[Cite as *State ex rel. Howard v. Indus. Comm.*, 2008-Ohio-5616.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Kimberly Howard,	:	
Relator,	:	
v.	:	No. 08AP-129
The Industrial Commission of Ohio and Tandem Health Care of Massillon,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on October 30, 2008

Brian Law Offices, and *Richard F. Brian*, for relator.

Nancy H. Rogers, Attorney General, and *Gerald H. Waterman*, for respondent Industrial Commission of Ohio.

Habash, Reasoner & Frazier LLP, and *Dennis H. Behm*, for respondent Tandem Health Care of Massillon.

IN MANDAMUS
ON OBJECTION TO THE MAGISTRATE'S DECISION

BROWN, J.

{¶1} Relator, Kimberly Howard, 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 setting relator's average weekly wage ("AWW") at $103.17 per week and to enter an order setting her AWW in accordance with the "special circumstances" provision of R.C. 4123.61.

{¶2} This matter was referred to a court-appointed magistrate pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate issued a decision, including findings of fact and conclusions of law, and recommended that this court deny relator's request for a writ of mandamus. (Attached as Appendix A.) Relator has filed an objection to the magistrate's decision.

{¶3} Relator's objection is that the magistrate erred in finding that relator could receive no relief in mandamus because she had a plain and adequate remedy at law by way of an administrative appeal from the December 11, 2006 order, but she failed to exercise the remedy. We first note that, after the magistrate filed his decision, the record was supplemented via a joint motion to supplement the record to include an additional page that was missing from the commission's order that was originally a part of the record before this court. On this additional page, the final paragraph indicates in all capital letters that "THIS DECISION BECOMES FINAL IF A WRITTEN APPEAL IS NOT RECEIVED WITHIN 14 DAYS OF RECEIVING THIS NOTICE."

{¶4} Relator asserts that, despite the above language in the commission's order, the order also contained the following language: "BWC may reconsider the full or average weekly wage based upon information currently on file or submission of additional information." Relator contends that this language demonstrates that the Bureau of Workers Compensation ("BWC") reserved the right to reconsider her AWW at any time. Relator points out the BWC exhibited its willingness to reconsider her AWW when it

considered her motion for AWW adjustment, no parties objected to relator's request, and the issue was not raised until the magistrate raised it sua sponte. The commission agrees it had discretion to address the matter.

{¶5} We agree with relator and the commission that the commission was within its discretion to address relator's motion for AWW adjustment. Although we can find no cases that have construed such language in an order, or even any cases that mention such language, we believe the verbiage should mean something and have some purpose. It is well-established the commission has authority to reconsider a previous decision pursuant to the general grant of continuing jurisdiction under R.C. 4123.52. See *State ex rel. Gobich v. Indus. Comm.*, 103 Ohio St.3d 585, 2004-Ohio-5990, at ¶14. Among other reasons, continuing jurisdiction can be invoked when there is a clear mistake of fact or clear mistake of law. *State ex rel. Nicholls v. Indus. Comm.* (1998), 81 Ohio St.3d 454, 459. Here, relator alleged the commission wrongly included periods of unemployment in the year preceding her injury. Thus, we find the commission was within its discretion to address relator's motion. For these reasons, we do not adopt the magistrate's conclusions of law, insofar as he concludes that mandamus was not available because relator failed to exhaust her administrative remedies.

{¶6} However, we find that mandamus should still be denied, as the present circumstances do not constitute "special circumstances" pursuant to R.C. 4123.61. Ordinarily, AWW is determined by dividing a claimant's earnings for the year preceding the injury by 52 weeks. This is considered the "standard" formula as contained in R.C. 4123.61. The AWW is designed to find a fair basis for awards of future compensation and should approximate the average amount that claimant would have received had claimant

continued working after the injury as the claimant had before the injury. *State ex rel. Riley v. Indus. Comm.* (1983), 9 Ohio App.3d 71. However, under "special circumstances," another method may be used to arrive at the AWW instead of the standard formula. R.C. 4123.61 provides, in pertinent part:

> In cases where there are special circumstances under which the average weekly wage cannot justly be determined by applying this section, the administrator of workers' compensation, in determining the average weekly wage in such cases, shall use such method as will enable the administrator to do substantial justice to the claimants, provided that the administrator shall not recalculate the claimant's average weekly wage for awards for permanent total disability solely for the reason that the claimant continued working and the claimant's wages increased following the injury.

