

OHIO DEPARTMENT OF JOB AND FAMILY SERVICES  
UNEMPLOYMENT COMPENSATION PROGRAM SERVICES  
PO Box 182830  
Columbus, Ohio 43218-2830  
Telephone: (614) 752-8419  
Web Page: [www.jfs.ohio.gov/labordisputes](http://www.jfs.ohio.gov/labordisputes)

In The Matter Of A Labor Dispute  
Between:

United Steelworkers	:	Docket No. LD-2013-002
Local 4564-2	:	
	:	
(Local 4564-2)	:	
	:	Hearing Officer:
Union/Claimants	:	Jim Bubutiev
	:	
and	:	
	:	Date of Hearing:
Phillips Manufacturing CO., LLC	:	March 18, 2013
(Phillips)	:	
	:	Date of Issuance:
Employer	:	June 18, 2013

REVISED DETERMINATION AND DECISION AS TO THE  
DURATION OR ENDING DATE OF THE LABOR DISPUTE

Appearances

James G. Porcaro, Attorney At Law, represented Local 4564-2. Dennis Brubaker, United Steelworkers International Staff Representative, and Richard Houy, Claimant, were witnesses for Local 4564-2. Patrick K. Wilson, Attorney At Law, represented Phillips. Brad Garlock, Director of Human Resources, was a witness for Phillips.

This matter was heard by Jim Bubutiev, Hearing Officer for the Director of the Ohio Department of Job and Family Services (ODJFS), pursuant to Section 4141.283(A) of the Ohio Revised Code. The purpose of this hearing is to determine the duration or ending date of the labor dispute other than a lockout between the parties that

began on September 13, 2012. The Ohio Department of Job and Family Services received approximately 32 claims for unemployment benefits that relate to this matter.

All interested parties were notified of this hearing pursuant to Ohio law. This hearing was held on March 18, 2013, in Akron, Ohio.

#### **CASE HISTORY**

On October 30, 2012, determinations were issued which held that the claimants were unemployed due to a labor dispute other than a lockout at Phillips beginning September 13, 2012. The claimants were disqualified from receiving unemployment compensation benefits due to a labor dispute other than a lockout beginning with the week including September 13, 2012, pursuant to Section 4141.29 (D)(1)(a) of the Ohio Revised Code.

On March 28, 2013, a decision as to the duration or ending date of the labor dispute was issued based upon the March 18, 2013 hearing. The decision held that the labor dispute other than a lockout at Phillips was continuing. Consequently, the claimants remained disqualified from receiving unemployment compensation benefits due to a labor dispute other than a lockout pursuant to Section 4141.29 (D)(1)(a) of the Ohio Revised Code.

#### **FINDINGS OF FACT FROM THE HEARING HELD MARCH 18, 2013**

Phillips is a manufacturer of drywall finishing beads, trims, and channels and framing components. There are approximately 44 members of Local 4564-2. The labor dispute involves only the Phillips facility located in Niles, Ohio. (Transcript Pages 13-14).

On December 5, 2012, and December 7, 2012, negotiation sessions were held between the parties. Phillips verbally explained to Local 4564-2 that approximately 25 permanent replacement workers had been hired. Local 4564-2 requested in writing that Phillips provide written information about replacement workers and for anyone that crossed the picket line and returned to work. Phillips followed up by providing written documentation on December 7, 2012, December 13, 2012, December 22, 2012, January 11, 2013, and February 6, 2013. Local 4564-2 asserts that in the written documentation the individuals listed in the recall group have been specifically identified as being permanently replaced. Phillips asserts the verbal explanations and written documents are merely bargaining proposals until a new collective bargaining agreement is ratified by the parties. Furthermore, Phillips states no last, best, or final offer has ever been made to Local 4564-2, and that Local 4564-2 has never offered or proposed to return to work (Transcript Pages 15-23, 25-29, 31-35, 40-41, 47-50, 55-58, 61-64, 66-72, 84-91, 98-101/Union Exhibits 1-5, 8).

Phillips asserts that no letter or notice has ever been sent individually to any Local 4564-2 member stating that you have been permanently replaced (Transcript Pages 45-46, 78).

Three members of Local 4564-2 crossed the picket line and returned to work in September of 2012. A fourth member of Local 4564-2 returned to work for a few weeks, in October of 2012, but then left work because of medical issues. A fifth member of Local 4564-2 crossed the picket line and returned to work the week of March 11, 2013, a week before this hearing was held. The returning workers are receiving the wages and benefits specified under the now expired collective bargaining agreement previously in place between

the parties (Transcript Pages 22,37,43-45,100-101/Union Exhibits 5,7).

Phillips has publically advertised for replacement workers in local newspapers and via the internet since September of 2012. The advertisements do not state if the job openings being advertised are temporary or permanent (Transcript Page 23,91-93/Union Exhibit 5).

