ORIGINAL

IN THE SUPREME COURT OF OHIO

POWELL MEASLES, et al.,

Plaintiffs-Appellees

vs.

INDUSTRIAL COMMISSION OF OHIO., et al.

Defendants-Appellants

CASE NO. 2010-0393

On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District

Court of Appeals Case No. CA-09-093071

PLAINTIFFS-APPELLEES' MERIT BRIEF

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SUMMARY OF ARGUMENT

This case is not "about a written LSA agreement." It is about activities by the BWC which its management warned, in written memos, were illegal and in violation of the rights of seriously injured PTD workers.

The BWC mentions none of that in its brief to this court. This careful silence, however, does not change the challenged practice—carried out unlawfully pursuant to an internal and non-rulefiled policy—which takes thousands of dollars from workers **after** they have fully paid-off their LSA and applicable interest.

The BWC is also conspicuously silent about the uncomfortable fact that the people being victimized by this embarrassing abuse of power are the most vulnerable—elderly injured workers in their 70's and 80's, who are permanently and totally disabled, unable to work in any occupation, and whose primary, meager income is their monthly PTD check. Kielmeyer depo, p. 74-76.

The BWC's campaign to cover-up the controlling issue in this suit was very evident at oral argument in the court of appeals, where the BWC would not answer the panels' pointed question: How much did the agency overcharge Mr. Measles? The BWC then insisted its policy was not properly called an "overcharge" and claimed it had "no information" on the amount taken pursuant to it. These falsehoods did not withstand scrutiny. The agency's internal documents specifically described the policy as an improper overcharge against workers. And the agency's public records showed the amounts of overcharge. For 81 year old Powell Measles, alone, it was over $19,000.

The last point which the BWC's current Merit's Brief tries to hide, by saying not a word about it, is perhaps the most important issue. In the lower courts the BWC aggressively

defended its conduct against Mr. Measles and the class by arguing a decision from this Honorable court, *State ex rel. Funtash v. Indus. Comm.* (1951) 154 Ohio St. 497.[1] (The BWC's present brief to this court does not mention Funtash a single time.) According to the BWC, under Funtash the government is allowed to collect more than a worker owes on their loan. See, e.g. Defendant's Motion for Summary Judgment, filed in the Trial Court, at p. 4; Appellee Brief in the Court of Appeals at p. 13.

The problem is, a subsequent decision from this court limits *Funtash* and holds that the BWC is not allowed to use LSA collections from one worker, to pay off the debts of a different worker. This court held such practice to be a violation of equity. This court granted the equitable relief sought in that case, and issued a writ of mandamus to terminate the practice and restore the overcharges. *State ex rel. Shively v. Murphy Motor Freight* (1994), 71 Ohio St.3d 114.

It is not surprising that the BWC is totally silent about all of this, since such claims and relief have nothing to do with 'written LSA agreements' and rather present a case of disgorgement in equity. Those are the very issues and claims in this case, and they are within the jurisdiction of the courts below.

STATEMENT OF THE CASE

Plaintiffs Powell Measles, Vada Measles and Ann Pocaro (hereafter sometimes "Plaintiffs" or collectively "Mr. Measles") brought this action in the Cuyahoga County Court of Common Pleas on behalf of themselves and others similarly situated to challenge certain practices of the Industrial Commission of Ohio and the Ohio Bureau of Workers' Compensation

[1] The BWC argued this in the trial court at Defendant's Motion for Summary Judgment, p. 4 and in the court of appeals at Appellee's Brief, p. 13. Curiously, the BWC's its present Merit's Brief to this court does not mention *Funtash* a single time.

dealing with payment of PTD awards as required under R.C. 4123.58. In this action plaintiffs seek a declaration that the defendants are wrongfully withholding a portion of plaintiffs' Permanent Total Disability benefits, injunctive relief to prevent defendants from continuing to wrongfully withhold these amounts, and the disgorgement of funds wrongfully withheld.

Defendants moved to dismiss, arguing that the Cuyahoga County Court of Common Pleas was without jurisdiction because plaintiffs' claims were "legal" rather than equitable. In a Journal Entry dated March 13, 2009 the trial court held the case was a legal claim not within the court's jurisdiction and dismissed the suit, citing *Cristino v. Ohio Bureau of Workers' Compensation*, 118 Ohio St.3d 151, 2008-Ohio-2013.

The court of appeals reversed, holding this suit to be in equity and within the jurisdiction of the court of common pleas, also citing *Cristino*. The matter is now before this court pursuant to the allowance of a motion to certify the record.

STATEMENT OF FACTS

Plaintiffs all are permanently and totally disabled workers as the result of a work-related injury. Each obtained a permanent total disability (PTD) award. (Complaint ¶ 2.) They are, in the words of Justice Pfeifer, among "Ohio's most seriously injured workers." *Cristino v. Ohio Bureau of Workers' Comp.*, 118 Ohio St.3d at 155, 2008 Ohio 2013 ¶ 18, Pfeifer concurring.

A PTD award is a fixed amount, paid bi-weekly to the individual for life. It is not based on a contract or agreement. It is by statute and the amount and duration of the award is set by R.C. 4123.58 ("[i]n cases of permanent total disability, the employee shall receive an award to continue until the employee's death in the amount of sixty-six and two-thirds per cent of the employee's average weekly wage * * *"). The statute uses the mandatory "shall."

