

ORIGINAL

IN THE SUPREME COURT OF OHIO

CASE NO. 2010-1283

STATE OF OHIO, ex rel. RICK D. WARNER,
Relator-Appellee,

-vs-

INDUSTRIAL COMMISSION OF OHIO, et al.
Respondents- Appellants.

ON APPEAL FROM FRANKLIN COUNTY
COURT OF APPEALS, TENTH APPELLATE DISTRICT

BRIEF OF *AMICUS CURIAE*,
OHIO ASSOCIATION OF CLAIMANTS' COUNSEL AND
OHIO ASSOCIATION FOR JUSTICE
URGING AFFIRMANCE ON BEHALF OF RELATOR-APPELLEE

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FILED
JUN 15 2011
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CLERK OF COURT
SUPREME COURT OF OHIO

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INTRODUCTION AND INTERESTS OF *AMICUS CURIAE*

The National Association of Claimants' Counsel (NACCA), Ohio Chapter, was founded in 1954. It was an organization created with the purpose "to help injured persons, especially in the field of workers' compensation."

In 1963, the NACCA was changed to the Ohio Academy of Trial Lawyers. Now known as the Ohio Association for Justice (OAJ), it is an organization of 1,500 lawyers dedicated to the protection of Ohio's consumers, workers, and families.

In 2008, the Ohio Association of Claimants' Counsel (OACC) was founded to advance the founding ideals of the NACCA and to promote the education of workers' compensation issues. The OACC is a statewide organization of workers' compensation attorneys.

The OACC and OAJ file this amicus brief to ask this Court to accept the decision of the Court of Appeals for the Second Appellate District and deny the Appellant's request to reverse the Second Appellate District's determination. The OACC and OAJ adopt the statement of facts set forth in Appellee Rick D. Warner's merit brief.

ARGUMENT

Proposition of Law No. 1:

The plain language of R.C. 4123.61 requires that unemployment beyond an employee's control be eliminated for purposes of their AWW.

The Ohio workers compensation system is statutorily based and the application of workers' compensation law necessitates statutory construction. *State ex rel. Brilliant Electric Sign Co. v. Indus. Comm.* (1939), 135 Ohio St. 211, 20 N.E.2d 252. Further, when a court engages in statutory interpretation, a statute's text is the starting point, and where the statute is clear, it must be followed. See *Hubbard v. Canton City School Bd. of Education* (2002), 97 Ohio St.3d 451, 454, 780 N.E.2d 543 ("This court has stated that where the language of a statute is clear and unambiguous, it is the duty of the court to enforce the statute as written, making neither additions to the statute nor subtractions therefrom.").

R.C. 4123.61 is the statutory provision that describes the basis of an injured worker's Average Weekly Wage ("AWW"), which determines the amount of compensation an injured worker is entitled to: "[t]he average weekly wage of an injured employee at the time of the injury or at the time disability due to the occupational disease begins is the basis upon which to compute benefits." R.C. 4123.61. The statute further describes how a worker's AWW is calculated:

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

Id. Last, the statute directs the Industrial Commission to eliminate weeks of unemployment under certain circumstances: "In ascertaining the average weekly wage for the year previous to the injury, or the date the disability due to the occupational disease begins any period of

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

In the instant case, the SHO found that Mr. Warner's seasonal employment and resulting twenty-two weeks of unemployment did not allow him to eliminate those weeks of unemployment from his AWW. While the Court of Appeals for the Tenth District issued a limited writ and directed the Commission to determine whether Mr. Warner's seasonal employment was a lifestyle choice, the latter concept is not in the statute and is a complete judicial construct. Accordingly, this Court should follow the plain language of R.C. 4123.61 and find that the term, "period of unemployment . . . beyond the employee's control" encompasses seasonal employment. It is commonsense that seasonal employment would be included in this language since it is the type of employment that is dependent on the time of the year. Moreover, the use of the term, "shall" emphasizes that deleting said weeks of unemployment due to cases beyond an employee's control, such as seasonal employment, is a mandatory directive. See *Merriam-Webster Dictionary Online*, available at <http://www.merriam-webster.com> ("shall: used in laws, regulations, or directives to express what is mandatory").

Further, R.C. 4123.95 mandates that "[s]ections 4123.01 to 4123.94, inclusive, of the Revised Code shall be liberally construed in favor of employees and the dependents of deceased employees." Thus, if there was a doubt that periods of unemployment due to seasonal employment were not included in the statutory language, courts should nonetheless interpret this provision liberally in favor of the injured worker. See *McCrone v. Bank One Corp.*, 107 Ohio St.3d 272, 2005-Ohio-6505, 839 N.E. 1, ¶ 37 (making additions to statutory language is not in the courts' province and is a policy decision reserved to the General Assembly).

