[Cite as *State ex rel. Jefferson Smurfit Corp. v. Indus. Comm.*, 2010-Ohio-3521.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Jefferson Smurfit Corp. Reclamation,	:	
Relator,	:	
v.	:	No. 09AP-851
Industrial Commission of Ohio and Cynthia L. Williams,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on July 29, 2010

Taft Stettinius & Hollister LLP, and *Cynthia C. Felson*, for relator.

Richard Cordray, Attorney General, and *Andrew J. Alatis*, for respondent Industrial Commission of Ohio.

Manley Burke, LPA, and *George F. Moeller*, for respondent Cynthia L. Williams.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

McGRATH, J.

{¶1} Relator, Jefferson Smurfit Corp. Reclamation ("Jefferson Smurfit" or "relator"), has filed this original action requesting that this court issue a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission"), to vacate its order

awarding respondent Cynthia L. Williams ("claimant") R.C. 4123.56(B) wage loss compensation, and to enter an order denying R.C. 4123.56(B) wage loss compensation on grounds that compensation is barred by her having previously received 200 weeks of R.C. 4121.67(B) living maintenance wage loss ("LMWL") payments.

{¶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 concluded that R.C. 4121.67(B) does not limit payments under R.C. 4121.67(B) and 4123.56(B) to an aggregate maximum of 200 weeks and that the commission did not abuse its discretion in awarding claimant R.C. 4123.56(B) wage loss compensation. Therefore, the magistrate recommended that this court deny the requested writ of mandamus.

{¶3} In its objections, relator contends the magistrate erred when he (1) stated that it is relator's view that a 400-week award of working wage loss is what renders the statutory scheme absurd; and (2) indicated that a request for working wage loss under R.C. 4123.56(B) does not require reference to R.C. 4121.67(B). Upon review, and for the reasons set forth in the magistrate's decision, we do not find relator's position to be well-taken.

{¶4} Following an independent review of this matter, we find that the magistrate has properly determined the facts and applied the appropriate law. Therefore, relator's objections to the magistrate's decision are overruled, and we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained

therein. In accordance with the magistrate's decision, we deny the requested writ of mandamus.

Objections overruled; writ denied.

TYACK, P.J., and BROWN, J., concurs.

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APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Jefferson Smurfit Corp. Reclamation,	:	
Relator,	:	
v.	:	No. 09AP-851
Industrial Commission of Ohio and Cynthia L. Williams,	:	(REGULAR CALENDAR)
Respondents.	:	

M A G I S T R A T E ' S D E C I S I O N

Rendered on March 31, 2010

Taft Stettinius & Hollister LLP, and *Cynthia C. Felson*, for relator.

Richard Cordray, Attorney General, and *Andrew J. Alatis*, for respondent Industrial Commission of Ohio.

Manley Burke, LPA, and *George F. Moeller*, for respondent Cynthia L. Williams.

IN MANDAMUS

{¶5} In this original action, relator, Jefferson Smurfit Corp. Reclamation ("Jefferson Smurfit" or "relator"), requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order awarding to respondent

Cynthia L. Williams ("claimant") R.C. 4123.56(B) wage loss compensation, and to enter an order denying R.C. 4123.56(B) wage loss compensation on grounds that compensation is barred by her having previously received 200 weeks of R.C. 4121.67(B) living maintenance wage loss ("LMWL") payments.

Findings of Fact:

{¶6} 1. On June 15, 2001, claimant sustained an industrial injury while employed as a laborer for Jefferson Smurfit, a self-insured employer under Ohio's workers' compensation laws. The industrial claim (No. 01-848973) is allowed for "sprain/strain neck; sprain/strain right trapezius muscle; herniated disc at C6-7; sick scapular syndrome, left; right vocal cord paralysis; depressive disorder."

{¶7} 2. On April 1, 2004, pursuant to Ohio Adm.Code 4123-18-03, relator moved for authorization of vocational rehabilitation.

{¶8} 3. Following a September 23, 2004 hearing, a district hearing officer ("DHO") issued an order authorizing vocational rehabilitation. Apparently, the DHO's order was not administratively appealed.

{¶9} 4. In May 2005, claimant successfully completed vocational rehabilitation and obtained medically suitable employment with Vendor Supply of Ohio.

{¶10} 5. Because claimant's weekly wage at Vendor Supply was less than her average weekly wage at Jefferson Smurfit, claimant applied for R.C. 4121.67 LMWL compensation.

{¶11} 6. As a self-insured employer, Jefferson Smurfit, through its third-party administrator, paid to claimant LMWL payments. In February 2009, claimant reached the 200 week maximum payment under R.C. 4121.67(B).

