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## II. STATEMENT OF FACTS

On April 12, 1999, Appellee Kathleen E. Moran (“Moran”) signed a First Report of Injury (“FROI-1) form alleging that she suffered a neck and back injury on March 11, 1999 while in the employ of Appellant Chrysler LLC, formerly known as DaimlerChrysler Corporation (“Chrysler”). (Supp. 1.) Moran signed an additional FROI-1 on July 25, 1999 also alleging that she injured her neck, shoulder and mid-back areas on March 11, 1999. (Supp. 4.) On September 14, 1999, a district hearing was held; Moran’s claim, Claim No. 99-463550, was allowed for the condition “herniated disc C4-5;” and temporary total compensation (“TTC”) was ordered paid upon certification of disability. (Supp. 6-7.) Pursuant to a C-84 signed by Dr. Gosman and filed on October 23, 1999, Moran began receiving TTC effective April 12, 1999. (Supp. 3.)

On February 14, 2003, Chrysler filed a motion requesting termination of Moran’s TTC pursuant to Dr. Jeffrey LaPorte’s February 7, 2003 report. (Supp. 19-23.) Chrysler’s motion was granted in an Industrial Commission of Ohio (“Commission”) order dated March 18, 2003, and Moran’s TTC compensation was terminated. (Supp. 33-34.) In an August 12, 2003 Commission order, Moran’s claim was additionally allowed for the condition of “aggravation of pre-existing cervical spondylosis at C6-7 and C6-7 cervical radiculopathy.” (Supp. 36-37.)

On May 26, 2005, Moran underwent fusion surgery at C6-7, and Chrysler resumed payment of Moran’s TTC. (Supp. 87.) On March 8, 2006, Chrysler’s third-party administrator, ESIS, sent a letter to Moran’s attending physician, Dr. Thomas Andreshak, asking whether Moran would ever return to her former position of employment based on the allowed conditions of “herniated disc C4-5 and aggravation of cervical spondylosis C6-7 with

radiculopathy.” (Supp. 91.) Dr. Andreshak responded, “No she will not return to her former position.” (Id.) Based on Dr. Andreshak’s opinion, Chrysler filed a motion requesting that the Industrial Commission terminate Moran’s TTC. (Supp. 90-91.)

On April 12, 2006, a district hearing was held regarding Chrysler’s motion. (Supp. 95-96.) The district hearing officer erroneously denied Chrysler’s motion, rendered a finding that Moran had not reached maximum medical improvement, and failed to address the issue of permanency regarding Moran’s inability to return to her former position of employment. (Supp. 197-199.) Chrysler appealed, and a staff hearing was held on May 24, 2006. (Supp. 97, 106-108.) Prior to the staff hearing, Chrysler filed a brief setting forth the argument that Moran’s TTC should be terminated based on Dr. Andreshak’s certification that Moran could never return to her former position of employment. (Supp. 100-105.) The staff hearing officer denied Chrysler’s motion. (Supp. 106-108.) Chrysler filed an appeal to the Commission on June 19, 2006, but the Commission refused the appeal. (Supp. 109-113.) Chrysler sought reconsideration of the refusal order. (Supp. 114-115.) On August 16, 2006, the Commission denied Chrysler’s reconsideration request. (Supp. 116.)

Chrysler instituted this mandamus action in the Franklin County Court of Appeals on September 26, 2006. (Appendix p. 13.) On March 19, 2007, Magistrate Kenneth Macke issued a decision recommending that Chrysler’s request for a writ of mandamus be denied. (Appendix p. 8.) Chrysler filed objections to the magistrate’s decision, and on September 18, 2007, the Franklin County Court of Appeals overruled Chrysler’s objections and denied Chrysler’s request for a writ of mandamus. (Appendix p. 5.) Chrysler filed a Notice of Appeal to this Court on November 1, 2007. (Appendix p. 1.)

### III. ARGUMENT

#### A. Standard for Mandamus Relief

To establish entitlement to a writ of mandamus, Chrysler must demonstrate all of the following: 1) a clear legal right to the relief prayed for; 2) a clear legal duty on the part of the Commission to perform the requested act; and 3) no plain and adequate remedy in the ordinary course of the law. *State, ex rel. Westchester Estates, Inc. v. Bacon* (1980), 61 Ohio St.2d 42. If Chrysler can satisfy these criteria, it is entitled to the requested writ. *State, ex rel. Berger v. McMonagle* (1983), 6 Ohio St.3d 28.

Chrysler has the burden of showing a clear legal right to a writ of mandamus as a remedy from the determination of the Commission. *State ex rel. Pressley v. Indus. Comm.* (1967), 11 Ohio St.2d 141. A clear legal right to a writ of mandamus exists if Chrysler can show that the Commission abused its discretion by issuing an order which is not supported by any evidence in the record. *State, ex rel. Hutton v. Indus. Comm.* (1972), 29 Ohio St.2d 9. Where the record contains no evidence to support the findings and determination of the Commission, there is an abuse of discretion and mandamus is appropriate. *State, ex rel. G.F. Business Equipment, Inc. v. Indus. Comm.* (1981), 66 Ohio St.2d 446; *State, ex rel. Lewis v. Diamond Foundry Co.* (1987), 29 Ohio St.3d 56.

#### B. Proposition of Law No. I: The permanency of a claimant's inability to return to her former position of employment requires termination of the claimant's temporary total compensation.

Pursuant to this Court's decisions in *State ex rel. Ramirez v. Indus. Comm.* (1982), 69 Ohio St.2d 630, 632, and *State ex rel. Advantage Tank Lines v. Indus. Comm.* (2005), 107 Ohio St.3d 16, 17, a claimant is not entitled to TTC when her inability to return to her former position of employment has become permanent ("*Ramirez* permanency"). In this case, the court of appeals, in adopting the magistrate's decision, correctly found that Moran's

inability to return to her former position of employment is permanent, and that permanency was not contested by either Moran or Appellee the Industrial Commission of Ohio. (Appendix p. 13.) The court erred, however, by concluding that this uncontested fact did not require termination of Moran's TTC. The court of appeals' conclusion is wrong for three reasons: 1) *Ramirez* permanency is distinguishable from maximum medical improvement ("MMI"); 2) this Court's decision in *State ex rel. Vulcan Materials Co. v. Indus. Comm.* (1986), 25 Ohio St.3d 31, did not overrule *Ramirez* and permanency continues to be a basis for termination of TTC; and 3) this Court's statement in *Advantage Tank Lines* that TTC is not payable when a claimant's inability to return to her former position of employment is permanent is not mere *dicta*.

1. *Ramirez* permanency and maximum medical improvement are distinct concepts.

*Ramirez* permanency and MMI are separate and distinct bases upon which TTC can be terminated. The court of appeals ignores this distinction and creates the term "permanency/MMI." (Appendix p. 6.) This term, as best as Chrysler can tell, has never been used in any other Ohio court of appeals or Ohio Supreme Court case. The Commission's staff hearing officer made the same mistake when she found that because Moran had not reached MMI, her disability was not permanent. (Appendix p. 23.) MMI is not entirely synonymous with and does not eliminate the significance of *Ramirez* permanency.

a. Reliance on *Matlack* is misplaced.

The Magistrate found that the court of appeals had previously "equated the permanency concept ...with the concept of MMI" in *State ex rel. Matlack v. Indus. Comm.* (1991), 73 Ohio App.3d 648. (Appendix p. 15.) In *Matlack*, the court of appeals analyzed the "ubiquitous" MMI test, but in no way identified MMI as the only basis upon which to terminate

TTC. See *Matlack*, supra at 655. Moreover, the facts in *Matlack* are distinguishable from this case. In *Matlack*, the Industrial Commission found that the medical evidence “anticipated possible return to work and/or rehabilitation,” and the court of appeals upheld the award of TTC based on the Industrial Commission’s reliance upon “these return-to-work and rehabilitation indications.” *Matlack*, supra, 73 Ohio App.3d at 651, 659. In this case, no one contests Dr. Andreshak’s opinion that Moran will never return to her former position of employment.

In *Matlack*, the issue for the court of appeals’ consideration was whether an “irreversible” medical condition required a finding of MMI, not whether a permanent inability to return to work rendered a claimant ineligible for TTC. *Id.* at 658. In Moran’s case, Chrysler’s argument focuses on Moran’s permanent inability to return to her former position of employment, i.e., *Ramirez* permanency, and, therefore, poses a different question for this Court’s resolution. Thus, the court of appeals’ reliance on *Matlack* was misplaced.

b. The distinction between *Ramirez* permanency and MMI is underscored by their different origins.

