[Cite as *State ex rel. BF Goodrich Co. v. Indus. Comm.*, 2015-Ohio-2239.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. BF Goodrich Company, Specialty Chemicals Division,	:	
Relator,	:	
v.	:	No. 13AP-1056
Industrial Commission of Ohio and Marilynne J. Earles,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on June 9 2015

Calfee, Halter & Griswold LLP, William L. S. Ross and *Christopher M. Ward,* for relator.

Michael DeWine, Attorney General, and *Colleen C. Erdman*, for respondent Industrial Commission of Ohio.

Stephen E. Mindzak Law Offices, LLC, and *Stephen E. Mindzak,* for respondent Marilynne J. Earles.

IN MANDAMUS
ON OBJECTIONS TO MAGISTRATE'S DECISION

DORRIAN, J.

Relator, BF Goodrich Company, Specialty Chemicals Division ("relator"), filed this original action requesting a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order awarding respondent Marilynne J. Earles ("Earles") working wage loss compensation, and to enter an order denying Earles' application for wage loss compensation.

{¶ 1} Pursuant to Civ.R. 53(D) and Loc.R. 13(M) of the Tenth District Court of Appeals, this matter was referred to a magistrate, who issued a decision, including

findings of fact and conclusions of law, which is appended hereto. The magistrate recommends that this court deny the requested writ of mandamus.

{¶ 2} Relator sets forth two objections to the magistrate's decision:

> I. THE MAGISTRATE'S DECISION FAILS TO APPLY THE "MAILBOX RULE" AND DOES SO WITHOUT GIVING ANY REASON[.]
>
> II. THE MAGISTRATE'S DECISION IMPERMISSIBLY APPLIES A "BUT FOR" ANALYSIS TO CLAIMANT'S WAGE LOSS APPLICATION[.]

{¶ 3} Pursuant to Civ.R. 53(D)(4)(d), we undertake an independent review of the objected matters "to ascertain that the magistrate has properly determined the factual issues and appropriately applied the law." None of the parties have objected to the magistrate's findings of fact, and we adopt them as our own.

{¶ 4} As explained in the magistrate's decision, Earles suffered an industrial injury on August 21, 2011, while employed by relator as a laborer. An industrial claim was allowed for her injuries. Earles' physician indicated that she was subject to certain temporary physical restrictions from February 8 until June 5, 2012, but did not limit the number of hours she could work. Earles returned to work and was placed on light-duty status.

{¶ 5} It appears that there were two collective bargaining agreements in effect at various times relative to Earles' claim. The first agreement, effective May 7, 2007, contained provisions establishing a light-duty/restricted-employee work program. The agreement provided that employees assigned to that program would only be eligible for overtime opportunities if their medical restrictions allowed and that they would only be offered overtime after all other employees in the classification and shift to which they were assigned had been given the opportunity to work overtime. The second agreement, effective February 19, 2012, provided that employees on light duty outside of their own job classification would not be eligible for overtime.

{¶ 6} Earles filed an application for wage loss compensation for the periods of February 13 through March 2, 2012, and March 12 through March 18, 2012. The commission ultimately granted Earles' claim for wage loss compensation, concluding that,

upon returning to work, Earles was not eligible for overtime due to provisions of the collective bargaining agreement between relator and the union and that due to the loss of overtime, Earles sustained a wage loss during the relevant periods.

{¶ 7} We begin with relator's second objection, which asserts that the magistrate erred by concluding that there was a causal relationship between Earles' injuries and her loss in wages due to lost overtime pay. Relator argues that Earles was not restricted from working overtime based on her injuries but, rather, because of provisions in the collective bargaining agreements. Therefore, relator asserts, Earles was not entitled to wage loss compensation because she was not medically restricted from working overtime.

{¶ 8} An employee is eligible for wage loss compensation if the employee has an allowed claim and "suffers a wage loss as a result of returning to employment other than the employee's former position of employment due to an injury or occupational disease." R.C. 4123.56(B)(1). "A claim for wage loss compensation has two components—actual wage loss and causal relationship between the allowed condition and the wage loss." *State ex rel. Watts v. Schottenstein Stores Corp.*, 68 Ohio St.3d 118, 121 (1993). There is no dispute that Earles experienced actual wage loss. Therefore, our analysis turns on whether there was a causal relationship between her allowed conditions and the wage loss.

{¶ 9} This court recently considered a similar case in *State ex rel. Cleveland v. Indus. Comm.*, 10th Dist. No. 13AP-1069, 2015-Ohio-2165, which was consolidated with this case for purposes of oral argument. As we explained in *Cleveland*, the Supreme Court of Ohio addressed causation in wage loss claims in its decision in *State ex rel. Jordan v. Indus. Comm.*, 102 Ohio St.3d 153, 2004-Ohio-2115. In that case, the court concluded that, because the record was unclear as to whether the claimant had been offered the opportunity to work overtime, two key questions remained:

> First, was overtime offered? If it was and was declined, claimant's refusal—unless supported by medical restrictions on the number of hours claimant could work—would break the requisite causal connection. Second, if it was not offered, then why not? If, for example, overtime was rescinded on a plantwide basis for economic reasons, then again there would be no causal connection. If, however, the employer singled out

> claimant because of his injury, a causal relationship between injury and wage loss could be present.

