

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel.	:	
Arrow International, Inc.,	:	
	:	
Relator,	:	
	:	
v.	:	No. 08AP-763
	:	
The Industrial Commission of Ohio	:	(REGULAR CALENDAR)
and Maggie Thomas,	:	
	:	
Respondents.	:	

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D E C I S I O N

Rendered on September 17, 2009

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*Yormick & Associates Co., L.P.A., Jon P. Yormick, Jason B. DeSiderio and Ruby K. Singh, for relator.*

*Richard Cordray, Attorney General, and Elise Porter, for respondent Industrial Commission of Ohio.*

*Russo, Rosalina & Co., L.P.A., and Joseph K. Rosalina, for respondent Maggie Thomas.*

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IN MANDAMUS  
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

McGRATH, J.

{¶1} In this original action, relator, Arrow International, Inc., requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its July 17, 2007 order that, on the basis of continuing jurisdiction, vacates an order of a staff hearing officer ("SHO") finding an overpayment of Disabled Workers' Relief Fund ("DWRF") payments to respondent Maggie Thomas ("claimant"), and to enter a new order that reinstates the DWRF overpayment finding.

{¶2} This matter was referred to a magistrate of this court pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate examined the evidence and issued a decision, including findings of fact and conclusions of law, which is appended to this decision. Therein, the magistrate applied the pertinent statutes and concluded the commission has the authority and the duty to inquire into the factual circumstances behind DWRP benefits. Therefore, the magistrate recommended that this court issue a writ of mandamus ordering the commission to vacate its July 17, 2007 order and enter a new order adjudicating the contested matter.

{¶3} The commission filed objections to the magistrate's decision. Though not delineating specific objections, the commission contends the magistrate erred and essentially makes two arguments: (1) no statutory interpretation is needed here because the statute at issue is clear on its face; and (2) even if statutory interpretation was necessary, the result here is not "absurd."

{¶4} This cause is now before the court for a full review. No party has filed objections to the magistrate's findings of fact, and upon an independent review of the same, we adopt them as our own. For ease of discussion, however, a recitation of those facts is appropriate at this juncture.

{¶5} Claimant was industrially injured during her employment with relator in 1994. Claimant began receiving social security disability ("SSD") benefits in August 2000. In February 2004, claimant sought permanent total disability ("PTD") compensation, which was awarded effective November 10, 2003. In March 2005, the Social Security Administration ("SSA") informed claimant that because of her PTD award, she had received an overpayment of SSD and must repay \$10,274.40. It appears no action was taken by claimant, and beginning in June 2005, the SSA reduced claimant's SSD

payments to recoup the overpayment. This recoupment caused claimant's combined SSD and workers' compensation benefits to fall below the statutorily mandated minimum, and in May 2005, the Bureau of Workers' Compensation ("bureau") determined claimant was entitled to receive DWRF benefits of \$45.56 per week.

{¶6} Relator sought an administrative appeal, and in March 2007, an SHO vacated the bureau's order, finding that an overpayment in SSD is not a basis for granting an additional DWRF benefit, and, therefore, there was an overpayment of DWRF benefits paid to claimant. Claimant sought reconsideration from the three-member commission. Following a hearing, the commission exercised continuing jurisdiction, vacated the SHO's order, and found the bureau properly granted DWRF benefits because the statute states that when PTD and SSD fall below an annually adjusted minimum rate, the injured worker is entitled to participate in the DWRF. According to the commission, DWRF payments to those entitled to participate in the fund are mandatory with no exceptions provided, and, therefore, the SHO erred in finding a DWRF overpayment. This mandamus action followed.

{¶7} As provided in R.C. 4123.412:

For the relief of persons who are permanently and totally disabled as the result of injury or disease sustained in the course of their employment and who are receiving workers' compensation which is payable to them by virtue of and under the laws of this state in amounts, the total of which, when combined with disability benefits received pursuant to the Social Security Act is less than three hundred forty-two dollars per month adjusted annually as provided in division (B) of section 4123.62 of the Revised Code, there is hereby created a separate fund to be known as the disabled workers' relief fund[.]

{¶8} Eligibility for DWRF payments is provided in R.C. 4123.413, which states:

To be eligible to participate in said fund, a participant must be permanently and totally disabled and be receiving workers' compensation payments, the total of which, when combined with disability benefits received pursuant to The Social Security Act is less than three hundred forty-two dollars per month adjusted annually as provided in division (B) of section 4123.62 of the Revised Code.