The concept of *Ramirez* permanency is derived from this Court’s 1982 decision, *State ex rel. Ramirez v. Indus. Comm.* (1982), 9 Ohio St.2d 630, and was most recently restated by the court in *State ex rel. Advantage Tank Lines v. Indus. Comm.* (2005), 107 Ohio St.3d 16, 17. The concept of MMI was created by the legislature when R.C. §4123.56 was amended in 1986 to provide that TTC shall not be paid “when the employee has reached maximum medical improvement.” R.C. §4123.56(A). When this Court reached its decision in *Ramirez* in 1982, “maximum medical improvement” was not yet identified in R.C. §4123.56 as an additional basis upon which to terminate TTC. There is no language in the statute or any case law to support the conclusion that the legislature, in amending R.C. §4123.56 in 1986, overruled the

holding in *Ramirez* that when a claimant's temporary inability to return to work has become permanent, the claimant is no longer entitled to TTC.

c. *Ramirez* permanency and MMI have a different focus.

The term MMI is defined in OAC 4121-3-32(A)(1) as a "treatment plateau ... at which no fundamental functional or physiological change can be expected ...," and the definition does not include any language pertaining to a claimant's ability or inability to return to her former position of employment. In contrast, *Ramirez* permanency concerns whether a claimant is permanently prevented from returning to her former position of employment. *Ramirez*, supra at 631-632. In *Advantage Tank Lines*, supra, this Court reiterated its *Ramirez* holding. The Court, relying on *Ramirez*, held that:

TTC awards are based exclusively on a claimant's ability to return to his or her former position of employment. In this context, a determination that a disability is permanent means that the condition will never improve to the point where the claimant can resume his or her former job. Thus, when this determination is made, the disability is no longer considered temporary, so TTC is terminated.

*Advantage Tank Lines*, supra at 17, citing R.C. 4123.56 and *Ramirez*, supra. The concept of MMI focuses on the status of a claimant's medical condition. The concept of *Ramirez* permanency focuses on whether the claimant retains the potential to return to her former position of employment. "Permanency/maximum medical improvement" is a term which erroneously ignores the distinct nature of the two concepts.

d. The Ohio Administrative Code recognizes the distinction between permanency and MMI.

OAC 4123-19-03 recognizes the distinction between *Ramirez* permanency and MMI. The rule states, "Payment of temporary total disability compensation ... shall continue

uninterrupted until further order ..., unless the claimant has ... reached maximum medical improvement **or that the disability has become permanent....**” OAC 4123-19-03(K)(8)(emphasis added.) If MMI and permanency were synonymous or necessarily occur simultaneously, as suggested by the court of appeals, the rule would not use the disjunctive “or.”

e. MMI and Ramirez permanency do not necessarily occur simultaneously.

While a finding of permanency and MMI may occur simultaneously, they may also occur sequentially or one may occur in the absence of the other. A common example of the divergence of the concepts is when a claimant returns to work after a finding of maximum medical improvement.

Another example is Moran’s case Moran had not reached MMI when Dr. Andreshak certified that Moran would never return to her former position of employment, despite the possibility of some medical improvement.

In sum, the concepts of *Ramirez* permanency and MMI are distinct concepts which should be treated as separate bases upon which TTC can be terminated. The 1986 inclusion of MMI in R.C. 4123.56 did not replace the idea of *Ramirez* permanency, and “MMI” and “permanency” have different focuses and definitions. This distinction has been recognized by this Court and the regulatory provisions of Ohio workers’ compensation law. Accordingly, Moran can, and did, reach *Ramirez* permanency, despite not having reached MMI, when her treating physician, Dr. Andreshak, opined that she would never return to her former position of employment. Under this Court’s decisions in *Ramirez* and *Advantage Tank Lines*, Moran’s TTC should have been terminated.

2. *Vulcan* did not overrule *Ramirez*, and *Ramirez* permanency remains a viable basis for terminating TTC.

The court of appeals erroneously concluded that *Vulcan Materials Co. v. Indus. Comm.* (1986), 25 Ohio St.3d 31, overruled *Ramirez*. (Appendix p. 6-7.) The court of appeals reasoned that while *Advantage Tank Lines* contains language supporting Chrysler's contention that Moran's TTC should have been terminated, the statement in *Vulcan* that permanency "has no bearing on the claimant's ability to perform the tasks involved in his former position of employment" effectually overruled *Ramirez*. (Appendix p. 7.)

The court of appeals offers as support for its conclusion a quote from *Vulcan* (which is the same quote examined in *Matlack*) in which this Court cited a 1944 definition of permanency from *Logsdon v. Indus. Comm.* (1944), 143 Ohio St. 508. (Appendix p. 14.) The issue in *Logsdon* was purely one of length. That is, the issue was whether "indefinite" and "indeterminate" sufficiently and accurately defined "permanent" or whether the standard must be "life long." *Id.* at 514. The *Logsdon*-based quote, "with reasonable probability, continue for an indefinite period of time," concerns only temporality, not what is being measured. Here, the length of Moran's inability to return to her former position of employment is not at issue. Dr. Andreshak stated that she would never return to her former position of employment. Thus, the issue addressed in *Logsdon*, which was: How long is permanent?, is not relevant to the issue in *Ramirez* or this case.

Moreover, this Court's reliance on *Ramirez* in *Advantage Tank Lines* makes clear that *Vulcan* did not *Ramirez*. *Advantage Tank Lines*, supra at 17, citing R.C. 4123.56 and *Ramirez*, supra.

Chrysler urges the Court to follow its holdings in *Advantage Tank Lines* and *Ramirez*, that a claimant's disability is permanent when the claimant will never improve to the

point where she can resume her former job and when the disability is found to be permanent TTC must be terminated. *Advantage Tank Lines*, supra at 17, citing R.C. § 4123.56 and *Ramirez*, supra. Because Dr. Andreshak opined without contradiction that Moran will never return to her former position of employment, the court of appeals should have held that the Industrial Commission's failure to terminate Moran's TTD constitutes an abuse of discretion.

3. The definition of "permanency" in *Advantage Tank Lines* is not dicta.

The court of appeals erroneously discounts Chrysler's reliance upon *Advantage Tank Lines* as reliance upon mere dicta. (Appendix p. 7.) Contrary to the court of appeals' analysis, this Court expressly indicated in *Advantage Tank Lines* that the outcome determinative issue was whether "permanency" had different meanings in different contexts. *Advantage Tank Lines*, supra at 17. Indeed, the Court's analysis of the different meanings and significances of the term "permanency" contrasts markedly with the notion that MMI is the only relevant determination.

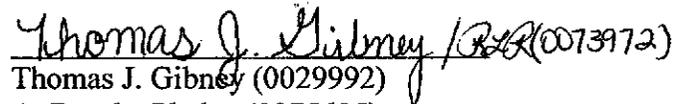
In *Advantage Tank Lines*, this Court ultimately concluded that because "permanent" has different meanings for purposes of TTC and permanent partial disability compensation ("PPD"), a claimant can receive TTC and PPD for the same condition over the same period of time. *Advantage Tank Lines*, supra at 17. Therefore, this Court's description of the different meanings of permanency was necessary to reach its actual decision, and it is not mere dicta. See *Huntington National Bank v. Fulton*, 19 Ohio Law Abs. 610 (holding that statements are only dicta if they are not necessary to reach the actual decision); *Rosenberger v. L'Archer*, 30 Ohio Law Abs. 552; 14 Ohio Jurisprudence 2d 684, Sections 248, 249.

#### IV. CONCLUSION

A claimant is not entitled to TTC when her inability to return to her former position of employment has become permanent. Dr. Andreshak certified that Moran will never return to her former position of employment because of the allowed conditions of her claim. Because there is not some contrary evidence on the issue of Moran's *Ramirez* permanency, the Industrial Commission's denial of Chrysler's request to terminate Moran's TTD compensation was an abuse of discretion. Accordingly, this Court should grant Chrysler the requested writ of mandamus ordering the Commission to vacate its May 24, 2006 order and to issue a new order granting Chrysler's motion and terminating Moran's TTC as of March 8, 2006. In the alternative, Chrysler seeks a limited writ vacating the Commission order and directing a further hearing, and the issuance of an order which complies in all respects with the requirements of the law.

Respectfully submitted,

EASTMAN & SMITH LTD.

 (0073972)

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Counsel for Appellant  
Chrysler Corporation

V. CERTIFICATE OF SERVICE

I certify that a copy of this **Merit Brief of Appellant Chrysler LLC** was sent by ordinary U.S. Mail on this 22<sup>nd</sup> day of February, 2008 to John R. Polofka, Esq., Polofka and Van Berkom, 500 Madison Avenue, Suite 605, Toledo, Ohio 43604, attorney for Respondent Kathleen E. Moran; and to Andrew Alatis, Esq., Assistant Attorney General, Workers' Compensation Section, 150 East Gay Street, 22<sup>nd</sup> Floor, Columbus, Ohio 43215, attorney for Respondent Industrial Commission of Ohio.

*Thomas J. Gibney / RLR(0073972)*  
Counsel for Appellant  
Chrysler Corporation

## APPENDIX



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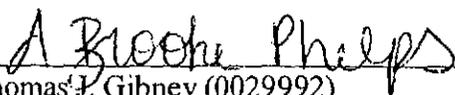
Notice of Appeal of Chrysler LLC

Appellant Chrysler LLC, formerly known as DaimlerChrysler Corporation, hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Franklin County Court of Appeals, Tenth Appellate District, entered in State of Ohio, *ex rel.* DaimlerChrysler Corporation v. Industrial Commission, *et al.*, Court of Appeals Case No. 06AP-968 on September 18, 2007.