Id. at ¶ 10. The court then remanded the case to the commission for further proceedings. *Id.* at ¶ 11.

{¶ 10} This court subsequently applied *Jordan* to conclude that the commission should have denied wage loss compensation in *State ex rel. DaimlerChrysler v. Indus. Comm.*, 10th Dist. No. 06AP-895, 2007-Ohio-5093. Addressing the questions set forth in *Jordan*, the court found that the claimant, who was subject to permanent work restrictions as a result of an industrial accident and transferred to a new position in a different department upon returning to work, could and did work the overtime hours available to him. With respect to the hours of overtime not available in the new position, the court found that "the evidence indicates that it was simply a matter of the fluctuation in hours available in different departments." *Id.* at ¶ 10. There was no evidence that the employer singled the claimant out or that his ability to work overtime in the sanitation position was directly related to his injury or work restrictions. *Id.* Therefore, the court concluded that there was no direct causal relationship between the claimant's injury and his reduced overtime, and he was not entitled to wage loss compensation. *Id.* at ¶ 13-14.

{¶ 11} In *Cleveland*, the claimant was a police officer who was placed on restricted duty after returning to work following an industrial accident. *Cleveland* at ¶ 5. A general order issued by the police department provided that officers on restricted duty were not eligible to work overtime. With respect to the second question posed in *Jordan*—i.e., why was overtime not offered?—this court concluded that there was a causal relationship between the claimant's injuries and the prohibition on working overtime. *Cleveland* at ¶ 11. We held that the general police order prohibiting overtime for restricted duty employees was not the same type of neutral, economically motivated limitation that existed in *DaimlerChrysler*, where the court concluded that the claimant's lost overtime was simply a function of different departments receiving different amounts of overtime work. Rather, the employer in the *Cleveland* case had created a separate class of ill and injured workers who were placed on restricted duty and then denied overtime *because* they were on restricted duty. Thus, the claimant's loss of overtime was a result of her injuries. *Id.*

{¶ 12} The present case involves a prohibition on overtime for restricted duty employees imposed under a collective bargaining agreement, rather than a management policy or rule, but we conclude that the same result occurs here as in the *Cleveland* case. Earles was placed on restricted duty because she was subject to work restrictions after her injury; she was then denied overtime because she was on restricted duty. Relator argues that there was no evidence that Earles was singled out for lack of overtime. However, in this case, as in *Cleveland*, the evidence demonstrates that the effect of the collective bargaining agreement provision is to single out all employees on restricted duty as a class and deny them the opportunity to work overtime. *Id*. at ¶ 13. Finally, relator argues that public policy should prohibit an employee from making an "end run" around provisions of a collective bargaining agreement to which her union has agreed. Under Ohio law, with limited exceptions, "[n]o agreement by an employee to waive an employee's rights to [workers'] compensation * * * is valid." R.C. 4123.80. Therefore, to the extent that the overtime limitation in the collective bargaining agreement functioned as a waiver of Earles' right to receive workers' compensation, it would not be valid. *See Cleveland* at ¶ 12; *State ex rel. General Mills, Inc. v. Indus. Comm*., 10th Dist. No. 02AP-127, 2002-Ohio-4727, ¶ 39.

{¶ 13} Accordingly, relator's second objection to the magistrate's decision lacks merit and is overruled.

{¶ 14} Relator also argues in its first objection that the magistrate failed to apply the "mailbox rule" in determining whether Earles' appeal from the order of the commission's district hearing officer ("DHO") was timely. Earles' claim for wage loss compensation was initially denied by a commission DHO in an order mailed on November 23, 2012. On December 13, 2012, Earles' union representative, William Hannah ("Hannah"), filed an online appeal on her behalf. Hannah indicated that he received the DHO's order on November 29, 2012. A commission staff hearing officer ("SHO") then issued an order finding that the commission had no jurisdiction over Earles' appeal because the notice of appeal was untimely. Hannah filed an administrative appeal of this order, including an affidavit attesting that he received the DHO's order on November 29, 2012. The commission accepted the administrative appeal and concluded

that the appeal from the DHO's order was timely filed and that Earles was entitled to wage loss compensation.

{¶ 15} A party may appeal a DHO's order "within fourteen days after the receipt of the order." R.C. 4123.511(C). In *Weiss v. Ferro Corp.*, 44 Ohio St.3d 178 (1989), the Supreme Court of Ohio noted that "[t]here is a rebuttable presumption, sometimes called the 'mailbox rule' that, once a notice is mailed, it is presumed to be received in due course." *Id.* at 180. Relator argues that the mailbox rule should be applied in this case and that "in due course" means three days. Therefore, relator asserts, Earles' appeal of the DHO's order was due no later than December 10, 2012, 14 days after it was mailed, plus 3 days under the mailbox rule. Relator further argues that, because Hannah did not file the appeal within that time, Earles was required to seek relief under R.C. 4123.522 before appealing the DHO's order.