{¶7} As "special circumstances" and "substantial justice" are not defined, we must turn to case law to compare relator's circumstances to those of others who have been granted or denied an adjustment to the standard AWW calculation based upon special circumstances or a lack thereof. The "special circumstances" exception found in R.C. 4123.61 has been used when the wages earned prior to the injury do not reflect the claimant's earnings at the time of the injury and has generally been confined to uncommon situations involving the claimant's age, education, and background. See *State ex rel. Wireman v. Indus. Comm.* (1990), 49 Ohio St.3d 286, 288. Both relator and the commission, here, rely largely on the same three cases to support their opposing positions, although each interprets them differently. In *State ex rel. Ohio State Univ. Hosp. v. Indus. Comm.*, 118 Ohio St.3d 170, 2008-Ohio-1969, the injured worker had graduated in June 2003 from a radiology technology program and began working full time at the Ohio State University Hospital ("OSU"), but was injured soon after commencing

work in September 2003. The year prior to her injury, she had had taken a part-time job at a low wage while she recovered from an injury, and then she abandoned the work force to re-enroll in school. The commission granted her an adjusted AWW based upon special circumstances. Citing two cases, *Riley*, supra, and *State ex rel. Clark v. Indus. Comm.* (1994), 69 Ohio St.3d 563, the Ohio Supreme Court found that special circumstances warranted a departure from the standard calculation because it was the injured worker's first time in the full-time work force, and the work force entrance followed a period of specialized education and training in a field with enhanced income and career potential. *Ohio State Univ. Hosp*., at ¶17. Under these circumstances, found the court in *Ohio State Univ. Hosp.*, the AWW using the standard calculation was not a just barometer of the weekly earnings that the injured worker lost because of her industrial injury. Id.

{¶8} In *Riley*, an employee began a full-time job after a period during which he chose not to work because he had other income. After returning to the labor market, he was injured after three weeks at the new job. The evidence indicated, however, that the injured worker would have continued to be employed in his job and would have continued to earn his same salary. This court found no indication that the worker did not intend to work regularly in the future. Thus, this court found special circumstances existed to depart from the standard calculation under R.C. 4123.61.

{¶9} In *Clark*, the Ohio Supreme Court found that, even though the claimant's reduced hours were voluntarily undertaken, "special circumstances" existed. The court explained that, even when a claimant has voluntarily limited her hours, the commission must inquire further to determine if "special circumstances" exist. In *Clark*, the claimant had left full-time work to care for her granddaughter who suffered severe psychiatric

problems. When her granddaughter's situation changed, the claimant re-entered the work force and worked at a restaurant a few hours per week to see how her granddaughter would adjust to her absence. She was injured during her first month of employment. After her injury, she obtained full-time employment, where she earned substantially more per week than at the restaurant. The court found that "special circumstances" existed and that substantial justice would not be done, in that case, if the standard formula was applied.

{¶10} Relator contends that the special circumstance found in *Riley* was not that the claimant had other income that allowed him not to work in the year prior to the injury, as the commission contends but, rather, that the claimant first became employed only three weeks before the injury. Likewise, with regard to *Clark*, relator contends that the special circumstance was the proximity of the claimant's date of injury to her re-entry into the work force, rather than the fact that the claimant had been forced from the work force for the year prior to the injury in order to get custody of her abused granddaughter, as the commission asserts. Similarly, with regard to *Ohio State Univ. Hosp.*, relator contends that the special situation was an injury that quickly followed an entry into the work force, and not the fact that the claimant entered into full-time work after a period of specialized education and training in a field that enhanced her income potential, as the commission asserts. Thus, relator insists that the special circumstance in all of the above cases is the same as hers, i.e., an injury quickly following a re-entry into the work force after an extended absence, and the commission did not need to look any further than this fact.