Pursuant to R.C. 4123.64 and internal policies of the BWC and IC, Plaintiffs in this action received Lump Sum Advancements (LSA). Lump Sum Advancements are issued to injured workers (or dependents in case of death benefits) where a need for financial relief or rehabilitation is demonstrated.

Plaintiffs repaid the amount of their lump sum advancement. (Complaint ¶ 18.) They also paid in full the interest on the amount. (Id.) But the BWC continues to make deductions from their statutorily mandated PTD disability award. (Id.) The BWC originally claimed it was taking the excess payments based on a written LSA application. Then, discovery was conducted and a number of embarrassing internal memos were obtained from sources in and out of the agency. Depositions were also conducted, demanding under oath the truth about the "overcollections." In that discovery and in written memos, the BWC admitted that it makes "excess" deductions pursuant to an internal policy of "over-collecting" on some lump sum advancements, to offset losses on other advances due to the death of the claimant before the advance is repaid. After prodding and being confronted by the memos, the BWC witnesses reluctantly admitted under oath in deposition that the BWC is requiring Measles to repay the lump sum advances of other claimants. That practice is not a breach of contract. It is illegal per this Court. LSA Claimants may not be required to pay for LSA benefits provided to others. *State ex rel. Shively v. Murphy Motor Freight* (1994), 71 Ohio St.3d 114, 116.

In sum, because their LSA has been completely repaid, these ongoing deductions unlawfully deprive plaintiffs of the PTD compensation to which they are statutorily entitled pursuant to R.C. 4123.58, in violation of that statute, in violation of *Shively,* and in violation of O.A.C. 4123-3-37(B)(3), which provides that deductions may only continue until the LSA is repaid with interest.

> If the administrator determines that the lump sum application is advisable, the administrator shall determine the amount of the biweekly rate reduction and the terms of such reduction. The administrator shall fix a specific time for the reduction of the biweekly rate of compensation to repay the lump sum advancement. The administrator may include interest in the repayment schedule. (Emphasis added.)

DISCUSSION OF LAW

PLAINTIFFS' PROPOSITION OF LAW

> Where a party seeks disgorgement of funds illegally withheld from them by agencies of the State in violation of their statutory rights, the action is for equitable relief and the courts of common pleas have subject matter jurisdiction.

PART ONE. The General Assembly created the Ohio Court of Claims in 1975 by enacting the Court of Claims Act, codified in Chapter 2743 of the Ohio Revised Code. The Court of Claims was created to have exclusive jurisdiction over claims against the state, "with the narrow exception that specific types of suits that the state subjected itself [to] prior to 1975 could be tried elsewhere as if the defendant was a private party." *Ohio Hosp. Ass'n v. Ohio Dep't of Human Services* (1991), 62 Ohio St.3d 97, 103. Accordingly, "any type of action against the state which the courts entertained prior to the Act may still be maintained outside the Court of Claims." *Racing Guild of Ohio, Local 304 v. Ohio State Racing Com.* (1986), 28 Ohio St.3d 317, 319. Thus, a civil claim against the state that requests only equitable relief may be heard in the courts of common pleas. *Cristino,* 118 Ohio St.3d at 151, 2008 Ohio 2013 ¶ 1; *Santos v. Ohio Bureau of Workers' Comp.* (2004), 101 Ohio St.3d 74, 76, 2004 Ohio 28 at ¶9. In fact, the Court of Claims cannot exercise jurisdiction over equitable actions. *Parsons v. Ohio Bureau of Workers' Comp.*, 10th Dist. No. 03AP-772, 2004 Ohio 4552, ¶ 12.

Specifically, R.C. 2743.03(A)(2) provides in pertinent part that "[t]his division does not affect, and shall not be construed as affecting, the original jurisdiction of another court of this

state to hear and determine a civil action in which the sole relief that the claimant seeks against the state is a declaratory judgment, injunctive relief, or other equitable relief."

Mr. Measles requested three types of relief: (1) a declaration that defendants' practices are unlawful and violate the permanent total disability payment obligations of R.C. 4123.58; (2) an injunction, enjoining and restraining Defendants from this conduct; and (3) a disgorgement order for defendants to release all monies they are improperly withholding. It is not disputed that his claims for declaratory judgment and injunctive relief fall within the ambit of R.C. 2743.03(A)(2). The question is whether his claim for disgorgement under the circumstances of this case constitutes "other equitable relief."

Disgorgement is an equitable remedy. See, *Harris v. Physicians Mut. Ins. Co.* (N.D. Ohio, 2003), 240 F. Supp.2d 715, 723 ("[d]isgorgement is an equitable remedy designed to force a defendant to give up the amount equal to the defendant's unjust enrichment"); *United States SEC v. Maxxon, Inc.* (10th Cir., 2006), 465 F.3d 1174, 1179 ("[d]isgorgement is by nature an equitable remedy * * * "); *Laparade v. Ivanova* (9th Cir., 2004), 116 Fed. Appx. 100, 104 ("[d]isgorgement is an equitable remedy * * * ").

The BWC argues, however, that disgorgement is just another way of saying restitution, which this court in *Cristino* found not to be an equitable remedy.

