

In the
Supreme Court of Ohio

STATE OF OHIO, EX REL.,	:	Case No. 2010-2288
GARRY K. McBEE,	:	
	:	
Relator-Appellee,	:	On Appeal from the
	:	Franklin County
vs.	:	Court of Appeals,
	:	Tenth Appellate District
	:	
INDUSTRIAL COMMISSION OF OHIO,	:	Court of Appeals
et al.,	:	Case No. 09AP 239
	:	
Respondents-Appellants.	:	

MERIT BRIEF OF APPELLANT,
INDUSTRIAL COMMISSION OF OHIO

JOHN F. POTTS (0051833)
405 Madison Avenue, Suite 1010
Toledo, Ohio 43604-1154
419-255-1105
419-241-1122 -- Fax

Counsel for Appellee-Relator,
Garry K. McBee

MICHAEL DEWINE
Ohio Attorney General

SANDRA E. PINKERTON (0062217)
*Counsel of Record
Assistant Attorney General
Workers' Compensation Section
150 East Gay Street, 22nd Floor
Columbus, Ohio 43215
614-466-6696
614-728-9535 - Fax
sandra.pinkerton@ohioattorneygeneral.gov
Counsel for Appellant-Respondent,
Industrial Commission of Ohio

VINCENT S. MEZINKO (0012108)
Margelefsky & Mezinko, LLC
709 Madison Avenue, Suite 301
Toledo, Ohio 43604
419-244-4200
419-244-1463 - Fax
vmezinko@mpmlawoffice.com

Counsel for Appellee-Respondent,

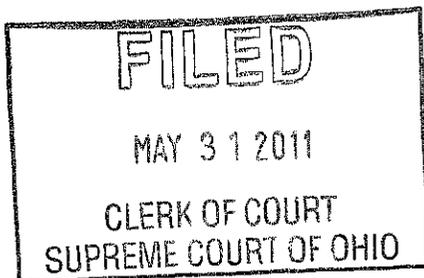


TABLE OF CONTENTS

TABLE OF AUTHORITIES2

INTRODUCTION.....1

STATEMENT OF FACTS AND THE CASE.....2

ARGUMENT7

Appellant Industrial Commission’s Proposition of Law:8

 Oral testimony at a hearing, whether transcribed or not, may serve as “some evidence” to support a the Industrial Commission’s decision.8

CONCLUSION.....12

CERTIFICATE OF SERVICE13

APPENDIX.....14

 Notice of Appeal filed.....Appendix 1

 Tenth District Judgment Entry.....Appendix 4

 Tenth District Decision.....Appendix 5

 R.C. 4123.511Appendix 34

 R.C. 4123.56Appendix 39

TABLE OF AUTHORITIES

Cases	Page
<i>Chirila v. Ohio State Chiropractic Bd.</i> (2001) 145 Ohio App.3d 589	9
<i>DePalma v. City of Lima</i> , 155 Ohio App.3d 81, 2003-Ohio-5451	9
<i>Gaines v. Preterm Cleveland, Inc.</i> (1987) 33 Ohio St.3d 54	9
<i>Hurt v. Charles J. Rogers Transp. Co.</i> (1955) 164 Ohio St. 329	7
<i>State ex rel McBee v. Indus. Comm.</i> , Franklin App. No. 09AP-239, 2010-Ohio-5547	1, 6
<i>State ex rel. Commercial Lovelace Motor Freight v. Lancaster</i> (1986) 22 Ohio St.3d 191	7
<i>State ex rel. Ford Motor Co. v. Indus. Comm.</i> , 98 Ohio St.3d 20, 2002-Ohio-7038	8
<i>State ex rel. Lawson v. Mondie Forge</i> , 104 Ohio St.3d 39, 2004-Ohio-6086	8, 9
<i>State ex rel. Mobley v. Indus. Comm.</i> (1997) 78 Ohio St. 3d 579, 584.	7
<i>State ex rel. Moss v. Indus. Comm.</i> (1996) 75 Ohio St.3d 414	7
<i>State ex rel. Pass v. C.S.T. Extraction Co.</i> (1996) 74 Ohio St.3d 373	7
<i>State ex rel. Taylor v. Indus. Comm.</i> 150 Ohio App.3d 309, 2002-Ohio-6451	7
<i>State v. DeHass</i> (1967) 10 Ohio St.2d 230	7, 9
<i>State v. Thompson</i> (1998) 127 Ohio App.3d 511	9

Statutes

Page

§R.C. 4123.511 5

R.C. 4123.56 7

INTRODUCTION

This is an appeal of right from a workers' compensation mandamus action originating in the Tenth District Court of Appeals. The question presented in this appeal is very narrow: whether Appellant, Industrial Commission of Ohio ("commission") can rely on oral testimony of a claimant and his spouse to support its finding of fraud. The answer to the question is "yes." The secondary question presented is whether knowledge of wrongdoing or impermissible work can be inferred even when the claimant receives no pay. Again the answer is "yes."

Appellee-Relator Garry McBee sought a writ of mandamus to vacate a commission order that found that he had fraudulently received temporary total disability compensation ("TTD") while working for his wife's business. McBee has not appealed the portion of the appellate court decision that upheld the overpayment or the termination of his TTD. Thus, McBee concedes that he engaged in work activities for his wife's business while receiving TTD, and that those activities rendered him ineligible for TTD. *State ex rel McBee v. Indus. Comm.*, Franklin App. No. 09AP-239, 2010-Ohio-5547.

However, the court of appeals erred when it found that the commission could not rely on McBee's and his wife's untranscribed oral testimony to infer knowledge of falsity, to satisfy the requirements of fraud. The appellate court usurped the commission's role as fact-finder, inappropriately substituting the court's judgment for that of the commission. As explained by the minority opinion, the commission hearing officer heard testimony from McBee and his wife and was in the best position to observe their demeanor and credibility. Thus, the commission could reasonably infer that McBee knew his activities for his wife's business were "work" making him ineligible for TTD when he repeatedly applied for additional TTD and told examining physicians and hearing officers that he had not returned to work. "Some evidence," along with reasonable

inferences support the commission's order finding that McBee fraudulently received TTD while he worked in his wife's business. Accordingly, this court should overrule the portion of the appellate court decision that vacated the finding of fraud and vacate the writ of mandamus issued by that court.

STATEMENT OF FACTS AND THE CASE

A. Garry McBee sought temporary total disability following an industrial injury while employed with Blue Ribbon Rental.

McBee was injured on October 27, 2004 while employed with Appellee, Blue Ribbon Rentals, Inc. Supplement at p. 1 ("S. ___"). By an order in April 2005, his claim was allowed for sprain right shoulder, TTD was awarded from October 28, 2004 and continuing, and his average weekly wage was set to \$97.10. S. 5. Following the TTD award, McBee received a letter regarding his TTD eligibility which stated that he would become ineligible for TTD if he returned to work:

The Ohio Bureau of Workers' Compensation (BWC) has issued an order to award you temporary total disability benefits.

According to workers' compensation law, the Ohio Revised Code, you may continue to receive these benefits as long as medical evidence supports temporary total disability due to your work-related injury.

Also, according to workers' compensation law, you are not entitled to temporary total benefits if:

- (1) You return to *any type of work* including full-time, part-time, self-employment, and commission work with any employer. This includes employers other than the one you worked for when you were injured,
- (2) Your treating physician says you are ready to go back to your former job,
- (3) Your former employer or another employer offers you a new job within your physical capabilities,
- (4) You have reached maximum medical improvement.

(Emphasis added). S. 7. Thus, McBee had received a letter indicating that he would stop receiving TTD if he engaged in any type of work.

McBee requested and received additional TTD. S. 9-23. Each of his eight applications for TTD contained the following warning just above McBee's signature, indicating that he understood he was not to work while receiving TTD:

I understand that I am not permitted to work while receiving temporary total compensation. I have answered the foregoing questions truthfully and completely. I am aware that any person who knowingly makes a false statement, misrepresentation, concealment of fact or any other act of fraud to obtain compensation as provided by BWC or who knowingly accepts compensation to which that person is not entitled is subject to felony criminal prosecution and may, under appropriate criminal provisions be punished by a fine or imprisonment or both.

S. 9. McBee also received warrants for payment of TTD and warrant or check contained the following warning—again indicating that he would not be entitled to the benefits if he was working—above McBee's signature:

WARNING- If this warrant is to compensate you for permanent total disability, temporary total disability, living maintenance or wage loss not working benefits, you are not entitle to it if you are working....

S. 24.¹ McBee endorsed and deposited 44 warrants with the same warning language. S. 25-26.

In January 2006, McBee moved to reset his average weekly wage ("AWW"), the basis for all future compensation payments ordinarily calculated by dividing the claimant's earnings from the year immediately prior to the industrial injury by 52 weeks. S. 34. McBee's motion was heard by the same SHO who would later hear the fraud allegations. S. 35. Before the SHO, McBee testified that he had nine years of experience in the auto industry, but became unemployed from March 2003, when his employer went out of business, until September 2004,

¹ A list of the warrants issued to McBee is provided in the Supplement at pages 25-26. Both the front and back of each warrant is included in the full SIU report before the commission. Each warrant contains the same warning above McBee's signature. However, for convenience and economy, only one example of a warrant is included in the Supplement to this Court.

approximately eight weeks before his injury, when he started with Blue Ribbon Rentals. McBee sought to exclude those weeks of unemployment from the calculations of his AWW. The commission, relying on McBee's testimony, agreed to recalculate McBee's AWW by dividing his previous year's earnings by eight rather than 52 weeks of employment, finding that his period of unemployment was not a lifestyle choice. S. 35. Notably, McBee failed to mention that he worked as the general manager of McBee Auto Sales, for more than 40 of the 44 excluded weeks, having started that position in November 2003.

The exclusion of the weeks of unemployment raised McBee's AWW from \$97.10 to \$631.13, and, entitled him to an additional \$21,800 in past TTD benefits. McBee continued to submit requests for TTD; all TTD after May 2006 was paid at the higher rate.

B. McBee bought and sold vehicles on behalf of his wife's business for 18 months following his injury.

The Bureau of Workers' Compensation's Special Investigation Unit ("BWC-SIU") investigated McBee and his activities for McBee Auto Sales (also referred to as "McBee Sales"), a used car business owned by his wife ("Mrs. McBee"). S. 27-31.² BWC-SIU found that McBee attended auctions on behalf of McBee Sales starting three days after his injury. Between October 30, 2004 and March 9, 2006 ("the disability period"), McBee attended 46 auto auctions (36 without his wife), bought 43 vehicles, and sold 44 vehicles. S. 29. McBee was listed as the general manager of McBee Sales. He signed checks, purchase documents, and auto titles for his wife's business; he approved minimum bids for cars that were auctioned and entered bids to purchase vehicles but was not paid. S. 29.

² The full SIU report with attachments exceeds 500 pages. For convenience of the court and because McBee did not dispute the appellate court's finding that he "worked" for his wife's business, only the summary narrative and certain pertinent attachments are included in the Supplement to this court.

C. The Bureau of Workers' Compensation sought to terminate McBee's temporary total disability compensation and to declare that McBee fraudulently received compensation.

