

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, ex rel.)
RICK D. WARNER)
)
Appellee,)
)
v.)
)
INDUSTRIAL COMMISSION OF)
OHIO, *et al.*)
)
Appellants.)

Case No. 2010-1283

On appeal from the Court of Appeals for
Franklin County, Ohio, Tenth
Appellate District, Case No. 09AP841

MERIT BRIEF OF APPELLANT CENTRAL ALLIED ENTERPRISES

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STATEMENT OF FACTS

On September 7, 2007, Relator-Appellee Rick Warner sustained an injury while in the course and scope of his employment with Respondent-Appellant Central Allied Enterprises, Inc. ("Central Allied"). App. 5. The resultant workers' compensation claim, BWC claim number 07-374558, has been recognized for face/scalp/neck contusion, left hand abrasion, cervical sprain, thoracic sprain, substantial aggravation of pre-existing left lateral cervical radiculitis, and substantial aggravation of pre-existing cervical spinal stenosis. App. 7. The claim has been specifically disallowed for cervical subluxation, thoracic subluxation, bilateral brachial neuritis, and lumbar sprain/strain. App. 7.

As part of this claim Warner requested temporary total disability benefits. App. 7. To determine Warner's benefit rate Respondent-Appellant Industrial Commission of Ohio needed to address his average weekly wage ("AWW") under the Workers' Compensation Act. In a July 2, 2008 order a District Hearing Officer of the Industrial Commission found claimant's AWW to be \$713.04. App. 5. In reaching that conclusion the DHO divided Warner's wages for the year prior to his injury (\$37,078.29) by fifty-two weeks. App. 5. The DHO's order further noted that "The evidence also indicated that the Injured Worker was a seasonal worker by choice and that periods of unemployment were not due to circumstances beyond his control." App. 6.

The issue of Warner's AWW was next addressed, *de novo*, by an Industrial Commission Staff Hearing Officer on October 8, 2008. App. 5. In the October 8 order the SHO affirmed Warner's AWW rate to be \$713.04. *Id.* The SHO found that Warner

earned \$37,078.29 in wages for the year prior to this injury. Id. The SHO also found that Warner earned these wages in thirty weeks, with twenty-two weeks of unemployment for which he received unemployment benefits from the Ohio Department of Job and Family services. Id.

At the hearing Warner sought to have his twenty-two weeks of unemployment removed from his AWW calculation, asking that his \$37,078.29 earnings be divided by thirty instead of fifty-two. App. 8. This would presumably give him a higher AWW rate of \$1,235.94. Id. However, after reviewing the evidence and hearing testimony the SHO stated:

The Claimant has requested the 22 weeks of unemployment be excluded from the calculation of the Average Weekly Wage. However, the period of unemployment at issue represents a seasonal layoff from the Claimant's employment with an asphalt paving company. The Claimant testified that he had been employed by this Employer for approximately four years prior to the injury in this claim. Further, the Claimant testified that he has been employed in this particular field for many years. Thus, the Hearing Officer finds that the seasonal layoff was not unforeseen and is a normal part of employment within this industry. The Claimant presented no evidence of any attempt to look for work during his period of seasonal layoff. Thus, the Hearing Officer finds that the unemployment sustained by the Claimant represents a lifestyle choice and shall not be excluded from the calculation of the average weekly wage.

Id. The Industrial Commission refused to hear further appeal on the issue of Warner's AWW in a formal order dated November 3, 2008. App. 10.

Warner appealed the Industrial Commission's decision to the Tenth District Court of Appeals, seeking a writ of mandamus, alleging that the Industrial Commission abused its discretion in calculating his AWW. In a February 26, 2010 decision a magistrate of the Court of Appeals held that Warner could not establish an abuse of discretion by the Industrial Commission. App. at 16. However, the Court of Appeals

rejected the Magistrate's Decision. The Court issued a limited writ of mandamus, ordering the Industrial Commission to weigh the evidence of Warner's receipt of unemployment benefits during his seasonal layoff and to include those unemployment benefits in the calculation of his AWW if appropriate. App. at 12, 26.

Both the Industrial Commission of Ohio and Central Allied Enterprises appealed the Court of Appeals' June 7, 2010 Judgment Entry to this Honorable Court as a matter of right. App. at 27-33. As set forth below, the Industrial Commission's calculation of Warner's AWW is supported by the evidence in the record, rendering the Court of Appeal's limited writ inappropriate and contrary to law.

ARGUMENT

I. STANDARD OF REVIEW

To establish the right to a writ of mandamus a relator must establish: 1) that he or she has a legal right to the remedy sought; 2) that the respondent has a clear legal duty to provide the remedy; and 3) that there remains no adequate remedy in the ordinary course of law. *State ex rel. Pressley v. Industrial Commission* (1967), 11 Ohio St. 2d 141.

With regard to decisions by the Industrial Commission of Ohio, it is well established that a writ of mandamus is an extraordinary remedy. *State ex rel. Teece v. Industrial Commission* (1981), 68 Ohio St. 2d 165. A writ of mandamus will only issue if a relator can establish that the Industrial Commission committed an abuse of discretion. *Id.* Ohio courts have also noted that the members of the Industrial Commission are vested with vast discretion in the resolution of factual disputes, and that such decisions

are presumed to be made in good faith and sound judgment. *State ex. rel. Gerspacher v. Coffinberry* (1952), 157 Ohio St. 32. Accordingly, an abuse of discretion “implies not merely error of judgment, but a perversity of will, passion, prejudice, partiality, or moral delinquency.” *State ex rel. Commercial Lovelace Motor Freight, Inc., v. Lancaster* (1986), 22 Ohio St. 3d 191 (quoting *State ex rel. Shafer v. Ohio Turnpike Commission* (1953), 159 Ohio St. 581).

Ohio courts have consistently interpreted the abuse of discretion standard under the “some evidence” rule. An abuse of discretion is only established, and thus a writ of mandamus issued, if there is no evidence to support an Industrial Commission decision. *Id.* at 193. Therefore, to establish an entitlement to a writ of mandamus, Warner must show that there is no evidence to support the Industrial Commission’s conclusion that his AWW rate was properly set at \$713.04.

II. THE INDUSTRIAL COMMISSION DID NOT ABUSE ITS DISCRETION BY EXCLUDING RELATOR’S SEASONAL LAYOFF FROM HIS AVERAGE WEEKLY WAGE CALCULATION.

The Ohio Workers’ Compensation Act provides that an injured workers’ average weekly wage is calculated by dividing his or her wages for the year prior to the injury by fifty-two. R.C. 4123.61; *State ex rel. Clark v. Industrial Commission* (1994), 69 Ohio St. 3d 563. However, periods of unemployment attributable to “sickness, industrial depression, strike, lockout, or other cause beyond the employee’s control” may be excluded from AWW calculations. *Id.*

In this matter the Industrial Commission applied R.C. 4123.61 and divided Warner’s wages for the year prior to this injury (\$37,078.29) by fifty-two to reach a

\$713.04 AWW. App. 8. In issuing a limited writ the Court of Appeals determined that the Industrial Commission abused its discretion by applying the formula set forth above. Specifically, the Court found that the Industrial Commission did not consider Warner's receipt of unemployment compensation benefits when addressing his seasonal layoff for purposes of calculating his AWW. App. 13. Central Allied Enterprises asserts that the Court's finding is contrary to fact and law. The Industrial Commission's calculation of Warner's AWW is supported by some evidence, rendering the issuance of the limited writ contrary to law.

Ohio courts have addressed seasonal layoffs in the context of calculating an injured worker's average weekly wage in several cases. *State ex rel. The Andersons v. Industrial Commission* (1992), 64 Ohio St 3d 539; *State ex rel. Baker Concrete Constr., Inc. v. Industrial Commission* (2004), 102 Ohio St. 3d 149; *State ex rel. R&L Carrier Shared Serv., L.L. v. Industrial Commission*, 2005-Ohio-6372. These cases have consistently held that the weeks of a seasonal layoff are included in AWW calculations if the seasonal employment constitutes a lifestyle choice. *Baker* at 152. The *Baker* Court explained that whether or not seasonal employment is a lifestyle choice is "a question of intent, which in turn, derives from words and actions." *Id.* Therefore, the Industrial Commission must review an employee's words and actions to determine whether or not the employee has elected seasonal employment as a lifestyle when calculating average weekly wages.

In *Baker* an injured worker testified before the Industrial Commission that he expected to be unemployed, and receive unemployment benefits, four months out of every year. *Id.* at 150. The injured worker then presented the same argument

advanced by Warner in this case: his seasonal unemployment was beyond his control, and should therefore be excluded for purposes of his AWW calculation. In support of his position the injured worker asserted, as in this case, that the Ohio Department of Job and Family Services required that his unemployment be beyond his control to receive unemployment compensation. Therefore, he argued, the receipt of unemployment benefits was conclusive evidence that his employment was beyond his control for AWW purposes. *Id.* The Ohio Supreme Court rejected this argument as a matter of law, finding that “worker’s compensation benefits were not intended to subsidize lifestyle choices.” *Id.* at 151.

In reaching its conclusion the Court noted that the injured worker testified to the Industrial Commission that he expected an annual seasonal layoff as part of his employment. Accordingly, the Court referred the matter back to the Industrial Commission to determine if all of the evidence, including the expectation of seasonal layoffs and receipt of unemployment benefits, constituted a lifestyle choice by the injured worker. *Id.* at 152.

In *The Andersons* an injured worker also sought to have his weeks of seasonal unemployment excluded from his AWW calculation. However, in *The Andersons* the Industrial Commission agreed with the injured worker and excluded the seasonal employment from his AWW. In reaching that conclusion the Industrial Commission noted that there was evidence to suggest that an injured worker worked only one year as a seasonal employee, because it was the only employment he could find. *Id.* at 541. Accordingly, the Industrial Commission found that the injured worker had not elected seasonal employment as a lifestyle choice. *Id.* Citing the Industrial Commission’s

review of that evidence the employer's appeal was denied by both the Court of Appeal and this Honorable Court.

Finally, in *R&L Carrier* there was evidence that the injured worker had worked for twenty-five years as a seasonal employee. *Id.* The injured worker further testified before the Industrial Commission that he was actively seeking non-seasonal employment and had, in fact, been searching newspaper advertisements and contacting other drivers and prospective employers in an effort to secure non-seasonal employment. *Id.* Based on this testimony the Industrial Commission determined that the injured workers' actions were evidence that he had not selected seasonal employment as a lifestyle. *Id.* The Court affirmed that conclusion, finding that the Industrial Commission's decision was supported by some evidence.

In this matter the Industrial Commission determined that Warner's seasonal unemployment represented a lifestyle choice. App. at 8. In support of that conclusion the SHO addressed all of the "words and actions" discussed by the courts in *Baker*, *The Andersons* and *R&L Carrier*. Again in this matter the SHO found:

The Claimant testified that he had been employed by this Employer for approximately four years prior to the injury in this claim. Further, the Claimant testified that he has been employed in this particular field for many years. Thus, the Hearing Officer finds that the seasonal layoff was not unforeseen and is a normal part of employment within this industry. The Claimant presented no evidence of any attempt to look for work during his period of seasonal layoff. Thus, the Hearing Officer finds that the unemployment sustained by the Claimant represents a lifestyle choice and shall not be excluded from the calculation of the average weekly wage.

App. at 8.

In reaching its conclusion in this matter the Industrial Commission relied on, and specifically cited, Warner's testimony to the Staff Hearing Officer. Warner testified that

he had worked in this position for multiple seasons and came to expect seasonal unemployment and the receipt of unemployment benefits (as in *Baker*). Moreover, when questioned, Warner could present no evidence of any intent to seek non-seasonal employment (as in *R&L Carrier*). After reviewing the evidence the SHO determined Warner's words and actions supported the conclusion that seasonal employment was a lifestyle choice. There was no evidence to the contrary.