This case originated in the court of appeals and is, therefore, an appeal of right pursuant to S.Ct. Prac. R. II §1(A)(1).

Respectfully submitted,

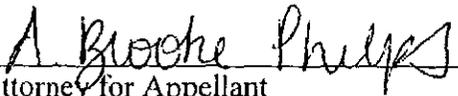
EASTMAN & SMITH LTD.

  
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Attorneys for Appellant  
Chrysler LLC

**PROOF OF SERVICE**

A copy of the foregoing *Notice of Appeal* has been sent by ordinary U.S. Mail this 1<sup>st</sup> day of November, 2007 to John R. Polofka, Esq., Polofka and Van Berkom, 500 Madison Avenue, Suite 605, Toledo, Ohio 43604, attorney for appellee Kathleen E. Moran; and to Andrew Alatis, Esq., Assistant Attorney General, Workers' Compensation Section, 150 East Gay Street, 22<sup>nd</sup> Floor, Columbus, Ohio 43215, attorney for appellee Industrial Commission of Ohio.

  
\_\_\_\_\_  
Attorney for Appellant  
Chrysler LLC

2007.09.18.05

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

2007.09.18.05  
CLEVELAND, OHIO

State of Ohio ex rel.  
DaimlerChrysler Corporation,

Relator,

v.

Industrial Commission of Ohio  
and Kathleen E. Moran,

Respondents.

No. 06AP-968

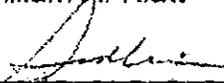
(REGULAR CALENDAR)

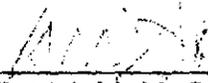
JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on September 18, 2007, the decision of the magistrate is approved and adopted by this court, and it is the judgment and order of this court that the requested writ of mandamus is denied. Costs assessed against relator.

Within three (3) days from the filing hereof, the clerk of this court is hereby ordered to serve upon all parties not in default for failure to appear notice of this judgment and its date of entry upon the journal.

  
\_\_\_\_\_  
Judge William A. Klatt

  
\_\_\_\_\_  
Judge Lisa L. Sadler, Presiding Judge

  
\_\_\_\_\_  
Judge Patrick M. McGrath

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

CLERK OF COURTS

State of Ohio ex rel.  
DaimlerChrysler Corporation,  
  
Relator,

v.

Industrial Commission of Ohio  
and Kathleen E. Moran,  
  
Respondents.

No. 06AP-968

(REGULAR CALENDAR)

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D E C I S I O N

Rendered on September 18, 2007

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*Eastman & Smith LTD., Thomas J. Gibney and A. Brooke Phelps, for relator.*

*Marc Dann, Attorney General, and Andrew J. Alatis, for respondent Industrial Commission of Ohio.*

*Polofka & Van Berkorn, John R. Polofka and Trevor P. Van Berkorn, for respondent Kathleen E. Moran.*

---

IN MANDAMUS  
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

KLATT, J.

{¶1} Relator, DaimlerChrysler Corporation, commenced this original action in mandamus seeking an order compelling respondent, Industrial Commission of Ohio ("commission"), to vacate its order denying relator's March 20, 2006 motion to terminate

temporary total disability ("TTD") compensation to claimant, Kathleen E. Moran, and to enter an order granting said motion.

{¶2} Pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth District Court of Appeals, this matter was referred to a magistrate who issued a decision, including findings of fact and conclusions of law. (Attached as Appendix A.) The magistrate found that the commission did not abuse its discretion when it denied relator's motion to terminate TTD compensation. Relator's motion was based upon Dr. Andreshak's opinion that the claimant's inability to return to her former position of employment was permanent. Relying upon *Vulcan Materials Co. v. Indus. Comm.* (1986), 25 Ohio St.3d 31, the magistrate noted that a determination of permanency/maximum medical improvement ("MMI") for purposes of terminating TTD compensation does not require an assessment of whether the claimant could return to his or her former position of employment. The permanency of a disability relates solely to the perceived longevity of the condition at issue—not the claimant's ability to perform the tasks involved in his or her former position of employment. Therefore, the magistrate agreed with the commission's assessment that Dr. Andreshak's opinion that the claimant will never return to her former position of employment is not evidence that the claimant's condition is at MMI. Accordingly, the magistrate has recommended that we deny relator's request for a writ of mandamus.

{¶3} Relator filed objections to the magistrate's decision essentially arguing that a claimant is not entitled to TTD when there is evidence that the claimant will never return to his or her former position of employment, even though there is evidence that the claimant's physiological condition will continue to improve. Relator relies primarily upon

*Advantage Tank Lines v. Indus. Comm.*, 107 Ohio St.3d 16, 2005-Ohio-5829, to support its position.

{¶4} Although *Advantage* does contain dicta that seems to support relator's argument, *Advantage* did not directly address the issue presented here. We agree with the magistrate that the issue before us was directly addressed in *Vulcan* wherein the court expressly held that "[t]he commission's designation of a disability as permanent relates solely to the perceived longevity of the condition at issue. It has absolutely no bearing upon the claimant's ability to perform the tasks involved in his former position of employment." *Vulcan* at 33. Although *Advantage* was decided after *Vulcan*, the court in *Advantage* did not discuss, let alone overrule *Vulcan*. Moreover, as previously noted, the language relator relies on in *Advantage* is dicta. The holding in *Vulcan* is controlling. Therefore, we overrule relator's objections.

{¶5} Following an independent review of this matter, we find that the magistrate has properly determined the facts and applied the appropriate law. Therefore, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein. In accordance with the magistrate's decision, we deny relator's request for a writ of mandamus.

*Objections overruled;  
writ of mandamus denied.*

SADLER, P.J., and McGRATH, J., concur.

---

**APPENDIX A**

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. :  
DaimlerChrysler Corporation, :

Relator, :

v. :

No. 06AP-968

Industrial Commission of Ohio :  
and Kathleen E. Moran, :

(REGULAR CALENDAR)

Respondents. :

---

MAGISTRATE'S DECISION

Rendered on March 19, 2007

---

*Eastman & Smith LTD., Thomas J. Gibney and A. Brooke Phelps, for relator.*

*Marc Dann, Attorney General, and Andrew J. Alatis, for respondent Industrial Commission of Ohio.*

*Polofka & Van Berkorn, John R. Polofka and Trevor P. Van Berkorn, for respondent Kathleen E. Moran.*

---

IN MANDAMUS

(¶6) In this original action, relator, DaimlerChrysler Corporation, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order denying relator's March 20, 2006 motion to terminate temporary total

disability ("TTD") compensation being paid to respondent Kathleen E. Moran ("claimant"), and to enter an order granting relator's motion.

Findings of Fact:

{¶7} 1. On March 11, 1999, claimant sustained an industrial injury while employed as a "weld auditor" for relator, a self-insured employer under Ohio's workers' compensation laws. On that date, an elevator gate came down on top of claimant's head. The industrial claim was initially allowed for "herniated disc C4-5," and was assigned claim number 99-463550.

{¶8} 2. Relator began payments of TTD compensation based upon C-84 reports from claimant's attending physician James Gosman, M.D.

{¶9} 3. On February 7, 2003, at relator's request, claimant was examined by Jeffrey M. LaPorte, M.D., who opined that claimant "has reached maximum medical improvement with regard to the C4-5 herniated disc."

{¶10} 4. On February 14, 2003, citing the report of Dr. LaPorte, relator moved for the termination of TTD compensation.

{¶11} 5. Following a March 18, 2003 hearing, a district hearing officer ("DHO") issued an order terminating TTD compensation based upon a finding that the industrial injury had reached maximum medical improvement ("MMI"). The DHO's order relied upon the report of Dr. LaPorte. Apparently, the DHO's order of March 18, 2003 was not administratively appealed.

{¶12} 6. On May 2, 2003, claimant moved for the allowance of additional conditions in the claim.

{¶13} 7. Ultimately, following an August 12, 2003 hearing, a staff hearing officer ("SHO") additionally allowed the claim for "aggravation of pre-existing cervical spondylosis at C6-7 and C6-7 cervical radiculopathy."

{¶14} 8. On May 26, 2005, Thomas G. Andreshak, M.D., performed a repeat cervical fusion at the C6-7 level. Relator resumed payments of TTD compensation.

{¶15} 9. On January 11, 2006, at relator's request, claimant was examined by S. S. Purewal, M.D., who is board certified in orthopedic surgery. Dr. Purewal wrote:

In my opinion, Ms. Moran has not yet reached maximum medical improvement, and it will take up to one year of healing and consolidation period for the fusion to be considered as having reached maximum medical improvement; that is if further x-rays do not show development of pseudoarthrosis at the surgery site.

Ms. Moran needs to continue her rehabilitative exercise program for the next 4-6 weeks to strengthen her upper extremities.