{¶12} 7. Earlier, on January 21, 2009, anticipating her exhaustion of LMWL payments, claimant moved for R.C. 4123.56(B) wage loss compensation.

{¶13} 8. Following an April 21, 2009 hearing, a DHO issued an order denying claimant's January 21, 2009 motion.

{¶14} 9. Claimant administratively appealed the DHO's order of April 21, 2009.

{¶15} 10. Following a June 3, 2009 hearing, a staff hearing officer ("SHO") issued an order vacating the DHO's order of April 21, 2009, and granting claimant's motion:

> By her motion, the Injured Worker seeks an award of working wage loss benefits commencing on 02/16/2009 and continuing through an estimated 04/13/2009.
>
> The self-insuring Employer argues that the Injured Worker's request is barred by statute because the injured worker has already been paid 200 weeks of working wage loss compensation pursuant to statute.
>
> The Injured Worker argues that she was paid 200 weeks of living maintenance wage loss benefits, and thus, her present request is not barred by statute.
>
> * * *
>
> It is the finding of the Staff Hearing Officer that the Injured Worker was paid 200 weeks of living maintenance wage loss benefits.
>
> * * *
>
> The Staff Hearing Officer finds that for an injury occurring on 06/19/2001 the Injured Worker may receive a maximum of 200 weeks of wage loss benefits regardless of the number of living maintenance wage loss weeks that were previously paid in the claim. The Staff Hearing Officer further finds that neither chapters 4121 nor 4123 of the Ohio Revised Code preclude the receipt of wage loss compensation under 4123.56 where an Injured Worker has previously received 200 weeks of rehabilitation wage loss compensation pursuant to Revised Code 4121.67.

It is the further order of the Hearing Officer that the Injured Worker's request for working wage loss compensation beginning 02/16/2009 be granted.

The Staff Hearing Officer finds that the Injured Worker returned to employment and suffered a wage loss as a direct result of her 06/15/2001 industrial injury. The Staff Hearing Officer finds that the Injured Worker has physical restrictions as set forth in the medical report of Dr. Blatman, dated 10/13/2008.

These restrictions prevent the Injured Worker from returning to her former position of employment. These restrictions include limited bending, squatting, crawling, climbing and reaching with limitations both in lifting and carrying. The Injured Worker is also precluded from pushing and pulling arm controls and she is limited to a 30 hour work week.

The Staff Hearing Officer finds that the Injured Worker has returned to employment as an accounts receivable clerk, a position within her physical restrictions stated by Dr. Blatman.

The Staff Hearing Officer further finds that the Injured Worker's earnings since 02/16/2009 have been less than her wages were at the time of the industrial injury and that her wage loss is the result of a medical impairment causally related to her 06/15/2001 industrial injury.

The Staff Hearing Officer further finds that the Injured Worker has otherwise complied with the requirements of the Industrial Commission wage loss rule set out in Ohio Administrative Code Chapter 4125-1.

Accordingly, it is the order of the Hearing Officer that working wage loss benefits be paid for the period from 02/16/2009 through 04/13/2009.

Wage loss compensation may continue upon submission of evidence which documents an ongoing wage loss due to this industrial injury, including appropriate wage evidence and updated medical reports from the treating physician.

Wage loss is payable at 66 2/3 percent of the difference between the Injured Worker's present earnings and the Injured Worker's average weekly wage, not to exceed the

> state wide average weekly wage. Wage loss is authorized no longer than the time period specified in Ohio Revised Code Section 4123.56.
>
> This order is based upon the authority cited in it, the report of Dr. Blatman dated 01/13/2008, the Injured Worker's testimony, and the evidence cited in the order.

{¶16} 11. On June 30, 2009, another SHO mailed an order refusing relator's administrative appeal from the SHO's order of June 3, 2009.

{¶17} 12. On August 11, 2009, the three-member commission mailed an order denying relator's request for reconsideration of the SHO's order of June 30, 2009.

{¶18} 13. On September 10, 2009, relator, Jefferson Smurfit Corp. Reclamation, filed this mandamus action.

Conclusions of Law:

{¶19} The issue is whether, prior to the June 30, 2006 amendment of R.C. 4123.56(B), R.C. 4121.67(B) limited payments received under both R.C. 4121.67(B) and 4123.56(B) to an aggregate maximum of 200 weeks.

{¶20} Finding that R.C. 4121.67(B) does not limit payments under R.C. 4121.67(B) and 4123.56(B) to an aggregate maximum of 200 weeks, it is the magistrate's decision that this court deny relator's request for a writ of mandamus, as more fully explained below.