Accordingly, the Industrial Commission's decision that Warner's seasonal employment constituted a lifestyle choice, and in turn to include his weeks of seasonal unemployment in his AWW calculation, is supported by some evidence. In reaching these conclusions the SHO specifically cited and relied on Warner's testimony before the Industrial Commission. As the Industrial Commission's decision is supported by some evidence the issuance of a writ of mandamus is contrary to law.

III. THE INDUSTRIAL COMMISSION OF OHIO DID NOT ABUSE ITS DISCRETION BY EXCLUDING RELATOR'S UNEMPLOYMENT BENEFITS FROM HIS AVERAGE WEEKLY WAGE CALCULATION.

As set forth above, the formula for calculating AWW benefits under The Ohio Workers' Compensation Act is to divide an injured workers' wages for the year prior to the injury by fifty-two. R.C. 4123.61; *State ex rel. Clark v. Industrial Commission* (1994), 69 Ohio St. 3d 563. In this matter the Industrial Commission divided Warner's wages for the year prior to this injury (\$37,078.29) by fifty-two to reach a \$713.04 AWW.

As part of his application for wage loss benefits Warner argued that the unemployment benefits he received during his seasonal layoff should be included in his AWW calculation. App. at 8. From November 2006, through April 2007, Relator

received unemployment benefits in the amount of \$8,856.00. App. at 1-4. He argued that this amount (\$8,856.00) should be added to his wages for the year prior to this injury (\$37,078.29) when calculating his AWW. App. at 8. The Industrial Commission rejected Warner's position, finding that income from unemployment benefits was not wages for calculating AWW. App. at 8. In issuing the limited writ the Court of Appeals rejected the Industrial Commission's conclusion. App. at 15. However, as set forth below, the rationale given for that decision by the Court of Appeals is contrary to law.

The Ohio Supreme Court addressed the issue of non-wage income and AWW calculations in *State ex rel. McDulin v. Industrial Commission* (2000), 89 Ohio St. 3d 390. In *McDulin*, the injured worker asked the Industrial Commission to include "miscellaneous income" when calculating his AWW. *Id.* at 390. The income in question was reimbursement for lodging, meals, and tool and truck expenses, which were included on the injured worker's 1099 federal tax form. *Id.* at 392. The Industrial Commission refused to include the non-wage income in the injured workers' AWW calculation.

The Ohio Supreme Court affirmed the Industrial Commission's refusal to include this income in the AWW calculation. The Court reviewed the Workers' Compensation Act, and controlling Ohio law, and held that AWW calculations are limited to an injured worker's wages, and must not include any non-wage income. The Court explained:

Claimant asks us to substitute the term "income" for the terms "wage" and "earnings."

This is important, because the distinction in terms transforms claimant's proposal into a request that we read into a statute words that are not contained therein.

To hold as claimant advocates is inappropriate from a legal perspective, for to do so would permit the inclusion into the AWW calculation of dividends, interest, and other forms of income unrelated to claimant's job performance. This is clearly not what the General Assembly had in mind.

Id. at 392.

As set forth above, the Court in *McDulin* clearly limits AWW calculations to an injured worker's wages: "monetary remuneration by an employer for labor or services." *Id.* at 392. Moreover, the Court specifically rejected the inclusion of all forms of non-wage income from AWW calculations. As the Court noted, to find otherwise would open the floodgates for the inclusion of all forms of "income" to AWW calculations (i.e. dividends, interest, capital gains, inheritance, lottery winnings). This was clearly not the General Assembly's intent and all non-wage income has been excluded from AWW calculations accordingly.

The Court of Appeals in this matter found that Warner's unemployment benefits should be included in the AWW calculation because, "unemployment compensation is taxable income for purposes of the Internal Revenue Code." App. at 15 (emphasis added). However, this premise was patently rejected by the Supreme Court in *McDulin*, when the Court refused to include "income" reported on an injured worker's 1099 federal tax form in AWW calculations. In doing so the Court instructed that "income" may not be substituted for "wages" when calculating AWW under this Worker's Compensation Act. The Court of Appeals failed to make that distinction when rendering the limited writ on this issue. According, the writ, as issued by the Court of Appeals, is contrary to law.

CONCLUSION

In Ohio the Industrial Commission is vested with vast discretion in the resolution of factual disputes, and such decisions are presumed to be made in good faith and sound judgment. Therefore, to be entitled to the requested writ Warner must show that the Industrial Commission abused its discretion in the calculation of his AWW rate. An abuse of discretion is only established if there is no evidence to support an Industrial Commission decision.

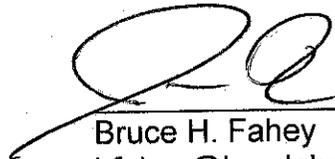
In this matter the Industrial Commission cited specific instances in Warner's testimony before the Industrial Commission. After reviewing the evidence the Industrial Commission found, in its discretion, that said testimony supported the conclusion that Warner's seasonal employment was a lifestyle choice. Because the Industrial Commission cited specific evidence in support of its conclusion an abuse of discretion cannot be established.

Moreover, Ohio law forbids the inclusion of all forms of non-wage income in the calculation of AWW rates. Accordingly, Warner's request to have unemployment benefits included in his AWW calculation is not supported by, and is in direct conflict with, Ohio law.

Based on the foregoing the issuance of a limited writ of mandamus by the Court of Appeals usurps the inherent discretion of the Industrial Commission of Ohio, as its order was supported by specific testimony by Mr. Warner. Moreover, the writ as issued is in direct conflict with this Court's decision in *State ex rel. McDulin v. Industrial Commission*.

Accordingly, Central Allied Enterprises respectfully requests that the Court of Appeal's June 7, 2010 Judgment Entry be reversed, and Warner's request for a writ of mandamus must be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing was served this 12th day of May, 2011, by regular U.S.

Mail on:

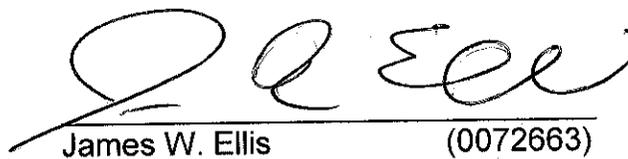
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APPENDIX

SECTION 5. RECORD ON APPEAL

S.Ct. Prac. R. 5.1. Composition of the Record on Appeal.

In all appeals, the record on appeal shall consist of the original papers and exhibits to those papers; the transcript of proceedings and exhibits, along with an electronic version of the transcript, if available; and certified copies of the journal entries and the docket prepared by the clerk of the court or other custodian of the original papers. Where applicable, the record on appeal shall consist of all of the above items from both the court of appeals and the trial court.

Effective Date: June 1, 1994

Amended Effective: April 1, 1996; April 1, 2000; July 1, 2004; January 1, 2008; January 1, 2010.

S.Ct. Prac. R. 5.2. When Record Is to Be Transmitted to Supreme Court from Court of Appeals.

In every case on appeal to the Supreme Court from a court of appeals, the clerk of the court of appeals or other custodian having possession of the record shall not transmit the record to the Supreme Court unless and until the Supreme Court issues an order to the custodian to transmit the record pursuant to S.Ct. Prac. R. 5.3.

Effective Date: June 1, 1994

Amended Effective: April 1, 1996; April 1, 2000; July 1, 2004; January 1, 2008; January 1, 2010.

S.Ct. Prac. R. 5.3. Certification and Transmission of Record from Court of Appeals.

(A) Upon order of the Supreme Court, the clerk of the court of appeals or other custodian having possession of the record shall certify and transmit the record to the Clerk of the Supreme Court. Unless otherwise ordered by the Supreme Court, the record shall be transmitted within twenty days of the order. If the case involves termination of parental rights or adoption of a minor child, or both, preparation and transmission of the record shall be expedited and given priority over preparation and transmission of the records in other cases.

(B) The record shall be transmitted along with an index that lists all items included in the record. All items and exhibits listed in the index, regardless of whether they are transmitted, shall be briefly described. The clerk of the court of appeals or other custodian transmitting the record shall send a copy of the index to all counsel of record in the case. The Clerk of the Supreme Court shall notify counsel of record when the record is filed in the Supreme Court.

Effective Date: June 1, 1994

Amended Effective: April 1, 1996; April 1, 2000; July 1, 2004; January 1, 2008; January 1, 2010.

S.Ct. Prac. R. 5.4. Submission of Record from Board of Tax Appeals.

(A) Transmission of the record in an appeal of a decision from the Board of Tax Appeals shall be as prescribed by section 5717.04 of the Revised Code. For the purposes of filing the record with the Clerk of the Supreme Court, the Board may transmit a video or audio record of any hearing before the Board, and if a written transcript was created, it shall be included.

(B) If a written transcript of a hearing is not included, the appellant shall file a written transcript of the hearing with the Clerk of the Supreme Court when the appellant files its merit brief as provided by S.Ct. Prac. R. 6.2. The Supreme Court may dismiss an appeal where no written transcript has been provided, or sua sponte order the appellant to file a written transcript.

Effective Date: January 1, 2010.

Commentary

This rule was added to address the transmission of the record in appeals from the Board of Tax Appeals.

S.Ct. Prac. R. 5.5. Submission of Record from Public Utilities Commission.

The word “forthwith” as used in section 4903.21 of the Revised Code, providing that upon service or waiver of service of the notice of appeal the Public Utilities Commission shall forthwith transmit to the Clerk of the Supreme Court a complete transcript of the proceeding, shall mean a period of thirty days. If at the expiration of thirty days the transcript has not been filed, the appellant shall have an additional three days in which to file a complaint in the Supreme Court for a writ of mandamus to compel the Commission to file the transcript. The appeal shall be dismissed if, at the expiration of thirty-three days, neither the transcript nor a complaint for a writ of mandamus has been filed.

Effective Date: June 1, 1994

Amended Effective: April 1, 1996; April 1, 2000; July 1, 2004; January 1, 2008; January 1, 2010.

S.Ct. Prac. R. 5.6. Items Not to Be Transmitted with the Record.

(A) The custodian of the record shall not transmit any physical exhibits unless directed to do so by the Clerk of the Supreme Court or as required by division (B) of this rule.

(B) The custodian shall transmit any audio exhibits, video exhibits, and documents such as papers, maps, or photographs.

(C) If exhibits are not transmitted pursuant to division (A) of this rule the custodian who certifies the record shall designate in the index the exhibits not being transmitted and identify the custodian of those exhibits.

Effective Date: June 1, 1994

Amended Effective: April 1, 1996; April 1, 2000; July 1, 2004; January 1, 2008; January 1, 2010.

Commentary

The changes to this rule are for clarification only. The items to be transmitted as part of the record remain the same as under the prior version of the rule.

S.Ct. Prac. R. 5.7. Transmission of Record in Death Penalty Appeals.

(A) In cases in which the death penalty has been imposed by the court of common pleas for an offense committed before January 1, 1995, the creation, transmission, supplementation, and correction of the record shall be governed by S.Ct. Prac. R. 5.1 through 5.8.

(B) In cases in which the death penalty has been imposed by the court of common pleas for an offense committed on or after January 1, 1995, the creation, transmission, supplementation, and correction of the record shall be governed by S.Ct. Prac. R. 19.4 and 19.5.

Effective Date: June 1, 1994

Amended Effective: April 1, 1996; April 1, 2000; July 1, 2004; January 1, 2008; January 1, 2010.

Commentary

This rule has been amended so that the portions of the record that are transmitted in death penalty appeals are the same portions that are transmitted in all other appeals. The rule still permits the Court to order any portion of the record that is not transmitted if it deems necessary.

S.Ct. Prac. R. 5.8. Supplementation of the Record.