{¶ 16} R.C. 4123.522 provides that "[i]f any person to whom a notice is mailed fails to receive the notice and the commission, upon hearing, determines that the failure was due to cause beyond the control and without the fault or neglect of such person or his representative and that such person or his representative did not have actual knowledge of the import of the information contained in the notice, such person may take the action afforded to such person within twenty-one days after the receipt of the notice of such determination of the commission." This statute provides that a presumption of receipt arising under the mailbox rule can be rebutted through evidence showing that the addressee did not receive the mailed notice and that the failure was due to a cause beyond the addressee's control. *Weiss* at 180. *See also Daniel v. Williams*, 10th Dist. No. 10AP-797, 2011-Ohio-1941, ¶ 35; *State ex rel. Fresh Mark, Inc. v. Indus. Comm.*, 10th Dist. No. 06AP-459, 2007-Ohio-2876, ¶ 27.

{¶ 17} The magistrate concluded that Earles was not required to seek relief under R.C. 4123.522 before filing her appeal because she did not claim that Hannah had not received the DHO's order. We agree that, by its own terms, R.C. 4123.522 does not appear to apply in this case. The statute indicates that relief may be sought if "any person to whom a notice is mailed *fails to receive* the notice." (Emphasis added.) R.C. 4123.522. *See also State ex rel. Tisdale v. Cherry Hill Mgmt., Inc.*, 88 Ohio St.3d 423, 425 (2000) ("R.C. 4123.522 is a narrow statute designed to remedy a *single* specific problem--a party's

failure to receive notice of a commission decision." (Emphasis sic.)). This is not a case where a party failed to receive the DHO's order. Rather, Hannah, acting as Earles' representative, asserted that he received the notice on November 29, 2012. Therefore, Earles and the commission argue that R.C. 4123.522 does not apply and that the appeal was timely filed because it was filed within 14 days of the date of receipt.

{¶ 18} Moreover, even if we credit relator's argument that the mailbox rule should be applied to create a presumption that Earles and her representative, Hannah, received notice of the DHO's order within three days after it was mailed, we conclude that Hannah presented sufficient evidence to rebut this presumption and establish the date of actual receipt. In this case, Hannah submitted an affidavit asserting that he received the DHO order on November 29, 2012. He further asserted in that affidavit that, at no time prior to November 29, 2012, was he aware of the order. Therefore, Hannah filed the appeal on December 13, 2012, which was within 14 days after receipt of the order as required under R.C. 4123.511(C).

{¶ 19} Accordingly, relator's first objection to the magistrate's decision lacks merit and is overruled.

{¶ 20} Upon review of the magistrate's decision, an independent review of the record, and due consideration of relator's objections, we find that the magistrate has properly determined the pertinent facts and applied the appropriate law. We therefore overrule relator's objections to the magistrate's decision and adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein. The requested writ of mandamus is hereby denied.

Objections overruled; writ denied.

T. BRYANT, J., concurs.
SADLER, J., concurs separately.

T. BRYANT, J., retired, of the Third Appellate District, assigned to active duty under the authority of the Ohio Constitution, Article IV, Section 6(C).

SADLER, J., concurring separately.

I believe that the magistrate properly determined the pertinent facts and applied the appropriate law in his reasoning as to both objections, including his conclusion that R.C. 4123.522(C), the "mailbox rule," does not apply. In my view, given the plain language of R.C. 4123.522(C) and the fact that this is not a case where a party failed to receive the DHO's order, the mailbox rule is inapplicable. Accordingly, I would not address relator's argument that claimant's appeal was untimely. Because the majority does so and overrules relator's first objection on different grounds, I respectfully concur separately.

_____

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State, ex rel. BF Goodrich Company, Specialty Chemicals Division,	:	
Relator,	:	
v.	:	No. 13AP-1056
Industrial Commission of Ohio and Marilynne J. Earles,	:	(REGULAR CALENDAR)
Respondents.	:	
	:	

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

Rendered on November 10, 2014

Calfee, Halter & Griswold LLP, William L. S. Ross and *Christopher M. Ward,* for relator.

Michael DeWine, Attorney General, and *Colleen C. Erdman,* for respondent Industrial Commission of Ohio.

Stephen E. Mindzak Law Offices, LLC, and *Stephen E. Mindzak,* for respondent Marilynne J. Earles.

