ORIGINAL

In the

Supreme Court of Ohio

STATE OF OHIO, ex rel. RICK D. WARNER, Relator-Appellee, vs. INDUSTRIAL COMMISSION OF OHIO, et al Respondents-Appellants.	: : : : : : : : : : : :	CASE NO. 2010-1283 On Appeal from the Franklin County Court of Appeals, Tenth District Court of Appeals Case No. 09AP-841

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTRODUCTION 1

STATEMENT OF FACTS 2

LAW AND ARGUMENT 4

I. Standard of Review 4

II. Appellant Industrial Commission's Proposition of Law No. 1: 6

The Industrial Commission does not abuse its discretion in the calculation of the average weekly wage by not excluding weeks during which a claimant was unemployed where there is evidence that those weeks of unemployment were the result of the claimant's own lifestyle choice. 6

A. "Wages" serve as the basis for awards of disability compensation. 6

B. *Baker Concrete* does not justify a writ of mandamus. 8

C. Mandamus should not be used to correct errors or procedural irregularities. 11

III. Appellant Industrial Commission's Proposition of Law No. 2: 12

Unemployment compensation benefits are not "wages" and are not included in the calculation of the average weekly wage under the workers' compensation laws 12

A. AWW does not contemplate all of the injured worker's sources of income. 12

IV. Appellant Industrial Commission's Proposition of Law No. 3: 14

A fair AWW determination made by the Industrial Commission should not be disturbed in mandamus. 14

A. AWW is the *average* of the wages earned in the prior year. 14

B. FWW contemplates the injured worker's most current wages. 15

C. The "special circumstances" provision is inapplicable here. 16

CONCLUSION 18

CERTIFICATE OF SERVICE 19

APPENDIX 20

Notice of Appeal, filed by the Industrial Commission of Ohio ..... A. 1

Second Notice of Appeal, filed by Central Allied Enterprises, Inc. ..... A. 3

Judgment Entry ..... A. 6

State ex rel. Warner v. Indus. Comm. Franklin App. No. 09AP-841, 2010-Ohio-2476 .. A. 7

R.C. 2731.01 ..... A. 22

R.C. 2731.03 ..... A. 23

R.C. 4123.56 ..... A. 24

R.C. 4123.57 ..... A. 25

R.C. 4123.58 ..... A. 27

R.C. 4123.61 ..... A. 28

R.C. 4123.62 ..... A. 29

TABLE OF AUTHORITIES

Cases

State ex rel. Allerton v. Indus. Comm. (1982)
69 Ohio St.2d 396 5

State ex rel. Athey v. Indus. Comm.
89 Ohio St.3d 473, 2000-Ohio-489 10

State ex rel. Baker Concrete Constru., Inc. v. Indus. Comm.
102 Ohio St.3d 149, 2004-Ohio-2114 ..... passim

State ex rel. Cawthorn v. Indus. Comm. (1997)
78 Ohio St.3d 112 ..... 7, 16

State ex rel. Clark v. Indus. Comm. (1994)
69 Ohio St.3d 563 ..... 1, 17

State ex rel. Commercial Lovelace Motor Freight v. Lancaster (1986)
22 Ohio St.3d 191 6

State ex rel. Elliott v. Indus. Comm.(1986)
26 Ohio St.3d 76 5

State ex rel. FedEx Ground Package Sys., Inc. v. Indus. Comm.
126 Ohio St.3d 37, 2010-Ohio-2451 ..... 7, 14, 16

State ex rel. Gerspacher v. Coffinberry (1952)
157 Ohio St. 32 ..... 4, 11

State ex rel. Hina v. Indus. Comm.
121 Ohio St.3d 4, 2009-Ohio-250 14

State ex rel. Jerninghan v. Gaughan
(Sept. 26, 1994), Cuyahoga App. No. 67787 ..... 4, 11

State ex rel. Keenan v. Calabrese (1994)
69 Ohio St.3d 176 4

[State ex rel.] Lipsky v. Barry, Adm'r.
Franklin App. No. 90AP-07, 1990 Ohio App. LEXIS 5538 14

State ex rel. LTV Steel Co. v. Indus. Comm.
88 Ohio St.3d 284, 2000-Ohio-328 5

State ex rel. Marshall v. Keller (1968)
15 Ohio St.2d 203 4

State ex rel. McDulin v. Indus. Comm. (2000)
89 Ohio St.3d 390 ..... 3, 13

State ex rel. Noll v. Indus. Comm. (1991)
57 Ohio St.3d 203. 9

State ex rel. Ohio State Univ. Hosp. v. Indus. Comm.
118 Ohio St.3d 170, 2008-Ohio-1969 ..... 17, 18

State ex rel. Pass v. C.S.T. Extraction Co. (1996)
74 Ohio St.3d 373 5

State ex rel. Pressley v. Indus. Comm. (1967)
11 Ohio St.2d 141 4

State ex rel. Pruitt v. Donnelly
Cuyahoga App. No. 95518, 2011-Ohio-1252 11

State ex rel. Reaugh Constr. Co. v. Indus. Comm. (1928)
119 Ohio St. 205 14

[State ex rel.] Riley v. Indus. Comm. (1983)
9 Ohio App.3d 71 17

State ex rel. Rohr v. Indus. Comm.
126 Ohio St.3d 259, 2010-Ohio-3756 10

State ex rel. Shafer v. Ohio Turnpike Comm. (1953)
159 Ohio St. 581 5

State ex rel. Shelly Co. v. Steigerwald
121 Ohio St.3d 158, 2009-Ohio-585 6

State ex rel. Smith v. Indus. Comm. (1933)
127 Ohio St. 217 14

State ex rel. St. Marys Foundry Co. v. Indus. Comm. (1997)
78 Ohio St.3d 521 11

State ex rel. Stephenson v. Indus. Comm. (1987)
31 Ohio St.3d 167 5

State ex rel. Stevens v. Indus. Comm.
110 Ohio St.3d 32, 2006-Ohio-3456 16

State ex rel. Teece v. Indus. Comm. (1981)
68 Ohio St.2d 165 5

State ex rel. Warner v. Indus. Comm.
Franklin App. No. 09AP-841, 2010-Ohio-2476 ..... passim

