Ohio-28, and *Cristino*, 2008-Ohio-2013.

Through the Court of Claims Act, R.C. Chapter 2743, the General Assembly established the Court of Claims to adjudicate claims against the State that were previously barred by the doctrine of sovereign immunity. R.C. 2743.03(A)(1). That exclusive jurisdiction includes not only cases seeking monetary relief from the State, but also cases seeking equitable relief, as long as it is sought alongside money damages. R.C. 2743.03(A)(2). This exclusivity serves the Court of Claims Act's primary purpose—to centralize the filing and adjudication of all claims against the State. *Friedman v. Johnson* (1985), 18 Ohio St. 3d 85, 87.

But R.C. Chapter 2743 does not divest other Ohio courts of jurisdiction “to hear and determine a civil action in which the sole relief that the claimant seeks against the state is a declaratory judgment, injunctive relief, or other equitable relief.” R.C. 2743.03; *Racing Guild of Ohio, Local 304 v. State Racing Comm'n* (1986), 28 Ohio St. 3d 317, 320. The Court of Claims

Act concerned those claims for which the State was previously immune from suit anywhere, and plaintiffs could bring such purely equitable or declaratory claims in the common pleas courts before the General Assembly created the Court of Claims. *Racing Guild*, 28 Ohio St. 3d at 319 (“[A]ny type of action against the state which the courts entertained prior to the Act may still be maintained in the Court of Claims.”). Thus, a determination of whether this case belongs in the Court of Claims or a court of common pleas depends on whether a court deems Plaintiffs’ claims legal or equitable.

This Court considered the line between law and equity in the workers’ compensation context in *Santos v. Ohio Bureau of Workers’ Compensation*, 2004-Ohio-28 and revisited the issue a few years later in *Cristino*, 2008-Ohio-2013.

In *Santos*, a putative class of plaintiffs sought to reclaim certain funds they alleged the Bureau had wrongfully collected from them under R.C. 4123.931, a subrogation scheme that this Court subsequently invalidated in *Holeton v. Crouse Cartage Co.* (2001), 92 Ohio St. 3d 115, 2001-Ohio-109. In analyzing plaintiffs’ claims, this Court established a framework for differentiating between legal and equitable restitution claims, holding that claims are equitable where they seek the “return of specific funds wrongfully collected or held by the state.” *Santos*, 2004-Ohio-28, at ¶ 1. The Court based its analysis on the broader principles of the distinguishing legal and equitable restitution present in both federal and Ohio jurisprudence.

In particular, the *Santos* Court adopted the United States Supreme Court’s explanation of the difference between legal and equitable claims for restitution, set forth in *Great-West Life & Annuity Ins. Co. v. Knudson* (2002), 534 U.S. 204, 214. *Great-West* explained that not all suits seeking restitution can be characterized as seeking equitable relief, and determined that whether restitution is “legal or equitable depends on the basis for the plaintiff’s claims and the nature of

the underlying remedies sought.” *Id.* at 213 (internal citations omitted). *Great-West* then clarified that, “for restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to *restore* to the plaintiff *particular* funds or property in the defendant’s possession.” *Id.* at 214 (emphasis added). Relying on *Great-West*, therefore, this Court determined that “restitution is available as a *legal* remedy when a plaintiff cannot ‘assert title or right to possession of particular property, but in which nevertheless he might be able to show just grounds for recovering money.’” *Santos*, 2004-Ohio-28, at ¶ 13 (quoting *Great-West*, 534 U.S. at 214) (emphasis in original).

In light of the above, an equitable claim includes three distinctive but related elements. First, the plaintiff must seek to *restore* funds. To do so, he must have held those funds previously. Second, the funds or property must be *particular*. In other words, the funds must be an identifiable amount that the defendant allegedly took from the plaintiff. And third, a *statute* or *rule* entitles the plaintiff to the relief he seeks. See *Santos*, 2004-Ohio-28, at ¶ 14 (citing *Ohio Hosp. Ass’n v. Ohio Dep’t of Human Servs.* (1991), 62 Ohio St. 3d 97, 105 (“The reimbursement of monies withheld pursuant to an invalid administrative rule is equitable relief, not money damages.”)). Thus, because the *Santos* plaintiffs sought the return of *specific* amounts of their *own* previously-held money they alleged the Bureau had liquidated under a now unlawful *statutory* scheme, their claims were equitable.

And a few years later, in *Cristino*, the Court considered claims on the other end of the spectrum, applying the *Great-West* distinction elucidated in *Santos* to an injured worker’s putative class-action suit for damages under R.C. 4123.64(A). See 2008-Ohio-2013. There, plaintiff Pietro Cristino, an injured worker to whom the State had granted PTD benefits, contractually agreed to relinquish his right to periodic PTD payments in exchange for a single

lump-sum settlement at the “present value” of his PTD claim, which the Commission approved. *Id.* at ¶ 2. Several years later, he brought a putative class-action suit against the Bureau and the State in the Cuyahoga County Court of Common Pleas alleging that the Bureau had calculated the present value of his PTD claim improperly and seeking the money allegedly owed in excess of the agreed-upon settlement amount. *Id.* at ¶ 3. This Court held that Cristino sought legal, not equitable, restitution, and that his claim therefore fell within the exclusive, original jurisdiction of the Court of Claims. *Id.* at ¶ 16.

Notably, relying again on the *Great-West* distinction, the *Cristino* Court emphasized the importance of analyzing the *substance* of a plaintiff’s claim, explaining that the difference between legal and equitable claims turns on “the basis for the plaintiff’s claim and the nature of the underlying remedy.” *Id.* at ¶ 7. The “crux” of Cristino’s position was that the Bureau had violated its agreement to provide him and the other putative class members with “a lump sum payment of the ‘present value’ of their claims.” *Id.* at ¶ 12. Thus, the Court explained, “[h]is recovery depends upon the interpretation of the term ‘present value’ in his agreement with the bureau,” such that his claim for entitlement for those funds necessarily arose from that agreement. *Id.*

The *Cristino* Court also rejected Cristino’s argument that he sought to enforce a statutory right to PTD benefits under R.C. 4123.58(A). The Court reasoned that because Cristino had requested a lump-sum settlement from the Bureau in lieu of bi-weekly PTD payments, and had no right to such a settlement under R.C. 4123.64(A)’s discretionary language, he was not statutorily entitled to the relief he sought. Thus, any right (to the extent one existed) necessarily arose from the parties’ settlement contract. *Id.* at ¶ 13.

