IN THE SUMPREME COURT OF OHIO

| | | |
|---|---|---|
| STATE OF OHIO, ex rel.<br>Mosier Industrial Services Corporation | : | CASE NO. 06-1889 |
| Appellee, | : | On Appeal from the<br>Franklin County Court of Appeals,<br>Tenth Appellate District |
| vs. | : | |
| INDUSTRIAL COMMISSION OF OHIO, | : | |
| Appellant. | : | |

**MOTION FOR RECONSIDERATION**
**OF APPELLEE MOSIER INDUSTRIAL SERVICES CORPORATION**


JOHN TARKOWSKY #0008766
BARAN, PIPER, TARKOWSKY,
FITZGERALD & THEIS CO., L.P.A.
3 N. Main Street, Suite 500
Mansfield, Ohio 44902
Phone (419) 524-6682
Fax (419) 525-4571

Attorney for Appelle,
Mosier Industrial Services Corporation

MARC DANN
Attorney General of Ohio

CHARISSA D. PAYER #0064452
Assistant Attorney General
150 East Gay Street, 22nd Floor
Columbus, Ohio 43215
Phone (614) 466-6696
Fax (614) 728-9535

Counsel for Appellant,
Industrial Commission of Ohio

DEAN A. CATIGNANI #0041296
4005 West Central Avenue
Toledo, Ohio 43264
Phone (419) 329-6500
Fax (419) 329-7831

Counsel for Shawn Walker



FILED
FEB 11 2008
CLERK OF COURT
SUPREME COURT OF OHIO

## MOTION FOR RECONSIDERATION

Now comes Appellee, Mosier Industrial Services Corporation (hereinafter referred to as "Mosier"), which moves this Honorable Court to reconsider its opinion of January 30, 2008, granting Appellant, Industrial Commission of Ohio's (hereinafter referred to as "Commission") Motion to Dismiss and to either issue a decision on the merits or to consider the Commission's motion as one to withdraw its appeal to the Supreme Court allowing the Court of Appeal's decision to stand, for the following reasons:

1. The death of an injured worker in a workers' compensation claim does not render an employer's appeal of an adverse administrative ruling moot.

2. The Industrial Commission, through its Attorney General, did not notify the appellee or its counsel of its filing of the Motion to Dismiss, preventing Appellee from responding in a timely fashion, erroneously creating the suggestion that Appellee did not object to the Motion.

THEREFORE, Appellee, Mosier Industrial Services Corporation, respectfully requests that this Court reconsider its granting of Appellant's Motion to Dismiss for alleged mootness.

Respectfully submitted,

John Tarkowsky #0008766
BARAN, PIPER, TARKOWSKY,
FITZGERALD & THEIS CO., L.P.A.
3 N. Main Street, Suite 500
Mansfield, Ohio 44902
Phone (419) 524-6682
Fax (419) 525-4571
Attorney for Appellee,
Mosier Industrial Services Corporation

## MEMORANDUM IN SUPPORT

The Commission's Motion to Dismiss this case as being moot (filed November 8, 2007, two days after an oral argument herein) rests solely on the premises that the injured worker returned to work and/or died, yet cites no case law in support thereof. Mosier had no opportunity to respond as it was not put on notice of the filing of the Motion to Dismiss (see Affidavit of Attorney John Tarkowsky, counsel for Appellee, Mosier, attached hereto as Exhibit A.) Appellee can only speculate as to whether such failure of notice was purposeful or inadvertent.

This case arose as a consequence of an administrative motion filed by Appellee, Mosier, with the Commission, seeking a declaration of maximum medical improvement and a request to terminate injured worker Shawn Walker's (hereinafter referred to as "Walker") entitlement to temporary total disability compensation. Mosier had paid wage continuation in lieu of having the Bureau of Workers' Compensation pay temporary total disability weekly benefits, so as not to convert the case into one of lost time, which would result in a loss of group rating.

