

commission failed to sufficiently address the critical issue of whether some portion of the time that relator worked part-time at Toys R Us should be eliminated from the AWW calculation given the small number of hours he worked and his sworn statement that he sought full-time employment throughout this period of time. The magistrate determined that the commission's failure to sufficiently address this issue violated *State ex rel. Noll v. Indus. Comm.*, 57 Ohio St.3d 203 (1991). Therefore, the magistrate has recommended that we grant relator's request for a writ of mandamus, and order the commission to vacate its order of December 8, 2011 and, in a manner consistent with the magistrate's decision, enter a new order that determines relator's AWW.

{¶ 3} The commission has filed objections to the magistrate's decision. Essentially, the commission argues that the magistrate has impermissibly substituted his judgment for that of the commission. We disagree.

{¶ 4} The standard calculation to be used to determine AWW is to divide the total wages earned in the one year prior to the date of injury, by 52. *State ex rel. Clark v. Indus. Comm.*, 69 Ohio St.3d 563, 565 (1994). However, there are two exceptions to the standard calculation: (1) unemployment beyond the control of the claimant; and (2) the "special circumstances" provision. R.C. 4123.61.

{¶ 5} Here, the commission recognized that relator worked continuously and consistently during the 52 weeks prior to the date of injury and that, therefore, the unemployment exception to the standard calculation did not apply. However, it appears from the record that approximately 39 weeks of the 52 weeks preceding his injury, relator worked part-time at Toys R Us. For many of these 39 weeks, relator worked less than 20 hours. Relator also provided an affidavit in which he stated that he sought full-time employment during the period of time he was working part-time at Toys R Us. Therefore, the central issue before the commission was whether the special-circumstances provision applied to any portion of the time relator worked for Toys R Us. We recognize that part-time work is not per se a "special circumstance." *State ex rel. Wireman v. Indus. Comm.*, 49 Ohio St.3d 286, 289 (1990). However, if the facts justified the application of the special-circumstances exception, the applicable weeks would be excluded from the AWW calculation.

{¶ 6} In conclusory fashion, the staff hearing officer ("SHO") found that relator did not demonstrate special circumstances justifying a method of calculation other than the standard method. However, the SHO offered no analysis or explanation whatsoever for why it reached this conclusion. What little explanation the commission provided only addressed the relator's failure to present persuasive evidence regarding periods of unemployment due to circumstances beyond relator's control. There is no mention of relator's part-time employment with Toys R Us or his assertion that he sought full-time employment during this period of time. The commission presents no argument demonstrating why it believes its decision complies with *Noll* with respect to the central issue presented. Because we have no ability to assess whether the commission abused its discretion when it rejected the special-circumstances exception, we agree with the magistrate that the commission's decision violates *Noll*. Therefore, we overrule the commission's objections.

{¶ 7} Following an independent review of this matter, we find that the magistrate has properly determined the facts and applied the appropriate law. Therefore, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein. In accordance with the magistrate's decision, we grant relator's request for a writ of mandamus to the extent that we order the commission to vacate its SHO's order of December 8, 2011, and in a manner consistent with the magistrate's decision, enter a new order that determines relator's AWW.

Objections overruled; writ of mandamus granted.

BROWN and McCORMAC, JJ., concur.

McCORMAC, J., retired, of the Tenth Appellate District,
assigned to active duty under authority of Ohio Constitution,
Article IV, Section 6(C).

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Roger Mattscheck,	:	
	:	
Relator,	:	
	:	
v.	:	No. 12AP-255
	:	
Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
and Royalty Trucking, Inc.,	:	
	:	
Respondents.	:	
	:	

MAGISTRATE'S DECISION

Rendered on October 24, 2012

Laufman & Napolitano, LLC, and Gregory A. Napolitano,
for relator.

Michael DeWine, Attorney General, and Gerald H. Waterman, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶ 8} In this original action, relator, Roger Mattscheck, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order setting his average weekly wage ("AWW") at \$331.67, and to enter an order setting AWW at \$556.35.

Findings of Fact:

{¶ 9} 1. On January 31, 2011, relator sustained an industrial injury while employed full-time with respondent Royalty Trucking, Inc. ("Royalty Trucking"), a state-fund employer.

{¶ 10} 2. The industrial claim (No. 11-304755) is allowed for:

Traumatic brain injury; subdural and subarachnoid hemorrhage; skull fractures.

{¶ 11} 3. Relator had been employed with Royalty Trucking since approximately November 15, 2010. During this period of approximately 11 weeks, relator earned \$8,775.71 in gross wages at Royalty Trucking.

