

ORIGINAL
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In the
Supreme Court of Ohio

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

**MOTION OF APPELLANT
THE INDUSTRIAL COMMISSION OF OHIO
TO DISMISS APPEAL FOR MOOTNESS**

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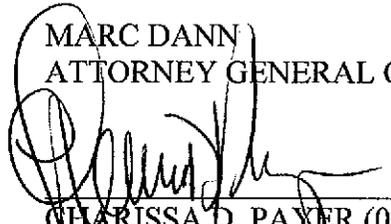
FILED
 NOV 08 2007
 CLERK OF COURT
 SUPREME COURT OF OHIO

MOTION TO DISMISS APPEAL FOR MOOTNESS

Appellant Industrial Commission of Ohio (“Commission”) believes that the facts that claimant, Shawn Walker (“Walker”), resumed work in 2006, and shortly thereafter died in a non-work related incident, moot the present controversy and mooted the controversy in the Court of Appeals below. Therefore, the Commission respectfully requests that the Court dismiss the appeal and vacate the decision below, or alternatively, remand the case to the Tenth District Court of Appeals to allow the Commission to move to vacate its decision and dismiss the case.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

Because this case is moot, and has been since before the decision of the Tenth District Court of Appeals, the Commission moves the Court to dismiss the appeal and vacate the decision below, or in the alternative, to remand the case to the Tenth District to allow the Industrial Commission to move to vacate the decision and dismiss.

A. The case is moot first because Walker returned to work and second because Walker died in a non-work related incident.

This case arose from a motion by the employer, Mosier Industrial Services Corporation (“Mosier”) for a declaration that the injured worker, Walker, had reached maximum medical improvement (“MMI”). The Commission denied the motion because it lacked jurisdiction to find MMI as Walker was receiving wage continuation rather than temporary total compensation (“TT”).

Mosier filed a complaint for a writ of mandamus with the Tenth District Court of Appeals on the Commission’s decision. Oral argument before the magistrate appointed to hear the case occurred on April 20, 2006, and on April 27, 2006, the magistrate recommended that Mosier’s request for a writ be granted. The Commission filed objections to the magistrate’s recommendation on May 10, 2006. The Tenth District adopted the magistrate’s recommendation on August 31, 2006. The Commission appealed the Tenth District’s decision on October 13, 2006.

Walker apparently went back to work in early 2006, but neither the Commission nor its counsel knew that fact until oral argument before this Court. See, streaming video of oral argument at 35:15-35:43. This fact alone mooted the issue in this case, as Walker could not have returned to work unless the employer and employee resolved the underlying merits questions regarding wage continuation and MMI.

Moreover, Walker died on April 21, 2006, of non-work-related injuries. See death certificate, attached. However, no one filed any notice of his death with the Tenth District below. Rule 25(E) (suggestion of death or incompetency) of the Ohio Rules of Civil Procedure specifically requires the attorney for a party to inform the court and all other parties of the death of a party:

Upon the death or incompetency of a party it shall be the duty of the attorney of record for that party to suggest such fact upon the record within fourteen days after he acquires actual knowledge of the death or incompetency of that party. The suggestion of death or incompetency shall be served on all other parties as provided in Rule 5.

Walker's attorney failed to inform the Tenth District and counsel for the Commission about the death within the fourteen-day period provided for in Civ. R. 25(E). Counsel for the Commission did informally learn of Walker's death through a telephone call from Walker's counsel on July 13, 2006, long after the recommendation of the magistrate had been issued and after the filing of objections to the magistrate's decision by the Commission, but before the Tenth District had issued its opinion. Counsel for the Commission neglected to realize at the time that Walker's death had the effect of mooting the case.

Upon further investigation after the oral argument in this Court, counsel for the Commission learned that Walker returned to work, not in the spring of 2006, but in January of 2006. Counsel for the Commission further learned, after receiving the death certificate, that Walker died on April 21, 2006, one day after the oral argument before the magistrate in the Tenth District, and six days before the magistrate's decision was issued on April 27, 2006. Therefore, the case was moot in the appellate court below even before the magistrate issued his decision.

B. This Court should vacate the Court of Appeals' decision.

The courts of Ohio do not issue advisory opinions. *State ex rel. United Auto., Aerospace & Agric. Implement Workers of Am. v. Ohio Bureau of Workers' Comp.* (2006), 108 Ohio St. 3d 432, at ¶ 60. The Court should therefore dismiss the appeal. Additionally, for the reasons explained below, the Court should remand the case to allow the Commission to move to vacate the decision of the court below.

If the Court dismisses the Commission's appeal without allowing for the opportunity to vacate the decision below, the Commission will be burdened with an entrenched decision rendered unreviewable. Specifically, the Commission will now be obligated through the Tenth District's opinion to allow employers who chose wage continuation instead of TT to ask for and receive hearings on maximum medical improvement. Because this case is moot, no review of that decision is now possible. Even if a similar case arises it will be unreviewable because only the Tenth District hears mandamus cases against the Commission, and its opinion on the issue here will be deemed binding.

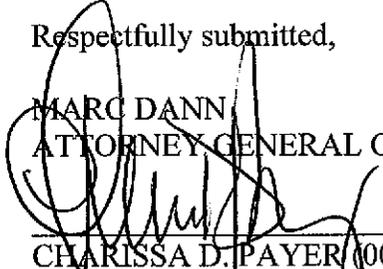
Moreover, as the mootness occurred *before* the decision was rendered below, the Tenth District's opinion is advisory. Thus, not only would the Commission be bound by an unreviewable opinion, but that opinion itself should not have been rendered because the case was also moot at the time. The Court should vacate the decision below to avoid binding the Commission to a decision that should never have been made in the first place.

CONCLUSION

For the reasons set forth above, the Commission respectfully requests that the Court remand the case to the Tenth District Court of Appeals so that the Commission can move to vacate that court's decision and dismiss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion of the Appellant Industrial Commission of Ohio to Dismiss Appeal for Mootness was sent, postage prepaid, by regular U.S. Mail service on this 8th day of November, 2007, to the following:

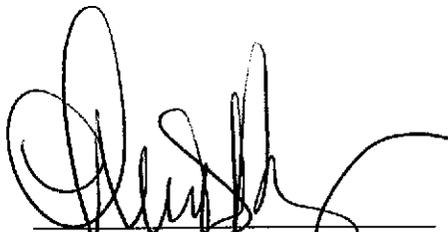
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Attachment not scanned