

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

State of Ohio ex rel. John Evans,	:	
Relator,	:	
v.	:	No. 10AP-700
Garfield-Indecon Electrical Service and Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
Respondents.	:	
	:	

---

D E C I S I O N

Rendered on November 8, 2011

---

*O'Connor, Acciani & Levy, and Ronald T. Bella*, for relator.

*Michael DeWine*, Attorney General, and *Andrew J. Alatis*, for  
respondent Industrial Commission of Ohio.

---

IN MANDAMUS  
ON OBJECTION TO MAGISTRATE'S DECISION

BRYANT, P.J.

{¶1} Relator, John Evans, commenced this original action requesting a writ of mandamus that orders respondent Industrial Commission of Ohio to vacate its order denying his June 25, 2008 motion for R.C. 4123.56(B) wage loss compensation and to enter an order granting said compensation.

## I. Procedural History

{¶2} Pursuant to Civ.R. 53 and Section (M), Loc.R. 12 of the Tenth Appellate District, this matter was referred to a magistrate who issued the appended decision, including findings of fact and conclusions of law. According to the magistrate's findings of fact, relator on March 30, 2004 completed and signed a form C-140 requesting wage loss compensation, but he did not indicate whether he was seeking working or nonworking wage loss compensation, or a combination of both. On June 8, 2004, the bureau granted wage loss compensation beginning November 24, 2003, pursuant to which relator received 200 weeks of working wage loss compensation.

{¶3} Relator on June 5, 2008 moved for R.C. 4123.56(B) wage loss compensation to begin May 5, 2008. The bureau referred the matter to the commission for adjudication, noting its request was based on "the fact that working wage loss has been paid in full for 200 weeks" from December 1, 2003 to May 4, 2008. (Magistrate's Decision, ¶20.) Although the request also acknowledged relator participated in a rehabilitation plan that potentially made him eligible for living maintenance wage loss, the request further noted the application was not filed within the requisite 60 days of rehabilitation closure.

{¶4} Both the district hearing officer and the staff hearing officer denied the request for wage loss compensation, concluding relator had received the maximum in working wage loss compensation pursuant to R.C. 4123.56 and could not receive any additional weeks of working wage loss compensation. As the magistrate explained, a claimant, prior to the June 30, 2006 amendment of R.C. 4123.56(B), could receive 200 weeks of living maintenance wage loss compensation under R.C. 4121.67 followed by

200 weeks of R.C. 4123.56(B) wage loss compensation. As a result, had relator received the 200 weeks of compensation under R.C. 4121.67, he would remain eligible for 200 weeks of R.C. 4123.56(B) wage loss compensation as requested in his June 25, 2008 motion. The reverse, however, was not true.

{¶5} Faced with those circumstances, relator sought in his mandamus action to have the already received compensation reclassified as living maintenance wage loss. The magistrate concluded relator could not obtain a writ to change the compensation previously received to living maintenance wage loss under R.C. 4121.67, if for no other reason than his failure to exhaust administrative remedies by appealing from the award of wage loss compensation in 2004.

{¶6} Accordingly, the magistrate determined the requested writ should be denied.

## **II. Objection**

{¶7} In his single objection, relator does not contest the magistrate's factual findings but disputes the magistrate's conclusions that relator's failure to appeal from the June 8, 2004 order of the bureau granting him wage loss compensation precludes mandamus relief. Relator argues he had no reason to appeal the 2004 decision that granted him compensation because, he asserts, "the classification of the compensation is merely an administrative function. The Bureau has the authority to correct a clerical error whenever it is brought to the attention of the Bureau." (Objection, 1.)

{¶8} Relator's objection is unpersuasive. Were relator seeking living maintenance wage loss compensation in 2004, he should have administratively appealed from the determination that instead awarded him wage loss compensation, as the

difference between living maintenance wage loss compensation and wage loss compensation is not a clerical error; each represents a different form of compensation with different requirements. The magistrate properly concluded relator cannot now seek mandamus relief to change the 2004 award of wage loss compensation to living maintenance wage loss where he failed to administratively appeal from the 2004 award and, as a result, failed to exhaust his administrative remedies. Because an adequate remedy at law existed, albeit not pursued, mandamus relief is inappropriate. Relator's objection is overruled.