{¶21} Entitlement to workers' compensation payments is a substantive right measured by the statutes in force on the date of the injury. *State ex rel. Kirk v. Owens-Illinois, Inc.* (1986), 25 Ohio St.3d 360, 361.

{¶22} Prior to its amendment effective June 30, 2006, R.C. 4123.56(B) stated:

> 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.

{¶23} The above-quoted version of R.C. 4123.56(B) was in effect on the date of claimant's industrial injury, i.e., June 15, 2001.

{¶24} Effective June 30, 2006, R.C. 4123.56(B) was amended so that it contains two paragraphs. Of interest here, is the first paragraph under R.C. 4123.56(B), which currently states:

> (1) If 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 due to an injury or occupational disease, the employee shall receive compensation at sixty-six and two-thirds per cent of the difference between the employee's average weekly wage and the employee's present earnings not to exceed the statewide average weekly wage. The payments may continue for up to a maximum of two hundred weeks, but the payments shall be reduced by the corresponding number of weeks in which the employee receives payments pursuant to division (B) of section 4121.67 [o]f the Revised Code.

{¶25} R.C. 4121.67(B) currently reads as it did on the date of injury:

> The administrator of workers' compensation, with the advice and consent of the workers' compensation oversight commission, shall adopt rules:
>
> * * *
>
> (B) Requiring payment, in the same manner as living maintenance payments are made pursuant to section 4121.63 of the Revised Code, to the claimant who completes a rehabilitation training program and returns to employment, but who suffers a wage loss compared to the wage the claimant was receiving at the time of injury. Payments per week shall be sixty-six and two-thirds per cent of the

> difference, if any, between the claimant's weekly wage at the time of injury and the weekly wage received while employed, up to a maximum payment per week equal to the statewide average weekly wage. The payments may continue for up to a maximum of two hundred weeks but shall be reduced by the corresponding number of weeks in which the claimant receives payments pursuant to division (B) of section 4123.56 of the Revised Code.

{¶26} Pursuant to the statute, the Ohio Bureau of Workers' Compensation ("bureau") promulgated Ohio Adm.Code 4123-18-21 which currently states in part:

> (A) In claims with a date of injury on or after August 22, 1986, the bureau shall make living maintenance wage loss payments to injured workers who complete an authorized vocational rehabilitation plan, successfully return to work, and experience a wage loss while employed.
>
> * * *
>
> (D) Payments may continue for up to a maximum of two hundred weeks but shall be reduced by the corresponding number of weeks in which an injured worker receives payments pursuant to division (B) of section 4123.56 of the Revised Code.

{¶27} No one disputes that, had relator's injury occurred on or after June 30, 2006, R.C. 4123.56(B) would indeed bar wage loss compensation following the payment of 200 weeks of R.C. 4121.67(B) LMWL compensation. But, as earlier noted, relator's injury occurred prior to the June 30, 2006 amendment. Thus, at the time of relator's injury, there was no language in R.C. 4123.56(B) that would limit the payment of wage loss compensation based upon prior payments of R.C. 4121.67(B) LMWL compensation.

{¶28} Nevertheless, relator contends that the language of R.C. 4121.67(B), in effect on the date of claimant's injury, limits payments received under R.C. 4121.67(B) and 4123.56(B) to an aggregate maximum of 200 weeks.

{¶29} Under the commission's view of the two statutes, for injuries that predate June 30, 2006, the claimant who first exhausts his or her 200 week statutory maximum under R.C. 4121.67(B) remains eligible for R.C. 4123.56(B) wage loss compensation up to another 200 week statutory maximum. However, the claimant who first exhausts his or her 200 week statutory maximum under R.C. 4123.56(B) is not eligible for LMWL payments under R.C. 4121.67(B).

{¶30} According to relator, "[a]llowing the order in which benefits are applied for to determine whether a claimant is entitled to 200 weeks or 400 weeks of wage loss would most certainly yield an absurd result." (Relator's brief, at 5.) The magistrate disagrees that the commission's position produces an absurd result requiring this court to adopt relator's position.

{¶31} Analysis begins with a review of the rules or principles that courts must use for statutory construction.

{¶32} In *State ex rel. Cordray v. Midway Motor Sales, Inc.*, 122 Ohio St.3d 234, 2009-Ohio-2610, ¶15, a case cited by relator, the court states:

> The primary goal in construing a statute is to ascertain and give effect to the intent of the legislature. *State v. Hairston*, 101 Ohio St.3d 308, 2004-Ohio-969, 804 N.E.2d 471, ¶ 11. In interpreting a statute, this court has held that "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." *Slingluff v. Weaver* (1902), 66 Ohio St. 621, 64 N.E. 574, paragraph two of the syllabus.

