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IN THE SUPREME COURT OF OHIO

* *

State of Ohio, *ex rel.* DaimlerChrysler Corporation,	)	**Case No. 2007-2020**
Appellant	)	
vs.	)	**On Appeal from Franklin County Court of Appeals/Tenth Appellate District**
Industrial Commission of Ohio	)	
and	)	**Court of Appeals Case No. 06-AP-968**
Kathleen E. Moran	)	
Appellees.	)	

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TABLE OF CONTENTS

I.	TABLE OF AUTHORITIES	PAGE 3
II.	STATEMENT OF FACTS	PAGE 4
III.	ARGUMENT	PAGE 5-10
	A. Standard for Mandamus Review	PAGE 5
	B. Proposition of Law No. 1 A medical opinion that an injured worker "will not return to her former position," standing alone, is not evidence that the injured worker's condition has reached Maximum Medical Improvement (MMI), and is not a basis for terminating temporary total disability compensation.	PAGE 6-10
IV.	CONCLUSION	PAGE 11
V.	CERTIFICATE OF SERVICE	PAGE 12

I. TABLE OF AUTHORITIES

CASES

PAGES

Logsdon v. Indus. Comm. (1944) 143 Ohio St. 508 (Syllabus No. 2) 7, 8

State ex rel. Advantage Tank Lines v. Indus Comm. (2005) 107 Ohio St. 3d 16 8, 9, 10

State ex rel. Advantage Tank Lines v. Industrial Commission (2004) 2004 WL 1445691 9

State ex rel. Advantage Tank Lines v. Industrial Commission (2005) 107 Ohio St. 3d at 17 9

State ex rel. Commercial Lovelace Motor Freight v. Lancaster (1986), 22 Ohio St.3d 191, 193 5

State ex rel. Elliott v. Indus. Comm. (1986), 26 Ohio St.3d 76, 78-79 5

State ex rel. Matlack Inc. v. Industrial Commission (1991) 73 Ohio App 3d 648 10

State ex rel. Pass v. C.S.T. Extraction Co. (1986), 74 Ohio St.3D 373, 376 5

State ex rel. Ramirez v. Industrial Commission (1982) 69 Ohio St. 2d 630 6, 7, 8, 10

State ex rel. Stephenson v. Indus. Comm. (1987), 31 Ohio St.3D 167, 170 5

State ex rel. Vulcan Materials v. Industrial Commission (1986) 25 Ohio St. 3d 31 8, 10, 11

CONSTITUTIONAL PROVISIONS AND STATUTES:

Ohio Administrative Code Section 4121-3-32 6

Ohio Revised Code Section 4123.56 6, 7, 8, 11

OTHER AUTHORITY:

Ohio Workers Compensation Law Second Edition (1998) Anderson Publishing 8

II. STATEMENT OF FACTS

In addition to the facts as noted by Appellant, it should be noted that the surgery on May 26, 2005 was Mrs. Moran's *second* cervical spinal fusion related to this claim. Her treating physician, Dr. Andreshak, continued to certify that she had not reached MMI, (Supp. 93), and his recommend further treatment, massage therapy, was approved by the self insured employer (Supp. 94).

Also, on January 11, 2006, Appellant had Mrs. Moran evaluated by S. S. Purewal M.D. (Supp. 86-89) on the issue of temporary total disability. His report, in pertinent part, states as follows:

> "...Ms. Moran is about 8 months status post repeat cervical fusion at the C6-7 level, and according to Dr. Andreshak's note of November 1, 2005, the x-rays have not yet shown solid fusion. He is hoping that she will not develop another nonunion. Currently she is continuing her physical therapy for strengthening and mobilizing her neck and upper extremities.
>
> *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..." (emphasis added)

III. ARGUMENT

A. Standard for Mandamus Review

Appellant has set forth the requirements for an extraordinary writ of mandamus to issue: (1) a clear legal right to the relief sought; (2) that the respondent had a clear legal duty to provide such relief; and (3) that the relator had no other adequate legal remedy.

Regarding the first two elements, in order for Appellant to establish the basis for mandamus relief, it must be clearly shown that the Industrial Commission acted contrary to law or abused discretion by issuing an order that is not supported by evidence in the administrative record. *State ex rel. Elliott v. Indus. Comm.* (1986), 26 Ohio St.3d 76, 78-79. In *State ex rel. Stephenson v. Indus. Comm.* (1987), 31 Ohio St.3D 167, 170, the Court stated:

> It is basic law, without need of citation, that the Industrial Commission has considerable discretion in the performance of its duties; that its actions are presumed to be valid and performed in good faith and judgment, unless shown to be otherwise; and that so long as there is some evidence in the file to support its findings and orders, this court will not overturn such.