{¶9} As is relevant here, R.C. 4123.414 provides:

Each person determined eligible \* \* \* to participate in the disabled workers' relief fund is entitled to receive payments, without application, from the fund[.]

{¶10} As the magistrate's decision sets forth, relator's position is that the DWRF statutes give the bureau and the commission the authority and duty to inquire into factual circumstances behind any reduction in SSD payments. The commission, however, contends the statute provides for a mathematical calculation only, and it is irrelevant as to why the SSD payments have been decreased.

{¶11} The magistrate, relying on rules of statutory construction, correctly noted a statute should not be interpreted to yield an absurd result. According to the magistrate, interpreting the statute in the manner in which the commission suggests is an abdication of the commission's adjudicatory power and is an implication that the commission believes it lacks statutory authority to adjudicate the contested matter. We disagree.

{¶12} Initially, we note the commission did not find it lacked authority to review this matter but, rather, it found the statutory language required DWRF payments in this instance. We also note that while the magistrate correctly stated statutes should not be interpreted to yield an absurd result, this premise is not applicable here. As recently stated by the Supreme Court of Ohio, " 'the intent of the law-makers is to be sought first of all in the language employed, and if the words be free from ambiguity and doubt, and express plainly, clearly and distinctly, the sense of the law-making body, there is no

occasion to resort to other means of interpretation.' " *State ex rel. Cordray v. Midway Motor Sales, Inc.*, 122 Ohio St.3d 234, 2009-Ohio-2610, ¶36, quoting *Slingluff v. Weaver*, (1902), 66 Ohio St. 621, paragraph two of the syllabus. See also *Columbia Gas Transmission Corp. v. Levin*, 117 Ohio St.3d 122, 2009-Ohio-511, ¶19 (stating "[t]he first rule of statutory construction is to look at the statute's language to determine its meaning. If the statute conveys a clear, unequivocal, and definite meaning, interpretation comes to an end, and the statute must be applied according to its terms. Courts may not delete words used or insert words not used.")

{¶13} The language employed in the statute at issue here is plain and unambiguous. This court would invade the province of the legislature and violate separation of powers if it rewrote the statute and included a provision that the commission is required to ascertain the reasoning behind an increase or decrease in SSD benefits when calculating DWRP benefits. Such practice is not permitted by this court. *Midway*, supra; *Columbia Gas*, supra. Accordingly, we sustain the commission's objections to the magistrate's decision.

{¶14} Following an independent review of this matter, we find that the magistrate properly determined the facts, but erred in finding the commission has the authority and duty to inquire about the factual circumstances behind a reduction in SSD benefits and to premise DWRP eligibility upon such factual determination. Therefore, we adopt only the magistrate's findings of fact, reject the conclusions of law, and deny relator's request for a writ of mandamus.

*Objections sustained; writ denied.*

TYACK and CONNOR, JJ., concur.

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**APPENDIX**

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel.	:	
Arrow International, Inc.,	:	
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Relator,	:	
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v.	:	No. 08AP-763
	:	
The Industrial Commission of Ohio	:	(REGULAR CALENDAR)
and Maggie Thomas,	:	
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Respondents.	:	

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MAGISTRATE'S DECISION

Rendered on June 9, 2009

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*Yormick & Associates Co., L.P.A., Jon P. Yormick, Jason B. DeSiderio and Ruby K. Singh, for relator.*

*Richard Cordray, Attorney General, and Elise Porter, for respondent Industrial Commission of Ohio.*

*Russo, Rosalina & Co., L.P.A., and Joseph K. Rosalina, for respondent Maggie Thomas.*

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IN MANDAMUS

{¶15} In this original action, relator, Arrow International, Inc., requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its July 17, 2007 order that, on the basis of continuing jurisdiction, vacates an order of a

staff hearing officer ("SHO") finding an overpayment of Disabled Workers' Relief Fund ("DWRF") payments to respondent Maggie Thomas ("claimant"), and to enter a new order that reinstates the DWRF overpayment finding.

Findings of Fact:

{¶16} 1. On January 25, 1994, claimant sustained an injury (claim No. 94-1127) in the course of and arising out of her employment with relator.

{¶17} 2. In August 2000, claimant began receiving social security disability ("SSD") benefits.

{¶18} 3. In February 2004, claimant filed an application for permanent total disability ("PTD") compensation.

{¶19} 4. Following a February 24, 2005 hearing, an SHO issued an order awarding PTD compensation effective November 10, 2003.