### III. Disposition

{¶9} Following independent review pursuant to Civ.R. 53, we find the magistrate has properly determined the pertinent facts and applied the salient law to them. Accordingly, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained in it. In accordance with the magistrate's decision, we deny the requested writ of mandamus.

*Objection overruled;  
writ denied.*

KLATT and SADLER, JJ., concur.

---

# APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. John Evans,	:	
	:	
Relator,	:	No. 10AP-700
	:	
v.	:	(REGULAR CALENDAR)
	:	
Garfield-Indecon Electrical Service	:	
and Industrial Commission of Ohio,	:	
	:	
Respondents.	:	
	:	

---

## MAGISTRATE'S DECISION

Rendered on August 4, 2011

---

*O'Connor, Acciani & Levy, and Ronald T. Bella*, for relator.

*Michael DeWine*, Attorney General, and *Andrew J. Alatis*, for respondent Industrial Commission of Ohio.

---

### IN MANDAMUS

{¶10} In this original action, relator, John Evans, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order denying his June 25, 2008 motion for R.C. 4123.56(B) wage loss compensation, and to enter an order granting said compensation.

Findings of Fact:

{¶11} 1. On December 24, 2002, relator sustained an industrial injury while employed as an electrician by Garfield-Indecon Electrical Service, a state-fund employer. The industrial claim (No. 02-477436) is allowed for "fracture calcaneus, right; localized 2nd osteoarthritis, right ankle."

{¶12} 2. In August 2003, relator entered into an individualized vocational rehabilitation plan with the Ohio Bureau of Workers' Compensation ("bureau").

{¶13} 3. On October 29, 2003, relator began employment with "Endeavor Electric" as a result of his participation in his bureau authorized vocational rehabilitation plan.

{¶14} 4. Effective November 28, 2003, the bureau issued a "Vocational Rehabilitation Closure Report" on bureau form RH-21. The bureau's vocational rehabilitation case manager signed the RH-21 on December 8, 2003.

{¶15} 5. The bureau provides a form captioned "Application for Wage Loss Compensation" (C-140). The form asks the applicant to indicate, by marking the appropriate box, whether he is seeking "working" or "non-working" wage loss compensation or a "combination of both benefits."

{¶16} 6. On March 30, 2004, relator completed form C-140 and signed the same. However, he did not mark a box to indicate whether he sought "working" or "non-working" wage loss compensation or a "combination of both benefits."

{¶17} 7. On June 8, 2004, the bureau mailed an order stating:

The injured worker is unable to return to his or her former position of employment. He or she became employed at Encompasis on 11/24/2003 working as Industrial Electrician.

\* \* \*

\* \* \*

Payment of wage loss compensation is granted beginning 11/24/2003. Benefits will continue based on sufficient wage information and medical proof of restrictions that are a direct result of the allowed conditions in the claim. \* \* \*

\* \* \*

This decision is based on:

Medical documentation and wage information on file[.]

Ohio law requires that BWC allow the injured worker or employer 14 days from the receipt of this order to file an appeal. \* \* \*

{¶18} 8. Relator did not administratively appeal the bureau's order of June 8, 2004.

{¶19} 9. On June 25, 2008, relator moved for R.C. 4123.56(B) wage loss compensation beginning May 5, 2008.

{¶20} 10. On July 1, 2008, the bureau referred the June 25, 2008 motion to the commission for adjudication. The bureau's July 1, 2008 referral order states:

The Ohio Bureau of Workers' Compensation (BWC) is referring this claim to the Industrial Commission of Ohio (IC) for consideration of the C86 filed by the injured worker on 06/25/2008.

This request is based on:

the fact that working wage loss (WWL) has been paid in full for 200 weeks from 12-1-03 through 5-4-08. WWL was granted by BWC order on 6-8-04 and no appeal was filed the IW's rep was copied on the order. Therefore the BWC Administrator requests that the C86 be denied.