Finally, the *Cristino* Court specifically distinguished *Santos*, explaining that the *Santos* plaintiffs “sought the return of funds that had once been in their possession and so belonged to them ‘in good conscience,’” *id.* at ¶ 15, whereas the amount of *Cristino*’s claim wholly depended on a court’s interpretation of the terms of his contract, *id.*

B. This case, like *Cristino*, turns on the Plaintiffs’ lump-sum advancement agreements and does not involve the return of particular funds, so it belongs in the Court of Claims.

The Eighth District determined that *Cristino* did not apply to Plaintiffs’ claims because Plaintiffs had “not exclusively pled claims for money due and owing under a contract,” but rather, sought equitable relief for “property they believe is rightfully theirs.” App. Op. at ¶¶ 16, 18. But the Eighth District was wrong.

First, the core issues in *Cristino* are identical to those present in this case, and the Eighth District was bound by its holding. Plaintiffs have no statutory relief to the right that they seek, and their claims arise only from the binding LSAs they each signed with the Bureau. Under *Cristino*, claims for money from the State arising from a contract are legal, not equitable, and they belong in the Court of Claims.

Moreover, the Eighth District misapplied the proper standard of review for a motion to dismiss for lack of subject matter jurisdiction, relying solely on the plain language of Plaintiffs’ complaint when the resolution of the merits of Plaintiffs’ claims requires an interpretation of the parties’ LSA agreements.

For these reasons and those that follow, this Court should reverse.

1. Plaintiffs’ claims arise from their lump-sum advancement agreements and are functionally identical to those in *Cristino*, so Plaintiffs must file suit in the Court of Claims.

In the court below, Plaintiffs deemed the similarities between their case and *Cristino* “superficial.” Pls.’ Br. Opposing Defs.’ Motion to Dismiss at 13. This could not be further from

the truth. In fact, the *only* factual distinction between the two cases lies in the form of the LSA. Where the *Cristino* plaintiffs contracted for a one-time lump-sum LSA settlement in lieu of lifetime PTD payments, Plaintiffs applied for and were granted LSAs to be followed by commuted bi-weekly lifetime PTD payments “for the life of the claim.” See App. Op. at ¶ 14.

But this is a distinction without a difference. An injured worker is not statutorily entitled to an LSA, be it a total claim settlement or a one-time advancement. Regardless of the form, R.C. 4123.64(A) specifically states that the administrator “*may* commute payments of compensation or benefits to one or more lump-sum payments.” (emphasis added); see *State ex rel. Funtash*, 154 Ohio St. at 500. Accordingly, neither *Cristino* nor Plaintiffs had a statutory right to the LSAs the Commission granted them, and their claims necessarily arise from their contracts. See *Cristino*, 2008-Ohio-2013, at ¶ 12.

Plaintiffs also argued to the Eighth District that their claims arose from their statutory right to receive lifetime PTD payments under R.C. 4123.58. They asserted that by continuing to commute their bi-weekly payments *after* Plaintiffs had already repaid the full amount of their LSAs, the State breached R.C. 4123.58’s requirements. They opined, therefore, that just as the *Santos* plaintiffs sought to recover specific funds that the State unlawfully withheld, they were pursuing the recovery of specific funds that the State had unlawfully commuted from the PTD awards to which they were statutorily entitled. Plaintiffs’ position is nothing but revisionist history.

Each Plaintiff, with the help of an attorney, contracted with the State for an LSA, thereby agreeing to commute his R.C. 4123.58 PTD benefits “for the life of the claim.” Thus, when Plaintiffs signed their LSAs, they altered both the form and the substance of their R.C. 4123.58 benefits—the form because the statutory benefits were now based in contract, and the substance

because the statutory rate of payment was reduced according to the Bureau's method of calculation.

Moreover, the Commission at all times complied with R.C. 4123.64(B)(6)'s requirement to inform the Plaintiffs about the exact amount of the commutation of their PTD benefits. After reviewing each Plaintiff's LSA Agreement, the Commission issued an order confirming the details of their LSAs. See, e.g., Exs. A-G to Dep. of Powell Measles, Defs.' Motion for Summary Judgment, Ex. 4; Exs. H-I to Dep. of Ann M. Pocar, Defs.' Motion for Summary Judgment, Ex. 5. But Plaintiffs never exercised their right to object to those orders; rather, they stuck with the bargain for which they contracted and reaped the financial benefits for over fifteen years before dubbing them "unlawful."

Finally, despite their request for what they deem "equitable restitution," as in *Cristino*, the *remedy* Plaintiffs seek is purely legal. It is well-established that the remedy of restitution differs from a claim for money damages. "[I]n awarding damages the purpose is to put the injured party in as good a position as he would have occupied, had the contract been fully performed." Corbin on Contracts § 1107 (2010). On the other hand, when "enforcing restitution, the purpose is to require the wrongdoer to restore what he has received and thus tend to put the injured party in as good a position as that occupied by him *before* the contract was made." *Id.* (emphasis added). In *Cristino*, the plaintiff sought to recover money *on top of* the "present value" amount previously awarded to him by the Bureau at settlement. Similarly, Plaintiffs do not want to be restored to the positions they were in *before* signing their LSA contracts. In fact, their Complaint expressly demands *more* money than what they were bound to receive under those agreements. Compl. at ¶ 28 (requesting the disgorgement of "all monies collected in excess of" the amounts

collected under the LSAs). This is the definition of a pure claim for money damages—not a claim for equitable restitution.

