

In the
Supreme Court of Ohio

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| State of Ohio ex rel. | : | Case No. 06-1889 |
| Mosier Industrial Services Corporation, | : | |
| | : | |
| Appellee, | : | On Appeal from the |
| | : | Franklin County Court of Appeals |
| vs. | : | Tenth Appellate District |
| | : | |
| Industrial Commission of Ohio, | : | Court of Appeals |
| | : | Case No. 05AP-1096 |
| Appellant. | : | |

**REPLY BRIEF OF APPELLANT,
INDUSTRIAL COMMISSION OF OHIO**

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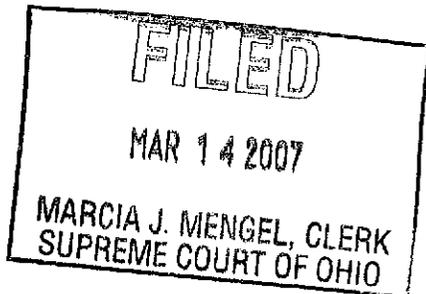


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INTRODUCTION

The proposition of law and argument presented by Appellee, Mosier Industrial Services Corporation (“Mosier”) misses the point that prompted the Industrial Commission of Ohio (“commission”) to appeal the decision of the court of appeals. Contrary to its assertions, the commission does not have jurisdiction in this case.

The commission cannot accept jurisdiction under R.C. 4123.52 to determine if Shawn Walker (“Walker”) reached maximum medical improvement (“MMI”) and to terminate temporary total disability (“TTD”) compensation because Walker was receiving wage continuation from Mosier, not TTD compensation, at the time of Mosier’s request. In short, the commission does not have jurisdiction to make the type of findings Mosier seeks regarding MMI and TTD compensation because Mosier paid Walker wage continuation. A wage continuation agreement is not governed by workers’ compensation laws in Ohio, conversely, a wage continuation agreement is a separate contract between the employer and the employee that does not involve the commission nor the Ohio Bureau of Workers’ Compensation (“BWC”).

LAW AND ARGUMENT

Reply to Appellee’s Proposition of Law No. I:

The Industrial Commission Of Ohio Does Not Have Jurisdiction To Terminate Temporary Total Disability (“TTD”) Compensation If The Claimant Is Not Receiving Temporary Total Disability Compensation, But Is Instead Receiving Wage Continuation.

In response to Mosier’s assertion in Proposition I, the commission states, as it does in detail in its merit brief, that Mosier paid Walker wage continuation, not TTD compensation, thus, the commission does not have jurisdiction to find Walker MMI and to terminate TTD compensation as Mosier requested. Mosier correctly states in its Merit Brief, that the commission’s argument concerning its lack of jurisdiction here is based on the commission’s

position that wage continuation and TTD compensation are not the same thing, and that the commission was not a party to the wage continuation agreement between Mosier and Walker.

In *State ex rel. Rubin v. Indus. Comm.* (1938), 134 Ohio St. 12, this Court held that wage continuation is not the same thing as TTD compensation. *Rubin*, supra. TTD compensation cannot be paid during the same period in which a claimant is receiving wages. *Rubin*, supra. If an employer willingly elects to pay a claimant wage continuation, such payment prohibits the payment of TTD compensation to the claimant for the same time period. Ohio Adm.Code 4123-5-20(C). (A-26). Where a claimant is paid his regular salary during a period when he is temporarily disabled due to his industrial injury, TTD compensation, under R.C. 4123.56, cannot be paid as long as the claimant's salary or wages are being paid. *Id.* Mosier's arguments here are contrary to this Court's holding in *Rubin*, supra.

Mosier's entire argument in support of the commission taking jurisdiction to find Walker MMI and terminate TTD compensation is based on the September 9, 2003 order that was issued at the beginning of Walker's, case before the BWC became aware of the wage continuation agreement. The order was based on an MRI and one C-84 form. The order stated that Walker had to submit ongoing evidence to support payment of ongoing TTD compensation. Walker, however, never complied with the directive for ongoing proof of TTD in the order because he received wage continuation from Mosier. Walker's non-compliance with the September 9, 2003 order renders it moot.

