[Cite as *State ex rel. Strait v. Indus. Comm.*, 2013-Ohio-108.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Bruce R. Strait,	:	
Relator,	:	
v.	:	No. 12AP-166
The Industrial Commission of Ohio and Modern Poured Walls, Inc.,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on January 17, 2013

Donald M. Levy, for relator.

Michael DeWine, Attorney General, and *Cheryl J. Nester*, for respondent The Industrial Commission of Ohio.

IN MANDAMUS

TYACK, J.

{¶ 1} Bruce R. Strait filed this action in mandamus, seeking a writ to compel the Industrial Commission of Ohio to re-compute his full weekly wage and his average weekly wage.

{¶ 2} In accord with Loc.R. 13(M), the case was referred to a magistrate to conduct appropriate proceedings. The parties stipulated the pertinent evidence and filed briefs. The magistrate then issued a magistrate's decision, appended hereto, which contains detailed findings of fact and conclusions of law. The magistrate's decision includes a recommendation that we deny the request for a writ of mandamus.

{¶ 3} No party has filed objections to the magistrate's decision. The case is now before the court for review.

{¶ 4} No error of law or fact is present on the face of the magistrate's decision. We, therefore, adopt the findings of fact and conclusions of law contained in the magistrate's decision. As a result, we deny the request for a writ of mandamus.

Writ denied.

SADLER and DORRIAN, JJ., concur.

A P P E N D I X

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The Industrial Commission of Ohio and Modern Poured Walls, Inc.,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on August 20, 2012

Donald M. Levy, for relator.

Michael DeWine, Attorney General, and *Gerald H. Waterman*, for respondent The Industrial Commission of Ohio.

IN MANDAMUS

{¶ 5} Relator, Bruce R. Strait, has filed this original action requesting that this court issue a writ of mandamus ordering respondent The Industrial Commission of Ohio ("commission") to vacate its order determining his full weekly wage ("FWW") and average weekly wage ("AWW") after including approximately $12,000 which relator contends should be attributed to his total wages for 2006 and 2007.

Findings of Fact:

{¶ 6} 1. Relator sustained a work-related injury on November 30, 2007, and his workers' claim has been allowed for the following conditions:

> Right proximal fibular fracture; contusion to right lower leg; tear of the right medial meniscus.

{¶ 7} 2. In February 2010, relator filed a motion with the Ohio Bureau of Workers' Compensation ("BWC") asking that the BWC determine his wages based on the evidence which he submitted with the motion. Specifically, relator requested:

> Please set wages at $600.61 based on the enclosed W-2s which are for 100 weeks since Mr. Strait did not work all of December. In addition, there was a claim in Federal Court that he was entitled to an extra one hour of overtime per day, which is the $12,825.00, which he received in 2009. The total is $6,060.95 ÷ 100 which equals $600.61.

{¶ 8} 3. The evidence which relator submitted included copies of his Internal Revenue form W-2s for 2006 and 2007. Those W-2s provide that his earnings for 2006 were $26,927.66 and for 2007 were $25,064.91.

{¶ 9} 4. Relator also submitted an earnings statement from his employer noting the following taxable wages for 2009: $12,825.

{¶ 10} 5. In an order mailed May 4, 2010, the BWC determined relator's FWW and AWW as follows:

> The full weekly wage (FWW) for this claim is set at $522.20. The first 12 weeks of temporary total compensation is payable at the rate of $375.98. This rate is 72 percent of the full weekly wage, or is the maximum or minimum allowable amount based on the statewide average weekly wage in effect at the date of injury.
>
> The average weekly wage (AWW) for this claim is set at $521.86. After the first 12 weeks of temporary total compensation, additional temporary total compensation is

> payable at the rate of $347.91. This rate is 66 2/3 percent of the average weekly wage, or is the maximum or minimum allowable amount based on the statewide average weekly wage in effect at the date of injury.
>
> BWC may reconsider the full or average weekly wage based upon information currently on file or submission of additional information.
>
> This decision is based on:
>
> [T]he wage information filed by the injured worker on 2/17/10.

{¶ 11} 6. Relator appealed and, with that appeal, relator submitted two isolated pages from a settlement agreement in a federal court case which relator argues demonstrates that the $12,825 amount which he received in 2009 should have been paid to him in 2006 and/or 2007 and, as such, argues that this amount should be included in the commission's calculations. Those pages provide, in relevant part, as follows:

> [Two] Defendants refused to pay Plaintiff and class members for time worked at the beginning and end of the work day. As a result, Defendants failed to pay for all hours worked and for overtime hours worked in excess of a forty-hour work week.
>
> [Three] Plaintiff and the putative class members are or were covered, non-exempt employees under the Fair Labor Standards Act ("FLSA") and Ohio laws and are entitled to overtime pay consistent with the requirements of these laws. As current/former hourly construction employees, these employees are/were similarly-situated under the FLSA, 29 U.S.C. § 216(b), and meet Federal Rule of Civil Procedure 23 standards for class certification.
>
> [Four] The FLSA Collective Class consists of all persons who are or have been employed by Defendants as hourly construction employees in the State of Ohio at any time within three years prior to this action's filing date through the date of final disposition of this action (the "Collective Class Period").