{¶16} 10. By letter dated March 8, 2006, relator's third-party administrator ("TPA") posed the following question to Dr. Andreshak:

With regards to the allowed conditions of Herniated Disc C4-5 and aggravation of pre-existing cervical spondylosis C6-7 with radiculopathy, will this claimant ever return to his/her former position of employment?

{¶17} Dr. Andreshak responded: "No she will not return to her former position."  
(Emphasis omitted.)

{¶18} 11. On March 20, 2006, citing Dr. Andreshak's response to the March 8, 2006 letter, relator moved for termination of TTD compensation on grounds that Dr. Andreshak's response allegedly indicates that "claimant's condition is permanent."

{¶19} 12. Following an April 12, 2006 hearing, a DHO issued an order denying relator's March 20, 2006 motion to terminate TTD compensation. The DHO's order explains:

The District Hearing Officer finds that the Injured Worker has not yet reached Maximum Medical Improvement. The report of S.S. Purewal, M.D., dated 01/11/2006, is relied upon.

The District Hearing Officer finds that Dr. Thomas Andreshak's, M.D. opinion that the Injured Worker will not return to her former position, stated on a letter dated March 8, 2006, is insufficient to terminate Temporary Total Disability, as Dr. Andreshak does not give any basis for that opinion. Further, the Injured Worker continues to treat for her allowed conditions in this claim.

In his 01/11/2006 report, Dr. Purewal opines that the Injured Worker has not yet reached Maximum Medical Improvement. She underwent a cervical fusion at the C6-7 levels in 2005. Dr. Purewal opines that it will take up to "one year of healing and consolidation period before the fusion to be considered as having reached Maximum Medical Improvement." Dr. Purewal goes on to state that the Injured Worker needs [a] continued rehabilitative exercise program to help strengthen her upper extremities.

Therefore, the District Hearing Officer finds that the Injured Worker has not yet reached Maximum Medical Improvement.

{¶20} 13. Relator administratively appealed the DHO's order of April 12, 2006.

{¶21} 14. Following a May 24, 2006 hearing, an SHO issued an order stating:

The order of the District Hearing Officer, from the hearing dated 04/12/2006, is VACATED. Therefore, the C-86 Motion, filed 3/20/2006, by Employer, is DENIED.

The Staff Hearing Officer DENIES the Employer's request to terminate Temporary Total Disability Compensation benefits.

The Employer relies upon the cases Ramirez v. Industrial Commission 69 Ohio St. 2d 630 and Advantage Tank Lines v. Industrial Commission 107 Ohio St. 3d 16, in making the

argument that Injured Worker's condition has reached a level of permanency. In support of Employer's motion, a letter from the Employer to the Injured Worker's physician, Thomas Andreshak, dated 3/8/2006, was submitted. The statement asks with regard to the allowed conditions... "will this claimant ever return to his/her former position of employment?" The response given from Dr. Andreshak is, "no she will not return to her former position."

The Staff Hearing Officer does not find the statement from Dr. Andreshak that she will not return to her former position to equate to a finding of permanency. Dr. Andreshak does not state that the Injured Worker's temporary disability has become permanent. The Court in Ramirez is clear that an employee is entitled to be paid Temporary Total Disability until one of the following three occur: 1) He has returned to work; 2) His treating physician has made a written statement that he is capable of returning to his former position of employment[;] or 3) That temporary disability has become permanent.

Further, the Employer's reliance upon the Advantage Tank Lines case is misplaced. The Court in that case stated: "TTC awards are based exclusively on a claimant's ability to return to his or her former position of employment. In this context, a determination that a disability is permanent means that the condition will never improve to the point where the claimant can resume his or her former job. Thus, when this determination is made, the disability is no longer considered TEMPORARY, so TTC is terminated." The Staff Hearing Officer finds that the determination that the condition is permanent must first be made before a finding that the injured Worker will not improve to the point where they can return to their former job. The Staff Hearing Officer finds that the Employer wishes to equate a negative statement that the Injured Worker is incapable of returning to the former position of employment to a finding of permanency. However, the Staff Hearing Officer does not find the one to equal the other.

Further, Ohio Administrative Code 4121-3-32 is clear that Temporary Total Disability may be terminated by a District Hearing Officer upon the finding that the employee is capable of returning to his/her former position of employment; upon the finding that the employee has reached Maximum Medical Improvement; or upon the finding

that the Employee has received a written job offer of suitable employment.

The Staff Hearing Officer does not find any of these requirements have been met.

Therefore, this Staff Hearing Officer has no basis to terminate Injured Worker's Temporary Total Compensation benefits. Temporary Total Disability Compensation benefits are ordered to continue upon submission of proof.

(Emphasis sic.)

{¶22} 15. On June 28, 2006, another SHO mailed an order refusing relator's administrative appeal from the SHO's order of May 24, 2006.

{¶23} 16. On August 31, 2006, the commission mailed an order denying relator's request for reconsideration of the June 28, 2006 SHO's refusal order.

{¶24} 17. On September 26, 2006, relator, DaimlerChrysler Corporation, filed this mandamus action.

Conclusions of Law:

{¶25} In response to the March 8, 2006 letter from relator's TPA, Dr. Andreshak opined that the allowed conditions of the industrial claim prevent claimant from ever returning to her former position of employment. In other words, it is Dr. Andreshak's opinion that claimant's inability to return to her former position of employment is permanent.

{¶26} The SHO's order of May 24, 2006, in effect, determines that Dr. Andreshak's opinion is not some evidence that the industrial injury has reached MMI. On that basis, the SHO's order of May 24, 2006, denies relator's motion which was premised upon Dr. Andreshak's response to the March 8, 2006 letter.

{¶27} Citing *State ex rel. Advantage Tank Lines v. Indus. Comm.*, 107 Ohio St.3d 16, 2005-Ohio-5829, relator argues here, as it did before the commission, that Dr. Andreshak's opinion is some evidence upon which the commission can rely to support a finding that the industrial injury is at MMI.

{¶28} The magistrate disagrees with relator's argument that Dr. Andreshak's response to the March 8, 2006 letter is some evidence supporting relator's motion for the termination of TTD compensation on permanency/MMI grounds.

{¶29} Accordingly, it is the magistrate's decision that this court deny relator's request for a writ of mandamus, as more fully explained below.

{¶30} Unfortunately, in their briefs, none of the parties to this action cited to the key decision of the Supreme Court of Ohio that is dispositive of relator's argument. In *Vulcan Materials Co. v. Indus. Comm.* (1986), 25 Ohio St.3d 31, the Supreme Court of Ohio addressed one of the termination criteria for TTD compensation, stating:

A second issue raised in these appeals brings into question whether, in the commission's consideration of the permanency of a disability, the commission must determine whether the claimant could return to his former position of employment.

We hold that in the consideration of the permanency of a disability, the commission need not determine whether the claimant could return to his former position of employment. The commission's designation of a disability as permanent relates solely to the perceived longevity of the condition at issue. It has absolutely no bearing upon the claimant's ability to perform the tasks involved in his former position of employment. Further, in *Logsdon v. Indus. Comm.* (1944), 143 Ohio St. 508 \* \* \*, at paragraph two of the syllabus, this court defined the term "permanent" as applied to disability under the workmen's compensation law as a condition which will, " \* \* \* with reasonable probability, continue for an indefinite period of time without any present indication of recovery therefrom."

Id. at 33.

{¶31} Effective August 22, 1986, R.C. 4123.56(A) provides that payment of TTD compensation shall not be made "when the employee has reached maximum medical improvement."

{¶32} Supplementing the statutory change, Ohio Adm.Code 4121-3-32 states:

(A) The following provisions shall apply to all claims where the date of injury or the date of disability in occupational disease claims accrued on or after August 22, 1986. The following definitions shall be applicable to this rule:

(1) "Maximum medical improvement" is a treatment plateau (static or well-stabilized) at which no fundamental functional or physiological change can be expected within reasonable medical probability in spite of continuing medical or rehabilitative procedures. An injured worker may need supportive treatment to maintain this level of function.

{¶33} Four years after *Vulcan Materials*, this court, in *State ex rel. Matlack, Inc. v. Indus. Comm.* (1991), 73 Ohio App.3d 648, equated the permanency concept of *Vulcan Materials* with the concept of MMI. This court, in *Matlack*, stated:

In *State ex rel. Ramirez v. Indus. Comm.* (1982), 69 Ohio St.2d 630 \* \* \*, the Supreme Court of Ohio held that an employee may receive temporary total disability compensation until: (1) the employee has returned to work; (2) the employee's treating physician states that the employee is capable of returning to the employee's former position of employment; and (3) the temporary disability has become permanent. Accord *State ex rel. Eaton Corp. v. Lancaster* (1988), 40 Ohio St.3d 404[.] \* \* \*

The concept of permanency relates to the perceived longevity of the condition. *Vulcan Materials Co. v. Indus. Comm.* (1986), 25 Ohio St.3d 31[.] \* \* \* A permanent condition is one which will, with reasonable probability, continue for an indefinite period of time without any indication of recovery therefrom. *Id.* at 33 \* \* \*, quoting *Logsdon v. Indus. Comm.* (1944), 143 Ohio St. 508[.] \* \* \*

Essentially, the Supreme Court of Ohio has adopted the ubiquitous maximum medical improvement ("MMI") test for purposes of temporary total disability compensation. As is the case in other states, temporary total benefits will be paid during the healing and treatment period for the condition until the claimant has reached some certain level of stabilization. See 2 Larson, *The Law of Workmen's Compensation* (1991), Sections 57.12(b) and (c). When this stabilization has been reached and no further improvement is probable, then the condition is permanent and claimant can seek compensation for types of permanent disability, namely, permanent partial disability compensation for partial impairment of earning capacity, and permanent total disability compensation for total impairment of earning capacity.

