

In the
Supreme Court of Ohio

STATE OF OHIO, ex rel.
DAIMLERCHRYSLER CORPORATION,

Appellant,

v.

INDUSTRIAL COMMISSION OF OHIO,
et al.,

Appellees.

: Case No. 2007-2020
:
:
: On Appeal from the Franklin County
: Court of Appeals
: Tenth Appellate District
:
: Court of Appeals Case
: No. 06AP-968
:
:

**MERIT BRIEF OF APPELLEE,
INDUSTRIAL COMMISSION OF OHIO**

THOMAS J. GIBNEY (0029992)
A. BROOKE PHELPS (0075605)
Eastman & Smith Ltd.
One SeaGate, 24th Floor
P.O. Box 10032
Toledo, Ohio 43699-0032
419-241-6000
419-247-1777 fax

Counsel for Appellant,
DaimlerChrysler Corporation

MARC DANN (0039425)
Attorney General of Ohio

ANDREW J. ALATIS (0042401)
Assistant Attorney General
Workers' Compensation Section
150 East Gay Street, 22nd Floor
Columbus, Ohio 43215-3130
614-466-6696
614-752-2538 fax
aalatis@ag.state.oh.us

Counsel for Appellee,
Industrial Commission of Ohio

JOHN R. POLOFKA (0011822)
Polofka and Van Berkom
500 Madison Ave., Suite 605
Toledo, Ohio 43604-1242
419-241-7900
419-241-1530 fax

Counsel for Appellee,
Kathleen E. Moran

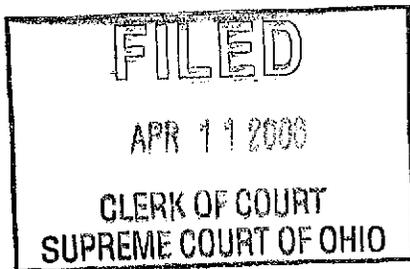


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INTRODUCTION

This is a workers' compensation case arising as an original action in mandamus. The case now before this Court concerns termination of temporary total disability ("TTD") benefits to workers' compensation claimant and Appellee, Kathleen Moran ("Ms. Moran"). The co-Appellee, Industrial Commission of Ohio ("commission"), issued a decision continuing TTD benefits to Ms. Moran while her work injuries healed. The commission based its decision on the updated 1986 statutory language of the TTD enabling statute, R.C. 4123.56, as well as on case law in effect at the time Ms. Moran was injured in 1999. However, Appellant-Employer, DaimlerChrysler Corporation ("Daimler") argues that a prior version of R.C. 4123.56 should apply to Ms. Moran. Daimler is wrong.

The issue here is the interplay between the concepts of "permanency" and "maximum medical improvement." In Ms. Moran's case, the commission continued her TTD benefits because her injuries had not yet reached maximum medical improvement ("MMI"), the point at which the benefits could be terminated. Daimler argues that her injuries are "permanent," in that she cannot return to her former position of employment, and that therefore her TTD should be terminated. But Daimler's interpretation of the law dates to a 1982 interpretation and application of R.C. 4123.56 in *State ex rel. Ramirez v. Indus. Comm.*, 69 Ohio St.2d 630. That interpretation was overruled by 1986 amendments to R.C. 4123.56, corresponding regulations and more recent case law.

Terminating her TTD before she reaches MMI would work an injustice to Ms. Moran, leaving her without any wage replacement while her injuries heal. This situation was the very injustice that the statutory revision sought to prevent and rectify. Daimler's argument is not supported by current law and the Court of Appeals' judgment should therefore be affirmed.

STATEMENT OF THE CASE AND FACTS

Ms. Moran was injured at work on March 11, 1999, while employed by Daimler, a self-insured employer under Ohio's workers' compensation laws. Specifically, an elevator gate came down on top of her head. Her claim was initially allowed for "herniated disc C4-5." (Appendix to Merit Brief of Appellant ("Apx.") at pg. 9, ¶ 7.) Daimler began payments of TTD compensation based upon C84 reports from Ms. Moran's physician, James Gosman, M.D. (Apx. at pg. 9, ¶ 8.)