Also note that the IW did participate in a Rehab Plan which ended on 11-28-03 and based on ORC 4123-18-21 & Chapter 4 Rehab Policy in order for BWC to address Living Maintenance Wage Loss the application must be filed within 60 days of the Rehab Closure. The application was not filed until 5-12-04. Therefore the C140 was processed as WWL and granted per BWC order 6-8-04 which was never appealed \* \* \*.

(Sic passim.)

{¶21} 11. Following an August 18, 2008 hearing, a district hearing officer ("DHO") issued an order denying relator's June 25, 2008 motion:

The District Hearing Officer hereby denies the injured worker's request for additional wage loss compensation in this claim. The District Hearing Officer finds the injured worker has already received the maximum of 200 weeks of working wage loss compensation in this claim. Therefore, the District Hearing Officer finds the injured worker is not entitled to additional weeks of working wage loss compensation in this claim.

The District Hearing Officer notes that the injured worker argued that he was entitled to additional weeks of wage loss compensation because he alleged he found his initial employment as a result of a vocational rehabilitation program. The injured worker alleged the initial weeks of wage loss compensation should have been classified as Living Maintenance Wage Loss Compensation, which he argued would allow him to be provided additional wage loss compensation at this time.

The District Hearing Officer finds the Bureau of Workers' Compensation issued an order, dated 06/08/2004, which granted the injured worker wage loss compensation beginning 11/24/2003. The order did not state the wage loss compensation granted was for Living Maintenance Wage Loss but rather the order simply stated it was granting wage loss compensation. The District Hearing Officer finds there are specific requirements which must be found by the Bureau of Workers' Compensation for wage loss compensation to be classified as Living Maintenance Wage Loss, which were not enumerate[d] by the Bureau of

Workers' Compensation in its [sic] 06/08/2004 order. The District Hearing Officer finds the intent of the Bureau of Workers' Compensation was to have this compensation be classified as simply working wage loss compensation and not Living Maintenance Wage Loss. The District Hearing Officer notes that the injured worker did not appeal the 06/08/2004 order nor did he file a motion in 2004 requesting the wage loss compensation being granted be found to be Living Maintenance Wage Loss.

Based on the foregoing, the District Hearing Officer refuses to reclassify the wage loss compensation received by the injured worker in 2003 and 2004 in this claim. Therefore, the District Hearing Officer finds the injured worker has received the maximum of 200 weeks of working wage loss compensation in this claim and he is not entitled to additional weeks of working wage loss compensation at this time.

The District Hearing Officer relies on wage loss information in the Industrial Commission claim file, and on the Bureau of Workers' Compensation order, dated 06/08/2004.

{¶22} 12. Relator administratively appealed the DHO's order of August 18, 2008.

{¶23} 13. Following a September 22, 2008 hearing, a staff hearing officer

("SHO") issued an order stating:

The order of the District Hearing Officer, from the hearing dated 08/18/2008, is modified to the following extent. The injured worker's motion, filed 06/25/2008, is denied.

The injured worker's motion requests the payment of an additional 200 weeks of wage loss compensation beginning 05/05/2008. At the hearing, counsel for the injured worker clarified the motion to request that the 200 weeks of wage loss that the injured worker has previously received be classified as Living Maintenance Wage Loss and that a new period of wage loss compensation be paid pursuant to Ohio Revised Code 4123.56.

The relevant facts are these: the injured worker was involved in a rehabilitation program in 2003. Independently of the rehabilitation program, but while enrolled in the rehabilitation program, the injured worker found employment. The injured

worker requested the payment of working wage loss compensation and 200 weeks of working wage loss compensation were paid. The injured worker did not specifically request the payment of living maintenance wage loss. The order of the Bureau of \* \* \* Workers' Compensation, dated 06/08/2004, which granted the wage loss compensation did not indicate that living maintenance wage loss was being paid. The injured worker did not appeal the order of the Bureau of Workers' Compensation dated 06/08/2004. The injured worker did not request that the wage loss compensation be paid as living maintenance wage loss compensation.