{¶20} 5. By letter dated March 18, 2005, the Social Security Administration ("SSA") informed claimant that she had been overpaid SSD benefits beginning November 2003 because of her PTD award. The letter informed claimant of her right to appeal the SSA overpayment determination. It also informed of a right to request a waiver, explaining:

\* \* \* You also have the right to request a determination concerning the need to recover the overpayment. An overpayment must be refunded or withheld from benefits unless both of the following are true:

a. The overpayment was not your fault in any way, and

b. You could not meet your necessary living expenses if we recovered the overpayment, or recovery would be unfair for some other reason.

{¶21} The letter requested that claimant refund to the SSA the full amount of the overpayment, explaining:

\* \* \* If you cannot refund the full \$10,274.40 now, you should submit: (a) a partial payment; (b) an explanation of your financial circumstances; and (c) a definite plan for repaying the balance.

If we do not receive your refund within 30 days, we plan to recover the overpayment by withholding your full benefit beginning with the payment you would normally receive about June 3, 2005. We will continue withholding the benefit you receive until the overpayment has been fully recovered.

{¶22} 6. Apparently, claimant did not administratively appeal the SSA overpayment determination nor did she request a waiver. Also, claimant did not voluntarily refund any of the overpayment to the SSA.

{¶23} 7. Beginning June 2005, the SSA reduced or withheld claimant's SSD benefits in order to recoup the SSD overpayment.

{¶24} 8. Earlier, by order mailed May 11, 2005, the Ohio Bureau of Workers' Compensation ("bureau") determined that claimant was entitled to receive DWRF benefits. The bureau's order explained:

Our review found that you are entitled to receive DWRF benefits. \* \* \*

\* \* \*

To determine eligibility, we look to see what your total benefit amount is per week. Since that amount is less than \$ 286.56, you are eligible to receive DWRF benefits at this time.

You are entitled because DWRF received information from the Social Security Administration that your social security benefits are being decreased and this makes you entitled to receive DWRF benefits.

Effective with the payment of 05/18/2005 your DWRF weekly rate will be \$ 45.56.

{¶25} 9. Relator administratively appealed the May 11, 2005 bureau order.

{¶26} 10. Following a March 16, 2007 hearing, an SHO issued an order (mailed March 20, 2007) vacating the bureau's May 11, 2005 order. The SHO's order of March 16, 2007 explains:

Staff Hearing Officer finds that DWRF benefits were granted by Bureau of Workers' Compensation only after the claimant was declared overpaid by the social security administration and her weekly social security disability benefits were reduced to \$0. Staff Hearing Officer finds claimant's overpayment in social security disability is not a basis for the granting of an additional benefit of DWRF Compensation.

This order is based on social security administration overpayment order dated 03/18/2005 filed with the Industrial Commission on 07/26/2006 showing an overpayment of social security disability in the count [sic] of \$10,274.40.

Staff Hearing Officer orders an overpayment of DRWF [sic] benefits paid to claimant to date.

{¶27} 11. On March 27, 2007, claimant moved the three-member commission for reconsideration of the SHO's order of March 16, 2007.

{¶28} 12. Following a July 17, 2007 hearing, the three-member commission issued an order exercising continuing jurisdiction over the SHO's order of March 16, 2007 on grounds that it contained a clear mistake of law. The commission vacated the SHO's order and stated:

It is the finding of the Commission that the Bureau of Workers' Compensation (BWC) properly granted Disabled Worker Relief Fund (DWRF) benefits in its order dated 05/11/2005. Accordingly, there is no overpayment of DWRF benefits.

The history of the payment of DWRF benefits in this claim is set forth in the 03/10/2006 memorandum from BWC DWRF

claims representative Marilyn Hageman. In addition, as set forth in the permanent total disability statement of facts prepared 03/30/2004, the injured worker began receiving social security disability on 08/23/2000. The Commission granted the injured worker permanent total disability by order issued 02/26/2005, which awarded compensation from 11/10/2003 and to continue. The 03/18/2005 letter to the injured worker from the Social Security Administration indicates that as a result of the retroactive award of permanent total disability compensation, the injured worker was found to have an overpayment of social security disability benefits. In order to collect the overpayment, the injured worker's social security disability benefits were reduced. As a result of the reduction of social security disability benefits, the injured worker's benefits (permanent total disability plus social security disability) fell below the 2005 DWRF entry level thereby making the injured worker eligible to receive DWRF benefits. Consequently, DWRF benefits commenced effective 05/01/2005 as granted by BWC order dated 05/11/2005. The injured worker continued to be eligible to receive and was paid DWRF benefits until the Staff Hearing Officer order, issued 03/20/2007, found otherwise.

