

In the  
**Supreme Court of Ohio**

STATE EX REL. SEARS ROEBUCK CO.,	:	Case No. 2007-0642
	:	
Appellant-Relator,	:	
	:	
v.	:	On Appeal from the
	:	Franklin County
	:	Court of Appeals,
INDUSTRIAL COMMISSION OF OHIO,	:	Tenth Appellate District
et. al.,	:	
	:	
	:	Court of Appeals Case
Appellees-Respondents.	:	No. 05AP-1135

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**REVISED MERIT BRIEF OF APPELLEE-RESPONDENT,  
INDUSTRIAL COMMISSION OF OHIO**

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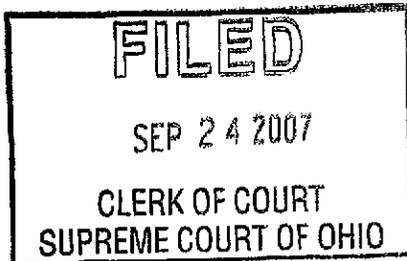
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## INTRODUCTION

Appellee-Respondent, Industrial Commission of Ohio (“commission”), granted permanent and total disability (“PTD”) compensation to Appellee-Respondent, Sue Moenter (“Mrs. Moenter”). Appellant-Relator, Sears Roebuck & Company (“Sears”) appealed to the Tenth District Court of Appeals, arguing that the commission abused its discretion in granting Mrs. Moenter’s application for PTD compensation. A magistrate with the court of appeals recommended that the court deny Sears’ request for a writ of mandamus with respect to the commission’s granting of PTD benefits, but issue a limited writ ordering the commission to amend the start date of the PTD award. Sears filed objections to the magistrate’s decision, but did not object to the magistrate’s finding concerning the start date of the PTD award. The court of appeals overruled Sears’ objections to the magistrate’s decision, adopted the magistrate’s decision as its own, including the findings of fact and conclusions of law, and issued a writ ordering the commission to adjust the beginning date of the PTD award. Sears appeals to this Court as of right.

Sears contends the commission abused its discretion by relying on Dr. Rutherford’s medical report as “some evidence” because it is ambiguous as to whether he considered non-allowed conditions, and is internally inconsistent with respect to his determination of her physical limitations and his appraisal of her capacity for employment. Sears also argues that the magistrate improperly changed the opening date of the PTD award. Finally, Sears claims that the commission erred in denying its request to depose Dr. Rutherford.

Contrary to Sears’ assertions, Dr. Rutherford’s report, when read in its entirety, is neither ambiguous nor internally inconsistent. Rather, the report is consistent, logical, and thorough, and it states quite clearly that Dr. Rutherford only relied on the allowed conditions in the claim. Moreover, Sears is prohibited from arguing before this Court that the magistrate improperly

changed the opening date of the PTD award because Sears failed to raise an objection to the magistrate's decision on this issue at the appellate court level. Finally, Sears cannot demonstrate how the commission abused its discretion in denying its request to depose Dr. Rutherford because the hearing was a reasonably equal option to a deposition, and it afforded Sears the opportunity to address any alleged defect or potential problem in Dr. Rutherford's report.

Based on the foregoing, Sears cannot demonstrate that the commission abused its discretion and therefore the commission respectfully requests this Court to deny Sears' request for a writ of mandamus.

### **STATEMENT OF THE CASE AND FACTS**

No objections had been made to the Appellate Court's Finding of Fact. The relevant facts are undisputed. On January 17, 1979, Mrs. Moenter was injured in a fall in the parking lot of Sears, a self insured employer under Ohio's workers' compensation laws. Her industrial claim is allowed for sprain of sacrum; protruding disc L4-L5, lumbar; postlaminectomy syndrome, NOS. She was assigned claim number 671200-22.

In 2004, Mrs. Moenter was examined twice by Dr. May who issued two reports, the first on January 15, 2004 and the second on March 24, 2004. On May 6, 2004, Mrs. Moenter filed an application for PTD compensation supported by the medical reports of Dr. May who determined that "Mrs. Moenter was permanently and totally disabled from any form of substantial gainful employment as a direct and proximate result of the allowed injuries in the claim." See Supplement to the Merit Brief, Stipulated Record, page 7. (Hereinafter, Supp. Stip. p. 7).

On June 17, 2004, Sears had Mrs. Moenter examined by Dr. McDaniel who concluded that "Mrs. Moenter would be capable of returning to remunerative employment as related to the allowed conditions of this claim" and that "Mrs. Moenter is not permanently and totally disabled

from all forms of remunerative employment as a direct and sole result of the allowed conditions of this claim.” (Supp. Stip. p. 21).

On July 15, 2004, the commission had Mrs. Moenter examined by orthopedist, James Rutherford, M.D., who issued a four-page narrative report dated July 20, 2004 in which he opined, “Based on the orthopedic claim allowances of claim no. 671200-22, and the functional limitations related to those claim allowances, it is my medical opinion that Ms. Sue Moenter is not capable of physical work activity...” (Supp. Stip. p. 43).

On August 16, 2004, Sears moved to depose Dr. Rutherford because it believed his report considered non-allowed conditions, was internally inconsistent, and represented a substantial disparity with the opinion of Dr. McDaniel. (Supp. Stip. p. 22).

On October 26, 2004, a staff hearing officer (“SHO”) heard the matter and issued an order denying Sears’ motion to depose, explaining that “[p]ursuant to *State ex rel. Cox v. Greyhound Food Mgt. Inc.*, 95 Ohio St.3d 353, 2002-Ohio-2335, issues such as inconsistencies and differences of opinions can be addressed by the hearing officer at hearing.” (Supp. Stip. p. 31).

On February 2, 2005, the hearing on Mrs. Moenter’s PTD application was held. Sears argued among other things that Dr. Rutherford’s report was ambiguous and internally inconsistent. The SHO granted PTD basing its decision particularly upon the medical reports of Dr. Rutherford and Dr. May. The SHO established the PTD start date based on Dr. May’s January 15, 2004 report. However, this decision contained a clear mistake of fact because the SHO incorrectly stated that, “All physician’s [sic] who have examined the claimant find that...she is permanently and totally impaired from engaging in sustained remunerative employment.” (Supp Stip. pp. 33, 34).

On April 8, 2005, Sears moved for reconsideration of the February 2, 2005 SHO order which was granted on April 22, 2005. The hearing was held on May 26, 2005 where, once again, Sears argued that Dr. Rutherford's report was ambiguous and internally inconsistent. Following the hearing, the commission issued an order vacating the February 2, 2005 SHO order, correcting the clear mistake of fact by the SHO, and awarding PTD benefits to Mrs. Moenter. The commission based its award of PTD benefits on Dr. Rutherford's July 7, 2004 report. The commission stated, "Dr. May's 03/24/2004 and 01/15/2004 reports are relied upon only to the extent of commencing the award of permanent total disability benefits as of 01/15/2004." The commission specifically addressed Sears' ambiguity and internal inconsistency arguments stating:

It is clear from a review of Dr. Rutherford's report that he was aware that the injured worker had a degenerative condition of the spine and that this condition was not recognized as part of the claim. Dr. Rutherford clearly states that this opinion is limited to the allowed conditions in the claim.

Dr. Rutherford lists specific limitations that the injured worker has related to the allowed conditions in the claim. Some of the limitations listed by Dr. Rutherford are consistent with a finding that the injured worker could perform some aspect of sedentary work, but Dr. Rutherford also stated that the injured worker "could not sustain a functional position for sitting or standing for sustained remunerative employment." Accordingly, there is no inconsistency found in the doctor's description of the injured worker's limitations and his conclusion that she is not capable of sustained remunerative employment. (Supp. Stip. pp. 64, 65).

