

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio ex rel. The Timken Company, :
Relator, :
v. : No. 11AP-1095
Industrial Commission of Ohio : (REGULAR CALENDAR)
and Angelia M. Tyson, :
Respondents. :

D E C I S I O N

Rendered on November 1, 2012

Morrow & Meyer LLC, Robert C. Meyer, and Mary E. Reynolds, for relator.

Michael DeWine, Attorney General, and *Rema A. Ina*, for respondent Industrial Commission of Ohio.

Jon Goodman Law, LLC, and Jon H. Goodman, for respondent Angelia M. Tyson.

IN MANDAMUS

BROWN, P.J.

{¶ 1} Relator, The Timken Company, 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 that granted temporary total disability ("TTD") compensation to respondent Angelia M. Tyson ("claimant") without ordering that the

unemployment compensation claimant received offset against any TTD compensation paid over the same period, and ordering the commission to make that finding.

{¶ 2} This matter was referred to a magistrate of this court, pursuant to Civ.R. 53(C) and Loc.R. 13(M) of the Tenth District Court of Appeals. The magistrate issued the attached decision, including findings of fact and conclusions of law, and recommended that this court deny relator's request for a writ of mandamus. No objections have been filed to that decision.

{¶ 3} As there have been no objections filed to the magistrate's decision, and it contains no error of law or other defect on its face, based on an independent review of the file, this court adopts the magistrate's decision. Relator's request for a writ of mandamus is denied.

Writ denied.

SADLER and TYACK, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. The Timken Company, :
Relator, :
v. : No. 11AP-1095
Industrial Commission of Ohio : (REGULAR CALENDAR)
and Angelia M. Tyson, :
Respondents. :
:

MAGISTRATE'S DECISION

Rendered on July 30, 2012

Robert C. Meyer, and Mary E. Reynolds, for relator.

*Michael DeWine, Attorney General, and Rema A. Ina, for
respondent Industrial Commission of Ohio.*

*Jon Goodman Law, LLC, and Jon H. Goodman, for
respondent Angelia M. Tyson.*

IN MANDAMUS

{¶ 4} Relator, The Timken Company, 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 granting temporary total disability ("TTD") compensation to respondent Angelia M. Tyson ("claimant") without ordering that the

unemployment compensation claimant received offset against any TTD compensation paid over the same period, and ordering the commission to make that finding.

Findings of Fact:

{¶ 5} 1. Claimant was employed by relator as a bricklayer.

{¶ 6} 2. During the course of her employment, claimant was laid-off on numerous occasions.

{¶ 7} 3. Claimant developed "bilateral wrist tenosynovitis; bilateral carpal tunnel syndrome" as a result of repetitive heavy work as a bricklayer which she performed for relator.

{¶ 8} 4. Claimant filed a first report of an injury form (FROI-1) on September 14, 2010.

{¶ 9} 5. Following a hearing before a district hearing officer ("DHO") on November 29, 2010, claimant's claim was allowed for bilateral tenosynovitis; bilateral carpal tunnel syndrome and the DHO determined that the correct date of diagnosis was August 20, 2010.

{¶ 10} 6. Relator appealed and the matter was heard before a staff hearing officer ("SHO") on January 20, 2011. The SHO affirmed the prior DHO order.

{¶ 11} 7. In an order mailed February 19, 2011, the commission refused relator's further appeal.

{¶ 12} 8. On March 8, 2011, claimant's treating physician John Pinghero, D.C., certified that claimant was temporarily and totally disabled from September 2, 2010 through an estimated return-to-work date of May 2, 2011.

{¶ 13} 9. Relator objected to the payment of TTD compensation to claimant on grounds that claimant had received unemployment compensation.

{¶ 14} 10. In response to an inquiry made by relator, Steve Malaszefski, an accountant with the Ohio Department of Job and Family Services ("ODJFS"), sent a letter to relator dated April 13, 2011. In that letter, Malaszefski informed relator that claimant had been paid federally funded unemployment compensation. Specifically, that letter provides:

This is in reply to your recent inquiry in which you requested a benefit payment record during the following period September 2, 2010 to present.

A review of the accounting records reveals Angelia Tyson was paid Federally Funded Unemployment Compensation benefits from September 2, 2010 to present. The Bureau of Workers' Compensation does not reimburse Unemployment Compensation for Federally Funded Unemployment Compensation benefits.

The amount Angelia Tyson was paid Federally Funded Unemployment Compensation benefits from September 2, 2010 to present was \$10,620.00.