The Commission denied the administrative motion suggesting that it lacked jurisdiction as Walker was receiving wage continuation rather than temporary total, and that it had no authority to terminate wage continuation voluntarily paid by a State-Funded employer. Mosier filed a Complaint in Mandamus with the Tenth District Court of Appeals in Franklin County On October 13, 2005, appealing the Commission's final ruling of September 17, 2005. Walker returned to work in January, 2006. Oral arguments before the Magistrate in the Court of Appeals, who was appointed to hear the case, occurred on April 20, 2006. Walker died on April 21, 2006. A decision was issued by the Magistrate on April 27, 2006, recommending that the

Writ be granted, compelling the Industrial Commission to accept jurisdiction and finding that the payment of wage continuation should be treated similarly as payment of temporary total. The Commission objected. The undersigned, counsel for Mosier, learned of Walker's death and communicated same to counsel for the Commission on July 13, 2006. (See Motion to Dismiss, page 4.) The Tenth District Court of Appeals issued a decision on August 31, 2006, adopting the Magistrate's recommendation granting the writ which the Commission appealed to this Court.

Initially, Appellant Commission suggested in its Motion to Dismiss that Walker's return to work mooted the issue as no more wage continuation was being paid. Certainly Mosier had standing to proceed with its motion to obtain a declaration of maximum medical improvement, as at the time the motion was filed, wage continuation was, in fact, being paid. The Commission's own policy permits such a filing and pursuit of a maximum medical improvement finding in spite of the cessation of temporary total or wage continuation. (See Industrial Commission Hearing Officer Manual, Policy Statements, Memo C3, attached hereto as Exhibit B.) Moreover, Walker's return to work to allegedly prevent the adjudication of the issue does not render the subject moot. Otherwise, injured workers' may always seek a return to work to defeat any such motion and then after dismissal of such a motion, immediately reapply for temporary total eligibility. The employer in such circumstance would perpetually be precluded from seeking maximum medical improvement and the termination of temporary total or wage continuation from the Commission if a return to work is the determinative test, allowing the insured worker to dictate his eligibility for such compensation and findings of maximum medical improvement.

Moreover, the death of an injured worker does not serve to hold that an employer's appeal from a Commission decision is moot. In *Youghiogheny & Ohio Coal Company v. Mayfield,* 11 Ohio St.3d 70 (1984), this Court specifically held that the death of a workers' compensation claimant does not abate an appeal filed by an employer to an adverse decision issued by the Industrial Commission and, consequently, the appeal is not subject to dismissal during its pendency. (See also, *Byrum Construction v. Administrator BWC,* 111 Ohio App.3d, 782 (1996), citing *Youghiogheny.*) Walker as the injured worker is not an indispensable party to this proceeding, as evidenced by his failure to participate at the appellate level. Furthermore, Appellant Industrial Commission admits in its Motion to Dismiss (Page 4 of said motion) that it was aware of Walker's death even before the Court of Appeals decision was adopted, yet it took no action to dismiss the appeal at that time. Ohio Civil Rule of Procedure 25(E), concerning suggestions of death or incompetency, allows <u>any</u> attorney for a party to an action to inform the Court of the death of a party. Having been put on notice, counsel for appellant did nothing to seek a dismissal before the Court of Appeals entered a final order. Consequently, even if this Court was to dismiss Appellant's appeal to this Court, there is no legal basis upon which to vacate the Court of Appeals decision. However, if the Commission wishes to withdraw its appeal to this Court, Mosier will not object, thereby allowing the Court of Appeals decision to stand.

## CONCLUSION

This is an issue of paramount importance to all State-Funded employers. For the foregoing reason, Appellee, Mosier Industrial Services Corporation, moves this Court to reconsider its order of January 30, 2008, granting Appellant's Motion to Dismiss and issue its

decision on the merits; or, in the alternative Appellee requests this Court to treat Appellant Commission's Motion to Dismiss as one to withdraw it's appeal filed to this Court only, thereby allowing the Court of Appeal's Decision to stand.

Respectfully submitted,

John Tarkowsky #0008766
BARAN, PIPER, TARKOWSKY,
FITZGERALD & THEIS CO., L.P.A.
3 N. Main Street, Suite 500
Mansfield, Ohio 44902
Phone (419) 524-6682
Fax (419) 525-4571
Attorney for Appellee,
Mosier Industrial Services Corporation

CERTIFICATE OF SERVICE

A copy of the foregoing was served upon the following by regular U.S. Mail this 6th day of February, 2008.