Despite the plain language of R.C. 4123.61, Appellants attempt to argue that Mr. Warner should not have his weeks of unemployment eliminated from the AWW calculation, asserting that his seasonal employment is a “lifestyle choice.” Basing their argument on the precedents of *State ex rel. Baker Concrete Construction, Inc. v. Indus. Comm.*, 102 Ohio St.3d 149, 2004-Ohio-2114, 807 N.E.2d 347 and *State ex rel. The Andersons v. Indus. Comm.* (1992), 64 Ohio St.3d 539, 597 N.E.2d 143, these cases are textbook examples of judicial activism, wherein the Court added language to a simple and clear statute to delineate what constitutes ‘unemployment beyond an employee’s control.’ In *The Andersons*, 64 Ohio St.3d 539, 543, this Court held that foreseeability of job loss does not render seasonal unemployment voluntary, and most recently in *Baker Concrete Construction*, 2004-Ohio-2114, this Court held that the receipt of unemployment benefits was some evidence on which the commission may rely to prove that a claimant was unable to find work and accordingly, that his seasonal employment was not a lifestyle choice.

However, this Court should return to the plain meaning of the statute and eliminate Mr. Warner’s periods of unemployment from the calculation of his AWW because the very nature of seasonal employment makes it explicit that an injured worker will have weeks of unemployment beyond their control. R.C. 4123.95 mandates the same result, as it directs the Commission and courts to liberally interpret the statute in favor of injured workers. Unfortunately, Appellant Industrial Commission is encouraging more judicial activism, writing that it was the SHO’s fact-finding role to determine if “Warner had really undertaken a legitimate job search, or whether he has exercised basic responsibilities associated with receiving unemployment compensation during this period.” (Industrial Commission (hereinafter “IC brief at x”) Brief at 10). Amicus is unclear what the latter part of this argument even means, since neither the statute (nor precedent) requires any type of legal analysis even resembling this. Rather, all that the plain language of the

statute requires is that “periods of unemployment attributable to ‘sickness, industrial depression, strike, lockout, or other cause beyond the employee’s control shall be eliminated.” Nowhere does the language of R.C. 4123.61 require a job search, either legitimate or illegitimate, to prove that unemployment is beyond a worker’s control, and it is far-reaching for the Industrial Commission to invent a new legal standard out of thin air.

In short, the plain language of R.C. 4123.61 mandates that periods of unemployment beyond an employee’s control be eliminated from their average weekly wage; accordingly, the decision of the Court of Appeals should be affirmed as a writ of mandamus was appropriate.

Proposition of Law No. 2:

Although Baker Concrete strays from the strict construction of R.C. 4123.61, it nonetheless shows that Mr. Warner is entitled to a writ of mandamus.

In *State ex rel. Baker Concrete Construction, Inc. v. Indus. Comm.*, 102 Ohio St.3d 149, 2004-Ohio-2114, 807 N.E.2d 347 at ¶ 23, the Supreme Court granted a limited writ so the Commission could further examine whether a claimant’s seasonal layoff and receipt of unemployment benefits was a lifestyle choice (as opposed to unemployment beyond his control) when determining the calculation of his AWW. The Court stated that “[d]etermining whether a particular employment pattern is a lifestyle choice is relevant to calculating a claimant’s AWW is logically a question of intent, which, in turn derives from words and actions.” *Id.* at ¶ 20. Since the district hearing officer failed to gather evidence on the question of intent, and merely cited that “claimant had grown to expect the yearly seasonal layoff,” in his order, the court of appeals found the statement insufficient to support a finding of intent, noting that foreseeability of job loss did not render unemployment voluntary. *Id.* at ¶ 20-21. It also found that “evidence of receiving unemployment benefits is ‘some evidence’ on which the commission may rely [to prove that a claimant was unable to find work], but such evidence is not conclusive in that the

commission is not required to accept that evidence as determinative of involuntary employment as a matter of law. . . . The commission may or may not find it persuasive for purposes of setting the AWW.” Id. at ¶ 22. This Court affirmed, and remanded the case pursuant to *State ex rel. Noll v. Indus. Comm.* (1991), 57 Ohio St.3d 203, 567 N.E.2d 245. Id. at ¶ 23.

Similarly, Mr. Warner was collecting unemployment benefits during his twenty-two weeks of unemployment, which, pursuant to *Baker Concrete* at ¶ 22 and R.C. 4141.29(A)(4)(a)(i), constitutes some evidence that he was actively seeking employment. Despite the submission of his unemployment checks, the SHO nonetheless found that “[t]he claimant has presented **no evidence** of any attempt to look for work during his period of seasonal layoff,” which is a clear mistake of law pursuant to *Baker Concrete* and the plain meaning of the statute, which merely requires unemployment to be beyond a claimant’s control (something that unemployment checks conclusively prove). In addition, the SHO noted that “[t]he claimant also testified that he has been employed in this particular field for many years. . . . Thus, the hearing officer finds that the seasonal layoff was not unforeseen and is a normal part of employment within this industry.” Like the hearing officer’s cite in *Baker Concrete*, this information is legally irrelevant since foreseeability of job loss does not make unemployment voluntary.