{¶ 15} 11. Claimant signed a C-86 form on April 26, 2011 requesting TTD compensation. In her motion, claimant indicated as follows:

Claimant requests T.T. from 09/2/10 to present and to continue upon submission of proof. The self insured employer has indicated that they are in agreement with the period of disability but that there is a dispute regarding the deductions/setoffs for Federal Unemployment TRA benefits over some of the same period of disability.

{¶ 16} 12. Claimant's motion seeking the payment of TTD compensation was heard before a DHO on June 7, 2011. The DHO determined that claimant was entitled to TTD compensation from September 2, 2010 through April 30, 2011 and continuing based on the March 8, 2011 C-84 of Dr. Pinghero. The DHO addressed relator's argument concerning claimant's receipt of unemployment compensation during a portion of the period in which she was requesting TTD compensation and rejected it as follows:

The Hearing Officer finds that the Self-Insuring Employer had indicated that the Injured Worker was not eligible for the payment of temporary total compensation due to receiving federal unemployment TRA benefits over the same period.

The Hearing Officer finds that the Injured Worker has submitted documentation from the Ohio Department of Jobs & Family Services Office of Unemployment Compensation, which indicates that the Injured [W]orker is directed to reimburse the Ohio Department of Jobs & Family Services the sum of \$12,870.

The Hearing Officer finds that the Employer's concern that the Injured Worker would be double dipping is no longer an issue since the Injured Worker has been found to have been overpaid unemployment compensation. Therefore, no double dipping has occurred. This order is also based on the Injured Worker's testimony at hearing.

{¶ 17} 13. The determination referenced in the DHO order is the May 17, 2011 determination from ODJFS Office of Unemployment Compensation. The director determined that claimant had been overpaid unemployment compensation based on the determination that she had been physically unable to perform her customary job duties, but failed to present medical evidence to establish that she was able to engage in other types of employment. Specifically, the director stated:

An issue regarding the claimant's ability to work, affecting benefits beginning on 07/03/2010, was adjudicated as follows. The claimant was physically unable to perform his/her customary job duties. No medical evidence was presented to establish the claimant's ability to engage in other types of employment. Therefore, the claimant failed to meet the ability requirements of Section 4141.29(A)(4), Ohio Revised Code. An individual is ineligible from Sunday of the week in which the issue started through Saturday of the week in which the issue ended. Therefore, claimant is ineligible from 07/03/2010 until this agency is provided evidence that this issue no longer exists and claimant is otherwise eligible.

The claimant has been overpaid benefits to which he/she was not entitled for reasons determined to be Non-Fraud (DENIED) in the amount of \$12845.00.

(Emphasis sic.)

{¶ 18} 14. Claimant appealed this determination that she was not entitled to the unemployment compensation.

{¶ 19} 15. Relator appealed from the June 7, 2011 DHO order granting claimant's request for TTD compensation.

{¶ 20} 16. Before relator's appeal would be heard by an SHO, a final decision concerning claimant's entitlement to any unemployment compensation was determined. The May 17, 2011 director's determination was reversed and it was determined that

claimant had not been overpaid benefits. The following findings of fact were made:

Findings of Fact:

Claimant was employed from June 5, 1995, through September 1, 2010. She worked for five years in Office Sanitation and thereafter she took a position as a Stool Plate Handler until the end of her employment.

The claimant's position in Office Sanitation required her to empty trash cans, run a vacuum sweeper and other cleaning duties. Such position did not require her to lift more than 10 pounds, make repetitive wrist movements or climb steps. Upon assuming the position of Stool Plate Handler, the claimant was required to lift bricks. Such position required significant repetitive wrist movement.

On or about July 5, 2010, the claimant began having difficulty with her arms and hands. She began having difficulty squeezing and gripping items and after a period began suffering a numbing and tingling sensation in her arms and hands. The condition worsened over the month of July but the claimant continued to work full time until August 3, 2010.

On August 4, 2010, the claimant went to the infirmary and was subsequently diagnosed with Bilateral Wrist Tenosynovitis. This condition was subsequently determined by the Bureau of Worker's compensation to have been contracted in the course of her employment with her employer in conducting her duties as a Plate Stool Handler. The claimant's physician placed her on restriction beginning August 2010, and continuing to the present time. Such restriction prohibited the claimant from repetitive wrist movements of her arm and hand or from lifting items weighing more than between 10 to 15 pounds. Otherwise the claimant's physician cleared her to work within her restriction. The employer could not accommodate the claimant and did not have any light duty positions for her.