Id. at 654-655.

{¶34} In *Advantage Tank Lines*, a single issue was presented: May a claimant receive permanent partial disability compensation and TTD compensation for the same condition over the same period? The court answered this single issue in the affirmative.

In reaching its conclusion, the *Advantage Tank Lines* court states:

TTC awards are based exclusively on a claimant's ability to return to his or her former position of employment. R.C. 4123.56; *State ex rel. Ramirez v. Indus. Comm.* (1982), 69 Ohio St.2d 630[.] \* \* \* In this context, a determination that a disability is permanent means that the condition will never improve to the point where the claimant can resume his or her former job. Thus, when this determination is made, the disability is no longer considered *temporary*, so TTC is terminated.

(Emphasis sic.) Id. at ¶8.

{¶35} Relator's reliance upon the above-quoted language from *Advantage Tank Lines* is misplaced.

{¶36} The court in *Advantage Tank Lines* did not overrule *Vulcan Materials* nor is that case even cited. Moreover, the definition of MMI or permanency was not at issue in

*Advantage Tank Lines* as it was in *Vulcan Materials*. To the extent that the above-quoted language may be inconsistent with the holding in *Vulcan Materials* or the definition of MMI, it must be viewed as dicta.

{¶37} The SHO's order of May 24, 2006 correctly holds that Dr. Andreshak's response to the March 8, 2006 letter is not evidence of MMI, albeit the SHO's explanation for the holding differs from the explanation provided by the magistrate here. Nevertheless, the SHO's order of May 24, 2006 is not an abuse of discretion.

{¶38} Accordingly, for all the above reasons, it is the magistrate's decision that this court deny relator's request for a writ of mandamus.

s/s Kenneth W. Macke  
KENNETH W. MACKE  
MAGISTRATE

#### NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides 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).

**Attachment not scanned**

ORC Ann. 4123.56

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\*\*\* CURRENT THROUGH LEGISLATION PASSED BY THE  
127TH OHIO GENERAL ASSEMBLY AND FILED WITH THE  
SECRETARY OF STATE THROUGH JANUARY 25, 2008 \*\*\*  
\*\*\* ANNOTATIONS CURRENT THROUGH JANUARY 1, 2008  
\*\*\*  
\*\*\* OPINIONS OF ATTORNEY GENERAL CURRENT  
THROUGH JANUARY 15, 2008 \*\*\*

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TITLE 41. LABOR AND INDUSTRY  
CHAPTER 4123. WORKERS' COMPENSATION  
COMPENSATION; BENEFITS

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ORC Ann. 4123.56 (2008)

§ 4123.56. Temporary total disability benefits; wage loss compensation

(A) Except as provided in division (D) of this section, in the case of temporary disability, an employee shall receive sixty-six and two-thirds per cent of the employee's average weekly wage so long as such disability is total, not to exceed a maximum amount of weekly compensation which is equal to the statewide average weekly wage as defined in division (C) of section 4123.62 of the Revised Code, and not less than a minimum amount of compensation which is equal to thirty-three and one-third per cent of the statewide average weekly wage as defined in division (C) of section 4123.62 of the Revised Code unless the employee's wage is less than thirty-three and one-third per cent of the minimum statewide average weekly wage, in which event the employee shall receive compensation equal to the employee's full wages; provided that for the first twelve weeks of total disability the employee shall receive seventy-two per cent of the employee's full weekly wage, but not to exceed a maximum amount of weekly compensation which is equal to the lesser of the statewide average weekly wage as defined in division (C) of section 4123.62 of the Revised Code or one hundred per cent of the employee's net take-home weekly wage. In the case of a self-insuring employer, payments shall be for a duration based upon the medical reports of the attending physician. If the employer disputes the attending physician's report, payments may be terminated only upon application and hearing by a district hearing officer pursuant to division (C) of section 4123.511 [4123.51.1] of the Revised Code. Payments shall continue pending the determination of the matter, however payment shall not be made for the period when any employee has returned to work, when an employee's treating physician has made a written statement that the employee is capable of returning to the employee's former position of employment, when work within the physical capabilities of the employee is made available by the employer or another employer, or when the employee has reached the maximum medical improvement. Where the employee is capable of work activity, but the employee's employer is unable to offer the employee any employment, the employee shall register with the director of job and family services, who shall assist the employee in finding suitable employment. The termination of temporary total disability, whether by order or otherwise, does not preclude the commencement of temporary total disability at another point in time if the employee again becomes temporarily totally disabled.

After two hundred weeks of temporary total disability benefits, the medical section of the bureau of workers' compensation shall schedule the claimant for an examination for an evaluation to determine whether or not the temporary disability has become permanent. A self-insuring employer shall notify the bureau immediately after payment of two hundred weeks of temporary total disability and request that the bureau schedule the claimant for such an examination.

When the employee is awarded compensation for temporary total disability for a period for which the employee has received benefits under Chapter 4141. of the Revised Code, the bureau shall pay an amount equal to the amount received from the award to the director of job and family services and the director shall credit the amount to the accounts of the employers to whose accounts the payment of benefits was charged or is chargeable to the extent it was charged or is chargeable.

If any compensation under this section has been paid for the same period or periods for which temporary nonoccupational accident and sickness insurance is or has been paid pursuant to an insurance policy or program to which the employer has made the entire contribution or payment for providing insurance or under a nonoccupational accident and sickness program fully funded by the employer, compensation paid under this section for the period or periods shall be paid only to the extent by which the payment or payments exceeds the amount of the nonoccupational insurance or program paid or payable. Offset of the compensation shall be made only upon the prior order of the bureau or industrial commission or agreement of the claimant.

As used in this division, "net take-home weekly wage" means the amount obtained by dividing an employee's total remuneration, as defined in section 4141.01 of the Revised Code, paid to or earned by the employee during the first four of the last five completed calendar quarters which immediately precede the first day of the employee's entitlement to benefits under this division, by the number of weeks during which the employee was paid or earned remuneration during those four quarters, less the amount of local, state, and federal income taxes deducted for each such week.

(B) (1) If an employee in a claim allowed under this chapter suffers a wage loss as a result of returning to employment other than the employee's former position of employment due to an injury or occupational disease, the employee shall receive compensation at sixty-six and two-thirds per cent of the difference between the employee's average weekly wage and the employee's present earnings not to exceed the statewide average weekly wage. The payments may continue for up to a maximum of two hundred weeks, but the payments shall be reduced by the corresponding number of weeks in which the employee receives payments pursuant to division (B) of section 4121.67 Of the Revised Code.

(2) If an employee in a claim allowed under this chapter suffers a wage loss as a result of being unable to find employment consistent with the employee's disability resulting from the employee's injury or occupational disease, the employee shall receive compensation at sixty-six and two-thirds per cent of the difference between the employee's average weekly wage and the employee's present earnings, not to exceed the statewide average weekly wage. The payments may continue for up to a maximum of fifty-two weeks. The first twenty-six weeks of payments under division (B)(2) of this section shall be in addition to the maximum of two hundred weeks of payments allowed under division (B)(1) of this section. If an employee in a claim allowed under this chapter receives compensation under division (B)(2) of this section in excess of twenty-six weeks, the number of weeks of compensation allowable under division (B)(1) of this section shall be reduced by the corresponding number of weeks in excess of twenty-six, and up to fifty-two, that is allowable under division (B)(1) of this section.

(3) The number of weeks of wage loss payable to an employee under divisions (B)(1) and (2) of this section shall not exceed two hundred and twenty-six weeks in the aggregate.

(C) In the event an employee of a professional sports franchise domiciled in this state is disabled as the result of an injury or occupational disease, the total amount of payments made under a contract of hire or collective bargaining agreement to the employee during a period of disability is deemed an advanced payment of compensation payable under sections 4123.56 to 4123.58 of the Revised Code. The employer shall be reimbursed the total amount of the advanced payments out of any award of compensation made pursuant to sections 4123.56 to 4123.58 of the Revised Code.

(D) If an employee receives temporary total disability benefits pursuant to division (A) of this section and social security retirement benefits pursuant to the "Social Security Act," the weekly benefit amount under division (A) of this section shall not exceed sixty-six and two-thirds per cent of the statewide average weekly wage as defined in division (C) of section 4123.62 of the Revised Code.