State ex rel. Wireman v. Indus. Comm. (1990)
49 Ohio St.3d 286 ..... 16, 17, 18

Other Authorities

Black's Law Dictionary, 9th ed. 13

R.C. 2731.01 4

R.C. 2731.03 4

R.C. 4123.56 ..... 6, 7, 15, 16

R.C. 4123.57 ..... 6, 7

R.C. 4123.58 6

R.C. 4123.61 ..... passim

R.C. 4123.62 ..... 7, 16

Section 1465-84, General Code 14, 15

INTRODUCTION

The Tenth District Court of Appeals has upended statutory language and established case law on the issue of calculating the average weekly wage in the workers' compensation system. The average weekly wage ("AWW") of an injured worker is the basis for awards of disability compensation under Ohio's workers' compensation program. R.C. 4123.61. The standard calculation for the determination of a claim's AWW is the total *wages* earned in the one year prior to the date of injury, divided by 52. *State ex rel. Clark v. Indus. Comm.* (1994), 69 Ohio St.3d 563, 565. Revised Code 4123.61 contains a provision that, "[i]n ascertaining the average weekly *wage* for the year previous to the injury, ..., any period of unemployment due to sickness, industrial depression, strike, lockout, or other cause *beyond the employee's control* shall be eliminated." (Emphasis added.)

To increase the AWW for his claim, thereby also increasing the actual rate by which disability compensation is paid, the injured worker here, Relator-Appellee Rick D. Warner ("Warner") has challenged, on either of two separate theories, the calculation made by the Respondent-Appellant Industrial Commission of Ohio ("Industrial Commission"). First, he administratively sought the *exclusion* of 22 weeks from the divisor in the calculation, because he was not employed for that number of weeks in the year before his date of injury. That is, Warner desired that the total of his wages for the year be divided by 30 weeks instead of 52. In the alternative Warner argued that, if those weeks in which he did not work remain in the divisor for the calculation, the unemployment compensation benefits he received during the 22 weeks should be *included* in the wages used for the computation. Either notion would increase the AWW. The Industrial Commission denied these requests, leading Warner to file this action in mandamus to vacate the Industrial Commission's determination.

The court of appeals' magistrate found Warner's arguments unjustified and recommended that the writ be denied. A panel of the Tenth District Court of Appeals rejected the magistrate's conclusions, and issued a writ directing the Industrial Commission to redetermine the AWW calculation based on both of Warner's objections which it sustained.

However, under the facts presented and a plain reading of the statutory and case law, the weeks of unemployment should *not* be excluded from the calculation and the unemployment compensation Warner received should *not* be included. Specifically, Warner's unemployment was due to his own lifestyle choice, not due to circumstances beyond his control, and unemployment compensation is not "wages" as specified in R.C. 4123.61.

Accordingly, the court of appeals' decision should be reversed, and the writ of mandamus should be denied.

STATEMENT OF FACTS

Warner was injured while working for Respondent-Appellant Central Allied Enterprises, Inc., an asphalt paving company, on September 7, 2007. Warner had worked many years in the asphalt paving business and for Central Allied the last four years. *State ex rel. Warner v. Indus. Comm.* Franklin App. No. 09AP-841, 2010-Ohio-2476, at ¶ 23. (See also, Supplement, p. 15, hereinafter, "Supp. #"). Warner's workers' compensation claim was allowed and a district hearing officer ("DHO") of the Industrial Commission, in the consideration of the AWW for the claim, set it at $713.04 based on wages of $37,078.29 divided by 52 weeks. Id. at ¶ 14. (Supp. 8). The DHO found that Warner was a seasonal employee by choice and his periods of unemployment were not due to circumstances beyond his control. Id.

Warner administratively appealed this decision under R.C. 4123.511(E), seeking the exclusion of the 22 weeks of seasonal layoff from the AWW calculation, thereby increasing his

disability compensation rate. In the alternative, he asked that his unemployment benefits be included in the AWW calculation, which would also serve to increase the compensation rate. Id. A staff hearing officer ("SHO") of the Industrial Commission denied both requests. Id. at ¶ 15. (Supp. 14-15). The SHO found that the seasonal layoff was not unforeseen, and is a normal part of employment in the asphalt paving industry. Id. The SHO further found that Warner's unemployment for these 22 weeks was a lifestyle choice. Id. The SHO held that unemployment benefits are not "earnings" or "wages" to be included in the AWW calculation, citing *State ex rel. McDulin v. Indus. Comm.* (2000), 89 Ohio St.3d 390. Id. Warner's AWW was affirmed as $713.04, based on his wages of $37,078.29, divided by 52.

Warner sued in mandamus, and the Tenth District's magistrate recommended the denial of a writ of mandamus. *Warner*, 2010-Ohio-2476, at ¶ 30. The court panel, however, rejected the Industrial Commission's calculation of the AWW and sustained Warner's objections. The court first focused on the SHO's statement that Warner "presented no evidence of any attempt to look for work during his period of seasonal layoff." Id. at ¶ 8. The court determined this finding to be "technically incorrect because the SHO had detailed evidence of the payment of unemployment compensation," which would entail an employment search. Id. Next, in suggesting the inclusion of unemployment compensation in the calculation, the court noted that unemployment compensation is taxable income for purposes of the Internal Revenue Code, and that "[p]enalizing 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." Id. at ¶ 9. The appellate court reasoned: "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." Id.

The court of appeals issued a limited writ, remanding the matter to the Industrial Commission to redetermine the issue in light of its decision. Id. at ¶ 10. The court ordered the Industrial Commission to weigh the evidence of seasonal layoff, even though the SHO had done such an analysis based on the evidence available administratively. The court also ordered the Industrial Commission to include unemployment compensation in the calculation of the AWW. Id. at ¶ 9. From this decision and judgment, the Industrial Commission appeals because its calculation is in full accordance with the law, and it did not abuse its discretion.

LAW AND ARGUMENT

I. Standard of Review

"Mandamus is an extraordinary legal remedy, the essential purpose of which is to command the performance of an act which the law specifically enjoins as a duty resulting from an office, trust, or station." *State ex rel. Gerspacher v. Coffinberry* (1952), 157 Ohio St. 32, paragraph one of the syllabus; R.C. 2731.01. "The writ will not issue in a doubtful case, or where the effect of its issuance would be to control the discretion of the one against whom it would be directed." *Gerspacher*, syllabus one; R.C. 2731.03. Mandamus is not a substitute for an appeal. *State ex rel. Keenan v. Calabrese* (1994), 69 Ohio St.3d 176; *State ex rel. Marshall v. Keller* (1968), 15 Ohio St.2d 203, 205. Nor should mandamus be used to correct errors and procedural irregularities in the course of a case. *State ex rel. Jerninghan v. Gaughan* (Sept. 26, 1994), Cuyahoga App. No. 67787.

