

[Cite as *State ex rel. Best Buy Stores v. Hawkins*, 2004-Ohio-551.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Best Buy Stores,	:	
Relator,	:	No. 02AP-1329
v.	:	(REGULAR CALENDAR)
Rebecca G. Hawkins and Industrial Commission of Ohio,	:	
Respondents.	:	

D E C I S I O N

Rendered on February 5, 2004

Porter, Wright, Morris & Arthur, and Christopher C. Russell,
for relator.

Jim Petro, Attorney General, and Stephen D. Plymale, for
respondent Industrial Commission of Ohio.

Larrimer & Larrimer, and Darla Kaikis, for respondent
Rebecca G. Hawkins.

IN MANDAMUS
ON OBJECTION TO THE MAGISTRATE'S DECISION

SADLER, J.

{¶1} Relator, Best Buy Stores ("relator"), filed this original action seeking a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its order granting the motion of respondent, Rebecca G. Hawkins ("claimant"), for the payment of temporary total disability ("TTD") compensation beginning January 1, 2001.

{¶2} Pursuant to Civ.R. 53(C) and Loc.R. 12(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. (Attached as Appendix A.) In his decision, the magistrate determined that the commission did not abuse its discretion in finding that claimant did not receive remuneration for services to a local middle school beginning January 1, 2001, and that she was therefore not precluded from receiving TTD compensation.

{¶3} Relator timely filed an objection to this decision, and the commission has filed a memorandum in support. Relator's objection essentially restates the same arguments it made before the magistrate, and asks this court to follow the precedent set forth in *State ex rel. Greathouse v. Indus. Comm.* (Dec. 7, 1993), Franklin App. No. 92AP-1330, and *State ex rel. Schultz v. Indus. Comm.*, 96 Ohio St.3d 27, 2002-Ohio-3316.

{¶4} Claimant sustained an industrial injury in 1998 while working for relator as a shipper and handler in its distribution center. She was loading boxes of chairs each weighing 40 pounds when she was injured. In November 2000, a district hearing officer ("DHO") denied claimant's request for TTD compensation after learning that claimant had received a "stipend" as an athletic director and occasional coach for a local middle school

while she was also receiving TTD compensation. Relator and claimant each appealed the DHO's decision.

{¶5} In November 2001, the staff hearing officer ("SHO") found that claimant was ineligible to receive TTD compensation during any time in which she also received a "stipend" from the school, since even minimal remunerative employment precludes a claimant from receiving TTD compensation. The SHO also determined that, after December 2000, claimant no longer received a "stipend" for the services she provided to the school and that claimant was not precluded from receiving TTD compensation for her charitable activity at the school so long as she was not paid anything.

{¶6} In November 2000, claimant underwent her third surgical procedure, a spinal fusion, resulting from her workplace injury. The pain medication she was prescribed left her sleepy and incoherent, unable to answer phone calls from other athletic directors, unable to schedule games, and unable to drive to attend games. She could only attend games when she felt well enough to do so, and then only if her husband drove her. Claimant informed "the pastor of the church at which she was the athletic director that she was not performing all the duties associated with the director position and, therefore, was not entitled to receive the stipend the church had been paying her." (See magistrate's decision, *infra*, at ¶80.)

{¶7} Claimant then sought TTD compensation from January 1, 2001 forward. After the DHO and SHO granted claimant's request, relator sought and was granted a hearing before the full commission. Relator contends that claimant's request that the

school buy athletic uniforms for the students constitutes payment for her services, which would preclude her from receiving TTD compensation.

{¶8} On August 27, 2002, the commission affirmed the April 26, 2002 order of the SHO. In a written decision, the commission specifically noted claimant's testimony that she was no longer performing all of the duties she had previously performed as athletic director. The commission's decision referred to claimant's testimony that the pain medication she was prescribed after her November 2000 spinal fusion left her unable to schedule activities or attend games. The commission specifically found that there was no evidence claimant had any control over any school funds, and that the school was under no obligation to honor claimant's request to buy athletic uniforms. Thus, the commission determined that claimant was entitled to receive TTD compensation after December 2000 because the nature of her service to the school changed and because she did not receive wages or other remuneration for her activities.