For all of these reasons, this case mirrors *Cristino*—not *Santos*. In *Cristino*, plaintiff applied for and was granted a single lump-sum settlement of a reduced amount of his R.C. 4123.58 payments. 2008-Ohio-2013, at ¶ 2. In contracting for that settlement, Cristino agreed to receive an amount equal to the “present value” of his PTD claim. *Id.* at ¶ 3. This Court therefore determined that Cristino’s argument that the State fraudulently withheld amounts due under the settlement rested on a court’s interpretation of the meaning of “present value”—an interpretation that could only be made by considering and evaluating the parties’ contract. *Id.* at ¶ 12.

The *Cristino* analysis fits this case like a glove. Plaintiffs’ dispute with Defendants over whether amounts were wrongfully over-commuted from their PTD payments necessarily depends on a court’s interpretation of the phrase “for the life of the claim.” In the lower courts, Plaintiffs argued that “for the life of the claim” meant “for the life of their *LSA* claim,” and that the *LSA* claim was extinguished when, through the commutation of their benefits, they repaid the amount the State had advanced them. But Defendants countered (and still maintain) that the phrase referred to Plaintiffs’ *PTD* benefits, and because such benefits are statutorily required for the life of the injured worker under R.C. 4123.58, the “life of the claim” means the “life of the claimant.” See Defs.’ Motion for Summary Judgment at 23-26. This Court need not decide which party is correct to reach the narrow jurisdictional matter in this case. Instead, the critical point is that the dispute is over the meaning of *the terms in the contracts*. And when contractual terms are at issue, *Cristino* establishes that the claim is legal, not equitable. *Cristino*, 2008-Ohio-2013, at ¶ 12.

2. O.A.C. 4123-3-37, which the Bureau promulgated in 2004, also does not afford Plaintiffs relief.

Finally, although the lower court did not consider their arguments on this issue, Plaintiffs' position that O.A.C. 4123-3-37 requires the Defendants to cease commuting their PTD benefits once they have paid off their LSAs also fails.

Plaintiffs' interpretation of the code provisions is correct as far as it goes. As noted above, in 2004, the Bureau promulgated O.A.C. 4123-3-37(B)(3), which states that where the administrator grants an LSA, he "shall fix a specific time for the reduction of the biweekly rate of compensation to repay the lump sum advancement." Further, O.A.C. 4123-3-37(C)(3) expressly provides that, "[u]pon the repayment of the lump sum advancement in accordance with the terms of the order and agreement, the administrator shall remove the rate reduction due to the lump sum advancement and reinstate the injured worker's rate of compensation."

But O.A.C. 4123-3-37 was not at issue until more than fifteen years after Plaintiffs requested and contracted for their LSAs. And notably, there is no indication that it was intended to apply retroactively. See *Kneisley v. Lattimer-Stevens Co.* (1988), 40 Ohio St. 3d 354, 355 (absent a clear indication of legislative intent to the contrary, a statute applies prospectively). Quite the opposite, in fact—the Defendants have made it quite clear that the regulation was *not* meant to be retroactive. The Bureau's website specifically states that permanently injured workers granted LSAs before the December 1, 2004 regulatory rule change are *not* restored to their original compensation rate upon repayment of the amount of the LSA because they contractually agreed to a *permanent* rate reduction at that rate. See Ohio Bureau of Workers' Compensation, "Processing a Lump Sum Advancement for Permanent Total Disability Claims" available at <http://www.ohiobwc.com/basics/InfoStation/InfoStationContent.asp?Item=1.2.3.5.10> (last visited July 9, 2010). O.A.C. 4123-3-37 is therefore irrelevant to the Court's analysis.

3. The Eighth District failed to consider the substance of the Plaintiffs' underlying claim, and focused solely on the plain language of Plaintiffs' complaint.

As shown above, *Santos* and *Cristino* both demonstrate that the key to determining whether a claim for restitution is legal or equitable lies in an analysis of the *substance* of that claim. *Santos*, 2004-Ohio-28, at ¶ 13 (citing *Great-West*, 534 U.S. at 213); *Cristino*, 2008-Ohio-2013, at ¶¶ 7-8. But the Eighth District went astray when it denied Defendants' motion to dismiss based solely on Plaintiffs' own unsupported assertions that their claims were "equitable." The Eighth District ignored the actual function of the law and relied on Plaintiffs' labels alone. Such a determination supports a rule under which a court may limit itself to considering only the face of a plaintiff's complaint in evaluating the nature of the claims therein. And in effect, it allows any plaintiff who artfully drafts his complaint to proceed in the court of common pleas when R.C. Chapter 2743 actually limits him to review by the Court of Claims.

The relevant inquiry on a motion to dismiss for lack of subject matter jurisdiction—under either Civ. R. 12(B)(1) or 12(H)(3)—is "whether any cause of action cognizable by the forum has been raised in the complaint." *State ex rel. Bush v. Spurlock* (1989), 42 Ohio St. 3d 77, 80. And where, as here, a defendant challenges the factual basis of the court's jurisdiction, rather than just the complaint's facial sufficiency, the court "has authority to consider any pertinent evidentiary materials," *Nemazee v. Mt. Sinai Med. Ctr.* (1990), 56 Ohio St. 3d 109, 111 n.3, and may "consider outside matter attached to a motion to dismiss for lack of jurisdiction without converting it into a motion for summary judgment if such material is pertinent to that inquiry," *Southgate Dev. Corp. v. Columbia Gas Transmission Corp.* (1976), 48 Ohio St. 2d 211, 214.

The Eighth District correctly set forth the foregoing standard of review, App. Op. at ¶ 10, but it applied that standard improperly. According to the Eighth District, the record demonstrated that Plaintiffs' claims "emanate[d], at least in part, from their LSA claims made

with the Bureau pursuant to R.C. 4123.64(A).” *Id.* at ¶ 15. But the court then ignored these contracts and based its decision solely on the terms of Plaintiffs’ “Complaint for Equitable Relief Only.” The court determined that Plaintiffs’ claims sounded in equity because they sought purely “equitable” relief—“declaratory judgment, injunctive relief, and finally, equitable disgorgement of property they believed was rightfully theirs.” *Id.* at ¶ 18.