Although disgorgement and restitution are sometimes used imprecisely and interchangeably, in fact there is a distinction between the two remedies. As the court in *SEC v. Huffman* (5th Cir., 1993), 996 F.2d 800, 802 explained

> Despite some casual references in our caselaw to the contrary, disgorgement is not precisely restitution. Disgorgement wrests ill-gotten gains from the hands of a wrongdoer. It is an equitable remedy meant to prevent the wrongdoer from enriching himself by his wrongs. Disgorgement does not aim to compensate the victims of the wrongful acts, as restitution does. (Citations omitted.)

See also, *SEC v. Drexel Burnham Lambert* (S.D.N.Y., 1997), 956 F. Supp. 503, 507 ("[w]hile some cases have equated the two remedies, they are distinct in that restitution aims to make the damaged persons whole, while disgorgement aims to deprive the wrongdoer of ill-gotten gains" (citations omitted)); *SEC v. Sunbelt Dev. Corp.* (W.D. La., Mar. 1, 2006), Civil Action No. 97-1387, 2006 U.S. Dist. LEXIS 11959, * 6-7 ("[disgorgement] is an equitable remedy meant to prevent the wrongdoer from enriching himself by his wrongs. Disgorgement, unlike restitution, does not aim to compensate the victims of the wrongful acts").

The BWC asserts that Measles cannot meet this element. It argues that "he must have held those funds previously" and they must be money "the defendant allegedly took from plaintiff." BWC Merit's Brief, p. 11. In short, the BWC says that equitable claims of disgorgement for which there is common pleas court jurisdiction only include funds wrongfully collected by the government, not fund wrongfully withheld. *Id.*

In *Santos v. Ohio Bureau of Workers' Comp.* (2004), 101 Ohio St.3d 74, 78 this court ordered that

> A suit that seeks the return of specific funds wrongfully collected or held by the state is brought in equity. Thus, a court of common pleas may properly exercise jurisdiction over the matter as provided in R.C. 2743.03(A)(2).

The BWC is correct that the facts of *Santos* do not track the present lawsuit to the extent that Santos sued for money ***collected*** by the state contrary to law while the present suit is for money wrongfully withheld by the state contrary to law.

But the origin of the rule that equitable relief (not a remedy at law) is sought by a suit against the government for wrongful withholding of monies rightfully belonging to another under statute, regulation, constitution, or caselaw is older than *Santos*.

In *Ohio Hosp. Assn. vs. Ohio Dept. of Human Services* (1991), 62 Ohio St.3d at 103-104, this court addressed the proper forum for claims made against a state agency for money claimed to be wrongfully withheld by the state, in violation of law.

The Ohio Hospital Association brought suit against the Department of Human Services. The OHA received payments from the Department for Medicaid or Medicare services. It was entitled to them by written contract and statute. The subject of the suit was the refusal by the Department to pay monies which the OHA claimed to be due. The department cited an administrative regulation as authority for the reduced payment. The OHA challenged the practice and the regulation as contrary to law. The OHA argued that the Ohio Department of Human Services had adopted administrative regulations that allowed funds to be withheld in violation of their rights. The trial court agreed and ultimately this Supreme Court affirmed the finding that the practice was unlawful. *Id,* 62 Ohio St.3d at 102, 579 N.E.2d at 699. The State nevertheless then argued that it was "immune from liability for money damages that result from an invalid administrative rule." *Id,* 62 Ohio St.3d at 103, 579 N.E.2d at 699. However, this court disagreed and held that the suit was not for damages at law, but for relief in equity.

> "The order to reimburse Medicaid providers for the amounts unlawfully withheld is not an award of money damages, but equitable relief. * * * The reimbursement of monies withheld pursuant to an invalid administrative rule is equitable relief, not money damages, and is consequently not barred by sovereign immunity."

Id. at 103-104. See also, *Henley Health Care v. Ohio Bureau of Workers' Compensation* (Fra. Cty App. 1995), 1995 Ohio App. LEXIS 715.

Henley Health Care provided supplies to workers' compensation claimants. Henley received reimbursement of those monies pursuant to statute. A suit was brought when the BWC adopted a policy under an administrative rule which withheld certain amounts of money from Henley and other providers.

The court discussed and rejected the jurisdictional challenge by the BWC :

> "[A]ppellant's cause of action is one for equitable relief. Under *Ohio Hosp. Assn.*, Appellant's request for reimbursement of money withheld pursuant to alleged invalid rules is equitable in nature and not a request for money damages. If the rules are invalid and the $233,893.40 was withheld pursuant to these "rules," then Appellant would be entitled to the specific performance of reimbursement of that sum. This court * * * is holding that * * * Appellant requests equitable relief and therefore the Common Pleas Court has jurisdiction."

The use of labels in these cases by either side is not helpful or dispositive. *Cristino* did not hold that claims for restitution are always legal and never equitable. *Cristino* noted that "restitution can be either a legal or an equitable remedy." *Cristino*, 118 Ohio St.3d at 152, 2008 Ohio 2013 ¶ 7.

