

IN THE SUPREME COURT OF OHIO

State ex rel. SEARS ROEBUCK CO., : Case No. 2007-0642
Relator, :
VS. : On Appeal from the Franklin
INDUSTRIAL COMMISSION OF OHIO : County Court of Appeals, Tenth
and SUE MOENTER : Appellate District
Respondents : Court of Appeals Case No.:
05AP-1135

REPLY BRIEF OF APPELLANT-RELATOR SEARS ROEBUCK CO.

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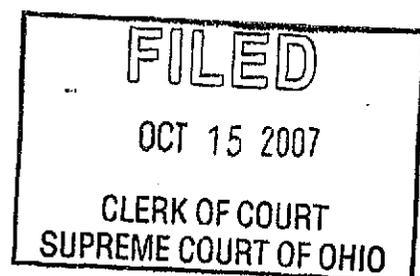


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I. STATEMENT OF THE CASE & FACTS

On pages 2-7 of its Merit Brief, Respondent Industrial Commission sets forth its version of the Statement of the Case and Facts. Having presented nothing contradictory to that set forth by Relator, no reply/rebuttal is warranted.

On pages 1-3 of its Merit Brief, Respondent Moenter sets forth her version of the Statement of the Case and Facts. Relator takes issue with two statements made in Respondent Moenter's Statement of the Case and the Facts.

1. "Dr. May limited his opinion to the allowed conditions of the claim."

(*Respondent Moenter's Merit Brief*, p.1) This assertion is not a statement of fact, as Relator has suggested at every level of this case that Dr. May considered both allowed and non-allowed conditions. Further explanation of this position is presented in Relator's Merit Brief at pages 10-11.

2. "Dr. Rutherford also specifically limited his opinion to the allowed conditions

of the claim." (*Respondent Moenter's Merit Brief*, p.1) Again, this assertion is not a statement of fact, as Relator has suggested at every level of this case that Dr. Rutherford also considered allowed and non-allowed conditions. Further explanation of this position is presented in Relator's Merit Brief at pages 11-12.

Other than these two statements, having presented nothing contradictory to that set forth by Relator, no further reply/rebuttal is warranted.

II. LAW & ARGUMENT

A. The appropriate standard of review is abuse of discretion where “some evidence” is not presented to support the Commission’s findings

Respondent Moenter suggests that “Sears simply asks this Court to reweigh the evidence, a province reserved solely for the Commission. Complaints for writ of mandamus do not invoke a *de novo* review of the commission’s decision by the courts.” citing *State ex rel. Pass v. C.S.T. Extraction Co.* (1996), 74 Ohio St.3d 373, 376, 658 N.E.2d 1055. (*Respondent Moenter’s Merit Brief*, p.3) Respondent Moenter’s assertion is incorrect as she has drastically misinterpreted Sears’s original statement of the standard of review.

Sears is not asking this Court for a *de novo* review of the evidence; Sears is asking this court to examine the sufficiency of the evidence and find that it does not constitute “some evidence” to support the Commission’s finding of PTD benefits. (*Relator Sears Roebuck Co. Merit Brief*, p.8) “[T]he ‘some evidence’ test is and has for years been the appropriate standard for review of the Industrial Commission's findings.” *State ex rel. Rouch v. Eagle Tool & Mach. Co.* (1986), 26 Ohio St.3d 197, 198, 498 N.E.2d 464, FN1. Stated another way, the appropriate standard is as follows:

In order for this court to issue a writ of mandamus, appellant must show that he has a clear legal right to the relief sought, and that the commission has a clear legal duty to provide such relief. See, e.g., *State, ex rel. Pressley, v. Indus. Comm.* (1967), 11 Ohio St.2d 141, 228 N.E.2d 141 [40 O.O.2d 141]; *State, ex rel. Elliott, v. Indus. Comm.* (1986), 26 Ohio St.3d 76, 497 N.E.2d 70. To show that a clear legal right to relief exists, appellant must demonstrate that the commission abused its discretion. See, e.g., *State, ex rel. Hutton, v. Indus. Comm.* (1972), 29 Ohio St.2d 9, 278 N.E.2d 34 [58 O.O.2d 66]; *Elliott*, supra. This court will not determine that the commission abused its discretion when there is some evidence in the record to support the commission's finding.

