

**THE STATE EX REL. HILLSIDE DAIRY COMPANY v. CONRAD, ADMINISTRATOR,
ET AL.**

[Cite as *State ex rel. Hillside Dairy Co. v. Conrad*, 1999-Ohio-508.]

*Workers' compensation—Temporary total disability—Reimbursement for medical
expenses from Surplus Fund—Former R.C. 4123.515 controls.*

(No. 97-1791—Submitted September 15, 1998—Decided January 13, 1999.)

IN MANDAMUS and PROCEDENDO.

{¶ 1} This case comes before us after protracted litigation both administratively and judicially. Litigation has, at various points, encompassed the nature of the allowed conditions, extent of disability, and reimbursement eligibility. The case's entire procedural history is too cumbersome to recite here and serves only to confuse rather than elucidate.

{¶ 2} Relevantly, claimant-respondent Freddie R. McKenney was injured in the course of his employment with relator, Hillside Dairy Company. Relator, a self-insured employer, certified claimant's claim for his injuries as being valid to respondent Bureau of Workers' Compensation. Subsequently, relator paid claimant temporary total disability benefits ("TTD").

{¶ 3} Relator discontinued further payments effective September 9, 1990, upon noting that the medical report forms signed by Dr. William Kay did not support the continuing payment of TTD. A district hearing officer for respondent Industrial Commission of Ohio granted claimant's motion for allowance and payment of benefits, and payment of TTD resumed. This order was appealed both administratively and to the court of common pleas. The trial court ultimately entered a judgment partially affirming and partially reversing the commission's original allowance orders. The court of appeals affirmed.

{¶ 4} Thereafter, in 1992, relator moved the commission to terminate claimant's eligibility to receive further payment of benefits on the ground that his condition had become permanent. Relator's motion was denied. In 1993, relator applied to the bureau for Surplus Fund reimbursement for the period March 9, 1992 to September 1, 1993. Relator's request was denied. Relator unsuccessfully appealed the above decisions administratively.

{¶ 5} The final proceedings before the commission involved three issues: (1) payment of medical expenses for a condition that, after payment, was disallowed; (2) payment of TTD from September 12, 1989 through March 8, 1992; and (3) relator's request under former R.C. 4123.515 for Surplus Fund reimbursement for these monies. In two lengthy orders, the commission upheld the award of TTD. It also found that relator had indeed paid medical benefits to which it was entitled to recover, but held that R.C. 4123.511(J), not former R.C. 4123.515, governed recoupment.

{¶ 6} This cause is now before this court as an original action in mandamus and procedendo.

Willacy, LoPresti & Marcovy, Aubrey B. Willacy and M. Scott Young, for relator.

Betty D. Montgomery, Attorney General, and *Gerald H. Waterman*, Assistant Attorney General, for respondents Administrator, Bureau of Workers' Compensation, and Industrial Commission.

Sonkin, Fromson, Kess & Koberna Co., L.P.A., and *Jeffrey M. Sonkin*, for respondent McKenney.

Per Curiam.

{¶ 7} Contrary to relator's representation, there is "some evidence" that claimant's temporary total disability from September 12, 1989 through March 8,

1992 was caused by the claim's allowed conditions alone. Dr. William Kay's March 24, 1997 report specifically attributed claimant's temporary total disability solely to claimant's allowed conditions. Recoupment of this payment is, therefore, a moot question.

{¶ 8} No one contests relator's right to recover for medical expenses paid for "traumatic iritis left eye" and "strain and/or myofascitis of the lumbar area" — conditions that were ultimately disallowed by the Court of Common Pleas of Cuyahoga County. At issue is the statute governing relator's recovery — former R.C. 4123.515 or 4123.511(J). Pursuant to our recent decision in *State ex rel. Roadway Express v. Indus. Comm.* (1998), 82 Ohio St.3d 510, 696 N.E.2d 1064, we find that relator's recovery rights are controlled by former R.C. 4123.515.

{¶ 9} A writ of mandamus directing the commission to vacate its award of TTD compensation is denied. A writ of procedendo directing respondent Bureau of Workers' Compensation to determine the amount of Surplus Fund reimbursement for medical expenses to which relator is entitled is granted.

Judgment accordingly.

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