An important aspect of these decisions is the nature of the funds sought. The cases distinguish between monies sought as damages under contract, compared to monies claimed owed based on a statutory payment duty or constitutional entitlement. In *Ohio Hospital Ass'n,* Justice Craig Wright discussed this for a unanimous court at 101-102, 105:

> "This court has applied *Wilder* to a suit challenging ODHS's decision to reduce the ceiling for administrative and general services cost reimbursement from $ 12.55 to $ 10.80. *Ohio Academy of Nursing Homes, Inc. v. Barry (1990), 56 Ohio St.3d 120, 564 N.E.2d 686.* In *Barry*, we allowed Medicaid providers to sue in the court of common pleas for injunctive relief or a declaratory judgment under *Section 1983, Title 42, U.S.Code.* We also recognized that Medicaid providers have a legitimate property interest in the reimbursement rate. Today's decision is a natural extension of that case." Ohio Hosp Assn, supra.
>
> "'* * * Damages are given to the plaintiff to *substitute* for a suffered loss, whereas specific remedies "are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled." D. Dobbs, *Handbook on the Law of Remedies* 135 (1973). Thus, while in many instances an award of money is an award of damages, "[o]ccasionally a money award is also a specie remedy." *Id.* * * *

Justice Wright discussed the lead U.S. Supreme Court decision which emphasized the difference between a suit for funds due under a contract (as we recently saw with *Cristino*), compared to one for funds which a statute allegedly entitles the claimant:

> "'In the present case, Maryland is seeking funds to which a statute allegedly entitles it, rather than money in compensation for the losses, whatever they may be, that Maryland will suffer or has suffered by virtue of the withholding of those funds. If the program in this case involved in-kind benefits this would be altogether evident. The fact that in the present case it is money rather than in-kind benefits that pass from the federal government to the states (and then, in the form of services, to program beneficiaries) cannot transform the nature of the relief sought -- specific relief, not relief in the form of damages. * * *'" (Citation omitted; emphasis *sic.*) *Bowen, supra, 487 U.S. at 895, 108 S.Ct. at 2732-2733, 101 L.Ed.2d at 764-765.*
>
> "We find this distinction applicable to this suit."

Ohio Hosp Assn, at 105.

The dispositive question therefore to whether claims are equitable or legal is the basis for the claim and the nature of the underlying remedy sought. "In order to determine whether a claim for restitution requests legal or equitable relief, we look to the basis for the plaintiff's claim and the nature of the underlying remedies sought." *Id.*

Citing *Great-West Life & Annuity Ins. Co. v. Knudson* (2002), 534 U.S. 204 *Cristino* discussed the difference between suits at law, and those in equity. It described equitable restitution thus: "an equitable restitution claim was one in which 'money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession.'" *Cristino,* 118 Ohio St.3d at 152-153, 2008 Ohio 2013 ¶ 8. In contrast, *Cristino* described a legal restitution thus: "a legal restitution claim was a claim in which the plaintiff 'could not assert title or right to possession of particular property, but in which nevertheless he might be able to show just grounds for recovering money to pay for some benefit the defendant had received from him.'" *Id.*

As *Cristino* noted, *Great-West Life & Annuity* drew the distinction once again between claims based on contract and those based on a statutory right. *Cristino* noted that "this court has also distinguished between statutory and contractual entitlement to past due funds." *Cristino*, 118 Ohio St.3d at 153, 2008 Ohio 2013 ¶ 11. *Cristino* concluded that Mr. Cristino was not seeking to enforce his statutory right to PTD but rather to recover the amount he felt was proper under his contract with the Bureau. *Cristino*, 118 Ohio St.3d at 154, 2008 Ohio 2013 ¶ 14.

Santos also relied on *Great-West Life & Annuity*. *Santos* involved a claim for money in the hands of the BWC allegedly in violation of *Holeton v. Crouse Cartage Co.* (2001), 92 Ohio St.3d 115, 2001 Ohio 109. The BWC had certain funds accounted from claimants which it claimed to be 'recovered subrogation.' Mr. Santos filed suit to force the BWC to release those monies in the government's possession to him and other claimants as their rightful owners.

Citing *Great-West,* this court in *Santos* explained that "for restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession." *Santos*, 101 Ohio St.3d at 77; 2004 Ohio 28 ¶ 13. *Santos* noted and followed prior caselaw which held jurisdiction to exist where monies never came into the possession of the plaintiff and rather were being withheld by the state in claimed violation of a statute, rule, or case. "This court has employed similar reasoning to hold that equitable restitution may include the recovery of funds wrongfully held by another," citing *Ohio Hosp. Ass'n v. Ohio Dep't of Human Services*, (1991), 62 Ohio St.3d 97. *Id.* ¶ 14. *Ohio Hosp. Ass'n* noted at 62 Ohio St.3d 105 that "[t]he reimbursement of monies withheld pursuant to an invalid administrative rule is equitable relief, not money damages, and is consequently not barred by sovereign immunity. *Santos* discussed the issue of unjust enrichment of the government at 101 Ohio St.3d 78 that

> The action seeking restitution by Santos and his fellow class members is not a civil suit for money damages but rather an action to correct the unjust enrichment of the BWC.

In that case, in *Ohio Hospital Ass'n*, in *Henley Health Care*, and in the present matter, the government was withholding monies claimed to be the property of citizens, in a manner asserted to violate a statute, court decision, or administrative rule.

The foregoing case law identifies the following elements for a claim in equity. An equitable claim may seek to recover funds or specific property. The funds must be one directly attributable to the challenged action. They must be in the defendant's possession. Finally, they must have been wrongly collected from the plaintiff in violation of law, or must be wrongfully withheld from him in violation of law, so that they "belong in good conscience to the plaintiff."