For a court to issue a writ of mandamus, the relator must demonstrate (1) a clear legal right to the relief sought, (2) that the respondent had a clear legal duty to provide such relief, and (3) that relator had no other adequate legal remedy. *State ex rel. Pressley v. Indus. Comm.* (1967), 11 Ohio St.2d 141. Regarding the first two elements, for Warner to establish a basis for

mandamus relief, he must show that the Industrial Commission acted contrary to law or otherwise grossly abused its discretion by issuing an order that is not supported by evidence in the administrative record. *State ex rel. Elliott v. Indus. Comm.* (1986), 26 Ohio St.3d 76, 78-79. In *State ex rel. Stephenson v. Indus. Comm.* (1987), 31 Ohio St.3d 167, 170, the Court stated:

> It is basic law, without need of citation, that the Industrial Commission has considerable discretion in the performance of its duties; that *its actions are presumed to be valid and performed in good faith and judgment*, unless shown to be otherwise; and that so long as there is some evidence in the file to support its findings and orders, this court will not overturn such.

(Emphasis added.) Thus, as long as the Industrial Commission acted according to law, and had some evidence on the record supporting its actions, a writ of mandamus is inappropriate.

Moreover, the determination of disputed facts is within the final jurisdiction of the Industrial Commission, subject to correction by an action in mandamus only on a showing of an abuse of discretion. *State ex rel. Allerton v. Indus. Comm.* (1982), 69 Ohio St.2d 396. An abuse of discretion "implies not merely error of judgment, but perversity of will, passion, prejudice, partiality, or moral delinquency." *State ex rel. Shafer v. Ohio Turnpike Comm.* (1953), 159 Ohio St. 581, 590. "[Q]uestions of credibility and the weight to be given evidence are clearly within the commission's discretionary powers of fact-finding." *State ex rel. Teece v. Indus. Comm.* (1981), 68 Ohio St.2d 165, 167. The Industrial Commission is the *exclusive* evaluator of the weight and credibility of evidence. *State ex rel. LTV Steel Co. v. Indus. Comm.* 88 Ohio St.3d 284, 2000-Ohio-328.

This Court has held that a writ of mandamus will not be granted if an order of the Industrial Commission is supported by "some evidence." *State ex rel. Pass v. C.S.T. Extraction Co.* (1996), 74 Ohio St.3d 373, 376. It is fundamental that, "[s]o long as the commission's order is supported by 'some evidence,' [i]t is immaterial whether other evidence, even if greater in

quality and/or quantity, supports a decision contrary to the commission's." *State ex rel. Shelly Co. v. Steigerwald*, 121 Ohio St.3d 158, 2009-Ohio-585, ¶ 35. An abuse of discretion will be found only when there exists no evidence upon which the Industrial Commission could have based its decision. *State ex rel. Commercial Lovelace Motor Freight v. Lancaster* (1986), 22 Ohio St.3d 191, 193.

Here, Warner failed to meet any of the criteria necessary to entitle him to a writ of mandamus, and the court of appeals was not justified in issuing a writ, even a limited writ that remands the matter back to the Industrial Commission for redetermination.

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

The Industrial Commission does not abuse its discretion in the calculation of the average weekly wage by not excluding weeks during which a claimant was unemployed where there is evidence that those weeks of unemployment were the result of the claimant's own lifestyle choice.

A. "Wages" serve as the basis for awards of disability compensation.

An employee's wages prior to sustaining an industrial injury or occupational disease provide the primary basis for awards of disability compensation in a workers' compensation claim. R.C. 4123.61. This principle is applicable to compensation for both total and partial disability. Revised Code 4123.56(A), addressing temporary total disability ("TTD") compensation, states: "[I]n the case of temporary disability, an employee shall receive sixty-six and two-thirds per cent of the employee's average weekly wage so long as such disability is total," subject to a statutory maximum and minimum. Likewise, R.C. 4123.58 provides an award of two-thirds of the AWW for permanent total disability. Compensation for a permanent partial disability, which looks to a percentage of whole-person impairment and is akin to a "damages" award, also uses "sixty-six and two-thirds per cent of the employee's average weekly wage" to determine the award. R.C. 4123.57(A).

Two types of compensation award are based on factors other than the injured worker's AWW. Revised Code 4123.56(A) provides that the first 12 weeks of TTD are awarded at 72% of the worker's full weekly wage ("FWW"), a determination that looks at the injured worker's most-current wages. *State ex rel. FedEx Ground Package Sys., Inc. v. Indus. Comm.*, 126 Ohio St.3d 37, 2010-Ohio-2451, ¶¶ 18-24. Second, scheduled loss awards under R.C. 4123.57(B), such as for a loss of an appendage by amputation, are based on the *statewide* average weekly wage ("SAWW"), which is defined in R.C. 4123.62(C) as "the average weekly earnings of all workers in Ohio employment subject to Chapter 4141. of the Revised Code..."

Revised Code 4123.61 begins with the statement that "[t]he average weekly wage of an injured employee at the time of injury ... is the basis upon which to compute benefits." (Emphasis added.) The fourth paragraph of the statute further explains that "the claimant's or the decedent's *average weekly wage for the year preceding the injury* or the date of disability due to the occupational disease begins *is the weekly wage upon which compensation shall be based.*" (Emphasis added.) R.C. 4123.61. Accordingly, the AWW is calculated by dividing the injured worker's total wages for the year prior by 52. This is the standard basis for calculation to be used in all circumstances unless there is justification for application of the statute's "special circumstances" provision, which is set forth in the last paragraph of R.C. 4123.61. *State ex rel. Cawthorn v. Indus. Comm.* (1997), 78 Ohio St.3d 112, 114. This "special circumstances" proviso has not been advocated by Warner.

An exclusionary provision is contained within R.C. 4123.61 which, if found by the Industrial Commission to be appropriate, would reduce the number of weeks used in the AWW calculation. The General Assembly has recognized certain limited situations that would give rise to a reduced divisor in determining the AWW:

> 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.

(Emphasis added.) R.C. 4123.61. This provision, along with *Baker Concrete*, infra, provided Warner and the court of appeals with the rationale for issuance of a writ of mandamus.

B. *Baker Concrete* does not justify a writ of mandamus.

The court of appeals' reliance on *State ex rel. Baker Concrete Constru., Inc. v. Indus. Comm.*, 102 Ohio St.3d 149, 2004-Ohio-2114, to find that the SHO's order is fatally flawed is misplaced. In fact, the teachings of *Baker Concrete* support the SHO's order here, and the appellate court's analysis of a single sentence in the SHO's order should not be the basis for a writ of mandamus, even one limited in nature.