IN MANDAMUS

{¶ 21} In this original action, relator, BF Goodrich Company, Specialty Chemicals Division ("relator" or "BF Goodrich"), requests a writ of mandamus ordering respondent

Industrial Commission of Ohio ("commission") to vacate the March 21, 2013 order and corrected order of its deputy awarding to respondent Marilynne J. Earles ("claimant") R.C. 4123.56(B) working wage loss compensation when the difference between claimant's average weekly wage ("AWW") and her "present earnings" is attributable to the mandatory loss of overtime while employed in a light-duty program, the terms of which are set forth in agreements between relator and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America ("UAW" or "union").

Findings of Fact:

{¶ 22} 1. On August 12, 2011, claimant sustained an industrial injury while employed as a laborer for BF Goodrich, a self-insured employer under Ohio's Workers' Compensation laws.

{¶ 23} 2. The industrial claim (No. 11-862968) is allowed for:

> Right shoulder strain; right supraspinatus tendon tear; infraspinatus tendon tear, right; tendonitis of supraspinatus tendon, right.

{¶ 24} 3. Attending physician Paul Nitz, M.D., completed a form captioned "Medical Report," which is to be used as part of the C-140 application for wage loss compensation. These forms are provided by the Ohio Bureau of Workers' Compensation ("bureau"). While Dr. Nitz failed to indicate the date of his signing the "Medical Report," he did list temporary restrictions for the period February 8 to June 5, 2012. Among the restrictions listed, Dr. Nitz wrote in his own hand:

> No climbing/crawling
> No heavy pushing/pulling
> No overhead work [right] shoulder
> No lifting/carrying > 8 x 16 [weeks]

{¶ 25} 4. On June 25, 2012, claimant filed a C-140 application for wage loss compensation. On the form, claimant listed four weeks during 2012 in which she worked light-duty and, thus, claimed a wage loss. The four weeks listed and her corresponding earnings are:

February 13 through 19	$1008.34
February 20 through 26	$1,008.27
February 26 through March 2	$1,008.34
March 12 through 18	$1,044.37

{¶ 26} 5. The record contains a single page document captioned "Computation of Compensation Rate." Presumably, the document was prepared by someone at BF Goodrich who is not identified.

{¶ 27} On the document, AWW is calculated by dividing total wages of $69,976.98 by 52 weeks. Thus, AWW is determined to be $1,345.71 ($69,976.98 ÷ 52 = $1,345.71). Apparently, BF Goodrich established $1,345.71 as claimant's AWW for the industrial injury at issue.

{¶ 28} 6. The record contains four single-page documents captioned "earnings statement," which were prepared by BF Goodrich regarding claimant's earnings during four weeks in 2012.

{¶ 29} For the period February 13 to 19, 2012, claimant worked a 40-hour week, earning $1,008.34 in gross wages. The document has an "advice date" of 02/24/2012.

{¶ 30} For the period February 20 to 26, 2012, claimant worked a 40-hour week earning $1,008.27 in gross wages. The document has an "advice date" of 03/02/2012.

{¶ 31} For the period March 5 to 11, 2012, claimant worked a 40-hour week earning $1,008.40 in gross wages. The document has an "advice date" of 03/15/2012. However, this pay period is not listed on the C-140 and is not claimed on the C-140 as a wage loss week.

{¶ 32} For the period March 12 to 18, 2012, claimant worked a 32-hour week and received 8 hours of vacation pay. Relator earned a total of $1,033.54 in gross wages for the 40-hour period. The document has an "advice date" of 03/23/2012.

{¶ 33} 7. It can be noted that the record fails to contain a BF Goodrich "earning statement" corresponding to the week listed on the C-140 from February 26 through March 2, 2012.

{¶ 34} 8. The record contains a copy of the relevant provisions of the collective bargaining agreement between "Goodrich Corporation, Troy, Ohio Plant" and the UAW effective May 7, 2007.

{¶ 35} Section 19 of the agreement states:

> The parties agree to the establishment of a light-duty/restricted-employee work program. The purpose of this program is to provide medically-restricted employees an opportunity to work and make a value-added contribution to the products manufactured.

{¶ 36} Paragraph i. of section 19 provides:

> Employees assigned to this program shall be eligible for overtime opportunities in the specific job to which they have been assigned only if their medical restrictions allow. They shall be asked to work overtime only after all other employees in the classification and shift to which they have been borrowed have been given the opportunity to work overtime.

{¶ 37} 9. The record contains a copy of the relevant provisions of the collective bargaining agreement between "Goodrich Corporation, Troy, Ohio Plant" and the UAW effective February 19, 2012. Under section 19, paragraph 1, the agreement provides: "Employees on light duty outside of their own job classification will not be eligible for overtime."

{¶ 38} 10. Following a November 14, 2012 hearing, a district hearing officer ("DHO") issued an order denying claimant's wage loss application. The DHO's order explains:

> [T]he Injured Worker's C-140 Application for Wage Loss filed 06/27/2012, is denied. The District Hearing Officer finds that the Injured Worker is requesting a period of wage loss which is covered by the new collective bargaining agreement addressing the issue of overtime. The District Hearing Officer finds that the new collective bargaining agreement prohibits employees from working overtime for the Employer when medical restrictions do not permit assignment.
>
> This order is based upon the collective bargaining agreement Local 128, Troy, Ohio, UAW Goodrich Unit effective 05/07/2007.