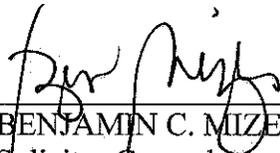
It is well established that a plaintiff is the “master” of his own complaint. *The Fair v. Kohler Die & Specialty Co.* (1913), 228 U.S. 22, 24. But the mere fact that Plaintiffs labeled their restitution claims “equitable” does not make them so. By ignoring the basis of Plaintiffs’ claims—their LSA contracts—and focusing only on the remedies they alleged—declaratory and injunctive relief, and equitable disgorgement—the Eighth District missed the mark. This Court should not sanction a rule under which a plaintiff can artfully plead himself into the forum of his choice. To do so would both fly in the face of the General Assembly’s intent in creating the Court of Claims, and contravene precedent from this and other courts intended to prevent litigants from benefiting from a strategic end-run around mandatory jurisdictional rules.

CONCLUSION

For the foregoing reasons, this Court should reverse the Eighth District's decision and affirm the dismissal of this action from the court of common pleas.

Respectfully submitted,

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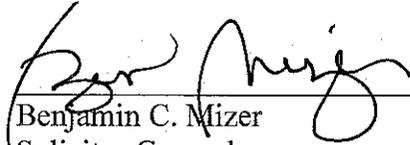
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Merit Brief of Defendants-Appellants Industrial Commission and Bureau of Workers' Compensation was served by U.S. mail this 14th day of July, 2010, upon the following counsel:

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In the
Supreme Court of Ohio 10-0393

| | | |
|--------------------------------|---|---------------------------|
| POWELL MEASLES, et al., | : | Case No. _____ |
| | : | |
| Plaintiffs-Appellees, | : | On Appeal from the |
| | : | Cuyahoga County |
| v. | : | Court of Appeals, |
| | : | Eighth Appellate District |
| INDUSTRIAL COMMISSION OF OHIO, | : | |
| et al., | : | Court of Appeals Case |
| | : | No. CA-09-093071 |
| Defendants-Appellants. | : | |

**NOTICE OF APPEAL OF DEFENDANTS-APPELLANTS
INDUSTRIAL COMMISSION OF OHIO AND
BUREAU OF WORKERS' COMPENSATION**

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FILED
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 SUPREME COURT OF OHIO

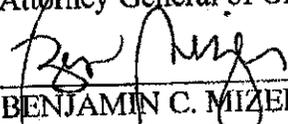
**NOTICE OF APPEAL OF DEFENDANTS-APPELLANTS
INDUSTRIAL COMMISSION OF OHIO AND
BUREAU OF WORKERS' COMPENSATION**

Defendants-Appellants Industrial Commission of Ohio and Bureau of Workers' Compensation hereby give notice pursuant to S. Ct. Prac. R. 2.1(A)(3) of its discretionary appeal to the Supreme Court of Ohio from the opinion and judgment of the Cuyahoga County Court of Appeals, Eighth Appellate District, entered in *Powell Measles, et al. v. Industrial Commission of Ohio, et al.*, Case No. CA-09-093071 on February 1, 2010. A date-stamped copy of the Eighth District's Decision and Judgment is attached as Exhibit 1 to Defendants-Appellants' Memorandum in Support of Jurisdiction.

For the reasons set forth in the accompanying Memorandum in Support of Jurisdiction, this case is one of public and great general interest.

Respectfully submitted,

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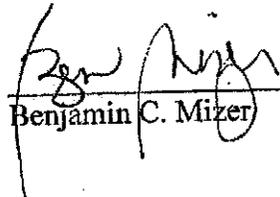
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Notice of Appeal of Defendants-Appellants Industrial Commission of Ohio and Bureau of Workers' Compensation was served by U.S. mail this 3rd day of March, 2010, upon the following counsel:

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FEB 0 2010

J.D.

EXHIBIT 1

Court of Appeals of OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

FEB 5 - 2010
ATTORNEY GENERAL
GLE ADMIN.

JOURNAL ENTRY AND OPINION
No. 93071

POWELL MEASLES, ET AL.

PLAINTIFFS-APPELLANTS

vs.

**INDUSTRIAL COMMISSION
OF OHIO, ET AL.**

DEFENDANTS-APPELLEES

**JUDGMENT:
REVERSED AND REMANDED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-623468

BEFORE: Kilbane, P.J., McMonagle, J., and Boyle, J.

RELEASED: January 21, 2010

JOURNALIZED: FEB 21 2010

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FILED AND JOURNALIZED
PER APP.R. 22(C)

FEB 01 2010
GERALD E. FUEB
CLERK OF THE COURT
BY *[Signature]*

ANNOUNCEMENT OF DECISION
PER APP.R. 22(B) AND 26(A)
RECEIVED

JAN 31 2010
GERALD E. FUEB
CLERK OF THE COURT OF APPEALS
BY *[Signature]*

CA09093071 61329477


N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

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AT PAINESVILLE COURT HOUSE

VOL 0698 PG 0224

MARY EILEEN KILBANE, P.J.:

Appellants, Powell Measles, Vada Measles, and Ann Pocaro (collectively "appellants") appeal the trial court's dismissal of their complaint for lack of subject matter jurisdiction. In May 2007, appellants sued the Ohio Industrial Commission and the Administrator of the Bureau of Workers' Compensation (collectively "the Bureau") after a dispute arose regarding a decrease in their permanent total disability ("PTD") awards as they relate to lump-sum advancements ("LSA") that each had taken against those awards.

The trial court found that it lacked subject matter jurisdiction to hear the case in light of the Supreme Court's ruling in *Cristino v. Ohio Bur. of Workers Comp.*, 118 Ohio St.3d 151, 153, 2008-Ohio-2013, 886 N.E.2d 857. *Cristino* held, inter alia, that the Court of Claims has exclusive jurisdiction over cases seeking recovery under contract-related theories. Relying on *Cristino*, the trial court determined that jurisdiction rested with the Ohio Court of Claims because appellants' claims sounded in contract and not in equity.

