In the Supreme Court of Ohio

STATE OF OHIO, ex rel. ANTHONY TANTARELLI	:	CASE NO. 2017-0922
Appellant,	:	
vs.	:	
DECAPUA ENTERPRISES, INC., et al.	:	On Appeal from the Franklin County Court of Appeals, Tenth Appellate District
Appellees.	:	Case No. 16AP-700

MERIT BRIEF OF APPELLEE, INDUSTRIAL COMMISSION OF OHIO

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INTRODUCTION

The Court of Appeals correctly held that the Industrial Commission of Ohio ("commission") did not abuse its discretion in its recalculation of the Appellant's, Anthony Tantarelli ("Tantarelli"), average weekly wage ("AWW"). Tantarelli's self-insured employer, Decapua Enterprises, Incorporated ("Decapua"), calculated Tantarelli's AWW based on Tantarelli's total wages during the fifty-two (52) week period prior to the date of his industrial injury. Tantarelli had filed multiple motions to recalculate his AWW in accordance with R.C. 4123.61. Tantarelli has not shown that special circumstances exist to abandon the standard method for calculating AWW.

STATEMENT OF THE CASE AND FACTS

Tantarelli was hired through Dawson Resources ("Dawson"), a temporary agency, and was sent to work for Decapua, on July 16, 2013. He was injured on August 12, 2013. (Amended Stipulation of Evidence at 45; "Am. S. __"). He filed a workers' compensation claim that has been allowed for conditions involving his left shoulder, neck, left wrist, and left hip.

On his initial application for his workers' compensation claim, Tantarelli listed his hourly rate of pay as $11.90. (Am. S. 45). Decapua calculated Tantarelli's AWW based solely on the wages earned in the few weeks of employment by dividing by 52 weeks, for an AWW of $22.26. (Am. S. 14).

On February 7, 2014, Tantarelli filed his first motion with the Ohio Bureau of Workers' Compensation ("BWC") for a recalculation of his AWW to $416.58. (Am. S. 1). He attached an affidavit that simply averred that, from August 12, 2012, through his date of hire at the temporary agency in July 2013, he had been "unemployed but actively seeking employment."

(Am. S. 3). He provided no other evidence of other earnings, job search efforts, or the reason for his unemployment.

Dawson submitted a C-94-A Wage Statement ("C94A") that purported to showing his gross earnings, in the six- week time frame before his date of injury, to be $1,249.74, plus $484.93for the seven days prior to the date of injury (not including any overtime). (Am. S. 4). A Dawson Tempworks printout, showing a week-by-week breakdown of wages for the week ending July 28, 2013, through the week ending August 18, 2013 (five days after the date of injury in this case), revealed that Tantarelli's total gross earnings for his total four-week span of employment was $1,350.80. (Am. S. 5).

A district hearing officer ("DHO") for the commission heard Tantarelli's motion to recalculate his AWW on April 29, 2014, and denied the motion. The DHO held:

> The Injured Worker's request to set the average weekly wage at $416.58 is denied. The District Hearing Officer finds that the Injured Worker has failed to submit sufficient credible evidence to exclude 49 weeks from the standard formula or support an alternative calculation. The Injured Worker could only identify three potential employers that he contacted during the alleged 49 week unemployment period and no historical wage information was submitted to the file.

(Am. S. 6).

Tantarelli appealed the DHO order, but submitted no further evidence. Following a hearing on October 14, 2014, a staff hearing officer ("SHO") for the commission held:

> The Injured Worker's request to set the average weekly wage at $416.58 is denied. The Staff Hearing Officer finds the Injured Worker has failed to establish the existence of special circumstances which would justify the use of an alternate calculation to the standard 52 week divisor used in determining an average weekly wage. Specifically, the Staff Hearing Officer finds the Injured Worker has failed to justify his request to exclude 49 weeks of unemployment between 8/12/2012 and approximately 7/21/2013, when the injured worker began working for the Employer of record. The Injured Worker testified he last worked regularly in 2008 when he was self employed as a tow truck operator. The Injured Worker's affidavit, signed 1/23/2014, avers that he was unemployed but actively

> seeking work prior to his employment with the named Employer but this assertion remains undocumented and substantially unsupported. For instance, the Injured Worker was only able to identify three potential employers he sought employment with. Furthermore, the Injured Worker testified that he did engage in some "miscellaneous" work in 2012 described by his testimony as buying cars and selling car parts and hauling items to scrap yards. The Injured Worker testified, however, that he failed to file a tax return nor has he supplied any documentation concerning these earnings to the Industrial Commission. Accordingly, the Staff Hearing Officer finds the Injured Worker has failed to establish the existence of "special circumstances" as provided for in Revised Code 4123.61 and therefore the Staff Hearing Officer declines to apply any alternative calculation other than the standard 52 week divisor to this claim.