Baker Concrete stands for the proposition that unemployment due to a worker's lifestyle choice cannot be used to omit weeks from the calculation of AWW. To maximize the determination of the AWW for his claim, the injured worker in *Baker Concrete* sought the exclusion of 16 weeks of unemployment from the AWW calculation. Id. at ¶ 1. In the calculation of the AWW in that claim, the SHO excluded those 16 weeks, as well as the unemployment compensation the claimant received, writing merely that the unemployment was "due to circumstances beyond the claimant's control and the nature of the construction business." Id. at ¶ 9. Baker Concrete sought a writ of mandamus, contending that the weeks should not have been excluded from the calculation since "the annual *** occurrence of claimant's seasonal layoff removes it from the realm of unforeseen and hence involuntary unemployment." Id. at ¶ 14. That is, Baker Concrete argued that the claimant's period of unemployment was voluntary – within the worker's control and, accordingly, not subject to elimination under the terms of R.C. 4123.61.

The *Baker Concrete* Court first observed that, "[t]o date, foreseeability of job loss has not rendered seasonal unemployment voluntary." Id. at ¶ 15. The Court then acknowledged that the "lifestyle choice" of the worker "may very well be relevant in calculating AWW" and held 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." (Emphasis added.) Id. at ¶ 19. That is, the standard formula should be used – dividing the total wages for the year by 52.

Baker Concrete also held that the question of "lifestyle choice" is a question of intent, derived from the words and actions available to the fact-finder. Id. at ¶ 20. In *Baker Concrete*, the DHO—the first administrative fact-finder—was presented with nothing more than the claimant's blanket statement that he works eight months out of the year and receives unemployment compensation for the remaining four months. Id. at ¶ 4. This Court agreed with the court of appeals that this statement, in and of itself, was insufficient to establish intent and support the inclusion of the weeks in the calculation. Id. at ¶ 20. The matter was returned to the Industrial Commission for further explanation under the doctrine of *State ex rel. Noll v. Indus. Comm.* (1991), 57 Ohio St.3d 203. Id. at ¶ 23.

Applied to the facts here, *Baker Concrete* supports the Industrial Commission's, and not the court of appeals', conclusion. After finding that the 22-week period of unemployment "represents a seasonal layoff from the Claimant's employment with an asphalt paving company," the SHO here expressly recognized the need to address "intent," and indicated that Warner "testified that he had been employed with this Employer for approximately four years prior to the injury in this claim" and that he had "testified that he has been employed in this particular field for many years." (Supp. 15). The SHO concluded that "the seasonal layoff was not unforeseen

and is a normal part of employment within this industry." The SHO further explained that Warner "has presented no evidence of any attempt to look for work during this period of seasonal layoff" and opined that the unemployment "represents a lifestyle choice." Id. Following the express doctrine of *Baker Concrete*, the SHO correctly found that the weeks of Warner's unemployment should not be excluded in the AWW calculation: "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*." (Emphasis added.) *Baker Concrete*, at ¶ 19. (Supp. 15).

The court of appeals here holds that *Baker Concrete* requires that Warner's receipt of unemployment compensation fully establishes that he was seeking employment. The court inferred that the unemployment compensation contradicts the SHO's statement that Warner offered no evidence of any attempt to look for work during the seasonal layoff, and issued a limited writ to correct this perceived fatal flaw in the SHO's order. Warner's receipt of unemployment benefits certainly suggests that he was unemployed and in the job market for the weeks he did not work for Central Allied. However, the SHO, as the fact-finder, was in the position to evaluate whether Warner had really undertaken a legitimate job search, or whether he merely had exercised basic responsibilities associated with receiving unemployment compensation during this period. The SHO's finding of fact is afforded due deference, and should not be overruled by a court in mandamus. Questions of credibility and the weight to be given evidence are clearly within the Industrial Commission's discretionary powers of fact-finding. *State ex rel. Rohr v. Indus. Comm.*, 126 Ohio St.3d 259, 2010-Ohio-3756, ¶ 15. And, the Industrial Commission is the *exclusive* evaluator of the weight and credibility of the evidence presented to it. *State ex rel. Athey v. Indus. Comm.*, 89 Ohio St.3d 473, 2000-Ohio-489.

Further, Warner's job search for purposes of OBES is neither significant nor determinative of the issue of intent for purposes of the workers' compensation program. As the *Baker Concrete* Court recognized, the receipt of benefits from the Ohio Bureau of Employment Services is not determinative as a matter of law of an involuntary unemployment for purposes of compensation under R.C. 4123.56. *Baker Concrete*, 2004-Ohio-2114, at ¶ 22. Rather, the Industrial Commission and OBES are separate and distinct bodies and "[a] job search sufficient to satisfy OBES might not satisfy the commission." Id. at ¶ 23. A writ of mandamus is not warranted here under the holding of *Baker Concrete*.

C. Mandamus should not be used to correct errors or procedural irregularities.

The appellate court's attempt to use *Baker Concrete* as justification for a writ exceeds its responsibility in mandamus, where the analysis should focus on the relator's clear legal right and the respondent's clear legal duty. Whether Warner actually conducted a job search sufficient to warrant unemployment compensation is not determinative of the AWW calculation under workers' compensation law. Mandamus should not be used by a court to address the "error to be corrected upon further review," as the court of appeals has instructed. *Warner*, 2010-Ohio-2476, at ¶ 8. "Mandamus does not lie to correct errors and procedural irregularities in the course of a case." *State ex rel. Pruitt v. Donnelly*, Cuyahoga App. No. 95518, 2011-Ohio-1252, ¶ 9, citing *State ex rel. Jerninghan v. Gaughan* (Sept. 26, 1994), Cuyahoga App. No. 67787.

Review in mandamus is limited to whether the Industrial Commission's decision is contrary to law or otherwise constitutes a gross abuse of discretion. There is a presumption that, in areas over which the Industrial Commission has jurisdiction, its orders are "in all respects valid and in the exercise of good faith and sound judgment." *State ex rel. St. Marys Foundry Co. v. Indus. Comm.* (1997), 78 Ohio St.3d 521, 522; *Gerspacher*, 157 Ohio St. 32, paragraph two of

the syllabus. Here, the court of appeals focused on a single ancillary statement by the SHO that Warner "presented no evidence of any attempt to look for work." The record fails to show that Warner presented any evidence of his actual search for work. Thus, the SHO's statement was not erroneous, and definitely should not justify an extraordinary writ of mandamus.

