

IN THE SUPREME COURT OF OHIO

ORIGINAL

STATE OF OHIO, ex rel.
RICK D. WARNER

Appellee,

v.

INDUSTRIAL COMMISSION OF
OHIO, *et al.*

Appellants.

Case No. 2010-1283

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

REPLY BRIEF OF APPELLANT CENTRAL ALLIED ENTERPRISES

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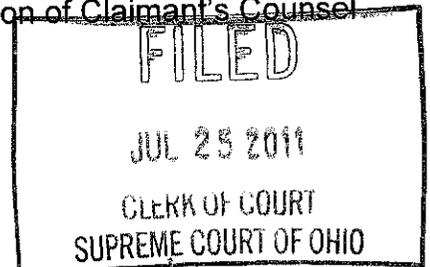
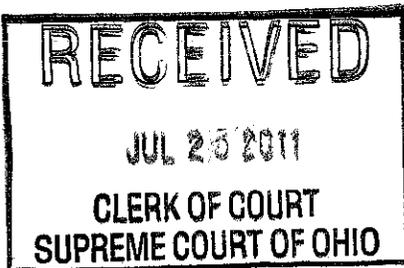
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REPLY BRIEF

I. THE INDUSTRIAL COMMISSION PROPERLY CONSIDERED WARNER'S UNEMPLOYMENT COMPENSATION WHEN ADDRESSING HIS AVERAGE WEEKLY WAGE.

The thrust of Warner's and Amicus' argument is that the Industrial Commission failed to properly apply the *Baker Concrete* case. Specifically both object to the Industrial Commission's statement, "the claimant has presented no evidence of any attempt to look for work during his period of seasonal layoff." Appellees argue that Warner submitted evidence that he received unemployment compensation during his seasonal layoff, which, as they correctly point out, *can* be considered evidence of an attempt to find employment under *Baker Concrete*. They further argue that the hearing officer's order is flawed because it did not discuss Warner's unemployment compensation in reaching the discretionary conclusion of "no evidence" to support a good faith job search. However, these arguments are contrary to law.

When issuing an order the Industrial Commission must only list the evidence it relied on in reaching its conclusion. *State ex rel. Lovell v. Industrial Commission* (1996), 74 Ohio St. 3d 250. In reaching its conclusion in this matter the Industrial Commission relied on, and specifically cited, Warner's testimony to the Staff Hearing Officer. Warner testified that he had worked in this position for multiple seasons and came to expect seasonal unemployment and the receipt of unemployment benefits. Moreover, when specifically questioned, Warner could present no evidence of any intent to seek non-seasonal employment. Accordingly, the Industrial Commission cited the evidence it relied on in reaching the discretionary conclusion of "no evidence" to support a good faith job search.

Appellees argue that because the Industrial Commission did not cite Warner's unemployment benefits they were not considered by the SHO. However, a hearing officer is not required to list all evidence he or she considered reaching a conclusion. *Lovell* at 253. In fact, pursuant to *Lovell*, there is a presumption that the Industrial Commission considered all the evidence before it. It is undisputed that the evidence of Warner's unemployment was before the Industrial Commission and the SHO. Therefore, it must be presumed by the Court that the unemployment evidence was considered by the SHO.

As set forth above, the Industrial Commission was not required to discuss Warner's unemployment compensation when finding that there was no evidence to support an attempt to look for non-seasonal work. Under Ohio law the Industrial Commission is only required to cite the evidence it relied on, which was done in this matter. Accordingly, appellees' argument that the hearing officer was required to address the unemployment before finding "no evidence" lacks merit.

II. THE COURTS' INTERPRETATION OF R.C. § 4123.61 IS NECESSARY TO ADDRESS THE ISSUE OF SEASONAL LAYOFFS IN THE CONTEXT OF AWW CALCULATIONS.