(Am. S. 8-9).

Tantarelli appealed the SHO decision to the full commission without any new evidence. The commission refused further appeal. (Am. S. 10). The order became final.

Nothing more happened until January 29, 2016, when Tantarelli filed a second motion. This second motion requested both a change of physicians and a recalculation of his AWW under R.C. 4123.61. (Am. S. 12-13). While the motion alleged that the self-insured employer had set Tantarelli's AWW at $14.84 a week, the AWW was actually set at $22.26. The pay rate for permanent partial awards was 66 2/3 of the AWW or $14.84. (Am. S. 13). However, temporary total disability ("TTD") compensation would have been paid at the full amount, $22.26, since the $14.84 fell below the minimum statewide AWW for an injury that occurred in 2013. Tantarelli did not provide any specific evidence, documents, or other exhibits to justify his request to modify the AWW calculation.

On March 29, 2016, counsel for Tantarelli provided a letter indicating that they were "relying upon the records on file when Mr. Tantarelli was operating his own company." No such records were provided or "on file." The letter also cited *State ex rel. Clark v. Indus. Comm.*, 69 Ohio St.3d 563, 634 N.E.2d 1041 (1994). The only documentation provided by Tantarelli was a

2014 W-2 form and copies of 15 business checks payable to Tantarelli from K&K Towing & Recovery LLC, all dated *after* the date of Tantarelli's 2013 injury. (Am. S. 22-44).

After a hearing held on June 6, 2016, a DHO issued an order that in relevant part denied Tantarelli's request to re-set the AWW. The basis for the decision was that it was not supported by evidence. The DHO held:

> The District Hearing Officer finds that the Injured Worker has not presented new evidence to justify the resetting of his Average Weekly Wage in this claim. The District Hearing Officer finds that the Injured Worker has not presented evidence of special circumstances which would warrant an increase in the Injured Worker's Average Weekly Wage.

(Am. S. 15-16).

Tantarelli appealed that order. Following a hearing on July 14, 2016, the SHO issued a lengthy and detailed order that affirmed, in relevant part, the DHO decision to deny re-setting Tantarelli's AWW. The SHO order noted that, at hearing, Tantarelli requested that his AWW be set at $320.00 per week based on the minimum hourly rate of pay of $8.00 per hour multiplied by 40 hours a week. (Am. S. 17-18).

Tantarelli did not contest the amount of wages he had earned in the year prior to injury but, rather, claimed that he made more money several years earlier, while self-employed. (Am. S. 18). Tantarelli also argued that, in 2014 and 2015, the two years following his injury, he earned more money. *Id.*

The SHO found no sufficient documentation to warrant the application of special circumstances to apply an alternative method of calculating the AWW based on Tantarelli's prior and/or subsequent earning capacity, as it relates to his date of injury. *Id.* Tantarelli failed to file any wage information from when he owned his own business in 2002. *Id.* He also failed to file sufficient wage information for 2015. *Id.* Additionally, the SHO found that this issue was

previously adjudicated. In an October 17, 2014 commission order, it was determined that there were no special circumstances to merit the use of an alternative method of calculating Tantarelli's AWW. (Am. S. 8-9, 10-11). Therefore, the SHO concluded that the issue of resetting Tantarelli's AWW due to special circumstances was *res judicata*. (Am. S. 19).

The commission refused Tantarelli's further appeal by order mailed on August 9, 2016. (Am. S. 20-21). Tantarelli then filed his complaint in the Tenth District Court of Appeals seeking a writ of mandamus to compel the commission to re-set his AWW. The magistrate for the court recommended that the requested writ be denied. Tantarelli filed objections to the magistrate's decision.

The Court of Appeals adopted magistrate's findings of fact, conclusions of law and decision of the magistrate as its own. The court agreed that Tantarelli had failed to meet his burden to trigger the application of R.C. 4123.61 special circumstances exception and therefore could not show that the low AWW rate was substantially unjust. (Decision, p. 3.)