In December 2003, Mosier filed a request for the commission to find an overpayment for a short time between August and September because for approximately two weeks Walker received TTD compensation and wage continuation. After the finding of the overpayment, wage continuation for Walker continued, but again, Walker submitted nothing that would suggest

entitlement to TTD compensation. Nothing prevented Mosier from terminating the wage continuation agreement with Walker, which it did not. Thus, Mosier's motion was asking the commission to terminate TTD compensation when such compensation was not even being paid to Walker. It was a moot issue then, just as it is a moot issue now. The commission could only terminate TTD compensation if Walker were receiving it at the time of the request, which he was not. Walker had no need to comply with the September 2003 order because of the wage continuation agreement.

Ongoing entitlement to TTD compensation requires the submission of documentation, generally C-84 forms, to support payment from the BWC. *State ex rel. Russell v. Indus. Comm.* (1998), 82 Ohio St.3d 516. In short, the commission must not be forced to accept jurisdiction over a case based on a BWC order that Walker never needed because he had wage continuation, nor that he complied with because he did not submit support to receive TTD compensation. Mosier received the finding of an overpayment in TTD compensation and wage continuation for August 15, 2003 through September 14, 2003, and continued paying Walker wage continuation. There was no TTD compensation to terminate at the time of Mosier's request it chose to pay Walker wage continuation. TTD compensation requires ongoing proof of disability. Walker did not submit that proof, nor did he need to because of the wage continuation agreement, and as this Court held in *Clifford v. Daugherty* (1980), 62 Ohio St.2d 414, wages received by a claimant are not disability compensation. *Clifford, supra.*

CONCLUSION

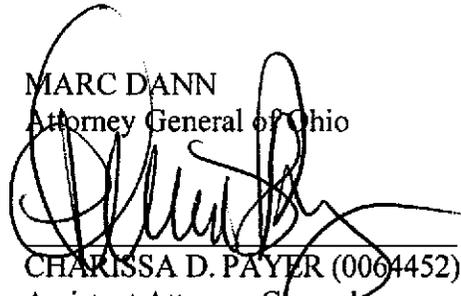
The commission does not have jurisdiction to make the findings here that Mosier seeks because Walker did not receive TTD compensation. Mosier had complete control of the wage continuation it had with Walker and could terminate the agreement at any time.

Mosier knew the September 9, 2003 BWC award of TTD compensation existed because it requested a finding of an overpayment, and was awarded that finding of an overpayment, for approximately one month when TTD compensation and wage continuation payments overlapped. Wage continuation only continued after the overpayment finding. Walker's wage continuation agreement is unrelated to the BWC's September 2003 order, particularly because Walker never complied with the directives in that order regarding the submission of ongoing proof disability.

For all of the foregoing reasons, the commission requests that this Court reverse the decision of the court of appeals, and deny issue of the writ of mandamus.

Respectfully submitted,

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Attorney General of Ohio

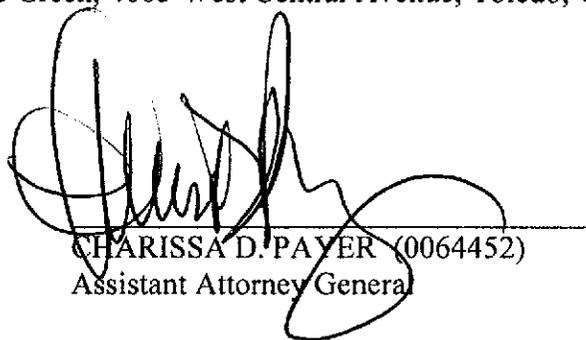


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Brief of Appellant, the Industrial Commission of Ohio, was sent by regular U.S. mail, postage prepaid, to John Tarkowsky, counsel for Mosier Industrial Services Corporation, Baran, Piper, Tarkowsky, Fitzgerald & Theis Co., L.P.A., 3 North Main Street, Suite 500, Mansfield, Ohio 44902, and to Dean Catignani, counsel for Shawn Walker, The Village Green, 4005 West Central Avenue, Toledo, Ohio 43624, on this 14th day of March 2007.



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