The fact-finder and decision-maker of the AWW determination is, of course, the Industrial Commission and its hearing officers, subject to reversal only on an abuse of discretion. Here, the SHO concluded that Warner's 22 weeks of unemployment, with no actual showing of a job search, indicated a lifestyle choice, and the weeks should, thus, not be excluded from the AWW calculation, i.e., the divisor would remain at 52. Nothing presented persuaded the SHO to override the conclusion that it was Warner's lifestyle choice to not work for 22 weeks out of a year, and instead receive unemployment compensation. Warner offered nothing more than his self-serving allegation that this was "beyond his control," in an attempt to invoke the exclusionary provision of R.C. 4123.61.

The SHO did not abuse his discretion in finding that the 22-week period of unemployment was a lifestyle choice within Warner's control, and there was no compelling reason to exclude those weeks from the AWW calculation. The critical analysis of the SHO's statement relative to Warner's looking for work during the period of unemployment cannot serve as a basis for the extraordinary relief associated with mandamus.

III. <u>Appellant Industrial Commission's Proposition of Law No. 2</u>:

Unemployment compensation benefits are not "wages" and are not included in the calculation of the average weekly wage under the workers' compensation laws.

A. AWW does not contemplate all of the injured worker's sources of income.

The court of appeals incorrectly found that the Industrial Commission erroneously excluded Warner's unemployment compensation from the AWW calculation. The court relied

on the Internal Revenue Code to determine that, since unemployment compensation is taxable *income*, this *income* should be included in the determination of the average weekly *wage*. The court of appeals' reasoning conflicts with R.C. 4123.61, as well as established case law.

R.C. 4123.61 provides that the financial basis for the AWW calculation is the injured worker's *wages* earned in the year prior, and nothing more. All sources of income do not qualify as wages. "Wage" is defined by *Black's Law Dictionary*, 9th ed., at 1716, as "Payment *for labor or services*, usu[ally] based on time worked or quantity produced." (Emphasis added.) The payment of "unemployment compensation," by its very nature, does not qualify – a benefit provided for one's *not working* cannot be considered "wages." In *State ex rel. McDulin v. Indus. Comm.* 89 Ohio St.3d 390, 2000-Ohio-205, the Court considered whether an employee's per diem for certain expenditures, as shown on a Form 1099, should be included in the AWW calculation. The Court found:

> "Income" is not synonymous with "earnings" or "wages." Webster's Third New International Dictionary (1986) 714, defines "earnings" as "wages *** earned as compensation for labor." Similarly, wages constitute "monetary remuneration by an employer *** for labor or services." Id. at 2568. "Income," on the other hand, represents "a gain or recurrent benefit that is [usually] measured in money and for a given period of time, derives from capital, labor, or a combination of both." Id. at 1143. *Income is a much broader term than "earnings" or "wages," and cannot, therefore be used interchangeably.*

Id. at 392. (Emphasis added.) Thus, the Court has already established that "wages" and "income" are not synonymous for purposes of AWW.

Under the court of appeals' analysis here, *any* source of income that is taxable under the Internal Revenue Code might qualify for inclusion in the calculation of AWW. This might include interest on savings, lottery winnings, and other sources that are clearly beyond the expectation of *wages* received in the past year for labor that had been performed. Unquestionably, unemployment compensation is not a part of the AWW calculation.

The court below was wrong to conclude that the Industrial Commission should have included Warner's unemployment compensation as "wages" in the calculation of the claim's AWW.

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

A fair AWW determination made by the Industrial Commission should not be disturbed in mandamus.

A. AWW is the *average* of the wages earned in the prior year.

This Court has long-recognized the need to defer to the expertise of the Industrial Commission in areas within its jurisdiction. *State ex rel. Hina v. Indus. Comm.*, 121 Ohio St.3d 4, 2009-Ohio-250, ¶ 19; *State ex rel. Reaugh Constr. Co. v. Indus. Comm.* (1928), 119 Ohio St. 205, 209. A mandamus proceeding is not a de novo review of the evidence, with the court substituting its judgment for the determination of the Industrial Commission. Rather, the issue before the court in mandamus is whether the Industrial Commission's determination of a factual question is contrary to law or otherwise constitutes a gross abuse of discretion. The decision here is neither.

The General Assembly provided in the statute that the average of the injured worker's wages for the year before the date of injury is the basis for the calculation of disability compensation benefits. "R.C. 4123.61 refers to *wages earned* in the year prior to injury without qualification or exclusion." *State ex rel. FedEx Ground*, 2010-Ohio-2451, at ¶ 12. The statutory provision directing that the AWW is "the average weekly wage for the year previous to the injury," was enacted in response to *State ex rel. Smith v. Indus. Comm.* (1933), 127 Ohio St. 217. See, *[State ex rel.] Lipsky v. Barry, Adm'r.*, Franklin App. No. 90AP-07, 1990 Ohio App. LEXIS 5538, at [*7]. *Smith* had addressed Section 1465-84, General Code, the predecessor to R.C. 4123.61, which reads, in toto:

> The average weekly wage of the injured person *at the time of the injury* shall be taken as the basis upon which to compute the benefits.

(Emphasis added.) Based on the statutory language then in existence, the Court concluded that "average weekly wage" did *not* include the earnings of secondary employment not connected with the employment in which the injury was sustained, i.e., only the wages *at the time of injury* served as the basis for the calculation. The General Assembly amended Section 1465-84, General Code, to include language indicating that the "average weekly wage *for the year preceding the injury* shall be the weekly wage upon which compensation shall be based." (Emphasis added.) 117 Laws of Ohio 252.

Being the arithmetic mean, the average of the weekly wage for the year prior to injury may, or may not, be the same as the claimant's actual wages earned at the time of injury, and since the amendment in 1937, there is no statutory indication that the General Assembly intended the basis for the compensation award to equate to the present wage base. There not being a hard-and-fast rule as to the calculation of the AWW, the Court has clearly left the determinations to the function of the Bureau of Workers' Compensation or the Industrial Commission to decide in accordance with procedural policies. As long as the determination is a fair reflection of the average of the individual's wages for the prior year, it should not be disturbed.