After a careful review of the facts and the law, we disagree and reverse.

Statement of Facts and Procedural History

The following facts are undisputed. Appellants have all been permanently and totally disabled as a result of workplace accidents. They are each statutorily entitled to receive lifetime bi-weekly PTD payments from the Bureau.

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Appellants have taken LSAs against their PTD awards. Under R.C. 4123.64(A), when LSAs are paid, a portion of a claimant's lifetime benefit is "commuted" or reduced into a lump-sum advance, and their corresponding bi-weekly benefit is reduced.

On May 7, 2007, appellants filed suit against the Ohio Industrial Commission in common pleas court, seeking return of money they allege was wrongfully withheld from their bi-weekly PTD awards. Their three-count complaint demanded a declaratory judgment in their favor, injunctive relief, and sought equitable disgorgement of funds the Bureau allegedly kept from them. Appellants also sought class status.

Measles was initially injured in 1981. He received his first LSA in 1986 in the amount of \$5,000, and applied for his second LSA in 1987 in the amount of \$9,563. The crux of appellants' claims, then and now, is that they have repaid the amount of their respective LSAs with interest, and that the LSAs should not continue to be a set-off against their bi-weekly lifetime PTD awards.

On October 21, 2008, the Bureau filed a motion to dismiss for lack of subject matter jurisdiction based upon the Supreme Court's holding in *Cristino*.

On March 12, 2009, the common pleas court granted the motion to dismiss, stating in part:

"Plaintiffs' claims arise from their agreement with the Bureau of Workers' Compensation to receive a LSA;

however, there is no statutory right to a lump-sum payment. A claim based on a LSA made pursuant to R.C. 4123.64(A) is a claim against the State for money due under a contract, it is not a claim for equitable restitution, and such claims therefore must be brought in the Ohio Court of Claims. * * * As this court lacks subject matter jurisdiction over plaintiffs' claims, the case is dismissed."

Analysis

On May 15, 2009, appellants filed the instant appeal, asserting a single assignment of error:

"The trial court erred in dismissing plaintiffs' action for lack of subject matter jurisdiction."

Civ.R. 12(B)(1) permits dismissal where the trial court lacks jurisdiction over the subject matter of the litigation. The standard of review for a dismissal pursuant to Civ.R. 12(B)(1) is whether any cause of action cognizable by the forum has been raised in the complaint. *Ferren v. Cuyahoga Cty. Dept. of Children & Family Servs.*, Cuyahoga App. No. 92294, 2009-Ohio-2359, at ¶3. (Internal citations omitted.) We review an appeal of a dismissal for lack of subject matter jurisdiction under Civ.R. 12(B)(1) de novo. *Boutros v. Noffsinger*, Cuyahoga App. No. 91446, 2009-Ohio-740, ¶12. A trial court is not confined to the allegations of the complaint when determining subject matter jurisdiction under Civ.R. 12(B)(1), and it may consider pertinent material without converting the motion into a motion for summary judgment. *Boutros* at ¶13.

On appeal, we are essentially asked to decide whether the appellants have

pled a cause of action asking for equitable relief or money damages. If the essence of appellants' claims is not money damages but equitable relief, then the Court of Claims does not have exclusive jurisdiction over the case. See, e.g., *Ohio Academy of Nursing Homes v. Ohio Dept. of Job and Family Servs.*, 114 Ohio St.3d 14, 17-18, 2007-Ohio-2620, 867 N.E.2d 400, 403-404.

Appellants argue that because their complaint requested equitable relief only, jurisdiction rested with the trial court. Appellants argue that this case is analogous to *Santos v. Ohio Bur. of Workers' Comp.*, 101 Ohio St.3d 74, 2004-Ohio-28, 801 N.E.2d 441. In *Santos*, the Supreme Court held, inter alia, that "[a] suit that seeks the return of specific funds wrongfully collected or held by the state is brought in equity. Thus, a court of common pleas may properly exercise jurisdiction over the matter as provided in R.C. 2743.03(A)(2)." *Id.* at syllabus.

In *Santos*, the class of plaintiffs at issue "sought return of funds already collected by the BWC under the subrogation statute." *Id.* at ¶7. The plaintiffs in *Santos* "thus sought the return of funds that had once been in their possession and so belonged to them 'in good conscience.'" *Cristino*, supra, at 155, citing *Santos* at ¶7. (Internal citations omitted.)

Like the plaintiffs in *Cristino*, appellants received PTD benefits. However, unlike the *Cristino* plaintiffs, who took a reduced one-time lump-sum PTD payment in lieu of lifetime PTD payments, appellants received only LSAs and

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continue to receive bi-weekly lifetime PTD payments.

In this case, appellants were careful to word their complaint "in equity," expressly avoiding claims for money damages. The record demonstrates that while appellants' claims emanate, at least in part, from their LSA claims made with the Bureau pursuant to R.C. 4123.64(A), the issues they raise in their complaint go beyond whether the Bureau may commute payments into a lump sum. Appellants raise the question of whether the Bureau is required to return specific funds it has retained over and above that which appellants were required to pay pursuant to their LSA agreement. While the Bureau argues that because appellants seek restitution for an alleged overpayment, their claims sound in breach of contract and so should be decided according to *Cristino*. However, both the *Cristino* court and the *Santos* court recognized that restitution claims could present either equitable or legal relief: "It is well established that restitution can be either a legal or an equitable remedy. * * * In order to determine whether a claim for restitution requests legal or equitable relief, we look to the basis for the plaintiff's claim and the nature of the underlying remedies sought." *Cristino*, supra, at 152, citing *Santos*, supra, at 76.

At this stage of the proceedings, appellants have not exclusively pled claims for money due and owing under a contract, and so have not made what is "quintessentially an action at law." *Cristino* at 153. (Internal citations

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omitted.) As such, their claims are not essentially claims for money damages, and they sound in equity. Therefore, we cannot agree with the trial court that the Court of Claims is vested with exclusive jurisdiction in this matter.