{¶ 39} 11. The DHO's order of November 14, 2012 was mailed November 23, 2012 as indicated on the DHO's order.

{¶ 40} 12. On December 13, 2012, union representative William Hannah filed an online appeal on behalf of claimant. The online appeal form asks the representative to list the "Order receive date." In response, Hannah entered "11/29/2012."

{¶ 41} Following a January 25, 2013 hearing, a staff hearing officer ("SHO") issued an order finding no jurisdiction to address the merits of claimant's appeal. The SHO's order of January 25, 2013 explains:

> The Staff Hearing Officer finds that on 01/22/2013 the Employer filed a brief in support of the Employer's position within this claim. The Staff Hearing Officer further finds that the Employer asserted within that memorandum:
>
> "Upon information and belief, Ms. Earles' Notice of Appeal of the DHO order, mailed from the Commission on 11/23/2012, was untimely filed."
>
> The Staff Hearing Officer finds that the District Hearing Officer's order was mailed on 11/23/2012, a Friday, and was not appealed until Thursday, 12/13/2012.
>
> Allowing three days for the mailing of [the]order as provided by the rules, and allowing a two week appeal period as provided for appeal of the District Hearing Officer order, it is the finding of the Staff Hearing Officer that the Injured Worker's appeal filed 12/13/2012 is not timely.
>
> Therefore, the Staff Hearing Officer finds no jurisdiction to address the Injured Worker's appeal of the District Hearing Officer's order mailed 11/23/2012. Therefore, this order shall have no effect upon the order of the District Hearing Officer published 11/23/2012. The Staff Hearing Officer finds no jurisdiction to address the merits of the Injured Worker's appeal.

{¶ 42} 13. On claimant's behalf, Hannah administratively appealed the January 25, 2013 order of the SHO. In support, Hannah submitted his affidavit executed February 12, 2013:

> On the appeal that I filed on 12-13-12, I had clearly indicated that I received the Order from the 11-14-12 DHO Hearing on **11-29-12**. When I was questioned about this matter at the 1-25-13 SHO Hearing, I affirmed the fact that I did not receive

> the Order in question until 11-29-12. My date-stamp confirmed this.
>
> At no time prior to 11-29-12 was I aware of the Order in question. It is my sworn testimony that I did not receive the Order in the above-noted claim from the 11-14-12 DHO Hearing until 11-29-12.

(Emphasis sic.)

{¶ 43} 14. On February 28, 2013, the three-member commission mailed a notice that it has accepted claimant's administrative appeal from the SHO's order of January 25, 2013 and that the appeal would be heard by a commission deputy.

{¶ 44} 15. Following a March 21, 2013 hearing before a commission deputy, an order was mailed on May 11, 2013 with the unanimous approval of the three commissioners. The order vacates the SHO's order of January 25, 2013 and grants the C-140 application for wage loss compensation. The order explains:

> Preliminarily, the Deputy finds the Injured Worker's appeal, filed 12/13/2012, to District Hearing Officer order, issued 11/23/2012, was timely filed. The Deputy finds the Injured Worker's representative submitted an affidavit, signed 02/12/2013, indicating he received said District Hearing Officer order on 11/29/2012 and the order was date stamped to confirm this fact. The Deputy finds no evidence to the contrary.
>
> It is the order of the Deputy that the request for working wage loss commencing 02/13/2013 [sic] through 03/02/2013 [sic], closed period and 03/12/2013 [sic] through 03/18/2013 [sic], closed period, is granted.
>
> Pursuant to R.C. 4123.56(B) and Ohio Adm.Code 4125-1-01, wage loss compensation may be paid to an Injured Worker who experiences a reduction in earnings as a direct result of the restrictions due to the allowed conditions in the claim. To be eligible for wage loss, an Injured Worker must show that loss or reduction in wages exists and the wage loss is a direct result of restrictions caused by the allowed conditions in the claim. Once these two conditions are satisfied, wage loss is paid at 66 2/3% of the difference between the average weekly wage and the Injured Worker's present earnings, not to exceed the statewide average weekly wage.

> The Deputy finds the evidence in the file indicates the restrictions in the claim are a direct result of the allowed conditions in the claim. The C-140 application, filed 06/25/2012, indicates the Injured Worker has temporary restrictions of no climbing, no heavy pushing/pulling, no overhead right shoulder work and no lifting/carrying greater than 8 pounds, as indicated by Paul A. Nitz, M.D.
>
> The Deputy finds that prior to the date of injury, the Injured Worker was a high wage earner based on her ability to work overtime. However, following her industrial injury, the Injured Worker returned to work with temporary restrictions and with the same employer, but was not eligible for overtime due to the collective bargaining agreement between the employer and the union. The Deputy further finds the Injured Worker submitted wage documentation indicating she experienced a reduction in wages for the closed periods. The wage documentation in the file demonstrates that the Injured Worker's weekly earnings during the time periods requested is less than her average weekly wage and therefore she is entitled to 66 2/3% of the difference between her average weekly wage and her earnings.
>
> This decision is based on the C-140 application, filed 06/25/2012, the wage documentation in the file and O.A.C. 4125-1-01.