On October 24, 2005, Sears challenged the commission's May 26, 2005 order in the Tenth District Court of Appeals. Sears requested a writ of mandamus to vacate the commission's order and deny PTD compensation or, in the alternative, vacate the order, permit Sears to depose Dr. Rutherford, and then rehear Mrs. Moenter's PTD application. Sears argued that Dr. Rutherford's report was ambiguous and internally inconsistent, that Dr. May's report could not be relied upon to determine the start date of PTD benefits, and the commission erred in

denying Sears' deposition request. See Supplement to the Merit Brief page 53. (Hereinafter, Supp. p. 53).

On September 26, 2006, Magistrate Macke with the Tenth District Court of Appeals recommended that the court deny Sears' request for a writ of mandamus with respect to the commission's granting of PTD benefits and made three findings. First, Dr. Rutherford's report was not ambiguous and did not rely on non-allowed conditions to support his opinion that the claimant is not capable of physical work activity. (Supp. p. 20). The magistrate concluded the commission was "not required to read Dr. Rutherford's report in a manner that creates equivocation" and that Sears' interpretation "simply ignores the sequencing of the paragraphs in the report." (Supp. p. 22). Also, Dr. Rutherford's report was not internally inconsistent. The magistrate cited the commission's own finding that the report contained no inconsistency between the limitations as listed and the inability to work and found the commission's interpretation of Dr. Rutherford's report was clearly supported by language in that report. Furthermore, the magistrate noted that even if the report were interpreted as Sears chose to interpret it, "the commission was not required to give it an equivocal or inconsistent interpretation." (Supp. pp 22, 23).

Second, the magistrate found that the commission can rely upon Dr. May's March 24, 2004 report to start the PTD award as of March 24, 2004, but that the commission cannot rely upon Dr. May's January 15, 2004 report to the PTD award as of January 15, 2004. (Supp. p. 20).

Third, the magistrate found that commission did not abuse its discretion in denying relator's motion to depose Dr. Rutherford. The magistrate opined that "[a]s the *Cox* court explained, that is why there is a hearing." The Magistrate also found there to be "no defect in Dr. Rutherford's report with respect to [Sears'] claim that Dr. Rutherford considered non-

allowed conditions in rendering his opinion that claimant is not capable of physical work activity” so therefore the commission could not have erred in denying Sears’ request for a deposition. (Supp pp. 28, 29).

Accordingly, the magistrate determined that the court should issue a limited writ ordering the commission to amend its May 26, 2005 order awarding PTD compensation so that PTD compensation is commenced on March 24, 2004 rather than January 15, 2004. (Supp. p. 29).

In October, 2006, Sears filed objections to the first and third findings in the magistrate’s decision; objecting to the finding that Dr. Rutherford had not relied on non-allowed conditions to support his opinion that Mrs. Moenter was not capable of physical work activity, and objecting to the finding that the commission did not abuse its discretion in denying Sears’ motion to depose Dr. Rutherford. Sears did not file an objection to the magistrate’s second finding; the start date for the PTD award. (Supp. pp. 2, 3).

On March 1, 2007, The Tenth District Court of Appeals overruled Sears’ objections to the magistrate’s decision, adopted the decision as its own, including the findings of fact and conclusions of law and issued a writ ordering the commission to adjust the beginning date of the PTD award.

Sears has appealed to this Court as of right.

## LAW AND ARGUMENT

### A. THE STANDARD OF REVIEW.

“A writ of mandamus is an extraordinary remedy.” *State ex rel. Haylett v. Ohio Bureau of Workers’ Comp.* (1999), 87 Ohio St.3d 325, 334. Entitlement to a writ of mandamus requires: (1) a clear legal right to the requested relief; (2) a corresponding clear legal duty on the part of the commission; and (3) the lack of an adequate remedy in the ordinary course of the law. *State ex rel. Moore v. Malone* (2002), 96 Ohio St.3d 417, 420. To establish a basis for mandamus relief, Sears must show that the commission abused its discretion by issuing an order unsupported by any evidence in the administrative record. *State ex rel. Elliott v. Indus. Comm.* (1986), 26 Ohio St.3d 76, 78-79. An abuse of discretion is “not merely an error in judgment but a perversity of will, passion, prejudice, partiality, or moral delinquency, to be found only where there is no evidence upon which the commission could have based its decision.” *State ex rel. Commercial Lovelace Motor Freight v. Lancaster* (1986), 22 Ohio St.3d 191, 193.

The commission is the exclusive evaluator of evidentiary weight and credibility. *State ex rel. Teece v. Indus. Comm.* (1981), 68 Ohio St.2d 165. The commission’s actions are presumed to be valid and performed in good faith and judgment, unless shown to be otherwise; as long as some evidence supports its findings, its orders will not be overturned. *State ex rel. Stephenson v. Indus. Comm.* (1987), 31 Ohio St.3d 167, 170. A writ will not be granted if a commission order is supported by “some evidence,” even if contrary evidence of greater quality and/or quantity was presented at the administrative hearing. *State ex rel. Pass v. C.S.T. Extraction Co.* (1996), 74 Ohio St.3d 373.

## **B. PROPOSITION OF LAW ONE:**

***The Industrial Commission of Ohio does not abuse its discretion when its order granting permanent and total disability benefits is based upon some evidence.***

In its June 8, 2005, order, the commission found that Mrs. Moenter was entitled to PTD benefits based upon Dr. Rutherford's July 20, 2004 report. Dr. Rutherford's report provides consistent, unequivocal evidence to support the commission's decision. Dr. Rutherford performed an independent medical examination of Mrs. Moenter and concluded that the allowed medical conditions precluded her from any work activity. Despite Mrs. Moenter's relatively low impairment, Dr. Rutherford made it very clear that he was relying exclusively on Mrs. Moenter's allowed conditions to find her PTD:

It is my medical opinion that the difficulty that she has with any prolonged sitting or standing and walking is *related to her industrial claim allowances*. It is my medical opinion that *due to the industrial claim allowances* of Claim No. 671200-22, that Ms. Sue Moenter is not capable of physical work activity. It is my medical opinion that *due to the claim allowances* of Claim No. 671200-22 that Ms. Moenter could not sustain a functional position for sitting or standing for sustained remunerative employment. (Supp. Stip. p. 42). (Emphasis added).

Dr. Rutherford's report is consistent and his opinion is based solely on the allowed conditions in Mrs. Moenter's claim. Dr. Rutherford is very careful to explain that Mrs. Moenter's difficulty with prolonged sitting, standing, or walking, despite her low level of total body impairment, prevents her from engaging in even sedentary employment. Further, Dr. Rutherford makes it clear on at least five occasions that he is relying solely upon the allowed conditions to find Mrs. Moenter PTD. (Supp. Stip. pp 42, 43). Dr. Rutherford's report thus provides clear, unequivocal evidence to support the award of PTD.

### **1. Dr. Rutherford's report is not ambiguous.**

Sears argues that when Dr. Rutherford introduces the second paragraph under the Discussion section of his report with the clause "[a]s a result of the above described orthopedic

impairments” he is unclear as to which orthopedic impairments he is referring. According to Sears, because Dr. Rutherford allegedly fails to specify which “orthopedic impairments” he considered, his opinion that Mrs. Moenter is not capable of physical work activity is rendered equivocal due to the ambiguity as to whether it is based exclusively upon the allowed conditions of the claim. Sears’ argument is without merit because Dr. Rutherford’s report, when read in its entirety is clearly based upon the allowed conditions in the claim and is not ambiguous and therefore not equivocal.