State ex rel. Rouch v. Eagle Tool & Mach. Co., 26 Ohio St.3d at 198. As mentioned above, both *Pressley* and *Elliott* are properly cited in Relator’s Merit Brief (See *Relator Sears Roebuck Co.*

Merit Brief, p.iii). Indeed, in Relator's Law & Argument Section, the title of subsection "A" reads "The Industrial Commission's award of PTD was not based on 'some evidence' found in the record." (*Relator Sears Roebuck Co. Merit Brief*, p.9) With Respondents unable to demonstrate the required "some evidence," the Commission's awarding of such benefits was an abuse of discretion.

Given the above, any suggestion that Relator is encouraging this Court to apply the incorrect standard of review is without merit.

B. Respondents fail to present any arguments which show how Industrial Commission's award of PTD was based on "some evidence" found in the record

Respondent Moenter addresses this argument at pages 4-7 of her Merit Brief. Respondent Industrial Commission addresses this argument at pages 8-16 of its Merit Brief. Both party's arguments are broken down by doctor and, accordingly, that is how they will be addressed here.

1. Dr. May

Respondent Moenter suggests that "[t]here is nothing in the Commission order indicating a rejection of Dr. May's report. Sears [sic] argument that there is such a finding is groundless." (*Respondent Moenter's Merit Brief*, p.4) Given that the Commission only "speaks through its orders," *State ex rel. Yellow Freight System, Inc. v. Indus. Comm.* (1994), 71 Ohio St.3d 139, 642 N.E.2d 378, there should be some affirmative reference to those facts which the Commission is choosing to highlight from Dr. May's reports which support the finding of PTD benefits. However, this reference to medical facts is completely absent.

What the Commission did use from Dr. May's reports was described as follows:

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.

(*Stip. Rec.* p.65) This use of the words "relied upon only to the extent of..." clearly indicates that Dr. May's reports were used for just one purpose. One must assume that had the Commission intended to use Dr. May's reports as the basis for any other portion of their decision, they would have said so.

When discussing Dr. May's reports, Relator often pointed out how the Tenth District Magistrate found it appropriate to push the start date back even further in order to correspond with Dr. May's first mention of permanent total impairment. (*Magistrate's Decision*, ¶ 57-61) When responding to this position, Respondent Industrial Commission suggests a nonsensical argument grounded in semantics. Respondent states:

...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)

(*Respondent Industrial Commission's Merit Brief*, p.18) This difference between "can" and "are" is entirely insignificant. The point remains that Dr. May's reports were only considered for their value in being able to determine a start date – nothing else. Even after the Commission used the reports for that limited purpose, the Magistrate found it appropriate to further limit their purpose and focus solely on the March 24, 2004 report. (*Magistrate's Decision*, ¶ 57-61) Furthermore, Relator continues to maintain that Dr. May's reports considered allowed and non-allowed conditions and should not be used at all. (*Relator Sears Roebuck Co. Merit Brief*, p.10-11)

2. Dr. Rutherford

Both Respondents suggest that when Dr. Rutherford's report is read as a whole it is neither inconsistent nor ambiguous. This position is unsupported. Even reading Dr. Rutherford's report as a whole, without removing any one sentence from its relevant context, the report remains inconsistent. Dr Rutherford states:

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.

(*Stip. Rec.* p.42). It is not the juxtaposition of sentences that creates the inconsistency – it is the meaning of the sentences themselves. “[I]t is my medical opinion that Ms. Moenter is limited to sitting only four hours out of an eight hour day.” *Id.* This would seem to mean that if Ms. Moenter could find gainful employment which allowed her to sit four hours or less a day she would be able to accept this employment. However, the inconsistency arises when Dr. Rutherford states, “...Ms. Moenter could not sustain a functional position for sitting or standing for sustained remunerative employment.” *Id.* Dr. Rutherford agrees that Ms. Moenter can “drive for her own transportation,” but she should not drive “heavy equipment.” *Id.* These statements do not seem inconsistent with finding a job where Ms. Moenter could drive herself to work and simply refrain from working in a factory with forklifts, a construction site with bulldozers, or

similar large machinery situation. Dr. Rutherford states, Ms. Moenter has “satisfactory use of her upper extremities.” *Id.* This may well suit her for an office position or other upper body focused position. These obvious gaps of logic in Dr. Rutherford’s report seem to question the validity of his later statements regarding Ms. Moenter’s capabilities for sustained remunerative employment. As illustrated above, it is the meaning of these statements, not their relative position to one and other, which creates the inconsistency within Dr. Rutherford’s report.