{¶ 45} 16. On May 24, 2013, claimant's union representative requested a correction of the March 21, 2013 order.

{¶ 46} 17. Also on May 24, 2013, BF Goodrich requested reconsideration of the March 21, 2013 order.

{¶ 47} 18. On June 15, 2013, the commission deputy mailed a corrected order with approval of the three commissioners. The corrected order states:

> The Injured Worker's representative contends that the Deputy order contains a clerical error. The Injured Worker's representative contends that dates for wage loss should be 02/13/2012 through 03/02/2012 and 03/12/2012 through 03/18/2012 and not 2013. After reviewing the claim, the Deputy finds that this is a clerical error in the Deputy's order. The Injured Worker's representative [sic] request for a corrected order is granted. Therefore, pursuant to the continuing jurisdiction provision of R.C. 4123.52, the Deputy's order is corrected as follows:

> **It is the order of the Deputy that the request for working wage loss commencing 02/13/2012 through 03/02/2012, closed period and 03/12/2012 through 03/18/2012, closed period, is granted.**
>
> In all other respects, the Deputy's order dated 03/21/2013, findings mailed 05/11/2013, remains as originally published.

(Emphasis sic.)

{¶ 48} 19. On July 12, 2013, the three-member commission mailed an order denying BF Goodrich's May 24, 2013 request for reconsideration.

{¶ 49} 20. On December 19, 2013, relator, BF Goodrich Company, Specialty Chemicals Division, filed this mandamus action.

Conclusions of Law:

{¶ 50} Two main issues are presented: (1) whether the commission abused its discretion in determining that claimant's administrative appeal of the DHO's order of November 14, 2012 was timely filed, and (2) whether the loss of overtime pay was proximately caused by the industrial injury.

{¶ 51} The magistrate finds: (1) the commission did not abuse its discretion in determining that claimant's administrative appeal of the DHO's order of November 14, 2012 was timely filed, and (2) the loss of overtime pay was proximately caused by the industrial injury.

{¶ 52} Accordingly, it is the magistrate's decision that this court deny relator's request for a writ of mandamus, as more fully explained below.

First Issue

{¶ 53} The first issue as previously noted is whether the commission abused its discretion in determining that claimant's administrative appeal of the DHO's order of November 14, 2012 was timely filed within the parameters of R.C. 4123.511(C), which provides that the appeal may be filed "within 14 days after receipt of the order."

{¶ 54} The DHO's order that resulted from the November 14, 2012 hearing was mailed on November 23, 2012 as indicated on the order. In filing the online appeal on behalf of claimant, Hannah stated that he received the order on November 29, 2012. He filed the online appeal on December 13, 2012, which is the 14th day following the

November 29, 2012 receipt date. Later, in an affidavit, Hannah reaffirmed that he received the order on November 29, 2012.

{¶ 55} At first blush, it would seem that Hannah satisfied R.C. 4123.511(C)'s requirement by filing the online appeal on the 14th day following his November 29, 2012 receipt of the order. However, relator argues to the contrary.

{¶ 56} Relator's argument for an untimely appeal begins with the undisputed observation that the online appeal at issue was filed on the 20th day following the November 23, 2012 mailing of the DHO's order. Obviously, the online appeal was filed beyond 14 days from the mailing date.

{¶ 57} According to relator, the so-called mailbox rule permitted the filing of the appeal as late as the 17th day following the mailing of the order. This is so, according to relator, because the mailbox rule requires that 3 days be added to the statutory 14 days.

{¶ 58} Relator argues that the appeal was required to be filed no later than December 10, 2012 and, thus, the online appeal filed on December 13, 2012 was three days late. The magistrate disagrees with relator's analysis.

{¶ 59} Interestingly, because Hannah received the order on the 6th day following its mailing—well within the 14-day period as measured from the mailing date—R.C. 4123.522 was clearly not applicable and Hannah was required to file the appeal pursuant to the time requirements of R.C. 4123.511(C).

{¶ 60} Nevertheless, relator suggests that claimant was required to pursue R.C. 4123.522 relief to obtain leave to file the appeal. Relator is incorrect.

{¶ 61} *Weiss v. Ferro Corp.*, 44 Ohio St.3d 178 (1989), is the seminal case on R.C. 4123.522 relief. In *Weiss*, the Supreme Court of Ohio states:

> There is a rebuttable presumption, sometimes called the "mailbox rule" that, once a notice is mailed, it is presumed to be received in due course. * * * R.C. 4123.522 provides that such presumption may, upon application to the commission, be rebutted by evidence which shows that the addressee did not receive the mailed notice, and " * * * that such failure was due to cause beyond the control * * * " of that person.