BWC-SIU moved to terminate McBee's TTD, find that McBee had fraudulently received TTD since October 30, 2004, and to declare all compensation overpaid. S. 32.

On January 16, 2008, the commission conducted a hearing. The hearing officer found that McBee had "been engaged in work activities while receiving [TTD] from October 30, 2004 through March 9, 2006." S. 37. McBee has not appealed the Tenth District's affirmance of these commission findings.

Additionally the commission found McBee committed fraud in receiving TTD and his benefits were terminated effective October 30, 2004. The commission found "that the elements of fraud have been met." S. 38. McBee concealed his work activity at McBee Sales when he had a duty to disclose. The commission also noted that "despite his current activities with McBee Sales," McBee told an examining doctor "that he had not returned to work since the date of his injury and that...he was unable to drive to work because of the potential for drowsiness related to his medications." McBee misrepresented that he had not returned to work when he signed multiple applications for TTD and when he was interviewed by BWC-SIU. S. 28-30.

From McBee's experience in the used car business, the SHO inferred that McBee knew that his buying and selling cars generated income for his wife's business. S. 35 and 38. The SHO—who was the same SHO that heard his AWW application—found that McBee's work activities at McBee Sales were material because McBee would not have received TTD had he disclosed his work activity. Thus, the SHO, then hearing a motion regarding McBee's work experience for the second time, concluded that McBee committed fraud when he misrepresented his work activities with knowledge that these misrepresentations were false. S. 38. The

commission, therefore, declared all TTD compensation from October 29, 2004, to March 6, 2006, overpaid and ordered recoupment under the fraud provisions of R.C. 4123.511(K). S. 39-40. From this order, McBee filed this action in mandamus.

D. The court incorrectly found that the Industrial Commission abused its discretion in finding that McBee knew his activity for McBee sales was “work.”

The Tenth District issued a writ ordering the commission to vacate the portion of its order that found fraud. The appellate court agreed with the commission that McBee’s activities generated income for McBee Sales, and, therefore, were impermissible work disentitling him to TTD. *Id.* at ¶66. The appellate court upheld the overpayment but issued a writ to vacate the portion of the commission’s order declaring fraud. *Id.* at 77.

The appellate court found that the “focus of the overpayment issue is on the concept of remuneration.” *McBee* at ¶ 49. The court acknowledged that the receipt of wages is not a prerequisite to disentitle the claimant’s receipt of TTD. *Id.* at ¶59-60. However, the appellate court implied that remuneration is a prerequisite for fraud when it concluded that the commission cannot infer knowledge from the warning letter and the C-84 applications. The court held that the commission demonstrated that McBee met four of the six elements of fraud but failed to show that McBee knew that his unremunerated activities were prohibited “work” or that he intended to mislead the BWC or the commission. *Id.* at ¶ 5. The appellate court, therefore, issued a writ to vacate the commission’s fraud finding. *Id.* at ¶ 77.

However, the dissent found that the court failed to consider the commission’s ability to rely on McBee’s oral testimony regarding his knowledge of the auto industry, the amount of income generated for McBee Sales as a result of his activities, McBee’s reticence to disclose those activities during his AWW hearing and the hearing officer’s opportunity to observe McBee’s demeanor at two hearings. *McBee* at ¶ 8. The dissent stated that, McBee’s knowledge can be

reasonably inferred from the live testimony, and that the appellate court should not substitute its judgment for that of the commission. *McBee* at ¶ 8.

ARGUMENT

In a mandamus action, the court should not reweigh the evidence or substitute its judgment for that of the commission. A mandamus proceeding is not a de novo review of the evidence, with the court substituting its judgment for that of the commission. *State ex rel. Mobley v. Indus. Comm.* (1997) 78 Ohio St. 3d 579, 584. A writ of mandamus will issue “only 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. Taylor v. Indus. Comm.*, 150 Ohio App.3d 309, 2002-Ohio-6451, at ¶ 21, emphasis added. Abuse of discretion, which is necessary to justify an interference with the exercise of the commission’s discretionary power, implies not merely error of judgment, but perversity of will, passion, prejudice, partiality or moral delinquency. *State ex rel. Commercial Lovelace Motor Freight v. Lancaster* (1986), 22 Ohio St.3d 191.

Questions of the weight and credibility of the evidence are reserved solely to the commission and should not be disturbed by the reviewing court. The commission is the sole fact-finder and the exclusive evaluator of evidentiary weight and credibility. *State ex rel. Moss v. Indus. Comm.* (1996), 75 Ohio St.3d 414, 416. This court has long held that “the weight of the evidence and the credibility of the witnesses are issues primarily for the trier of fact.” *State v. DeHass* (1967), 10 Ohio St.2d 230. Moreover, the fact-finder is entitled to draw inferences, even if the inferences are based in part on another inference. *Hurt v. Charles J. Rogers Transp. Co.* (1955), 164 Ohio St. 329. A writ should not issue if a commission order is supported by “some evidence,” and the reasonable inferences therefrom, even if contrary evidence of greater quality and/or quantity was presented. *State ex rel. Pass v. C.S.T. Extraction Co.* (1996), 74 Ohio St.3d

373, 376. A commission order relying on the oral testimony of the claimant should be afforded the same deference as an order relying on written evidence and should not be disturbed when supported by “some evidence.” The commission order here is supported by “some evidence” and should not be disturbed.

Appellant Industrial Commission’s Proposition of Law:

Oral testimony at a hearing, whether transcribed or not, may serve as “some evidence” to support the Industrial Commission’s decision.

McBee concedes that he was working when receiving TTD. A claimant who receives TTD by knowingly misrepresenting his return to employment is guilty of civil fraud. TTD is paid when a claimant is temporarily unable to return to his former employment due to the industrial injury and is terminated when, inter alia, work within the claimant’s physical capabilities is made available. R.C. 4123.56. Payment of TTD is inappropriate where there is evidence of: (1) actual sustained remunerative employment; (2) the physical ability to do sustained remunerative employment; or (3) activities so medically inconsistent with the disability evidence that they impeach the medical evidence underlying the award. *State ex rel. Ford Motor Co. v. Indus. Comm.*, 98 Ohio St.3d 20, 2002-Ohio-7038, ¶ 18, adopting the standards applied to PTD from *State ex rel. Lawson v. Mondie Forge*, 104 Ohio St.3d 39, 2004-Ohio-6086. As explained in *Lawson*, “nothing demonstrates capacity to perform sustained remunerative employment better than actual performance thereof.” *Lawson* at ¶ 17. McBee did not appeal the Tenth District’s decision not to vacate the portion of the commission order that declared an overpayment and denied McBee TTD. He therefore concedes that he worked when accepting TTD benefits.

However, the question remaining here is whether McBee committed civil fraud. Fraud occurs when: (1) there is a representation, or, where there is a duty to disclose, concealment of a fact; (2) material to the transaction at hand; (3) made falsely, with knowledge of its falsity, or

with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred; (4) made with the intent of misleading another into relying upon it; (5) there is justifiable reliance upon the representation or concealment; and (6) a resulting injury caused by the reliance. *Gaines v. Preterm Cleveland, Inc.* (1987), 33 Ohio St.3d 54. The appellate court found that while all other elements of fraud were supported by some evidence, the third element, that McBee had made the representation with knowledge of falsity, was not supported.

Specifically, the commission had inferred McBee's knowledge of falsity from his oral testimony at hearing, as well as Mrs. McBee's testimony. The court below held that the commission could not infer knowledge of falsity from the written evidence. *McBee* at ¶ 77. However, the appellate court discredited the oral testimony of McBee and his wife.

The court should not disturb the commission's fraud finding when the order is supported by "some evidence," including oral testimony, and the reasonable inferences drawn from that testimony. The commission, not the court, judges that weight and credibility of the witnesses and is afforded deference in its judgment and the inferences drawn from the witness testimony. The Ohio Supreme Court has long held that "the weight of the evidence and the credibility of the witnesses are issues primarily for the trier of fact." *State v. DeHass* (1967), 10 Ohio St.2d 230. A reviewing court should defer, on issues of credibility and weight, to the fact-finder because:

The fact-finder . . . occupies a superior position in determining credibility. The fact-finder can hear and see as well as observe the body language, evaluate voice inflections, observe hand gestures, perceive the interplay between the witness and the examiner, and watch the witness's reaction to exhibits and the like. Determining credibility from a sterile transcript is a Herculean endeavor. A reviewing court must, therefore, accord due deference to the credibility determinations made by the fact-finder.

State v. Thompson (1998), 127 Ohio App.3d 511, 529. The same deference is afforded when the trier-of-fact is an administrative agency. *Chirila v. Ohio State Chiropractic Bd.* (2001), 145

Ohio App.3d 589; see also *DePalma v. City of Lima*, 155 Ohio App.3d 81, 2003-Ohio-5451. This court explained that “the commission has substantial leeway in both interpreting and drawing inferences from the evidence before it.” *Lawson* at ¶34.

The commission relied on McBee’s testimony not only from the fraud hearing but also from his prior AWW and TTD hearings. The commission noted its reliance on McBee’s testimony, or more correctly, stated his omissions from his testimony, stating that:

He [McBee] was also present at the District and Staff level hearings on January 6, 2005 and April 25, 2005 when temporary total was granted from October 28, 2004 to January 17, 2005 and to continue and did not indicate that he was involved in work activity with McBee Sales.

At the Staff Hearing on May 16, 2006 injured worker advised the Hearing Officer that he was in the car business for nine years until March of 2003 when the company went out of business. He did not mention his work activity with McBee Sales.

S. 38. Moreover, the hearing officer acknowledges that “all evidence was reviewed and considered.” S. 39. Thus, the commission apparently relied, at least in part, on McBee’s testimony from both the fraud hearing and the previous hearings regarding TTD and AWW, as well as the fact that McBee failed to disclose mention his work for McBee Sales. The prior TTD and AWW hearings resulted in McBee’s receipt of additional compensation, either by the award of TTD, continued TTD or the increased rate of compensation payment. McBee’s omission resulted in his receipt of additional benefits.

The commission inferred from his testimony that McBee knew that he would not receive TTD if the commission or BWC learned of his activities for McBee Sales. McBee testified that he had previously operated his own used car business, worked for another employer for nine years in the same business, had a dealer license and had a performed the same work for his wife before the injury. S. 39. Upon the commission’s initial decision awarding McBee TTD, McBee received a letter from the BWC which contained the following warning:

Also, according to workers' compensation law, you are not entitled to temporary total benefits if:

(1) You return to *any type of work* including full-time, part-time, self-employment, and commission work with any employer. This includes employers other than the one you worked for when you were injured, ...

(3) Your former employer or another employer offers you a new job within your physical capabilities.

(Emphasis added). S. 7. The letter warned McBee that “any type of work” would preclude payment of TTD. Moreover, the letter explained that any work included self-employment where one might not expect to receive a salary or wages. S. 7. The commission could reasonably infer that, given his experience, McBee understood that “work” did not require remuneration.

Given the evidence, including McBee’s testimony, the commission made the reasonable inference that McBee understood that his activities were prohibited “work.” Based on McBee’s testimony regarding his familiarity with the used car business, in his own business and as an employee for another employer, the commission could reasonably infer that:

- McBee would expect to be paid if he performed the same duties for an employer other than his wife;
- McBee understood that his activities generated income for his wife’s business
- Mc Bee understood that if he did not perform these duties, his wife would either miss the income opportunity or have to pay someone else to perform those same duties.