{¶ 12} 4. Prior to his employment at Royalty Trucking, relator was employed at Ohio Valley Goodwill Industries ("Goodwill") from October to November 2010. Relator earned \$1,678.05 in gross wages at Goodwill.

{¶ 13} 5. Prior to his employment at Goodwill, relator was employed part-time at Toys R Us. The Toys R Us W-2 statement for calendar year 2010 shows that relator earned \$6,996.84 during 2010.

{¶ 14} 6. The record contains a Toys R Us document recording the weekly number of hours worked and the gross wages earned for the weekly hours worked. The document covers the period October 2009 to January 2011. There were many weeks during the year prior to the date of injury during which relator worked under 20 hours at Toys R Us. There were a few weeks in which relator worked more than 30 hours at Toys R Us.

{¶ 15} 7. On June 15, 2011, the Ohio Bureau of Workers' Compensation ("bureau") mailed an order setting the full weekly wage ("FWW") at \$749.17. The order also sets AWW at \$239.57.

{¶ 16} 8. The June 15, 2011 bureau order states:

BWC may consider the full or average weekly wage based upon information currently on file or submission of additional information.

* * *

If the injured worker or the employer disagrees with this decision, either may file an appeal within 14 days of receipt of this order.

* * *

This decision becomes final if a written appeal is not received within 14 days of receiving this notice.

{¶ 17} 9. Apparently, relator did not administratively appeal the bureau's order mailed June 15, 2011p.

{¶ 18} 10. However, on September 13, 2011, relator moved that his AWW be set at \$556.35. On the motion (form C-86), relator, through counsel, stated:

The attached evidence demonstrates Claimant earned \$17,247.02 during the equivalent of 31 work weeks during the year prior to his injury. Claimant was unemployed and employed only part time during portions of this year due to causes beyond his control. Accordingly, special circumstances exist pursuant to O.R.C. 4123.61 to recalculate the AWW as the usual method leads to an unjust result.

{¶ 19} 11. In support of his motion, relator submitted wage information from Royalty Trucking, Goodwill, and Toys R Us. Relator also submitted his affidavit executed August 26, 2011.

{¶ 20} 12. Relator's affidavit avers:

[One] I was unemployed for most of 2009, after losing my job with Cowan Trucking following a motor vehicle accident in which I was not at fault.

[Two] From January 31, 2010 to December 26, 2010, I worked to the fullest extent to which I was able to find employment. I accepted a parttime position with ToysRUs [sic] and earned approximately only \$6,793.20 in gross wages during that period of time.

[Three] All throughout this period I sought full-time employment while receiving unemployment benefits as a result of my active search for a full-time position.

[Four] I was offered a full-time position with Ohio Valley Goodwill Industries in October 2010. From October 2010 to November of 2010, I earned \$1,678.05 in gross wages working for Goodwill.

[Five] I worked for Goodwill until I was offered a full-time position with Royalty Trucking (employer of record) in November 2010. I left my employment with Goodwill and began working for Royalty Trucking fulltime to earn more wages. From approximately November 15, 2010, to the date of my injury, January 31, 2011, I earned \$8,775.77 in gross wages working for Royalty.

{¶ 21} 13. By letter dated September 23, 2011, the bureau mailed a letter referring relator's September 13, 2011 motion to the commission for adjudication.

{¶ 22} 14. Following an October 21, 2011 hearing, a district hearing officer ("DHO") issued an order setting AWW at \$331.67. The DHO calculated AWW by dividing total wages of \$17,247.02 earned during the year prior to the date of injury by 52 weeks. ($\$17,247.02 \div 52 = \331.67 .)

{¶ 23} 15. Relator administratively appealed the DHO's order of October 21, 2011.

{¶ 24} 16. Following a December 8, 2011 hearing, a staff hearing officer ("SHO") issued an order stating that the SHO vacates the DHO's order and grants relator's motion to the extent of the order. The SHO's order explains:

The Staff Hearing Officer grants the Injured Worker's C-86 Motion filed 09/13/2011 to the extent of this order.

The Staff Hearing Officer sets the Injured Worker's average weekly wage in this claim at \$331.67.

The Staff Hearing Officer finds that the Injured Worker filed a motion on 09/13/2011 requesting that the average weekly wage be recalculated. The Staff Hearing Officer finds that the Injured Worker earned \$17,247.02 in the 52 weeks prior to the date of injury in this claim. Therefore, the Staff Hearing Officer sets the average weekly wage at \$331.67 based on the earnings of \$17,247.02 divided by 52 week period.