(Citations omitted.) *Id.* at 180.

{¶ 62} The *Weiss* court further states:

> The purpose of R.C. 4123.522 is to extend the time for appeal in any case where a person can rebut the presumption of receipt of notice of the decision from the commission arising under the "mailbox rule." This is a special provision providing a procedure to be followed where there is a failure to receive notice of a decision and prevails over the general provisions of R.C. 4123.516 and 4123.519 as to the time for appeal.

Id. at 182.

{¶ 63} Applying *Weiss* here, it is clear that R.C. 4123.522 had no applicability because Hannah received notice of the DHO's order well within the 14-day period for the filing of the appeal under R.C. 4123.511(C). Had Hannah not received notice at some point beyond the statutory time limit for filing an appeal, R.C. 4123.522 relief may have been appropriate. However, that is not the case here.

Second Issue

{¶ 64} The second issue is whether it can be found that the loss of overtime was proximately caused by the industrial injury when (1) claimant had no medical restrictions as to overtime, and (2) the collective bargaining agreements prohibited overtime to those employees such as claimant who participated in the light-duty program.

{¶ 65} Much of the law pertaining to this issue is set forth in *State ex rel. Jordan v. Indus. Comm.*, 102 Ohio St.3d 153, 2004-Ohio-2115, and this court's decision in *DaimlerChrysler Corp. v. Indus. Comm.*, 10th Dist. No. 06AP-895, 2007-Ohio-5093, that applied *Jordan*.

{¶ 66} Paragraphs 4 through 14 of this court's decision in *DaimlerChrysler* succinctly set forth the *Jordan* case in determining the overtime issue before this court in *DaimlerChrysler*. Accordingly, the magistrate sets forth paragraphs 4 through 14 of this court's decision in *DaimlerChrysler*:

> On June 2, 2002, claimant suffered an industrial injury while employed as a mechanic for relator. He underwent surgery, and his doctor imposed permanent work restrictions. These restrictions did not limit the number of hours claimant could work in a day.
>
> On September 4, 2003, claimant returned to work. While relator argues that claimant returned to his former position

> as a mechanic, claimant argues that he was not able to perform that position within his restrictions and, therefore, did not "return" to that position. On the day of his return, claimant bid on a new position in the sanitation department, and his transfer to that department became effective October 20, 2003.
>
> On May 3, 2005, claimant filed his first application for wage-loss compensation, beginning September 8, 2003, based on his alleged reduced wages in the sanitation position. As detailed in the magistrate's decision, relator raised a number of issues regarding claimant's application, and the commission issued multiple decisions on the application. In order to address the objections most efficiently, we limit our discussion to the full commission's decision based on the January 5, 2006 hearing and, specifically, the following conclusion regarding the impact of claimant's reduced overtime in the sanitation position:
>
> The Commission finds that the injured worker returned to work and suffered a wage loss for the weeks noted above as the result of the conditions allowed in this claim. * * * Due to a fluctuation in the number of overtime hours available, the injured worker periodically earned less per week than his average week wage. The Commission finds that during those weeks, the injured worker suffered a wage loss as the result of the allowed conditions in this claim.
>
> In essence, the commission concluded that claimant suffered a compensable wage loss, even though his hourly wages were roughly the same in the two positions, because claimant had fewer overtime hours in the sanitation position-a position his injury forced him to take. While he was able to work overtime, and did work some overtime in the sanitation position, his weekly wages were sometimes lower in the new position simply because the sanitation department offered less overtime. Because his injury caused him to take the sanitation position, there was a causal connection between his injury and his loss in wages.
>
> The magistrate found that the commission's conclusion in this respect was inconsistent with *Jordan*. We agree.
>
> In *Jordan*, as the magistrate explains, the claimant suffered an injury, took a new position within his work restrictions, and received a lower weekly wage because he worked less