**History:**

GC § 1465-79; 103 v 72(85), § 32; 108 v PtI, 313; 110 v 224; 117 v 252; 119 v 565; 121 v 660; 122 v 268(280); 123 v 250; 124 v 806; Bureau of Code Revision, 10-1-53; 126 v 1015 (1028) (Eff 10-5-55); 128 v 743(757) (Eff 11-2-59); 130 v 926 (Eff 10-1-63); 132 v H 268 (Eff 12-11-67); 133 v H 1 (Eff 3-18-69); 134 v H 280 (Eff 9-20-71); 135 v H 417 (Eff 11-16-73); 136 v H 714 (Eff 1-1-76); 136 v S 545 (Eff 1-17-77); 137 v H 1282 (Eff 1-1-79); 138 v S 30 (Eff 5-14-79); 138 v H 184 (Eff 6-27-79); 141 v S 307 (Eff 8-22-86); 141 v S 390 (Eff 7-17-86); 141 v S 411, § 3 (Eff 7-17-86); 141 v S 411, § 5 (Eff 8-22-86); 143 v H 222 (Eff 11-3-89); 145 v H 107 (Eff 10-20-93); 147 v S 45; \* 148 v H 471. Eff 7-1-2000; 151 v S 7, § 1, 6-30-06.

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TOC: Ohio Administrative Code > /.../ > Chapter 4123-19 General Procedures for State Insurance Fund; Self-Insuring Employers > 4123-19-03. Where an employer desires to secure the privilege to pay compensation, etc., directly.

OAC Ann. 4123-19-03

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4123 Bureau of Workers' Compensation  
Chapter 4123-19 General Procedures for State Insurance Fund; Self-Insuring Employers

OAC Ann. 4123-19-03 (2008)

**4123-19-03. Where an employer desires to secure the privilege to pay compensation, etc., directly.**

(A) All employers granted the privilege to pay compensation directly shall demonstrate sufficient financial strength and administrative ability to assure that all obligations under section 4123.35 of the Revised Code will be met promptly. The administrator of workers' compensation shall deny the privilege to pay compensation, etc., directly, where the employer is unable to demonstrate its ability to promptly meet all the obligations under the rules of the commission and bureau and section 4123.35 of the Revised Code. The administrator shall consider, but shall not be limited to the factors in divisions (B)(1) and (B)(2) of section 4123.35 of the Revised Code where they are applicable in determining the employer's ability to meet all obligations under section 4123.35 of the Revised Code.

The administrator shall review all financial records, documents, and data necessary to provide a full financial disclosure of the employer, certified by a certified public accountant, including but not limited to, the balance sheets and a profit and loss history for the current year and the previous four years. For purposes of this rule, certified financial statements shall be construed by the administrator as audited by a certified public accountant, in accordance with generally accepted accounting principles, and shall include the certified public accountant's audit opinion.

(1) In determining whether to grant a waiver of the requirement of division (B)(1)(e) of section 4123.35 of the Revised Code for certified financial records, the administrator shall consider the following criteria and conditions.

(a) The administrator shall require reviewed financial statements, including full footnote disclosure, to be prepared and submitted in accordance with generally accepted accounting principles. For the purposes of this rule, "reviewed financial statements" shall mean financial statements that have been subject to procedures performed by a certified public accountant in accordance with AICPA Professional Standards, specifically, Statements on Standards for Accounting and Review Services, Section 100, Paragraph.24 through.38, December 1978.

(b) The administrator may utilize the services of a commercial credit reporting bureau to assist in the evaluation of an applicant's ability to meet its workers' compensation obligations. The cost of this commercial reporting service shall be assumed by the applicant

employer.

**(c)** Notwithstanding the above criteria, the administrator may deem it necessary for an applicant employer to provide additional security to ensure meeting its workers' compensation obligations. The amount of such additional security shall be in the form and amount as determined by the administrator and provided prior to the granting of self-insurance. Pursuant to paragraph (F) of this rule, in the event of the default of the self-insuring employer, the bureau shall first seek reimbursement from the additional security, which shall be first liable and exhausted, before payment is made from the self-insuring employers' guaranty fund under section 4123.351 of the Revised Code.

**(2)** The administrator shall not grant the status of self-insuring employer to the state, except that the administrator may grant the status of self-insuring employer to a state institution of higher education, excluding its hospitals.

**(B)** The employer shall secure from the bureau of workers' compensation proper application form(s) for completion. The completed application shall be filed with the bureau at least ninety days prior to the effective date of the employer's requested status as a self-insurer. The administrator may require that the application be accompanied by an application fee as established by bureau resolution to cover the cost of processing the application in accordance with section 4123.35 of the Revised Code. The application shall not be deemed complete until all required information is attached thereto. Prior to presentation to the administrator, applicable items listed in divisions (B)(1) and (B)(2) of section 4123.35 of the Revised Code shall be made available to the bureau and shall be reviewed by the bureau of workers' compensation. The bureau shall only accept applications which contain the required information.

**(C)** The bureau shall recognize only such application forms which provide answers to all questions asked and furnish such information as may be required.

**(D)** Return of the completed forms required by this rule and any additional information required by the bureau to process the employer's application should be submitted at least ninety days prior to the effective date of the employer's requested status as a self-insurer.

**(1)** If the administrator determines to grant the privilege of self-insurance, the bureau shall issue a "Finding of Facts" statement which has been prepared by the bureau, signed by the administrator, subject to all conditions outlined in paragraph (L)(3) of this rule.

**(2)** If the administrator determines not to grant the privilege of self-insurance, the bureau shall so notify the employer, whereupon the employer shall be required to continue to pay its full premium into the state insurance fund.

**(E)** All employers that have secured the privilege to pay compensation, etc., directly, will be required to make contributions as determined by the administrator to the self-insuring employers' guaranty fund established under section 4123.351 of the Revised Code, and, if an additional security is required by the bureau, in the amount or form that may be specified by the bureau. If the additional security is in the form of a surety bond, the bond shall be from a company approved by the bureau and authorized to do business in the state of Ohio by the Ohio department of insurance. The surety bond shall be in the form prescribed by the bureau. The penal amount of such additional security is to be fixed by the administrator.

**(F)** The surety bond or additional security furnished by the employer shall be for an amount and period as established by the bureau and may be periodically reviewed and reevaluated by the bureau. The surety bond or additional security shall provide on its face that the surety shall be responsible for the payment of all claims where the cause of action, as determined by the date of injury or date of occupational disease, arose during the liability of the surety

bond or additional security. The liability under the surety bond or additional security and the rights and obligations of the surety shall be limited to reimbursement for the amounts paid from the surplus accounts of the state insurance fund by reason of the default of the self-insuring employer in accordance with division (B) of section 4123.82 of the Revised Code; however, in the event of such self-insuring employer's default, the bureau shall first seek reimbursement from the surety bond or additional security, which shall be first liable and exhausted, before payment is made from the self-insuring employers' guaranty fund established under section 4123.351 of the Revised Code. Upon default of the self-insuring employer, it shall be the responsibility of the administrator of the bureau of workers' compensation to represent the interests of the state insurance fund and the self-insuring employers' guaranty fund. The administrator, on behalf of the self-insuring employers' guaranty fund, has the rights of reimbursement and subrogation and shall collect from a defaulting self-insuring employer or other liable person all amounts the bureau has paid or reasonably expects to pay from the guaranty fund on account of the defaulting self-insuring employer.

**(G)** The security herein required to be given by the employer shall be given to the state of Ohio, for the benefit of the disabled or the dependents of killed employees of the employer filing the same, and shall be conditioned for the payment by the employer of such compensation to disabled employees or the dependents of killed employees of such employer, and the furnishing to them of medical, surgical, nursing and hospital attention and services, medicines and funeral expenses equal to or greater than is provided by the Ohio workers' compensation law and for the full compliance with the rules and regulations of the commission and bureau and rules of procedure.

**(H)** If another or parent corporation or entity owns more than fifty per cent of the stock of an employer, such employer must furnish a contract of guaranty executed by the ultimate domestic parent corporation or entity. If the employer establishes to the bureau that such contract of guaranty cannot be given by the ultimate domestic parent corporation, then the bureau may, in its discretion, waive the requirement of a contract of guaranty. The bureau may require an alternative form of security.

**(I)** From the effective date of this rule, employees having one or more years of experience as a workers' compensation administrator for a self-insuring employer in Ohio shall be deemed sufficiently competent and knowledgeable to administer a program of self-insurance. Those self-insuring employers that employ workers' compensation administrators who have less than one year of experience as a workers' compensation administrator in Ohio shall not have its status as a self-insuring employer affected pending notification by bureau of workers' compensation as to whether mandatory attendance of the administrator at a bureau of workers' compensation training program is required. If the bureau determines that the administrator is not able to administer a self-insuring program, the bureau may direct mandatory attendance of the administrator at a bureau of workers' compensation training program until such time as the bureau determines that the administrator is sufficiently competent and knowledgeable to run such a workers' compensation program. The cost of the bureau's training of the administrator(s) under this rule will be borne by the self-insuring employer or self-insuring employer applicant. By accepting the privilege of self-insurance, an employer acknowledges that the ultimate responsibility for the administration of workers' compensation claims in accordance with the law and rules of the bureau of workers' compensation and the commission rests with that employer. The self-insuring employer's records and compliance with the bureau of workers' compensation and commission rules shall be subject to periodic audit by the bureau of workers' compensation.