The last negotiation session was held on January 24, 2013. Local 4564-2 asserts Phillips explained that the permanent replacement workers will have seniority rights over members of Local 4564-2 returning to work if a lay off were to occur in the future. Local 4564-2 asserts that Phillips stated the same thing during the negotiation sessions in December of 2012. Phillips asserts the seniority rights issue is merely an item that remains open for proposals and for negotiation. Both parties agree that negotiations are not at an impasse (Transcript Pages 29-30,38-40,48-49,51-55,82-84,90,98-99/Union Exhibit 8).

Local 4564-2 held a meeting on February 16, 2013 and advised all the members that Phillips had permanently replaced them (Transcript Pages 41-43,78-79).

As of the date of hearing Phillips has hired 31 permanent replacement workers and 4 individuals have crossed the picket line and returned to work (Transcript Page 90).

**FINDINGS OF FACT SUBSEQUENT TO THE DECISION AS TO THE  
DURATION OR ENDING DATE OF THE LABOR DISPUTE ISSUED MARCH 28,**

**2013**

On April 1, 2013, Local 4564-2 ended their strike and made an unconditional offer to return to work effective immediately (Union Exhibit 9).

On April 4, 2013, Phillips responded to Local 4564-2's unconditional offer by agreeing to accept back five (5) claimants into operations on April 9 and April 11 as positions opened up (Union Exhibit 10).

On April 4, 2013, a claimant from Local 4564-2 filed an appeal of the March 28, 2013, decision as to the duration or ending date of the labor dispute with the Unemployment Compensation Review Commission.

On June 13, 2013, the Unemployment Compensation Review Commission remanded this matter for further consideration of newly presented evidence. The newly presented evidence consists of Union Exhibit 9 and Union Exhibit 10. These exhibits were accepted into the record without objection from the interested parties.

**ISSUE**

What is the duration or ending date of the labor dispute between PHILLIPS and Local 4564-2?

**REASONING**

In *Baugh v. United Telephone Co.*, (1978), 54 Ohio St. 2d 419, the employer notified the striking employees, in writing, that they had been permanently replaced. The Ohio Supreme Court held that when the employer terminates the employer-employee relationship by replacing a striking employee, the employer has thereby removed the labor dispute as the proximate cause of unemployment. The Court stated that the employer's action of permanent replacement prevented any volition on the part of the workers to return to work and since it severed the labor dispute as the cause of the unemployment, the statutory disqualification provision of section 4141.29 of the Ohio Revised Code did not apply and was not a bar to the appellants'

rights to receive unemployment compensation benefits. The Court explained this rationale with the following statement:

Thus, pivotal to the resolution of the instant cause is a determination of whether the employer terminated the appellants' status as employees. While the facts are not in dispute, their legal consequence is in contention. Appellants claim that the employer-employee relationship was severed by their permanent replacement, and thus they are entitled to receive unemployment benefits. Appellee argues that it may lawfully hire permanent replacements and that this does not effectuate a discharge of the striking employees or entitle them to unemployment compensation benefits. After a perusal of the facts, we find that the board's determination that appellants were not disqualified from receiving unemployment compensation benefits was proper. In the instant causes, we are confronted with the affirmative action of the employer in notifying the appellants pursuant to a letter, dated May 25, 1972, not only that their union representatives had been informed of the employer's intention to hire permanent replacements, but further that, if each employee did not report to work on June 1, the immediate hiring of permanent replacements would commence and, if at the end of the strike a replacement occupied the employee's former job, the employee had no job. A second letter was sent to the employees shortly after the June 1 deadline, informing them that their positions had been filled. The only possible conclusion that can be drawn from these facts is that the employer's severance of the employee status was the proximate cause of appellants' unemployment. As of June 1, 1972, it was the employer's action and not the labor dispute that prevented the appellants from being employed. Indeed, the very action of the appellants is consistent with their assertion of termination as they

immediately filed applications for unemployment benefits. Nor do we find the fact that negotiations between the employer and appellants continued after June 1, 1972, in any manner decisive of the question of the severance of appellants' employee status. This is because such strike activity is ambivalent, in that it may demonstrate an effort to regain the employee status or be construed to reveal appellants' belief their status had not been terminated.

*Hi-State Beverage Co., v. Ohio Bureau of Employment Services* (1991), 77 Ohio App. 3d 633, and *Moriarity v. Elyria United Methodist Home* (1993) 86 Ohio App. 3d 502, both distinguish the *Baugh* case.

*Magnode Corp. v. Director, Ohio Department of Job and Family Services*, No. CA2005-02-050, 2006 WL 1673138 (Ohio Ct. App. June 19, 2006) distinguishes *Baugh* and *M. Conley Co.*

However, in *Hi-State*, *Moriarity*, and *Magnode Corp.* the unemployed workers were never informed that they had been permanently replaced.