If any part of the record is not transmitted to the Supreme Court but is necessary to the Supreme Court's consideration of the questions presented on appeal, the Supreme Court, on its own initiative or on motion of a party, may direct that a supplemental record be certified and transmitted to the Clerk of the Supreme Court in accordance with S.Ct. Prac. R. 5.3(B).

Effective Date: June 1, 1994

Amended Effective: April 1, 1996; April 1, 2000; July 1, 2004; January 1, 2008; January 1, 2010.

S.Ct. Prac. R. 5.9. Return of Record.

After the mandate has been issued in a case on appeal, the Clerk of the Supreme Court shall return the record to the clerk or custodian that transmitted the record.

Effective Date: January 1, 2010.

Commentary

Rule 5.9 was former Rule XIII and was added to Section Five so that all rules concerning the record on appeal are contained in the same section.

SECTION 6. BRIEFS ON THE MERITS IN APPEALS

S.Ct. Prac. R. 6.1. Limitation on Application of Briefing Rules.

The filing deadlines imposed by S.Ct. Prac. R. 6.2 through 6.7 do not apply to appeals involving the imposition of the death penalty for an offense committed on or after January 1, 1995, and instituted under S.Ct. Prac. R. 2.1(C)(1). Filing deadlines for briefs in those appeals are governed by S.Ct. Prac. R. 19.6.

Effective Date: June 1, 1994

Amended Effective: April 1, 1996; April 1, 2000; June 1, 2000; July 1, 2004; January 1, 2008; January 1, 2010.

S.Ct. Prac. R. 6.2. Appellant's Brief.

[See Appendix D following these rules for a sample brief.]

(A) Time to file

(1) In every appeal involving termination of parental rights or adoption of a minor child, or both, the appellant shall file a merit brief with the Supreme Court within twenty days from the date the Clerk of the Supreme Court files the record from the court of appeals.

(2) In every other appeal, the appellant shall file a merit brief within forty days from the date the Clerk files the record from the court of appeals or the administrative agency. In any case, the appellant shall not file a merit brief prior to the filing of the record by the Clerk.

(B) Contents

The appellant's brief shall contain all of the following:

(1) A table of contents listing the table of authorities cited, the statement of facts, the argument with proposition or propositions of law, and the appendix, with references to the pages of the brief where each appears.

(2) A table of the authorities cited, listing the citations for all cases or other authorities, arranged alphabetically; constitutional provisions; statutes; ordinances; and administrative rules or regulations upon which appellant relies, with references to the pages of the brief where each citation appears.

(3) A statement of the facts with page references, in parentheses, to supporting portions of both the original transcript of testimony and any supplement filed in the case pursuant to S.Ct. Prac. R. 7.1 through 7.2.

(4) An argument, headed by the proposition of law that appellant contends is applicable to the facts of the case and that could serve as a syllabus for the case if appellant prevails. If several propositions of law are presented, the argument shall be divided with each proposition set forth as a subheading.

(5) An appendix, numbered separately from the body of the brief, containing copies of all of the following:

(a) The date-stamped notice of appeal to the Supreme Court, the notice of certified conflict, or the federal court certification order, whichever is applicable;

(b) The judgment or order from which the appeal is taken;

(c) The opinion, if any, relating to the judgment or order being appealed;

(d) All judgments, orders, and opinions rendered by any court or agency in the case, if relevant to the issues on appeal;

(e) Any relevant rules or regulations of any department, board, commission, or any other agency, upon which appellant relies;

(f) Any constitutional provision, statute, or ordinance upon which appellant relies, to be construed, or otherwise involved in the case;

(g) In appeals from the Public Utilities Commission, the appellant's application for rehearing.

(C) Page limit

Except in death penalty appeals of right, the appellant's brief shall not exceed fifty numbered pages, exclusive of the table of contents, the table of authorities cited, the certificate of service, and the appendix.

Effective Date: June 1, 1994

Amended Effective: April 1, 1996; April 1, 2000; June 1, 2000; July 1, 2004; January 1, 2008; January 1, 2010.

Commentary

The citation to *Drake v. Bucher* (1966), 5 Ohio St.2d 37, 39, 213 N.E.2d 182, 184 was removed.

S.Ct. Prac. R. 6.3. Appellee's Brief.

(A) Time to file

(1) In every appeal involving termination of parental rights or adoption of a minor child, or both, within twenty days after the filing of appellant's brief the appellee shall file a merit brief.

(2) In every other appeal, the appellee shall file a merit brief within thirty days after the filing of appellant's brief.

(3) If the case involves multiple appellants who file separate merit briefs, the appellee shall file only one merit brief responding to all of the appellants' merit briefs. The time for filing the appellee's brief shall be calculated from the date the last brief in support of appellant is filed.

(B) Contents

The appellee's brief shall comply with the provisions in S.Ct. Prac. R. 6.2(B), answer the appellant's contentions, and make any other appropriate contentions as reasons for affirmance of the order or judgment from which the appeal is taken. A statement of facts may be omitted from the appellee's brief if the appellee agrees with the statement of facts given in the appellant's merit brief. The appendix need not duplicate any materials provided in the appendix of the appellant's brief.

(C) Page limit

Except in death penalty appeals of right, the appellee's brief shall not exceed fifty numbered pages, exclusive of the table of contents, the table of authorities cited, the certificate of service, and any appendix.

Effective Date: June 1, 1994

Amended Effective: April 1, 1996; April 1, 2000; June 1, 2000; July 1, 2004; January 1, 2008; January 1, 2010.

S.Ct. Prac. R. 6.4. Appellant's Reply Brief.

(A) Time to file

(1) In every appeal involving termination of parental rights or adoption of a minor child, or both, the appellant may file a reply brief within fifteen days after the filing of appellee's brief.

(2) In every other appeal, the appellant may file a reply brief within twenty days after the filing of appellee's brief.

(3) If the case involves multiple appellees who file separate merit briefs, the appellant shall file only one reply brief, if any, responding to all of the appellees' merit briefs. The time for filing the appellant's reply brief, if any, shall be calculated from the date the last brief in support of appellee is filed.

(B) Page limit

Except in death penalty appeals of right, the reply brief shall not exceed twenty numbered pages, exclusive of the table of contents, the table of authorities cited, the certificate of service, and any appendix.

Effective Date: June 1, 1994

Amended Effective: April 1, 1996; April 1, 2000; June 1, 2000; July 1, 2004; January 1, 2008; January 1, 2010.

S.Ct. Prac. R. 6.5. Merit Briefs in Case Involving Cross-Appeal.

(A) Requirements

In a case involving a cross-appeal, each of the parties shall be permitted to file two briefs, and each brief shall conform to the requirements of S.Ct. Prac. R. 6.2(B).

(B) First brief

(1) (a) In every appeal involving termination of parental rights or adoption of a minor child, or both, the appellant/cross-appellee shall file the first merit brief within twenty days from the date the Clerk files the record from the court of appeals.

(b) In every other appeal, the appellant/cross-appellee shall file the first merit brief within forty days from the date the Clerk files the record from the court of appeals or the administrative agency.

(2) Except in death penalty appeals of right, this first brief shall not exceed fifty numbered pages, exclusive of the table of contents, the table of authorities cited, the certificate of service, and the appendix.

(C) Second brief

(1) (a) In every appeal involving termination of parental rights or adoption of a minor child, or both, the appellee/cross-appellant shall file the second merit brief within twenty days after the filing of the first brief.

(b) In every other appeal, the appellee/cross-appellant shall file the second merit brief within thirty days after the filing of the first brief. The second brief shall be a combined brief containing both a response to the appellant/cross-appellee's brief and the propositions of law and arguments in support of the cross-appeal.

(2) Except in death penalty appeals of right, the second brief shall not exceed fifty numbered pages, exclusive of the table of contents, the table of authorities cited, the certificate of service, and the appendix.

(D) Third brief

(1) (a) In every appeal involving termination of parental rights or adoption of a minor child, or both, the appellant/cross-appellee shall file the third merit brief within twenty days after the filing of the second brief.

(b) In every other appeal, the appellant/cross-appellee shall file the third merit brief within thirty days after the filing of the second brief. If the appellant/cross-appellee elects to file a reply brief in that party's appeal, the third brief shall be a combined brief containing both a reply and a response to the arguments in the cross-appeal. Otherwise, the third brief shall include only a response in opposition to the cross-appeal.

(2) Except in death penalty appeals of right, the third brief shall not exceed fifty numbered pages, exclusive of the table of contents, the table of authorities cited, the certificate of service, and any appendix.

(E) Fourth brief

(1) The fourth brief may be filed by the appellee/cross-appellant only as a reply brief in the cross-appeal.

(a) In every appeal involving termination of parental rights or adoption of a minor child, or both, if a fourth brief is filed, it shall be filed within fifteen days after the filing of the third brief.

(b) In every other appeal, if a fourth brief is filed, it shall be filed within twenty days after the filing of the third brief.

(2) Except in death penalty appeals of right, a fourth brief shall not exceed twenty numbered pages, exclusive of the table of contents, the table of authorities cited, the certificate of service, and any appendix.

Effective Date: June 1, 1994

Amended Effective: April 1, 1996; April 1, 2000; June 1, 2000; July 1, 2004; January 1, 2008; January 1, 2010.

Commentary

Divisions in this rule were separated for clarification.

S.Ct. Prac. R. 6.6. Brief of Amicus Curiae.

(A) An amicus curiae may file a brief urging affirmance or reversal, and leave to file an amicus brief is not required. The brief shall conform to the requirements of this rule, except that an amicus filing a brief in support of an appellant need not include the appendix required by S.Ct. Prac. R. 6.2(B)(5).

(B) The cover of an amicus brief shall identify the party on whose behalf the brief is being submitted or indicate that the brief does not expressly support the position of any parties to the appeal. If the amicus brief is in support of an appellant, the brief shall be filed within the time for filing allowed to the appellant to file a merit brief, and the amicus curiae may file a reply brief within the time allowed to the appellant to file a reply brief. If the amicus brief is in support of an appellee or does not expressly support the position of any party, the brief shall be filed within the time for filing allowed to the appellee to file a merit brief. The Clerk shall refuse to file an amicus brief that is not submitted timely.

Effective Date: June 1, 1994

Amended Effective: April 1, 1996; April 1, 2000; June 1, 2000; July 1, 2004; January 1, 2008; January 1, 2010.

S.Ct. Prac. R. 6.7. Consequence of Failure to File Briefs.

(A) If the appellant fails to file a merit brief within the time provided by S.Ct. Prac. R. 6.2 or as extended in accordance with S.Ct. Prac. R. 14.3, the Supreme Court may dismiss the appeal.

(B) If the appellee fails to file a merit brief within the time provided by S.Ct. Prac. R. 6.3 or as extended in accordance with S.Ct. Prac. R. 14.3, the Supreme Court may accept the appellant's statement of facts and issues as correct and reverse the judgment if appellant's brief reasonably appears to sustain reversal.

Effective Date: June 1, 1994

Amended Effective: April 1, 1996; April 1, 2000; June 1, 2000; July 1, 2004; January 1, 2008; January 1, 2010.

S.Ct. Prac. R. 6.8. Prohibition Against Supplemental Briefing.

Except as provided in S.Ct. Prac. R. 8.7 and S.Ct. Prac. R. 9.8 and 9.9, merit briefs shall not be supplemented. If a relevant authority is issued after the deadline has passed for filing a party's merit brief, that party may file a citation to the relevant authority but shall not file additional argument.

Effective Date: June 1, 1994

Amended Effective: April 1, 1996; April 1, 2000; June 1, 2000; July 1, 2004; January 1, 2008; January 1, 2010.

SECTION 7. SUPPLEMENTS TO THE BRIEFS

S.Ct. Prac. R. 7.1. Parties' Supplements and Content.

