



have standing to challenge BWC's settlement of a subrogation interest, and 2) recalculate the subrogation interest and credit the risk of Infinity accordingly.

{¶2} This court referred this matter to a magistrate pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate issued a decision, which includes findings of fact and conclusions of law and is appended to this decision, recommending that this court deny the requested writ. No objections were filed concerning the magistrate's findings of fact. With the exception of one clarification we make below, we adopt them as our own.

{¶3} In brief, Infinity is an employee staffing agency that employed Corry Shauberger ("claimant") and assigned him to work at Wayne-Dalton. While working at Wayne-Dalton, claimant suffered an injury that resulted in the amputation of one finger and one thumb. He filed a workers' compensation claim against Infinity. Infinity paid claimant's medical bills and began paying his temporary total disability compensation.

{¶4} Claimant applied for an additional award for Wayne-Dalton's alleged violation of a specific safety requirement (a "VSSR" award) and also filed a lawsuit against Wayne-Dalton, alleging an intentional tort. Although Infinity was aware of the lawsuit against Wayne-Dalton, Infinity did not intervene in the action or otherwise make a claim for indemnity. BWC did intervene in the action to protect its subrogation interest.

{¶5} In October 2005, the BWC Subrogation Unit learned of a scheduled mediation concerning claimant's lawsuit against Wayne-Dalton. Thereafter, the parties to the lawsuit entered into a global settlement, which settled both the intentional tort lawsuit and claimant's VSSR application; claimant received \$400,000. BWC settled its

subrogation interest for \$18,500. BWC informed Infinity of the subrogation settlement, that the \$18,500 would be credited to the claim's experience, and that actuarial adjustments would be made to Infinity's premiums accordingly.

{¶6} Infinity filed a formal protest with BWC, asking that the subrogation interest value be recalculated so that it would receive a larger credit against its chargeable experience for the injury and its workers' compensation premiums would, in turn, be reduced. The adjudicating committee of BWC denied Infinity's protest, concluding that Infinity did not have standing to challenge BWC's settlement of its subrogation interest for \$18,500. Following a hearing, the administrator's designee affirmed that decision.

{¶7} In this action, Infinity asks for a writ of mandamus, contending that BWC abused its discretion by 1) finding that it had no standing to challenge BWC's settlement of the subrogation interest, and 2) by settling its interest for \$18,500.

{¶8} As noted, the magistrate recommended that this court deny the requested writ. The magistrate concluded that, because Infinity is not a statutory subrogee under R.C. 4123.931, it has no standing to challenge BWC's settlement of the subrogation interest. The magistrate also concluded that Infinity had an adequate remedy at law, i.e., assertion of a claim against Wayne-Dalton in the intentional tort action.

{¶9} Infinity raises two objections to the magistrate's decision. First, Infinity contends that the magistrate erred by refusing to find that BWC abused its discretion when it settled its subrogation interest for \$18,500. In this objection, Infinity responds to the magistrate's conclusion that it had an adequate remedy because it could have asserted a claim for indemnity against Wayne-Dalton. The point of its request for

mandamus, Infinity argues, is to force BWC "to comply with the statute." As its complaint and objection indicate, however, Infinity's goal is to force BWC to recalculate the value of the claim in its favor and to "credit the risk of Infinity Resources accordingly." We agree with the magistrate that Infinity has or had another means of recovering the increase in its premiums.

{¶10} As BWC notes, the Supreme Court of Ohio has held that an employer whose employee has suffered injury and receives workers' compensation can recover damages for all resulting increases in workers' compensation premiums from a third party whose conduct caused the injury. *Ledex, Inc. v. Heatbath Corp.* (1984), 10 Ohio St.3d 126. The court has clarified that a state-fund employer that has incurred increased premiums due to an employee's injury can recover against a third party as long as the employer and the third party have a legal relationship based in contract or warranty. *Cincinnati Bell Tel. Co. v. Straley* (1988), 40 Ohio St.3d 372.