The most recent Supreme Court of Ohio decision to address this issue is *M. Conley Co. v. Anderson* (2006) 108 Ohio St. 3d 252. The Court reaffirmed its holding in *Baugh*. The Court stressed that when striking workers receive written notice that they have been permanently replaced, the employee relationship is severed and the disqualification for unemployment compensation benefits is removed.

The Court explained their holding by saying:

We reaffirm our holding in *Baugh* and hold that the hiring of permanent replacement workers coupled with notice to striking workers that they have been replaced or that their positions have been permanently filled severs the employee relationship

for purposes of R.C. 4141.29(D)(1)(a) and removes the disqualification to receive unemployment compensation benefits.

Applying the holdings from all five previously mentioned court decisions, and being mindful of the *Baugh* and *M. Conley Co.* decisions, the totality of the testimony, evidence, documentation, and the documentation received subsequent to the March 28, 2013, decision, indicate that Phillips has ended the employer-employee relationship with the members of Local 4564-2 effective April 1, 2013.

This Hearing Officer now has the benefit of hindsight to review the testimony of the witness for Phillips which failed to provide any clear and direct answer to the question of whether the members of Local 4564-2 had, in fact, been permanently replaced. This Hearing Officer notes that the artful dodging of the witness for Phillips certainly appeared to be intended. The Local 4564-2 witnesses, on the other hand, provided spontaneous, clear, and direct answers to the questions posed to them. Accordingly, it appears highly probable that Phillips actually permanently replaced the members of Local 4564-2 far sooner than even April 1, 2013.

Also, the actions taken by Local 4564-2 and Phillips in this matter cannot be ignored. Local 4564-2 offered to unconditionally return to work on April 1, 2013. In response, Phillips offered work to just five (5) people beginning on April 9, 2013, and April 11, 2013. Union Exhibit 9 and Union Exhibit 10 make that abundantly clear. The vast majority of the jobs have been permanently filled.

Consequently, it is the conclusion of this Hearing Officer that the claimants in this matter are unemployed due to a labor dispute other than a lockout which began September 13, 2012, and ended on April 1, 2013, when Phillips permanently replaced them.

#### DECISION

It is the decision of this Hearing Officer that all of the Claimants herein are unemployed due to a labor dispute other than a lockout at Phillips which began September 13, 2012, and ended on April 1, 2013 with their permanent replacement. The claimants' disqualification from receiving unemployment compensation benefits due to a labor dispute other than a lockout, pursuant to Section 4141.29 (D) (1) (a) of the Ohio Revised Code, ended on April 1, 2013.

#### APPEAL RIGHTS

**If you disagree with this decision, you have the right to appeal. The following paragraph provides a detailed explanation of your appeal rights:**

**APPLICATION FOR APPEAL BEFORE THE UNEMPLOYMENT COMPENSATION REVIEW COMMISSION, OHIO DEPARTMENT OF JOB AND FAMILY SERVICES, POST OFFICE BOX 182299 COLUMBUS, OHIO 43218-2299, OR BY FAX TO (614) 387-3694; MAY BE FILED BY ANY INTERESTED PARTY WITHIN TWENTY-ONE (21) CALENDAR DAYS OF THE DATE OF MAILING OF THE DECISION. IN ORDER TO BE CONSIDERED TIMELY, THE APPEAL MUST BE FILED IN PERSON, FAXED, OR POSTMARKED NO LATER THAN TWENTY-ONE (21) DAYS AFTER THE DATE OF MAILING INDICATED ON THIS DECISION. IF THE 21ST CALENDAR DAY FALLS ON A SATURDAY, SUNDAY OR LEGAL HOLIDAY, THE PERIOD FOR FILING IS EXTENDED TO INCLUDE THE NEXT SCHEDULED WORK DAY. UPON RECEIPT OF CERTIFIED MEDICAL EVIDENCE STATING THAT THE INTERESTED PARTY'S PHYSICAL CONDITION OR MENTAL CAPACITY PREVENTED THE FILING OF AN APPEAL WITHIN THE SPECIFIED 21 CALENDAR DAY PERIOD, THE INTERESTED PARTY'S TIME FOR FILING THE APPEAL SHALL BE EXTENDED AND CONSIDERED TIMELY IF FILED WITHIN 21 CALENDAR DAYS AFTER THE END OF THE PHYSICAL OR MENTAL CONDITION. IF UNEMPLOYED, CLAMAINTS SHOULD CONTINUE TO FILE WEEKLY CLAIMS FOR BENEFITS WHILE UNDER APPEAL.**

THIS DECISION WAS MAILED ON JUNE 18, 2013.

THE TWENTY-ONE (21) DAY APPEAL PERIOD ENDS ON JULY 9, 2013.