The BWC is correct that Measles "had no statutory right to a lump-sum payment under the permissive language of R.C. 4123.64 [the LSA statute]." BWC Merit's Brief at 7. The BWC is also correct that Measles has a ***statutory*** right to PTD. R.C. 4123.58. *Id.* at 2-3. That illustrates an important difference from the claim in *Cristino*.

Measles has no claim under a contract for money, as did Cristino. Measles sues under R.C. 4123.58 for disgorgement of funds withheld from him pursuant to a claimed illegal practice. The illegal conduct he asserts is violation of R.C. 4123.54, violation of *Shively*, and violation of the Ohio Administrative Code.[2] Mr. Cristino said he had a contract with the BWC which it allegedly breached by paying him too little. Cristino had no right to PTD payments while

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[2] See also, *Keller v. Dailey* (1997), 124 Ohio App.3d 298, 303 ("[t]he reimbursement of monies withheld pursuant to an invalid administrative rule is equitable relief, not money damages, and is consequently not barred by sovereign immunity").

Measles is receiving PTD payments and sues over the amount due under the PTD statute. Measles is having monies deducted by Defendant from payments mandated by statute, R.C. 4123.58, and he demands his payment be reinstated to the amount required by the statute. As described in Cristino, plaintiff Measles "seeks a reinstatement of the benefits accorded to him by statute." He seeks specific and particular funds that are "clearly traced" to the deductions defendants are making from his PTD benefits—funds which have been wrongly collected or withheld and belong in good conscience to the plaintiff. Those are equitable claims.

In summary, the plaintiffs in *Cristino* relinquished their statutory rights to PTD in exchange for a single lump sum payment. *Cristino,* 118 Ohio St.3d at 154, 2008 Ohio 2013 ¶ 14. They sued for breach of that agreement only. Having no statutory rights, this court noted that "Cristino claims entitlement to the "actual present value" of his permanent total disability claim pursuant to his agreement with the Bureau." *Cristino*, 118 Ohio St.3d at 155, 2008 Ohio 2013 ¶ 16. *Cristino* explained that

> Cristino's restitution claim does not challenge the validity of his agreement with the Bureau; he does not seek a reinstatement of the benefits accorded to him by statute. On the contrary, Cristino requested the amount he believed was proper under the agreement. His claim for restitution is therefore not a claim to enforce his statutory right.

In contrast, Measles challenges the deductions of his statutory award. R.C. 4123.58 provides that "[i]n cases of permanent total disability, the employee shall receive an award to continue until the employee's death in the amount of sixty-six and two-thirds per cent of the employee's average weekly wage * * *." Measles seeks reinstatement of the benefits accorded to him by statute. He seeks disgorgement of funds withheld from him contrary to R.C. 4123.58. This is a claim in equity and the court of appeals was correct in that holding.

PART TWO. The challenge presented by this lawsuit in the Complaint is not confined to asserting that the government's activities violate R.C. 4123.58 and O.A.C. 4123-3-37(B)(3).

Equally important (and perhaps more so), Plaintiffs claim that the government's conduct violates *State ex rel. Shively v. Murphy Motor Freight* (1994), 71 Ohio St.3d 114, 116. A lawsuit for monies based on violation of a Supreme Court order is equitable. See, *Santos* (equity suit for disgorgement of money held by the BWC in violation of the ruling in *Holeton v. Crouse Cartage Co.*, 92 Ohio St.3d 115, 2001 Ohio 109, 748 N.E.2d 1111).

The record in the present case indicates that the sole reason the government continues to take money from these Plaintiffs until death is not to repay the lump sum advancement and interest which they received. It is to offset monies the government was unable to collect from other persons who died prematurely before they were able to repay their lump sum advancement plus interest. Plaintiffs in the present case assert that this violates the prohibition clearly set forth by the Ohio Supreme Court in *Shively*.

George Shively was killed in the course of his employment, leaving a widow and two children. The Industrial Commission issued a PTD award in the fixed sum of $298 per week, apportioned between the widow and the two children. The children retained counsel and incurred attorney fees. The children subsequently requested a lump sum advancement of $5000 to pay those attorney fees. The agency authorized the LSA and thereafter reduced the payment to each child by $3 per check to recoup the LSA.

After a period of time, however, the children reached majority and did not continue education beyond that point. Therefore, their monthly benefits checks stopped. Of course, the recoupment by the agency of the $5000 of lump sum advancements stopped, too.

The mother requested a reapportionment of the $298 per week to her, in total, with no reduction. The agency disagreed, insisting that a reduction of the mother's benefit was necessary so that the agency could recoup the unreimbursed LSA to other persons:

> The commission defends its apportionment by arguing that the $30 per week per child reduction had been insufficient to pay off the $5000 advancement by the time the step-children lost their benefit eligibility. Continued reduced benefits were necessary, therefore, to insure that the obligation was repaid. *Id.* at 116.

If this sounds familiar, it is. It is the precise argument which the BWC made to the lower courts in the present case to explain and justify its actions.