“[H]istorically, the distinction between legal and equitable claims for restitution depended on whether the plaintiff could assert ‘title or right to possession’ in particular funds or other property. * * * [A] legal restitution claim [is] a claim in which the plaintiff ‘could not assert title or right to possession of particular property, but in which nevertheless he might be able to show just grounds for recovering money to pay for some benefit the defendant had received from him.’ * * * By contrast, an equitable restitution claim [is] one in which ‘money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant’s possession.’”
Id. at 152-153. (Internal citations omitted.)

Here, appellants assert title or a right to possession of particular “property,” i.e., the funds they were entitled to as permanently injured workers in Ohio that they believe the Bureau has kept from them. Under Civ.R. 12, they have made a case in equity such that exclusive jurisdiction does not reside with the Court of Claims. The trial court incorrectly decided that it lacked subject matter jurisdiction over appellants’ claims.

While it is true that claims based on a LSA made pursuant to R.C. 4123.64(A) are claims against the State for money due under a contract and not claims for equitable restitution, appellants have made no such claims in their complaint. They seek declaratory judgment, injunctive relief, and finally,

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equitable disgorgement of property they believe is rightfully theirs. Appellants' claims sound in equity. The trial court erred in granting the Bureau's motion to dismiss.

Judgment reversed. This matter is remanded to the trial court for further proceedings consistent with the opinion.

It is ordered that appellants recover from appellees costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.



MARY EILEEN KILBANE, PRESIDING JUDGE

CHRISTINE T. McMONAGLE, J., CONCURS;
MARY J. BOYLE, J., DISSENTS (SEE SEPARATE DISSENTING OPINION)

MARY J. BOYLE, J., DISSENTING:

I respectfully disagree with the majority and would find that appellants' claims herein against the state sound in contract and not equity. Thus, I agree with the trial court in its application of the very recent Ohio Supreme Court case of *Cristino v. Ohio Bur. of Workers Comp.*, 118 Ohio St.3d 151, 2008-Ohio-2013,

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886 N.E.2d 857. Appellants' claims, therefore, must be brought in the Ohio Court of Claims. Thus, I would affirm the trial court's decision that it lacks subject matter jurisdiction.

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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

POWELL MEASLES ETAL
Plaintiff

Case No: CV-07-623468

Judge: MICHAEL J RUSSO

INDUSTRIAL COMMISSION OF OHIO ETAL
Defendant

JOURNAL ENTRY

96 DISP OTHER - FINAL

FOR THE FOLLOWING REASONS, DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION IS GRANTED. PLAINTIFFS (ON BEHALF OF THEMSELVES AND CLASS MEMBERS) ALLEGE IN THEIR COMPLAINT THAT THEY RECEIVED AWARDS OF PERMANENT TOTAL DISABILITY(PTD) (PARAGRAPH 14). A LUMP SUM ADVANCEMENT (LSA) WAS ISSUED BY DEFENDANTS IN CONNECTION WITH THE PTD AWARD (PARAGRAPH 16). DEFENDANTS DEDUCTED AN AMOUNT FROM EACH CHECK TO RECOVER THE MONIES ISSUED AS THE ADVANCE (PARAGRAPH 17). PLAINTIFFS FURTHER ALLEGE THAT DEFENDANTS CONTINUED TO DEDUCT MONIES FROM THE PLAINTIFFS' FUNDS IN AN AMOUNT GREATER THAN THE TOTAL ADVANCE WHICH HAD BEEN GRANTED; AND/OR DEFENDANTS DEDUCTED MONIES IN AN AMOUNT GREATER THAN THE ADVANCE PLUS INTEREST ALLOWED BY LAW (IF INTEREST IS ALLOWED) (PARAGRAPH 18). PLAINTIFFS' THREE COUNT COMPLAINT SEEKS DECLARATORY AND INJUNCTIVE RELIEF AS WELL AS DISGORGEMENT OF ALL MONIES TAKEN BY DEFENDANTS FROM PLAINTIFFS IN EXCESS OF THE LSA. PLAINTIFFS' CLAIMS ARISE FROM THEIR AGREEMENT WITH THE BUREAU OF WORKERS' COMPENSATION TO RECEIVE A LSA; HOWEVER, THERE IS NO STATUTORY RIGHT TO A LUMP-SUM PAYMENT. A CLAIM BASED ON A LSA MADE PURSUANT TO R.C. 4123.64(A) IS A CLAIM AGAINST THE STATE FOR MONEY DUE UNDER A CONTRACT, IS NOT A CLAIM FOR EQUITABLE RESTITUTION, AND SUCH CLAIMS THEREFORE MUST BE BROUGHT IN THE OHIO COURT OF CLAIMS. CRISTINO V. OHIO BUREAU OF WORKERS' COMPENSATION, 118 OHIO ST.3D 151, 2008-OHIO-2013. AS THIS COURT LACKS SUBJECT MATTER JURISDICTION OVER PLAINTIFFS' CLAIMS, THE CASE IS DISMISSED. COURT COST ASSESSED TO THE PLAINTIFF(S).

Michael J Russo 3-12-09

Judge Signature Date

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MAR 13 2009

GERALD E. FUERST, CLERK
By *[Signature]* Deputy



OHIO MONTHLY RECORD

For 1978-79

supplementing
the Ohio Administrative Code

Rules of state administrative agencies ...
In full text, with tables and index ... including a
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4121-3-10 Awards**(A) Payment.**

(1) Awards of compensation benefits shall be paid in biweekly installments, except that where accruals are permitted by law, the accrued portion of an award will be paid in a lump sum.

(2) Medical awards shall be paid on a monthly basis or a more frequent disbursement schedule, as established by the administrator.

(3) Awards of compensation benefits shall be paid to the employee or dependents if it be a death claim, as established in the adjudication of the claim, or to the duly authorized representative. In the event that a guardian of the property of such employee or such dependents has been appointed, such payment shall be made to such guardian only. If the bureau or commission determines that it is to the best interest of any employee or dependent that a guardian of the property be appointed to receive the benefits payable, payment is withheld until such guardian is appointed.