The commission occupies the best position to observe the witnesses, including body language and their reaction to examination and other evidence. The commission, as fact-finder, may draw inferences from those observations. The courts must defer to the commission’s superior position to draw inferences from the witnesses. The appellate court usurped the commission’s role as fact-finder and erred in finding that the commission cannot rely on oral testimony, and reasonable inferences from that testimony, to find fraud.

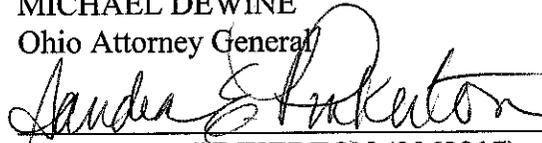
A commission's order supported by oral testimony is still supported by "some evidence" and should not be disturbed. Accordingly, the decision and judgment of the appellate court should be overruled and the requested writ denied.

CONCLUSION

The Tenth District improperly found that the commission order, supported by oral testimony, is not supported by "some evidence." The commission alone judges the weight and credibility of the witnesses and may draw reasonable inferences from their testimony. A reviewing court must defer to the commission's assessment of the credibility of the witnesses and the inferences from their testimony. A commission order is not invalid simply because it is supported by oral testimony. Oral testimony can serve as "some evidence" to sustain the commission's order. The appellate court's decision should be overruled and the requested writ of mandamus should be denied.

Respectfully submitted,

MICHAEL DEWINE
Ohio Attorney General



SANDRA E. PINKERTON (0062217)
Assistant Attorney General
Workers' Compensation Section
150 East Gay Street, 22nd Floor
Columbus, Ohio 43215
614-466-6696
Sandra.pinkerton@ohioattorneygeneral.gov

Counsel for Respondent,
Industrial Commission of Ohio

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Merit Brief of Appellant, Industrial Commission of Ohio, was served by, postage-paid regular mail, this 31 day of May 2011, on:

John F. Potts
405 Madison Avenue, Suite 1010
Toledo, Ohio 43604-1154

Attorney for Relator,
Garry K. McBee

Vincent S. Mezinko
LAW OFFICES OF MARGELEFSKY & MEZINKO, LLC
709 Madison Avenue, Suite 301
Toledo, Ohio 43604

Attorney for Respondent,
Blue Ribbon Rentals, Inc.


/SANDRA E. PINKERTON
Assistant Attorney General

APPENDIX

In the
Supreme Court of Ohio

ORIGINAL

State of Ohio ex rel. :
Garry K. McBee, :
Appellee, :
vs. :
Industrial Commission of Ohio :
Appellant, :
and :
Blue Ribbon Rentals, Inc., :
Appellee. :

CASE NO. **10-2288**

On Appeal from the
Franklin County Court of Appeals, Tenth
Appellate District

Court of Appeals
Case No. 09AP 239

**NOTICE OF APPEAL OF APPELLANT
INDUSTRIAL COMMISSION OF OHIO**

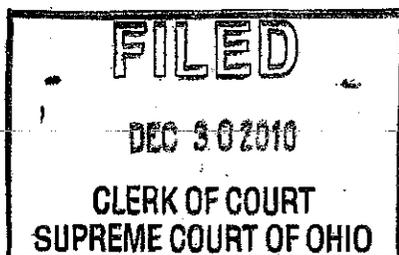
JOHN F. POTTS (0051833)
405 Madison Avenue, Suite 1010
Toledo, Ohio 43604-1154
419-255-1105
419-241-1122 – Fax

Counsel for Appellee-Relator,
Garry K. McBee

RICHARD CORDRAY
Ohio Attorney General

SANDRA E. PINKERTON*(0062217)
Assistant Attorney General
**Counsel of Record*
Workers' Compensation Section
150 East Gay Street, 22nd Floor
Columbus, Ohio 43215
614-466-6696
614-728-9535 fax
sandra.pinkerton@ohioattorneygeneral.gov
Counsel for Respondent,
Industrial Commission of Ohio

VINCENT S. MEZINKO (0012108)
Margelefsky & Mezinko, LLC
709 Madison Avenue, Suite 301
Toledo, OH 43604
419-244-4200
419-244-1463 – Fax
vmezinko@mpmlawoffice.com
Counsel for Appellee-Respondent,
Blue Ribbon Rentals, Inc.

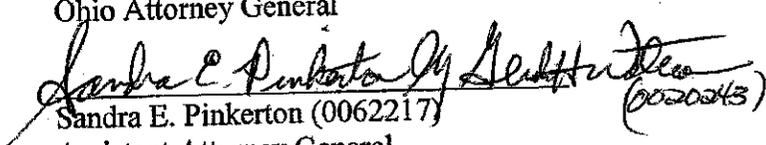


**NOTICE OF APPEAL OF APPELLANT
INDUSTRIAL COMMISSION OF OHIO**

Appellant Industrial Commission of Ohio hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Franklin County Court of Appeals, Tenth Appellate District, entered in Court of Appeals Case No. 09AP 239 on November 16, 2010. This case originated in the Franklin County Court of Appeals via complaint in mandamus, and this appeal is from the court's decision in said case. Therefore, this is an appeal as of right. A copy of the judgment is attached hereto.

Respectfully submitted,

RICHARD CORDRAY
Ohio Attorney General


Sandra E. Pinkerton (0062217)
Assistant Attorney General
Workers' Compensation Section
150 East Gay Street, 22nd Floor
Columbus, Ohio 43215
614-466-6696
sandra.pinkerton@ohioattorneygeneral.gov
Counsel for Respondent,
Industrial Commission of Ohio

CERTIFICATE OF SERVICE

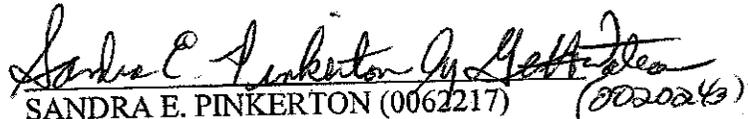
This is to certify that a copy of the foregoing, Notice of Appeal of Appellant/Respondent Industrial Commission of Ohio, was served by postage paid regular U.S. Mail, this 30th day of December 2010, upon:

John F. Potts
405 Madison Avenue, Suite 1010
Toledo, Ohio 43604-1154

Attorney for Appellee-Relator,
Garry K. McBee

Vincent S. Mezinko
LAW OFFICES OF MARGELEFSKY & MEZINKO, LLC
709 Madison Avenue, Suite 301
Toledo, Ohio 43604

Attorney for Appellee-Respondent,
Blue Ribbon Rentals, Inc.


SANDRA E. PINKERTON (0062217) (0020243)
Assistant Attorney General

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

FILED
COURT OF APPEALS
FRANKLIN CO. OHIO

2010 NOV 16 PM 3:20

CLERK OF COURTS

State of Ohio ex rel. Garry K. McBee, :

Relator, :

v. :

No. 09AP-239

Industrial Commission of Ohio
and Blue Ribbon Rentals, Inc., :

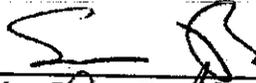
(REGULAR CALENDAR)

Respondents. :

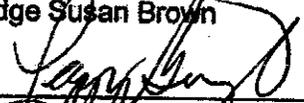
JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on November 16, 2010, the commission's objections to the magistrate's decision are overruled, the decision of the magistrate is approved and adopted by this court as its own, and it is the judgment and order of this court that relator's requested writ of mandamus is granted. The commission is ordered to amend its SHO's order of January 16, 2008 by deleting the finding that compensation was fraudulently obtained, and by entering a finding that the evidence fails to show that the compensation was fraudulently obtained. Costs assessed equally against respondents.

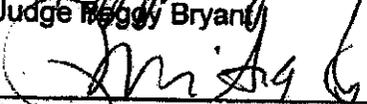
Within three (3) days from the filing hereof, the clerk of this court is hereby ordered to serve upon all parties not in default for failure to appear, notice of this judgment and its date of entry upon the journal.



Judge Susan Brown



Judge Peggy Bryant



Judge Patrick M. McGrath, concurs in part.

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

FILED
COURT OF APPEALS
10 NOV 16 2010

7^{PM} NOV 16 PM 2:43

CLERK OF COURTS

State of Ohio ex rel Garry K. McBee, .

Relator, :

v :

No. 09AP-239

Industrial Commission of Ohio
and Blue Ribbon Rentals, Inc., :

(REGULAR CALENDAR)

Respondents. :

D E C I S I O N

Rendered on November 16, 2010

John F Potts, for relator.

Richard Cordray, Attorney General, and *Sandra E Pinkerton*,
for respondent Industrial Commission of Ohio.

Law Offices of Margelefsky & Mezinko, LLC, and *Vincent S
Mezinko*, for respondent Blue Ribbon Rentals, Inc.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

BROWN, J

{¶1} Relator, Garry K McBee ("claimant"), has filed this original action requesting that this court issue a writ of mandamus ordenng respondent, Industrial Commission of Ohio ("commission"), to vacate its order finding that he was overpaid temporary total disability ("TTD") compensation from October 30, 2004 through March 9,

2006, terminating TTD compensation as of October 30, 2004, and determining that the compensation was fraudulently obtained, and to enter an order reinstating TTD compensation.

{¶2} This matter was referred to a court-appointed magistrate pursuant to Civ R. 53(C) and Loc.R 12(M) of the Tenth District Court of Appeals. The magistrate issued a decision, which is appended to this decision including findings of fact and conclusions of law, and recommended that this court issue a writ of mandamus. The commission has filed objections to the magistrate's decision.

{¶3} The commission presents two objections. In the first objection, the commission argues that the magistrate erred when he omitted any fact that claimant and his wife attended and testified at the January 16, 2008 fraud hearing or that the staff hearing officer ("SHO") had the opportunity to observe their behavior. The commission urges that the SHO's ability to observe the claimant is part and parcel to the commission's role as fact finder. However, we can find no error on the part of the magistrate for failing to include this detail in his decision. The commission presents no evidence that the magistrate was unaware that claimant and his wife testified at the fraud hearing, and our own reading of the magistrate's decision does not suggest such. To the contrary, the magistrate quoted nearly the entire SHO's decision from the January 16, 2008 hearing, and the introductory portion of the SHO's decision indicates that claimant and his wife were present. Therefore, given the magistrate's extensive treatment of the SHO's decision, we presume the magistrate read the entirety of the decision, including the SHO's indication that claimant and his wife were present. We find no error in the magistrate's decision in this respect and overrule the first objection.

{¶4} In its second objection, the commission argues that the magistrate erred when he found that the inference of fraud was based solely on the May 5, 2005 warning letter from the Bureau of Workers' Compensation ("BWC") and the C-84 applications, and failed to consider that the hearing officer had the opportunity to observe claimant and hear his testimony at least twice and was free to draw inferences from such. The commission contends that claimant himself made statements at multiple hearings that failed to mention that he was involved in work activity with McBee Auto Sales. The commission asserts the SHO was in the best position to judge claimant's credibility and infer that he had knowledge of the falsity of his statements.