The Supreme Court has held that a writ of mandamus will not be granted if an order of the Industrial Commission is supported by "some evidence." *State ex rel. Pass v. C.S.T. Extraction Co.* (1986), 74 Ohio St.3D 373, 376. Further, an abuse of discretion will be found only when there exists no evidence upon which the Industrial Commission could have based its decision. *State ex rel. Commercial Lovelace Motor Freight v. Lancaster* (1986), 22 Ohio St.3d 191, 193.

B. <u>Proposition of Law No. 1</u>: A medical opinion that an injured worker "will not return to her former position," standing alone, is not evidence that the injured worker's condition has reached Maximum Medical Improvement (MMI), and is not a basis for terminating temporary total disability compensation.

At the time of the Industrial Commission decision, which is the subject of this mandamus review, both Ms. Moran's treating physician, Dr. Andreshak, and the employer's examining physician, Dr. Purewal, felt that Ms. Moran was not at maximum medical improvement and was in need of further medical treatment due to the injuries in this case. The Industrial Commission correctly noted that Dr. Andreshak did not state that Ms. Moran's temporary disability had become permanent. The Commission applied Ohio Administrative Code 4121-3-32, Ohio Revised Code Section 4123.56, and this Court's decision in *State ex rel. Ramirez v. Industrial Commission* (1982) 69 Ohio St. 2d 630 and found that temporary total disability compensation was properly payable under these facts.

Given these facts, the Industrial Commission determined that a medical opinion that an injured worker "will not return to her former position" was not the equivalent of maximum medical improvement and not a basis for terminating temporary total disability compensation. In short, a medical opinion as to how much an injured worker may ultimately improve in the future is not the same as an opinion that the injured worker <u>has</u> reached a treatment plateau which will "with reasonable probability, continue for an indefinite period of time without any present indication of recovery therefrom."

Before addressing the Appellant's arguments for changing the existing law concerning temporary total compensation, it may be important to review some background concerning Ohio Workers Compensation law.

Through the years, there have been many changes to Revised Code Section 4123.56 concerning the payment of temporary total disability compensation. Until 1973, there was a statutory maximum of temporary total disability compensation payable. With the 1973 amendment to ORC Section 4123.56, the maximum temporary total payment was replaced with a Bureau requirement for a medical examination after 200 weeks of temporary total compensation had been paid.

Against this backdrop, and recognizing that ORC Section 4123.56 did not have a clear definition of "temporary total disability," the Supreme Court in *State ex rel. Ramirez v. Indus. Comm.* (1982), 69 Ohio St.2d 630, defined temporary total disability as a disability which prevents a worker from returning to his former position of employment.

In *Ramirez*, the Court reversed the Industrial Commission's award of temporary *partial* disability compensation of seventy-five percent without making a determination of whether or not Mr. Ramirez could return either partially or completely to his former employment.

The statutory amendments to ORC Section 4123.56 from 1973 and the Supreme Court's decision in *Ramirez* permitted the termination of temporary total disability benefits if: 1) the claimant returned to work; 2) the treating physician made a written statement that the claimant was capable of returning to his/her former position of employment; or 3) the temporary disability had become permanent. "Permanency" has been defined by this Court as a condition which will "with reasonable probability, continue for an indefinite period of time without any present indication of recovery therefrom." *Logsdon v. Indus. Comm.* (1944) 143 Ohio St. 508 (Syllabus No. 2).

Recognizing that the definition of "permanent" has no bearing upon a claimant's ability to perform the duties associated with his former position of employment, this Court cited with approval that Syllabus from *Logsdon* in *State ex rel. Vulcan Materials v. Indus. Comm.* (1986) 25 Ohio St.3d 31, 33.

For a more extensive historical discussion of the temporary total issue, *see generally, Fulton, Ohio Workers Compensation Law Second Edition,* (1998) Anderson Publishing, especially Sections 9.4 through 9.7.