Specifically, in *Shively*, the Industrial Commission admitted that it was taking money from the check of one claimant, in order to recoup LSA repayments which would not be made by some *other* claimant. Defendants in the present case admit that is what they are doing to Mr. and Mrs. Measles, Mrs. Pocaro, and all the class:

> 7 Q. Subsidize, that's a good word. And the workers
> 8 that continue on past their life expectancy, they
> 9 then subsidize the ones who died before their life
> 10 expectancy in order to make the fund equal?
> 11 A. We're talking about the total PTD benefit. The
> 12 ones that die before their life expectancy,
> 13 subsidizes the ones that die that exceed their life
> 14 expectancy. The ones that exceed their life
> 15 expectancy no longer have their rate restored.
> 16 They're subsidizing the ones that died earlier for
> 17 the lump-sum advancement.

Deposition of John A. Papadopoulos, Underwriter at 51. See, also, testimony of BWC Chief of Customer Services of the BWC, Tina L. Kielmeyer:

> 13 Q. And Mr. Papadopoulos in this memo explains the
> 14 design or methodology on why a worker's check was
> 15 deducted permanently even after the worker had
> 16 already repaid their lump-sum advancements; do you
> 17 see paragraph four?
> 18 A. Yes.
> 19 Q. What he is saying is that "the current [pre-2004]
> 20 methodology was designed to offset the negative
> 21 impact against the fund caused by those claims in
> 22 which the injured worker dies prematurely; therefore,
> 23 the BWC cannot recoup the overpayment of the lump-sum
> 24 advancement amount. Those occurrences that
> 25 negatively impact the fund are offset by the injured

> workers who live beyond their life expectancy;
> whereas the BWC recovers more than the lump-sum
> advancement." Do you see that?
> A. Yes.
> Q. Is there anything in that paragraph that he
> wrote that you disagree with either factually or
> legally?
> MR. HOLMAN: Objection.
> THE WITNESS: As I stated
> previously, I don't have information that that
> was the design. I think John is accurately
> describing the situation of an individual who
> may die prematurely versus one who exceeded
> their life expectancy.

Kielmeyer depo, p. 74-76.

As the BWC author of this system admitted, the BWC was not collecting a lawful amount from the class. The BWC was "overcollecting." Overcollection is not a breach of contract claim, as in *Cristino,* but a disgorgement claim, as in *Santos*:

> When an applicant lives longer than their estimated life expectancy, an over collection of their Lump Sum Advancement is created. Over collection then continues until death or until the claim is settled.

December 1, 2004 Memo of Scott D. Drake, Claims Technical Specialist, BWC Policy Author, Plaintiffs' Exhibit 16.

Significantly, the BWC itself notes that overcharging these workers presents a claim in equity:

> The problem if we stay with the current method of allowing an LSA to stay in effect past life expectancy is one of equity. If a customer is lucky enough to life (*sic*) past his/her life expectancy, he/she is penalized by being required to continue re-paying an advancement, after that advancement has been repaid. As I've shown in the past, living long past life expectancy coupled with a particularly large rate reduction equates to thousands over collected by BWC.

> I believe both of these problems can be handled by increasing the interest rate for every LSA enough to offset the impact. We would still collect the same amount in rate reductions that we're currently collecting using the never ending loan but the burden of uncollected advancements would be distributed evenly among all customers. Thus, we'd still protect the fund, not harm a segment of our customers by over collecting and lessen the liability associated with the aforementioned issues.

December 1, 2004 Memo, Plaintiffs' Exhibit 16.

That conduct is what this Court in *Shively* found unlawful and inequitable. In Shively, this court first described the practice being attacked as unlawful—the same practice being attacked as unlawful by Mr. Measles,

> The Commission does not challenge appellant's assertion that she is effectively being forced to pay another party's attorney fees.

Id. at 116. Finding that practice to be improper, the Supreme Court allowed the writ and ordered the agency to discontinue reductions, from the mother's check, which was being taken to repay the debt of another. *Id.* at 116.

Notably, the Industrial Commission argued that the mother should have been able to foresee that there would be a deficit in recovering lump sum advancements, and since there was such a short-fall, the agency could make it up by taking from others. The BWC made the exact same argument to the court below in the present matter—our class members should know that there would be others who die early, and should therefore expect to shoulder the debt of those others. However, the unanimous Supreme Court found that argument to be untenable:

> The Commission's claim that appellant was at fault for failing to notify ... the Commission that the step-children's recoupment off-set was too low is untenable. It was not appellant's responsibility to do so, nor was she even in a position to know of the potential short-fall.

Id. at 116.

To recap, the BWC is allowed to reapportion payments to collect the whole LSA, and interest. The BWC, however, may not reapportion in order to collect, from one person, the obligations of another.

> The commission defends its apportionment by arguing that the $30 per week per child reduction had been insufficient to pay off the $5000 advancement by the time the step-children lost their benefit eligibility. Continued reduced benefits were necessary, therefore, to insure that the obligation was repaid.
>
> ...
>
> ***The commission does not challenge appellant's assertion that she is effectively being forced to pay for another party's attorney fees.
>
> ...
>
> The commission has broad discretion in apportionment matters. However, there is nothing to suggest that reapportionment at the reduced rather than the full rate is either just or equitable to appellant.
>
> Accordingly, the judgment of the court of appeals [for the defendant] is reversed and the writ is allowed.