(B) Lump sum payments or advancements.

Under special circumstances and when deemed advisable, for the purpose of affording financial relief or furthering rehabilitation, the commission may commute an award of compensation benefits to one or more lump sum payments. An application for commutation shall be on a form provided by the commission and/or bureau and shall set forth the nature of the obligation, and when the obligation was incurred. The application must be fully executed and be current. It shall be executed by the claimant before a notary public who shall affix his official seal. Failure to file a completely executed application is grounds for its dismissal. An application for lump sum payment shall embrace all contemplated requests for such payment. Subsequent applications for lump sum payments will not be granted unless sufficient justification is established for the obligation not having been included in the original request. No lump sum payment is to be granted from awards of compensation for temporary total or temporary partial disability.

(1) Lump sum payments, and death awards.

(a) Lump sum advancements to creditors will be considered for allowance in cases of documented emergencies, to pay off loans, to pay off home mortgages or land contracts only in situations where the indebtedness was incurred and recorded prior to the filing of an application for permanent partial disability or death award. For the purchase of a home, the seller is to provide a general warranty deed, abstract or certificate of title and termite reports. No personal loans will be paid unless there is an affidavit signed by the claimant and creditor verifying the existence of a debt.

(b) No advancements are to be made for luxury items such as color tv's or stereo's etc., nor for a down payment on any purchase, nor for the purchase of an automobile unless there is shown a documented need for transportation.

(c) Before an application for lump sum payment will be considered, there must be filed vouchers (F-32) in which the creditors certify as to the nature of the transaction involved and the amount due and unpaid. The

voucher is also to be signed by the claimant.

(d) No one lump sum advancement may exceed more than one-third of the biweekly rate of compensation (excluding attorney fees for services in securing the award). Attorney fees for services in other matters are to be treated in the same manner as other debts.

(e) No additional advancements are to be made which, together with previous advancements, will reduce the biweekly rate of compensation by more than one-third.

(f) All checks are to include the claimant as one of the payees.

(g) Prior to considering an application for lump sum advancement, the commission will ascertain the reduction in the rate of compensation which would be caused should the application be granted, and advise the claimant as to this.

(h) In death claims where death occurred on/or after November 16, 1973, no advancements are to be made from an award granted to a surviving spouse exceeding the amount of death benefits payable over a two-year period.

(i) The commission in its discretion may deviate from the provision of paragraph (B)(1)(a) to (h) when, after due consideration, the commission deems it appropriate to do so.

(2) Lump sum payment of attorney fees for services in securing an award.

(a) An application from a claimant for such purpose is to be accompanied by a certificate, executed by the attorney, listing in detail the services rendered, all fees received prior to the filing of the application for services in obtaining the award under which the advancement to pay the fee is requested, and that the claimant is liable for no further fee with respect to continuing compensation except where a later dispute arises in the claim requiring additional services by the attorney. A copy of this certificate is to be furnished to the claimant by the commission or a staff hearing officer prior to the hearing on the application.

(b) The commission may approve, disapprove or modify applications for lump sum payment to pay such attorney fees, and may allow the payment of a reasonable fee after review of the application and the supporting evidence.

(C) Self-insuring employers.

(1) Paragraph (A) of this rule shall apply to self-insuring employers.

(2) It is the duty of the employer to ascertain the amount of compensation due an employee whose injury or occupational disease has resulted in more than seven days lost time and to pay the amount as ascertained to the employee in the manner provided by law and the rules of the bureau, boards and commission.

(3) It is the duty of the employer to ascertain the amount of compensation due in a compensable death case, and to make payment to the proper dependents in accordance with the governing statutes and the rules of the bureau, boards and commission. In the event death is the result of a compensable injury or occupational disease, the employer shall pay the funeral allowance provided by statute at the time of the death.

(4) All awards made by self-insuring employers must be at least equal to the amounts specified in the applica-

ble statutes, the rules of the industrial commission and the bureau of workers' compensation.

HISTORY: Eff. 12-11-78

Am. 1-10-78; former IC/WC-21-10, am. 1-1-64

REVISED CODE REFERENCES

4121.13, Powers and duties of industrial commission
4121.31, Types of rules to be adopted
4123.05, Workers' compensation; rules and regulations
4123.64, Commutation to lump sum

4121-3-11 Reports of payments by self-insuring employers

(A) During the continuance of the temporary total disability or temporary partial disability caused by an injury or occupational disease, the employer shall, by the tenth day of the month, file a report of compensation payments, form C-83 or such other form as may be provided by the commission and/or bureau, with the bureau showing the amount and type of compensation paid to such employee during the preceding month. The first such monthly report shall indicate the date when the first installment of the type of compensation reported was paid. The second report shall be filed at the end of the thirteenth week showing the changed rate of compensation, if any. The third and subsequent reports shall be made each six months thereafter. In the event the payment of compensation is terminated, the employer shall immediately advise the bureau of that fact stating the amount paid and not previously reported and the reasons for termination on the form C-61 or on such other form as may be provided by the commission and/or bureau.

(B) In the event an injury or occupational disease results in a disability compensable under division (B) or (C) of section 4123.57 of the Revised Code, and an agreement has been entered into between the employee and the employer as to the compensation to be paid for such permanent partial disability, the agreement executed on form C-52 or such other form as may be provided by the commission and/or bureau shall state when the first installment of such compensation is to be paid. Such agreement shall be signed by the employee and employer and shall be filed with the bureau as soon as it has been completed. Such agreement shall be accompanied by a report from the attending physician on which he shall indicate the extent of the permanent partial disability sustained.