{¶9} In *Greathouse*, supra, a claimant was receiving TTD compensation while he attempted to start his own business. The commission reviewed the claimant's tax records, an investigator's report on the claimant's activities, leases and insurance documents the claimant executed, and the claimant's own testimony. Based on the evidence before it, the commission concluded that the claimant was engaged in sustained remunerative employment and, therefore, was no longer entitled to receive TTD compensation.

{¶10} On appeal to this court, the claimant in *Greathouse* contended his activities at starting his business did not constitute remunerative employment because the business did not make a profit. This court affirmed the commission's decision that the claimant's activities constituted sustained remunerative employment because there was "some evidence" in the record to support it. We rejected the claimant's position, stating that the issue was whether he was engaged in sustained remunerative employment, not whether his business was making money.

{¶11} In *Schultz*, supra, a claimant who was receiving permanent total disability ("PTD") compensation also worked at her daughter's swimwear store. While at the store, the claimant paid the store's bills, scheduled its employees, consulted with suppliers, waited on customers, and stocked merchandise displays. The claimant acknowledged she performed these services at the store for 18 to 20 hours weekly for 15 years. Nonetheless, she characterized her efforts as "intermittent favors" and insisted she received no remuneration.

{¶12} Based on the evidence before it, the commission determined that the claimant was not entitled to continue to receive permanent total disability ("PTD") compensation because her efforts over the previous 15 years demonstrated the ability to perform sustained remunerative employment. This court and the Ohio Supreme Court affirmed the commission's decision, because there was "some evidence" in the record to support it, stating that a claimant who performs sustained remunerable activity without pay can perform the same activity for remuneration.

{¶13} We see no inconsistency between the magistrate's decision here and the holdings in *Greathouse* and *Schultz*, supra. Whether this claimant's activities at a local middle school constitute sustained remunerative employment, or work, is a determination that can only be made after consideration of all the relevant evidence. Though claimant was at one time paid for her services to the school, the commission heard evidence that after December 2000, she was no longer able to perform the duties for which she received the stipend because of the pain from her November 2000 spinal fusion. Here, the commission determined that this claimant was entitled to receive TTD compensation because her services to the school were not inconsistent with her workplace injury, she had not reached maximum medical improvement, and she was not receiving "wages or other remuneration for her activities as a coach and athletic director for St. Michael's Parish." (Magistrate's Decision, ¶80.)

{¶14} The commission is the sole evaluator of the weight and credibility of the evidence. *State ex rel. Moss v. Indus. Comm.* (1996), 75 Ohio St.3d 414, 417. Thus, an order that is supported by "some evidence" will be upheld, since the courts may not substitute their judgment for that of the commission. *State ex rel. Pass v. C.S.T. Extraction Co.* (1996), 74 Ohio St.3d 373, 376; *State ex rel. Burley v. Coil Packing, Inc.* (1987), 31 Ohio St.3d 18, at syllabus. Because there is "some evidence" to support its finding that claimant's activities after December 2000 did not constitute sustained remunerative employment, the commission did not abuse its discretion in so finding.

{¶15} Following an independent review of the record, we find the magistrate has properly determined the facts and applied the appropriate legal standards. We, therefore, overrule relator's objection and adopt the magistrate's decision as our own, including the findings of fact and conclusions of law therein. In accordance with the magistrate's decision, we deny relator's request for a writ of mandamus.

Objection overruled;
writ of mandamus denied.

BRYANT and PETREE, JJ., concur.

(APPENDIX A)

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Best Buy Stores,	:	
	:	
Relator,	:	
	:	
v.	:	No. 02AP-1329
	:	
Rebecca G. Hawkins and Industrial	:	(REGULAR CALENDAR)
Commission of Ohio,	:	
	:	
Respondents.	:	
	:	

MAGISTRATE'S DECISION

Rendered on July 29, 2003

Porter, Wright, Morris & Arthur LLP, and Christopher C. Russell, for relator.