The Staff Hearing Officer finds that the Injured Worker's counsel argued at hearing that special circumstances exist in this claim therefore justifying the exclusion of 21 weeks from the standard average weekly wage calculation. Specifically, the Injured Worker's counsel argued that from January 2010 through December 2010 he worked only part time while searching for full time employment.

The Staff Hearing Officer finds that the Injured Worker has not demonstrated special circumstances; thus justifying a method of calculating the average weekly wage other than the standard method of calculation. The Staff Hearing Officer finds that the Injured Worker has presented evidence that shows he worked continuously and consistently in the 52 weeks prior to the date of injury in the claim. The Staff Hearing Officer finds that the Injured Worker has not presented any persuasive evidence regarding periods of unemployment as a result of circumstances beyond the Injured Worker's control. The Staff Hearing Officer finds that the Injured Worker's method of calculating the average weekly wage with the exclusion of 21 weeks from the standard calculation is not supported as the calculation is not an accurate or adequate method of calculating the average weekly wage. The Staff Hearing Officer further notes that the Injured Worker has not presented sufficient evidence regarding the Injured Worker's prior earnings to support that the standard 52 week calculation would not do substantial justice to the Injured Worker.

Therefore, the Staff Hearing Officer finds that the average weekly wage is set at \$331.67.

This order is based on the wage information from Toys R Us, Ohio Valley Goodwill Industries and Royalty Trucking each filed 09/13/2011, Ohio Revised Code 4123.61, the Injured Worker's affidavit filed 09/13/2011 and the Injured Worker's testimony at the hearing.

{¶ 25} 17. On January 6, 2011, another SHO mailed an order refusing relator's administrative appeal from the SHO's order of December 8, 2011.

{¶ 26} 18. Relator's calculation of 31 weeks of work during the year prior to the date of injury appears to contain an error. In a footnote to his brief, relator, through counsel, explains his calculation of AWW:

Figure of 31 weeks was calculated by taking the number of actual hours worked by Mr. Mattscheck at Toys R Us, and dividing them by forty hours, to create an equivalent of how many full forty-hour work weeks he was actually employed. This yielded approximately 21 full-time, forty-hour work weeks which, when added to the 10 weeks he actually worked full-time for Royalty and Goodwill, resulted in a divisor of 31 workweeks.

Relator's brief, at 13.

{¶ 27} Relator's affidavit states that he worked at Royalty Trucking approximately from November 15, 2010 to the date of injury, which is January 31, 2011. That period of time is approximately 11 weeks of work at Royalty Trucking. The affidavit also states that relator worked at Goodwill "[f]rom October 2010 to November of 2010." Based on his affidavit, relator must have worked more than 10 weeks total at Royalty Trucking and Goodwill. Therefore, relator's calculation of 31 weeks worked appears to be in error.

{¶ 28} 19. On March 23, 2012, relator, Roger Mattscheck, filed this mandamus action.

Conclusions of Law:

{¶ 29} It is the magistrate's decision that this court issue a writ of mandamus as more fully explained below.

R.C. 4123.61 currently provides:

[T]he claimant's * * * weekly wage for the year preceding the injury * * * is the weekly wage upon which compensation shall be based. In ascertaining the average weekly wage for the year previous to the injury, * * * 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 the administrator to do substantial justice to the claimants.

{¶ 30} The standard formula for establishing the AWW is to divide the claimant's earnings for the year preceding injury by 52 weeks. *State ex rel. McDulin v. Indus. Comm.*, 89 Ohio St.3d 390 (2000), citing *State ex rel. Clark v. Indus. Comm.*, 69 Ohio St.3d 563, 565 (1994).

{¶ 31} Pursuant to R.C. 4123.61, when "special circumstances" render the standard formula untenable, the commission may deviate from the standard AWW formula. *McDulin* at 393.

{¶ 32} Although the phrase "special circumstances" is not defined by statute, its application has been limited to uncommon situations. *State ex rel. Wireman v. Indus. Comm.*, 49 Ohio St.3d 286, 288 (1990). In calculating AWW, two considerations dominate. First, the AWW must do substantial justice to the claimant. Second, it should not provide a windfall. *Id.* at 287. Moreover, if the claimant believes that 52 weeks is an inaccurate denominator, it is the claimant's burden to so demonstrate. *Id.* at 289.

{¶ 33} R.C. 4123.61 special circumstances can be invoked only if the standard calculation yields a result that is substantially unjust. *State ex rel. Cawthorn v. Indus. Comm.*, 78 Ohio St.3d 112, 115 (1997); *Clark* at 566.