{¶11} Here, Infinity does not argue that it could not have sought recovery of the amount of the increased premiums from Wayne-Dalton or intervened in claimant's intentional tort action or otherwise participated in settlement of the claim, only that it should not have to. The extraordinary remedy of mandamus is only available, however, to complainants who lack an adequate remedy in the ordinary course of law. Because Infinity had or has an adequate remedy, it is not entitled to mandamus. Therefore, we overrule Infinity's first objection.

{¶12} Because we have determined that Infinity has an adequate remedy and, therefore, is not entitled to mandamus, we need not address Infinity's second objection, which contends that the magistrate erred by concluding that BWC did not abuse its

discretion by deciding that Infinity did not have standing to challenge BWC's settlement of the subrogation interest. The magistrate's discussion of the standing issue is not necessary for a resolution of this matter, and we decline to adopt that discussion.

{¶13} Following our independent review, we adopt the magistrate's findings of fact as our own, except that we delete the last sentence of Findings of Fact number 12 and insert the following: "Infinity argued that it should have received a larger credit against its chargeable experience for claimant's injury than the one received with the subrogation recovery credit based on BWC's \$18,500 settlement of the subrogation interest. A larger credit would lower its workers' compensation premiums." We adopt as our own the magistrate's conclusions of law concerning the adequacy of Infinity's alternative remedy. We decline to adopt the following portions of the magistrate's conclusions concerning the issue of standing, as they are unnecessary: paragraphs 38 and 39; the last sentence of paragraph 41; and the first part of the first sentence of paragraph 42, ending with "award." Accordingly, we deny the requested writ.

*Writ of mandamus denied.*

BRYANT, P.J., and DORRIAN, J., concur.

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IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

State ex rel. Infinity Resources, Inc.,	:	
	:	
Relator,	:	
	:	
v.	:	No. 09AP-760
	:	
State of Ohio Bureau of Workers' Compensation, and Marsha Ryan, Administrator, Bureau of Workers' Compensation,	:	(REGULAR CALENDAR)
	:	
	:	
Respondents.	:	
	:	

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MAGISTRATE'S DECISION

Rendered on February 16, 2010

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*Stefanski & Associates LLC, and Janice T. O'Halloran, for relator.*

*Richard Cordray, Attorney General, and Stephen D. Plymale, for respondent Marsha Ryan, Administrator, Ohio Bureau of Workers' Compensation.*

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IN MANDAMUS

{¶14} Relator, Infinity Resources, Inc. ("Infinity"), has filed this original action requesting that this court issue a writ of mandamus ordering respondent Ohio Bureau of Workers' Compensation ("BWC") to vacate the final order of the administrator's designee affirming the order of the BWC Adjudicating Committee finding that Infinity is not a subrogee having standing to object to the subrogation lien determined by the

BWC Subrogation Unit and ordering the BWC to recalculate the subrogation settlement and credit the risk of Infinity accordingly.

Findings of Fact:

{¶15} 1. Infinity operates as an employee staffing company. Infinity employed Corry Shauberger ("claimant") and assigned him to work at the Wayne-Dalton Corp. ("Wayne-Dalton"). On July 8, 2003, while working at Wayne-Dalton, claimant sustained a work-related injury and subsequently filed a workers' compensation claim against Infinity. Claimant's injury occurred while he was operating a saw and his workers' compensation claim against Infinity was allowed for the following conditions: "Amputation left second finger; amputation left thumb; fracture left third finger; fracture left fourth finger."

{¶16} 2. Claimant applied for an additional award for Wayne-Dalton's violation of a specific safety requirement ("VSSR") alleging the saw he was using on the day of his injury was not properly guarded. Claimant also filed an intentional tort claim against Wayne-Dalton in Ashtabula County, Ohio.

{¶17} 3. As claimant's employer, Infinity paid his medical bills and began paying him temporary total disability ("TTD") compensation.

{¶18} 4. According to the testimony of Infinity's president, Martin J. Farrell, Infinity was aware of the intentional tort action claimant filed against Wayne-Dalton. Infinity did not intervene in the intentional tort action despite the fact that Infinity was aware of the action and had an interest in protecting its rights and liabilities to recover damages for any potential increase in Infinity's workers' compensation premiums from a third-party (Wayne-Dalton) whose conduct caused the employee's (claimant) injuries.