Larrimer & Larrimer, and David H. Swanson, for respondent Rebecca G. Hawkins.

Jim Petro, Attorney General, and Stephen D. Plymale, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶16} In this original action, relator, Best Buy Stores, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order granting the motion of respondent Rebecca G. Hawkins ("claimant") for the payment of temporary total disability ("TTD") compensation beginning January 1, 2001, and to enter an order denying TTD compensation for the closed period January 1, 2001 through February 19, 2002.

Findings of Fact

{¶17} 1. On November 9, 1998, claimant sustained an industrial injury while employed at a warehouse operated by relator, a self-insured employer under Ohio's workers' compensation laws. Claimant's job required her to unload merchandise from trucks.

{¶18} 2. The industrial claim is allowed for: "lumbosacral sprain/strain; L4-L5 herniated disc; aggravation of pre-existing lumbar degenerative disc disease; herniated nucleus pulposis L5-S1; depressive disorder, not otherwise specified; chronic pain syndrome," and is assigned claim number 98-626825.

{¶19} 3. On July 27, 2000, relator moved to terminate TTD compensation on grounds that the industrial injury had reached maximum medical improvement ("MMI"). Thereafter, claimant moved for the recognition of additional claim allowances.

{¶20} 4. The motions were heard by a district hearing officer ("DHO") on November 9, 2000. The hearing was recorded and a transcript was produced. During the hearing, claimant testified that she had served as the athletic director for St. Michael's Middle School for the past six years and that she had also coached a track team and

basketball team for St. Michael's. She testified that she was paid \$700 every six months for the athletic director position.

{¶21} 5. Following the hearing, the DHO issued an order granting the additional claim allowances. The DHO also granted relator's motion to terminate TTD compensation but not on MMI grounds. In that regard, the DHO's order states:

{¶22} "Temporary Total Disability Compensation is not properly payable as claimant has continued to work part-time as a paid athletic director at St. Michael's School. The Supreme Court of Ohio in State ex rel. Blabac v. Industrial Commission (1999), 87 Ohio St.3d 113, indicated renumeration [sic] employment, even minimal amounts, prevents payment of Temporary Total Disability Compensation. Maximum Medical Improvement is not found, just a return to work which prevents payment of Temporary Total Disability Compensation, thus Employer Motion filed 09/08/2000 [sic], is GRANTED to the extent of this order." (Emphasis sic.)

{¶23} 6. Both relator and claimant administratively appealed the DHO's order of November 9, 2000. The administrative appeals were heard by a staff hearing officer ("SHO") on October 23, 2001. The hearing was recorded and a transcript was produced. Claimant and her husband Mr. Hawkins were sworn as witnesses. During the hearing, the following exchange was recorded between claimant, her husband and counsel for relator:

{¶24} "[Relator's counsel] And then with regard to the athletic director position there's part of the State file a statement that's dated November 27th, 2000 that you signed

as well as some other individuals from St. Michael's Parish and it indicates that you've been serving as an athletic director and coach at St. Michael's. That you're paid fifteen hundred and forty five dollars for the athletic director position, two hundred dollars for coaching track and three hundred dollars for basketball. And I understand that it's been characterized as a stipend but are those all accurate numbers and do they correlate to what you were doing? Fifteen forty five for being the athletic director, two hundred dollars for coaching track and three hundred for coaching basketball? Is that all accurate?

{¶25} "[Claimant:] Yeah.

{¶26} "[Relator's counsel:] And do you still hold all of those positions?

{¶27} "[Claimant:] I hold those positions but they are all voluntary now. I receive no money, no stipend.

{¶28} "[Relator's counsel:] When did that become effective?

{¶29} "[Claimant:] The end of last - - the last school year.

{¶30} "[Hearing Officer:] So would that be like May of 2001?

{¶31} "[Claimant:] Yeah. I told Father that - -

{¶32} "MR. HAWKINS: No, not 2001.