{¶ 34} AWW is designed to find a fair basis for award of future compensation. *State ex rel. Riley v. Indus. Comm.*, 9 Ohio App.3d 71, 73 (10th Dist.1983). The AWW should approximate the average amount that the claimant would have received had he continued working after the injury as he had before the injury. *State ex rel. Erkard v. Indus. Comm.*, 55 Ohio App.3d 186, 188 (10th Dist.1988).

{¶ 35} Recently, in *State ex rel. Warner v. Indus. Comm.*, 131 Ohio St.3d 366, 2012-Ohio-1084, the Supreme Court of Ohio addressed an AWW issue that is instructive here.

{¶ 36} In *Warner*, the claimant, Rick D. Warner ("Warner"), was a construction worker who had periods of unemployment each year that were the result of seasonal layoffs. Warner's employer, Central Allied Enterprises, Inc. ("Central Allied"), paved roadways. Warner had worked on paving crews before. He knew when he started with Central Allied that the work was seasonal. In the past, he had applied for unemployment compensation during the winter layoff and he continued this practice during his time with Central Allied.

{¶ 37} Following his September 7, 2007 industrial injury, Warner sought temporary total disability compensation which required the commission to establish his AWW.

{¶ 38} In the year prior to his injury, Warner had worked for 30 weeks and had been unemployed for 22 weeks during the seasonal layoff. During that time, Warner received both wages for the weeks worked and unemployment compensation for the weeks he did not.

{¶ 39} Finding that the weeks of unemployment were not beyond Warner's control and thus not within the exception of R.C. 4123.61, the commission, through its SHO, refused to exclude the weeks of unemployment from the calculation (also, the SHO did not include the dollar amount of the unemployment compensation).

In *Warner* at ¶ 5, the SHO explained:

[T]he seasonal layoff was not unforeseen and is a normal part of employment within this industry. The Claimant has presented no evidence of any attempt to look for work during his period of seasonal layoff. Thus, the Hearing Officer finds that the unemployment sustained by the Claimant represents a lifestyle choice and shall not be excluded from the calculation of the Average Weekly Wage. *State ex rel. Baker Concrete Constr. Inc. v. Indus. Comm.* (2004), 102 Ohio St.3d 149 [2004-Ohio-2114, 807 N.E.2d 347].

{¶ 40} Warner then filed a mandamus action in this court. This court issued a writ of mandamus and the employer appealed as of right to the Supreme Court of Ohio.

{¶ 41} Upholding in part this court's judgment, the Supreme Court of Ohio explained:

Foreseeability of job loss does not necessarily render seasonal unemployment voluntary. *State ex rel. Baker Concrete Constr. Inc. v. Indus. Comm.*, 102 Ohio St.3d 149, 2004-Ohio-2114, 807 N.E.2d 347 ¶ 15. Certainly, seasonal unemployment can be considered voluntary when it is the result of a worker's choice to enjoy the time off rather than look for another job during the off-season. On the other hand, many seasonal employees want to work during the layoff but, despite diligent efforts, cannot find other employment. In those situations, unemployment may be considered to be beyond the individual's control.

Warner cites his receipt of unemployment compensation as proof that he looked for work during the winter layoff. *Baker Concrete*, however, declared that a claimant's receipt of unemployment compensation did not, for workers' compensation purposes, automatically establish that postlayoff unemployment was beyond the individual's control. It acknowledged that receipt of those benefits required an ongoing search for work, but it also recognized that a job search had a qualitative component. Given the independence of the workers' compensation and unemployment-compensation systems, we noted, "A job

search sufficient to satisfy [the Ohio Bureau of Employment Services] might not satisfy the commission." *Baker Concrete* at ¶ 23.

In this case, the commission never addressed the adequacy of Warner's job search because it wrongly believed that he had not presented any evidence of a search for other employment. The court of appeals was accordingly correct in ordering further consideration of this issue, and that portion of its judgment is hereby affirmed.

Id. at ¶ 13-15.

{¶ 42} It should be noted that the *Warner* court relied heavily upon its earlier decision in *State ex rel. Baker Concrete Constr. Inc. v. Indus. Comm.*, 102 Ohio St.3d 149, 2004-Ohio-2114.

{¶ 43} In *Baker Concrete*, in setting AWW, controversy arose over how to handle the 16 weeks of unemployment that followed the yearly seasonal slow down and accompanying layoff experienced by the claimant, Edward Kinsler.

{¶ 44} In *Baker Concrete*, the commission, through its SHO, excluded the 16 weeks of unemployment and the unemployment compensation paid for those weeks due to circumstances beyond the claimant's control and the nature of the construction business.