B. FWW contemplates the injured worker's most current wages.

An award base comparable to the claimant's wages at the time of injury is, however, found in the calculation of the full weekly wage ("FWW"), separate from AWW. The FWW is used for the compensation for total disability payment to the injured worker, generally for the weeks of inability to work immediately after the injury. "In case 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." R.C. 4123.61. Revised Code 4123.56(A)

sets forth: "[P]rovided that for the first twelve weeks of total disability the employee shall receive seventy-two per cent of the employee's full weekly wage..." The computation of FWW looks at the injured worker's most current wages, the higher of wages in the six *weeks* prior to the injury (divided by six), or the gross wages for the seven *days* prior to the date of injury. *State ex rel. FedEx Ground*, 2010-Ohio-2451, ¶¶ 18-26. This calculation, by its nature in being based upon a period of time in very close proximity to the date of injury, would more approximate the amount the injured worker would have received had he or she continued working after the injury as before the injury.

C. The "special circumstances" provision is inapplicable here.

The Court in *State ex rel. Wireman v. Indus. Comm.* (1990), 49 Ohio St.3d 286, stated that the AWW should be fair and do justice to the claimant without providing a windfall. Id. at 287. Here, it cannot be said that the Industrial Commission's determination of the AWW of $713.04 is unfair, especially since the statewide average weekly wage for 2007, the year of Warner's injury, was just a few dollars more, i.e., $730.00. R.C. 4123.62(C). The *Wireman* Court reiterated that "R.C. 4123.61 establishes a standard formula to be employed in all but two situations – unemployment beyond control or special circumstances." Id. at 289. Neither applies here. Warner's unemployment was not beyond his control, and his situation cannot be described as constituting any special circumstance.

Just because an AWW may be less than an injured worker's current salary, even if the disparity is substantial, does not summarily qualify that worker for the "special circumstances" provision. Rather, the special circumstances provision "has generally been confined to *uncommon* situations." (Emphasis added.) *Wireman*, at 288. See also, *State ex rel. Stevens v. Indus. Comm.* 110 Ohio St.3d 32, 2006-Ohio-3456, ¶ 6. The Court in *State ex rel. Cawthorn v. Indus. Comm.*, 78

Ohio St.3d 112, described R.C. 4123.61 as providing "a standard AWW computation that is to be *used in all but the most exceptional* cases." (Emphasis added.) Id. at 114.

Cases before this Court that have looked at the special circumstances provision indicate that there must be circumstances so unusual as to be almost unique to qualify. For example, in *State ex rel. Clark v. Indus. Comm.* (1994), 69 Ohio St.3d 563, the injured worker had just returned to the workforce a few weeks prior to her injury, working just a few hours per week to see how her granddaughter, for whom she was primary caretaker, would adjust to her absence. After her injury, Clark obtained full-time employment. The AWW was set at $20.00 per week, based on her minimal earnings she received in the one year prior to the date of her injury, which was divided by 52. The Court held that the "special circumstances" should have been applied. The Court in *Clark* was guided by the reasoning of the Tenth District Court of Appeals in *[State ex rel.] Riley v. Indus. Comm.* (1983), 9 Ohio App.3d 71, where an employee who had never before needed a job was injured shortly after entering the work force, and his AWW and corresponding disability compensation should not justly be based only on the three weeks that he had worked.

Wireman involved a situation where "employees have aspired to full-time work in the year before an on-the-job injury but, due to circumstances beyond their control, have actually worked only a fraction of the standard fifty-two forty-hour weeks." *Wireman*, supra, at 287. There, the injured worker worked less than the "typical" 40-hour work week and the Court again looked to the court of appeals' decision in *Riley* to issue a writ. Id.

More recently, in *State ex rel. Ohio State Univ. Hosp. v. Indus. Comm.*, 118 Ohio St.3d 170, 2008-Ohio-1969, the Court, again presented with a claim involving an injury that occurred shortly after entry into the workforce, denied a writ sought by the employer, holding that the

Industrial Commission did not abuse its discretion in finding applicable the "special circumstances" exception. Id. at ¶¶ 15-17. In each of these situations, AWW calculations based on other than the traditional "pre-injury wages divided by 52" were warranted.

Just as part-time work is not per se a special circumstance (*Wireman*, 49 Ohio St.3d, at 289), seasonal work is also not a per se special circumstance that would justify the AWW being based on other than the standard calculation. Here, with many individuals engaged in seasonal work, and there being absolutely nothing unique or even unusual about his situation, "special circumstances" is not a consideration. Appropriately, Warner never contended that the special circumstances provision of R.C. 4123.61 should apply.

Thus, the standard AWW calculation was the appropriate formula for Warner's claim, and the amount determined by the Industrial Commission was a fair reflection of the average of Warner's wages earned in the year prior to this injury. There, thus, is no justification for a writ of mandamus.

CONCLUSION

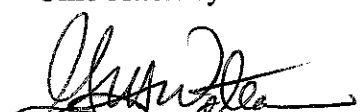
While Warner has relied on the "unemployment beyond control" exception to the calculation of the AWW for his claim, he has failed to show that his situation warrants anything other than the standard calculation, with no exclusion of weeks in the calculation and no inclusion of his unemployment compensation benefits. The magistrate of the court of appeals rightly wrote: "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." *Warner*, supra at ¶ 27.

Warner fails to show that the Industrial Commission committed a gross abuse of discretion in determining the AWW for this claim to be $713.04. This amount is not contrary to

law, not a gross abuse of discretion, and not unfair. Wherefore, the court of appeals' decision should be reversed and Warner's request for an extraordinary writ of mandamus must be denied.

Respectfully submitted,

MICHAEL DEWINE
Ohio Attorney General



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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing *Merit Brief of Appellant, Industrial Commission of Ohio*, was sent to the following by regular U.S. Mail, postage prepaid, this 16th day of May, 2011:

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APPENDIX

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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FILED
JUL 21 2010
CLERK OF COURT
SUPREME COURT OF OHIO

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,

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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 21st day of July, 2010.

GERALD H. WATERMAN (0020243)
Assistant Attorney General

ORIGINAL

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

RECEIVED
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SUPREME COURT OF OHIO

SECOND NOTICE OF APPEAL

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Counsel for Respondent-Appellant
Central Allied Enterprises, Inc.

FILED
JUL 26 2010
CLERK OF COURT
SUPREME COURT OF OHIO

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,

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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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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

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 Central Allied Enterprises, Inc.,	:	(REGULAR CALENDAR)
	:	
Respondents.	:	

ATTORNEY GENERAL'S OFFICE
WORKERS' COMPENSATION SECTION
JUN 07 2010
RECEIVED

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 Central Allied Enterprises, Inc.,	:	(REGULAR CALENDAR)
	:	
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).