In an effort to demonstrate an ambiguity in the report, Sears handpicks a portion of one sentence, removes it from its context within the report as a whole, ignores the remainder of the document, and assigns its own interpretation to the isolated sentence.

To fully understand how Sears attempts to create an ambiguity, it is important to review Dr. Rutherford’s report in its entirety. (Supp. Stip. pp 40-44). In the heading of Dr. Rutherford’s report he correctly lists the date of injury and the claim allowances. The body of Dr. Rutherford’s report is divided in five sections. In the Medical History section, Dr. Rutherford details claimant’s medical history relating to both the allowed and non-allowed medical conditions and describes the industrial injury’s impact on her ability to work. In the Medical Records section, Dr. Rutherford summarizes medical reports from Dr. May and Dr. McDaniel as well as the information contained on the commission’s Statement of Facts. In the Physical Examination section, Dr. Rutherford describes his clinical findings during his personal examination of Sue Moenter. In the Discussion section, Dr. Rutherford wrote:

It is my medical opinion that Ms. Sue Moenter has a 10% permanent partial impairment of the whole person as a result of claim No. 671200-22. This is based on a DRE Category II impairment of the lumbosacral spine with the reference being the AMA Guides to the Evaluation of Permanent Impairment, 4<sup>th</sup> Edition and Table 72 on Page 110.

As a result of the above described orthopedic impairments, it is my medical opinion that Ms. Moenter is limited to sitting only four hours out of an eight hour day. She can only stand and walk one hour out of an eight hour day. She can lift 10 lbs or less occasionally. She can do no climbing or crawling or stooping or bending below knee level for work activity. She can drive for her own transportation but she cannot drive heavy equipment. She has satisfactory use of her upper extremities. Ms. Moenter stands and walks with a slight forward list and she requires a cane for ambulation. She has difficulty getting up and down out of a chair. It is my medical opinion that the difficulty that she has with any prolonged sitting or standing and walking is related to her industrial claim allowances. It is my medical opinion that due to the industrial claim allowances of Claim No. 671200-22, that Ms. Sue Moenter is not capable of physical work activity. It is my medical opinion that due to the claim allowance of Claim No. 671200-22 that Ms. Moenter could not sustain a functional position for sitting or standing for sustained remunerative employment. (Supp. Stip. 42).

Clearly, when Dr. Rutherford's statement "[a]s a result of the above described orthopedic impairments" is read as it is supposed to be read, within the context of the medical report as a whole, it is not ambiguous.

The "orthopedic impairments" are described immediately prior to the statement in the phrase, "as a result of claim No. 671200-22." The orthopedic impairments in claim No. 671200-22 are sprain of sacrum; protruding disc L4-L5, lumbar; postlaminectomy syndrome NOS. The orthopedic impairments to which Dr. Rutherford refers are all allowed conditions in the claim. The normal, logical reading of Dr. Rutherford's statement within the context of the entire report is not ambiguous. Additionally, not only is Dr. Rutherford's reference not ambiguous, but he reinforces in four separate statements within the same section that his medical opinion is based upon the allowed conditions in the claim.

Lastly, Dr. Rutherford's medical opinion is unequivocally stated in the fifth section of his medical report titled "Conclusions & Medical Opinions" where he states:

The opinions are given with a reasonable degree of medical probability. The AMA Guides to the Evaluation of Permanent Impairment, 4<sup>th</sup> edition is used as a reference.

It is my medical opinion that Ms. Sue Moenter has reached MMI for the claim allowances of Claim No. 671200-22.

It is my medical opinion that Ms. Moenter has a 10% permanent partial impairment of the whole person based on the orthopedic claim allowances of Claim No. 671220-22. This is based on a DRE Category III impairment of the lumbosacral spine with the reference being Table 72 on Page 110.

Based on the orthopedic claim allowances of Claim No. 671200-22, and the functional limitations related to those claim allowances, it is my medical opinion that Ms. Sue Moenter is not capable of physical work activity and I have indicated this on the physical Strength Rating Form. (Supp. Stip. pp. 42, 43).

Dr. Rutherford bases his medical opinion on the allowed conditions of the claim three separate times in the fifth section. As in the Discussion section, Dr. Rutherford is very clear about basing his medical opinion on the allowed conditions in the claim.

When read as a whole, Dr. Rutherford's report contains seven statements that unequivocally state that his medical opinion is based on the allowed conditions in the claim. Sears asks this court to remove one sentence from Dr. Rutherford's report, analyze it out of context, assign an interpretation that defies normal construction, ignore the seven other statements by Dr. Rutherford, and deem the entire report unreliable as evidence to support the commission's order. Sears' interpretation defies common sense. Sears' argument fails because, when the report is read as a whole, it is not ambiguous and therefore there is no equivocation in Dr. Rutherford's medical opinion.

Even if the statement, "[a]s a result of the above described orthopedic impairments" by itself is considered ambiguous, the remainder of the report serves to clarify any ambiguity in the individual statement. As such, the report is not ambiguous. This Court discussed this very scenario in the case, *State ex rel. Eberhardt v. Flxible Corp* (1994), 70 Ohio St.3d 649.

In *Eberhardt*, this Court held that equivocal medical opinions are not evidence and that equivocation occurs when a doctor repudiates an earlier opinion, renders contradictory or

uncertain opinions or fails to clarify an ambiguous statement. *Id.* The Court went on to discuss the issue in detail and stated:

Moreover, ambiguous statements are inherently different from those that are repudiated, contradictory or uncertain. Repudiated, contradictory or uncertain statements reveal that the doctor is not sure what he means and, therefore, they are inherently unreliable. Such statements relate to the doctor's position on a critical issue. Ambiguous statements, however, merely reveal that the doctor did not effectively convey what he meant and, therefore, they are not inherently unreliable. Such statements do not relate to the doctor's position, but to his communication skills. If we were to hold that clarified statements, because previously ambiguous, are subject to *Jennings* or to commission rejection, we would effectively allow the commission to put words into a doctor's mouth or, worse, discount a truly probative opinion. Under such a view, any doctor's opinion could be disregarded merely because he failed on a single occasion to employ precise terminology. In a word, once an ambiguity, always an ambiguity. This court cannot countenance such an exclusion of probative evidence.

In the present case, the statement at issue, if considered ambiguous, is immediately clarified by Dr. Rutherford's seven additional unequivocal statements referring to the allowed conditions in the claim. In such an instance the alleged ambiguity in Dr. Rutherford's statement, "[a]s a result of the above described orthopedic impairments." is not a reflection of the doctor's position but represents a communication error. To hold that Dr. Rutherford's medical report is unreliable based upon the use of imprecise terminology would discount a truly probative opinion. The Court refused to adopt such a position in *Eberhardt* and likewise should refuse to exclude Dr. Rutherford's report in this case.