{¶33} "[Claimant:] 2000.

{¶34} "MR. HAWKINS: It would have been December of 2000.

{¶35} "[Hearing Officer:] Okay.

{¶36} "[Claimant:] I told Father Mike that I would continue these positions but that I would rather the money go back and be given to the kids and put in a fund that could be used for the kids and that's the way we go now. So it's an unpaid.

{¶37} "[Relator's counsel:] So just for clarity sake this document that I'm referring to which you have in front of you is dated November 27th, 2000. At that time you were still receiving these monetary figures. It would have been the next month, December of 2000, that you no longer received those funds. Is that accurate?

{¶38} "[Claimant:] Yes, it is."

{¶39} 7. Following the October 23, 2001 hearing, the SHO issued an order affirming the DHO's order of November 9, 2000. The SHO's order states in pertinent part:

{¶40} "The final remaining issue is claimant's entitlement to temporary total disability compensation. The evidence does not support the contention that claimant can return to work to the former position of employment at this time. She worked as a shipper and handler. The job was strenuous and physical in nature, requiring lifting boxes in weight up to 90 pounds. The evidence further does not support the contention that claimant has reached Maximum Medical Improvement. She has recently been referred by her neurosurgeon, Dr. Logan, to the Cleveland Clinic, where her case is being managed by Dr. Benzel, Director of Spinal Disorders and the Department of Neurosurgery. Dr. Benzel has referred her to participate in the 'failed back program' and also requested further diagnostic studies.

{¶41} "As such, the central question to be addressed is claimant's entitlement to temporary total disability compensation in light of her work as athletic director and coach for the St. Michael Middle School. The parties did not stipulate any specific periods of time on this issue since the bulk of the arguments were legal. Claimant's affidavit, dated 10/23/2001, reflects that she coached seventh grade basketball and cadet track in 1999. In the year 2000, claimant coached eighth grade boys basketball. Claimant also acted as athletic director for St. Michael's, pursuant to a statement, dated 11/27/2000, from the principal, Jeanne Atkins. Claimant was paid a 'stipend' for these services.

{¶42} "This Staff Hearing Officer specifically finds that temporary total disability compensation is not payable for the time that claimant was being paid money while performing duties as athletic director and coach pursuant to the case of State ex rel. Blabac v. Industrial Commission (1999), 87 Ohio St.3d 113. The transcript reveals that the claimant has not been paid monies by St. Michael's since December of 2000. This Staff Hearing Officer further finds that claimant is not precluded from entitlement to temporary total disability compensation by the Blabac doctrine for merely charitable activity at St. Michael's School, absent payment of money." (Emphasis sic.)

{¶43} 8. On December 5, 2001, another SHO mailed an order refusing relator's administrative appeal from the SHO's order of October 23, 2001.

{¶44} 9. On January 30, 2002, the commission itself mailed an order denying relator's request for reconsideration of the SHO's December 5, 2001 refusal order.

{¶45} 10. In the meantime, on December 14, 2001, claimant moved for TTD compensation beginning January 1, 2001.

{¶46} 11. Following a February 19, 2002 hearing that was apparently not recorded, a DHO issued an order granting claimant's motion. The DHO's order of February 19, 2002 states:

{¶47} "Temporary Total Disability Compensation is found to be properly payable from 01/01/2001 through 02/19/2002 and continuing upon submission of proof of disability.

{¶48} "* * *

{¶49} "Temporary Total Disability Compensation after 02/01/2002 is not at issue as injured worker 'resigned' her voluntary activities as of 01/31/2002. The employer argues against Temporary Total Disability Compensation from 01/01/2001 through 01/31/2002 indicating injured worker was 'working' within the meaning of statute and case law. This District Hearing Officer notes the Staff Hearing Officer order of 10/23/2001 supports payment of Temporary Total Disability Compensation when injured worker is volunteering and not in receipt of any payment for her duties. This District Hearing Officer notes the District Hearing Officer order of 11/09/2000 found injured worker was working as she received monies for her efforts.