Despite the fact that *Baker Concrete* clearly supports the decision of the Court of Appeals, Appellants attempt to show that the case somehow endorses the Commission’s conclusion. However, Appellant Industrial Commission fails to consider the fact that a worker needs to partake in a job search in order to receive unemployment under R.C. 4141.29(A)(4)(a)(i), something that the Court made explicit in *Baker Concrete* and which the Commission ignored when it concluded that Mr. Warner presented **NO** evidence of his attempt to look for work.

Appellant Central Allied Enterprises wrongly asserts that the staff hearing officer gathered enough evidence to infer a lack of intent, writing that “Warner testified that he had worked in this position for multiple seasons and came to expect seasonal unemployment and the receipt of unemployment benefits Moreover, when questioned, Warner could present no evidence of any intent to seek non-seasonal employment.” (Central Allied Enterprises brief at 7-8). Again, foreseeability of job loss does not make unemployment voluntary (under the plain language of the statute or under *Baker Concrete*), and contrary to Allied’s assertions, Mr. Warner did present evidence of his intent to seek employment—the submission of his unemployment checks.

Baker Concrete and R.C. 4141.29(A)(4)(a)(i) instruct that unemployment checks are some evidence of a worker’s intent to seek other employment. Because Mr. Warner submitted unemployment checks, Mr. Baker is entitled to a writ of mandamus as the SHO failed to even weigh the evidence he presented, instead finding that he submitted no evidence of his intent to look for work, a clear mistake of law.

Proposition of Law No. 3:

The plain language of R.C. 4123.61 does not direct the Industrial Commission to include unemployment compensation in the calculation of an injured worker’s AWW.

There is no statutory basis in R.C. 4123.61 that directs the Commission to mathematically add the amount of unemployment benefits in the calculation of an AWW. In fact, the statute specifically defines AWW as the “claimant’s . . . average weekly wage for the year preceding the injury . . . [and] is the weekly wage upon which compensation shall be based.” R.C. 4123.61. Amicus agrees with Appellant Industrial Commission that “[a]ll sources of income do not qualify as wages.” (See IC Brief at 13) (“Wage” is defined by *Black’s Law Dictionary*, 9th Ed., at 1716, as “Payment for labor or services, usu[ally] based on time worked or quantity produced.”

(emphasis added)). In fact, there is nothing in the statutory language that would suggest that unemployment compensation should be included in this calculation, and there is not even a basis in precedent supporting the Court of Appeals' position that "[u]nemployment compensation is taxable income for purposes of the Internal Revenue Code" so it should be included. (Decision at 4).

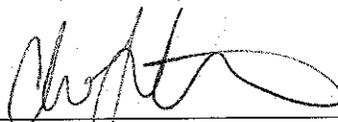
In addition, while the Court of Appeals advocates the inclusion of unemployment benefits so injured workers are not penalized, (decision at 4), the inclusion of these non-wages would ultimately hurt workers because low unemployment earnings would bring down the AWW of most claimants. Further, it makes no sense to delete weeks of unemployment from the denominator of an AWW while concurrently adding unemployment in the numerator because this calculation does nothing to accurately discern an injured worker's average weekly wage (and would more likely result in a windfall to the claimant). See *State ex rel. Davis v. Indus. Comm.* (Ohio App. 10th Dist.), No. 06AP-521, 2007-Ohio-1707 ("In calculating the average weekly wage in a workers' compensation case, two considerations dominate: (1) the AWW must do substantial justice to the claimant; and (2) it should not provide a claimant a windfall.") (citations omitted).

Instead, this Court should follow the statutory text of R.C. 4123.61 and direct the Commission to merely eliminate weeks of unemployment beyond a claimant's control while calculating the AWW. The statutory text is clear, and in any event, *Baker Concrete* supports the outcome of the Court of Appeals decision because Mr. Warner is entitled to a writ of mandamus based upon a clear mistake of law.

CONCLUSION

For the foregoing reasons, OACC and OAJ urge this Court to affirm the decision of the Court of Appeals for the Tenth Appellate District and enter judgment for Appellee Rick D. Warner.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was serviced by regular U.S. mail on this 15th day of June, 2011, upon:

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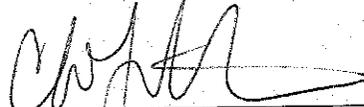
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