Even if Dr. Rutherford's report is subject to the interpretation that relator wishes to give it, the commission was not required to give it an equivocal or inconsistent interpretation. *State ex rel. Owens Corning fiberglass v. Indus. Comm.*, Franklin App. No 03 AP-684, 2004-Ohio-3841. The commission's interpretation of Dr. Rutherford's statement, "[a]s a result of the above described orthopedic impairments" is, based upon the logical, common sense construction of the report as a whole, reinforced by Dr. Rutherford's seven additional unequivocal medical opinions,

and supported by Dr. Rutherford's factual findings during his thorough personal examination of Mrs. Moenter. It is the commission's prerogative to interpret evidence and draw reasonable inferences. *State ex rel. West v. Indus. Comm.* (1996), 74 Ohio St.3d 354. Sears' interpretation requires the reader to not only ignore the sequencing and structure of Dr. Rutherford's report but also the remaining medical opinions in the report. The commission's interpretation, however, is supported by the remainder of the evidence. As such, Sears' argument that Dr. Rutherford's report is fatally ambiguous is without merit and should be rejected.

Sears' argues that because one sentence in a medical report is open to different interpretations, therefore the entire report is fatally flawed. This position could be used to attack any report where an individual sentence is isolated from the report as a whole and subjected to differing interpretations. Such an approach would render any medical report subject to the creation of ambiguities dependant solely upon the creative imagination of a prospective relator.

## **2. Dr. Rutherford's report is not internally inconsistent.**

Sears argues that Dr. Rutherford's report is internally inconsistent as to his findings regarding Mrs. Moenter's capacity for sustained remunerative employment. In making the argument, Sears, once again, takes two of Dr. Rutherford's statements out of context, isolates them and assigns its own meaning to them, ignores a significant portion of the report, and then compares them to each other in an effort to create the appearance of an internal inconsistency.

Sears claims that Dr. Rutherford states, "Claimant is capable of some sedentary work" (See Appellant's brief, last paragraph on page 11). This is not true. Dr. Rutherford never states at any point in his medical report that Mrs. Moenter is capable of some sedentary work. (Supp Stip. 40-44). Rather Dr. Rutherford actually states:

Mrs. Moenter is limited to sitting only four hours out of an eight hour day. She can only stand and walk one hour out of an eight hour day. She can lift 10 lbs or less occasionally. (Supp. Stip. p. 42).

In order for Sears to argue that an internal inconsistency exists, it ignores the context in which the above statement is made and equates that statement with Mrs. Moenter being capable of some sedentary work. It then attributes that equation to Dr. Rutherford as if it were his medical opinion.

Next, Sears skips a large portion of Dr. Rutherford's opinion which immediately follows the above statement and serves to further limit Dr. Rutherford's previous description of Mrs. Moenter's physical abilities. This portion of Dr. Rutherford's report is important because it demonstrates that Dr. Rutherford's opinion does not stop with the above statement. His additional comments, which Sears ignores, serve to further describe Mrs. Moenter's physical limitations. Dr. Rutherford's additional description states:

She can do no climbing or crawling or stooping or bending below knee level for work activity. She can drive for her own transportation but she cannot drive heavy equipment. She has satisfactory use of her upper extremities. Ms. Moenter stands and walks with a slight forward list and she requires a cane for ambulation. She has difficulty getting up and down out of a chair. It is my medical opinion that the difficulty that she has with any prolonged sitting or standing and walking is related to her industrial claim allowances. It is my medical opinion that due to the industrial claim allowances of Claim No. 671200-22, that Ms. Sue Moenter is not capable of physical work activity. (Supp. Stip. p. 42).

When one reads the first sentence Sears isolates within the context of the remainder of the paragraph that Sears ignores, it becomes apparent that Dr. Rutherford is describing Mrs. Moenter's physical limitations by beginning with her general physical abilities and then adding further limitations. A complete description of Mrs. Moenter's capacity for sustained remunerative employment is not achieved until all of her physical limitations are listed.

However, Sears ignores Dr. Rutherford's additional limitations and skips to and isolates the last sentence of the paragraph which states:

Mrs. Moenter could not sustain a functional position for sitting or standing for sustained remunerative employment. (Supp. Stip. 42).

Sears then alleges an internal inconsistency by comparing the two isolated sentences and ignoring the additional limitations described by Dr. Rutherford. Obviously, once Dr. Rutherford's report is read in its entirety and all of Mrs. Moenter's physical limitations are taken into account, the two isolated statements are not internally inconsistent but represent the beginning and end of a complete, consistent, and thorough description of Mrs. Moenter's incapacity for sustained remunerative employment.

Sears cites to the cases of *State ex rel. Lopez v. Indus. Comm.* (1994), 69 Ohio St.3d 445 and *State ex rel. Taylor v. Indus. Comm.* (1995), 71 Ohio St.3d 682 to support its argument. However, *Lopez* and *Taylor* are factually distinguishable. In *Lopez*, the internal inconsistency was between a "normal" physical finding, a relatively high (fifty percent) degree of impairment, and a conclusion that claimant was capable of sustained remunerative employment and that he could resume his former job duties. This Court held that, "Being unable to reconcile these seeming contradictions, we find that the report is not 'some evidence' on which to predicate a denial of permanent total disability compensation." *Id.* at 449.

In *Taylor*, the same internal inconsistency existed between a "normal" physical finding, a relatively high (fifty percent) degree of impairment, and a conclusion that claimant was capable of sustained remunerative employment and that he could resume his former job duties. This Court held that this internal inconsistency could not be reconciled and that the report, as a matter of law, could not be "some evidence" supporting the commission's decision.

However, in the instant case, Dr. Rutherford's report, when read in its entirety, does not contain any internal inconsistencies. Unlike the *Lopez* and *Taylor* cases, where the doctor's reports were obviously inconsistent, this case presents a doctor's report that is internally consistent, thorough, and cohesive. It is only when Sears manipulates the report by isolating two sentences and ignoring the substantive findings described between them that the appearance of an alleged internal inconsistency is purported to have been created. Clearly, Dr. Rutherford's report when read in its entirety is not internally inconsistent.

Furthermore, Dr. Rutherford's description of Mrs. Moenter's physical limitations and his medical conclusions are not only consistent with each other, but they are also consistent with Mrs. Moenter's self reporting when she states:

[s]he cannot sit very long and she gets increased back pain when she gets up out of a chair if she has been sitting very long. She uses a recliner a lot and she lays on the couch a lot. (Supp. Stip. 42).

Because Dr. Rutherford's medical opinion is supported by his physical findings and Mrs. Moenter's self reporting, his medical report is not comparable to the doctor's reports in the *Lopez* and *Taylor* cases. Dr. Rutherford's report represents a consistent, logical analysis of Mrs. Moenter's capacity for sustained remunerative employment and therefore can be considered some evidence to support the commission's order. Consequently, Sears' argument that Dr. Rutherford's report is internally inconsistent is not supported by the evidence nor the cited case law. Therefore, Sears' request for a writ on this issue is without merit and should be denied.

### C. PROPOSITION OF LAW TWO:

*Absent plain error, a party cannot raise as an issue on appeal before this Court an Appellate Court's adoption of any factual finding or legal conclusion unless the party timely objected to that finding or conclusion before the Appellate Court.*

This case was originally assigned to Magistrate Macke by the Tenth District Court of Appeals pursuant to Local Rule 12(M) and Civ. R. 53. After the magistrate issued his decision, Sears filed objections to the magistrate's decision pursuant to Civ. R. 53 (D)(3)(b). In its Memorandum in Support of Objection, Sears specifically stated:

Relator *partially* objects to the magistrates' findings. The magistrate made three findings:

- 1) Dr. Rutherford did not rely on non-allowed conditions to support his opinion that claimant is not capable of physical work activity, the PTD award must not be vacated.
- 2) The commission can rely upon Dr. May's March 23, 2004 report to start the PTD award as of March 24, 2004, but the commission cannot rely upon Dr. May's January 15, 2004 report to start the PTD award as Of January 15, 2004.
- 3) The commission did not abuse its discretion in denying Relator's motion to depose Dr. Rutherford.

