SUPREME COURT OF OHIO

State ex rel. Kirby v. Industrial Commission

97 Ohio St. 3d 427 · Decided December 13, 2002

SUMMARY

The Ohio Supreme Court affirmed the denial of mandamus relief to a claimant whose permanent total disability benefits were terminated after evidence showed that he had performed paid home-improvement and maintenance work. The court upheld findings that the work constituted sustained remunerative employment and that the claimant had committed fraud by concealing his employment while receiving benefits.

CASE DETAILS

COURT	Supreme Court of Ohio
WRITING FOR THE COURT	Moyer, C.J.; Douglas, J.; Resnick, J.; F.E. Sweeney, J.; Pfeifer, J.; Cook, J.; Lundberg Stratton, J.
JURISDICTION	Ohio
DECIDED	December 13, 2002
DISPOSITION	affirmed
PROCEDURAL POSTURE	Appeal as of right from the denial by the Franklin County Court of Appeals of a request for a writ of mandamus challenging the Industrial Commission's termination of permanent-total-disability benefits, declaration of overpayment, and finding of fraud.
STANDARD OF REVIEW	Mandamus review of the Industrial Commission's decision; the claimant had to establish a clear legal right to relief and that the commission had a clear legal duty to provide it. The court examined whether some evidence supported the commission's findings.
PRECEDENTIAL VALUE	Published Ohio Supreme Court opinion; precedential
PARTIES	Charles M. Kirby v. Industrial Commission of Ohio, Theodore Bogner & Sons, Inc.

TOPICS

workers compensation · judicial review of agency action · administrative law · appellate procedure · employment law

PRACTICE AREAS

workers compensation · administrative law · employment law

QUESTIONS PRESENTED

1. Whether irregular, part-time home-improvement and maintenance work constituted sustained remunerative employment sufficient to terminate permanent-total-disability compensation.
2. Whether the work was remunerative despite Kirby's relatively low rate of pay.
3. Whether Ohio's purported odd-lot doctrine preserved Kirby's eligibility for permanent-total-disability compensation despite concurrent wages.
4. Whether the Industrial Commission properly found that Kirby committed fraud by concealing his employment and making false statements.

HOLDINGS

1. Irregular employment may support a finding that a claimant is performing or capable of performing sustained remunerative employment when the work demonstrates an ongoing pattern of activity.
2. Work is remunerative when the claimant receives compensation for it, and the ability to perform the work may independently contradict a claim of total medical and vocational inability to work.
3. The odd-lot doctrine is not recognized in Ohio, and in any event it could not apply to Kirby's extensive history of at least part-time work over eight years.
4. The Industrial Commission properly found fraud where Kirby falsely denied employment while receiving PTD benefits and admitted that he accepted cash to avoid detection because he knew the conduct was wrong.

KEY QUOTATIONS

> *"Work is "sustained" if it consists of an ongoing pattern of activity."* (¶ 10)

> *"The odd-lot exemption implies absolutely minimal work on an extremely irregular and unpredictable basis."* (¶ 12)

FACTUAL BACKGROUND

Kirby received permanent-total-disability compensation for a work injury sustained while employed by Theodore Bogner & Sons, Inc. Surveillance and customer interviews showed that he repeatedly performed paid home-improvement and maintenance work, including carpentry, plumbing, electrical work, painting, remodeling, and concrete repair. Kirby admitted that he charged $10 per hour, preferred cash payments to avoid a paper trail, and had made false statements denying employment while receiving PTD benefits.

PROCEDURAL HISTORY

Kirby was awarded permanent-total-disability compensation in 1982. After an investigation revealed that he had performed paid home-improvement and maintenance work while receiving benefits and had made contrary statements to the Bureau of Workers' Compensation, the Industrial Commission terminated his benefits, declared benefits paid after December 23, 1991, overpaid, and found fraud. The Franklin County Court of Appeals denied mandamus relief, and Kirby appealed to the Supreme Court of Ohio.

DISPOSITION

affirmed

CASES CITED

- State ex rel. Schultz v. Indus. Comm., 96 Ohio St. 3d 27, 2002-Ohio-3316, 770 N.E.2d 576
- State ex rel. Durant v. Superior's Brand Meats, Inc., 69 Ohio St. 3d 284, 631 N.E.2d 627 (1994)

OPINION

PER CURIAM.

Per Curiam. {¶ 1} Appellant-claimant, Charles M. Kirby, was awarded permanent total disability compensation (“PTD”) in 1982 for an injury sustained with appellee Theodore Bogner & Sons, Inc. In 1999, the Bureau of Workers’ Compensation received an anonymous tip that claimant was working. {¶ 2} Surveillance through the summer of that year and into 2000 revealed that claimant was at least periodically doing paid home improvement and maintenance work for others.