(A) In every civil case on appeal to the Supreme Court from a court of appeals or an administrative agency, the appellant may prepare and file a supplement to the briefs that contains those portions of the record necessary to enable the Supreme Court to determine the questions presented. Parties to an appeal are encouraged to consult and agree on the contents of the supplement to minimize the appellee's need for filing a supplement. Documents not necessary to determine the questions presented shall not be included in the supplement. The fact that parts of the record are not included in the supplement shall not prevent the parties or the Supreme Court from relying on those parts of the record.

(B) The appellant shall file the supplement with the appellant's merit brief.

(C) The appellee may file a supplement to the merit briefs in the manner required by division (A) of this rule. The appellee's supplement shall not unnecessarily duplicate documents contained in the appellant's supplement.

(D) The appellee's supplement shall be filed with the appellee's merit brief.

Effective Date: June 1, 1994

Amended Effective: April 1, 1996; July 1, 2004; January 1, 2008; January 1, 2010.

Commentary

Division (A) was restructured for clarification. Former division (B) was eliminated. Former section 3 became division (C) and the "second" supplement was renamed "appellee's supplement."

S.Ct. Prac. R. 7.2. Pagination and Indexing of Supplement.

(A) The pages of the supplement shall be consecutively numbered in the bottom right-hand corner.

(B) If any portion of a transcript is included in the supplement, the original page numbering of the transcript shall be placed in parentheses.

(C) The supplement shall include an index that lists all items included in the supplement and references the page numbers at which each item can be located.

Effective Date: June 1, 1994

Amended Effective: April 1, 1996; July 1, 2004; January 1, 2008; January 1, 2010.

SECTION 5. RECORD ON APPEAL

S.Ct. Prac. R. 5.1. Composition of the Record on Appeal.

In all appeals, the record on appeal shall consist of the original papers and exhibits to those papers; the transcript of proceedings and exhibits, along with an electronic version of the transcript, if available; and certified copies of the journal entries and the docket prepared by the clerk of the court or other custodian of the original papers. Where applicable, the record on appeal shall consist of all of the above items from both the court of appeals and the trial court.

Effective Date: June 1, 1994

Amended Effective: April 1, 1996; April 1, 2000; July 1, 2004; January 1, 2008; January 1, 2010.

S.Ct. Prac. R. 5.2. When Record Is to Be Transmitted to Supreme Court from Court of Appeals.

In every case on appeal to the Supreme Court from a court of appeals, the clerk of the court of appeals or other custodian having possession of the record shall not transmit the record to the Supreme Court unless and until the Supreme Court issues an order to the custodian to transmit the record pursuant to S.Ct. Prac. R. 5.3.

Effective Date: June 1, 1994

Amended Effective: April 1, 1996; April 1, 2000; July 1, 2004; January 1, 2008; January 1, 2010.

S.Ct. Prac. R. 5.3. Certification and Transmission of Record from Court of Appeals.

(A) Upon order of the Supreme Court, the clerk of the court of appeals or other custodian having possession of the record shall certify and transmit the record to the Clerk of the Supreme Court. Unless otherwise ordered by the Supreme Court, the record shall be transmitted within twenty days of the order. If the case involves termination of parental rights or adoption of a minor child, or both, preparation and transmission of the record shall be expedited and given priority over preparation and transmission of the records in other cases.

(B) The record shall be transmitted along with an index that lists all items included in the record. All items and exhibits listed in the index, regardless of whether they are transmitted, shall be briefly described. The clerk of the court of appeals or other custodian transmitting the record shall send a copy of the index to all counsel of record in the case. The Clerk of the Supreme Court shall notify counsel of record when the record is filed in the Supreme Court.

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OFFICE OF UNEMPLOYMENT COMPENSATION
UNEMPLOYMENT BENEFIT PAYMENT

(07-374558)

Claimant's Name RICK D. WARNER			Social Security Number	
Date 12/04/2006	Deposit Transaction Number 33806222228	Total Remaining Benefits \$3,647.00	Amount Deposited \$***587.00	

EACH ITEM BELOW APPLIES TO YOUR CLAIM - MAINTAIN THIS STUB AS YOUR RECORD OF PAYMENT

WEEK ENDING	WEEKLY BENEFIT AMOUNT	EARNINGS	INCOME	GROSS AMOUNT PAYABLE	OVER-PAYMENT OFFSET	CHILD SUPPORT	FEDERAL TAX	NET PAYABLE AMOUNT
11/25/2006	\$416.00	\$327.25	\$0.00	\$171.00	\$0.00	\$0.00	\$0.00	\$171.00
12/02/2006	\$416.00	\$0.00	\$0.00	\$416.00	\$0.00	\$0.00	\$0.00	\$416.00



OFFICE OF UNEMPLOYMENT COMPENSATION
UNEMPLOYMENT BENEFIT PAYMENT

Claimant's Name RICK D. WARNER			Social Security Number	
Date 11/02/2007	Deposit Transaction Number 00206006699	Total Remaining Benefits \$2,022.00	Amount Deposited \$***819.00	

EACH ITEM BELOW APPLIES TO YOUR CLAIM - MAINTAIN THIS STUB AS YOUR RECORD OF PAYMENT

WEEK ENDING	WEEKLY BENEFIT AMOUNT	EARNINGS	INCOME	GROSS AMOUNT PAYABLE	OVER-PAYMENT OFFSET	CHILD SUPPORT	FEDERAL TAX	NET PAYABLE AMOUNT
12/23/2006	\$416.00	\$72.00	\$0.00	\$416.00	\$12.00	\$0.00	\$0.00	\$403.00
12/30/2006	\$416.00	\$0.00	\$0.00	\$416.00	\$0.00	\$0.00	\$0.00	\$416.00



OFFICE OF UNEMPLOYMENT COMPENSATION
UNEMPLOYMENT BENEFIT PAYMENT

Claimant's Name RICK D. WARNER			Social Security Number	
Date 2/18/2006	Deposit Transaction Number 35206282717	Total Remaining Benefits \$2,841.00	Amount Deposited \$***806.00	

EACH ITEM BELOW APPLIES TO YOUR CLAIM - MAINTAIN THIS STUB AS YOUR RECORD OF PAYMENT

WEEK ENDING	WEEKLY BENEFIT AMOUNT	EARNINGS	INCOME	GROSS AMOUNT PAYABLE	OVER-PAYMENT OFFSET	CHILD SUPPORT	FEDERAL TAX	NET PAYABLE AMOUNT
12/09/2006	\$416.00	\$108.50	\$0.00	\$390.00	\$0.00	\$0.00	\$0.00	\$390.00
12/16/2006	\$416.00	\$52.50	\$0.00	\$416.00	\$0.00	\$0.00	\$0.00	\$416.00

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07-374558



OFFICE OF UNEMPLOYMENT COMPENSATION
UNEMPLOYMENT BENEFIT PAYMENT

JPS-01110 08/01/2006

Claimant's Name RICK D. WARNER			Social Security Number
Date 01/19/2007	Deposit Transaction Number 01907117038	Total Remaining Benefits \$8,620.00	Amount Deposited \$***431.00

EACH ITEM BELOW APPLIES TO YOUR CLAIM - MAINTAIN THIS STUB AS YOUR RECORD OF PAYMENT

WEEK ENDING	WEEKLY BENEFIT AMOUNT	EARNINGS	INCOME	GROSS AMOUNT PAYABLE	OVER-PAYMENT OFFSET	CHILD SUPPORT	FEDERAL TAX	NET PAYABLE AMOUNT
01/13/2007	\$431.00	\$0.00	\$0.00	\$431.00	\$0.00	\$0.00	\$0.00	\$431.00



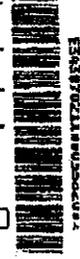
OFFICE OF UNEMPLOYMENT COMPENSATION
UNEMPLOYMENT BENEFIT PAYMENT

JPS-01110 08/01/2006

Claimant's Name RICK D. WARNER			Social Security Number
Date 01/22/2007	Deposit Transaction Number 02207128007	Total Remaining Benefits \$8,189.00	Amount Deposited \$***431.00

EACH ITEM BELOW APPLIES TO YOUR CLAIM - MAINTAIN THIS STUB AS YOUR RECORD OF PAYMENT

WEEK ENDING	WEEKLY BENEFIT AMOUNT	EARNINGS	INCOME	GROSS AMOUNT PAYABLE	OVER-PAYMENT OFFSET	CHILD SUPPORT	FEDERAL TAX	NET PAYABLE AMOUNT
01/20/2007	\$431.00	\$0.00	\$0.00	\$431.00	\$0.00	\$0.00	\$0.00	\$431.00



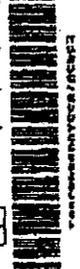
OFFICE OF UNEMPLOYMENT COMPENSATION
UNEMPLOYMENT BENEFIT PAYMENT

JPS-01110 08/01/2006

Claimant's Name RICK D. WARNER			Social Security Number
Date 02/05/2007	Deposit Transaction Number 03607214589	Total Remaining Benefits \$7,327.00	Amount Deposited \$***862.00

EACH ITEM BELOW APPLIES TO YOUR CLAIM - MAINTAIN THIS STUB AS YOUR RECORD OF PAYMENT

WEEK ENDING	WEEKLY BENEFIT AMOUNT	EARNINGS	INCOME	GROSS AMOUNT PAYABLE	OVER-PAYMENT OFFSET	CHILD SUPPORT	FEDERAL TAX	NET PAYABLE AMOUNT
01/27/2007	\$431.00	\$0.00	\$0.00	\$431.00	\$0.00	\$0.00	\$0.00	\$431.00
02/03/2007	\$431.00	\$0.00	\$0.00	\$431.00	\$0.00	\$0.00	\$0.00	\$431.00



CCT-7 04/20/27

07-374558



OFFICE OF UNEMPLOYMENT COMPENSATION

UNEMPLOYMENT BENEFIT PAYMENT

JFS-81110 08/01/2006

Claimant's Name: **RICK D. WARNER** Social Security Number: _____

Date: **02/20/2007** Deposit Transaction Number: **05107304581** Total Remaining Benefits: **\$6,465.00** Amount Deposited: **\$\$\$862.00**

EACH ITEM BELOW APPLIES TO YOUR CLAIM - MAINTAIN THIS STUB AS YOUR RECORD OF PAYMENT

WEEK ENDING	WEEKLY BENEFIT AMOUNT	EARNINGS	INCOME	GROSS AMOUNT PAYABLE	OVER-PAYMENT OFFSET	CHILD SUPPORT	FEDERAL TAX	NET PAYABLE AMOUNT
02/10/2007	\$431.00	\$0.00	\$0.00	\$431.00	\$0.00	\$0.00	\$0.00	\$431.00
02/17/2007	\$431.00	\$0.00	\$0.00	\$431.00	\$0.00	\$0.00	\$0.00	\$431.00



OFFICE OF UNEMPLOYMENT COMPENSATION

UNEMPLOYMENT BENEFIT PAYMENT

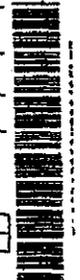
JFS-81110 08/01/2006

Claimant's Name: **RICK D. WARNER** Social Security Number: _____

Date: **03/05/2007** Deposit Transaction Number: **06407396999** Total Remaining Benefits: **\$5,603.00** Amount Deposited: **\$\$\$862.00**

EACH ITEM BELOW APPLIES TO YOUR CLAIM - MAINTAIN THIS STUB AS YOUR RECORD OF PAYMENT

WEEK ENDING	WEEKLY BENEFIT AMOUNT	EARNINGS	INCOME	GROSS AMOUNT PAYABLE	OVER-PAYMENT OFFSET	CHILD SUPPORT	FEDERAL TAX	NET PAYABLE AMOUNT
02/24/2007	\$431.00	\$0.00	\$0.00	\$431.00	\$0.00	\$0.00	\$0.00	\$431.00
03/03/2007	\$431.00	\$0.00	\$0.00	\$431.00	\$0.00	\$0.00	\$0.00	\$431.00