{¶ 12} 7. After considering the additional evidence submitted by relator, on June 8, 2010, the district hearing officer ("DHO") affirmed the prior BWC order setting relator's FWW and AWW after finding that relator did not establish that the entire amount constitutes compensation for lost wages and that the amount did not include any penalty created by the federal court. Further, the DHO stated that relator failed to establish that the $12,825 amount was attributed to wages for the years 2006 and 2007.

{¶ 13} 8. Relator appealed and the matter was heard before a staff hearing officer ("SHO") on July 8, 2010. The SHO affirmed the prior DHO order and denied relator's request to reset his FWW and AWW. The SHO explained:

> The Injured Worker's counsel contends the amount of $12,825.00 should be included in the Injured Worker's wages for the purpose of calculating the full weekly wage and average weekly wage. The Injured Worker testified the figure of $12,825.00 represents a settlement for overtime pay that the Injured Worker received for work performed in the years prior to the industrial injury. The Injured Worker received the $12,825.00 as a result of a settlement in a wage/hour dispute with the employer.
>
> The Staff Hearing Officer finds the Injured Worker has failed to establish it is appropriate to include the settlement amount in the calculation for the full weekly wage and average weekly wage. The Injured Worker has submitted several documents from the settlement. The entire settlement is not on file. The Injured Worker asserts that 2/3 of the $12,825.00 pertains to the period at issue, that is the year prior to the 11/30/07 industrial injury. The Injured Worker concedes part of the settlement pertains to wages earned prior to 11/30/06. However, the calculation of the settlement is not clear given the lack of information filed concerning the settlement. Moreover, the nature of the settlement is not clear, specifically whether the settlement pertains solely to lost wages. Thus, the Staff Hearing Officer is unable to conclude that the settlement amount of $12,825.00, or any part thereof, represents wages in the year prior to the industrial injury. As such, it would be

> inappropriate to include the $12,825.00 figure in the calculation of the full weekly wage and average weekly wage.
>
> All evidence was read and evaluated, however this order is based on the wage information filed 2/17/10.

{¶ 14} 9. Relator's further appeal was refused by order of the commission mailed July 29, 2010.

{¶ 15} 10. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶ 16} In this mandamus action, relator contends that the commission abused its discretion by not including $12,825 when determining his wages for purposes of paying future compensation.

{¶ 17} For the reasons that follow, the magistrate disagrees.

{¶ 18} The Supreme Court of Ohio has set forth three requirements which must be met in establishing a right to a writ of mandamus: (1) that relator has a clear legal right to the relief prayed for; (2) that respondent is under a clear legal duty to perform the act requested; and (3) that relator has no plain and adequate remedy in the ordinary course of the law. *State ex rel. Berger v. McMonagle*, 6 Ohio St.3d 28 (1983).

{¶ 19} 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).

{¶ 20} Under workers' compensation law, benefits payable to claimants are calculated based upon the figure known as the AWW. R.C. 4123.61 provides:

> The average weekly wage of an injured employee at the time of the injury or at the time disability due to the occupational disease begins is the basis upon which to compute benefits.
>
> In cases of temporary total disability the compensation for the first twelve weeks for which compensation is payable shall be based on the full weekly wage of the claimant at the time of the injury or at the time of the disability due to occupational disease begins.
>
> * * *
>
> In ascertaining the average weekly wage for the year previous to the injury, or the date the disability due to the occupational disease begins any period of unemployment due to sickness, industrial depression, strike, lockout, or other cause beyond the employee's control shall be eliminated.
>
> 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.

{¶ 21} R.C. 4123.56(A) provides that, for the first 12 weeks of total disability, a qualifying injured worker's entitlement to temporary total disability ("TTD") compensation is 72 percent of the employee's FWW, subject to statutory maximum and minimum amounts. The determination of an injured worker's FWW looks to be injured worker's wages in the seven days or six weeks prior to the industrial injury. *See State ex rel. FedEx Ground Package Sys., Inc. v. Indus. Comm.*, 126 Ohio St.3d 37, 2010-Ohio-2451. AWW is generally calculated by dividing the injured worker's wages for the year preceding the date of injury by 52 weeks R.C. 4123.61.

{¶ 22} In the present case, certain evidence relator submitted is undisputed. Relator's Internal Revenue W-2 forms respectively show he had earnings of $26,927.66 in 2006 and $25,064.91 in 2007. When determining his AWW, the commission utilized this information.

{¶ 23} Relator contends that the 2009 earning statement which he submitted in conjunction with the two pages from a settlement agreement are conclusive evidence that the additional amount of $12,825 he received in 2009 was for overtime pay to which relator had been entitled for the years prior to the industrial injury.

{¶ 24} Relator bore the burden of establishing that this additional amount of $12,825 was part of his wages for the years preceding his work-related injury and that this dollar amount should have been utilized in the commission's calculations of his FWW and AWW. However, as the commission stated in its orders, the 2009 statement plus the two isolated pages from a settlement agreement were not sufficient to establish that amount was properly includable. And, as the SHO stated, relator conceded that part of the $12,825 pertained to wages earned prior to 2006. Relator was unable to demonstrate

what portion of the $12,825 might be properly included in calculating his FWW and AWW. The magistrate finds that relator simply has not demonstrated that he has a clear legal right to a writ of mandamus from this court ordering the commission to include that dollar amount in the calculation of his FWW and AWW.

{¶ 25} Based on the foregoing, it is this magistrate's decision that relator has not demonstrated that he is entitled to a writ of mandamus, and this court should deny his 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).