The Staff Hearing Officer denies the injured worker's motion and denies the injured worker's request to re-classify the 200 weeks of wage loss compensation previously paid as living maintenance wage loss. The Staff Hearing Officer finds that the injured worker received working wage loss pursuant to Ohio Revised Code 4123.56 for 200 weeks. The Staff Hearing Officer finds that the injured worker cannot now request that the compensation previously received be converted to living maintenance wage loss. Therefore, the injured worker's motion is denied.

This order is based upon Revised Code 4123.67(B), Revised Code 4123.56 and the order of the Bureau of Workers' Compensation dated 06/08/2004.

In all other respects, the order of the District Hearing Officer is affirmed.

{¶24} 14. On October 29, 2008, another SHO mailed an order refusing relator's administrative appeal from the SHO's order of September 22, 2008.

{¶25} 15. On July 23, 2010, relator, John Evans, filed this mandamus action.

#### Conclusions of Law:

{¶26} It is the magistrate's decision that this court deny relator's request for a writ of mandamus, as more fully explained below.

{¶27} On the date of relator's industrial injury, i.e., December 24, 2002, former R.C. 4123.56(B) provided for wage loss compensation:

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.

{¶28} On the date of relator's industrial injury, and currently, R.C. 4121.67(B) requires the administrator of workers' compensation to adopt rules:

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 hundreds 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.

{¶29} Supplementing R.C. 4121.67, Ohio Adm.Code 4123-18-21 currently provides:

(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 approved vocational rehabilitation plan, successfully return to work, and experience a wage loss while employed.

\* \* \*

(2) Injured workers requesting living maintenance wage loss payments shall be required to submit an application for living maintenance wage loss (on form RH-18 or equivalent) and medical documentation of the physical and/or psychiatric limitations as referenced in paragraph (A)(1) of this rule.

\* \* \*

(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.

{¶30} Prior to the June 30, 2006 amendment of R.C. 4123.56(B), a claimant could receive 200 weeks of R.C. 4121.67 living maintenance wage loss compensation followed by 200 weeks of R.C. 4123.56(B) wage loss compensation. *State ex rel. Jefferson Smurfit Corp., Reclamation v. Indus. Comm.*, 10th Dist. No. 09AP-851, 2010-Ohio-3521.

{¶31} Thus, had relator received the 200 weeks of compensation as R.C. 4121.67 living maintenance wage loss compensation he would remain eligible for the full 200 weeks of R.C. 4123.56(B) wage loss compensation that he requested in his June 25, 2008 motion.

{¶32} By his June 25, 2008 motion, relator requested that the commission declare that the 200 weeks of compensation he had received pursuant to the bureau's June 8, 2004 order be reclassified as R.C. 4121.67 living maintenance wage loss compensation so that he would be eligible for the full 200 weeks of R.C. 4123.56(B) wage loss compensation.

{¶33} In denying relator's motion, the SHO explains that relator did not request living maintenance wage loss compensation when the motion was filed in 2004. Relator,

in effect, argues that his failure to specifically request living maintenance wage loss compensation cannot be determinative because Ohio Adm.Code 4123-18-21(A) provides that "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."

{¶34} Relator asserts that he had met the requirements for obtaining living maintenance wage loss compensation under the rule and thus the compensation awarded by the bureau should be viewed as compensation awarded under R.C. 4121.67.

{¶35} Relator further asserts that, under the rule, he was not required to actually file an application for living maintenance wage loss compensation in order to obtain the compensation. In that regard, under Ohio Adm.Code 4123-18-21(A)(2) effective January 1, 2001, and as it read both on the date of injury and at the time of his application for wage loss in 2004, the rule provided:

Injured workers requesting living maintenance wage loss payments shall be required to submit medical documentation of the physical and/or psychiatric limitations as referenced in paragraph (A)(1) of this rule at each six month request for continuation of wage loss payments.

{¶36} Thus, to be accurate, while the rule in effect during the relevant time period did not specify that an application be filed on form RH-18 as the current rule does, it did provide for injured workers "requesting" the payments.

{¶37} Notwithstanding relator's assertions and arguments as above noted, his failure to administratively appeal the June 8, 2004 bureau's order precludes relief in mandamus on grounds that relator failed to exhaust an adequate administrative remedy.