71 Ohio St.3d at 116.

PART THREE. It is expected that the BWC will wait until its reply brief to argue *Funtash* and *Shively* because doing so gives Plaintiff, as appellee, no chance to respond. For that reason, those points are covered now based on the arguments the BWC already made to the courts below.. *State ex rel. Funtash v. Indus. Comm.* (1951) 154 Ohio St. 497; *State ex rel. Shively v. Murphy Motor Freight* (1994) 71 Ohio St. 3d 114.

The case relied upon below by the BWC was *State ex rel Funtash v. Industrial Commission*, 154 Ohio St. 497, decided in 1951. Mr. Funtash was rendered permanently and totally disabled and began receiving PTD payments of $15 per week. *Id.* at 498. Shortly after that, he requested an LSA of $8000 to pay a mortage indebtedness on his home. The request was granted, and his weekly compensation payments were reduced each week by $7.30.

After approximately 20 years, Mr. Funtash filed suit against the agency, arguing that since he had repaid the entire $8000, he was entitled to stop the deductions from his benefits check and receive the whole PTD benefits amount each week thereafter. Notable, Funtash's approach would not have given the agency any interest on the money which Funtash held for approximately 20 years.[3] The supreme court therefore refused the writ of mandamus. The supreme court in *Funtash* did not address the question presented in our case.

Over 50 years later, the question of LSA's and PTD payments again came before this Court and this time it did have the opportunity to address the question now presented. *State, ex rel. Shively v. Murphy Motor Freight* (1994) 71 Ohio St. 3d 114.

Contrary to the BWC's argument to the lower courts, and its' attempt to distinguish *Shively,* the plaintiff there did receive a fixed award with ongoing payments from the bureau:

> Decedent George L Shively, was killed on August 30, 1982 in the course of and arising from his employment with Murphy Motor Freight ("Murphy"), a formerly self-insured employer that is now bankrupt. He was survived by his widow, appellant Margaret Shively, and two children from an earlier marriage. His survivors filed an application for death benefits on his behalf with appellee, Industrial commission of Ohio.
>
> The Commission on March 9, 1983 awarded the death benefit maximum of $298 per week, assigning $218 per week to appellant and $40 per week to each child.
>
> *Shively* at 114. (emphasis added)

Mrs. Shively then found herself in the exact same position as plaintiffs, Mr. and Mrs. Measles and Mrs. Pocaro. Shively found her weekly installment reduced, not for something she had received, but based on an LSA paid to another which ***that person*** did not repay.

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[3] The statutory interest rate in 1951 was 6%, which is $9,600 on $8,000 over a 20-year period, non compounded. As outlined in the *Funtash* opinion, a deduction of $7.30 from Funtash's weekly check for 20 years only yielded $7,592.

Shively's reduction was not because she owed any money but to recoup the amount the government could not recover from step daughters, as noted by this court:

> The commission denied appellant's request for adjustment, writing,
>
> These fees were paid on behalf of the minor children of the decedent on September 15, 1983. These are not the children of the widow claimant, but the reduction must continue against the decedent's claim. *Shively* at 114.
>
> The commission defends it apportionment by arguing that the $3 per week per child reduction had been insufficient to pay off the $5000 advancement by the time the step-children lost their benefit eligibility. Continued reduced benefits, therefore, were necessary to insure that the obligation was repaid. *Shively* at 116.

The advancement made to them had nothing to do with her. She did not request it; she did not benefit from it; but she was finding herself paying it back.

The BWC should not try to cloud this fact in its upcoming Reply Brief to this Court, since it admitted it in its' Appellee brief, explaining, "The Shively controversy centered upon whether the Bureau could properly recover an advancement against benefits from a party who neither applied for the advancement nor benefited from it." BWC Appellee Brief at 14.

The BWC is correct, and that is exactly what happened to the plaintiffs in the instant case.

Like Mrs. Shively, they were in parity with the government on their claims. They had paid back their LSA in full. For Mr. Measles who received $14,000, he had paid it back in 2001.[4]

[4] Powell Measles' LSA was $14,563.40. He received the money on August 31, 1987. Thereafter $31.87 was taken from each PTD payment. At the interest rate of 7% his total balance reached zero in June 2001. Despite this, it is now 9 years later and the government has taken more than $19,000 extra to pay the debts of others.

Like Mrs. Shively, they were nevertheless saddled with paying back an LSA from someone else, when they had neither requested nor benefited by it. Compare the quotes from this Honorable court describing the situation in Shively, with the deposition admissions and memos by the BWC describing the situation in the instant Measles case:

> SHIVELY:
> The commission defends its apportionment by arguing that the $30 per week per child reduction had been insufficient to pay of the $5000 advancement by the time the step-children lost their benefit eligibility. Continued reduced benefits were necessary, therefore, to insure that the obligation was repaid.

Shively at 116.

> MEASLES:
> 7 Q. Subsidize, that's a good word. And the worker
> 8 that continue on past their life expectancy, then
> 9 then subsidize the ones who died before their life
> 10 expectancy in order to make the fund equal?
> 11 A. We're talking about the total PTD benefit.
> 12 The ones that die before their life expectancy,
> 13 subsidizes the ones that die that exceed their life
> 14 expectancy. The ones that exceed their life
> 15 expectancy no longer have their rate restored.
> 16 They're subsidizing the ones that died earlier for
> 17 the lump-sum advancement.