{¶5} The magistrate found that the commission, in finding claimant committed fraud and knew that his activities constituted "work," wrongly presumed that the May 10, 2005 BWC warning letter and the query on the C-84s clearly conveyed to claimant what activities constituted work that bars TTD compensation. The commission's contention herein is that the magistrate should have also considered claimant's testimony at the hearings, as well as claimant's statements to the examining physician and the bureau's Special Investigation Unit ("SIU") investigator, in which he failed to mention he was involved in work activity with McBee Auto Sales. However, neither claimant's testimony nor his statements to the examining physician and SIU investigator demonstrate that claimant knew he was "working" for purposes of TTD compensation. There was no other evidence cited by the commission to support the knowledge and intent elements of fraud, and we fail to find any evidence in the record strong enough to support an inference that claimant clearly had knowledge he was engaged in "work" or that he ever denied he was working with the intent to mislead

{¶6} After an examination of the magistrate's decision, an independent review of the evidence pursuant to Civ.R. 53, and due consideration of the commission's objections, we overrule the objections. Accordingly, we adopt the magistrate's decision as our own with regard to the findings of fact and conclusions of law and issue a writ of mandamus ordering the commission to amend its SHO's order of January 16, 2008 by deleting the finding that compensation was fraudulently obtained, and by entering a finding that the evidence fails to show that the compensation was fraudulently obtained.

Objections overruled; writ of mandamus granted

BRYANT, J , concurs.

McGRATH, J , concurs in part and dissents in part

McGRATH, J., concurring in part and dissenting in part.

{¶7} I concur with the majority's decision to adopt the magistrate's decision upholding the commission's having declared an overpayment of TTD compensation because of relator's activities on behalf of McBee Sales.

{¶8} However, I cannot agree with the magistrate's or the majority's determination that the commission abused its discretion in determining that the compensation was fraudulently obtained. Our role in review includes the restriction that we defer to the commission's fact-finding, and my reading of the evidence causes me to conclude that there is some evidence, with reasonable inferences thereof, to support the commission's determination of fraud. Relator and his wife both appeared before the hearing officer who was in the position to judge demeanor and credibility. Relator had been in the same business as McBee Motors was in for nine years before it went out of business, and he was doing the same work for McBee. There was evidence that he was

the only one doing the buying and selling and was listed as General Manager of the business. He disclosed none of this to his doctor or the Bureau of Workers' Compensation, although he had received multiple warnings on the C-94 applications and entitlement letters. For that reason, I respectfully dissent, would not adopt that portion of the majority's decision, and would accordingly deny the requested writ of mandamus.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Garry K. McBee,

Relator,

v

Industrial Commission of Ohio
and Blue Ribbon Rentals, Inc.,

Respondents

.
:
:
:

No 09AP-239

(REGULAR CALENDAR)

MAGISTRATE'S DECISION

Rendered on April 23, 2010

John F. Potts, for relator.

Richard Cordray, Attorney General, and *Sandra E. Pinkerton*,
for respondent Industrial Commission of Ohio.

Law Offices of Margelefsky & Mezinko, LLC, and *Vincent S. Mezinko*, for respondent Blue Ribbon Rentals, Inc.

IN MANDAMUS

{¶9} In this original action, relator, Garry K. McBee, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order declaring an overpayment of temporary total disability ("TTD") compensation for the

period October 30, 2004 through March 9, 2006, terminating TTD compensation as of October 30, 2004, and determining that the compensation was fraudulently obtained, and to enter an order reinstating TTD compensation. In the alternative, relator requests that the writ order the commission to amend its order so that it is found that the compensation was not fraudulently obtained.

Findings of Fact.

{¶10} 1 On October 27, 2004, relator sustained an industrial injury while employed with respondent Blue Ribbon Rentals, Inc. ("employer"), a state-fund employer. On that date, relator sprained his right shoulder while moving a furniture entertainment cabinet on a hand dolly.

{¶11} 2 On October 28, 2004, relator completed a workers' compensation claim form ("FROI-1") that was filed October 29, 2004. Apparently, the employer refused to certify the industrial claim (No. 04419232).

{¶12} 3. On a C-84 dated November 19, 2004, attending physician Moshir Khalil, M.D., certified TTD from November 4, 2004, to an estimated return-to-work date of December 27, 2004, based upon the shoulder sprain.

{¶13} 4. On November 26, 2004, the Ohio Bureau of Workers' Compensation ("bureau") mailed an order allowing the claim for a right shoulder/arm sprain, and awarding TTD compensation beginning October 30, 2004.

{¶14} 5 The employer administratively appealed the bureau's November 26, 2004 order.

{¶15} 6. Following a January 6, 2005 hearing, at which relator was present, a district hearing officer ("DHO") issued an order affirming the bureau's November 26, 2004

order The DHO's order allowed the claim for "sprain right shoulder" and awarded TTD compensation from October 28, 2004 to January 17, 2005, based upon records from Toledo Hospital dated October 28, 2004 and Dr. Khalil's C-84

{¶16} 7 The employer administratively appealed the DHO's order of January 6, 2005

{¶17} 8. Following an April 25, 2005 hearing, at which relator was present, a staff hearing officer ("SHO") issued an order affirming the DHO's order of January 6, 2005. The DHO's order was mailed May 3, 2005.

{¶18} 9. On May 10, 2005, the bureau mailed to relator a letter, warning

The Ohio Bureau of Workers' Compensation (BWC) has issued an order to award you temporary total disability benefits

According to workers' compensation law, the Ohio Revised Code, you may continue to receive these benefits as long as medical evidence supports temporary total disability due to your work-related injury

Also, according to workers' compensation law, you are not entitled to temporary total benefits if

(1) You return to any type of work including full-time, part-time, self-employment, and commission work with any employer. This includes employers other than the one you worked for when you were injured,

(2) Your treating physician says you are ready to go back to your former job,

(3) Your former employer or another employer offers you a new job within your physical capabilities,

(4) You have reached maximum medical improvement

{¶19} 10 In September 2005, the bureau's Toledo Special Investigations Unit ("SIU") opened an investigation following allegations from relator's employer that, during

his receipt of TTD compensation, relator had been working for a company doing business as McBee Sales.

{¶20} 11. On March 30, 2007, some 18 months after opening its investigation, SIU issued a written report and moved the commission for retroactive termination of TTD compensation to October 30, 2004, for a declaration of an overpayment, and for a determination that the compensation was fraudulently obtained

{¶21} 12. SIU obtained records from Montpelier Auto Auction of Ohio ("Montpelier Auction") located in Montpelier, Ohio. One of the records is a "Dealer Registration Application" ("DRA") dated March 29, 2004, signed by relator's spouse, Sandra J. McBee, as the owner of McBee Sales. The DRA is a Montpelier Auction form requiring the applicant to provide requested information.

{¶22} On the March 29, 2004 DRA, McBee Sales is listed as the dealer with a business address in Monroe, Michigan.

{¶23} According to the DRA, Sandra J. McBee is the owner of McBee Sales and Garry K. McBee is the "Gen[eral] Manager." McBee Sales opened for business in November 2003. Under the heading "Additional Authorized Employees (Will Buy/Sell At Auction)," relator's name is the only name listed.

{¶24} 13. SIU obtained a Montpelier Auction "Agent Authorization Form" dated March 29, 2004, from McBee Sales. Relator and his wife signed the form as agents of McBee Sales. The form provides in part:

~~McBee Sales (Dealership) wishes to register the following person(s) as an "Authorized Agent (s)" to buy and sell automobiles, and to execute checks and to sign on your behalf, the bills of sale, odometer mileage statements, assignments of titles on behalf of the above listed dealership. * * *~~

{¶25} 14. SIU also obtained a Montpelier Auction "Agent Authorization Form" dated December 8, 2004, for McBee Sales. This form is also signed by relator and his wife as agents of McBee Sales

{¶26} 15. SIU obtained from the Michigan Department of State a copy of an "Original Vehicle Dealer Application" signed on October 13, 2003 by Sandra J. McBee as owner of McBee Sales. Sandra J. McBee also applied for renewals of the vehicle dealer license on December 30, 2003, October 4, 2004, and December 8, 2005.

{¶27} 16. On September 18, 2006, SIU Special Agent Mitchey and Assistant Special Agent Fox interviewed relator at his home. According to the SIU report

* * * [Agents Mitchey and Fox] showed their identification to MCBEE and MCBEE invited the agents inside Business cards were provided to MCBEE. MCBEE was advised that his cooperation was voluntary and that he could ask the agents to leave at any time. MCBEE acknowledged he understood. MCBEE then invited the agents over to the kitchen table. SA Mitchey asked MCBEE whether he understood that he could not work in any capacity while receiving Temporary Total disability benefits and MCBEE stated that he understood. MCBEE stated that he had not worked since his injury in October 2004, and that the only money he has received was from BWC MCBEE inquired about the investigations on the business cards and it was explained to MCBEE that an allegation was received that he was working at McBee Sales while receiving disability benefits. MCBEE wanted to know who was the source of the allegation and indicated that he drove vehicles for his wife, who owns the business, but that "means nothing" MCBEE stated that he did not have a dealer's license and that the business was in his wife's name. MCBEE indicated that he was waiting for his surgery to get approved so that he could have surgery and return to work. MCBEE stated that he was not an employee of McBee Sales and that it was his wife's business. MCBEE then indicated that he drove vehicles for his wife prior to his injury * * * Fox asked MCBEE whether his wife would have to hire an employee if MCBEE did not drive the vehicles for her and MCBEE stated that he did not understand what * * * Fox was

asking. *** Fox re-phrased/explained the question and MCBEE stated that the agents were "twisting everything around". MCBEE informed that McBee Sales was inactive *** Fox advised MCBEE several times that the interview was voluntary and MCBEE stated that although he did nothing wrong and did not need an attorney, he was not comfortable talking any further with the agents.

{¶28} 17. On September 20, 2006, SIU Special Agent Mitchey interviewed Robert Burton, the former general manager of Montpelier Auction. Thereafter, Burton signed the following interview summary written by Special Agent Mitchey

I was the general manager for Montpelier Auto Auction, Montpelier, Ohio from 2003 until September 16, 2006. During that time, I dealt with Garry McBee of McBee Sales at the numerous auctions McBee attended between March 31, 2004 and February 8, 2006 (refer to records obtained from Montpelier Auto Auction). Typically McBee would drive the vehicles to the auction on the Monday or Tuesday prior to the auction on Wednesday and his wife would drive him home. I would meet McBee at the gate and he would drop the vehicle(s) off. On the days of the auctions, McBee was always present and was the one who represented the vehicles when they were on the block and being auctioned off. McBee would tell the auctioneer the amount/minimum bid he was expecting to receive and decided whether to accept the final bid. McBee would bring vehicles he had purchased from Manheim's Detroit Auto Auction and sell them at Montpelier Auto Auction. I dealt with McBee and not his wife regarding McBee Sales and the activities at the auction. ***

{¶29} 18. On June 1, 2007, SIU submitted additional evidence in support of its motion. Special Agent Mitchey and fraud analyst Stein signed the following "Addendum Report of Investigation" on May 31, 2007. The addendum report states.