OFFICE OF UNEMPLOYMENT COMPENSATION

UNEMPLOYMENT BENEFIT PAYMENT

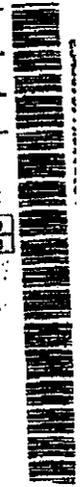
JFS-81110 08/01/2006

Claimant's Name: **RICK D. WARNER** Social Security Number: _____

Date: **03/19/2007** Deposit Transaction Number: **07807484716** Total Remaining Benefits: **\$4,741.00** Amount Deposited: **\$\$\$862.00**

EACH ITEM BELOW APPLIES TO YOUR CLAIM - MAINTAIN THIS STUB AS YOUR RECORD OF PAYMENT

WEEK ENDING	WEEKLY BENEFIT AMOUNT	EARNINGS	INCOME	GROSS AMOUNT PAYABLE	OVER-PAYMENT OFFSET	CHILD SUPPORT	FEDERAL TAX	NET PAYABLE AMOUNT
03/10/2007	\$431.00	\$0.00	\$0.00	\$431.00	\$0.00	\$0.00	\$0.00	\$431.00
03/17/2007	\$431.00	\$0.00	\$0.00	\$431.00	\$0.00	\$0.00	\$0.00	\$431.00



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OFFICE OF UNEMPLOYMENT COMPENSATION
UNEMPLOYMENT BENEFIT PAYMENT

07-374558

Claimant's Name RICK D. WARNER			Social Security Number
Date 04/02/2007	Deposit Transaction Number 09207566190	Total Remaining Benefits \$3,879.00	Amount Deposited \$***862.00

EACH ITEM BELOW APPLIES TO YOUR CLAIM - MAINTAIN THIS STUB AS YOUR RECORD OF PAYMENT

WEEK ENDING	WEEKLY BENEFIT AMOUNT	EARNINGS	INCOME	GROSS AMOUNT PAYABLE	OVER-PAYMENT OFFSET	CHILD SUPPORT	FEDERAL TAX	NET PAYABLE AMOUNT
03/24/2007	\$431.00	\$0.00	\$0.00	\$431.00	\$0.00	\$0.00	\$0.00	\$431.00
03/31/2007	\$431.00	\$0.00	\$0.00	\$431.00	\$0.00	\$0.00	\$0.00	\$431.00



OFFICE OF UNEMPLOYMENT COMPENSATION
UNEMPLOYMENT BENEFIT PAYMENT

Claimant's Name RICK D. WARNER			Social Security Number
Date 04/16/2007	Deposit Transaction Number 10607640064	Total Remaining Benefits \$3,017.00	Amount Deposited \$***862.00

EACH ITEM BELOW APPLIES TO YOUR CLAIM - MAINTAIN THIS STUB AS YOUR RECORD OF PAYMENT

WEEK ENDING	WEEKLY BENEFIT AMOUNT	EARNINGS	INCOME	GROSS AMOUNT PAYABLE	OVER-PAYMENT OFFSET	CHILD SUPPORT	FEDERAL TAX	NET PAYABLE AMOUNT
04/07/2007	\$431.00	\$0.00	\$0.00	\$431.00	\$0.00	\$0.00	\$0.00	\$431.00
04/14/2007	\$431.00	\$0.00	\$0.00	\$431.00	\$0.00	\$0.00	\$0.00	\$431.00



OFFICE OF UNEMPLOYMENT COMPENSATION
UNEMPLOYMENT BENEFIT PAYMENT

Claimant's Name RICK D. WARNER			Social Security Number
Date 04/30/2007	Deposit Transaction Number 12007715262	Total Remaining Benefits \$2,155.00	Amount Deposited \$***862.00

EACH ITEM BELOW APPLIES TO YOUR CLAIM - MAINTAIN THIS STUB AS YOUR RECORD OF PAYMENT

WEEK ENDING	WEEKLY BENEFIT AMOUNT	EARNINGS	INCOME	GROSS AMOUNT PAYABLE	OVER-PAYMENT OFFSET	CHILD SUPPORT	FEDERAL TAX	NET PAYABLE AMOUNT
04/21/2007	\$431.00	\$0.00	\$0.00	\$431.00	\$0.00	\$0.00	\$0.00	\$431.00
04/28/2007	\$431.00	\$0.00	\$0.00	\$431.00	\$0.00	\$0.00	\$0.00	\$431.00

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The Industrial Commission of Ohio
RECORD OF PROCEEDINGS

Claim Number: 07-374558 Claims Heard: 07-374558
 LT-ACC-OSIF-COV
PCN: 2081501 Rick D. Warner

RICK D. WARNER
645 COMMERCIAL AVE SW
NEW PHILADELPHIA OH 44663-9365

Date of Injury: 9/07/2007 Risk Number: 374267-0

This claim has been previously allowed for: CONTUSION FACE/SCALP/NECK;
ABRASION - LEFT HAND; CERVICAL SPRAIN/STRAIN, THORACIC SPRAIN/STRAIN;
SUBSTANTIAL AGGRAVATION PRE-EXISTING LATERAL CERVICAL RADICULITIS LEFT;
SUBSTANTIAL AGGRAVATION PRE-EXISTING CERVICAL SPINAL STENOSIS.

DISALLOWED: CERVICAL SUBLUXATION; THORACIC SUBLUXATION; BILATERAL BRACHIAL
NEURITIS; LUMBAR SPRAIN/STRAIN.

This matter was heard on 07/02/2008 before District Hearing Officer
Gary M. Bash pursuant to the provisions of Ohio Revised Code Section
4121.34 and 4123.511 on the following:

C-84 Request For Temporary Total Compensation filed by Injured Worker on
05/19/2008.
Issue: 1) Request For Temporary Total

APPEAL filed by Injured Worker on 06/09/2008 from the order of the
Administrator dated 06/04/2008.
Issue: 1) Full Weekly Wages/Average Weekly Wages

APPEAL filed by Employer on 06/12/2008 from the order of the Administrator
dated 06/06/2008.
Issue: 1) Substantial Aggravation of Pre-existing Condition -
CERVICAL RADICULITIS - LEFT SIDED.

APPEAL filed by Employer on 06/23/2008 from the order of the Administrator
dated 06/04/2008.
Issue: 1) Full Weekly Wages/Average Weekly Wages

Notices were mailed to the injured worker, the employer, their respective
representatives and the Administrator of the Bureau of Workers'
Compensation not less than 14 days prior to this date, and the following
were present at the hearing:

APPEARANCE FOR THE INJURED WORKER: Stocker, Injured Worker
APPEARANCE FOR THE EMPLOYER: Davies
APPEARANCE FOR THE ADMINISTRATOR: None

It is the order of the District Hearing Officer that the C-84 filed
05/19/2008 is dismissed pursuant to the request of counsel for the Injured
Worker.

The orders of the Administrator dated 06/04/2008 and 06/06/2008 are vacated.

It is the decision of the District Hearing Officer to set the full weekly
wage at \$1,495.03 based on wages of \$8,970.19 divided by six.

It is the decision of the District Hearing Officer to set the average
weekly wage at \$713.04 based on wages of \$37,078.29 divided by 52 weeks.

The Industrial Commission of Ohio

RECORD OF PROCEEDINGS

Claim Number: 07-374558

NOTE: INJURED WORKERS, EMPLOYERS, AND THEIR AUTHORIZED REPRESENTATIVES MAY REVIEW THEIR ACTIVE CLAIMS INFORMATION THROUGH THE INDUSTRIAL COMMISSION WEB SITE AT www.ohioic.com. ONCE ON THE HOME PAGE OF THE WEB SITE, PLEASE CLICK I.C.O.N. AND FOLLOW THE INSTRUCTIONS FOR OBTAINING A PASSWORD. ONCE YOU HAVE OBTAINED A PASSWORD, YOU SHOULD BE ABLE TO ACCESS YOUR ACTIVE CLAIM(S).

The Industrial Commission of Ohio
RECORD OF PROCEEDINGS

Claim Number: 07-374558
LT-ACC-OSIF-COV
PCN: 2081501 Rick D. Warner

Claims Heard: 07-374558

RICK D. WARNER
645 COMMERCIAL AVE SW
NEW PHILADELPHIA OH 44663-9365

Date of Injury: 9/07/2007

Risk Number: 374267-0

This claim has been previously allowed for: CONTUSION FACE/SCALP/NECK;
ABRASION - LEFT HAND; CERVICAL SPRAIN/STRAIN, THORACIC SPRAIN/STRAIN;
SUBSTANTIAL AGGRAVATION PRE-EXISTING LATERAL CERVICAL RADICULITIS LEFT;
SUBSTANTIAL AGGRAVATION PRE-EXISTING CERVICAL SPINAL STENOSIS.
DISALLOWED: CERVICAL SUBLUXATION; THORACIC SUBLUXATION; BILATERAL BRACHIAL
NEURITIS; LUMBAR SPRAIN/STRAIN.

This matter was heard on 10/08/2008 before Staff Hearing Officer
Gary J. Frame pursuant to the provisions of Ohio Revised Code Section
4121.35(B) and 4123.511(D) on the following:

APPEAL of District Hearing Officer order from the hearing dated
07/02/2008, filed by Employer on 07/31/2008.

- Issue: 1) Request For Temporary Total
2) Full Weekly Wages/Average Weekly Wages
3) Substantial Aggravation Of Pre-Existing Condition - CERVICAL
RADICULITIS - LEFT SIDED
4) Substantial Aggravation Of Pre-Existing Condition - CERVICAL
SPINAL STENOSIS
5) Full Weekly Wages/Average Weekly Wages

Notices were mailed to the injured worker, the employer, their respective
representatives and the Administrator of the Bureau of Workers'
Compensation not less than 14 days prior to this date, and the following
were present for the hearing:

APPEARANCE FOR THE INJURED WORKER: Stocker, Claimant
APPEARANCE FOR THE EMPLOYER: Fike, Sinclair
APPEARANCE FOR THE ADMINISTRATOR: None

The order of the District Hearing Officer from the hearing dated 07/02/2008
is vacated.

It is the order of the Staff Hearing Officer that the Injured Worker's C-86
filed 05/02/2008 is granted to the extent of this order.

The District Hearing Officer dismissed the Claimant's C-84 filed 05/19/2008
at the Claimant's representative's request at that hearing. Accordingly,
this issue shall not be further addressed herein.

For purposes of clarity, the Hearing Officer finds that the additional
allowance of cervical spinal stenosis relates to C3-4, C5-6, and C6-7 based
on the 10/19/2007 MRI report.

It is the order of the Staff Hearing Officer that the claim is additionally
allowed for the conditions of "SUBSTANTIAL AGGRAVATION OF PRE-EXISTING
CERVICAL SPINAL STENOSIS AT C3-4, C5-6, AND C6-7; LEFT SIDED CERVICAL
RADICULITIS."

This order is based on the 10/19/2007 MRI report; the 10/05/2007 Affinity

The Industrial Commission of Ohio

RECORD OF PROCEEDINGS

Claim Number: 07-374558

Medical Center Emergency Room report that describes cervical radiculopathy; the 10/23/2007 C-9 report of Dr. Brown that diagnoses an aggravation of pre-existing cervical spinal stenosis; the 07/31/2008 independent medical review of Dr. Kaffen that indicates that the Claimant has presented sufficient documentation to demonstrate an aggravation of his pre-existing cervical spine condition; the 05/21/2008 independent medical examination report of Dr. Kovesdi that supports the conclusion that the Claimant sustained a substantial aggravation of pre-existing cervical spinal stenosis when he was injured on 09/07/2007 and that he developed left sided cervical radiculitis as a direct and proximate result of this industrial injury; and the Claimant's testimony that following a previous cervical surgery in 1993 he had no problems with his cervical spine and no radiating left arm pain until the industrial injury in this claim.

