

[Cite as *Caddell v. Ohio Bur. of Workers' Comp.*, 1992-Ohio-276.]
IN THE COURT OF CLAIMS OF OHIO

EDWARD CADDELL :
Plaintiff : CASE NO. 90-08821
v. : DECISION
BUREAU OF WORKERS' : Judge Fred J. Shoemaker
COMPENSATION :
Defendant :

: : : : : : : : :

On February 11, 1983, plaintiff sustained his first injury in the course and scope of his employment. He applied for and received sickness and accident benefits from his employer, Southern Ohio Regional Transit Authority (employer), as well as insurance benefits from Metropolitan Insurance.

In a letter dated August 10, 1984, plaintiff's employer notified plaintiff that he was not entitled to either sick leave or insurance benefits. Plaintiff's employer was contesting plaintiff's allegation that he was injured in the course of his employment. Plaintiff was informed by his employer that if he was ultimately found to be entitled to workers' compensation benefits, he would have to repay sick leave and insurance benefits.

In February of 1987, plaintiff's right to receive workers' compensation benefits was conclusively affirmed. On June 12,

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1987, plaintiff was informed by his employer, consistent with its first letter, that because he was found to be entitled to workers' compensation benefits, he must repay the sick leave and insurance benefits he received. Plaintiff's union representative was also informed of the overpayments. Plaintiff ignored the requests. The letters mailed to Mr. Caddell were mailed to the correct address.

After plaintiff refused to repay the funds improperly received, plaintiff's employer filed a motion on September 14, 1987, to have its risk credited by defendant for amounts overpaid to plaintiff. His employer submitted information that plaintiff had improperly received benefits. The employer claimed that it had overpaid plaintiff the sum of \$5,887.91.

On January 29, 1985, the employer's motion was considered by a district hearing officer (hereinafter DHO), who found that:

*** Claimant was paid sick and accident benefits from the Metropolitan Life Insurance Fund and temporary total disability compensation for periods April 29, 1983, to August 6, 1983, and September 29, 1983, to April 2, 1984. District Hearing Officer finds the claimant was entitled to and did properly receive temporary total disability compensation in this claim. District Hearing Officer finds the claimant ***improperly received sickness and accident benefits for the above-mentioned periods.*** (Emphasis added.)

The DHO erred by failing to order that the employer's risk be credited.

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He also considered the issue of whether plaintiff received an overpayment.

The hearing notes of the DHO indicated that he incorrectly concluded that plaintiff did not receive an overpayment.

The employer appealed the DHO's order. On January 13, 1989, the Dayton Regional Board of Review (DRB), conducted a hearing on the employer's appeal and then ordered that the employer's risk be credited for the periods from April 29, 1983, to August 6, 1983, and September 29, 1983, to April 2, 1984, or for about nine months and ten days. The DRB corrected the DHO's error, by ordering that the employer's risk be credited.

Plaintiff was on notice of the time, place and subject matter of both of the hearings. Plaintiff's counsel attended both hearings.

On January 24, 1989, the DRB issued an order finding that plaintiff concurrently received sickness and accident benefits and temporary total benefits from April 29, 1983, to August 6, 1983, and September 29, 1983, to April 2, 1984, an overpayment of benefits for nine months and ten days.

Defendant credited the employer's risk as set forth in DRB's order. As is its practice, defendant also issued an adjustment order on March 17, 1989, wherein plaintiff was ordered to repay the overpayment he had received "in accordance with" DRB's order. The adjustment order directed defendant to recoup

money payable to plaintiff for future temporary total benefits in his second workers' compensation claim.

A form letter was sent out with the adjustment order on ***April 15, 1989***. In the letter, plaintiff was told that he had no right of appeal but that he could file an objection "*** ***within ten calendar days of the above date.***" The parties stipulated that plaintiff filed an objection to the order on April 27, 1989. Plaintiff objected two days later than the date specifically prescribed in defendant's letter. Since plaintiff did not file a timely objection, the bureau's order became final.

On July 31, 1989, plaintiff's first payment of temporary total benefits in the amount of \$4,690 was offset by defendant pursuant to the "adjustment order of March 17, 1989." On November 6, 1989, plaintiff's second payment of temporary total benefits was offset pursuant to the "adjustment order of March 17, 1989," and the recoupment of plaintiff's overpayment was completed.

Despite the fact that plaintiff did not timely file an objection to defendant's order of March 17, 1989, he continued to object as the defendant recouped plaintiff's overpayment pursuant to the orders of July 31, 1989, and November 6, 1989.

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After plaintiff's counsel contacted the administrator of the Bureau of Workers' Compensation, plaintiff was provided a third hearing on January 19, 1990, on the issue of his overpayment. The hearing encompassed both of plaintiff's workers' compensation claims. Defendant submitted a memorandum at the time the issues were under consideration. He requested that the Industrial Commission issue a new order correcting the dates for which plaintiff was previously found to have received overlapping payments. The bureau requested that the dates for which the Industrial Commission found overlapping payments to have been made to plaintiff be reduced because of information submitted after the previous hearing. It was decided that plaintiff received overlapping payments only "from April 23, 1983, through July 10, 1983, and from October 6, 1983, through November 10, 1983." In other words, plaintiff was found to have received an "overpayment" for overlapping payments for about three months and three weeks rather than nine months and ten days as set forth in DEB's order. Defendant was ordered to recalculate the overpayment and compensate plaintiff accordingly. Except for this reduced period of overlapping payment, the new order was identical to DRB's earlier order.