{¶50} "As injured worker received no monies after 12/31/2000, this District Hearing Officer finds Blaybak and Greathouse are distinguishable. Injured worker is not

found to have been working as contemplated by Ohio statute and case law. Therefore, Temporary Total Disability Compensation is found properly payable."

{¶51} 12. Relator administratively appealed the February 19, 2002 DHO order. Following an April 26, 2002 hearing that apparently was not recorded, the SHO issued an order stating that the DHO's order was being modified. The SHO's order states:

{¶52} "The narrow issue before the Staff Hearing Officer is the period of temporary total disability compensation, from 01/01/2001 through 01/31/2002. * * *

{¶53} "** * *

{¶54} "The sole question is: Had Injured Worker returned to work as to preclude payment under 4123.56 of the Ohio Revised Code? On 10/23/2001, a hearing was held, and a transcript taken concerning Injured Worker's activities as an Athletic Director for St. Michael's Parish.

{¶55} "Per the transcript 10/23/2001, Injured Worker's affidavit and oral testimony at hearing, the Staff Hearing Officer finds that from 01/10/2001 through 10/31/2002:

{¶56} " – Injured Worker did not receive a salary for her activities;

{¶57} " – Injured Worker's impairments after her November 2000 spinal fusion were significant, see affidavits 04/26/2002, from Injured Worker's husband and son;

{¶58} " – that Injured Worker had no set hours;

{¶59} " – that Injured Worker did not control the funds that were previously paid as a stipend;

{¶60} " – that Injured Worker received no other benefit, tax deduction, etc., for her efforts.

{¶61} "The parties agree that there is no case law directly on point.

{¶62} "In application of 4123.95 of the Ohio Revised Code, the Staff Hearing Officer orders payment of temporary total disability compensation from 01/01/2001 to date."

{¶63} 13. On May 15, 2002, another SHO issued an order refusing relator's administrative appeal from the SHO's order of April 26, 2002.

{¶64} 14. On May 28, 2002, relator moved for reconsideration of the May 15, 2002 SHO's refusal order.

{¶65} 15. Relator's request for reconsideration was set for hearing before the three-member commission on August 27, 2002.

{¶66} 16. Following the August 27, 2002 hearing, the commission issued an order denying relator's request for reconsideration. The commission's August 27, 2002 order explains:

{¶67} "It is the finding of the Industrial Commission that it lacks the authority to invoke continuing jurisdiction in this claim, pursuant to Ohio Revised Code 4123.52 and State ex rel. Nicholls v. Indus. Comm. (1998), 81 Ohio St.3d 454.

{¶68} "The employer's request for reconsideration alleges that the order of the Staff Hearing Officer, dated 04/26/2002, contains a mistake of law. Specifically, the employer alleges that the Staff Hearing Officer erroneously paid temporary total disability

compensation to an injured worker who was engaging in activities for which she was paid wages, in violation of State ex rel. Blabac v. Indus. Comm. (1999), 87 Ohio St.3d 113. For the reasons that follow, the Industrial Commission determines that the injured worker was not working or earning wages during the period in which the Staff Hearing Officer paid temporary total disability compensation.

{¶69} "At hearing, the injured worker testified that, after December 2000, she did not perform all of the job duties of coach and athletic director which she had previously performed. The injured worker indicated that she was in extreme pain following her November 2000 spinal fusion and that the pain medication she was prescribed caused her to be sleepy and incoherent, rendering her unable to answer phone calls from other athletic directors, schedule games, or drive to attend games. The injured worker indicated that her husband and son answered any telephone calls that she received at her home and that her husband drove her to the few games that she felt well enough to attend. The injured worker further testified to informing the pastor of the church at which she was the athletic director that she was not performing all the duties associated with the director position and, therefore, was not entitled to receive the stipend the church had been paying her. The injured worker admitted that she asked the pastor to use the stipend to buy new uniforms for the players; however, there is no proof on file that the injured worker actually controlled the use of the church funds that were allocated for that stipend. In light of the injured worker's testimony, the Industrial Commission finds that the injured worker

did not receive wages or any other remuneration for her activities as a coach and athletic director of St. Michael's Parish.