Although the Claimant's C-86 originally requested the condition of cervical radiculitis by way of substantial aggravation, the Hearing Officer elects to address this issue by way of direct causation pursuant to Hearing Officer Manual Memorandum S11 based on the 05/21/2008 independent medical examination report of Dr. Kovesdi and the Claimant's testimony regarding his lack of left arm radiating pain prior to the industrial injury in this claim.

It is the order of the Staff Hearing Officer that the Full Weekly Wage is set at \$1,495.03 based on the Claimant's earnings in the 6 weeks prior to the date of injury including overtime, \$8,970.19 divided by 6 weeks. This figure is adopted as it is higher than the Claimant's earnings in the week prior to the date of injury without overtime.

The Claimant has requested that 22 weeks of unemployment be excluded from the calculation of the Average Weekly Wage. However, the period of unemployment at issue represents a seasonal layoff from the Claimant's employment with an asphalt paving company. The Claimant testified that he had been employed by this Employer for approximately four years prior to the injury in this claim. Further, the Claimant testified that he has been employed in this particular field for many years. Thus, the Hearing Officer finds that the seasonal layoff was not unforeseen and is a normal part of employment within this industry. The Claimant has presented no evidence of any attempt to look for work during his period of seasonal layoff. Thus, the Hearing Officer finds that the unemployment sustained by the Claimant represents a lifestyle choice and shall not be excluded from the calculation of the Average Weekly Wage. State ex rel Baker Concrete Constr., Inc. v. Indus. Comm. (2004), 102 Ohio St. 3d 149.

In the alternative, the Claimant requests that his unemployment benefits be included in the calculation of the Average Weekly Wage. However, the Hearing Officer finds that unemployment benefits are not "earnings" or "wages" and therefore cannot be included in the calculation of the Average Weekly Wage. State ex rel McDulin v. Indus. Comm. (2000), 89 Ohio St. 3d 390.

Accordingly, it is the order of the Staff Hearing Officer that the Average Weekly Wage is set at \$713.04 based on \$37,078.29 divided by 52 weeks.

Previously paid compensation is to be adjusted as appropriate in accordance with Ohio Revised Code 4123.511, 4123.52, 4123.61, and 4123.62.

This order is based on the payroll records on file from the Employer of Record.

All evidence was reviewed and considered.

An Appeal from this order may be filed within 14 days of the receipt of the order. The Appeal may be filed online at www.ohioic.com or the Appeal (IC-12) may be sent to the Industrial Commission of Ohio, Canton District Office, 400 Third Street, S.E., Ste 1, Canton OH 44702.

The Industrial Commission of Ohio
RECORD OF PROCEEDINGS

Claim Number: 07-374558

Typed By: eh
Date Typed: 10/08/2008

Gary J. Frame
Staff Hearing Officer

Findings Mailed: 10/11/2008

Electronically signed by
Gary J. Frame

The parties and representatives listed below have been sent this record of proceedings. If you are not an authorized representative of either the injured worker or employer, please notify the Industrial Commission.

07-374558
Rick D. Warner
645 Commercial Ave SW
New Philadelphia OH 44663-9365

ID No: 11362-90
Steven E Stocker
437 Market Ave N
Canton OH 44702-1543

Risk No: 374267-0
Central Allied Enterprises Inc
PO Box 80449
Canton OH 44708-0449

ID No: 900-80
Companagement, Inc.
PO Box 884
Dublin OH 43017-6884

ID No: 1698-80
Kastner, Westman & Wilkins, Lic
3480 W Market St Ste 300
Fairlawn OH 44333-3369

BWC, LAW DIRECTOR

NOTE: INJURED WORKERS, EMPLOYERS, AND THEIR AUTHORIZED REPRESENTATIVES MAY REVIEW THEIR ACTIVE CLAIMS INFORMATION THROUGH THE INDUSTRIAL COMMISSION WEB SITE AT www.ohioic.com. ONCE ON THE HOME PAGE OF THE WEB SITE, PLEASE CLICK I.C.O.N. AND FOLLOW THE INSTRUCTIONS FOR OBTAINING A PASSWORD. ONCE YOU HAVE OBTAINED A PASSWORD, YOU SHOULD BE ABLE TO ACCESS YOUR ACTIVE CLAIM(S).

The Industrial Commission of Ohio
RECORD OF PROCEEDINGS

Claim Number: 07-374558
LT-ACC-OSIF-COV
PCN: 2081501 Rick D. Warner

Claims Heard: 07-374558

RICK D. WARNER
645 COMMERCIAL AVE SW
NEW PHILADELPHIA OH 44663-9365

Date of Injury: 9/07/2007

Risk Number: 374267-0

APPEAL filed by Employer on 10/30/2008.
Issue: 1) Request For Temporary Total
2) Full Weekly Wages/Average Weekly Wages
3) Substantial Aggravation Of Pre-Existing Condition - CERVICAL
RADICULITIS - LEFT SIDED
4) Substantial Aggravation Of Pre-Existing Condition - CERVICAL
SPINAL STENOSIS
5) Full Weekly Wages/Average Weekly Wages

Pursuant to the authority of the Industrial Commission under Ohio Revised Code 4123.511(E), it is ordered that the Appeal filed 10/30/2008 by the Employer from the order issued 10/11/2008 by the Staff Hearing Officer be refused and that copies of this order be mailed to all interested parties.

This appeal was reviewed by two Staff Hearing Officers on behalf of the commission. Both Staff Hearing Officers concur with this decision.

ANY PARTY MAY APPEAL AN ORDER OF THE COMMISSION, OTHER THAN A DECISION AS TO EXTENT OF DISABILITY, TO THE COURT OF COMMON PLEAS WITHIN 60 DAYS AFTER RECEIPT OF THE ORDER, SUBJECT TO THE LIMITATIONS CONTAINED IN OHIO REVISED CODE 4123.512.

Date Reviewed: 11/03/2008(WB)
Typed By: lwg
Date Typed: 11/04/2008
Findings Mailed: 11/06/2008

Robert Cromley
Staff Hearing Officer

Electronically signed by
Robert Cromley

The parties and representatives listed below have been sent this record of proceedings. If you are not an authorized representative of either the injured worker or employer, please notify the Industrial Commission.

07-374558
Rick D. Warner
645 Commercial Ave SW
New Philadelphia OH 44663-9365

ID No: 11362-90
Steven E Stocker
437 Market Ave N
Canton OH 44702-1543

The Industrial Commission of Ohio
RECORD OF PROCEEDINGS

Claim Number: 07-374558

Risk No: 374267-0
Central Allied Enterprises Inc
PO Box 80449
Canton OH 44708-0449

ID No: 900-80
Compmanagement, Inc.
PO Box 884
Dublin OH 43017-6884

ID No: 1698-80
Kastner, Westman & Wilkins, Llc
3480 W Market St Ste 300
Fairlawn OH 44333-3369

BWC, LAW DIRECTOR

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FILED
COURT OF APPEALS
FRANKLIN CO. OHIO
2010 JUN -3 PM 2:19
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio ex rel. Rick D. Warner, :
 :
 Relator, :
 :
 v. : No. 09AP-841
 :
 Industrial Commission of Ohio and : (REGULAR CALENDAR)
 Central Allied Enterprises, Inc., :
 :
 Respondents. :
 :

D E C I S I O N

Rendered on June 3, 2010

Stocker Pitts Co. LPA, and Thomas R. Pitts, for relator.

Richard Cordray, Attorney General, and Gerald H. Waterman, for respondent Industrial Commission of Ohio.

Kastner Westman & Wilkins, LLC, and James W. Ellis, for respondent Central Allied Enterprises, Inc.

IN MANDAMUS
ON OBJECTIONS TO MAGISTRATE'S DECISION

TYACK, P.J.

{¶1} Rick D. Warner ("Warner") filed this action in mandamus, seeking a writ to compel the Industrial Commission of Ohio ("commission") to raise his average weekly wage ("AWW").

{¶2} In accord with Loc.R. 12, the case was referred to a magistrate to conduct appropriate proceedings. The parties stipulated the pertinent evidence and filed briefs. The magistrate then issued a magistrate's decision containing detailed findings of fact and conclusions of law, which is appended to this decision. The magistrate's decision includes a recommendation that we not grant the requested writ.

{¶3} Counsel for Warner has filed objections to the magistrate's decision. Counsel for the commission has filed a memorandum in response. Counsel for Central Allied Enterprises, Inc. ("Allied"), has also filed a memorandum in response. The case is now before the court for a full, independent review.

{¶4} Warner was injured in September 2007 while working in the asphalt paving industry. In that industry, workers actually work for most of the year but routinely are idle during the months when Ohio weather prevents asphalt paving. Some workers draw unemployment compensation. Some seek other employment. Warner apparently drew unemployment compensation during the time he was not working in asphalt paving.

{¶5} A staff hearing officer ("SHO") with the commission set Warner's full weekly wage at \$1,495.03 based upon his earnings for the six weeks prior to his injury. The SHO set Warner's AWW at \$713.04, based upon earnings of \$37,078.29 for the full year prior to the injury. The SHO did not include any income for the weeks Warner was idle, including income from unemployment compensation. The SHO found that Warner chose to work in an industry which only works part of the year and that unemployment compensation is neither earnings nor wages for purposes of computing AWW. Our magistrate accepted these findings and reached the same result.

{¶6} Warner's counsel attacks these findings with the following objections:

1. The Magistrate erred in concluding that the Industrial Commission did not abuse its discretion by improperly including a period of unemployment which was beyond the Injured Worker's control when setting the average weekly wage.

2. The Magistrate erred in concluding that the Industrial Commission did not abuse its discretion by including both the Injured Worker's period of unemployment and excluding unemployment compensation received during the same period when setting the average weekly wage.

{¶7} Warner had worked for Allied Enterprises for four years when he was injured. He had worked in the asphalt paving industry for many more with other employers. In 2008, he was unemployed for 22 weeks and drew unemployment compensation. R.C. 4141.29(A)(4)(a)(i) requires that a laid-off worker demonstrate that he or she is actively seeking work in order to receive unemployment compensation. Thus, the information before the SHO and our magistrate contains a fact from which a job search could be inferred. However, no additional evidence of a job search was presented.

{¶8} The SHO found that Warner "presented no evidence of any attempt to look for work during his period of seasonal layoff." This finding is technically incorrect because the SHO had detailed evidence of the payment of unemployment compensation. See *State ex rel. Baker Concrete Constr., Inc. v. Indus. Comm.*, 102 Ohio St.3d 149, 2004-Ohio-2114. As a result, the SHO did not attempt to weigh or balance the evidence. The finding that this was no evidence meant that this was nothing to weigh for Warner. This was an error to be corrected upon further review.

{¶9} We also reject the SHO's findings with respect to the exclusion of unemployment compensation with respect to the AWW. Unemployment compensation is taxable income for purposes of the Internal Revenue Code. Penalizing an injured worker for periods of unemployment when the injured worker could be found to have sought work in the previous year seems inherently unreasonable and unfair. An AWW is intended to be a fair basis for the loss of future compensation for a worker who is injured on the job. See *State ex rel. Wireman v. Indus. Comm.* (1990), 49 Ohio St.3d 286. Especially in the current economy an injured worker should not be penalized for accepting employment for part-time work or work in an industry which has periods of lay-off.

{¶10} Both objections on behalf of Warner are sustained. We grant a limited writ of mandamus to compel the commission to weigh the evidence with regard to Warner seeking employment during the time Allied Enterprises idled him via a seasonal layoff. Based upon that weighing, the commission shall further address the inclusion of the unemployment compensation in computation of Warner's AWW.