* * * [T]he [SIU] obtained Garry McBee's (MCBEE) bank records from Fifth Third Bank including signature cards, statements, and copies of deposits during the period MCBEE received Temporary Total disability benefits ***. MCBEE had a joint checking account with his wife, Sandra McBee, along with a business account for McBee Sales, wherein MCBEE

and Sandra were authorized signers on both accounts. The account for McBee Sales was opened in November 2003 and closed in December 2006. Based on these records, *** Mitchey completed an excel spreadsheet summarizing the total deposits made into both accounts ***.

{¶30} The SIU excel spreadsheet discloses that, during December 2004, four checks from Montpelier Auction were deposited into the McBee Sales business checking account. Those checks were for the amounts of \$19,780, \$120, \$2,285, and \$1,745.

{¶31} During January 2005, one check from Montpelier Auction was deposited in the McBee Sales business account. That check was for the amount of \$11,625

{¶32} During February 2005, a check from Montpelier Auction in the amount of \$5,115 was deposited.

{¶33} During March 2005, five checks from Montpelier Auction were deposited in the McBee Sales business account. Those checks were for the amounts of \$4,970, \$3,017.50, \$7,160, \$15,260, and \$8,473

{¶34} The SIU excel spreadsheet shows significant deposits from Montpelier Auction into the McBee Sales business account through November 2005

{¶35} 19. Following a July 16, 2007 hearing, a DHO issued an order granting in part and denying in part the bureau's March 30, 2007 motion. The DHO's order explains:

The injured worker is found to have been engaged in work activities while receiving temporary total disability from 10/30/04 through 3/9/06. Therefore, this period of temporary total is found to be overpaid. Specifically, injured worker attended auto auctions to assist his wife's business. He actively participated in these auctions by providing the amounts of minimum bids to the auctioneer. The BWC provided records in the Special Investigations Unit (SIU) file from 10/30/04 through 3/9/06. There were no records provided from 3/10/06 through 8/27/06. Therefore, this period remains properly paid.

The request for a finding of fraud is DENIED. The Bureau failed to establish intent to deceive on the part of the injured worker. The injured worker testified credibly that he went along to the auctions for something to do. He did not consider this work. The overpayment is therefore to be collected in the same manner as an overpayment, pursuant to O.R.C 4123.511(J).

(Emphasis sic)

{¶36} 20 Both relator and the bureau administratively appealed the DHO's order of July 16, 2007

{¶37} 21 In August 2007, the bureau filed another "Addendum Report of Investigation " Dated August 22, 2007, the addendum is signed by Special Agent Mitchey and fraud analyst Stein. The addendum states:

* * * [T]he [SIU] has obtained employment records from Friendly Ford regarding Sandra McBee (Sandra). Specifically Sandra's weekly time sheets listing dates and hours worked. Sandra was employed full time (standard work hours Monday – Friday 8am to 5pm) as a title clerk/car biller from February 3, 2003 until she quit on October 31, 2005. During the time frame that Garry McBee (MCBEE) was receiving Temporary Total (TT) disability benefits and Sandra was employed at Friendly Ford, Sandra was working at Friendly Ford on ninety percent (36 out of 40) of the days wherein the auctions were attended and/or vehicles were bought/sold at the auctions. Per the auto auctions, auctions were held every Wednesday at 9:30 am at Montpelier Auto Auction and every Thursday at 9:00 am at Manheim Metro Detroit Auto Auction. Therefore, indicating that Sandra was not present at those auctions as she testified at the District Hearing and that it was necessary for MCBEE to handle the activities at the auctions and not merely attend for something to do. * * *

The [SIU] also obtained a response from Robert Kalb, M D. wherein he indicated that he released MCBEE to full duty work with no restrictions on January 5, 2007. * * *

In conclusion, the additional evidence submitted by the * * * * SIU has shown that Sandra's work activities would preclude

her attendance at the auctions thereby requiring MCBEE to take on an active role at the auctions on behalf of McBee Sales. Based on the evidence that MCBEE has demonstrated his ability to return to work and Dr. Kalb's response indicating that MCBEE was released to return to full duty work as of January 5, 2007, the evidence supports the SIU's motion for fraud and termination of TT benefits.

{¶38} 22. Following the DHO's order of July 16, 2007, relator submitted additional evidence in defense of the bureau's motion. This evidence is apparently in response to SIU's addendum report of August 22, 2007. Relator submitted a sheet captioned "Auctions attended by Sandra J McBee on days not at work and/or evening auctions." The sheet indicates that Sandra McBee attended three auctions at "Montpelier" on December 8, 2004, March 23, and November 2, 2005. She also attended 20 auctions at "Parma" between December 22, 2004 and August 17, 2005.

{¶39} 23. Relator submitted a sheet captioned "Auctions attended by Garry McBee without Sandra McBee." The sheet indicates that relator attended 22 auctions at "Montpelier Auto Auction" between December 15, 2004 and October 26, 2005. Relator attended auctions at other auction sites. The total auctions relator attended without his wife are 36, as listed on the sheet.

{¶40} 24. Relator also submitted a written statement from Louis Magyar dated October 1, 2007, stating:

From November of 2004 through October of 2005, I worked for McBee Sales transporting (driving) vehicles to and from auctions. I drove vehicles to auctions for McBee Sales on approximately 35 occasions. On approximately 30 occasions when I would drive a vehicle to one of the auctions, Gary McBee would ride with me. Mr McBee was unable to drive himself because of the medication that he was taking.

{¶41} 25 Following a January 16, 2008 hearing, an SHO issued an order that vacates the DHO's order of July 16, 2007. The SHO's order of January 16, 2008 grants the bureau's March 30, 2007 motion, and explains.

The injured worker is found to have been engaged in work activities while receiving receiving [sic] temporary total disability compensation from October 30, 2004 through March 9, 2006. Therefore, this period of temporary total is found to be overpaid.

Further, the Hearing Officer finds injured worker committed fraud and orders temporary total benefits TERMINATED as of October 30, 2004.

The Hearing Officer finds that injured worker was performing work activity of buying and selling vehicles at auto auctions for the company McBee Sales for the period of October 30, 2004 to March 9, 2006. March 9, 2006 is the last date that the Bureau of Workers' Compensation has provided proof that a vehicle was bought at an auction that injured worker attended.

It is further found that the elements of fraud have been met by the Bureau of Workers' Compensation. Injured worker made a representation when there was a duty to disclose, and concealed the fact that he had returned to work with McBee Sales. He failed to inform the BWC that he was actively engaged in buying and selling vehicles at auto auctions. His activities were material to the transaction at hand in that if he had informed the BWC of his periods of employment, temporary total benefits would not have been paid. He made the representation falsely with knowledge of its falsity, in that when interviewed on September 18, 2006 injured worker indicated that he had not worked since his injury in October of 2004 and that the only money he received was from the Bureau of Workers' Compensation. At that time, he indicated that he did not have a dealer's license and that the business was in his wife's name. He indicated that he drove vehicles for his wife prior to his injury. The Hearing Officer finds that he had the intent of misleading another into relying upon his representation when he signed C-84 forms between May 21, 2005 and May 21, 2006 wherein he indicated that he had not returned to work in any capacity despite the fraud warning about not working. He also received a temporary total

entitlement letter on May 10, 2005 in which he was notified he was not entitled to receive temporary total benefits if he returned to work. He was also present at the District and Staff level hearings on January 6, 2005 and April 25, 2005 when temporary total was granted from October 28, 2004 to January 17, 2005 and to continue and did not indicate that he was involved in work activity with McBee Sales

At the Staff Hearing on May 16, 2006 injured worker advised the Hearing Officer that he was in the car business for nine years until March of 2003 when the company went out of business. He did not mention his work activity with McBee Sales.

In the independent medical evaluation (IME) performed on April 28, 2006, injured worker stated that he had not returned to work since the date of his injury and he indicated that he was unable to drive to work because of the potential for drowsiness related to his medications, despite his current activities with McBee Sales

In his interview with the BWC on September 18, 2006, injured worker denied any work activity since the date of injury and denied having a dealer's license despite evidence that he had a Dealer Application, signed March 29, 2004.

Finally, injured worker signed BWC warrants which also contained a fraud warning indicating that he was not entitled to temporary total benefits if working in any capacity

The Bureau of Workers' Compensation is found to have justifiably relied upon injured worker's misrepresentation that he had not returned to work and as a result, the injured worker is found to have received temporary total benefits to which he was not entitled. If the BWC had been aware of the injured worker's work activities, temporary total benefits would not have been paid

The Hearing Officer also finds that a resulting injury was proximately caused by the reliance on injured worker's misrepresentation in that the BWC paid temporary total benefits to which injured worker was not entitled

The Hearing Officer specifically finds that injured worker was actively engaged in activities that generated income for his business known as McBee Auto Sales. It is found that his

activities were consistent, sustained, ongoing and regular.

Based upon the information presented by the Bureau of Workers' Compensation Fraud Department, the Hearing Officer finds that injured worker attended 46 auctions when 44 vehicles were sold, McBee Sales bought 43 vehicles and consigned 53 vehicles. Injured worker was involved in buying and selling vehicles through Montpelier Auto Auction in Montpelier, Ohio, and at Manheim's Metro Detroit Auto Auction in Flatrock, Michigan.

Injured worker had a Dealer Application, signed March 29, 2004, and an Agent Authorization Form, which allowed him to perform actions on behalf of the company signed December 8, 2004. He performed activities such as signing title forms, stand "on the block" telling the auctioneer what the minimum bid was, and decided when to accept bids.

The Hearing Officer further finds that injured worker attended these auctions during times that injured worker's wife was unable to attend auctions. Injured worker's wife was employed full time from 8:00 a.m. through 5:00 p.m. as a title clerk/car biller from February 3, 2003 until October 31, 2005. She was working at Friendly Ford 90% (36 out of 40) of the days when auctions were attended and vehicles were bought and sold at the auctions.

Therefore, the Hearing Officer finds the injured worker's activity of attending the auctions was beneficial to the company of McBee Auto Sales in that injured worker's wife could not have attended auctions during this same time frame because she was working.

The argument that someone at the auction could have performed the same activity as injured worker in acting as a "proxy" is not found persuasive. There is no indication that someone from the auction house was ever used as a proxy and the Hearing Officer also finds that there would have been a charge to use someone from the auction house. Therefore, there was a financial benefit to injured worker being present and performing the activities.

The fact that the company, McBee Auto Sales, operated at a "loss" as evidenced by the 1040s is found to be inconsequential. There is no need to find that the company operated at a profit. Rather, the Hearing Officer finds that it is only

necessary that injured worker's activities could be performed for pay. The activity of buying and selling cars is found to be the only activity of the company, McBee Auto Sales, that generated any income.

The Hearing Officer relies upon the case law of Meade vs. Indus. Comm., 2005 Ohio 6206 in finding that although injured worker did not receive "wages" for his activities, his activities generated income for the business. (In the Mead case the injured worker ran a pizza business where he took orders, prepared food, served customers, worked the cash register, and delivered pizzas. Even though he did not receive wages, his activities were "hands on" and generated income for the business.)