A self-insuring employer or applicant shall designate one of its Ohio employees who is knowledgeable and experienced with the requirements of the Ohio Workers' Compensation Act and rules and regulations therein, as administrator of its self-insuring program. The requirement for an Ohio administrator may be waived at the discretion of the bureau. The

name and telephone number of the Ohio administrator, or non-Ohio administrator where the Ohio requisite has been waived, shall be posted by the employer in a prominent place at all the employer's locations. The administrator's duties shall include, but not be limited to:

- (1)** Acting as liaison between the employer, the bureau of workers' compensation and the commission, and providing information to the agency upon request;
- (2)** Providing assistance to claimants in the filing of claims and applications for benefits;
- (3)** Providing information to claimants regarding the processing of claims and the benefits to which claimants may be entitled;
- (4)** Providing the various forms to be used in seeking compensation or benefits;
- (5)** Accepting or rejecting claims for benefits;
- (6)** Approving the payment of compensation and benefits to, or on behalf of, claimants, pursuant to paragraph (K) of this rule.

This rule is not intended to prevent the hiring of an attorney or representative to assist the employer in the handling and processing of workers' compensation claims.

**(J)** Employers that are granted the privilege of paying compensation, etc., directly, in accordance with these rules and regulations shall file with the bureau a report of paid compensation annually, shall keep a record of all injuries and occupational diseases resulting in more than seven days of temporary total disability or death occurring to its employees and report the same to the bureau upon forms to be furnished by it, and shall observe all the rules and regulations of the commission and bureau and their rules of procedure with reference to determining the amount of compensation, etc., due to the disabled employee or the dependents of killed employees, and payment of the same. All employers granted the privilege of paying compensation, etc., directly shall annually report paid compensation electronically via the bureau's website.

If a self-insured employer fails to timely file its annual report of paid compensation, the bureau may estimate the amount of paid compensation and assess the employer based on this estimate pursuant to rule 4123-17-32 of the Administrative Code. If the employer subsequently provides the bureau with actual paid compensation figures, the bureau shall adjust the paid compensation and any assessment accordingly. A self-insured employer that is no longer a self-insured employer in Ohio and has failed to timely file a report of paid compensation shall be subject to this rule.

**(K)** Minimal level of performance as a criterion for granting and maintaining the privilege to pay compensation directly.

**(1)** The employer must be able to furnish or make arrangements for reasonable medical services during all working hours. A written explanation of what arrangements have been made or will be made to provide medical treatment shall be supplied with the application for self-insurance.

For an employer desiring to be first granted the privilege of self-insured status on or after the effective date of this rule, the employer shall provide to the bureau for the bureau's approval the employer's plan for the following:

- (a)** Criteria for the selective contracting of health care providers;
- (b)** Plan structure and financial stability for the medical management of claims;

**(c)** Procedures for the resolution of medical disputes between an employee and the employer, an employee and a provider, or the employer and a provider, prior to an appeal under section 4123.511 of the Revised Code;

**(d)** Upon the request of the bureau, provide a timely and accurate method of reporting to the administrator necessary information regarding medical and health care service and supply costs, quality, and utilization; and,

**(e)** Provide an employee the right to change health care providers.

**(2)** The employer shall promptly pay the fees of outside medical specialists to whom the commission or bureau shall refer claimants for examination or where the commission or bureau refers the claim file for review and opinion by such specialist except as provided by law in cases where the claim was subsequently disallowed. Such fees shall be paid within the time limits provided for payment of medical bills under paragraph (K)(5) of this rule.

**(3)** Every employer shall keep a record of all injuries and occupational diseases resulting in more than seven days of total disability or death as well as all contested or denied claims and shall report them to the bureau, and to the employee or the claimant's surviving dependents in accordance with rule 4123-3-03 of the Administrative Code.

**(4)** The employer shall provide to the claimant and upon request, shall file with the bureau or the commission, medical reports relating thereto and received by it from the treating physician and physicians who have seen the claimant in consultation for the allowed injury or occupational disease, or any injury or occupational disease for which a claim has been filed. The claimant shall provide to the employer and, upon request, shall file with the bureau or the commission, medical reports relating thereto and received from the treating physician and physicians who have seen the claimant in consultation for the allowed injury or occupational disease or any injury or occupational disease for which a claim has been filed. The claimant shall honor the employer's request for appropriate written authorization to obtain medical reports to the extent that such reports pertain to the claim.

**(5)** Within thirty days after receipt of a hospital, medical, nursing or medication bill duly incurred by the claimant, the employer shall either pay such bill, or if the employer contests any of such matters, shall notify the provider, the employee, and, only upon request, the bureau or commission in writing. Such written notice shall specifically state the reason for nonpayment. The employer's notification to the employee shall indicate that the employee has the right to request a hearing before the industrial commission. If the self-insuring employer allows a claim for benefits or compensation without a hearing or if the matter is heard by the industrial commission, the employer shall pay such benefits or compensation no later than twenty-one days from acquiring knowledge of the claim or the claimant's filing of the C-84 form, whichever is later, or no later than twenty-one days from the employer's receipt of the industrial commission order as provided by section 4123.511 of the Revised Code; provided that where the claimant is subject to a withholding order for support and the self-insuring employer is required to provide notice to the claimant's attorney pursuant to section 3121.0311 of the Revised Code, the time for the employer to pay such compensation is extended pursuant to section 3121.0311 of the Revised Code. The employer shall approve a written request for a change of physicians within seven days of receipt of such request that includes the name of the physician and proposed treatment. The employer shall approve or deny a written request for treatment within ten days of the receipt of the request. If the employer fails to respond to the request, the authorization for treatment shall be deemed granted and payment shall be made within thirty days of receipt of the bill.

**(6)** The employer shall make its records and facilities available to the employees of the bureau at all reasonable times during regular business hours. A public employer shall make

the reports required by section 4123.353 of the Revised Code available for inspection by the administrator of workers' compensation and any other person at all reasonable times during regular business hours.

**(7)** The employer shall pay all compensation as required by the workers' compensation laws of the state of Ohio. By becoming self-insuring, the employer agrees to abide by the rules and regulations of the bureau and commission and further agrees to pay compensation and benefits subject to the provisions of these rules. The self-insuring employer shall proceed to make payment of compensation or medical benefits without any previous order from the bureau or commission and shall start such payments as required under the Workers' Compensation Act, unless it contests the claim.

**(8)** The employer may notify the medical section and the claimant at least sixty days prior to the completion of the payment of two hundred weeks of compensation for temporary total disability with the request that the claimant be scheduled for examination by the medical section. Payment of temporary total disability compensation after two hundred weeks shall continue uninterrupted until further order of the commission up to the maximum required by law, unless the claimant has returned to work, or the treating physician has made a written statement that the claimant is capable of returning to his former position of employment or has reached maximum medical improvement or that the disability has become permanent, or, after hearing, an order is issued approving the termination of temporary total disability compensation.

**(9)** Upon written request by the claimant or claimant's representative, the employer shall make available for review all the employer's records pertaining to the claim. Such review is to be made at a reasonable time (not to exceed seventy-two hours) and place. The claimant, upon written request, shall provide the employer or its representative with an appropriate written authorization to obtain medical reports and records pertaining to the claim.

Except as provided for in this rule, an employer may not assess a fee or charge the claimant or the claimant's representative for the cost of providing a copy of the employer's records pertaining to the claim. Where the employer has previously provided a copy of the record or records pertaining to the claim to the claimant or the claimant's representative, the employer may charge a fee for the copies. The employer's fee shall be based upon the actual cost of furnishing such copies, not to exceed twenty-five cents per page.

**(10)** The employer shall inform a claimant, and the bureau of workers' compensation, in writing, within thirty days from the filing of the claim, as to what conditions it has recognized as related to the injury or occupational disease and what, if any, it has denied. The same timeframe shall apply when the employer rejects a medical only claim.

**(11)** The employer shall post notices of its self-insuring status indicating the location in the plant(s) for the filing of a claim and the job title and department of the employees designated by the employer to be the person or persons responsible for the processing of workers' compensation claims.

**(12)** A public employer, except for a board of county commissioners described in division (G) of section 4123.01 of the Revised Code, a board of a county hospital, or a publicly owned utility, who is granted the status of self-insuring employer pursuant to section 4123.35 of the Revised Code shall comply with the section 4123.353 of the Revised Code.