*Objections sustained;
limited writ granted.*

McGRATH and CONNOR, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Rick D. Warner,	:	
	:	
Relator,	:	
	:	
v.	:	No. 09AP-841
	:	
Industrial Commission of Ohio and	:	(REGULAR CALENDAR)
Central Allied Enterprises, Inc.,	:	
	:	
Respondents.	:	
	:	

MAGISTRATE'S DECISION

Rendered on February 26, 2010

Stocker Pitts Co. LPA, and Thomas R. Pitts, for relator.

Richard Cordray, Attorney General, and Gerald H. Waterman, for respondent Industrial Commission of Ohio.

Kastner Westman & Wilkins, LLC, and James W. Ellis, for respondent Central Allied Enterprises, Inc.

IN MANDAMUS

{¶11} Relator, Rick D. Warner, has filed this original action requesting that this court issue a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order setting his average weekly wage ("AWW") at \$713.07 based on wages of \$37,078.29 divided by 52 weeks upon a finding that relator was a

seasonal worker by choice and ordering the commission to exclude his period of unemployment and ordering the commission to include unemployment compensation he received during that same period.

Findings of Fact:

{¶12} 1. Relator sustained a work-related injury on September 7, 2007, and his claim has been allowed for the following conditions:

Contusion face/scalp/neck; abrasion – left hand; cervical sprain/strain, thoracic sprain/strain; substantial aggravation pre-existing lateral cervical radiculitis left; substantial aggravation pre-existing cervical spinal stenosis.

{¶13} 2. Relator filed an application for temporary total disability ("TTD") compensation beginning April 23, 2008, and continuing.

{¶14} 3. On July 2, 2008, a hearing was held before a district hearing officer ("DHO"). At that time, relator dismissed his request for TTD compensation. Thereafter, the DHO considered the matter of relator's AWW. The DHO made the following determination:

It is the decision of the District Hearing Officer to set the average weekly wage at \$713.04 based on wages of \$37,078.29 divided by 52 weeks.

This decision is based on the wages on file in the year prior to the date of injury. The evidence also indicated that the Injured Worker was a seasonal worker by choice and that periods of unemployment were not due to circumstances beyond his control.

{¶15} 4. Upon appeal, the matter was heard before a staff hearing officer ("SHO") on October 8, 2008. The SHO considered relator's arguments and made the following determination with regard to setting relator's AWW:

It is the order of the Staff Hearing Officer that the Full Weekly Wage is set at \$1,495.03 based on the Claimant's earnings in the 6 weeks prior to the date of injury including overtime, \$8,970.19 divided by 6 weeks. This figure is adopted as it is higher than the Claimant's earnings in the week prior to the date of injury without overtime.

The Claimant has requested that 22 weeks of unemployment be excluded from the calculation of the Average Weekly Wage. However, the period of unemployment at issue represents a seasonal layoff from the Claimant's employment with an asphalt paving company. The Claimant testified that he had been employed by this Employer for approximately four years prior to the injury in this claim. Further, the Claimant testified that he has been employed in this particular field for many years. Thus, the Hearing Officer finds that the seasonal layoff was not unforeseen and is a normal part of employment within this industry. The Claimant has presented no evidence of any attempt to look for work during his period of seasonal layoff. Thus, the Hearing Officer finds that the unemployment sustained by the Claimant represents a lifestyle choice and shall not be excluded from the calculation of the Average Weekly Wage. *State ex rel Baker Concrete Constr., Inc. v. Indus. Comm.* (2004), 102 Ohio St. 3d 149.

In the alternative, the Claimant requests that his unemployment benefits be included in the calculation of the Average Weekly Wage. However, the Hearing Officer finds that unemployment benefits are not "earnings" or "wages" and therefore cannot be included in the calculation of the Average Weekly Wage. *State ex rel McDulin v. Indus. Comm.* (2000), 89 Ohio St. 3d 390.

Accordingly, it is the order of the Staff Hearing Officer that the Average Weekly Wage is set at \$713.04 based on \$37,078.29 divided by 52 weeks.

{¶16} 5. On September 8, 2009, relator filed the instant mandamus action in this court challenging the commission's determination of his AWW.

Conclusions of Law:

{¶17} In order for this court to issue a writ of mandamus as a remedy from a determination of the commission, relator must show a clear legal right to the relief sought and that the commission has a clear legal duty to provide such relief. *State ex rel. Pressley v. Indus. Comm.* (1967), 11 Ohio St.2d 141. A clear legal right to a writ of mandamus exists where the relator shows that the commission abused its discretion by entering an order which is not supported by any evidence in the record. *State ex rel. Elliott v. Indus. Comm.* (1986), 26 Ohio St.3d 76. On the other hand, where the record contains some evidence to support the commission's findings, there has been no abuse of discretion and mandamus is not appropriate. *State ex rel. Lewis v. Diamond Foundry Co.* (1987), 29 Ohio St.3d 56. Furthermore, questions of credibility and the weight to be given evidence are clearly within the discretion of the commission as fact finder. *State ex rel. Teece v. Indus. Comm.* (1981), 68 Ohio St.2d 165.

{¶18} In this mandamus action, relator argues that the commission abused its discretion by improperly including a period of unemployment which was beyond his control and in excluding the unemployment compensation received by relator in calculating his AWW. For the reasons that follow, relator's request for a writ of mandamus should be denied.

{¶19} As a general rule, AWW is typically computed by dividing the claimant's total earnings for the year preceding the injury by 52 weeks. R.C. 4123.61. The statute also provides in part: "In ascertaining the average weekly wage for the year previous to the injury, or the date the disability due to the occupational disease begins any period of

unemployment due to sickness, industrial depression, strike, lockout, or other cause beyond the employee's control shall be eliminated."

{¶20} Relator argues that the commission abused its discretion by applying the above formula. Instead, relator argues that the commission should have excluded 22 weeks of seasonal unemployment from his AWW calculation because it represents a period of unemployment beyond his control. In the alternative, relator contends that the commission should have included the unemployment benefits he received during his seasonal layoff in calculating his AWW.

{¶21} In *State ex rel. Baker Concrete Constr., Inc. v. Indus. Comm.*, 102 Ohio St.3d 149, 2004-Ohio-2114, a dispute arose over how to handle the 16 weeks of the claimant's unemployment that followed the employer's yearly seasonal slowdown and accompanying layoffs. The claimant sought to have both the 16 weeks of unemployment and the amount of unemployment compensation excluded from the calculation. The employer argued that the claimant was employed as a union construction worker who expected to work 8 months out of the year and expected to receive unemployment compensation for 4 months out of each calendar year. The claimant testified that this pattern repeated itself every year. The commission excluded the 16 weeks of unemployment and the unemployment compensation paid for those weeks, finding that the unemployment was due to circumstances beyond the claimant's control and the nature of the construction business. This court issued a limited writ of mandamus returning the cause to the commission and the Supreme Court of Ohio agreed. The *Baker* court determined that the commission's fleeting reference to the

claimant's unemployment benefits reflected a lack of analysis of the critical question of whether the claimant's 16 weeks of unemployment were actually beyond his control.

The *Baker* court stated:

At issue is the excludability of claimant's 16 weeks of seasonal unemployment. Claimant maintains that unemployment was beyond his control as demonstrated by his receipt of Ohio Bureau of Employment Services ("OBES") benefits.¹ Baker counters that the annual, as opposed to one-time, occurrence of claimant's seasonal layoff removes it from the realm of unforeseen and hence involuntary unemployment.

To date, foreseeability of job loss has not rendered seasonal unemployment voluntary. In *State ex rel. The Andersons v. Indus. Comm.* (1992), 64 Ohio St.3d 539, 597 N.E.2d 143, the claimant knew up front that his job would only last six to eight months. The employer contested exclusion of the subsequent unemployment from the AWW calculation, asserting that because claimant accepted the job knowing that he would be released at season's end, the unemployment that followed could not be considered beyond his control.

The employer did not prevail. In upholding exclusion, we cited the principle of encouraging gainful employment, observing that the claimant may have taken the position because it was all that he could find.

The Andersons' precepts obviously do not transfer seamlessly to this case. There is no evidence in this case that claimant took this job because it was the only one available. Likewise, there is no proof that claimant has stayed at this job over the years because other options did not exist. Herein lies the dilemma. It is one thing to work a seasonal job because no alternatives are present. It is perhaps another when seasonal employment becomes a pattern. At that point, it is legitimate to ask whether such employment has become a lifestyle choice.

¹ R.C. 4141.29(A)(4)(a)(i) premises these benefits on proof that the individual is actively seeking work.

We have decisively declared that workers' compensation benefits are not intended to subsidize lifestyle choices. Over a decade ago, in *State ex rel. Pauley v. Indus. Comm.* (1990), 53 Ohio St.3d 263, 559 N.E.2d 1333, we declined to award impaired-earning-capacity benefits to a claimant who left the labor market to stay home with her children. Even where the claimant has remained in the work force, extra scrutiny is given to employment that is not regular full-time work. This now includes part-time and self-employment and, because of the potential lifestyle benefits of seasonal work, may include this new category as well. See, e.g., *State ex rel. Pepsi-Cola Bottling Co. v. Morse* (1995), 72 Ohio St.3d 210, 648 N.E.2d 827; *State ex rel. Brinkman v. Indus. Comm.* (1999), 87 Ohio St.3d 171, 718 N.E.2d 897; *State ex rel. Ooten v. Siegel Interior Specialists Co.* (1998), 84 Ohio St.3d 255, 703 N.E.2d 306.

While the phrase "lifestyle choice" has been applied only to benefit eligibility and not the amount thereof, it may very well be relevant in calculating AWW. AWW cannot provide a windfall to claimants. *State ex rel. Wireman v. Indus. Comm.* (1990), 49 Ohio St.3d 286, 551 N.E.2d 1265. It follows, therefore, that if seasonal unemployment springs from a lifestyle choice, then those weeks of unemployment are not beyond a claimant's control and omitting those weeks from the AWW contradicts both the statute and case law.

Determining whether a particular employment pattern is a lifestyle choice relevant to calculating a claimant's AWW is logically a question of intent, which, in turn, derives from words and actions. * * *

Id. at ¶14-20.

{¶22} Relator points to that portion of the court's decision where the court criticized the commission's statements that he expected to work eight months out of the year and to receive unemployment compensation for four months out of the calendar year. The court was critical because that statement does not demonstrate intent. Relator contends that the commission's statements in the present case are every bit as

conclusory and constitute an abuse of discretion. For the reasons that follow, this magistrate disagrees.

{¶23} Following the *Baker* decision, claimants, such as relator, are well aware of the type of information they must present to the commission regarding their intent. In the present case, relator indicated that he had been in the asphalt paving business for a number of years and that he had worked for this specific employer for the last four years. Relator could have presented evidence that, in the preceding years, he obtained other employment during the period of seasonal unemployment; however, it does not appear that he did so. Relator also could have presented evidence that there were no other alternatives available to him but this employment. Apparently, he failed to do so. In *Baker*, the court made clear that this type of evidence could demonstrate that repeated seasonal unemployment over a number of years is not necessarily voluntary, in which case the commission could find that it was not a lifestyle choice. Because the commission is only required to cite the evidence upon which it relies and provide a brief explanation, the magistrate finds that the commission did not need to explain what evidence relator could have, but did not, presented in support of his argument. Again, following *Baker*, relator should have been aware of the type of evidence he needed to present and the magistrate finds that he failed in sustaining his burden of proof in this regard.

{¶24} Relator also contends the fact that he was receiving unemployment compensation is evidence that he was actively seeking employment. However, as the

court in *Baker* concluded, a job search that satisfies the Ohio Bureau of Employment Services ("OBES") might not satisfy the commission.