The case of Cassano vs. Indus. Comm., 2006 Ohio App Lexis 3020 is also found dispositive. (Injured worker was found to be engaged in activities that generated income, such as performing mechanic work on cars and attending auto auctions. The Court in that case also found fraud in that similar to when injured worker was contacted by the Bureau of Workers' Compensation, he said he had not worked since the injury and his business was on hold.) Here, when injured worker was interviewed by the BWC, he also denied performing any work.

Finally, Couch vs. Indus. Comm., 2006 Ohio 3147 is relied upon in reaching this decision. (Injured worker's activities of managing and dispatching a fleet of trucks and drivers and conducting day to day business out of his home constituted work activities inconsistent with receipt of temporary total compensation. The Court distinguished that "Where a person is actively involved in operating a business, the Ohio Industrial Commission may conclude that his or her activities are inconsistent with receipt of temporary total disability. Involvement such as making sales or assisting in day to day operation of a shop may be viewed as employment incompatible with disability, as opposed to mere ownership or managing one's personal finances). The Hearing Officer finds that here, the number of auctions injured worker attended supports the finding that he was actively engaged [i]n furthering the business.

Therefore, because [sic] Hearing Officer finds the injured worker performed income generating activity, for McBee Auto Sales, for the period October 30, 2004, through March 9,

2006, and orders temporary total compensation TERMINATED as of October 30, 2004, and makes a finding of fraud.

No finding is made for the period from 3/10/06 through 8/26/06. No records were provided for that period

This finding is based upon the SIU report in file, as well as the addendum, dated August 22, 2007, the memoranda of interviews with injured worker and Robert Burton, former general manager at Montpelier Auto Auction

(Emphasis sic.)

{¶42} 26. On March 1, 2008, another SHO mailed an order refusing relator's administrative appeal from the SHO's order of January 16, 2008

{¶43} 27. Relator moved for reconsideration of the March 1, 2008 SHO's refusal order. In support of reconsideration, relator submitted his own affidavit executed March 17, 2008, stating:

1 I am the Claimant herein, and I am married to Sandra McBee

2 My wife, Sandra McBee, began working in the used car business in 1968 My wife, Sandra, owned and operated a used car business known as McBee Sales from November 2003 until it ceased operating in March, 2006 and closed in December of 2006. I was not an owner of this business I worked in my wife's business until I became employed at Blue Ribbon Rentals in August of 2004. I never worked for McBee Sales after I became employed at Blue Ribbon Rentals.

3 During my period of disability, I was on prescription medication that prevented me from operating a motor vehicle.

4 I live in Monroe, Michigan, and my treating physicians maintain their office in Toledo, Ohio, approximately 25 miles from my home.

5 When I needed to go to a doctor's appointment, I would stop taking my medications that day so I would be able to drive

6 Since I was not able to work and not able to drive, I became bored sitting around my house, and so I accompanied the drivers my wife hired to deliver cars to used car auctions.

7 I only drove vehicles to the auctions myself on six (6) occasions when the regular drivers were unavailable. On those occasions I stopped taking my medication for the day, in the same manner as when I had to go to a doctor's appointment.

8 I was paid no compensation for going to the used car auctions and, except for the 6 times I drove myself, my wife saved no money by having me go to the auctions because she had to pay a driver anyway

9 The drivers who would regularly work for my wife were Louis Magyar and my son, Kevin McBee

10 I never considered going along for the ride to used car auctions to be employment.

{¶44} 28. On April 18, 2008, a three-member commission mailed an order refusing relator's motion for reconsideration.

{¶45} 29 On March 9, 2009, relator, Garry K. McBee, filed this mandamus action.

Conclusions of Law:

{¶46} Two issues are presented. (1) whether the commission abused its discretion in declaring an overpayment of TTD compensation because of relator's activities on behalf of McBee Sales, and (2) whether the commission abused its discretion in finding that the compensation was fraudulently obtained.

{¶47} The magistrate finds: (1) the commission did not abuse its discretion in declaring an overpayment of TTD compensation, and (2) the commission did abuse its discretion in finding that the compensation was fraudulently obtained

{¶48} Accordingly, it is the magistrate's decision that this court issue a writ of mandamus, as more fully explained below

{¶49} The focus of the overpayment issue is on the concept of remuneration.

{¶50} To appropriately review the SHO's order of January 16, 2008 at issue here, it is helpful to contrast the standard for terminating TTD compensation against the standard for terminating permanent total disability ("PTD") compensation

{¶51} The TTD standard is set forth succinctly in *State ex rel. Ford Motor Co v. Indus Comm.*, 98 Ohio St 3d 20, 2002-Ohio-7038. The PTD standard is succinctly set forth in *State ex rel. Lawson v Mondie Forge*, 104 Ohio St.3d 39, 2004-Ohio-6086.

{¶52} In *Ford* at ¶18-19, the court states.

TTC [temporary total disability compensation] is prohibited to one who has returned to work. R C 4123 56(A); *State ex rel. Ramirez v. Indus. Comm.* (1982), 69 Ohio St 2d 630, 23 O O.3d 518, 433 N.E 2d 586. * * *

Work is not defined for workers' compensation purposes We have held, however, that any remunerative activity outside the former position of employment precludes TTC. *State ex rel. Nye v. Indus. Comm.* (1986), 22 Ohio St 3d 75, 78, 22 OBR 91, 488 N.E 2d 867. We have also held that activities medically inconsistent with the alleged inability to return to the former position of employment bar TTC, regardless of whether the claimant is paid. *State ex rel. Parma Community Gen. Hosp. v Jankowski*, 95 Ohio St.3d 340, 2002-Ohio-2336, 767 N.E.2d 1143, ¶ 15. Activities that are not medically inconsistent, however, bar TTC only when a claimant is remunerated for them Id at ¶ 14-15, 767 N.E.2d 1143 Work, moreover, does not have to be full-time or even regular part-time to foreclose TTC; even sporadic employment can bar benefits *State ex rel. Blabac v Indus Comm* (1999), 87 Ohio St 3d 113, 717 N.E.2d 336.

{¶53} In *Lawson*, the court states at ¶16-21

PTD pivots on a single question: Is the claimant *capable* of

sustained remunerative employment? *State ex rel. Stephenson v. Indus. Comm.* (1987), 31 Ohio St.3d 167, 31 OBR 369, 509 N E 2d 946. Payment of PTD is inappropriate where there is evidence of (1) actual sustained remunerative employment, *State ex rel. Kirby v Indus Comm.*, 97 Ohio St.3d 427, 2002-Ohio-6668, 780 N.E.2d 275, (2) the physical ability to do sustained remunerative employment, *State ex rel. Schultz v. Indus. Comm*, 96 Ohio St 3d 27, 2002-Ohio-3316, 770 N E.2d 576; or (3) activities so medically inconsistent with the disability evidence that they impeach the medical evidence underlying the award See *State ex rel Timmerman Truss, Inc. v. Indus. Comm.*, 102 Ohio St 3d 244, 2004-Ohio-2589, 809 N.E.2d 15, ¶26.

{¶54} Having contrasted the standards for terminating TTD and PTD compensation, it is also helpful to note that the Supreme Court of Ohio again succinctly set forth the criteria for termination of TTD compensation in *State ex rel Honda of Am. Mfg. Co v. Indus. Comm.*, 113 Ohio St.3d 5, 2007-Ohio-969, ¶18.

Temporary total disability compensation cannot be paid to a claimant who is actually working—i.e., exchanging labor for pay—or to one who is medically capable of returning to the former position of employment R.C 4123.56(A); *State ex rel. Griffith v. Indus. Comm.*, 109 Ohio St 3d 479, 2006-Ohio-2992, 849 N E.2d 28, ¶ 10. Consequently, activities that are medically inconsistent with the alleged inability of a claimant to return to the former position of employment bar temporary total disability compensation even if done for free. *State ex rel. Parma Community Gen Hosp v. Jankowski*, 95 Ohio St 3d 340, 2002-Ohio-2336, 767 N.E.2d 1143. Conversely, activities done for pay, even activities consistent with medical restrictions, also foreclose temporary total disability compensation. *Id.*

{¶55} Both the *Ford* and *Honda* cases justify further discussion here.

{¶56} In *Ford*, the claimant, Christopher Posey, held a full-time job at Ford Motor Company and also owned a lawn care business Following his injury at Ford, Posey began receiving TTD compensation His injury also affected his ability to do lawn work,

forcing him to hire more employees to cover his fair share of the work load. Posey signed his four workers' pay checks and, on few occasions, fueled and drove riding lawnmowers onto a truck. Posey did no landscaping work in connection with his business while receiving TTD compensation. In *Ford*, the court found that Posey's activities did not in and of themselves generate income. Posey's activities produced money only secondarily. However, the *Ford* court concluded on a cautionary note.

Obviously, application of this rationale must be applied on a case-by-case basis and only when a claimant's activities are minimal. A claimant should not be able to erect a façade of third-party labor to hide the fact that he or she is working. In this case, however, claimant's activities were truly minimal and only indirectly related to generating income. * * *

Id. at ¶24.

{¶57} In *Honda*, the claimant, Edith K. Anderson, while receiving TTD compensation, opened a scrapbooking shop with proceeds from her husband's life insurance. Over a three-month period, she was observed in the shop five times. Her employer alleged that her store-related activities constituted work, precluding TTD compensation.

{¶58} The *Honda* court held that TTD compensation was not barred, explaining:

Applying *Ford* to these facts, we begin by examining Anderson's activities and the commission's determination that they were minimal. The commission emphasized that over a three-month period, Anderson was viewed just five times. On three of those occasions, she assisted no customers. On the other two, she apparently helped a single customer by answering questions and pointing out displays and once used the cash register for an unknown purpose. This was the sum total of her observed activities at My Crop Shop.

Honda challenges this conclusion, asserting that if Anderson was involved with My Crop Shop on each day of surveillance,

she was probably involved with the store on the days she was not observed. This assertion fails for two reasons. First, Anderson's mere presence at the store is not itself disqualifying. Moreover, even if she arguably was engaged in some business activity every time she was seen, the commission—as sole evaluator of evidentiary weight and credibility—was not compelled to conclude that she was doing the same thing when not observed. Accordingly, the commission's determination that Anderson's activities were minimal will not be disturbed.

Ford also questions whether Anderson's activities generated income directly. The commission found that Anderson's activities—to the extent that they generated any income at all—did so only secondarily because they were geared more towards promoting the goodwill of the business. We again defer to that finding. Most of the disputed activities consisted of answering customer questions. Certainly, Anderson cannot be required to ignore customer inquiries in order to maintain eligibility for compensation. That would indeed destroy the business's goodwill. As to the operation of the cash register, it occurred just once, without any evidence that it was connected to a sale, and does not justify termination of Anderson's temporary total disability compensation. Accordingly, given the lack of evidence that Anderson's business involvement was any more extensive, we uphold the commission's determination. This, in turn, moots any issue of fraud, because compensation was properly paid.

Id. at ¶¶27-29.