*Relator objects to the magistrate's finding #1 and #3.*

(Supp. pp. 2, 3). (Emphasis added).

Local Rule 1(B) of the Tenth Appellate Judicial District states, "The Ohio Rules of Civil Procedure, as supplemented hereby, shall govern procedure in original actions filed in this Court." Civ. R. 1(A) states, "These rules prescribe the procedure to be followed in all courts of the state in the exercise of civil jurisdiction at law or in equity. Civ. R. 53(D)(3)(b)(iv) which is titled, "Waiver of right to assign adoption by court as error on appeal," states:

Except for a claim of plain error, 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 has objected to that finding or conclusion as required by Civ. R. 53(d)(3)(b).

Because Sears failed to object to the magistrate's second finding regarding the start date of PTD based on Dr. May's report, it is precluded from raising that issue on appeal before this Court. As a result, Sears' entire argument regarding the start date of PTD based on Dr. May's report is waived and cannot be used to support its request for a writ of mandamus.

Even if this Court finds that Sears did not waive this argument, Sears' argument lacks merit. In an effort to demonstrate the appearance of error, Sears, alleges that the commission determined that Dr. May relied upon non-allowed conditions. This is not true. At no time does the record indicate that the commission determined that Dr. May's reports were based upon non-allowed conditions. (Supp. Stip. 1, 2, 7). This is an erroneous assumption by Sears that is not support by the evidence. Additionally, Sears claims that, "the Commission concluded that Dr. May's January 15, 2004 and March 24, 2004 reports *can be* relied on only to the extent of commencing the award of permanent total disability benefits as of January 15, 2004." (Appellant-Relator's Brief at page 5.) (Emphasis added) This is a misquote of the commission's order. The order actually states, "the reports *are* relied upon only to the extent of commencing the award of permanent total disability benefits..." (Supp. Stip. 64, 65). (Emphasis added) Once again this demonstrates that the evidence does not support Sears' argument.

Additionally, Sears refers to Dr. May's statement on Mrs. Moenter's PERS application as evidence that he considered non-allowed conditions in his medical report to the commission. There is no evidence to support this contention. This is purely conjecture by Sears and has no relevance to a PTD determination before the commission. The evidence necessary for awarding PERS benefits is completely different than the evidence necessary for PTD award by the Industrial Commission. As such, any conclusions reached by Dr. May on Mrs. Moenter's PERS

application are without relevance and should be given no weight. Based on the foregoing, Sears' request for a writ upon this issue should be denied.

**D. PROPOSITION OF LAW THREE:**

***The Industrial Commission does not abuse its discretion in denying a request for a deposition when a hearing provides a reasonably equal option to address or resolve the alleged defect or potential problem raised by the applicant.***

Pursuant to Ohio Adm. Code 4121-3-09(A)(7)(c), a hearing administrator shall determine whether a request for a deposition is "a reasonable one." When determining whether a deposition request is reasonable, the hearing administrator shall consider "whether the alleged defect or potential problem raised by the applicant can be adequately addressed or resolved by the claims examiner, hearing administrator, or hearing officer through the adjudicatory process within the commission or the claims process within the bureau of workers' compensation." Ohio Adm. Code 4121-3-09(A)(7)(d).

The commission did not abuse its discretion when it denied Sears' request to depose Dr. Rutherford because Sears failed to demonstrate that its request for a deposition was reasonable.

Sears argues three reasons why the commission abused its discretion in denying its deposition request. First, Sears alleges that a deposition is necessary because Dr. Rutherford's report is significantly disparate from that of Dr. McDaniel. Sears cites to *State ex rel. Cox v. Greyhound Food Management*, (2002), 95 Ohio St.3d 353 to support its argument. However, the Court in *Cox* criticized the substantial disparity argument when it stated:

Disability hearings occur precisely because there is a disparity in the medical evidence. Unanimity does not usually generate a hearing. To the contrary, the need for a hearing generally arises when one doctor says that a claimant can work and the other disagrees. They are completely opposite opinions and that is why there is a hearing—to debate a disputed report's strengths and weaknesses. Once the hearing is concluded, the commission can accept the disputed report or reject it as unpersuasive. *Id.* at 356.

Sears makes no argument how the existence of the disparity between the doctors' opinions entitles it to a deposition. Sears simply demonstrates that a disparity exists. Sears even quotes the magistrate's decision as support for the existence of the disparity. There is no new evidentiary issue raised here. There is no doubt that there is a disparity between the doctors' medical opinions. But as the Court in *Cox* said, "that is why there is a hearing." *Id.*

Sears claims that in a deposition setting, Dr. Rutherford could be asked to comment on the validity of the opinions expressed by Dr. McDaniel. This additional information is not necessary for the commission to render a decision because it is entirely within the commission's prerogative to find some reports more persuasive than others. *State ex rel. Burley Coil v. Indus. Comm.* (1978), 31 Ohio St.3d 18. Dr. Rutherford's opinion on the validity of another doctor's opinion would not assist the commission and only serve to invade its province in determining the weight of the evidence before it.

Sears also asserts that the deposition would aid in the clarity of presentation during the hearing. However, that would be true of all medical reports. More clarity could be added to any hearing if the parties were able to depose the doctor prior to the hearing. Sears misses the point. It is the existence of the disparity between the reports that can be used by a party at the hearing to show why the commission, as the exclusive determiner of the weight and credibility of the evidence, should accept one report and find another unpersuasive. It is not necessary to have all disparities clarified in order to avoid an abuse of discretion. Sears fails to demonstrate how the hearing process did not provide an opportunity for the commission to adequately address or resolve the disparity other than to say a deposition would have provided more clarity.

Second, Sears argues the commission abused its discretion in denying its deposition request because Sears contends a deposition would cure the ambiguities in Dr Rutherford's

medical report. Sears argues that the alleged ambiguities in Dr. Rutherford's medical report are defects that can be cured by deposition pursuant to *Cox*. Sears argument is misplaced. It is the existence of the ambiguous nature of a doctor's medical report that renders it incapable of being considered as some evidence by the commission. Clarification through deposition is not necessary to argue the existence of the alleged ambiguity before the commission. The commission only needs to find that a report is ambiguous to find it unpersuasive. The commission does not need an ambiguity clarified in order to decide that it renders a report unsuitable as evidence.

At the hearing before the commission, Sears had the opportunity to argue their claim of the ambiguous nature of Dr. Rutherford's report. Sears attempted to show that Dr. Rutherford's report could not be considered some evidence because it was ambiguous. Obviously, the commission disagreed with Sears' argument and found Dr. Rutherford's report could be considered some evidence. Sears' claim that the commission abused its discretion when it denied its request for a deposition is without merit because the hearing was an equally reasonable option for resolution. Sears was able to argue the existence of the alleged ambiguity without the need for a deposition.

Ironically, if Sears' request for a deposition had been granted, it would only have served to correct any alleged ambiguities in the report thereby rendering the report as some evidence. If Dr. Rutherford is deposed, Sears' alleged ambiguities would disappear and so would their argument that Dr. Rutherford's report cannot be used as some evidence because it is ambiguous. This would only serve to defeat Sears' ultimate objective which is to have the commission disregard Dr. Rutherford's report and deny PTD benefits to Mrs. Moenter.