Charissa D. Payer
Assistant Attorney General
150 East Gay Street, 22nd Floor
Columbus, Ohio 43215

Dean A. Catignani, Essq.
4005 West Central Avenue
Toledo, Ohio 43264

John Tarkowsky #0008766
BARAN, PIPER, TARKOWSKY,
FITZGERALD & THEIS CO., L.P.A.
Attorney for Appellee,
Mosier Industrial Services Corporation

ALL-STATE LEGAL EXHIBIT A

IN THE SUMPREME COURT OF OHIO

| | | |
|---|---|---|
| STATE OF OHIO, ex rel.<br>Mosier Industrial Services Corporation | : | CASE NO. 06-1889 |
| Appellee, | : | On Appeal from the<br>Franklin County Court of Appeals,<br>Tenth Appellate District |
| vs. | : | |
| INDUSTRIAL COMMISSION OF OHIO, | : | |
| Appellant. | : | |

**AFFIDAVIT OF JOHN TARKOWSKY, ESQ.**

STATE OF OHIO )
) SS:
COUNTY OF RICHLAND )

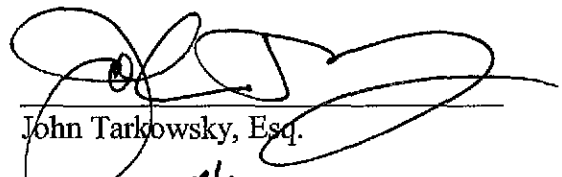
Now comes Affiant, John Tarkowsky, Esq., who being first duly sworn, deposes and states as follows:

1. Affiant is the attorney of record representing Appellee, Mosier Industrial Services Corporation in the case herein at all times relevant.

2. Affiant states that he did <u>not</u> receive a copy of Appellant, Industrial Commission's Motion to Dismiss and otherwise had absolutely no knowledge of the filing of such Motion to Dismiss until affiant received this Court's decision of January 30, 2008, granting said motion and also received no suggestion from counsel for Appellee, Industrial Commission, or anyone associated with the Attorney General's office that such a Motion was contemplated or filed.

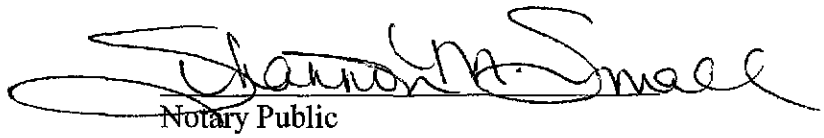
3. Affiant further states that upon receipt of this Court's order of January 30, 2008, granting Appellee Commission's Motion, affiant called counsel for the deceased injured worker, Shawn Walker, one Dean A. Catignani, who also confirmed that he did not receive a copy of Appellant Commission's Motion to Dismiss, although he had received a phone call after the parties arguments in the Ohio Supreme Court on November 6, 2007, requesting information concerning the death of his client.

Further affiant sayeth naught.



John Tarkowsky, Esq.

Sworn to before me and in my presence ~~on~~ this 6th day of February, 2008.



Notary Public

**SHANNON M. SMALL**
NOTARY PUBLIC, STATE OF OHIO
My Commission Expires
Oct. 23, 2008

ALL-STATE LEGAL®
EXHIBIT
B

May 7, 2001 Memo C3

**State of Ohio**
**Industrial Commission**
**Policy Statements and Guidelines**

---

## Jurisdiction over the Issue of Maximum Medical Improvement

In order for a Hearing Officer to proceed on the issue of Maximum Medical Improvement (MMI), it is necessary that Temporary Total Disability be an issue in the claim.

The measuring date to determine jurisdiction on the issue of MMI is the date on which the motion or request was filed seeking a finding of MMI. A Hearing Officer has the ability to proceed on the issue of MMI when a claimant is: (1) on TTD compensation at the time a party files a request that the claimant be found to have reached MMI, and/or (2) when the claimant is on TTD compensation at the time of the hearing on the issue of MMI.

Where the claimant was neither on TTD at the time of the request to find MMI, nor at the time of hearing on that issue, the Hearing Officer shall not proceed on the issue of MMI.

---