{¶25} Relator also cites this court's decision in *State ex rel. R & L Carriers Shared Servs., L.L. v. Indus. Comm.*, 10th Dist. No. 05AP-282, 2005-Ohio-6372, and asserts that it is analogous to his situation. This magistrate disagrees. In *R & L Carriers*, the claimant had a 25 year history as a truck driver for a company that delivered construction materials to job sites. This work was seasonal in nature and the claimant was usually laid off in late fall or early winter each year. The commission noted that, for the first 24 years, the claimant's seasonal employment may or may not be characterized as a lifestyle choice. However, the commission relied on the claimant's testimony to find that this time he did not just accept the seasonal layoff as he had in prior years. Instead, the claimant testified that his current situation no longer provided him with sufficient income to meet his bills and he had been taking steps to secure new and better employment. The claimant testified that he read newspaper want ads, networked with other drivers, and visited local truck stops. The claimant also testified that he applied for positions with five separate companies and that it was through these efforts that he had been hired by the employer for whom he was working at the time he was injured. As such, the commission determined that the 27 weeks of unemployment in the year prior to his injury were properly excluded from the calculation of his AWW.

{¶26} In *R & L Carriers*, this court specifically noted that the claimant's past work history was not the only evidence before the commission to determine the claimant's

intent. The claimant had testified that, in the year immediately prior to his injury, he did not simply accept his seasonal layoff as he had in the past. Instead, claimant testified that he determined that he needed to secure new and better employment and that he pursued a job search instead. There is no evidence in the record that relator provided any similar testimony. Relator could have provided this court with a copy of the hearing transcript; however, he did not. It was relator's burden to convince the commission to deviate from the typical AWW calculation. In the absence of such evidence, this court cannot infer it existed. Relator has not shown that the commission abused its discretion.

{¶27} Relator's final argument urging this court to order the commission to include his unemployment compensation as wages is that it constitutes income he earned. He worked; he was laid off; he met the requirements of OBES and was paid unemployment compensation. Therefore, he earned those wages.

{¶28} There is no case law to support relator's argument and the commission's refusal to follow it does not constitute an abuse of discretion.

{¶29} In the present case, it appears that the only evidence relator submitted was the fact that he was receiving unemployment compensation. That fact alone is not sufficient evidence to prove he did not intend to remain a seasonal employee. Other than the fact that he was receiving unemployment compensation, relator failed to present any evidence that it was not his ongoing intent to accept seasonal employment which included a period of regular unemployment.

{¶30} Based on the foregoing, it is this magistrate's conclusion that relator has not demonstrated that the commission abused its discretion when it determined his AWW, and this court should deny his request for a writ of mandamus.

/s/Stephanie Bisca Brooks
STEPHANIE BISCA BROOKS
MAGISTRATE

NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

FILED
COURT OF APPEALS
FRANKLIN CO. OHIO
2010 JUN -7 PM 2:01
CLERK OF COURTS

State of Ohio ex rel. Rick D. Warner, :

Relator, :

v. :

No. 09AP-841

Industrial Commission of Ohio and
Central Allied Enterprises, Inc., :

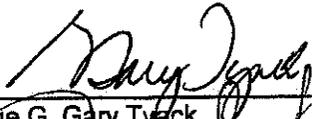
(REGULAR CALENDAR)

Respondents. :

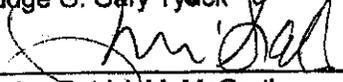
JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on June 3, 2010, we adopt the findings of fact contained in the magistrate's decision but we do not adopt the conclusions of law. As a result, we issue a limited writ of mandamus compelling the commission to weigh the evidence with regard to Rick D. Warner seeking employment during the time Allied Enterprises idled him via a seasonal layoff. Based upon that weighing, the commission shall further address the inclusion of the unemployment compensation in computation of Warner's AWW. Costs shall be assessed against respondent Industrial Commission of Ohio.

Within three (3) days from the filing hereof, the clerk of this court is hereby ordered to serve upon all parties not in default for failure to appear notice of this judgment and its date of entry upon the journal.



Judge G. Gary Tyack



Judge Patrick M. McGrath



Judge John A. Connor

ORIGINAL

In the
Supreme Court of Ohio

STATE OF OHIO, ex rel. RICK D. WARNER,

Case No.

10-1283

Relator-Appellee,

vs.

On Appeal from the Tenth District
Court of Appeals for Franklin County
Case No. 09AP-841

INDUSTRIAL COMMISSION OF OHIO,

Respondent-Appellant,

and

CENTRAL ALLIED ENTERPRISES, INC.,

Respondent.

NOTICE OF APPEAL

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Rick D. Warner

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GERALD H. WATERMAN (0020243)
Assistant Attorney General

**Counsel of Record*

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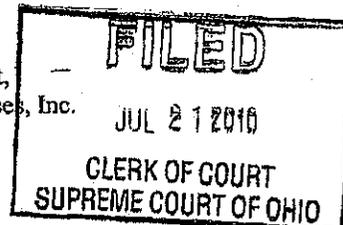
Fax: (614) 752-2538

gerald.waterman@ohioattorneygeneral.gov

Counsel for Respondent-Appellant,
Industrial Commission of Ohio

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Fax: (330) 867-3786

Counsel for Respondent,
Central Allied Enterprises, Inc.



NOTICE OF APPEAL

The Respondent, Industrial Commission of Ohio, gives notice of its appeal to the Supreme Court of Ohio from the Judgment Entry entered in Tenth District Court of Appeals Case No. 09AP-841, on June 7, 2010.

This case originated in the court of appeals.

Respectfully submitted,

RICHARD CORDRAY
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Counsel for Respondent-Appellant,
Industrial Commission of Ohio

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Notice of Appeal was sent by regular U.S. Mail, postage prepaid, to Thomas R. Pitts, attorney for Relator-Appellee, STOCKER PITTS CO., LPA, 159 South Main Street, Suite 400, Akron, Ohio 44308, and James W. Ellis, attorney for Respondent Central Allied Enterprises, Inc., KASTNER WESTMAN & WILKINS, LLC, 3480 West Market Street, Suite 300, Akron, Ohio 44333, on this 7th day of July, 2010.


GERALD H. WATERMAN (0020243)
Assistant Attorney General

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

FILED
COURT OF APPEALS
FRANKLIN CO. OHIO

2010 JUN -7 PM 2: 01

CLERK OF COURTS

State of Ohio ex rel. Rick D. Warner, :

Relator, :

v. :

No. 09AP-841

Industrial Commission of Ohio and
Central Allied Enterprises, Inc., :

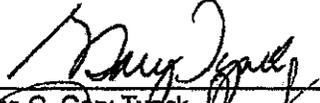
(REGULAR CALENDAR)

Respondents. :

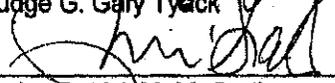
JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on June 3, 2010, we adopt the findings of fact contained in the magistrate's decision but we do not adopt the conclusions of law. As a result, we issue a limited writ of mandamus compelling the commission to weigh the evidence with regard to Rick D. Warner seeking employment during the time Allied Enterprises idled him via a seasonal layoff. Based upon that weighing, the commission shall further address the inclusion of the unemployment compensation in computation of Warner's AWW. Costs shall be assessed against respondent Industrial Commission of Ohio.

Within three (3) days from the filing hereof, the clerk of this court is hereby ordered to serve upon all parties not in default for failure to appear notice of this judgment and its date of entry upon the journal.



Judge G. Gary Tyack



Judge Patrick M. McGrath



Judge John A. Connor

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, ex rel.)
RICK D. WARNER)
)
Relator-Appellee,)
)
v.)
)
INDUSTRIAL COMMISSION OF)
OHIO,)
)
Respondent-Appellant,)
)
And)
)
CENTRAL ALLIED ENTERPRISES,)
INCORPORATED,)
)
Respondent-Appellant,)

CASE NO. 10-1283

On Appeal from the Tenth District
Court of Appeals for Franklin County
Case No. 09AP-841

SECOND NOTICE OF APPEAL

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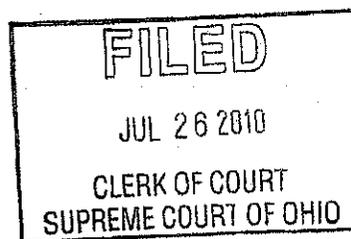
Counsel for Respondent-Appellant
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Counsel for Relator-Appellee
Rick D. Warner

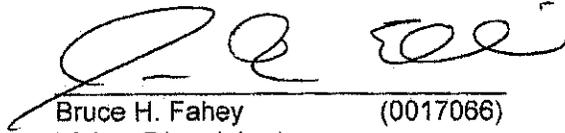


NOTICE OF APPEAL

Respondent, Central Allied Enterprises, hereby gives notice of its appeal to the Supreme Court of Ohio from the Judgment Entry entered in the Tenth District Court of Appeals, Case No. 09AP-841, on June 7, 2010.

Case No. 09AP-8431 originated in the court of appeals.

Respectfully submitted,



Bruce H. Fahey (0017066)

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James W. Ellis (0072663)

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Attorneys for Respondent-Appellant
Central Allied Enterprises, Inc.

CERTIFICATE OF SERVICE

A copy of the foregoing was served this 23rd day of July, 2010 by regular U.S.

Mail on:

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Rick D. Warner

and

Gerald H. Waterman, Esq.
Assistant Attorney General
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Columbus, OH 43215

Attorney for Relator-Appellant
Industrial Commission of Ohio


James W. Ellis (0072663)

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

FILED
COURT OF APPEALS
FRANKLIN CO. OHIO
2010 JUN -7 PM 2:01
CLERK OF COURTS

State of Ohio ex rel. Rick D. Warner, :

Relator, :

v. :

Industrial Commission of Ohio and
Central Allied Enterprises, Inc., :

Respondents. :

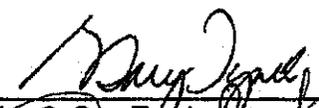
No. 09AP-841

(REGULAR CALENDAR)

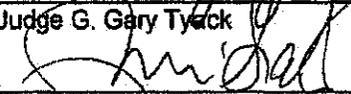
JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on June 3, 2010, we adopt the findings of fact contained in the magistrate's decision but we do not adopt the conclusions of law. As a result, we issue a limited writ of mandamus compelling the commission to weigh the evidence with regard to Rick D. Warner seeking employment during the time Allied Enterprises idled him via a seasonal layoff. Based upon that weighing, the commission shall further address the inclusion of the unemployment compensation in computation of Warner's AWW. Costs shall be assessed against respondent Industrial Commission of Ohio.

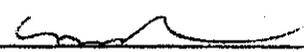
Within three (3) days from the filing hereof, the clerk of this court is hereby ordered to serve upon all parties not in default for failure to appear notice of this judgment and its date of entry upon the journal.



Judge G. Gary Tyack



Judge Patrick M. McGrath



Judge John A. Connor

4123.61 Basis for computation of benefits.

The average weekly wage of an injured employee at the time of the injury or at the time disability due to the occupational disease begins 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 or at the time of the disability due to occupational disease begins; when a factory, mine, or other place of employment is working short time in order to divide work among the employees, the bureau of workers' compensation shall take that fact into consideration when determining the wage for the first twelve weeks of temporary total disability.

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 ascertaining the average weekly wage for the year previous to the injury, or the date the disability due to the occupational disease begins any period of unemployment due to sickness, industrial depression, strike, lockout, or other cause beyond the employee's control shall be eliminated.

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, in determining the average weekly wage in such cases, shall use such method as will enable the administrator to do substantial justice to the claimants, provided that the administrator shall not recalculate the claimant's average weekly wage for awards for permanent total disability solely for the reason that the claimant continued working and the claimant's wages increased following the injury.

Effective Date: 10-20-1993; 2006 SB7 10-11-2006