{¶59} In declaring an overpayment of TTD compensation in the instant case, the SHO cited this court's decision in *State ex rel Meade v Indus Comm.*, 10th Dist. No. 04AP-1184, 2005-Ohio-6206. In *Meade*, the claimant, Steven L. Meade, collected TTD compensation while engaging in activities at a pizza shop. In November 2000, Meade had incorporated Ron's Pizza Enterprises, Inc., which does business as "Ron's Pizza." Meade was the president and statutory agent of the business. Finding that Meade's activities were incompatible with receipt of TTD compensation, this court explained

* * * [R]elator need not receive "wages" for his activities to have a preclusive effect on TTD compensation. Rather, the issue here is whether his activities generated income directly for the business. * * * While relator argues that he did not replace any employee, there can be no question that his activities—taking orders, preparing food, serving customers, working the cash register, and delivering pizzas—generated income for the business.

Id. at ¶7

¶60} The SHO here also cited to this court's decision in *State ex rel Couch v.*

Indus. Comm, 10th Dist No 05AP-652, 2006-Ohio-3147 In *Couch*, this court states:

In *Ford*, the Supreme Court of Ohio held that mere ownership of a business, without more, is not incompatible with receiving disability compensation. Of particular importance in *Ford* was the fact that the claimant's activities in that case did not directly generate income; they only secondarily produced income for the business. In *State ex rel Campbell v. Indus. Comm.*, 10th Dist. No 02AP-1253, 2003-Ohio-4824, this court discussed the application of *Ford*. We observed, at ¶ 55, that

* * * some entrepreneurial activities and some investment activities may be sufficiently extensive to be deemed employment. Where a person is actively involved in operating a business, the commission may conclude that his or her activities are inconsistent with receipt of total disability compensation. Involvement such as making sales or assisting in day-to-day operations of a shop may be viewed as employment incompatible with disability, as opposed to mere ownership or managing one's personal finances.

This is true regardless whether the claimant's activities for his side business performed while receiving TTD are the same (as here) or different (as in *Ford*) from those in which the claimant was engaged prior to his industrial accident. We so held in the case of *State ex rel. Cassano v Indus. Comm.*, 10th Dist. No. 03AP-1227, 2005-Ohio-68. In that case, the claimant operated his own car repair business while he was employed as a driver, and continued to operate his business while he received TTD following an industrial injury. The claimant argued that he was merely maintaining his business,

like the claimant in *Ford*, but we found otherwise. Because the evidence revealed that the claimant conducted the opening and closing activities of the business, talked with customers and assisted with mechanical work on vehicles, we concluded that the claimant was engaged actively in business activities that directly generated income

Id at ¶5-6

{¶61} In the instant case, relator contends that there is no evidence that his activities on behalf of McBee Sales were remunerated and, thus, the commission abused its discretion in declaring an overpayment of TTD compensation. The magistrate disagrees.

{¶62} Based upon the case law as reviewed above, the SHO correctly focused on the question of whether relator's activities generated income for McBee Sales. The SHO extensively explained her finding that relator's activities did generate income for McBee Sales and, thus, relator's activities preclude receipt of TTD compensation

{¶63} As found by the SHO, relator attended 46 auctions when McBee Sales bought and sold vehicles. Relator was actively involved in the auction sales. Without his wife's presence, relator "performed activities such as signing title forms, stand 'on the block' telling the auctioneer what the minimum bid was, and decided when to accept bids," as found by the SHO.

{¶64} The record fully supports, without dispute, that buying and selling cars was the company activity that generated income for McBee Sales. Relator's activities in that regard were, as the SHO found, "consistent, sustained, ongoing and regular "

{¶65} There is indeed some evidence, if not substantial evidence, supporting the commission's findings that relator's activities generated income for McBee Sales

{¶66} Accordingly, based upon the foregoing analysis, the magistrate finds that the commission did not abuse its discretion in finding the overpayment of TTD compensation and in terminating compensation as of October 30, 2004.

{¶67} As earlier noted, the second issue is whether the commission abused its discretion in finding that the compensation was fraudulently obtained

{¶68} The elements of fraud are: (1) a representation or, where there is a duty to disclose, concealment of a fact; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred; (4) with the intent of misleading another into relying upon it; (5) justifiable reliance upon the representation or concealment; and (6) a resulting injury proximately caused by the reliance *Gaines v. Preterm-Cleveland, Inc* (1987), 33 Ohio St.3d 54, 55.

{¶69} Analysis here begins with scrutiny of the bureau's May 10, 2005 letter to relator: "[A]ccording to workers' compensation law, you are not entitled to temporary total benefits if. (1) You return to any type of work including full-time, part-time, self-employment, and commission work with any employer This includes employers other than the one you worked for when you were injured."

{¶70} On the C-84s that relator signed in order to obtain TTD compensation, relator was required to answer the following query: "Have you worked, in any capacity, (include full-time, part-time, self-employment or commission work) during the disability period shown above?"

{¶71} As the *Ford* court tells us, work is not statutorily defined for workers' compensation law. However, it has been held that any remunerative activity outside the former position of employment precludes TTD compensation. *Ford* at ¶¶18-19.

{¶72} It has developed through case law that the remuneration element can be met when the claimant's activities are found to have generated income even in the absence of receipt of wages or direct compensation. The *Ford* court notes that "application of this rationale must be applied on a case-by-case basis and only when a claimant's activities are minimal." *Ford* at ¶24.

{¶73} Two of the elements of fraud seem pertinent here. First, the false representation or concealment of fact must be made with knowledge of the falsity or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred. Secondly, there must be an intent of misleading another into reliance.

{¶74} That is, the claimant must have the knowledge that his activities constitute work that precludes TTD compensation, and he must have the intent to mislead the bureau into paying for compensation to which he is legally not entitled. Knowledge and intent are key components of fraud.

{¶75} Where a claimant receives wages or other direct compensation for activities performed, it is easy to infer that the claimant has knowledge that his activities constitute work. If the claimant conceals his receipt of wages, it is again easy to infer the requisite intent. But the inference to knowledge and intent is not so easy when the claimant receives no wages or direct compensation for activities performed. Where it is determined on a case-by-case basis that the claimant has engaged in activities that

X

generate income to a business he does not own, and on that basis, work is the conclusion, the inference to knowledge and intent is not so easy

{¶76} At issue here, is the inference that the May 10, 2005 bureau warning letter or the query on the C-84s clearly conveyed to relator the knowledge that, even in the absence of wages or direct compensation, activities that generate income to his wife's business can be held to be work that bars TTD compensation. In the magistrate's view, the inference is not supported by the record.

{¶77} Given the above analysis, there is no evidence in the record upon which the commission relied to support the requisite elements of knowledge and intent with respect to a finding of fraud.

{¶78} Thus, the magistrate finds that the commission abused its discretion in finding that the compensation was fraudulently obtained

{¶79} Accordingly, it is the magistrate's decision that this court issue a writ of mandamus ordering the commission to amend its SHO's order of January 16, 2008, by deleting the finding that compensation was fraudulently obtained, and by entering a finding that the evidence fails to show that the compensation was fraudulently obtained

/s/ Kenneth W. Macke
KENNETH W. MACKE
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)

Ohio Statutes

Title 41. LABOR AND INDUSTRY

Chapter 4123. WORKERS' COMPENSATION

Current through March 23 of the 2011 Legislative Session

§ 4123.511. Notice of receipt of claim

(A) Within seven days after receipt of any claim under this chapter, the bureau of workers' compensation shall notify the claimant and the employer of the claimant of the receipt of the claim and of the facts alleged therein. If the bureau receives from a person other than the claimant written or facsimile information or information communicated verbally over the telephone indicating that an injury or occupational disease has occurred or been contracted which may be compensable under this chapter, the bureau shall notify the employee and the employer of the information. If the information is provided verbally over the telephone, the person providing the information shall provide written verification of the information to the bureau according to division (E) of section 4123.84 of the Revised Code. The receipt of the information in writing or facsimile, or if initially by telephone, the subsequent written verification, and the notice by the bureau shall be considered an application for compensation under section 4123.84 or 4123.85 of the Revised Code, provided that the conditions of division (E) of section 4123.84 of the Revised Code apply to information provided verbally over the telephone. Upon receipt of a claim, the bureau shall advise the claimant of the claim number assigned and the claimant's right to representation in the processing of a claim or to elect no representation. If the bureau determines that a claim is determined to be a compensable lost-time claim, the bureau shall notify the claimant and the employer of the availability of rehabilitation services. No bureau or industrial commission employee shall directly or indirectly convey any information in derogation of this right. This section shall in no way abrogate the bureau's responsibility to aid and assist a claimant in the filing of a claim and to advise the claimant of the claimant's rights under the law.

The administrator of workers' compensation shall assign all claims and investigations to the bureau service office from which investigation and determination may be made most expeditiously.

The bureau shall investigate the facts concerning an injury or occupational disease and ascertain such facts in whatever manner is most appropriate and may obtain statements of the employee, employer, attending physician, and witnesses in whatever manner is most appropriate.

The administrator, with the advice and consent of the bureau of workers' compensation board of directors, may adopt rules that identify specified medical conditions that have a historical record of being allowed whenever included in a claim. The administrator may grant immediate allowance of any medical condition identified in those rules upon the filing of a claim involving that medical condition and may make immediate payment of medical bills for any medical condition identified in those rules ~~that is included in a claim. If an employer contests the allowance of a claim involving any medical condition identified in those rules, and the claim is disallowed, payment for the medical condition included in that claim shall be charged to and paid from the surplus fund created under section 4123.34 of the Revised Code.~~

(B)(1) Except as provided in division (B)(2) of this section, in claims other than those in which the employer is a self-insuring employer, if the administrator determines under division (A) of this section

that a claimant is or is not entitled to an award of compensation or benefits, the administrator shall issue an order no later than twenty-eight days after the sending of the notice under division (A) of this section, granting or denying the payment of the compensation or benefits, or both as is appropriate to the claimant. Notwithstanding the time limitation specified in this division for the issuance of an order, if a medical examination of the claimant is required by statute, the administrator promptly shall schedule the claimant for that examination and shall issue an order no later than twenty-eight days after receipt of the report of the examination. The administrator shall notify the claimant and the employer of the claimant and their respective representatives in writing of the nature of the order and the amounts of compensation and benefit payments involved. The employer or claimant may appeal the order pursuant to division (C) of this section within fourteen days after the date of the receipt of the order. The employer and claimant may waive, in writing, their rights to an appeal under this division.

(2) Notwithstanding the time limitation specified in division (B)(1) of this section for the issuance of an order, if the employer certifies a claim for payment of compensation or benefits, or both, to a claimant, and the administrator has completed the investigation of the claim, the payment of benefits or compensation, or both, as is appropriate, shall commence upon the later of the date of the certification or completion of the investigation and issuance of the order by the administrator, provided that the administrator shall issue the order no later than the time limitation specified in division (B)(1) of this section.

(3) If an appeal is made under division (B)(1) or (2) of this section, the administrator shall forward the claim file to the appropriate district hearing officer within seven days of the appeal. In contested claims other than state fund claims, the administrator shall forward the claim within seven days of the administrator's receipt of the claim to the industrial commission, which shall refer the claim to an appropriate district hearing officer for a hearing in accordance with division (C) of this section.

(C) If an employer or claimant timely appeals the order of the administrator issued under division (B) of this section or in the case of other contested claims other than state fund claims, the commission shall refer the claim to an appropriate district hearing officer according to rules the commission adopts under section 4121.36 of the Revised Code. The district hearing officer shall notify the parties and their respective representatives of the time and place of the hearing.