{¶19} 5. When the BWC Subrogation Unit received notice of claimant's intentional tort claim, the BWC asserted its subrogation claim pursuant to R.C. 4123.931.

{¶20} 6. In October 2005, the BWC Subrogation Unit was notified of a scheduled mediation for global settlement of claimant's intentional tort case.

{¶21} 7. An e-mail indicates that the BWC State Fund had paid approximately \$141,000 and would continue to pay \$644 per week for another year for claimant's scheduled-loss award. The e-mail further provides as follows regarding the BWC's subrogation lien: "Settled for 400k but this includes vssr settlement. Also reviewed claim, our lien will likely decrease due to an overpayment due to bwc mistake in payment. Agreed to 18,500."

{¶22} 8. In November 2005, the BWC Subrogation Unit was informed that the parties had reached a \$400,000 global settlement of the intentional tort case. This also included an award in claimant's VSSR claim.

{¶23} 9. The BWC settled its subrogation claim for \$18,500.

{¶24} 10. In December 2005, the BWC informed Infinity that the BWC had collected \$18,500 on the statutory subrogation claim, that this amount would be credited to their claim's experience, and that actuarial adjustments would be made to Infinity's premiums.

{¶25} 11. Subsequently, Infinity made a public records request for the BWC's file concerning the subrogation of the claim.

{¶26} 12. After receiving the requested documentation, Infinity filed a formal protest requesting the BWC to recalculate the value of its subrogation lien under R.C.

4123.931 and to credit Infinity's premiums with the new hypothetical figure rather than the BWC's actual recovery. Infinity argued that the BWC was statutorily mandated to protect the BWC State Fund and to keep premiums of all employers, including Infinity, at the lowest level possible. Infinity argued that the BWC should have received more than \$18,500 in subrogation and, if the BWC had, then Infinity's premiums would not have been increased.

{¶27} 13. On December 18, 2008, Infinity's protest was heard before the adjudicating committee of the BWC. Ultimately, the committee denied Infinity's protest based upon the following:

The Committee finds that BWC properly determined the costs and reserve rate under the law. *Ohio Revised Code 4123.93 (B) defines "Statutory subrogee" means the administrator of workers' compensation, a self insuring employer, or an employer that contracts for the direct payment of medical services pursuant to division (L) of section 4121.44 of the Ohio Revised Code.* The Committee finds that the Laws and Rules have been properly applied by the Bureau. *Ohio Revised Code 4123.93.1* allows the Bureau to waive the formula listed in the statute in order to reach a settlement. The employer is not a "subrogee" which has standing to challenge the Bureau's settlement of its subrogation lien. Based on the testimony at the hearing and all materials submitted [to] the Adjudicating Committee **DENIES** the Employer's protest.

(Emphases sic.)

{¶28} 14. Infinity appealed to the administrator's designee.

{¶29} 15. Following a hearing on May 19, 2009, the administrator's designee affirmed the decision, findings, and rationale set forth in the order of the adjudicating committee and concluded that Infinity was not a subrogee and did not have standing to object to the BWC's settlement of the subrogation lien. Further, the administrator's

designee concluded that R.C. 4123.931 does not require the BWC to record the reasons for its decision to compromise the BWC's subrogation rights.

{¶30} 16. Thereafter, Infinity filed the instant mandamus action in this court arguing that the BWC abused its discretion in finding that it lacked standing to challenge the BWC's settlement of the subrogation lien and that the BWC abused its discretion by settling the subrogation claim for \$18,500.

Conclusions of Law:

{¶31} In order for this court to issue a writ of mandamus as a remedy from a determination of the commission, relator must show a clear legal right to the relief sought and that the commission has a clear legal duty to provide such relief. *State ex rel. Pressley v. Indus. Comm.* (1967), 11 Ohio St.2d 141. A clear legal right to a writ of mandamus exists where the relator shows that the commission abused its discretion by entering an order which is not supported by any evidence in the record. *State ex rel. Elliott v. Indus. Comm.* (1986), 26 Ohio St.3d 76. On the other hand, where the record contains some evidence to support the commission's findings, there has been no abuse of discretion and mandamus is not appropriate. *State ex rel. Lewis v. Diamond Foundry Co.* (1987), 29 Ohio St.3d 56. Furthermore, questions of credibility and the weight to be given evidence are clearly within the discretion of the commission as fact finder. *State ex rel. Teece v. Indus. Comm.* (1981), 68 Ohio St.2d 165.