{¶ 21} 17. The appeal of the DHO's order was heard before an SHO on August 23, 2011. The SHO vacated the order from the June 7, 2011 DHO hearing and granted claimant's request for TTD compensation beginning September 2, 2010. With regards to any potential offset with the unemployment compensation the claimant received, the SHO determined that, because the unemployment compensation claimant received was paid by

the federal government and not the state government, the SHO determined that the commission did not have jurisdiction to order any reimbursement. Specifically, the SHO stated:

The undisputed evidence presented at hearing reflects that the Injured Worker received federal unemployment compensation over a portion of time for which this order awards temporary total compensation. These federal benefits were paid for the weeks ending 07/03/2010 through 05/14/2011. Previously, the Injured Worker was found to be overpaid for the federal unemployment compensation she received for this period. However, by decision dated 08/05/2011 from the State of Ohio Unemployment Compensation Review Commission, the overpayment was vacated and the Injured Worker was found to be entitled to federal unemployment compensation.

Ohio Revised Code 4123.56(A) indicates that state unemployment compensation received pursuant to Ohio Revised Code Chapter 4141 shall be offset against temporary total compensation paid over the same period. However, no provision for the offset of federal benefits is made in the statute. Therefore, while the Self-Insuring Employer has concerns regarding subrogation issues to the federal government, the Industrial Commission does not have jurisdiction to order reimbursement of federal unemployment compensation benefits to the federal government and has no statutory authority to order an offset of federal unemployment compensation against temporary total compensation.

(Emphasis sic.)

{¶ 22} 18. Relator's further appeal was refused by order of the commission mailed September 16, 2011.

{¶ 23} 19. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶ 24} Relator contends that the commission abused its discretion when it found that it did not have the authority to offset the federal unemployment benefits that claimant received from the TTD compensation which she also received. Relator contends that pursuant to R.C. 4123.56(A), the commission was required to offset the

unemployment benefits which claimant received against the TTD compensation to which she was also entitled and credit back relator's account from which those benefits were charged.

{¶ 25} Both claimant and the commission assert that the type of unemployment compensation received by claimant was federally funded and not state funded. As a result, although ODJFS acted as an agent for the federal government in administering the payment of this type of unemployment compensation, because the compensation was not truly awarded pursuant to R.C. Chapter 4141, both claimant and the commission argue that the commission did not abuse its discretion in finding that it did not have jurisdiction to order an offset.

{¶ 26} For the reasons that follow, it is this magistrate's decision that the commission did not abuse its discretion when it refused to offset the TTD compensation awarded to claimant by the amount of unemployment compensation claimant received and this court should deny relator's request for a writ of mandamus.

{¶ 27} In order for this court to issue a writ of mandamus as a remedy from a determination of the commission, relator must show a clear legal right to the relief sought and that the commission has a clear legal duty to provide such relief. *State ex rel. Pressley v. Indus. Comm.*, 11 Ohio St.2d 141 (1967). A clear legal right to a writ of mandamus exists where the relator shows that the commission abused its discretion by entering an order which is not supported by any evidence in the record. *State ex rel. Elliott v. Indus. Comm.*, 26 Ohio St.3d 76 (1986). On the other hand, where the record contains some evidence to support the commission's findings, there has been no abuse of discretion and mandamus is not appropriate. *State ex rel. Lewis v. Diamond Foundry Co.*, 29 Ohio St.3d 56 (1987). Furthermore, questions of credibility and the weight to be given evidence are clearly within the discretion of the commission as fact finder. *State ex rel. Teece v. Indus. Comm.*, 68 Ohio St.2d 165 (1981).

{¶ 28} R.C. 4123.56(A) provides, in pertinent part:

When the employee is awarded compensation for temporary total disability for a period of which the employee has received benefits under Chapter 4141 of the Revised Code, the bureau shall pay an amount equal to the amount received from the award to the director of job and family services and

the director shall credit the amount to the accounts of the employers to whose accounts the payment of benefits was charged or is chargeable to the extent it was charged or is chargeable.

{¶ 29} R.C. Chapter 4141 pertains to the payment of unemployment compensation. Claimant acknowledges that she received a type of unemployment compensation under a program, specifically, the Trade and Globalization Adjustment Assistance Act of 2009. According to an exhibit in the stipulation of evidence:

The Trade and Globalization Adjustment Assistance Act of 2009 is a federal program, administered by the Ohio Department of Job and Family Services serving as an agent of the U.S. Department of Labor (USDOL).