LAW AND ARGUMENT

A. Standard of Review

For the court to issue a writ of mandamus, Tantarelli must demonstrate that he has a clear legal right to the relief sought and that the commission had a clear legal duty to provide such relief. *State ex rel. Pressley v. Indus. Comm.*, 11 Ohio St.2d 141, 228 N.E.2d 631 (1967). Tantarelli must show that the commission acted contrary to law or otherwise abused its discretion by issuing an order that is not supported by any evidence in the administrative record. *State ex rel. Elliott v. Indus. Comm.*, 26 Ohio St.3d 76, 78-79, 497 N.E.2d 70 (1986). An abuse of discretion is "not merely an error in judgment but a perversity of will, passion, prejudice, partiality, or moral delinquency, to be found only where there is no evidence upon which the

Commission could have based its decision." *State ex rel. Commercial Lovelace Motor Freight v. Lancaster*, 22 Ohio St.3d 191, 193, 489 N.E.2d 288 (1986).

The commission is the finder of fact and evaluator of credibility. The determination of disputed facts is within the final jurisdiction of the commission. *State ex rel. Allerton v. Indus. Comm.*, 69 Ohio St.2d 396, 433 N.E.2d 159 (1982). It is undisputed that "questions of credibility and the weight to be given evidence are clearly within the Commission's discretionary powers of fact-finding." *State ex rel. Teece v. Indus. Comm*., 68 Ohio St.2d 165, 167, 169, 429 N.E.2d 433, 436 (1981).

B. Appellee's Industrial Commission of Ohio Proposition of Law #1:

The Commission is not compelled to use an alternate method to calculate the average weekly wage based on the mere allegation of "special circumstances" under R.C. 4123.61 without sufficient proof.

R.C. 4123.61 provides that the AWW is calculated as follows:

> *** the claimant's or decedent's average weekly wage for the year preceding the injury or the date the disability due to the occupational disease begins is the average weekly wage upon which compensation shall be based. In ascertaining the average weekly wage for the year previous to the injury, or the date the disability due to the occupational disease begins *any period of unemployment due to sickness, industrial depression, strike, lockout, or other cause beyond the employee's control* shall be eliminated.
>
> In cases where there are *special circumstances* under which the average weekly wage cannot justly be determined by applying this section, the administrator of workers' compensation, in determining the average weekly wage in such cases, shall use such method as will enable him to do substantial justice to the claimant.

(Emphasis added.) Thus, the standard formula for establishing AWW is to divide a claimant's earnings in the year preceding the date of injury by 52 weeks. *State ex rel. Clark v. Indus. Comm*., 69 Ohio St.3d 563, 565, 643 N.E.2d 1014, 1016 (1994); *State ex rel. McDulin v. Indus. Comm.*, 89 Ohio St.3d 390, 391, 732 N.E.2d 367 (2000). This "standard AWW computation ***

is to be used in all but the most exceptional cases." *State ex rel. Cawthorn v. Indus. Comm.*, 78 Ohio St.3d 112, 114, 676 N.E.2d 886, 888 (1997).

The standard AWW computation is to divide the preceding year's total earnings by 52 weeks except "in two situations—unemployment beyond control or special circumstances." *State ex rel. Wireman v. Indus. Comm.*, 49 Ohio St.3d 286, 289, 551 N.E.2d 1265, 1268 (1990). Under R.C. 4123.61, any period of unemployment due to sickness, industrial depression, strike, lockout, or other cause beyond the employee's control are excluded from calculation of the AWW. However, the mere existence of weeks of unemployment does not mean that all such weeks are excludable. The claimant must establish that such unemployment was beyond his control, as defined by the statute.

Likewise, "R.C. 4123.61 speaks to 'special circumstances' which may permit recalculation of a benefit amount." *State ex rel. Kidwell v. Indus. Comm.*, 10th Dist. Franklin No. 02AP940, 2003-Ohio-4509, ¶ 22. The court confirmed that special circumstances only apply to "'unusual or exceptional cases,' and that 'two general considerations dominate: (1) that the AWW must do substantial justice; and (2) the calculation should not result in a windfall.'" *Id*., quoting *State ex rel. Major v. Indus. Comm.*, 10th Dist. Franklin No. 01AP-833, 2002-Ohio-2224, at ¶ 16.