Additionally, if Sears' argument were valid, any doctor would be subject to a deposition because the deposition could be used to "clarify statements" as Sears proposes. This would be no standard at all. Anyone could find some portion of a doctor's report that could use "clarification" and thereby be entitled to subject the doctor to a deposition.

Finally, Sears argues that the commission abused its discretion in denying its request for a deposition because the hearing was not a reasonably equal option. Sears offers no support for its argument other than the circular proposition that a hearing is not an equal option to a deposition because at the hearing the doctor is not present to clarify his opinions like he would be at a deposition. Sears simply claims, "It is the very nature of the proceedings". (Appellant-Relator's Brief at p. 18).

What Sears fails to realize is that at a hearing all that is necessary to have a report deemed unreliable as evidence is to point out an ambiguity or internal inconsistency and convince the commission that due to this defect a report is fatally flawed. Clarification through deposition is not necessary. In *Cox*, the Court ruled that the commission has the prerogative to disqualify as fatally flawed any report that is so internally inconsistent as to negate its credibility. *Id.* at 357. "Because this is a potential problem that the commission can address and remedy without resort to deposition, it is not an abuse of discretion for the commission to elect to do so." *Id.* Accordingly, it is not necessary for the doctor to be present at the hearing or be subject to a deposition to clarify his report.

Sears is concerned that without the aid of a deposition, the commission will be left to speculate and guess what a witness intended. Sears' concerns are misplaced. As stated earlier it is the commission's prerogative to interpret evidence and draw reasonable inferences. *West, supra*. The commission does not need to speculate or guess as to the meaning of Dr.

Rutherford's opinion. The commission is able to make logical inferences from the report which are based upon some evidence. This is not an abuse of discretion. *State ex rel. King v. Trimble* (1996), 77 Ohio St.3d 58. Additionally, if the commission cannot draw an inference based on some evidence before it, then the commission has the prerogative to disregard that report as the commission is the exclusive evaluator of evidentiary weight and credibility. *Teece*, supra. The hearing provides a reasonable opportunity for the commission to adequately address these issues and therefore a deposition is not necessary.

Sears argues that without a deposition, the only recourse available is to bring the inconsistencies to the commission's attention and advance that they are severe enough to cast doubt on the physician's credibility. Pursuant to the ruling in *Cox*, that is exactly what is supposed to happen. Accordingly, the commission did not abuse its discretion in denying Sears' request for a deposition and Sears' request for a writ of mandamus on this issue should be denied.

## E. CONCLUSION

The commission's order is based upon some evidence. Sears has failed to demonstrate that the commission abused its discretion in relying on Dr. Rutherford's medical report as some evidence and in denying Sears' request for a deposition. Therefore, the commission respectfully requests this court to deny Sears request for a writ of mandamus.

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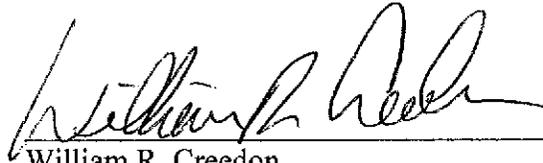
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**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing Revised Merit Brief of Appellee-Respondent, Industrial Commission of Ohio, was served by U.S. mail, postage pre-paid, this 24th day of September, 2007 upon the following counsel:

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A handwritten signature in black ink, appearing to read "William R. Creedon", written over a horizontal line.

William R. Creedon  
Assistant Attorney General

## APPENDIX

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\*\*\* RULES CURRENT THROUGH UPDATES RECEIVED JULY 15, 2007\*\*\*  
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Ohio Rules Of Civil Procedure  
Title I Scope Of Rules - One Form Of Action

*Ohio Civ. R. 1 (2007)*

**Rule 1. Scope of rules: applicability; construction; exceptions**

**(A) Applicability.**

These rules prescribe the procedure to be followed in all courts of this state in the exercise of civil jurisdiction at law or in equity, with the exceptions stated in subdivision (C) of this rule.

**(B) Construction.**

These rules shall be construed and applied to effect just results by eliminating delay, unnecessary expense and all other impediments to the expeditious administration of justice.

**(C) Exceptions.**

These rules, to the extent that they would by their nature be clearly inapplicable, shall not apply to procedure (1) upon appeal to review any judgment, order or ruling, (2) in the appropriation of property, (3) in forcible entry and detainer, (4) in small claims matters under Chapter 1925, Revised Code, (5) in uniform reciprocal support actions, (6) in the commitment of the mentally ill, (7) in all other special statutory proceedings; provided, that where any statute provides for procedure by a general or specific reference to the statutes governing procedure in civil actions such procedure shall be in accordance with these rules.

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Ohio Rules Of Civil Procedure  
Title VI Trials

*Ohio Civ. R. 53 (2007)*

**Rule 53. Magistrates**

**(A) Appointment.**

A court of record may appoint one or more magistrates who shall be attorneys at law admitted to practice in Ohio.

**(B) Compensation.**

The compensation of magistrates shall be fixed by the court, and no part of the compensation shall be taxed as costs under *Civ. R. 54(D)*.

**(C) Authority.**

**(1) Scope.**

To assist courts of record and pursuant to reference under *Civ. R. 53(D)(1)*, magistrates are authorized, subject to the terms of the relevant reference, to do any of the following:

- (a) Determine any motion in any case;
- (b) Conduct the trial of any case that will not be tried to a jury;
- (c) Upon unanimous written consent of the parties, preside over the trial of any case that will be tried to a jury;
- (d) Conduct proceedings upon application for the issuance of a temporary protection order as authorized by law;
- (e) Exercise any other authority specifically vested in magistrates by statute and consistent with this rule.

**(2) Regulation of proceedings.**

In performing the responsibilities described in *Civ. R. 53(C)(1)*, magistrates are authorized, subject to the terms of the relevant reference, to regulate all proceedings as if by the court and to do everything necessary for the efficient performance of those responsibilities, including but not limited to, the following:

- (a) Issuing subpoenas for the attendance of witnesses and the production of evidence;
- (b) Ruling upon the admissibility of evidence;
- (c) Putting witnesses under oath and examining them;
- (d) Calling the parties to the action and examining them under oath;
- (e) When necessary to obtain the presence of an alleged contemnor in cases involving direct or indirect contempt of court, issuing an attachment for the alleged contemnor and setting the type, amount, and any conditions of bail pursuant to *Crim. R. 46*;
- (f) Imposing, subject to *Civ. R. 53(D)(8)*, appropriate sanctions for civil or criminal contempt committed in the presence of the magistrate.

**(D) Proceedings in Matters Referred to Magistrates.**

**(1) Reference by court of record.**

**(a) Purpose and method.**

A court of record may, for one or more of the purposes described in *Civ. R. 53(C)(1)*, refer a particular case or matter or a category of cases or matters to a magistrate by a specific or general order of reference or by rule.

**(b) Limitation.**

A court of record may limit a reference by specifying or limiting the magistrate's powers, including but not limited to, directing the magistrate to determine only particular issues, directing the magistrate to perform particular responsibilities, directing the magistrate to receive and report evidence only, fixing the time and place for beginning and closing any hearings, or fixing the time for filing any magistrate's decision on the matter or matters referred.

**(2) Magistrate's order; motion to set aside magistrate's order.**

**(a) Magistrate's order.**

**(i) Nature of order.**

Subject to the terms of the relevant reference, a magistrate may enter orders without judicial approval if necessary to regulate the proceedings and if not dispositive of a claim or defense of a party.