{¶33} In *Columbia Gas Transmission Corp. v. Levin*, 117 Ohio St.3d 122, 2008-Ohio-511, ¶19, another case cited by relator, the court states:

> The 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. *Lancaster Colony Corp. v. Limbach* (1988), 37 Ohio St.3d 198, 199, 524 N.E.2d 1389. Courts may not delete words used or insert words not used. *Cline v. Ohio Bur. of Motor Vehicles* (1991), 61 Ohio St.3d 93, 97, 573 N.E.2d 77.

{¶34} In *Mishr v. Bd. of Zoning Appeals of Village of Poland*, 76 Ohio St.3d 238, 240, 1996-Ohio-400, another case cited by relator, the court states:

> It is a cardinal rule of statutory construction that a statute should not be interpreted to yield an absurd result. *State ex rel. Dispatch Printing Co. v. Wells* (1985), 18 Ohio St.3d 382, 384, 18 OBR 437, 439, 481 N.E.2d 632, 634; *Slater v. Cave* (1853), 3 Ohio St. 80, 83-84 ("[W]here the literal construction of a statute would lead to gross absurdity, or where, out of several acts touching the same subject matter, there arise collaterally any absurd consequences, manifestly contradictory to common reason, * * * provisions leading to collateral consequences of great absurdity or injustice, may be rejected * * *."). See, also, R.C. 1.47(C) ("In enacting a statute, it is presumed that * * * [a] just and reasonable result is intended.").

{¶35} In *State ex rel. Burrows v. Indus. Comm.,* 78 Ohio St.3d 78, 81, 1997-Ohio-310, a case not cited by the parties, the court states:

> The *in pari materia* rule of construction may be used in interpreting a statute, but first some doubt or ambiguity must exist. *State ex rel. Herman v. Klopfleisch* (1995), 72 Ohio St.3d 581, 585, 651 N.E.2d 995, 998. * * *

{¶36} In *Burrows*, the court notes that the in pari materia rule actually created the ambiguity that the respondents urged the court to resolve. Id.

{¶37} The magistrate here notes that commentator Philip J. Fulton comments on the issue at hand in his treatise, Ohio Workers' Compensation Law (2d ed.1998) at 248:

> The General Assembly enacted a similar provision in R.C. § 4121.67(B) to take account of employees who suffer a wage loss upon their return to work following completion of a rehabilitation program. Payments during a rehabilitation program under this provision are made in the same manner as living maintenance payments are made under R.C. § 4121.63. The statute limits the payments to a maximum of two hundred weeks, reduced by the corresponding number of weeks for which an award was made pursuant to R.C. § 4123.56(B). Revised Code § 4123.56(B) does not provide for a similar offset, so a claimant could receive two hundred weeks of living maintenance wage loss followed by two hundred weeks of wage loss.

(Footnotes omitted.)

{¶38} Analysis continues with the observation that it is claimant's motion for R.C. 4123.56(B) compensation that is directly at issue in this action. Yet, R.C. 4123.56(B), prior to the June 30, 2006 amendment, by itself, makes no reference to R.C. 4123.67 nor does it impose a limitation on receipt of 200 weeks of wage loss compensation based upon prior receipt of LMWL compensation.

{¶39} R.C. 4123.56(B), by itself, and prior to its amendment, presented no ambiguity as to entitlement to a maximum of 200 weeks of wage loss compensation. Thus, there is no occasion to resort to other means of interpretation, i.e., by referring to R.C. 4121.67(B) which arguably contains provisions similar to R.C. 4123.56(B).

{¶40} Nevertheless, relator starts its analysis with R.C. 4121.67(B) not R.C. 4123.56(B). Relator starts its analysis with the statute under which claimant did not seek the compensation under challenge here.

{¶41} Relator's argument for an absurd result is premised upon its desire to relate the two statutes into a scheme that provides only a 200 week maximum in the aggregate.

That it is relator's view that there should be a 200 week aggregate maximum does not render the statutory scheme absurd, as it existed prior to June 30, 2006.

{¶42} In its brief and reply brief, relator does not refer to the in pari materia rule. However, at oral argument before the magistrate, relator argued that R.C. 4123.56(B) and 4121.67 must be read in pari materia and that, by so doing, the statutes must be read to set forth a 200 week aggregate maximum of payments as to both types of compensation under the two statutes.

{¶43} This court's observation in *Burrows* answers relator's argument under the in pari materia rule. Neither R.C. 4121.67 nor 4123.56(B) are ambiguous as to the statutory maximum payments under each statute. That the two statutes do not provide in tandem offsets for maximum payments does not render them ambiguous.

{¶44} Accordingly, for all the above reasons, it is the magistrate's decision that this court deny relator's request for a writ of mandamus.

/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).