Left unclarified by the Dr. Rutherford, these ambiguous statements become equivocation. And as this Court well knows, whether it is a doctor’s report which is internally inconsistent or an equivocal medical opinion, these findings do not constitute “some evidence” upon which the Commission can rely in making a determination as to disability. *State ex rel. Eberhardt v. Flexible Corp.* (1994), 70 Ohio St.3d 649, 657, 640 N.E.2d 815. *See also State ex rel. Lopez v. Industrial Commission* (1994), 69 Ohio St.3d 445, 1994-Ohio-458, 633 N.E.2d 528; *State ex rel. Taylor v. Industrial Commission* (1995), 71 Ohio St.3d 582, 645 N.E.2d 1249.

C. Relator presented the testimony of Dr. McDaniel and Mr. Johnson as “some evidence” in the absence of consistent medical opinions by Drs. May and Rutherford

Respondent Moenter suggests that the Industrial Commission is not bound to accept the conclusions of a vocational expert. (*Respondent Moenter’s Merit Brief*, p.10-11) Relator does not dispute this proposition or call into question Respondent’s referenced case law. *Id.* at 11. But, when read literally, Respondent’s position misrepresents that contained at Relator’s Merit Brief at pages 12-13.

While the Industrial Commission is not *bound* to accept the conclusions of vocational or non-medical experts, they *may* accept those conclusions if they so choose. In this particular case, those opinions abound in the testimony of Dr. McDaniel and Mr. Johnson. Dr. McDaniel concluded that the allowed conditions do not preclude sustained remunerative employment.

(*Stip. Rec.* p.18-21) Specifically, Dr. McDaniel concluded that “[t]he majority of Ms. Moenter’s ongoing complaints, findings and disability are consistent with a non-allowed degenerative condition.” *Id.* at 20. Finally, Dr. McDaniel indicated that “Ms. Moenter would be able to sustain remunerative employment as related solely to the allowed conditions of this claim.” *Id.* at 21. This testimony was bolstered by the testimony of vocational expert Craig Johnston. Mr. Johnson opined that Claimant is capable of sustained remunerative employment. Specifically, Johnston opined that Claimant is capable of at least part-time employment based on her ability to sit for four hours at a time and full use of her upper extremities.¹ *Id.* at 24.

Relator would not now, and did not in its Merit Brief, suggest that the Commission *must* accept the opinions advanced by Dr. McDaniel and Mr. Johnson. Relator merely argued that the Commission *may* accept those opinions. After the reports of Drs. Rutherford and May were called into question, Relator used Dr. McDaniel’s testimony and Mr. Johnson’s testimony to show “some evidence” to support a finding that Respondent Moenter was capable of sustained remunerative employment.

D. Relator’s request for deposition stands without valid response while Respondent’s arguments shed light on the undesired effects of the Cox test

Respondent Moenter addresses the denial of Relator’s request for deposition at pages 8-10 of her Merit Brief. Respondent Industrial Commission addresses this argument at pages 19-23 of its Merit Brief. Both party’s arguments boil down to the belief that the hearing is the appropriate forum to “cure the ambiguities” found in Dr. Rutherford’s report. Both parties believe that the hearing was a reasonably equal option to the requested deposition. Respondent’s challenges to Relator’s deposition argument is misplaced.

¹ Note the similarities of the opinions expressed by Mr. Johnson to those presented in Section B.2 of this Reply Brief when discussing the obvious inconsistencies of Dr. Rutherford’s report.

First, neither Respondent adequately responds to Relator's argument that discrepancies are uncovered at depositions, thus a hearing is not a reasonably equal option since the expert rarely attends the hearing. A deposition may be used to further delve into the meaning behind a physician's word choice or critique the analysis of non-allowed medical conditions. Hypothetical situations, not addressed in the physician's report, may be brought up and discussed. Depending on the physician's answers, a deposition may shed light on new inconsistencies which would produce additional inconsistencies to present to a hearing officer. Without a deposition being granted, the requesting party will only be able to point out facial inconsistencies present in the report. Without a deposition, a requesting party will never have the opportunity to say, "This report is inconsistent because in this report the expert gave Explanation X, however in his deposition he gave Explanation Y."

Second, Respondent Industrial Commission suggests just the opposite to the previous argument - had Relator been permitted to take Dr. Rutherford's deposition it would have only served to "correct any alleged ambiguities in the report thereby rendering the report as some evidence." (*Respondent Industrial Commission's Merit Brief*, p.21) Respondent Industrial Commission goes on to say, "[i]f 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..." *Id.* If we take Respondent's arguments at face value, then the current test, established by *State ex rel. Cox v. Greyhound Food Mgt., Inc.*, 95 Ohio St.3d 353, 2002 -Ohio- 2335, 767 N.E.2d 1155, will *always favor* the party seeking introduction of the report and *dramatically disfavor* the party requesting a deposition. To illustrate this paradox, we need only consider two situations: 1. the facts of this case as they currently exist and then 2. the facts of this case assuming a deposition had been granted with the "curing" results as Respondent suggests.