Where the standard calculation is not substantially unjust, special circumstances cannot be invoked. *Cawthorn*, 78 Ohio St.3d at 115. By definition, special circumstances mean uncommon situations, such as recent college graduates who are working part-time or in temporary positions while seeking permanent work. *See, State ex rel. Valley Pontiac Co. v. Indus. Comm.*, 71 Ohio App.3d 388, 393-394, 594 N.E.2d 52 (10th Dist.1991). R.C. 4123.61 was not enacted to allow injured workers the opportunity to have their AWW increased simply

by excluding weeks for which they did not receive wages or earnings from the calculation. There must be something more uncommon or special about the reason for the low or lack of earnings. *State ex rel. Stevens v. Indus. Comm.*, 110 Ohio St.3d 32, 2006-Ohio-3456, 850 N.E.2d 55.

Tantarelli has failed to provide sufficient, credible evidence to justify his request that the commission apply the special circumstances exception to calculate his AWW. In his first motion seeking to re-set his AWW, Tantarelli provided a brief affidavit that simply acknowledged that he had only been employed for three weeks prior to the date of his injury. (Am. S. 3). He provided no explanation of the reason for his 49 weeks of unemployment. He did not allege the lack of earnings or employment was because of sickness, industrial depression, strike, lockout, or other cause beyond his control, nor did he allege that it was due to any special circumstance or unusual situation. There is no evidence in the record of any explanation for his weeks of unemployment.

Likewise, Tantarelli alleged an on-going job search during the 49 week time frame, but he failed to provide a list of potential employers, job listings, copies of applications, registration with the Ohio Department of Job and Family Services for job search activities, or any other job search diaries/journals to support or give credibility to the averments in his affidavit. Tantarelli was given ample opportunity to submit additional or new evidence at the commission hearings on his 2014 motion, but he did not. As the trier of fact and evaluator of credibility and weight of the evidence, the commission was well within its discretion to reject Tantarelli's affidavit and deny his request to recalculate his AWW.

Thereafter, Tantarelli failed to seek any other remedy or seek any other appeals. The commission's order became final as to the calculation of his AWW. He had ample opportunity

between the two 2014 commission hearings to gather documentation to support his prior earning ability. He failed to meet his burden of proof. The commission evaluated his testimony and found it insufficient to justify his extraordinary request to increase his AWW from $22.26 to $416.58.

In 2016, when Tantarelli filed his second motion to have his AWW recalculated under R.C.4123.61, he simply argued that Decapua's setting of the AWW was substantially unjust. In essence it was the same arguments as he had made when he argued his 2014 motion. Tantarelli proffered testimony about his prior earnings and self-employment prior to the 2013 date of injury, but his testimony related to earnings outside of the year preceding the date of injury. Even so, he offered no documentation to support any prior earnings or self-employment for those period(s).

The only new evidence presented by Tantarelli was proof of his earnings in 2014, which was for a period well after his 2013 date of injury. While that evidence shows that Tantarelli worked for a more substantial period of time after his date of injury, he provided no reason or explanation as to why he was unemployed during the year immediately preceding his injury date..

Tantarelli has failed in his burden to show special circumstances. He was born in 1954 and at the time of his injury was approximately 59 years old. He had owned and operated his own business in years past. Unlike the claimant in *Valley Pontiac Co., (71 Ohio App. 3d at 388, 393-394)* who was a recent college graduate, working part-time a bookstore until he could find a permanent job, Tantarelli was not a new graduate working part-time while he looked for a permanent position. He has not alleged that he was sick and unable to work. He has not alleged he was taking care of family members. He has not alleged he was unable to work due to strike,

lockout, or economic depression. He has not alleged his unemployment was due to some other circumstance beyond his control. Without such evidence, the commission may not provide him with a windfall and set his AWW at over 20 times the amount of the standard calculation. That is not substantial justice. That is unjust enrichment.