Appellant argues that this Court's decision in *State ex rel. Advantage Tank Lines v. Indus Comm.* (2005) 107 Ohio St. 3d 16 was a "restatement" of the temporary total definition as outlined in *Ramirez*. However, a review of these two cases shows that this is not, in fact, what the Court stated. In *Ramirez,* the Industrial Commission did not determine whether or not Mr. Ramirez could return to his former job. Rather, the Industrial Commission made an administrative finding that he had a seventy-five percent temporary partial disability. Recognizing that the definition of disability would be different for an injured worker claiming temporary total disability versus permanent total disability, the Court in *Ramirez* affirmed the Court of Appeals and reversed the Industrial Commission finding that Mr. Ramirez was entitled to a seventy-five percent temporary partial disability. Citing the three items to consider and awarding temporary total disability, as noted in Revised Code Section 4123.56, the Court defined temporary total disability "a disability which prevents a worker from returning to his former position of employment." *State ex rel. Ramirez v. Industrial Commission* (1982) 69 Ohio St. 2d 630, *Syllabus by the Court.*

This Court's decision in *Advantage Tank Lines* addressed a very different set of circumstances. In *Advantage Tank Lines*, the claimant was injured as a result of an on-the-job motor vehicle accident. He filed his application for permanent partial disability as required by the statute and was found to have a forty-one percent permanent partial disability at an August 28, 2002 DHO hearing. That award was affirmed by an October 25, 2002 SHO hearing. After the permanent partial disability benefits were paid, the claimant requested temporary total disability compensation be paid in the claim. At a hearing on February 3, 2003, the District Hearing Officer awarded temporary total disability compensation from October 24, 2002 through February 3, 2003 and continuing. The employer argued that, because permanent partial disability was paid in the claim, the claimant could not later be paid temporary total disability benefits. See *State ex rel. Advantage Tank Lines v. Industrial Commission* (2004) 2004 WL 1445691. (The underlying facts in *Advantage Tank Lines* can be found in the Court of Appeals' and Magistrate's decisions.)

This Court, in its *Advantage Tank Lines* decision, very narrowly defined the issue presented. "May a claimant receive PPC and TTC for the same condition over the same period?" *State ex rel. Advantage Tank Lines v. Industrial Commission* (2005) 107 Ohio St. 3d at 17. Noting the definition of "permanency" is not the same for temporary total and permanent partial disability, this Court affirmed the Court of Appeals decision and upheld the overlapping awards of permanent partial and temporary total benefits.

As the Court of Appeals and Magistrate below noted, *Advantage Tank Lines* did not directly address the issue presented here. They found that the *Advantage*

Tank Lines dicta is not controlling. Rather, the issue was directly addressed in *State ex rel. Vulcan Materials v. Industrial Commission* (1986) 25 Ohio St. 3d 31, and *State ex rel. Matlack Inc. v. Industrial Commission* (1991) 73 Ohio App 3d 648. "Permanent," as applied to temporary total disability compensation, relates to the longevity of the condition and whether there is any present indication of recovery therefrom. *Vulcan Materials, supra,* at 33.

The Tenth District Court of Appeals in *Matlack* notes that the permanency concept of *Vulcan Materials* is equated with the concept of maximum medical improvement (MMI).

Appellant claims that the Tenth District Court of Appeals in this case concluded that *Vulcan Materials* overruled *Ramirez* (Page 9 of Appellant's Brief). That is not at all what the Court of Appeals held. The Court below found that *Vulcan Materials* was the relevant case law, not the language argued by Appellant in *Advantage Tank Lines*. Had this Court in *Advantage Tank Lines* chosen to overrule *Vulcan Materials*, it could have done so succinctly and clearly. However, this Court in *Advantage Tank Lines* never addressed the *Vulcan Materials* decision because the two cases were so very different in the issues presented.

III. CONCLUSION

The decision by the Industrial Commission below was supported by some evidence, both the treating orthopedic surgeon and the physician specifically hired by the employer to examine the claimant on the issue of temporary total disability compensation. Both concluded that Ms. Moran needed further treatment and was not at MMI. The decision was based on uncontroverted medical, the clear language of the Revised Code Section 4123.56 and this Court's decisions, including *State ex rel. Vulcan Materials v. Industrial Commission* (1986) 25 Ohio St. 3d 31.

For the forgoing reasons, Appellee Kathleen Moran respectfully requests this Court to affirm the decision of the Court of Appeals and deny Appellant's appeal in this regard.

Respectfully submitted,

John R. Polofka
Attorney for Appellee Kathleen Moran

IV. CERTIFICATE OF SERVICE

This is to certify that a copy of this Merit Brief of Appellee Kathleen Moran was sent by ordinary US Mail on this 10th day of April 2008 to Thomas J. Gibney, attorney for Appellant DaimlerChrysler LLC, of Eastman & Smith, PO Box 10032, Toledo Ohio 43699-0032; and to Assistant Attorney General Andrew Alatis, attorney for Industrial Commission of Ohio, 150 East Gay Street, 22nd Floor, Columbus Ohio 43215.

Respectfully submitted,

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