{¶ 45} In *Baker Concrete*, the Supreme Court of Ohio affirmed the judgment of this court that the cause be returned to the commission pursuant to *State ex rel. Noll v. Indus. Comm.*, 57 Ohio St.3d 203 (1991). The court found that:

[T]he staff hearing officer's fleeting reference to claimant's unemployment benefits reflects a lack of analysis of the critical question of whether claimant's 16 weeks of unemployment were actually beyond his control. Accordingly, we agree with the court of appeals' decision to return the cause for further explanation pursuant to *State ex rel. Noll v. Indus. Comm.* (1991), 57 Ohio St.3d 203, 567 N.E. 2d 245.

Baker Concrete, at ¶ 23.

{¶ 46} The *Baker Concrete* court explained:

We have decisively declared that workers' compensation benefits are not intended to subsidize lifestyle choices.

While the phrase "lifestyle choice" has been applied only to benefit eligibility and not the amount thereof, it may very well be relevant in calculating AWW. AWW cannot provide a windfall to claimants. *State ex rel. Wireman v. Indus. Comm.* (1990), 49 Ohio St.3d 286, 551 N.E.2d 1265. It follows, therefore, that if seasonal unemployment springs from a lifestyle choice, then those weeks of unemployment are not beyond a claimant's control and omitting those weeks from the AWW contradicts both the statute and case law.

Determining whether a particular employment pattern is a lifestyle choice relevant to calculating a claimant's AWW is logically a question of intent, which, in turn, derives from words and actions. Here, there is no evidence on the question of intent. We know only from a claimant statement cited by the district hearing officer that claimant had grown to expect the yearly seasonal layoff.

Id. at ¶ 18-20.

{¶ 47} If the relator here could persuade the commission that he wanted to work full-time while employed part-time at Toys R Us and that he unsuccessfully sought full-time employment, he would be entitled to elimination of the periods of unemployment in the part-time work under the standard formula.

{¶ 48} In his order, the SHO determines that relator "worked continuously and consistently in the 52 weeks prior to the date of injury in the claim." This statement strongly suggests that the SHO incorrectly believed that relator could not have a period of unemployment beyond his control during any week that he worked part-time no matter how small the number of hours worked.

{¶ 49} This suggestion violates the principle set forth in *Wireman*:

The appellate court correctly observed that R.C. 4123.61 mandates omission of any *period* of unemployment beyond the employee's control, not any *week*. The court's holding, however, might be interpreted to mean that a claimant who worked fewer than forty hours per week was "unemployed" for the balance of hours necessary to complete a "full-time" forty-hour week. We disagree with this interpretation because it would define a period of

"unemployment," *as to all claimants*, within the context of a forty-hour week.

In many cases, a worker defines his or her own full-time workweek at less than forty hours. If, for example, a working parent wishes to work only thirty-two hours per week and secures such employment, that individual's full workweek should be deemed complete after thirty-two hours. To consider that claimant "unemployed" for the eight hours that he or she chose not to work and then omit that time from the AWW calculation would provide a windfall to the claimant.

On the other hand, a full workweek should not always be defined in terms of the number of hours a claimant voluntarily agrees to work. In some situations, the claimant may desire forty-hour employment, but because of economic depression, for example, may be able to secure only fifteen. To treat these hours as a full workweek because the claimant voluntarily accepted the job would actually penalize the claimant, since for purposes of AWW he or she would have been better off by declining part-time work and remaining totally unemployed. We find this result unacceptable as well.

(Emphasis sic.) *Id.* at 287-88.

{¶ 50} In effect, relator claimed in his affidavit that he did not define his full work week in terms of the number of hours he voluntarily agreed to work at Toys R Us. Relator claimed that he desired to work full-time and was not satisfied with the limited number of hours he was able to work at Toys R Us.

{¶ 51} Again, the main factual issue before the commission here, to put it in *Wireman* terms, was whether relator defined his full-time work week by the hours he worked at Toys R Us or whether relator defined his full-time work week to be more than the limited number of hours he was given at Toys R Us.

{¶ 52} Again, the SHO's order of December 8, 2011 strongly suggests that the SHO did not completely recognize the factual issue presented.

{¶ 53} In conclusory fashion, the SHO states that relator "has not presented sufficient evidence regarding the Injured Worker's prior earnings to support that the standard 52 week calculation would not do substantial justice."

{¶ 54} The SHO fails to explain how the evidence is insufficient. This was a violation of *Noll* and *Baker Concrete*.

{¶ 55} Accordingly, for all the above reasons, it is the magistrate's decision that this court issue a writ of mandamus ordering the commission to vacate its SHO's order of December 8, 2011 and, in a manner consistent with this magistrate's decision, enter a new order that determines relator's AWW.

/S/ MAGISTRATE
KENNETH W. MACKE

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).