**(ii) Form, filing, and service of magistrate's order.**

A magistrate's order shall be in writing, identified as a magistrate's order in the caption, signed by the magistrate, filed with the clerk, and served by the clerk on all parties or their attorneys.

**(b) Motion to set aside magistrate's order.**

Any party may file a motion with the court to set aside a magistrate's order. The motion shall state the moving party's reasons with particularity and shall be filed not later than ten days after the magistrate's order is filed. The pendency of a motion to set aside does not stay the effectiveness of the magistrate's order, though the magistrate or the court may by order stay the effectiveness of a magistrate's order.

**(3) Magistrate's decision; objections to magistrate's decision.**

**(a) Magistrate's decision.**

**(i) When required.**

Subject to the terms of the relevant reference, a magistrate shall prepare a magistrate's decision respecting any matter referred under *Civ. R. 53(D)(1)*.

**(ii) Findings of fact and conclusions of law.**

Subject to the terms of the relevant reference, a magistrate's decision may be general unless findings of fact and conclusions of law are timely requested by a party or otherwise required by law. A request for findings of fact and conclusions of law shall be made before the entry of a magistrate's decision or within seven days after the filing of a magistrate's decision. If a request for findings of fact and conclusions of law is timely made, the magistrate may require any or all of the parties to submit proposed findings of fact and conclusions of law.

**(iii) Form; filing, and service of magistrate's decision.**

A magistrate's decision shall be in writing, identified as a magistrate's decision in the caption, signed by the magistrate, filed with the clerk, and served by the clerk on all parties or their attorneys no later than three days after the decision is filed. A magistrate's decision shall indicate conspicuously 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)*.

**(b) Objections to magistrate's decision.**

**(i) Time for filing.**

A party may file written objections to a magistrate's decision within fourteen days of the filing of the decision, whether or not the court has adopted the decision during that fourteen-day period as permitted by *Civ. R. 53(D)(4)(e)(i)*. If any party timely files objections, any other party may also file objections not later than ten days after the first objections are filed. If a party makes a timely request for findings of fact and conclusions of law, the time for filing objections begins to run when the magistrate files a decision that includes findings of fact and conclusions of law.

**(ii) Specificity of objection.**

An objection to a magistrate's decision shall be specific and state with particularity all grounds for objection.

**(iii) Objection to magistrate's factual finding; transcript or affidavit.**

An objection to a factual finding, whether or not specifically designated as a finding of fact under *Civ. R. 53(D)(3)(a)(ii)*, shall be supported by a transcript of all the evidence submitted to the magistrate relevant to that finding or an affidavit of that evidence if a transcript is not available. With leave of court, alternative technology or manner of reviewing the relevant evidence may be considered. The objecting party shall file the transcript or affidavit with the court within thirty days after filing objections unless the court extends the time in writing for preparation of the transcript or other good cause. If a party files timely objections prior to the date on which a transcript is prepared, the party may seek leave of court to supplement the objections.

**(iv) Waiver of right to assign adoption by court as error on appeal.**

Except for a claim of plain error, 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 has objected to that finding or conclusion as required by *Civ. R. 53(D)(3)(b)*.

**(4) Action of court on magistrate's decision and on any objections to magistrate's decision; entry of judgment or interim order by court.**

**(a) Action of court required.**

A magistrate's decision is not effective unless adopted by the court.

**(b) Action on magistrate's decision.**

Whether or not objections are timely filed, a court may adopt or reject a magistrate's decision in whole or in part, with or without modification. A court may hear a previously-referred matter, take additional evidence, or return a matter to a magistrate.

**(c) If no objections are filed.**

If no timely objections are filed, the court may adopt a magistrate's decision, unless it determines that there is an error of law or other defect evident on the face of the magistrate's decision.

**(d) Action on objections.**

If one or more objections to a magistrate's decision are timely filed, the court shall rule on those objections. In ruling on objections, the court shall undertake an independent review as to the objected matters to ascertain that the magistrate has properly determined the factual issues and appropriately applied the law. Before so ruling, the court may hear additional evidence but may refuse to do so unless the objecting party demonstrates that the party could not, with reasonable diligence, have produced that evidence for consideration by the magistrate.

**(e) Entry of judgment or interim order by court.**

A court that adopts, rejects, or modifies a magistrate's decision shall also enter a judgment or interim order.

**(i) Judgment.**

The court may enter a judgment either during the fourteen days permitted by *Civ. R. 53(D)(3)(b)(i)* for the filing of objections to a magistrate's decision or after the fourteen days have expired. If the court enters a judgment during the fourteen days permitted by *Civ. R. 53(D)(3)(b)(i)* for the filing of objections, the timely filing of objections to the magistrate's decision shall operate as an automatic stay of execution of the judgment until the court disposes of those objections and vacates, modifies, or adheres to the judgment previously entered.

**(ii) Interim order.**

The court may enter an interim order on the basis of a magistrate's decision without waiting for or ruling on timely objections by the parties where immediate relief is justified. The timely filing of objections does not stay the execution of an interim order, but an interim order shall not extend more than twenty-eight days from the date of entry, subject to extension by the court in increments of twenty-eight additional days for good cause shown. An interim order shall comply with *Civ. R. 54(A)*, be journalized pursuant to *Civ. R. 58(A)*, and be served pursuant to *Civ. R. 58(B)*.

**(5) Extension of time.**

For good cause shown, the court shall allow a reasonable extension of time for a party to file a motion to set aside a magistrate's order or file objections to a magistrate's decision. "Good cause" includes, but is not limited to, a failure by the clerk to timely serve the party seeking the extension with the magistrate's order or decision.

**(6) Disqualification of a magistrate.**

Disqualification of a magistrate for bias or other cause is within the discretion of the court and may be sought by motion filed with the court.

**(7) Recording of proceedings before a magistrate.**

Except as otherwise provided by law, all proceedings before a magistrate shall be recorded in accordance with procedures established by the court.

**(8) Contempt in the presence of a magistrate.**

**(a) Contempt order.**

Contempt sanctions under *Civ. R. 53(C)(2)(f)* may be imposed only by a written order that recites the facts and certifies that the magistrate saw or heard the conduct constituting contempt.

**(b) Filing and provision of copies of contempt order.**

A contempt order shall be filed and copies provided forthwith by the clerk to the appropriate judge of the court and to the subject of the order.

**(c) Review of contempt order by court; bail.**

The subject of a contempt order may by motion obtain immediate review by a judge. A judge or the magistrate entering the contempt order may set bail pending judicial review of the order.

## Ohio 10th Dist. Loc. App. R. 1

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LOCAL RULES OF THE COURTS OF APPEALS  
Tenth Appellate District

*Ohio 10th Dist. Loc. App. R. 1 (2007)*

**Rule 1. Applicable rules**

**(A) Appeals.**

The Ohio Rules of Appellate Procedure, as supplemented hereby, shall govern procedure in appeals to this Court.

**(B) Original Actions.**

The Ohio Rules of Civil Procedure, as supplemented hereby, shall govern procedure in original actions filed in this Court.

**(C) Appeals from the Environmental Review Appeals Commission.**

*Appellate Rules 11(A), 11(B), 13, 14, 15, 16, 17, 18, 19, 21, 22, 23, 24, 27, 29 and 30*, as supplemented hereby, shall apply to and govern procedure in appeals to this Court from the Environmental Review Appeals Commission pursuant to *R.C. 3745.06*, except as may be otherwise provided by law.