Eligibility for DWRF benefits is addressed by R.C. 4123.412. The statute provides that when permanent total disability payments, combined with social security disability payments, fall below an annually adjusted minimum rate, the injured worker is eligible to participate in the DWRF fund. The statute further provides that "(d)isbursements from the fund shall be made by the bureau to those persons entitled to participate therein..."

The use of the word "shall" indicates payment is mandatory with no exceptions provided. In the present case, as demonstrated by the 03/18/2005 letter from the Social Security Administration and the 03/10/2006 memorandum prepared by the BWC DWRF section, the injured worker's rate of compensation did fall below the DWRF entry level when her social security benefits were reduced to recoup the social security disability overpayment caused by the retroactive award of permanent total disability compensation. Therefore, BWC was required to grant the injured worker DWRF benefits over the period the social security benefits were reduced. Further, there has been no evidence provided to indicate BWC's calculation of the DWRF benefits was incorrect. Therefore, based on the evidence noted above, it

is found the injured worker was properly paid DWRF benefits and no overpayment occurred. This claim is referred back to BWC's DWRF section to properly adjust and calculate the DWRF benefits that the injured worker is entitled to receive.

{¶29} 13. On August 29, 2008, relator, Arrow International, Inc., filed this mandamus action.

Conclusions of Law:

{¶30} This mandamus action presents an issue of statutory interpretation relating to DWRF.

The General Assembly created the Disabled Workers' Relief [F]und (DWRF) in 1953 to subsidize payments to qualifying recipients of workers' compensation. In order to qualify for payments out of the fund under R.C. §§ 4123.412 through 4123.414, an employee must be permanently and totally disabled as a result of an occupational injury or disease, and the employee's workers' compensation benefits, when combined with Social Security Act disability payments, must fall below a statutorily mandated minimum amount.

The creation of this subsidy was based upon the recognition that a large number of permanently and totally disabled claimants were receiving low levels of compensation, because benefits payable in a compensation claim are limited to those in effect at the time of injury, and inflation tended to victimize the recipients of such continuing benefits.

\* \* \*

(Footnote omitted.) Fulton, Ohio Workers' Compensation Law, (2d. ed.) 318, Section 10.6.

{¶31} R.C. 4123.412 establishes a separate fund to be known as DWRF. It states that the fund is:

For the relief of persons who are permanently and totally disabled as the result of injury or disease sustained in the course of their employment and who are receiving workers' compensation which is payable to them by virtue of and under the laws of this state in amounts, the total of which, when combined with disability benefits received pursuant to

the Social Security Act is less than three hundred forty-two dollars per month adjusted annually as provided in division (B) of section 4123.62 of the Revised Code[.] \* \* \*

{¶32} R.C. 4123.413 provides:

To be eligible to participate in said fund, a participant must be permanently and totally disabled and be receiving workers' compensation payments, the total of which, when combined with disability benefits received pursuant to The Social Security Act is less than three hundred forty-two dollars per month adjusted annually as provided in division (B) of section 4123.62 of the Revised Code.

{¶33} R.C. 4123.414 provides:

Each person determined eligible, pursuant to section 4123.413 of the Revised Code, to participate in the disabled workers' relief fund is entitled to receive payments, without application, from the fund of a monthly amount equal to the lesser of the difference between three hundred forty-two dollars, adjusted annually pursuant to division (B) of section 4123.62 of the Revised Code, and:

(1) The amount he is receiving per month as the disability monthly benefits award pursuant to The Social Security Act; or

(2) The amount he is receiving monthly under the workers' compensation laws for permanent and total disability. \* \* \*

{¶34} It is a cardinal rule of statutory construction that a statute should not be interpreted to yield an absurd result. *Mishr v. Bd. of Zoning Appeals of Village of Poland*, 76 Ohio St.3d 238, 240, 1996-Ohio-400, citing *State ex rel. Dispatch Printing Co. v. Wells* (1985), 18 Ohio St.3d 382, 384.