{¶32} R.C. 4123.931 applies to subrogation rights and provides, in pertinent part:

(A) The payment of compensation or benefits \* \* \* creates a right of recovery in favor of a statutory subrogee against a third party, and the statutory subrogee is subrogated to the rights of a claimant against that third party. The net amount

recovered is subject to a statutory subrogee's right of recovery.

(B) If a claimant, statutory subrogee, and third party settle or attempt to settle a claimant's claim against a third party, the claimant shall receive an amount equal to the uncompensated damages divided by the sum of the subrogation interest plus the uncompensated damages, multiplied by the net amount recovered, and the statutory subrogee shall receive an amount equal to the subrogation interest divided by the sum of the subrogation interest plus the uncompensated damages, multiplied by the net amount recovered, except that the net amount recovered may instead be divided and paid on a more fair and reasonable basis that is agreed to by the claimant and statutory subrogee. \* \* \*

\* \* \*

(D) When a claimant's action against a third party proceeds to trial and damages are awarded, both of the following apply:

(1) The claimant shall receive an amount equal to the uncompensated damages divided by the sum of the subrogation interest plus the uncompensated damages, multiplied by the net amount recovered, and the statutory subrogee shall receive an amount equal to the subrogation interest divided by the sum of the subrogation interest plus the uncompensated damages, multiplied by the net amount recovered.

(2) The court in a nonjury action shall make findings of fact, and the jury in a jury action shall return a general verdict accompanied by answers to interrogatories that specify the following:

(a) The total amount of the compensatory damages;

(b) The portion of the compensatory damages specified pursuant to division (D)(2)(a) of this section that represents economic loss;

(c) The portion of the compensatory damages specified pursuant to division (D)(2)(a) of this section that represents noneconomic loss.

\* \* \*

(H) The right of subrogation under this chapter is automatic, regardless of whether a statutory subrogee is joined as a party in an action by a claimant against a third party. A statutory subrogee may assert its subrogation rights through correspondence with the claimant and the third party or their legal representatives. A statutory subrogee may institute and pursue legal proceedings against a third party either by itself or in conjunction with a claimant. If a statutory subrogee institutes legal proceedings against a third party, the statutory subrogee shall provide notice of that fact to the claimant. If the statutory subrogee joins the claimant as a necessary party, or if the claimant elects to participate in the proceedings as a party, the claimant may present the claimant's case first if the matter proceeds to trial. If a claimant disputes the validity or amount of an asserted subrogation interest, the claimant shall join the statutory subrogee as a necessary party to the action against the third party.

{¶33} It is undisputed that the purpose of subrogation is to prevent claimants from recovering twice.

R.C. 4123.93 provides the following relevant definitions:

(B) "Statutory subrogee" means the administrator of workers' compensation, a self-insuring employer, or an employer that contracts for the direct payment of medical services pursuant to division (L) of section 4121.44 of the Revised Code.

(C) "Third party" means an individual, private insurer, public or private entity, or public or private program that is or may be liable to make payments to a person without regard to any statutory duty contained in this chapter or Chapter 4121., 4127., or 4131. of the Revised Code.

(D) "Subrogation interest" includes past, present, and estimated future payments of compensation, medical benefits, rehabilitation costs, or death benefits, and any other costs or expenses paid to or on behalf of the claimant by the statutory subrogee pursuant to this chapter or Chapter 4121., 4127., or 4131. of the Revised Code.

(E) "Net amount recovered" means the amount of any award, settlement, compromise, or recovery by a claimant against a third party, minus the attorney's fees, costs, or other expenses incurred by the claimant in securing the award, settlement, compromise, or recovery. "Net amount recovered" does not include any punitive damages that may be awarded by a judge or jury.

(F) "Uncompensated damages" means the claimant's demonstrated or proven damages minus the statutory subrogee's subrogation interest.

