

**THE STATE EX REL. SHOTTS, APPELLANT, v. AUSTIN POWDER COMPANY ET AL.,
APPELLEES.**

[Cite as *State ex rel. Shotts v. Austin Powder Co.*, 1999-Ohio-474.]

Workers' compensation—Industrial Commission's order denying impaired earning capacity compensation justified, when.

(No. 96-2342—Submitted January 13, 1999—Decided February 10, 1999.)

APPEAL from the Court of Appeals for Franklin County, No. 95APD12-1643.

{¶ 1} On March 12, 1981, appellant-claimant, David L. Shotts, sustained a lumbar strain/sprain in the course of and arising from his employment with appellee Austin Powder Company. He was thirty-nine years old and never worked again after June 25, 1981.

{¶ 2} In 1993, he applied for permanent partial disability compensation. Appellee Industrial Commission of Ohio assessed claimant's permanent partial disability at twenty-seven percent. Claimant asked to receive his award in the form of impaired earning capacity ("IEC") compensation under former R.C. 4123.57(A). A district hearing officer denied that motion "due to failure to provide [proof of] pre and post-injury earning capacity; and clear proof of present level of earning capacity in light of all factors of record. In summary, the requirements of the '*Eaton II* [*State ex rel. Eaton Corp. v. Indus. Comm.* (1993), 66 Ohio St.3d 180, 610 N.E.2d 992]' case have not been met, at this time, which is the claimant's burden."

{¶ 3} A staff hearing officer denied claimant's appeal, writing:

"In addition to the findings noted by the District Hearing Officer, the Staff Hearing Officer specifically finds the claimant is 53 years old and has an 8th grade education. His work history involved masonry work, which is considered medium to heavy labor. However, as noted in the prior IC order, which denied permanent

total disability benefits, claimant's young age (now 53) is considered a significant vocational asset in that over the next 15 years before claimant reaches retirement age[,] he can be vocationally retrained for employment [compatible] with the functional limitations outlined by Dr. [Timothy J.] Fallon in his report dated 4/10/91 and Dr. [Paul F.] Gatens [Jr.] in his IC Specialist report, dated 3/1/88.

"Accordingly, the vocational opinion dated 7/15/95, by Molly Williams, was not relied upon relative to the issue of establishing a post injury earning capacity relative to the issue of impairment of earning capacity. Moreover, claimant testified that he has not sought medical treatment since 1/15/94. He has not worked since 6/25/81. He receives Social Security benefits. At hearing he testified that he is being treated for a non[-]industrial emotional condition. Claimant has not sought vocational rehabilitation. Finally, claimant has not looked for work with[in] the restrictions noted herein, since 1981. Hence, lack of motivation and/or disability due to non[-]allowed conditions is not a basis to find that claimant 'retains no post injury earning capacity.' Hence, the Staff Hearing Officer finds that claimant has not shown that his lack of earnings is causally related to his 3/12/81 injury."

{¶ 4} Further administrative review was denied.

{¶ 5} Claimant filed a complaint in mandamus in the Court of Appeals for Franklin County. The court denied the writ, after finding that the claimant had not satisfied his burden of proof in establishing IEC.

{¶ 6} The cause is now before this court upon an appeal as of right.

Michael J. Muldoon, for appellant.

Duvin, Cahn & Hutton and *Christine C. Covey*, for appellee Austin Powder Company.

Betty D. Montgomery, Attorney General, and *Craig E. Gould*, Assistant Attorney General, for appellee Industrial Commission.

Per Curiam.

{¶ 7} Claimant asserts that he can do no work and offers the difference between pre-injury and post-injury earnings as proof of IEC. The commission was unpersuaded by claimant's position, as are we.

{¶ 8} The commission's order contains several reasons for denying IEC compensation, any of which alone could sustain its decision. Evidence of decreased wages, for example, does not establish an impaired earning capacity, which "connotes not what claimant *did* earn, but what he or she *could have* earned." (Emphasis *sic.*) *State ex rel. Eaton Corp. v. Indus. Comm.* (1993), 66 Ohio St.3d 180, 183-184, 610 N.E.2d 992, 995; *State ex rel. Johnson v. Indus. Comm.* (1988), 40 Ohio St.3d 384, 387, 533 N.E.2d 775, 778.

{¶ 9} The commission also supported with "some evidence" its determination that there was no causal relationship between claimant's allowed condition and his alleged IEC. It observed that claimant's allowed condition consisted solely of what was then a fourteen-year-old strain/sprain for which he no longer received treatment. It accordingly rejected claimant's assertion of an injury-related inability to work, relying on the reports of Drs. Fallon and Gatens, which established a physical capacity for both rehabilitation and reemployment.

{¶ 10} Finally, in speculating as to the true reason for claimant's unemployment, the commission issued two findings that, in and of themselves, additionally support a denial of IEC compensation. First, the commission noted that the sole condition for which claimant was being treated was a nonallowed psychiatric ailment. Compensation, however, cannot be based in whole or part on nonallowed conditions. *State ex rel. Waddle v. Indus. Comm.* (1993), 67 Ohio St.3d 452, 619 N.E.2d 1018. The commission also found that claimant was receiving Social Security benefits and simply had no interest in working — an assertion that claimant does not vigorously dispute. Because a claimant cannot successfully

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assert an IEC absent a desire to work, the commission's finding presents an additional justification for denying IEC compensation. See *State ex rel. Pauley v. Indus. Comm.* (1990), 53 Ohio St.3d 263, 559 N.E.2d 1333.

{¶ 11} For these reasons, the judgment of the court of appeals is affirmed.

Judgment affirmed.

MOYER, C.J., DOUGLAS, RESNICK, F.E. SWEENEY, PFEIFER, COOK and
LUNDBERG STRATTON, JJ., concur.