{¶35} Insofar as the statutes are silent on an interpretation issue, the courts must accord to the administrative agency that deference to which the agency is entitled in its interpretation of the pertinent legislation. *State ex rel. Gill v. School Emp. Retirement Sys. of Ohio*, 121 Ohio St.3d 567, 2009-Ohio-1358 at ¶28 citing *State ex rel. Schaengold*

*v. Ohio Pub. Emps. Retirement Sys.*, 114 Ohio St.3d 147, 151, 2007-Ohio-3760. The courts must give due deference to the agency's reasonable interpretation of the legislative scheme. *Gill*, at ¶28, citing *Northwestern Ohio Bldg. & Constr. Trades Council v. Conrad*, 92 Ohio St.3d 282, 287, 2001-Ohio-190.

{¶36} According to relator, the commission construed the relevant statute literally and in so doing created an absurd and unreasonable result.

{¶37} Relator points out that, had claimant voluntarily refunded the overpayment to the SSA or successfully sought a waiver of the SSA recoupment determination, her SSD benefits would not have been reduced and consequently she would not have fallen below the statutorily mandated minimum that rendered her eligible for DWRF benefits. Relator describes this situation as a windfall for claimant and a penalty for relator because it was claimant's failure to respond to SSA's demand set forth in the March 18, 2005 letter that imposed DWRF liability on relator under the commission's final decision.

{¶38} It is the position of the commission that the DWRF statutes do not require the commission or the bureau to determine the reason for the reduction in SSD benefits. According to the commission, the statutes only require the bureau to do a mathematical calculation. If that calculation shows that the claimant's combined disability payments fall below the statutorily mandated minimum, the claimant is automatically eligible for DWRF benefits. The commission further points out that DWRF payments are mandatory because under R.C. 4123.412 "[d]isbursements from the fund shall be made by the bureau to those persons entitled to participate." The commission also relies upon the liberal construction provision of R.C. 4123.95.

{¶39} Relator counters that the commission's interpretation of the statute is unreasonable because there is no evidence in the record that the DWRF benefits were

designed to compensate claimant for the inflation that tends to victimize recipients of PTD compensation.

{¶40} In short, it is relator's view of the DWRF statutes that they bestow upon the bureau and commission the authority and the duty to inquire into the factual circumstances behind any reduction in SSD payments and to premise DWRF eligibility upon such factual determination. On the other hand, it is the position of the bureau and commission that the DWRF statutes bestow no such authority or duty—that the bureau and commission are only authorized to perform a mathematical calculation based upon the disability payments actually received by the claimant during the period of eligibility at issue.

{¶41} In effect, the commission's interpretation of the DWRF statutes is an abdication of its adjudicatory power granted under other workers' compensation statutes. The commission's interpretation also improperly merges the functions of the bureau and commission.

{¶42} In *State ex rel. Crabtree v. Ohio Bur. of Workers' Comp.*, 71 Ohio St.3d 504, 507, 1994-Ohio-474, the court states:

\* \* \* The bureau's role is ministerial, not deliberative. The bureau gives way to the commission when a party contests an award, necessitating a weighing of evidence and a judgment. The bureau then makes the payments based upon the commission's judgments.

{¶43} Here, the SHO heard the administrative appeal from the bureau's order mailed May 11, 2005. The commission's hearing officers have statutory jurisdiction to hear appeals involving bureau orders.<sup>1</sup> See R.C. 4121.34 and 4121.35.

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<sup>1</sup> The commission here does not explain why relator's administrative appeal from the bureau's May 11, 2005 order was not first heard by a district hearing officer under R.C. 4121.34.

{¶44} When relator administratively appealed the bureau's May 11, 2005 order issued without a hearing, DWRF benefits became a contested matter for the commission and its hearing officers to adjudicate. Under their adjudicatory powers, the commission and its hearing officers had the authority and duty to determine the factual basis for the SSA's reduction in SSD payments, and to determine whether that factual basis provided cause to alter or forego the bureau's mathematical calculation of the DWRF benefits. *Crabtree*.

{¶45} The commission's July 17, 2007 order, as well as the commission's position in this action, indicates that the commission erroneously believed that it lacked the statutory authority to adjudicate the contested matter that relator endeavored to bring before it. Accordingly, the commission's July 17, 2007 order cannot stand.

{¶46} Accordingly, for all the above reasons, it is the magistrate's decision that this court issue a writ of mandamus ordering the commission to vacate its order of July 17, 2007 as well as any subsequent orders based thereon, and, in a manner consistent with this magistrate's decision, enter a new order that adjudicates the contested matter that relator brought before it by way of its administrative appeal from the bureau's order of May 11, 2005.

*/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).