Furthermore, the fact situation here is not identical to the facts in *Clark*, *supra*. However, the only similarity is that both Tantarelli and Clark only worked for three weeks in the year prior to their dates of injury. Where Clark provided credible affidavits and explanations of why she had been out of work for 49 weeks in the year prior to the date of injury, Tantarelli failed to do so. His affidavit was vague. His testimony at the hearings before the commission contradicted the affidavit he filed. He provided no details as to his job search or reasons for his unemployment. His documentation, about his earning abilities either pre- or post- the 52-week period of time before his date of injury, failed to explain why he only had 3 weeks of earnings in the relevant time frame. Unlike the situation in *Clark*, Tantarelli failed to provide credible evidence to support his allegation of special circumstance that would justify a recalculation of his AWW under R.C.4123.61.

C. Appellee's, Industrial Commission of Ohio, Proposition of Law #2:

Res judicata will bar a second request to recalculate average weekly wage under R.C. 4123.61 where the commission has adjudicated such request in a previous final order.

The commission alternatively found that Tantarelli's second motion for recalculation of his AWW was additionally barred from re-litigation. The doctrine of res judicata operates to prevent re-litigation of a point of law or fact that was at issue in a former action between the same parties and was ruled upon by a court of competent jurisdiction. *State ex rel. Kroger v.*

Indus. Comm., 80 Ohio St.3d 649, 651, 687 N.E.2d 768 (1988). In that case, this court held that the doctrine of res judicata also applies to administrative proceedings before the commission. *Id.*

Here, the commission addressed Tantarelli's request to set his AWW at $416.58 by the series of hearings in 2014. After the commission's order in 2014, Tantarelli took no further appeal and the order became final. Tantarelli's second motion in 2016 was the same as his 2014 motion, i.e., seeking to have his AWW recalculated at $416.58. He again argued that special circumstance warranted a different calculation. This second 2016 motion could not result in a different outcome as the request had already been decided in 2014.

Tantarelli fails to even address or contest the finding of res judicata, nor even the finding that he had not provided the commission with any substantial evidence upon which to base a "special circumstances" calculation. Rather, Tantarelli only focuses on the dollar amount, and not the reasons for the commission setting his AWW at $22.26.

While Tantarelli's AWW is indeed low, the commission's decision is supported by the evidence presented to, and relied upon by, the commission. The commission cannot ignore Tantarelli's failure to carry his burden of proof to have his AWW recalculated to a higher amount. The lack of credible evidence to support Tantarelli's request required the commission to deny his request.

D. Appellee's Industrial Commission of Ohio, Proposition of Law #3:

R.C. 4123.95 does not absolve the claimant of the requirement to present credible evidence that special circumstances exist to justify a higher average weekly wage calculation.

"The liberal construction provision of R.C. 4123.95 does not necessarily equate with giving an individual claimant what he thinks is best in his particular situation." *Swallow v. Indus. Comm.*, 36 Ohio St.3d 55, 57, 521 N.E.2d 778 (1988). Even with liberal construction of

the workers' compensation statutes in favor of an injured worker, there must be evidence on which the commission can rely. Courts must give due deference to the commission "which has accumulated substantial expertise, and to which the legislature has delegated the responsibility of implementing the legislative command." *State ex rel. McLean v. Indus. Comm.*, 25 Ohio St.3d 90, 92, 495 N.E.2d 370 (1986). Here, the commission acted within its authority, under R.C. 4123.61, when it determined that Tantarelli failed to carry his burden to justify a special circumstances exception.

CONCLUSION

The Court of Appeals reached the correct conclusion. The commission explained why it applied the standard AWW calculation and why this case did not merit different treatment under R.C. 4123.61 or constitute a special circumstance. *State ex rel. Noll v. Indus. Comm.*, 57 Ohio St.3d 203, 567 N.E.2d 245 (1991) requires nothing more.

Res judicata also precludes the re-setting of the AWW by means of the filing second motion in 2016. Tantarelli failed to appeal the final decisions from the commission in 2014 as to the setting of his AWW due to special circumstances. As such he cannot ask for the same relief in the 2016 motion.

The commission did not abuse its discretion in denying a recalculation of Tantarelli's AWW. Accordingly the writ of mandamus was properly denied and Tantarelli's appeal to this Court must be denied as well.

Respectfully submitted,

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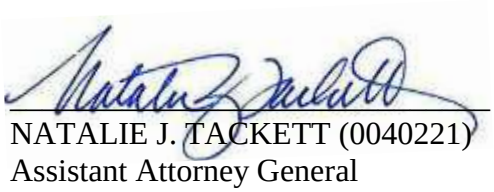

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on this 30th day of January, 2018, to:

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