{¶70} "Given the foregoing, the Industrial Commission concludes that the employer has not sustained its burden of proving that the Staff Hearing Officer order, dated 04/26/2002, contains a mistake of law of such character that remedial action would clearly follow. Therefore, the Industrial Commission orders that the Staff Hearing Officer order, dated 04/26/2002 remains in full force and effect, pursuant to State ex rel. Parma Community Gen. Hosp. v. Jankowski (2002), 95 Ohio St.3d 340."

{¶71} 17. On November 27, 2002, relator, Best Buy Stores, filed this mandamus action.

Conclusions of Law

{¶72} The issue is whether the commission abused its discretion in determining that claimant did not receive remuneration for the performance of her duties as athletic director after January 1, 2001.

{¶73} Finding no abuse of discretion, it is the magistrate's decision that this court deny relator's request for a writ of mandamus, as more fully explained below.

{¶74} In *State ex rel. Parma Community Gen. Hosp. v. Jankowski*, 95 Ohio St.3d 340, 2002-Ohio-2336, the court held that a claimant's activities in a workplace environment do not preclude TTD compensation if: (1) the claimant is not being remunerated, and (2) the duties are not medically inconsistent with her claim that she could not perform her former position of employment.

{¶75} Here, there is no claim by relator that claimant's duties as athletic director were inconsistent with her claim that she could not return to her former job as a warehouse worker. However, relator does claim that the claimant was being remunerated for her duties as athletic director even during the period beginning January 1, 2001.

{¶76} Here, relator contends that the claimant, in effect, received remuneration for the performance of her duties as athletic director after January 1, 2001, because she asked the pastor to use the stipend to buy new uniforms for the players. As relator puts it:

{¶77} "* * * [A]n injured worker who is offered payment for her activities but choses [sic] to give the payment to someone else is no different than the injured worker who actually accepts the payment. The 'bottom line' is that money - - no matter what you call it (i.e. a stipend, a salary, payment, etc.) - - is associated with the activity of Respondent Hawkins, and the fact that Respondent Hawkins simply elected [to] donate the money back to the school where she worked does not preclude Respondent Hawkins from a finding that she is not eligible for temporary total disability compensation." (Relator's reply brief at 8-9.)

{¶78} The commission, in effect, answered relator's remuneration argument in its August 27, 2002 order as follows:

{¶79} "* * * The injured worker further testified to informing the pastor of the church at which she was the athletic director that she was not performing all the duties associated with the director position and, therefore, was not entitled to receive the stipend the church had been paying her. The injured worker admitted that she asked the pastor to

use the stipend to buy new uniforms for the players; however, there is no proof on file that the injured worker actually controlled the use of the church funds that were allocated for that stipend. In light of the injured worker's testimony, the Industrial Commission finds that the injured worker did not receive wages or any other remuneration for her activities as a coach and athletic director of St. Michael's Parish."

{¶80} Apparently, the commission held that the test for determining remuneration is whether the claimant "actually controlled the use of the church funds that were allocated for that stipend." Here, relator does not challenge the test that the commission applied. Rather, relator seems to suggest that the commission's determination that claimant did not control the use of the funds is not supported by the record. The magistrate disagrees with relator's argument or suggestion.

{¶81} The commission's determination that claimant did not actually control the use of the church funds that were allocated for the stipend is supported by claimant's testimony of the October 23, 2001 hearing. To repeat claimant's testimony: "I told Father Mike that I would continue these positions but that I would rather the money go back and be given to the kids and put in a fund that could be used for the kids and that's the way we go now. So it's an unpaid."

{¶82} It is the commission that weighs the evidence. Ordinarily, this court does not reweigh the evidence for the commission in mandamus. Clearly, the commission could view claimant's understanding with Father Mike as a simple non-binding request that the stipend amount be given to the kids in light of the fact that she would no longer be