All parties, including the employer, were given notice of the new order and informed that they could file an appeal within twenty days. On March 1,

1990, after the appeal time lapsed, defendant compensated plaintiff pursuant to the new order. This decision was not appealed.

The stipulated facts prove that plaintiff wrongfully held overpayments from the defendant for about five years, and defendant wrongfully withheld funds owed plaintiff for approximately seven months.

Plaintiff claims that the Bureau of Workers' Compensation (Bureau) converted plaintiff's money because it withheld more money than it should have from plaintiff without holding the necessary hearings and without the proper notices to plaintiff. He further claims that the Bureau also violated its duty as an insurer to act in good faith and violated plaintiff's constitutional right to due process of law.

In *O'Connor v. Industrial Commission of Ohio, et al.*, (Dec. 27, 1990), Ct. of Claims No. 90-07468, unreported, Judge Leach stated in part:

A review of the language of the complaint in the instant action reveals that it requests this court to declare that the Industrial Commission, in essence, erred by its determination of the legal and factual issues which were then properly before it. A review of legal or factual determinations is invariably the proper subject of an appeal. The issue is thus clarified as not being a question of whether this court has exclusive or concurrent jurisdiction to hear claims against state agencies but is instead whether this court may provide a

substitute forum for an appellate review which has been statutorily established in a different court.

In *State, ex rel. Weimer v. Industrial Commission* (1980), 62 Ohio St. 2d 159, the court considered whether the recoupment can be made by deducting amounts from future payments. The claimant argued she was entitled to a hearing before any deductions were made by the Bureau. The Ohio Supreme Court held that continuing jurisdiction is vested in the commission by R.C. 4123.52 which provides in part:

'The jurisdiction of the industrial commission over each case shall be continuing, and the commission may make such modification or change with respect to former findings or orders with respect thereto, as in its opinion is justified.'

Those cases which have construed this continuing jurisdiction provision have held generally that the commission's power to modify applies only to new and changed conditions, not merely to a review of situations already determined. *State v. Ohio Stove Co.* (1950), 154 Ohio St. 27; *State, ex rel. Griffey, v. Industrial Commission* (1932), 125 Ohio St. 27. Appellant argues that the commission cannot obtain recoupment because the overpayment was based upon a mistake of law and not fact.

Although the question presented here is *sui generis*, the mistake in this case was indisputably a clerical error. This is clearly a mistake of fact.

Appellant also asserts that the impetus to action by the commission under R.C. 4123.52 must come from an aggrieved party, *i.e.*, a claimant or an employer, as the case might be. In addition to the statute not so providing, this approach by appellant further relegates the commission to the position of a mere purseholder of public funds. This is not the role of the commission vis-a-vis the state insurance fund, as defined by this court in *Indus. Comm. v. Dell* (1922), 104 Ohio St. 389, 396-397, as follows:

'*** The commission should be held to have inherent power to prevent the misappropriation or the misapplication of the insurance fund to claimants who are afterwards found not to be entitled thereto. The state insurance fund is in the nature of a trust fund and it is the duty of the commission to impartially distribute the same among persons entitled thereto and not permit the fund to be depleted or become the object of fraud or imposition, and it being clearly their moral and legal duty to correct any mistake or fraud or imposition which will result in a misapplication or misappropriation of any part of the fund the law should not be so construed, even in case of ambiguity, neither should the legislature be held to have intended to enact any provisions which would in any manner hamper or interfere with the members of the commission in their efforts to properly protect the fund.'

Obviously there were some errors made throughout the administration hearings. However, there is a failure by plaintiff to prove that the Bureau acted in bad faith, violated plaintiff's constitutional right to due process of

law, or were guilty of conversion or other tortious conduct justifying relief in this court.

Plaintiff relies on *Baylint v. Arkansas Best Freight* (1985), 18 Ohio St. 3d 126. The facts in that case are distinguishable from our case. The self-insured employer in *Baylint* had no authority to terminate benefits on its own without a hearing before the Industrial Commission. The Supreme Court held, "an employee of a self-insured employer may maintain a cause of action against the employer for the intentional and wrongful termination of workers' compensation payments."

The court finds in this case that the employer did not intentionally terminate plaintiff's workers' compensation payments. In *Sawicki v. Ottawa Hills* (1988), 37 Ohio St. 3d 222, the court in the syllabus held:

2. When a duty which the law imposes upon a public official is a duty to the public, a failure to perform it, or an inadequate or erroneous performance, is generally a public and not an individual injury.
3. The public duty rule, and the special duty exception, comprise a doctrine which is independent of, and accordingly survived the abrogation of, sovereign immunity.

Recently in *Anderson v. Ohio Department of Insurance* (1991), 58 Ohio St. 3d 215, the Supreme Court again pointed up the necessity of plaintiff proving a special relationship, with defendant. Certainly in this case plaintiff has failed to prove any special relationship existed between himself and defendant.

The court finds that the plaintiff has failed to prove any of his claims by a preponderance of the evidence and judgment will be rendered for defendant.

FRED J. SHOEMAKER
Judge

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 BUREAU OF WORKERS' : Judge Fred J. Shoemaker
 COMPENSATION :
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 Defendant :

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This action was tried before the court on January 21, 1992.
The court has considered the evidence and rendered a decision filed herein. Judgment is rendered in favor of defendant and against plaintiff. Court costs are assessed against plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

FRED J. SHOEMAKER
Judge

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