Amicus also argues that seasonal unemployment is clearly eliminated from AWW calculations by the plain language of R.C. § 4123.61. Therefore, Amicus asserts that the *Baker Concrete* line of cases should be abandoned as "judicial activism." In support of that position it is argued that the phrase "other cause beyond the employee's control" is clear and unambiguous, and requires no statutory interpretation by the Court. Amicus states as follows:

State ex rel. Baker Concrete Construction, Inc. v. Industrial Commission
102 Ohio St.3d 149, 2004-Ohio-2114, 807 N.E.2d 347 and *State ex rel.*

The Andersons v. Industrial Commission (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.'

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 year.

This argument ignores the real issue: what "other cause of unemployment" are beyond an employee's control? In R.C. § 4123.61 the General Assembly has given us some specific examples of causes of unemployment beyond an employee's control. The statute lists sickness, industrial depression, strike and lockout. But what did the General Assembly mean by "other cause beyond the employee's control?" It is ambiguous.

If R.C. § 4123.61 read, "any period of unemployment due to sickness, industrial depression, strike, lockout, seasonal layoff, or other cause beyond the employee's control" Amicus' argument would be legally sound. However, the General Assembly did not include seasonal layoff in R.C. § 4123.61; therefore, statutory interpretation is necessary to determine whether or not it is an "other cause beyond an employee's control." To that end Ohio courts have consistently addressed seasonal layoffs in the context of calculating an injured worker's average weekly wage. *State ex rel. The Andersons v. Industrial Commission* (1992), 64 Ohio St 3d 539; *State ex rel. Baker Concrete Constr., Inc. v. Industrial Commission* (2004), 102 Ohio St. 3d 149; *State ex rel. R&L Carrier Shared Serv., L.L. v. Industrial Commission*, 2005-Ohio-6372. Accordingly, seasonal

unemployment is not specifically addressed in the plain language of R.C. § 4123.61, rendering the courts' interpretation necessary and appropriate.

III. UNEMPLOYMENT COMPENSATION BENEFITS ARE NOT WAGES PROPERLY INCLUDED IN AWW CALCULATIONS.

Warner finally argues that it is simply unfair to exclude unemployment compensation benefits from his AWW calculation¹. Therefore, Warner is asking the Court to include his unemployment compensation benefits as part of his AWW. Coincidentally, Warner is now asking the Court to interpret a statute that requires no statutory interpretation.

As Amicus notes in its brief, when statutory language is clear and unambiguous the courts must not engage in statutory construction. See *Hubbard v. Canton City School Board of Education* (2002), 97 Ohio St. 3d 451, 454. Instead the court must enforce a clear and unambiguous statute as written by the General Assembly. *Id.*

The Court specifically applied this principle to R.C. § 4123.61 in *State ex rel. McDulin v. Industrial Commission* (2000), 89 Ohio St. 3d 390. Again, in *McDulin* the injured worker asked the Industrial Commission to include reimbursement for lodging, meals, and tool and truck expenses in his AWW calculation. *Id.* The Court reviewed R.C. § 4123.61 and held that AWW calculations are limited, by the General Assembly, to an injured worker's wages. The Court explained:

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

To hold as claimant advocates is inappropriate from a legal perspective, for to do so would permit the inclusion into the AWW calculation of

¹ Amicus does not join in this position. Amicus agrees with appellants that the Industrial Commission properly excluded unemployment compensation benefits from Warner's AWW calculation.

dividends, interest, and other forms of income unrelated to claimant's job performance. This is clearly not what the General Assembly had in mind.

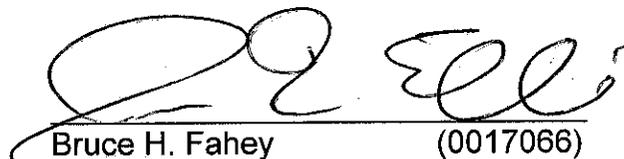
Id. at 392.

As the Court noted in *McDulin*, the General Assembly specifically limited AWW calculations to wages. If the General Assembly meant to include all income in AWW calculations it could simply have done so by substituting "income" for "wages" in the Ohio Revised Code. Finally, as the word "wage" is clear and unambiguous it would be inappropriate for the Court to engage in statutory construction on this issue. Instead, it is the duty of the Court to enforce the statutory language, as it did in *McDulin*.

CONCLUSION

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

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing was served this 25nd day of July 2011, by regular U.S.

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