{¶11} Initially, we agree with relator that both *Riley* and *Clark* suggest that the special circumstance in those cases was an injury quickly following a re-entry into the work force after an extended absence. Although both cases involved factual backgrounds

that provided unique circumstances, and although the Ohio Supreme Court and this court both endeavored to point out and discuss those backgrounds, the actual conclusions in those cases mention only the close proximity of the injury to the commencement of the job. For example, in *Clark*, the court stated, "[i]n *Riley*, *supra*, the proximity of the claimant's date of injury to his reentry into the work force constituted a 'special circumstance.' We find the same to exist in this case." *Clark*, at 565. In *Riley*, this court stated, "[t]he fact that relator first became employed only three weeks before the injury clearly constitutes a special circumstance since the average weekly wage is established to find a fair basis for award for the loss of future compensation." *Riley*, at 73.

{¶12} However, we are unable to decisively conclude herein that the close proximity of the injury to the start of employment was the sole reason for finding special circumstances in these cases. As mentioned above, in *Riley* and *Clark*, this court and the Ohio Supreme Court specifically endeavored to detail the reasons underlying the absence from the work force for the prior year. Particularly, with regard to our decision in *Riley*, we pointed out, "[t]he unusual circumstances shown by relator were that, because of other income, he had no need to work and did not work for forty-nine of the fifty-two previous weeks. There is no indication that relator did not intend to work regularly in the future; in fact, the evidence is all to the contrary." *Riley*, at 72. Thus, it is arguable that the underlying factual circumstances surrounding the term of unemployment also played into our final conclusion in *Riley* that special circumstances existed.

{¶13} In *Ohio State Univ. Hosp.,* it is even more apparent that the Ohio Supreme Court based its finding of special circumstances not only upon the unusually short period of employment prior to the injury, but, also, upon the reasons underlying the term of

unemployment in the year prior to the injury. In that case, the staff hearing officer ("SHO") concluded:

> "Claimant testified that she was recruited by OSU in June 2000 for a job upon graduation from Wheeling Hospital's radiological technician program for a full-time position paying $16.45 per hour. Claimant further testified that due to an injury she had to interrupt her schooling in 09/2001 and took whatever work was available in the vicinity-and could only work part-time until she resumed her education, graduated, and moved to OSU to the job for which she had been recruited.
>
> The Staff Hearing Officer finds such sequence of events to constitute special circumstances requiring an alternative means of setting the average weekly wage. * * *"

(Emphasis added.) *Ohio State Univ. Hosp.*, at ¶9-10. The Ohio Supreme Court reiterated the unusual underlying circumstances in affirming the decision of the DHO:

> We affirmed the *Riley* position in *Clark* and are guided by that reasoning in this case. This was not Burns's first foray into the workforce, but it certainly appears to be her first time in the full-time workforce. This workforce entrance, moreover, followed a period of specialized education and training in a field with enhanced income and career potential. Burns's efforts were rewarded when she was hired by OSU Hospital. Under these circumstances, the average weekly wage set by the bureau using the standard calculation is not a just barometer of the weekly earnings that Burns has lost because of her industrial injury.

(Emphasis added.) Id., at ¶17. Thus, it is apparent from the preceding that, in addition to the short period between re-entry into the work force and the injury, the Ohio Supreme Court found special circumstances existed that made the usual calculation method for AWW substantially unjust because the claimant had just re-entered the work force after a period of specialized education and training to enhance her income and career potential.