2731.01 Mandamus defined.

Mandamus is a writ, issued in the name of the state to an inferior tribunal, a corporation, board, or person, commanding the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station.

Effective Date: 10-01-1953

2731.03 Writ does not control judicial discretion.

The writ of mandamus may require an inferior tribunal to exercise its judgment, or proceed to the discharge of any of its functions, but it cannot control judicial discretion.

Effective Date: 10-01-1953

4123.56 Compensation in case of temporary disability.

(A) Except as provided in division (D) of this section, in the case of temporary disability, an employee shall receive sixty-six and two-thirds per cent of the employee's average weekly wage so long as such disability is total, not to exceed a maximum amount of weekly compensation which is equal to the statewide average weekly wage as defined in division (C) of section 4123.62 of the Revised Code, and not less than a minimum amount of compensation which is equal to thirty-three and one-third per cent of the statewide average weekly wage as defined in division (C) of section 4123.62 of the Revised Code unless the employee's wage is less than thirty-three and one-third per cent of the minimum statewide average weekly wage, in which event the employee shall receive compensation equal to the employee's full wages; provided that for the first twelve weeks of total disability the employee shall receive seventy-two per cent of the employee's full weekly wage, but not to exceed a maximum amount of weekly compensation which is equal to the lesser of the statewide average weekly wage as defined in division (C) of section 4123.62 of the Revised Code or one hundred per cent of the employee's net take-home weekly wage. In the case of a self-insuring employer, payments shall be for a duration based upon the medical reports of the attending physician. If the employer disputes the attending physician's report, payments may be terminated only upon application and hearing by a district hearing officer pursuant to division (C) of section 4123.511 of the Revised Code. Payments shall continue pending the determination of the matter, however payment shall not be made for the period when any employee has returned to work, when an employee's treating physician has made a written statement that the employee is capable of returning to the employee's former position of employment, when work within the physical capabilities of the employee is made available by the employer or another employer, or when the employee has reached the maximum medical improvement. Where the employee is capable of work activity, but the employee's employer is unable to offer the employee any employment, the employee shall register with the director of job and family services, who shall assist the employee in finding suitable employment. The termination of temporary total disability, whether by order or otherwise, does not preclude the commencement of temporary total disability at another point in time if the employee again becomes temporarily totally disabled.

After two hundred weeks of temporary total disability benefits, the medical section of the bureau of workers' compensation shall schedule the claimant for an examination for an evaluation to determine whether or not the temporary disability has become permanent. A self-insuring employer shall notify the bureau immediately after payment of two hundred weeks of temporary total disability and request that the bureau schedule the claimant for such an examination.

When the employee is awarded compensation for temporary total disability for a period for which the employee has received benefits under Chapter 4141. of the Revised Code, the bureau shall pay an amount equal to the amount received from the award to the director of job and family services and the director shall credit the amount to the accounts of the employers to whose accounts the payment of benefits was charged or is chargeable to the extent it was charged or is chargeable.

If any compensation under this section has been paid for the same period or periods for which temporary nonoccupational accident and sickness insurance is or has been paid pursuant to an insurance policy or program to which the employer has made the entire contribution or payment for providing insurance or under a nonoccupational accident and sickness program fully funded by the employer, compensation paid under this section for the period or periods shall be paid only to the extent by which the payment or payments exceeds the amount of the nonoccupational insurance or

4123.57 Partial disability compensation.

Partial disability compensation shall be paid as follows.

Except as provided in this section, not earlier than twenty-six weeks after the date of termination of the latest period of payments under section 4123.56 of the Revised Code, or not earlier than twenty-six weeks after the date of the injury or contraction of an occupational disease in the absence of payments under section 4123.56 of the Revised Code, the employee may file an application with the bureau of workers' compensation for the determination of the percentage of the employee's permanent partial disability resulting from an injury or occupational disease.

Whenever the application is filed, the bureau shall send a copy of the application to the employee's employer or the employer's representative and shall schedule the employee for a medical examination by the bureau medical section. The bureau shall send a copy of the report of the medical examination to the employee, the employer, and their representatives. Thereafter, the administrator of workers' compensation shall review the employee's claim file and make a tentative order as the evidence before the administrator at the time of the making of the order warrants. If the administrator determines that there is a conflict of evidence, the administrator shall send the application, along with the claimant's file, to the district hearing officer who shall set the application for a hearing.

The administrator shall notify the employee, the employer, and their representatives, in writing, of the tentative order and of the parties' right to request a hearing. Unless the employee, the employer, or their representative notifies the administrator, in writing, of an objection to the tentative order within twenty days after receipt of the notice thereof, the tentative order shall go into effect and the employee shall receive the compensation provided in the order. In no event shall there be a reconsideration of a tentative order issued under this division.

If the employee, the employer, or their representatives timely notify the administrator of an objection to the tentative order, the matter shall be referred to a district hearing officer who shall set the application for hearing with written notices to all interested persons. Upon referral to a district hearing officer, the employer may obtain a medical examination of the employee, pursuant to rules of the industrial commission.

(A) The district hearing officer, upon the application, shall determine the percentage of the employee's permanent disability, except as is subject to division (B) of this section, based upon that condition of the employee resulting from the injury or occupational disease and causing permanent impairment evidenced by medical or clinical findings reasonably demonstrable. The employee shall receive sixty-six and two-thirds per cent of the employee's average weekly wage, but not more than a maximum of thirty-three and one-third per cent of the statewide average weekly wage as defined in division (C) of section 4123.62 of the Revised Code, per week regardless of the average weekly wage, for the number of weeks which equals the percentage of two hundred weeks. Except on application for reconsideration, review, or modification, which is filed within ten days after the date of receipt of the decision of the district hearing officer, in no instance shall the former award be modified unless it is found from medical or clinical findings that the condition of the claimant resulting from the injury has so progressed as to have increased the percentage of permanent partial disability. A staff hearing officer shall hear an application for reconsideration filed and the staff hearing officer's decision is final. An employee may file an application for a subsequent determination of the percentage of the employee's permanent disability. If such an application is filed, the bureau shall send a copy of the application to the employer or the employer's representative. No sooner than sixty days from the date

of the mailing of the application to the employer or the employer's representative, the administrator shall review the application. The administrator may require a medical examination or medical review of the employee. The administrator shall issue a tentative order based upon the evidence before the administrator, provided that if the administrator requires a medical examination or medical review, the administrator shall not issue the tentative order until the completion of the examination or review.