**(D) Form of Filings.**

All pleadings, briefs, and other papers filed or presented to the Court for consideration in appeals and original actions shall be in writing. Writing for purposes of this rule means that said papers must be typewritten or produced by standard typographic printing or by any mechanical duplicating or copying process which produces a clear black image on white paper, in at least 12 point type, and which otherwise complies with *App.R. 19*. The clerk shall forthwith call to the attention of the court administrator any paper filed which does not comply with these rules or is filed out of rule.

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LOCAL RULES OF THE COURTS OF APPEALS  
Tenth Appellate District  
CASE MANAGEMENT PLAN: RULES 2-13

*Ohio 10th Dist. Loc. App. R. 12 (2007)*

**Rule 12. Original actions**

**(A) How Instituted.**

An original action, other than habeas corpus, shall be instituted by the filing of a complaint, together with three copies thereof and sufficient service copies, and service shall be made, and such action shall proceed as any civil action under the Ohio Rules of Civil Procedure.

**(B) Deposit for Costs.**

At the time of filing the complaint in an original action in this court, the relator shall deposit with the clerk of this court the sum of one hundred dollars (\$100), as security for the payment of costs.

A party claiming to be indigent shall file with the complaint a motion for leave to proceed *in forma pauperis* supported by an affidavit showing indigency and indicating their actual financial condition and the disposition of any request for similar leave sought in any other court. The motion shall comply with Loc.R. 6 of this court. Upon filing of the motion, the clerk shall forthwith forward a copy to the court administrator and the motion shall be determined in accordance with Loc.R. 6(B). A respondent may oppose the granting of a motion to proceed *in forma pauperis* in the manner set forth in *App.R. 15(B)*. The Court will *sua sponte* dismiss any complaint found to be frivolous, malicious or abusive.

**(C) Alternative Writ.**

In the absence of extraordinary circumstances, no alternative writ will be issued in an original action, other than a habeas corpus action.

**(D) Motion to Dismiss.**

When a motion to dismiss is filed, four copies of a brief in support of such motion must be filed with such motion, and the movant shall indicate whether ruling on the motion will dispose of the merits.

**(E) Brief in Opposition to Motion to Dismiss.**

Four copies of a brief in opposition to a motion to dismiss shall be filed within fifteen days of the filing of such motion with an indication whether ruling on the motion may be deemed dispositive of the merits.

**(F) Oral Argument on Motion to Dismiss.**

All motions will be ruled upon without oral argument before the Court, except where the Court requests such argument.

**(G) Presentation of Evidence.**

To facilitate the consideration and disposition of original actions, counsel should, whenever possible, file an agreed statement of facts.

When the evidence to be considered consists of all or part of an official record or the record of proceedings before an administrative agency, such as the Industrial Commission claim file, a stipulated or certified copy, rather than the

original, must be submitted pursuant to *Civ.R. 44*, and *Evid.R. 902* and *1005*. Unless the parties enter into a stipulation concerning the evidence to be submitted to the Court and attach to the stipulation legible copies of such evidentiary materials relevant to the determination of the action, each party shall file with the Court legible certified copies of evidentiary materials the party feels relevant to the issues before the Court. An original public record will not be accepted for filing as evidence.

When a case, unless referred to a magistrate, has not been submitted by the parties to the Court for its final determination, at the time of, or for, filing of a reply, it shall be referred to the Court Administrator, and the parties shall appear before such Court Administrator or attorney designated by the Court at such reasonable time and place as may be designated on not less than ten days notice, and shall there make arrangements for presenting all evidence which they desire to offer. Such evidence shall be presented by way of deposition or stipulation, or certified copy of official records, unless the Court otherwise orders.

**(H) Time for Briefs.**

The brief of the plaintiff shall be served and filed within fifteen days after completion of the presentation of evidence, pursuant to Section G; the brief of the defendant shall be served and filed within fifteen days after service of the brief of the plaintiff; and any reply brief shall be served and filed within five days after service of the brief of the defendant.

**(I) Service of Copy of Brief.**

Service of a copy of any brief shall be made upon opposing counsel forthwith, and proof of service shall be filed with the clerk.

**(J) Briefs.**

Briefs shall conform to *App.R. 19*. The brief of the plaintiff shall contain, under appropriate headings, and in the order here indicated:

(1) A table of contents, with page references, and a table of cases (alphabetically arranged), statutes and other authorities cited, with references to the pages of the brief where they are cited.

(2) A statement of the issues presented.

(3) A statement of the case. The statement shall first indicate briefly the nature of the case. There shall follow a statement of the facts relevant to the issues presented.

(4) An argument. The argument shall contain the contentions of the plaintiff with respect to the issues presented, and the reasons therefor, with citations to the authorities and statutes relied on.

(5) A short conclusion, stating the precise relief sought.

The brief of the defendant shall conform to the foregoing requirements except that a statement of the issues and a statement of the case, or of the facts relevant to the issues need not be made unless the defendant is dissatisfied with such statements of the plaintiff.

**(K) Election Matters.**

Because of the necessity of a prompt disposition of an original action relating to a pending election, and in order to give the Court adequate time for full consideration of such case, if such action is filed within ninety days prior to the election, answer day shall be five days after service of summons, and the reply brief of plaintiff must be filed within five days after the filing of the answer. All briefs must be filed no later than five days after the filing of plaintiff's brief. Only in exceptional cases will time be extended, even though opposing counsel has consented thereto.

**(L) Oral Argument.**

In any original action in this Court, oral argument may be had only on approval of a request therefor, provided that the Court may, if it so desires, require such oral argument in any case. Any request for oral argument must be made in writing, by either party, at the time of the filing of the party's original pleading. The party having the affirmative shall have the right to open and close the argument and the further right to divide the time allotted as desired.

**(M) Reference to Magistrate.**

(1) Original actions in this Court may, either upon motion of a party or of the Court, be referred by the Court to a magistrate, pursuant to *Civ.R. 53*. Unless otherwise indicated in the order of reference to a magistrate, the magistrate shall have all the powers specified in *Civ.R. 53*, and the proceedings and decision of the magistrate and objections thereto shall be governed by *Civ.R. 53*. Sections D through N of this Rule apply to proceedings before the magistrate.

(2) Where the evidence submitted consists of all or part of the record of the proceedings before an administrative agency, such as the Industrial Commission claim file, each party shall attach to any brief and to any memorandum pertaining to objections to the magistrates' decision a *legible* xerographic copy of all evidence in the administrative record which the party considers pertinent to the issues before the Court, including any order of the agency which is claimed to constitute an abuse of discretion. Unless some party indicates to the contrary, the Court will assume that the attachments to the briefs or memoranda include all the evidence necessary for the magistrate or the Court to determine the issues. Where the parties have entered into a stipulation regarding the evidence to be submitted to the magistrate, copies of the relevant evidence need not be attached to the parties' briefs, but shall be attached to any memorandum pertaining to objections to the magistrate's decision.

(3) Within fourteen days of the filing of a magistrate's decision, a party may file written objections to the magistrate's decision. Any other party may also file objections not later than ten days after the first objections are filed. A memorandum in support shall be served and filed with objections. Any memorandum in opposition shall be served and filed within fourteen days after service of objections. Objections will be submitted to the Court as a part of its regular hearing calendar. Requests for oral argument on objections, made pursuant to Section L of this Rule, shall be filed by a party no later than the time set for filing the initial memorandum.

**(N) Dismissals for Want of Prosecution.**

Unless all evidence is presented, and the plaintiff's brief is filed within four months after the filing of the complaint, an original action shall be dismissed, after notice to counsel of record, for want of prosecution, unless good cause be shown to the contrary.