Claimant was witnessed at numerous locations (1) *428using power saws, (2) doing exterior painting and preparation, including ladder work, (3) carrying large pieces of wood, (4) carrying extension ladders, and (5) carrying other tools and equipment. {¶ 3} Interviews with customers revealed that claimant had done other jobs, such as (1) concrete repair, (2) complete bathroom remodeling, (3) hot water heater installation, (4) plumbing, (5) carpentry, and (6) electrical work.

Don Cornell of Cornell Realty stated that he had used claimant regularly for odd jobs at his company’s properties for several years. Many of the jobs he reported mirrored those just listed. He also reported (1) tub and surround installation, (2) bathroom repair, (3) ceiling maintenance, (4) porch and step repair, (5) faucet installation, (6) installation of roof vents, and (7) the installation of a bathroom floor.

The amount of payment was also listed per job. {¶ 4} Customer comments revealed a prompt and diligent worker who obtained repeat business. Business apparently came by referrals, and for one customer, from claimant’s reputation in the community as a handyman. {¶ 5} Claimant was approached by a bureau investigator on November 7, 2000. Claimant initially denied doing any work.

When confronted with the evidence against him, however, claimant admitted to doing what he characterized as “odd jobs” for local customers. Claimant stated that he charged $10 per hour and that he preferred to accept cash from customers rather than checks in order to avoid “a paper trail.”

Claimant confessed that he “kind of thought it [working] was wrong.” {¶ 6} The matter of overpayment came before appellee Industrial Commission of Ohio in April 2001.

Additionally, letters were submitted from the bureau to the claimant dated 1997, 1998, 1999, and 2000, signed and returned by the claimant, in which he maintained that he had done no work in the prior year. {¶ 7} The commission terminated claimant’s PTD benefits and declared all benefits paid after December 23, 1991, to be overpaid. It found that claimant was capable of performing, and had performed, sustained remunerative employment, despite lack of evidence of full-time employment.

The commission also concluded that claimant had committed fraud. Reconsideration was denied. {¶ 8} Claimant turned to the Court of Appeals for Franklin County, where his request for a writ of mandamus was denied. Claimant now appeals to this court as of right. {¶ 9} Claimant decries the determination that he (1) engaged in sustained remunerative work and (2) committed fraud.

Both challenges fail. {¶ 10} Claimant’s contention that his employment was not sustained because it was not regular, daily employment has already been rejected in State ex rel. Schultz v. Indus. Comm., 96 Ohio St.3d 27, 2002-Ohio-3316, 770 N.E.2d 576, *429another fraudulent PTD case. Schultz held that evidence of even irregular employment can support the presumption that claimant is indeed either doing— or is capable of doing — sustained remunerative employment.

Work is “sustained” if it consists of an ongoing pattern of activity. Id. at ¶ 63. Sheerer, Pitts, Zerebniak & Stocker Co., L.P.A., and Thomas Pitts, for appellant. Betty D. Montgomery, Attorney General, and William J. McDonald, Assistant Attorney General, for appellee Industrial Commission. Susan E. Baker, for appellee Theodore Bogner & Sons, Inc. {¶ 11} Equally hollow is claimant’s assertion that his employment was not remunerative because he was low-paid.

First, claimant charged $10 per hour, which surpasses the minimum wage. Second, even if claimant charged no money at all, his ability to do these jobs contradicts his assertion that he is medically and vocationally unable to do any work. Schultz, supra. {¶ 12} Claimant also argues that the doctrine of “odd-lot” employment preserves his PTD eligibility despite evidence of concurrent wages.

This, too, fails. First, the odd-lot doctrine has never been accepted in Ohio. See State ex rel. Durant v. Superior’s Brand Meats, Inc. (1994), 69 Ohio St.3d 284, 293, 631 N.E.2d 627. Second, claimant’s employment history since 1991 is far too extensive for any application of the odd-lot principle.

The odd-lot exemption implies absolutely minimal work on an extremely irregular and unpredictable basis. Id. at 293-294, 631 N.E.2d 627. Our claimant worked, at a minimum, part-time for eight years until he was discovered. {¶ 13} Finally, claimant proposes that a declaration of fraud is inappropriate, as he never intended to deceive the commission. This, of course, is refuted by claimant's false statements to bureau examiners via letter and verbally to the fraud investigators that he had engaged in no employment while drawing PTD.

It is also belied by his eventual admission to investigators that he asked to be paid in cash to avoid detection because he knew what he was doing was wrong. {¶ 14} The judgment of the court of appeals is affirmed. Judgment affirmed. Moyer, C.J., Douglas, Resnick, F.E. Sweeney, Pfeifer, Cook and Lundberg Stratton, JJ., concur.