The employer may obtain a medical examination of the employee and may submit medical evidence at any stage of the process up to a hearing before the district hearing officer, pursuant to rules of the commission. The administrator shall notify the employee, the employer, and their representatives, in writing, of the nature and amount of any tentative order issued on an application requesting a subsequent determination of the percentage of an employee's permanent disability. An employee, employer, or their representatives may object to the tentative order within twenty days after the receipt of the notice thereof. If no timely objection is made, the tentative order shall go into effect. In no event shall there be a reconsideration of a tentative order issued under this division. If an objection is timely made, the application for a subsequent determination shall be referred to a district hearing officer who shall set the application for a hearing with written notice to all interested persons. No application for subsequent percentage determinations on the same claim for injury or occupational disease shall be accepted for review by the district hearing officer unless supported by substantial evidence of new and changed circumstances developing since the time of the hearing on the original or last determination.

No award shall be made under this division based upon a percentage of disability which, when taken with all other percentages of permanent disability, exceeds one hundred per cent. If the percentage of the permanent disability of the employee equals or exceeds ninety per cent, compensation for permanent partial disability shall be paid for two hundred weeks.

Compensation payable under this division accrues and is payable to the employee from the date of last payment of compensation, or, in cases where no previous compensation has been paid, from the date of the injury or the date of the diagnosis of the occupational disease.

When an award under this division has been made prior to the death of an employee, all unpaid installments accrued or to accrue under the provisions of the award are payable to the surviving spouse, or if there is no surviving spouse, to the dependent children of the employee, and if there are no children surviving, then to other dependents as the administrator determines.

(B) In cases included in the following schedule the compensation payable per week to the employee is the statewide average weekly wage as defined in division (C) of section 4123.62 of the Revised Code per week and shall continue during the periods provided in the following schedule:

For the loss of a first finger, commonly known as a thumb, sixty weeks.

For the loss of a second finger, commonly called index finger, thirty-five weeks.

For the loss of a third finger, thirty weeks.

For the loss of a fourth finger, twenty weeks.

For the loss of a fifth finger, commonly known as the little finger, fifteen weeks.

4123.58 Compensation for permanent total disability.

(A) In cases of permanent total disability, the employee shall receive an award to continue until the employee's death in the amount of sixty-six and two-thirds per cent of the employee's average weekly wage, but, except as otherwise provided in division (B) of this section, not more than a maximum amount of weekly compensation which is equal to sixty-six and two-thirds per cent of the statewide average weekly wage as defined in division (C) of section 4123.62 of the Revised Code in effect on the date of injury or on the date the disability due to the occupational disease begins, nor not less than a minimum amount of weekly compensation which is equal to fifty per cent of the statewide average weekly wage as defined in division (C) of section 4123.62 of the Revised Code in effect on the date of injury or on the date the disability due to the occupational disease begins, unless the employee's average weekly wage is less than fifty per cent of the statewide average weekly wage at the time of the injury, in which event the employee shall receive compensation in an amount equal to the employee's average weekly wage.

(B) In the event the weekly workers' compensation amount when combined with disability benefits received pursuant to the Social Security Act is less than the statewide average weekly wage as defined in division (C) of section 4123.62 of the Revised Code, then the maximum amount of weekly compensation shall be the statewide average weekly wage as defined in division (C) of section 4123.62 of the Revised Code. At any time that social security disability benefits terminate or are reduced, the workers' compensation award shall be recomputed to pay the maximum amount permitted under this division.

(C) Permanent total disability shall be compensated according to this section only when at least one of the following applies to the claimant:

(1) The claimant has lost, or lost the use of both hands or both arms, or both feet or both legs, or both eyes, or of any two thereof; however, the loss or loss of use of one limb does not constitute the loss or loss of use of two body parts;

(2) The impairment resulting from the employee's injury or occupational disease prevents the employee from engaging in sustained remunerative employment utilizing the employment skills that the employee has or may reasonably be expected to develop.

(D) Permanent total disability shall not be compensated when the reason the employee is unable to engage in sustained remunerative employment is due to any of the following reasons, whether individually or in combination:

(1) Impairments of the employee that are not the result of an allowed injury or occupational disease;

(2) Solely the employee's age or aging;

(3) The employee retired or otherwise voluntarily abandoned the workforce for reasons unrelated to the allowed injury or occupational disease.

(4) The employee has not engaged in educational or rehabilitative efforts to enhance the employee's employability, unless such efforts are determined to be in vain.

(E) Compensation payable under this section for permanent total disability is in addition to benefits payable under division (B) of section 4123.57 of the Revised Code.

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

4123.62 Consideration of expected wage increases.

(A) If it is established that an injured or disabled employee was of such age and experience when injured or disabled as that under natural conditions an injured or disabled employee's wages would be expected to increase, the administrator of workers' compensation may consider that fact in arriving at an injured or disabled employee's average weekly wage.

(B) On each first day of January, the current maximum monthly benefit amounts provided in sections 4123.412, 4123.413, and 4123.414 of the Revised Code in injury cases shall be adjusted based on the United States department of labor's national consumer price index. The percentage increase in the cost of living using the index figure for the first day of September of the preceding year and the first day of September of the year preceding that year shall be applied to the maximums in effect on the preceding thirty-first day of December to obtain the increase in the cost of living during that year.

In determining the increase in the maximum benefits for any year after 1972, the base shall be the national consumer price index on the first day of September of the preceding year. The increase in the index for the applicable twelve-month period shall be determined and shall be divided by the base used. The resulting percentage shall be applied to the existing maximums to arrive at the new maximums.

(C) Effective January 1, 1974, and each first day of January thereafter, the current maximum weekly benefit amounts provided in sections 4123.56, 4123.58, and 4123.59, and division (B) of section 4123.57 of the Revised Code shall be adjusted based on the increase or decrease in the statewide average weekly wage.

"Statewide average weekly wage" means the average weekly earnings of all workers in Ohio employment subject to Chapter 4141. of the Revised Code as determined as of the first day of September for the four full calendar quarters preceding the first day of July of each year, by the director of job and family services.

The statewide average weekly wage to be used for the determination of compensation for any employee who sustains an injury, or death, or who contracts an occupational disease during the subsequent calendar year beginning with the first day of January, shall be the statewide average weekly wage so determined as of the prior first day of September adjusted to the next higher even multiple of one dollar.

Any change in benefit amounts is effective with respect to injuries sustained, occupational diseases contracted, and deaths occurring during the calendar year for which adjustment is made.

In determining the change in the maximum benefits for any year after 1978, the base shall be the statewide average weekly wage on the first day of September of the preceding year.

Effective Date: 07-01-2000