Situation 1

1. Relator requests a deposition of Rutherford
2. The hearing officer asks, "Is there a defect which could be cured by deposition?"
3. Hearing Officer decides NO and denies the request
4. The report, containing no defects, is later admitted

Situation 2

1. Relator requests a deposition of Rutherford
2. The hearing officer asks, "Is there a defect which could be cured by deposition?"
3. Hearing Officer decides YES and grants the request
4. The defects are cured during deposition
5. The report, containing now explained defects, is still admitted

Note that in both situations the allegedly inconsistent report is *always admitted*. In Situation 1, the hearing officer did not find a defect and thus admitted the report. In Situation 2, once the deposition is granted and defects remedied, the report is admitted. Assuming Respondent's argument at face value, this example illustrates how the *Cox* test severely disadvantages the requesting party.

With this analysis in mind, there is no prudent reason why any party would ever request a deposition. A medical report will always be admitted if a deposition is requested, either because it has no errors or because the errors will be cured in deposition. If a party truly sought to exclude a report based on inconsistencies, then the best strategy would be to skip requesting a deposition and simply oppose the report at the hearing, hoping to cast enough doubt at that time to convince the hearing officer to exclude the report. In addition to always favoring the non-moving party's admission of the expert's report, the *Cox* test also creates an undesired side-effect of silently encouraging attorneys to never request depositions of experts whose reports they seek to exclude.

E. Relator properly preserved the issue of PTD start dates for appellate review

Respondent Industrial Commission suggests that Relator did not properly preserve the determination of PTD start date as a proper issue for appeal. (*Respondent Industrial Commission's Merit Brief*, p.17-18) This assertion is simply incorrect. While Relator does not

dispute Respondent Industrial Commission's quoted language from Relator's *Objection to the Magistrate's Decision*, Relator would point out that Respondent Industrial Commission has taken the language out of context. The next sentence after Respondent's quoted language is, "Additionally, Relator asserts that Respondent is not entitled to receive PTD benefits." (*Relator's Memorandum In Support of Objection*, Supp. p.3). That sentence, consistent with Relator's initial position from day one, references that Relator disputes all findings which suggest that any PTD benefits should be awarded, regardless of a particular start date. The reason Relator did not specifically list the Magistrate's second finding as an objection was because the finding indicated that some of Dr. May's reports would not be considered, and as such the start date for PTD benefits would be moved back. This was an issue which Relator argued before the Magistrate and successfully won. Preserving an objection to a point which was decided in Relator's favor seems somewhat nonsensical.

Furthermore, Relator's *Memorandum In Support of Objection*, read as a whole, goes on to take issue with the reports filed by Dr. May. The first full paragraph on page 4 (*Supp. p.4*) is entirely devoted to Dr. May's reports. This section praises the Commission for excluding the report, while continuing to suggest that Dr. May evaluated non-allowed conditions. Pertinent excerpts include:

With regard to Dr. May's reports, the Industrial Commission correctly disregarded them in terms of his assessment of Respondent's permanent total disability impairment. ...It is clear from these reports that Dr. May considered both allowed and non-allowed conditions in rendering his opinion that Respondent is permanently and totally disabled. ...Surprisingly, the magistrate not only attempts to rehabilitate the credibility of Dr. May's report..., he further seems to ignore the fact that the PERS application is signed on January 14, 2004 and the PTD letter is signed March 24, 2004, a mere two months later. ...Clearly, Dr. May relied on non-allowed conditions in his assessment.

(Relator's Memorandum In Support of Objection, Supp. p.4.) These citations indicate that Relator did indeed properly preserve this issue for appeal. Even viewed in the broadest sense, Relator has always asserted that Respondent is not entitled to receive any PTD benefits. As such, no start date is appropriate.

III. CONCLUSION

Based upon the foregoing, and the arguments set forth in its Merit Brief, Relator Sears Roebuck & Co. respectfully urges this Court to reverse the decision of the Tenth District Court of Appeals, and grant a writ of mandamus, ordering the Industrial Commission to vacate its decision which granted PTD benefits to Mrs. Moenter.

Respectfully submitted,



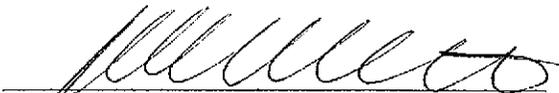
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent via regular U.S. Mail service to the following on this 15th day of October, 2007:

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