> overtime in the new position. The record contained no evidence, however, as to the reason for his reduced overtime. The Supreme Court of Ohio stated:
>
> Two key questions thus remain unaddressed. First, was overtime offered? If it was and was declined, claimant's refusal-unless supported by medical restrictions on the number of hours claimant could work-would break the requisite causal connection. Second, if it was not offered, then why not? If, for example, overtime was rescinded on a plantwide basis for economic reasons, then again there would be no causal connection. If, however, the employer singled out claimant because of his injury, a causal relationship between injury and wage loss could be present.
>
> *Jordan* at ¶ 10. Because the evidence did not address these questions, the court found that "further consideration of the question of causal relationship is warranted." *Id.* at ¶ 11.
>
> Here, we know the answers to the questions the Supreme Court raised in *Jordan*. As to whether overtime was offered and declined for medical reasons in the new position, we know that claimant could and did work the overtime hours available to him. As to those hours of overtime not available to him in the new position, the evidence indicates that it was simply a matter of the fluctuation in hours available in different departments. Claimant offers no evidence that the employer singled him out in any way or that his ability to work overtime in the new position was directly related to his injury or work restrictions.
>
> We acknowledge respondents' assertion that, once the commission determines that an industrial injury has forced a claimant to find a new position, applicable wage-loss compensation rules should require only a straightforward week-by-week comparison of a claimant's former weekly wage to his present earnings. That is not the approach the Supreme Court took in *Jordan,* however.
>
> Importantly, in *Jordan,* the Supreme Court did not rely on a straightforward comparison between the claimant's former weekly wage (with substantial overtime) and his present earnings (with less overtime). Instead, the court returned the case to the commission for "further consideration of the question of causal relationship." *Id.* at ¶ 11. And as to that further consideration, the court indicated its belief that an

> employer's limitation of overtime for economic reasons, as opposed to reasons specific to a claimant, was sufficient to break the causal connection between a claimant's injury and his loss of wages based on reduced overtime.
>
> Applying *Jordan* here, because the evidence shows no direct causal relationship between claimant's injury and his reduced overtime, we need no additional evidence or further consideration to determine that the commission should have denied compensation on these grounds. Accordingly, we overrule respondents' objections.
>
> Having conducted an independent review of the evidence in this matter, and finding no error of law or other defect on the face of the magistrate's decision, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained in it. In accordance with the magistrate's decision, we grant a writ of mandamus ordering the commission to vacate its orders granting R.C. 4123.56(B) wage-loss compensation and to enter orders denying said compensation.

{¶ 67} The issue here is one of causation. Is there a proximate causal relationship between the industrial injury and the loss of overtime pay? Relator argues that causal relationship fails because of two undisputed facts: (1) claimant was not medically restricted by her doctor from overtime work, and 2) the collective bargaining agreements prohibit or severely limit overtime to employees who participate in the light-duty program.

{¶ 68} On the other hand, the commission and claimant argue that causal relationship between the industrial injury and the loss of overtime pay does not fail for the lack of medical restrictions as to overtime or the collective bargaining agreements that prohibit or severely restrict overtime.

{¶ 69} In *Jordan*, as in the instant case, the claimant was not medically restricted from working overtime. *Id.* at ¶ 1. Yet, the *Jordan* court returned the cause to the commission for further proceedings and an amended order on the question of causal relationship. Obviously, the *Jordan* court did not believe that a wage loss based on lack of overtime pay was only compensable when the claimant is medically restricted from working overtime. Accordingly, the magistrate rejects relator's argument that causal

relationship between the industrial injury and the loss of overtime pay fails because claimant is medically able to work overtime. Rather, the causal connection is established by the medical restriction that prevents a return to the former position of employment and, thus, places claimant into the light-duty program.

{¶ 70} The commission here presents an argument premised on the *Jordan* court's statement "[i]f, however, the employer singled out claimant because of his injury, a causal relationship between the injury and wage loss could be present." *Id.* at ¶ 10.

> Unlike *Jordan* or *DaimlerChrysler,* here, it is precisely because an employee suffers an injury, either at home or work, or suffers from an illness, that the employee is barred from working overtime.

(Industrial Commission's Brief, 15.)

{¶ 71} That is to say, the commission, in effect, argues that claimant and the class of employees who participate in the light-duty program as set forth in the collective bargaining agreements are actually singled out and prohibited from overtime precisely because of the injuries sustained by the participants. Thus, claimant's loss of overtime is not the result of economic reasons applied across the board to all union members, but is specific to the class of injured workers who participate in the "light-duty program." Moreover, unlike the situation in *DaimlerChrysler* in which this court issued a full writ for denial of wage loss compensation, the loss of overtime here is not "simply a matter of the fluctuation in hours available in different departments." *DaimlerChrysler* at ¶ 10.

{¶ 72} The magistrate finds helpful this court's decision in *State ex rel. Webb v. Indus. Comm.*, 76 Ohio App.3d 701 (10th Dist.1991).

{¶ 73} In *Webb,* this court extensively discussed the concept of dual causation. "[T]here is no doubt that two causes can each directly and proximately contribute to an injury." *Id.* at 704. "The causal relationship must be a direct one but it need not be the sole causal relationship." *Id.*

{¶ 74} Based on *Webb,* it is insufficient to argue that the collective bargaining agreements are the cause of the loss of overtime and, thus, there is no causal connection between the industrial injury and the loss of overtime pay. That flawed reasoning is found in the November 14, 2012 order of the DHO.

{¶ 75} Thus, under a *Webb* analysis, it can be held that there is a proximate causal relationship between the loss of overtime pay and the injury that put claimant into a light-duty position even though the collective bargaining agreements are indeed a causal factor.

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

/S/ MAGISTRATE
KENNETH W. MACKE

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).