{¶14} Here, relator asserted that her unemployment from August 2005 to May 2006 should be excluded from the calculation of AWW because her absence from the work force during this period was due to her decision to stay at home to care for her children. We agree with the commission that this reason alone is not compelling enough to warrant "special circumstances." The Ohio Supreme Court has "decisively declared that workers' compensation benefits are not intended to subsidize lifestyle choices." *State ex rel. Baker Concrete Constr., Inc. v. Indus. Comm.*, 102 Ohio St.3d 149, 2004-Ohio-2114, at ¶18. For example, the Ohio Supreme Court has declined to award impaired earning capacity benefits to a claimant who left the labor market to stay home with her children. Id., citing *State ex rel. Pauley v. Indus. Comm.* (1990), 53 Ohio St.3d 263. In *Baker*, the court noted that the phrase "lifestyle choice" is also relevant in calculating AWW. Id. The court concluded in *Baker*, if unemployment springs from a lifestyle choice, then those weeks of unemployment are not beyond a claimant's control and omitting those weeks from the AWW contradicts both the statute and case law. Id. Therefore, *Baker* supports a finding that relator's unemployment due to her voluntary decision to stay home with her children was a lifestyle choice that should not provide her a windfall when calculating her AWW.

{¶15} We also note that this court touched upon a related issue in *State ex rel. Mancan, Inc. v. Indus. Comm.*, Franklin App. No. 05AP-883, 2006-Ohio-3710. In *Mancan, Inc.*, the claimant was injured two weeks after commencing employment, and his employment in the years preceding his injury had been "sporadic." After receiving total temporary disability payments, the claimant later filed a motion to have his AWW readjusted based upon special circumstances. In adjusting the claimant's AWW, the

commission found special circumstances existed because the injured worker did not have a prior history of working a full 40-hour week. The commission recalculated the claimant's AWW by taking the average of the claimant's past hourly rates and multiplying that by 30 hours per week.

{¶16} Upon the employer's filing for a writ of mandamus, with regard to the claimant's AWW, we found that the commission's finding of special circumstances was improper, as the commission's order did not show whether the commission inquired of claimant as to whether or not he had voluntarily limited his hours over the last couple of years or whether there were other circumstances which had precluded him from working full time. Id., at ¶27. Citing *Clark*, we found the commission must inquire about the reasons why the claimant's hours had been limited and cannot determine whether special circumstances exist without an inquiry. Id. Thus, it is apparent from *Mancan, Inc.*, that this court found it of great importance in examining "special circumstances" to consider the reasons for any lack of employment or limited employment during the period prior to the injury. Similarly, here, relator's reason for her lack of employment in the year prior to the injury would be relevant to the special circumstances inquiry.

{¶17} Notwithstanding, even if the special circumstance in *Ohio State Univ. Hosp.*, *Riley*, and *Clark* could be said to be solely an injury that quickly occurred after employment commenced, none of the circumstances in these cases mirror the present circumstances sufficiently for us to find the commission improperly declined to find special circumstances in the present case. The period between the start of employment and the injury in *Riley* was three weeks, in *Clark* four weeks, and in *Ohio State Univ. Hosp.* eight weeks. In the present case, relator worked approximately 12 weeks between the date she

was hired and the date she was injured. Although there is only a four-week difference between the eight-week period in *Ohio State Univ. Hosp.* and the 12-week span in the present case, our standard of review upon mandamus is whether relator has shown that she has a clear legal right to the relief sought and that the commission has a clear legal duty to provide such relief. *State ex rel. Rouch v. Eagle Tool & Machine Co.* (1986), 26 Ohio St.3d 197, 198, citing *State ex rel. Pressley v. Indus. Comm.* (1967), 11 Ohio St.2d 141, and *State ex rel. Elliott v. Indus. Comm.* (1986), 26 Ohio St.3d 76. The similarities between the present case and the three cited cases are not so similar that relator had a clear legal right to relief. Furthermore, we note again that, although the period between the commencement of work and the injury in the present case was relatively close to that in *Ohio State Univ. Hosp.*, at least as compared to the periods in *Riley* and *Clark*, the court in *Ohio State Univ. Hosp.* made clear that it was not relying solely upon this short period to find special circumstances. The court in *Ohio State Univ. Hosp.* also considered the fact that the reason the claimant had been absent from the work force for an extended time was that she had been undergoing specialized education and training to enhance her income and career potential. Relator's reasons for being absent from the work force in the present case are not as unusual or special as those in *Ohio State Univ. Hosp.* For these reasons, we cannot find that the commission had a clear legal duty to exclude certain periods of unemployment in the year prior to relator's injury in calculating AWW. Therefore, we must deny relator's request for a writ of mandamus.