**(L)** If a state insurance fund employer or a succeeding employer, as described in rule 4123-17-02 of the Administrative Code, applies for the privilege of paying compensation, etc., directly, by transferring from state fund to self-insurance, the actuary of the bureau shall determine the amount of the liability of such employer to the bureau for its proportionate share of any deficit in the fund. To determine an employer's liability under this rule, the

actuary of the bureau shall develop a set of factors to be applied to the pure premium paid by an employer on payroll for a seven year period, as described below. The factors shall be based on the full past experience of the commission and bureau as reflected in the most recent calendar year end audited combined financial statement of the commission and bureau, and shall also accommodate any projected change in the financial condition of the fund for the current calendar year, or any additional period for which an audited combined financial statement is unavailable. The factors shall be revised annually effective July first based on the most recent calendar year audited combined financial statement and the projected change in the financial condition of the fund in the current calendar year or any additional period for which an audited combined financial statement is unavailable. The annually revised factors shall be adopted by rule 4123-17-40 of the Administrative Code, and filed with the secretary of state and the legislative service commission at least ten days prior to July first of each year. Factors effective July first of each year shall apply to all applications for self-insurance filed on or after July first of that year through June thirtieth of the following year. The revised factors shall be applied to the pure premium paid by the employer on payroll for the seven calendar accident years ending December thirty-first of the year preceding the year in which the factors are adopted under rule 4123-17-40 of the Administrative Code. In the event the audited combined financial statement of the commission and bureau reveals that no deficit exists, or in the event the application of the factors adopted by rule 4123-17-40 of the Administrative Code yields a negative number, the employer will incur no liability under this paragraph, but will not receive any refund for prior premiums paid except for those matters specifically addressed in paragraph (L)(2) of this rule. As used in this rule, "pure premium paid" means premiums actually paid under a base rating plan or an experience rating plan and minimum premium paid under a retrospective rating plan. It does not include premiums billed for actual claims costs, including reserves at the end of ten years, under a retrospective rating plan. Obligations under a retrospective rating plan remain the responsibility of the employer regardless of the employer's status. The same principles shall apply to cases of a merger by a self-insuring employer and a state fund employer under the self-insurer's status. In addition, the provisions listed below shall apply:

**(1)** Within thirty days of the receipt from the employer of the necessary forms and of a separate statement of assets and liabilities, the bureau will forward to the employer a letter stating the amount of liability (if any) due the state fund as outlined above and a copy of the computation of such liability (if any).

**(2)** Within thirty days of the date of mailing of the letter by the bureau as outlined in paragraph (L)(1) of this rule, the employer shall reply by a letter, signed in handwriting, acknowledging that the employer agrees with the amount of liability specified in the letter and that there are no protests or claims hearings pending which could affect the amount of the liability. If any such matters are pending and would affect the liability, they must be detailed and set forth in the letter from the employer. This letter must also acknowledge that any protest letters, applications for handicap reimbursement or other requests affecting the risk's state fund experience filed subsequent to the date of this letter shall be considered invalid for both rebate of premium on state fund experience and the calculation of liability cited above. This letter must also specify the suggested effective date of the transfer to self-insurance which the employer requests, subject to paragraph (B) of this rule which requires that the effective date must be at least ninety days after the date the application forms are received by the bureau. Failure to comply with the requirements set forth herein shall terminate further consideration of the application.

**(3)** Subsequent to the approval of the employer's self-insurance status and the effective date thereof by the administrator, the bureau shall issue a settlement sheet statement containing the adjustment required above and billing for an advance deposit as required by other rules of the commission. The employer shall pay the amounts required by this paragraph, pay the contribution to the self-insuring employers' guaranty fund under section 4123.351 of the Revised Code, submit a performance surety bond or additional security, if

required by the bureau, and estimated final payroll report as a state fund risk, all within thirty days of the date of the mailing of the self-insured certificate.

**(4)** The final adjustments of all premiums due the state fund for the final payroll reports and final bureau audit (if any), as well as the pending protests, etc., as specified in paragraph (L)(2) of this rule, shall all be settled and paid within six months from the date of transfer from state fund to self-insuring status. Employer's records must be made available promptly for final audit which must also be completed within six months from the date of the transfer from state risk to self-insurance.

**(M)** If there is any change involving additions, mergers, or deletions of entities or ownership changes of a self-insuring employer, which would materially affect the administration of the employer's self-insuring employer program or the number of employees included in such program, the employer shall notify the bureau self-insuring employer's section within thirty days after the change occurs. Based upon the information provided or additional information requested by the bureau, the bureau will determine the effect of the change on the employer's self-insuring employer status, the adequacy of the employer's contribution to the self-insuring employers' guaranty fund, and the need for additional security.

**(N)** Public employers granted the privilege of self-insurance shall include volunteers and probationers performing services for the political subdivision as employees to be covered under the self-insurance policy.

**History:**Effective: 08/15/2007.

R.C. 119.032 review dates: 3/1/2011.

Promulgated Under: 119.03.

Statutory Authority: 4121.12, 4121.121, 4121.30, 4123.05.

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Prior effective dates: 7/1/76, 1/2/78, 12/11/78, 11/26/79, 2/17/81, 9/3/85, 8/22/86 (Emer.), 11/17/86 (Emer.), 1/10/87, 7/16/90, 11/23/92 (Emer.), 2/22/93, 12/17/01, 11/14/03, 10/30/06.

### **Case Notes And OAG**

(1998) A self-insuring employer was not subject to former OAC 4123-19-03(M) because it was not a succeeding employer under former OAC 4121-7-02(B)(1), nor did it merge with the state fund employers whose assets it bought. State ex rel. H.C.F., Inc. v. Ohio Bur. of Workers' Comp., 80 OS3d 642, 1998 Ohio 175, 687 NE2d 763, 1998 Ohio LEXIS 8.

(1997) The self-insured employer's failure to pay death benefits in the amount ordered by a district hearing officer did not constitute an intentional tort where the order was vacated on review: Haffner v. Conrad, 122 Ohio App. 3d 516, 702 NE2d 160, 1997 Ohio App. LEXIS 4139.

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## OAC Ann. 4121-3-32

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THROUGH 2/1/08 \*

4121 Industrial Commission  
Chapter 4121-3 Claims Procedures

OAC Ann. 4121-3-32 (2008)

**4121-3-32. Temporary disability.**

**(A)** The following provisions shall apply to all claims where the date of injury or the date of disability in occupational disease claims accrued on or after August 22, 1986. The following definitions shall be applicable to this rule:

**(1)** "Maximum medical improvement" is a treatment plateau (static or well-stabilized) at which no fundamental functional or physiological change can be expected within reasonable medical probability in spite of continuing medical or rehabilitative procedures. An injured worker may need supportive treatment to maintain this level of function.

**(2)** "Physical capabilities" includes any psychiatric condition allowed in a claim.

**(3)** "Suitable employment" means work which is within the employee's physical capabilities.

**(4)** "Treating physician" means the employee's attending physician of record on the date of the job offer, in the event of a written job offer to an employee by an employer. If the injured worker requested a change of doctors prior to the job offer and in the event that such request is approved, the new doctor is the treating physician.

**(5)** "Work activity" means sustained remunerative employment.

**(6)** "Job offer" means a proposal, made in good faith, of suitable employment within a reasonable proximity of the injured worker's residence. If the injured worker refuses an oral job offer and the employer intends to initiate proceedings to terminate temporary total disability compensation, the employer must give the injured worker a written job offer at least forty-eight hours prior to initiating proceedings. If the employer files a motion with the industrial commission to terminate payment of compensation, a copy of the written offer must accompany the employer's initial filing.

**(B) (1)** Temporary total disability may be terminated by a self-insured employer or the bureau of workers' compensation in the event of any of the following:

**(a)** The employee returns to work.

**(b)** The employee's treating physician finds that the employee is capable of returning to his former position of employment or other available suitable employment.

**(c)** The employee's treating physician finds the employee has reached maximum medical improvement.

**(2)** Except as provided in paragraph (B)(1) of this rule, temporary total disability

compensation may be terminated after a hearing as follows:

**(a)** Upon the finding of a district hearing officer that either the conditions in paragraph (B)(1)(a) or (B)(1)(b) of this rule has occurred.

**(b)** Upon the finding of a district hearing officer that the employee is capable of returning to his/her former position of employment.

**(c)** Upon the finding of a district hearing officer that the employee has reached maximum medical improvement.

**(d)** Upon the finding of a district hearing officer that the employee has received a written job offer of suitable employment.

If a district hearing officer determines, based upon the evidence, that as of the date of the hearing, the injured worker is no longer justified in remaining on temporary total disability compensation, he shall declare that no further payments may be made. If the district hearing officer determines that the injured worker was not justified in receiving temporary total disability compensation prior to the date of the hearing, he shall declare an overpayment from the date the injured worker was no longer justified in remaining on temporary total disability compensation. Such payment shall be recovered from future awards related to the claim or any other claim. The recovery order shall provide a method for the repayment of any such overpayment as is reasonable, taking into account such factors as the amount of money to be recouped, the length of the periodic payments to be made under any future award, and the financial hardship that would be imposed upon the employee by any specific schedule of repayment.

**History:**R.C. 119.032 review dates: 02/01/2008 and 02/01/2012.

Promulgated Under: 119.03.

Statutory Authority: 4121.30, 4121.31.

Rule Amplifies: 4123.56.

Prior Effective Dates: 8/22/86 (Emer.), 11/17/86 (Emer.), 2/17/87 (Emer.), 8/6/87, 5/15/97.