Papadopolous depo, p. 51.

This conduct was both inequitable as well as contrary to law for Shively as well as Measles:

> MEASLES:
> The problem if we stay with the current method of allowing an LSA to stay in effect past life expectancy is one of equity. If a customer is lucky enough to life (*sic*) past his/her life expectancy, he/she is penalized by being required to continue re-paying an advancement, after that advancement has been repaid. As I've shown in the past, living long past life expectancy coupled with a particularly large rate reduction equates to thousands over collected by BWC.

> I believe both of these problems can be handled by increasing the interest rate for every LSA enough to offset the impact. We would still collect the same amount in rate reductions that we're currently collecting using the never ending loan but the burden of uncollected advancements would be distributed evenly among all customers. Thus, we'd still protect the fund, not harm a segment of our customers by over collecting and lessen the liability associated with the aforementioned issues.

December 1, 2004 BWC Memo, Plaintiffs' Exhibit 16.

> SHIVELY:
> The commission defends its apportionment by arguing that the $30 per week per child reduction had been insufficient to pay off the $5000 advancement by the time the step-children lost their benefit eligibility. Continued reduced benefits were necessary, therefore, to insure that the obligation was repaid.
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> The commission has broad discretion in apportionment matters. However, there is nothing to suggest that reapportionment at the reduced rather than the full rate is either just or equitable to appellant.
>
> Accordingly, the judgment of the court of appeals [for the defendant] is reversed and the writ is allowed.

71 Ohio St.3d at 116.

Only taking what an individual has received, plus interest, is supported by newly enacted O.A.C. 4123-3-37(B)(3) which directs that the BWC administrator "shall fix a specific time for the reduction of the biweekly rate of compensation to repay the lump sum advancement." The deductions made to repay a lump sum advancement may only continue until the advancement is repaid.

The BWC argues that O.A.C. 4123-3-37 is inapplicable since it was adopted after the LSAs at issue in the present lawsuit were made. The specific applicability of O.A.C. 4123-3-37

to this case is a matter for the merits and not before this Court when considering whether dismissal is appropriate. However, that does not mean that O.A.C. 4123-3-37 is irrelevant to this inquiry. In arguing that O.A.C. 4123-3-37 has no bearing, the Bureau focuses on cases involving prospective and retrospective application. However, O.A.C. 4123-3-37 represents the Bureau's first formal interpretation of the applicable statutes, an interpretation which supports plaintiffs' position. It is fundamental that "an administrative rule cannot add or subtract from a legislative enactment" *State ex rel. Cordray v. Midway Motor Sales, Inc.* (June 10, 2009), 2009 Ohio 2610, ¶ 23, and that "[a] rule that is contrary to statute is invalid. *Hoover Universal, Inc. v. Limbach* (1991), 61 Ohio St. 3d 563, 569. See also *State ex rel. Funtash v. Indus. Comm.* (1951), 154 Ohio St. 497, Syl. 1 ("[t]he Industrial Commission of Ohio is an administrative agency possessing only such powers and duties as are conferred on it by the provisions of the state Constitution and statutes"). It is the plaintiffs' underlying statutory rights that are at issue here, and O.A.C. 4123-3-37 supports plaintiffs' position as to the illegality of the bureau's conduct under those statutes, and the illegality of its former practice of collecting more than owed plus interest, and doing so to pay the debts of others.

CONCLUSION

While the BWC is right that there is "no statutory right to a lump sum payment," there is clearly a statutory right to receive PTD payments, for life, in the amount of 66 2/3% of average weekly wage. See R.C. 4123.58.

The class members here do not sue because their LSA was the wrong amount. They sue because they are entitled to a reinstatement of the full benefits afforded by the PTD statute. R.C. 4123.58. This court in *Cristino* noted the distinction:

> Cristino's restitution claim does not challenge the validity of his agreement with the bureau; he does not seek a reinstatement of the benefits afforded to him by the statute. On the contrary, Cristino requested the amount he believed was proper under the agreement. His claim for restitution is therefore not a claim to enforce his statutory rights.

Cristino at ¶14.

The class members in this suit are very elderly people. They paid back their debt years ago. Instead of now enjoying the full amount provided to them by law per R.C. 4123.58 for their injury, their payments are being reduced every check. Powell Measles paid his debt over nine (9) years ago but the BWC is still taking his money. Mrs. Measles was not so lucky. She recently died, after the government pursued her and took money from her for years after she paid them back in full.

This situation is terribly wrong. It is inequitable and contrary to law. It must stop. The trial court has jurisdiction and the court of appeals did not err in so holding. [5]

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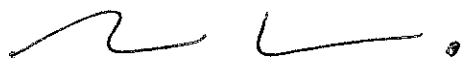
[5] The depositions of the following persons with the BWC were taken and as used in the briefing were filed in this matter. References in the present Appellee Merit's Brief are from those depositions: John A. Papadopoulos – Underwriter; Tina L. Kielmeyer – Chief of Customer Services; William E. Darlage – Actuarial Section Director; Bobbee F. Criner – Technical Claims Specialist; Kim Robinson – Director of Claims Policy Department; Scott D. Drake – Claims Technical Specialist; Debra Pancoast – Claims Technical Specialist.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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