(C) In cases of compensable death claims, where the employer and the dependents or legal representatives of a deceased employee agree that his death is compensable, and there being no question of apportionment of death benefits they enter into an agreement in writing as to the benefits which are to be paid, such agreement shall be reported by the employer on a form provided by the commission and/or bureau. It shall indicate the date of the first installment of payment, the weekly rate of death benefits, the period of time over which such benefits will be paid (lifetime or specific dates) and the total amount of benefits in cases where it is known. Such

agreement shall be signed by the employer and the dependent, dependents, or legal representatives and shall be filed with the bureau within one month of the decedent's death. Such agreement shall include provision for the payment of the appropriate funeral, medical, hospital, and other expenses. Subsequent reports of the payment of death benefits shall be filed with the bureau on forms provided by the commission and/or bureau on an annual basis. Should there be a change in death benefits as a result of changes in the dependency status of the recipients, employer's reports shall reflect same.

In other death claims approved for payment by the industrial commission or its hearing officers, the employer shall report payments in the same general manner as indicated above.

(D) In all claims, the self-insuring employer shall, upon completion of the payment of compensation and benefits, report that fact to the bureau on a form provided by the commission and/or bureau indicating the dates of the payment of the first and last installments of compensation, and the total amount of each type paid, together with the total amounts expended for benefits other than compensation according to type of benefit.

(1) Such report shall be signed by the employer and the employee or his dependents or their legal representatives as the circumstances may require.

(2) Upon receipt of such report by the bureau it shall be examined to determine whether or not the payments made have been in conformity to the provisions of the workers' compensation law. If it is found that the reported payments do conform to the provisions of the workers' compensation law the same shall be approved by the bureau and the employer shall be advised thereof. If it is found that the reported payments do not conform, the bureau or commission shall notify the employer of that fact indicating the further payments that are to be made. The employer shall make such payments and file a revised report with the bureau.

(3) If, for any reason, it is impossible for the employer to promptly file a report of payments or an agreement as to compensation paid or to be paid, he shall immediately report that fact and the reason therefor to the bureau. Failure to do so shall be sufficient reason for the industrial commission to take such action as may be indicated.

(E) Where compensation has been ordered paid or where the employee and employer have agreed upon the compensation to be paid, request to the commission may be made by either the employer or the employee or his dependents for authorization to pay all or part of the unpaid balance of the award in one or more lump sum payments. Such request shall be made on a form provided by the commission and/or bureau and shall be filed in duplicate.

HISTORY: Eff. 12-11-78

Former IC/WC-21-11, am. 3-25-73

REVISED CODE REFERENCES

4121.13, Powers and duties of industrial commission
4121.31, Types of rules to be adopted
4121.35, Industrial commission; staff hearing officers
4123.05, Workers' compensation; rules and regulations

4123-3-37. Lump sum advancements.

(A) The administrator of the bureau of workers' compensation may commute an award of compensation to a lump sum payment when the administrator determines that the advancement is advisable for the purpose of providing the injured worker financial relief or for furthering the injured worker's rehabilitation.

(1) The administrator may only grant a lump sum payment to an injured worker from an award of compensation made pursuant to section 4123.58 of the Revised Code or from division (B) of section 4123.57 of the Revised Code.

(2) The administrator may grant a lump sum payment to a surviving spouse from awards of compensation made pursuant to sections 4123.59 of the Revised Code. However, the advancement shall not exceed the amount of death benefits payable to the surviving spouse over a two-year period.

(3) The industrial commission has exclusive jurisdiction over an application for a lump sum advancement for the payment of attorney fees incurred in the securing an award. The bureau shall refer such applications to the industrial commission to adjudicate.

(B) An injured worker shall file an application requesting a lump sum advancement with the bureau. (1) The application shall be fully completed and notarized.

(2) The administrator shall review the application and utilize whatever methods the administrator determines to be appropriate, consistent with general insurance principles, to evaluate the claim for a lump sum payment.

(3) If the administrator determines that the lump sum application is advisable, the administrator shall determine the amount of the biweekly rate reduction and the terms of such reduction. The administrator shall fix a specific time for the reduction of the biweekly rate of compensation to repay the lump sum advancement. The administrator may include interest in the repayment schedule.

(4) The administrator shall issue an order approving or disapproving the application. If the application is approved, the order shall advise the injured worker of the amount of reduction of compensation and the terms of the lump sum advancement.

(C) Maximum rate reduction in compensation. (1) Except for advancements of awards of compensation made pursuant to division (B) of section 4123.57 of the Revised Code, no lump sum advancement shall be approved that will result in a rate reduction of more than one-third of the biweekly rate of compensation, except where the payment is for attorney's fees in accordance with section 4123.06 of the Revised Code.

(2) The administrator may approve more than one lump sum advancement in a claim, but shall not permit more than two concurrent lump sum advancements.

(3) Upon the repayment of the lump sum advancement in accordance with the terms of the order and agreement, the administrator shall remove the rate reduction due to the lump sum advancement and reinstate the injured worker's rate of compensation.

(D) The lump sum advancement warrant shall include the claimant or the surviving spouse as a payee, except where the check is for the payment of attorney's fees in accordance with section 4123.06 of the Revised Code, in which case the attorney shall be named as the only payee on the check.

History:Effective: 12/1/04.

4123.64. Commutation to lump sum

(A) The administrator of workers' compensation, under special circumstances, and when the same is deemed advisable for the purpose of rendering the injured or disabled employee financial relief or for the purpose of furthering his rehabilitation, may commute payments of compensation or benefits to one or more lump-sum payments.

(B) The administrator shall adopt rules which set forth the policy for awarding lump sum payments. The rules shall:

(1) Enumerate the allowable purposes for payments and the conditions for making such awards;

(2) Enumerate the maximum reduction in compensation allowable;

(3) Enumerate the documentation necessary to award a lump-sum payment;

(4) Require that all checks include the claimant as a payee, except where the check is for the payment of attorney's fees in accordance with section 4123.06 of the Revised Code, in which case the attorney shall be named as the only payee on the check;

(5) Require a fully completed and current application including notary and seal; and

(6) Specify procedures to make a claimant aware of the reduction in amount of compensation which will occur.

(C) An order of the administrator issued under this section is appealable pursuant to section 4123.511 [4123.51.1] of the Revised Code but is not appealable to court under section 4123.512 [4123.51.2] of the Revised Code.