{¶18} After an examination of the magistrate's decision, an independent review of the evidence, pursuant to Civ.R. 53, and due consideration of relator's objection, we sustain relator's objection insofar as the magistrate erred when he found mandamus was

unavailable because relator had an adequate remedy at law. However, we overrule relator's objection insofar as she was not entitled to a writ of mandamus because the commission properly declined to exclude certain periods of unemployment in the year prior to her injury when it calculated AWW. Accordingly, we deny relator's request for a writ of mandamus.

Objection sustained in part and overruled in part; writ of mandamus denied.

SADLER and TYACK, JJ., concur.

APPENDIX A

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Kimberly Howard,	:	
Relator,	:	
v.	:	No. 08AP-129
The Industrial Commission of Ohio and Tandem Health Care of Massillon,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on July 25, 2008

Brian Law Offices, and *Richard F. Brian*, for relator.

Nancy H. Rogers, Attorney General, and *Gerald H. Waterman*, for respondent Industrial Commission of Ohio.

Habash, Reasoner & Frazier LLP, and *Dennis H. Behm*, for respondent Tandem Health Care of Massillon.

IN MANDAMUS

{¶19} In this original action, relator, Kimberly Howard, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order setting her average weekly wage ("AWW") at $103.17, and to enter an order setting her AWW in accordance with the "special circumstances" provision of R.C. 4123.61.

Findings of Fact:

{¶20} 1. On August 29, 2006, relator sustained an industrial injury while employed with respondent Tandem Health Care of Massillon ("employer"), a state-fund employer. The injury occurred when relator was attempting to reposition a patient in a wheelchair using a lift. The industrial claim is assigned claim number 06-374806.

{¶21} 2. The employer completed a C-94-A wage statement. The employer reported relator's earnings during seven bi-weekly pay periods. The employer totaled the seven bi-weekly paychecks at $5,364.81. For the last bi-weekly pay period ending September 2, 2006, the employer indicated that relator earned $752.29. Parenthetically, the magistrate notes that the last pay period reported by the employer ends after the date of injury but, nevertheless, includes earnings prior to the date of injury.

{¶22} 3. The employer's C-94-A also indicates that relator was rehired May 31, 2006, after having previously terminated her employment on December 27, 2004. Relator's hourly rate of pay was $9.05 during the 14 weeks of employment reported.

{¶23} 4. On December 11, 2006, the Ohio Bureau of Workers' Compensation ("bureau") mailed an order setting AWW at $88.70. A bureau "wages history report" discloses how AWW was calculated to be $88.70. Apparently, the bureau did not include the pay period ending September 2, 2006 in the calculation. Rather, the bureau totaled earnings during six bi-weekly pay periods at $4,612.52 and divided by 52 weeks (4,612.52 ÷ 52 = 88.70).

{¶24} 5. Apparently, the bureau's order mailed December 11, 2006 was not administratively appealed even though the bureau's December 11, 2006 order warned:

> Ohio law requires that BWC allow the injured worker or employer 14 days from the receipt of this order to file an appeal. If the injured worker and employer agree with this decision, the 14-day appeal period may be waived. Both parties may submit a signed waiver of appeal to BWC. * * *

{¶25} 6. On March 2, 2007, relator moved for an AWW adjustment. In her motion, relator requested that her AWW be set at $384.38 based upon the "special circumstances" provision of R.C. 4123.61. Apparently, relator calculated her requested AWW of $384.38 by dividing $4,612.52 by 12 weeks worked (4,612.52 ÷ 12 = 384.38).