{¶34} It is undisputed that Infinity is a state fund employer. As such, Infinity is not a "statutory subrogee" as above defined in R.C. 4123.93(B).

{¶35} In the present case, claimant's action against Wayne-Dalton did not proceed to trial. Therefore, R.C. 4123.931(D) does not apply. R.C. 4123.931(D) requires findings of fact concerning the total amount of compensatory damages, the portion of compensatory damages that represent the economic loss, and the portion of compensatory damages that represents noneconomic loss. There is no such requirement when, as here, the claim was settled before trial.

{¶36} Claimant and Wayne-Dalton entered into settlement negotiations and reached a global settlement of claimant's claim for \$400,000. Nothing in the record sets forth what portion of this award constituted punitive damages which are not included in the net amount recovered. There is no information regarding the amount of attorney fees, costs, or other expenses incurred by claimant in securing the settlement against Wayne-Dalton. Nothing in the record establishes what claimant's uncompensated damages were. Further, nothing in the record indicates that the BWC had knowledge of these amounts when the BWC agreed to accept \$18,500 as its statutory subrogee recovery.

{¶37} Because the above information is not included in the record and, by statute, is not required to be set forth, it is impossible to determine the "reasonableness" of the BWC's decision to settle the subrogation claim for \$18,500. As R.C. 4123.931(B) provides, the BWC may agree to settle the subrogation interest on a more fair and reasonable basis other than the formula set out in that section.

~~{¶38} As above stated, Infinity does not meet the definition of a statutory subrogee under the statute. As such, Infinity was not entitled to participate in the discussions regarding the settlement of the subrogation interest. Because Infinity is not a statutory subrogee, the magistrate finds that the BWC did not abuse its discretion in finding that Infinity lacked standing to challenge the BWC's determination.~~

~~{¶39} Part of Infinity's argument here is that the BWC is obligated to keep the premiums of all employers at the lowest rates possible. The BWC does not dispute this assertion. However, Infinity's argument does not give them standing to challenge the BWC's determination.~~

{¶40} As noted in the findings of fact, Infinity was aware that claimant had filed an application for an additional award for a VSSR and an intentional tort action against Wayne-Dalton. Infinity did not file an application to intervene in the intentional tort action pursuant to Civ.R. 24, which provides for intervention where the claims of the application are such that the disposition of the action may, as a practical manner, impair or impede the applicant's ability to protect its interest. Infinity could have sought to recover damages for the increased workers' compensation premiums from Wayne-Dalton, because it was Wayne-Dalton's conduct that caused claimant's injuries. *Ledex, Inc. v. Heatbath Corp.* (1984), 10 Ohio St.3d 126. Infinity had an adequate remedy at

law by way of intervening in claimant's intentional tort claim against Wayne-Dalton. Because Infinity failed to pursue its available remedies at law, Infinity is not entitled to a writ of mandamus here.

{¶41} Infinity is a staffing agency. One of the employers for whom Infinity makes its employees available is Wayne-Dalton. Activities at Wayne-Dalton involve the use of dangerous equipment, including saws. Wayne-Dalton did not become claimant's employer when Infinity made him available to Wayne-Dalton. As such, Infinity was responsible for the costs of any claim claimant may have filed involving injuries he sustained at Wayne-Dalton. Infinity knew that claims such as the one involved here could have an impact on its premiums and, yet, Infinity took no action to protect those interests. If Infinity would have intervened in the underlying intentional tort action, Infinity would have been able to participate in the global settlement negotiations and could have protected its interests. Infinity did not. ~~Because Infinity does not meet the definition of a statutory subrogee, Infinity lacks standing to challenge the BWC's decision to settle the BWC's subrogation rights in this case.~~

{¶42} ~~Because Infinity has not demonstrated that the BWC abused its discretion in determining that Infinity lacked standing to challenge the subrogation award, [I]t is this~~ magistrate's decision that this court should deny Infinity's request for a writ of mandamus.

/s/ Stephanie Bisca Brooks  
STEPHANIE BISCA BROOKS  
MAGISTRATE

**NOTICE TO THE PARTIES**

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).