The district hearing officer shall hold a hearing on a disputed issue or claim within forty-five days after the filing of the appeal under this division and issue a decision within seven days after holding the hearing. The district hearing officer shall notify the parties and their respective representatives in writing of the order. Any party may appeal an order issued under this division pursuant to division (D) of this section within fourteen days after receipt of the order under this division.

(D) Upon the timely filing of an appeal of the order of the district hearing officer issued under division (C) of this section, the commission shall refer the claim file to an appropriate staff hearing officer according to its rules adopted under section 4121.36 of the Revised Code. The staff hearing officer shall hold a hearing within forty-five days after the filing of an appeal under this division and issue a decision within seven days after holding the hearing under this division. The staff hearing officer shall notify the parties and their respective representatives in writing of the staff hearing officer's order. Any party may appeal an order issued under this division pursuant to division (E) of this section within fourteen days after receipt of the order under this division.

(E) Upon the filing of a timely appeal of the order of the staff hearing officer issued under division (D)

of this section, the commission or a designated staff hearing officer, on behalf of the commission, shall determine whether the commission will hear the appeal. If the commission or the designated staff hearing officer decides to hear the appeal, the commission or the designated staff hearing officer shall notify the parties and their respective representatives in writing of the time and place of the hearing. The commission shall hold the hearing within forty-five days after the filing of the notice of appeal and, within seven days after the conclusion of the hearing, the commission shall issue its order affirming, modifying, or reversing the order issued under division (D) of this section. The commission shall notify the parties and their respective representatives in writing of the order. If the commission or the designated staff hearing officer determines not to hear the appeal, within fourteen days after the expiration of the period in which an appeal of the order of the staff hearing officer may be filed as provided in division (D) of this section, the commission or the designated staff hearing officer shall issue an order to that effect and notify the parties and their respective representatives in writing of that order.

Except as otherwise provided in this chapter and Chapters 4121., 4127., and 4131. of the Revised Code, any party may appeal an order issued under this division to the court pursuant to section 4123.512 of the Revised Code within sixty days after receipt of the order, subject to the limitations contained in that section.

(F) Every notice of an appeal from an order issued under divisions (B), (C), (D), and (E) of this section shall state the names of the claimant and employer, the number of the claim, the date of the decision appealed from, and the fact that the appellant appeals therefrom.

(G) All of the following apply to the proceedings under divisions (C), (D), and (E) of this section:

- (1) The parties shall proceed promptly and without continuances except for good cause;
- (2) The parties, in good faith, shall engage in the free exchange of information relevant to the claim prior to the conduct of a hearing according to the rules the commission adopts under section 4121.36 of the Revised Code;
- (3) The administrator is a party and may appear and participate at all administrative proceedings on behalf of the state insurance fund. However, in cases in which the employer is represented, the administrator shall neither present arguments nor introduce testimony that is cumulative to that presented or introduced by the employer or the employer's representative. The administrator may file an appeal under this section on behalf of the state insurance fund; however, except in cases arising under section 4123.343 of the Revised Code, the administrator only may appeal questions of law or issues of fraud when the employer appears in person or by representative.

(H) Except as provided in section 4121.63 of the Revised Code and division (K) of this section, payments of compensation to a claimant or on behalf of a claimant as a result of any order issued under this chapter shall commence upon the earlier of the following:

- (1) Fourteen days after the date the administrator issues an order under division (B) of this section, unless that order is appealed;
- (2) The date when the employer has waived the right to appeal a decision issued under division (B) of this section;
- (3) If no appeal of an order has been filed under this section or to a court under section 4123.512 of

the Revised Code, the expiration of the time limitations for the filing of an appeal of an order;

(4) The date of receipt by the employer of an order of a district hearing officer, a staff hearing officer, or the industrial commission issued under division (C), (D), or (E) of this section.

(I) Payments of medical benefits payable under this chapter or Chapter 4121., 4127., or 4131. of the Revised Code shall commence upon the earlier of the following:

(1) The date of the issuance of the staff hearing officer's order under division (D) of this section;

(2) The date of the final administrative or judicial determination.

(J) The administrator shall charge the compensation payments made in accordance with division (H) of this section or medical benefits payments made in accordance with division (I) of this section to an employer's experience immediately after the employer has exhausted the employer's administrative appeals as provided in this section or has waived the employer's right to an administrative appeal under division (B) of this section, subject to the adjustment specified in division (H) of section 4123.512 of the Revised Code.

(K) Upon the final administrative or judicial determination under this section or section 4123.512 of the Revised Code of an appeal of an order to pay compensation, if a claimant is found to have received compensation pursuant to a prior order which is reversed upon subsequent appeal, the claimant's employer, if a self-insuring employer, or the bureau, shall withhold from any amount to which the claimant becomes entitled pursuant to any claim, past, present, or future, under Chapter 4121., 4123., 4127., or 4131. of the Revised Code, the amount of previously paid compensation to the claimant which, due to reversal upon appeal, the claimant is not entitled, pursuant to the following criteria:

(1) No withholding for the first twelve weeks of temporary total disability compensation pursuant to section 4123.56 of the Revised Code shall be made;

(2) Forty per cent of all awards of compensation paid pursuant to sections 4123.56 and 4123.57 of the Revised Code, until the amount overpaid is refunded;

(3) Twenty-five per cent of any compensation paid pursuant to section 4123.58 of the Revised Code until the amount overpaid is refunded;

(4) If, pursuant to an appeal under section 4123.512 of the Revised Code, the court of appeals or the supreme court reverses the allowance of the claim, then no amount of any compensation will be withheld.

The administrator and self-insuring employers, as appropriate, are subject to the repayment schedule of this division only with respect to an order to pay compensation that was properly paid under a previous order, but which is subsequently reversed upon an administrative or judicial appeal. The administrator and self-insuring employers are not subject to, but may utilize, the repayment schedule of this division, or any other lawful means, to collect payment of compensation made to a person who was not entitled to the compensation due to fraud as determined by the administrator or the industrial commission.

(L) If a staff hearing officer or the commission fails to issue a decision or the commission fails to refuse to hear an appeal within the time periods required by this section, payments to a claimant shall cease until the staff hearing officer or commission issues a decision or hears the appeal, unless the

failure was due to the fault or neglect of the employer or the employer agrees that the payments should continue for a longer period of time.

(M) Except as otherwise provided in this section or section 4123.522 of the Revised Code, no appeal is timely filed under this section unless the appeal is filed with the time limits set forth in this section.

(N) No person who is not an employee of the bureau or commission or who is not by law given access to the contents of a claims file shall have a file in the person's possession.

(O) Upon application of a party who resides in an area in which an emergency or disaster is declared, the industrial commission and hearing officers of the commission may waive the time frame within which claims and appeals of claims set forth in this section must be filed upon a finding that the applicant was unable to comply with a filing deadline due to an emergency or a disaster.

As used in this division:

(1) "Emergency" means any occasion or instance for which the governor of Ohio or the president of the United States publicly declares an emergency and orders state or federal assistance to save lives and protect property, the public health and safety, or to lessen or avert the threat of a catastrophe.

(2) "Disaster" means any natural catastrophe or fire, flood, or explosion, regardless of the cause, that causes damage of sufficient magnitude that the governor of Ohio or the president of the United States, through a public declaration, orders state or federal assistance to alleviate damage, loss, hardship, or suffering that results from the occurrence.

History. Amended by 128th General Assembly ch. 4, HB 16, §101, eff. 9/29/2009.

Effective Date: 06-14-2000; 06-21-2005; 2007 HB100 09-10-2007

*** ARCHIVE MATERIAL ***

* CURRENT THROUGH LEGISLATION PASSED BY THE 126TH OHIO GENERAL ASSEMBLY *
 * AND FILED WITH THE SECRETARY OF STATE THROUGH DECEMBER 18, 2005 *
 * ANNOTATIONS CURRENT THROUGH OCTOBER 1, 2005 *

TITLE 41. LABOR AND INDUSTRY
 CHAPTER 4123. WORKERS' COMPENSATION
 COMPENSATION; BENEFITS

ORC Ann. 4123.56 (2005)

§ 4123.56. Temporary disability compensation

(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 [4123.51.1] 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 program paid or payable. Offset of the compensation shall be made only upon the prior order of the bureau or industrial commission or agreement of the claimant.

As used in this division, "net take-home weekly wage" means the amount obtained by dividing an employee's total remuneration, as defined in *section 4141.01 of the Revised Code*, paid to or earned by the employee during the first four of the last five completed calendar quarters which immediately precede the first day of the employee's entitlement to benefits under this division, by the number of weeks during which the employee was paid or earned remuneration during those four quarters, less the amount of local, state, and federal income taxes deducted for each such week.

(B) Where an employee in a claim allowed under this chapter suffers a wage loss as a result of returning to employment other than the employee's former position of employment or as a result of being unable to find employment consistent with the claimant's physical capabilities, the employee shall receive compensation at sixty-six and two-thirds per cent of the employee's weekly wage loss not to exceed the statewide average weekly wage for a period not to exceed two hundred weeks.

(C) In the event an employee of a professional sports franchise domiciled in this state is disabled as the result of an injury or occupational disease, the total amount of payments made under a contract of hire or collective bargaining agreement to the employee during a period of disability is deemed an advanced payment of compensation payable under *sections 4123.56 to 4123.58 of the Revised Code*. The employer shall be reimbursed the total amount of the advanced payments out of any award of compensation made pursuant to *sections 4123.56 to 4123.58 of the Revised Code*.

(D) If an employee receives temporary total disability benefits pursuant to division (A) of this section and social security retirement benefits pursuant to the "Social Security Act," the weekly benefit amount under division (A) of this section shall not exceed 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*.

HISTORY: GC § 1465-79; 103 v 72(85), § 32; 108 v PtI, 313; 110 v 224; 117 v 252; 119 v 565; 121 v 660; 122 v 268(280); 123 v 250; 124 v 806; Bureau of Code Revision, 10-1-53; 126 v 1015(1028) (Eff 10-5-55); 128 v 743(757) (Eff 11-2-59); 130 v 926 (Eff 10-1-63); 132 v H 268 (Eff 12-11-67); 133 v H 1 (Eff 3-18-69); 134 v H 280 (Eff 9-20-71); 135 v H 417 (Eff 11-16-73); 136 v H 714 (Eff 1-1-76); 136 v S 545 (Eff 1-17-77); 137 v H 1282 (Eff 1-1-79); 138 v S 30 (Eff 5-14-79); 138 v H 184 (Eff 6-27-79); 141 v S 307 (Eff 8-22-86); 141 v S 390 (Eff 7-17-86); 141 v S 411, § 3 (Eff 7-17-86); 141 v S 411, § 5 (Eff 8-22-86); 143 v H 222 (Eff 11-3-89); 145 v H 107 (Eff 10-20-93); 147 v S 45;* 148 v H 471. Eff 7-1-2000.

NOTES:

FOOTNOTE

*The amendments made by SB-45 (147 v --) were rejected by the 11-4-97 referendum vote on Issue 2. The effective date is set by section 12(A) of HB 471.