{¶ 30} As part of this program, people like claimant file petitions with the United States Department of Labor ("USDOL"). Those petitions are investigated by an investigator at the USDOL to determine whether a lay-off or threatened lay-off was caused by increased imports, shifts in production, or contracting for services outside the United States. Once a petition is certified, the following assistance and services are available:

- Trade Readjustment Allowances - TRA - weekly cash benefits
- Trade Adjustment Assistance - TAA - Training
- Job Search Allowances
- Relocation Allowances
- Reemployment Trade Adjustment Assistance - RTAA- Wage Supplement with Reemployment for older workers
- Health Care Tax Credit (HCTC)

{¶ 31} In the majority of cases, the petitioner must have exhausted all their rights to state or any other federal unemployment compensation benefits. Other eligibility considerations include the physical and mental ability to perform work in the petitioner's trade or occupation or, if a petitioner is not physically and medically able to work in their respective trade or occupation, the petitioner may receive benefits only if they furnish medical evidence indicating that they can do other types of work. Petitioners must be ready and willing to work and most are required to actively seek suitable work on their

own. Petitioners are also required to register for unemployment benefits with ODJFS. Further, petitioners must file weekly documentation and must re-file annually. In that regard, petitioners are required to file new applications annually for Ohio unemployment benefits in order to determine whether they qualify for those benefits under the state unemployment compensation program before benefits under the Trade Readjustment Act can be paid.

{¶ 32} All the evidence in the record indicates that the type of unemployment compensation which claimant received was, in fact, federally funded. Relator does not dispute this fact; however, relator contends that whether those benefits are federally funded or state funded, R.C. 4123.56(A) requires that the money claimant received must be credited to relator's account. For the reasons that follow, the magistrate disagrees.

{¶ 33} R.C. 4141.09 pertains to the unemployment compensation fund, accounts, claims, and ODJFS' banking fee fund. Pursuant to R.C. 4141.09(A), the unemployment compensation fund consists of all contributions, payments in lieu of contributions, reimbursements of the federal share of extended benefits, together with all interest earned upon those monies, and the fund is administered by the state. In the present case, the stipulation of evidence establishes that the unemployment compensation benefits which claimant received were federal funds and were not paid from Ohio's unemployment compensation fund. R.C. 4123.56(A) applies to benefits received under R.C. Chapter 4141.

{¶ 34} In the present case, the commission determined that claimant had not received benefits under R.C. Chapter 4141; instead, the benefits were paid from a federal source. While those funds were administered by ODJFS under the specific provisions of R.C. Chapter 4141, the magistrate finds that the commission did not abuse its discretion in finding that federal funds were not to be treated the same as state funds. It is a well-settled principle of law that the legislature's expressed inclusion of one thing implies the exclusion of the other. *Myers v. Toledo*, 110 Ohio St.3d 218, 2006-Ohio-4353. Although relator contends that there is no reason to differentiate between state funded unemployment compensation and federal funded compensation, the legislature specifically included state unemployment compensation which implies the exclusion of federally funded unemployment compensation. Further, the offset provision of R.C.

4123.56(A) indicates that, when an employee is awarded TTD compensation for a period of time during which the employee has been paid unemployment compensation under R.C. Chapter 4141, the BWC is required to pay the amount of that award to ODJFS, and ODJFS is required to credit the account of the employer to whose account the payment of benefits under R.C. Chapter 4141 was charged. Because the unemployment compensation claimant received came from a federal source and not a state source, relator's account was never charged under R.C. Chapter 4141 and relator is not entitled to an offset.

{¶ 35} Further, pursuant to 19 U.S.C. 2311, the United States Secretary of Labor is authorized to enter into an agreement with any state or state agency to review applications and provide payments authorized by the Trade Act of 1974. In the present case, the stipulation of evidence establishes that ODJFS was administering the federally funded unemployment compensation program and that the benefits paid to claimant were federal funds and not state funds. Inasmuch as R.C. 4123.56(A) pertains to the receipt of benefits under R.C. Chapter 4141, the magistrate finds that the commission did not abuse its discretion by finding that this section applied to state funded unemployment compensation and not to federally funded unemployment compensation, the payment of which is administered by, but not paid for by the state of Ohio.

{¶ 36} Based on the foregoing, it is this magistrate's decision that relator has not demonstrated that the commission abused its discretion and this court should deny relator's request for a writ of mandamus.

/s/ Stephanie Bisca Brooks
STEPHANIE BISCA BROOKS
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).