{¶26} 7. Following an April 23, 2007 hearing, a district hearing officer ("DHO") issued an order granting relator's March 2, 2007 motion and setting AWW at $384.38. The DHO's order explains:

> The District Hearing Officer arrives at the average weekly wage calculation by utilizing the Injured Worker's gross

> earnings with the instant Employer for the period from 05/28/-2006 through 08/19/2006 as reflected on the C-94-A Wage Statement filed on 12/01/2006, which are $4,612.52 and dividing by the 12 weeks that the Injured Worker worked during 2006 prior to the work injury. The District Hearing Officer employs the special circumstances provision contained in Ohio Revised Code 4123.61 in calculating the average weekly wage. The special circumstance in this case [is] that the average weekly wage of $384.38 closely approximates the Injured Worker's earnings had she not been injured on 08/29/2006. The District Hearing Officer finds that the average weekly wage of $384.38 does substantial justice to the Injured Worker without providing her with a windfall.
>
> Therefore, it is the order of the District Hearing Officer that the average weekly wage is set at $384.38.
>
> * * *
>
> This decision is based on the C-94-A Wage Statement from the instant Employer filed on 12/01/2006.

{¶27} 8. The employer administratively appealed the DHO's order of April 23, 2007.

{¶28} 9. Following a June 8, 2007 hearing, a staff hearing officer ("SHO") issued an order vacating the DHO's order and setting AWW at $103.17. The SHO's order explains:

> It is the order of the Staff Hearing Officer that the Claimant's Motion, filed 03/02/2007, is granted to the extent of this order.
>
> The Claimant earned $5,364.81 over fourteen weeks with the named employer prior to the industrial injury in this claim. Before her date of hire by the employer, the Claimant stayed at home and cared for her two children and her fiance's two children. The Claimant now requests that the thirty eight weeks of unemployment prior to her date of hire with this employer be excluded from the calculation of the Average Weekly Wage.
>
> The Claimant's unemployment was clearly not due to a layoff, strike, or other circumstance beyond her control pursuant to Ohio Revised Code 4123.61. The Hearing Officer further finds

> that the Claimant's voluntary decision to stay at home and care for her children and her fiance's children is not a "special circumstance" sufficient to justify an alternate calculation of the Average Weekly Wage pursuant to Ohio Revised Code 4123.61. Rather, the Hearing Officer finds that the Claimant's decision to stay at home and raise her children was a "lifestyle choice", voluntary in nature, which is not a special circumstance sufficient to deviate from the standard calculation of the Average Weekly Wage. State ex rel. Baker Concrete Construction, Inc. v. Indus. Comm. (2004), 102 Ohio St.3d 149.
>
> Therefore, it is the order of the Staff Hearing Officer that the Average Weekly Wage is set at $103.17 based on $5,364.81 divided by fifty two weeks.
>
> * * *
>
> This order is based on the C-94-A filed by the employer regarding the Claimant's earnings in the year prior to the date of injury.

{¶29} 10. Relator administratively appealed the SHO's order of June 8, 2007.

{¶30} 11. On June 29, 2007, another SHO mailed an order refusing relator's administrative appeal from the SHO's order of June 8, 2007.

{¶31} 12. On February 19, 2008, relator, Kimberly Howard, filed this mandamus action.

Conclusions of Law:

{¶32} In this mandamus action, relator challenges the SHO's order of June 8, 2007 setting her AWW at $103.17. However, her failure to administratively appeal the bureau's order mailed December 11, 2006 bars relief in mandamus.

{¶33} Mandamus will not issue when relator has a plain and adequate remedy at law. Relator had an adequate administrative remedy by way of an administrative appeal from the bureau's December 11, 2006 order but she failed to exercise the remedy. Her later motion for an AWW adjustment filed March 2, 2007, does not alter the fact that she

failed to exercise an adequate administrative remedy. Consequently, this action is barred by relator's failure to pursue an adequate administrative remedy. *State ex rel. Leyendecker v. Duro Test Corp.* (1999), 87 Ohio St.3d 237; *State ex rel. Buckley v. Indus. Comm.*, 100 Ohio St.3d 68, 2003-Ohio-5072.

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

s/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).