On February 7, 2003, at Daimler's request, Ms. Moran was examined by Jeffrey M. LaPorte, M.D., who opined that Ms. Moran "has reached maximum medical improvement with regard to the C4-5 herniated disc." (Apx. at pg. 9, ¶ 9.) A district hearing officer ("DHO") issued an order terminating TTD compensation following a March 18, 2003 hearing. The DHO based his decision on Dr. LaPorte's report in which he found Ms. Moran's industrial injury had reached maximum medical improvement ("MMI"). (Apx. at pg. 9, ¶ 11.)

On May 2, 2003, Ms. Moran moved for the allowance of additional conditions. (Apx. at pg., 9, ¶ 12.) Following a hearing on August 12, 2003, a staff hearing officer ("SHO") additionally allowed Ms. Moran's claim for "aggravation of pre-existing cervical spondylosis at C6-7 and C6-7 cervical radiculopathy" (Apx. at pg., 10, ¶ 13.) On May 26, 2005, Thomas G. Andreshak, M.D., performed a repeat cervical fusion at the C6-7 level. Daimler resumed TTD payments. (Apx. at pg. 10, ¶ 14.)

On January 11, 2006, at Daimler's request, Ms. Moran was examined by S. S. Purewal, M.D., who is board certified in orthopedic surgery. (Apx. at pg. 10, ¶ 15.) Dr. Purewal opined that Ms. Moran had not yet reached MMI and that it would take "up to one year of healing and consolidation period for the fusion to be at MMI." He also stated Ms. Moran "needs to continue

her rehabilitative exercise program for the next 4-6 weeks to strengthen her upper extremities.”

Id.

On March 8, 2006, Daimler’s third-party administrator (“TPA”) asked Dr. Andreshak by letter if, given the allowed conditions of “herniated disc C4-5, aggravation of pre-existing cervical spondylosis with radiculopathy,” Ms. Moran would ever return to her former position of employment. (Apx. at pg. 10, ¶ 16.) Dr. Andreshak responded: “No she will not return to her former position.” (Apx. at pg. 10, ¶ 17.) Daimler then moved to terminate Ms. Moran’s TTD compensation on grounds that Dr. Andreshak’s response allegedly indicates that Ms. Moran’s condition is “permanent.” (Apx. at pg. 10, ¶ 18.)

Following a hearing on April 12, 2006, a DHO found Ms. Moran was not at MMI based on Dr. Purewal’s report. The DHO also noted that the doctor had opined Ms. Moran would need rehabilitative therapy to strengthen her upper extremities. (Apx. at pg. 11, ¶ 19.) The DHO found Dr. Andreshak’s answer via letter insufficient to terminate TTD because he did not give any basis for his opinion. Id.

Daimler appealed from the decision. Following a May 24, 2006 hearing, an SHO vacated the DHO order but still denied Daimler’s motion, finding that there was no basis to terminate Ms. Moran’s benefits. (Apx. at pg. 13, ¶ 21.) To support his finding, the SHO referred to Ohio Adm.Code 4121-3-32, which lists the three conditions that can terminate TTD benefits. (Apx. at pg. 12, ¶ 21.) The relevant condition here is that a claimant must be declared MMI to terminate temporary total disability benefits. Id. Because Ms. Moran had not been declared at MMI, the SHO concluded termination of TTD was improper. Id.

Daimler appealed from the SHO decision but the commission denied the motion. Daimler then filed an action in mandamus with the Tenth District Court of Appeals. (Apx. at pg. 13, ¶¶

23-24.) In his decision, the Court of Appeals magistrate agreed with the SHO's finding and recommended the denial of issuance of a writ of mandamus. (Apx. at pg. 17, ¶¶ 37-38.) The appeals court found the magistrate had properly determined the facts and applied the appropriate law, and it adopted the magistrate's decision as its own. (Apx. at pg. 7, ¶ 5.) Daimler appealed.

ARGUMENT

A. Standard of review.

The commission is the sole fact-finder and the exclusive evaluator of evidentiary weight and credibility. *State ex rel. Moss v. Indus. Comm.* (1996), 75 Ohio St.3d 414, 416. *State ex rel. Stephenson v. Indus. Comm.* (1987), 31 Ohio St.3d 167, states that the commission's actions are presumed to be valid:

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.

Id. at 170.

Moreover, “[a] writ of mandamus is an extraordinary remedy.” *State ex rel. Haylett v. Ohio Bureau of Workers’ Comp.* (1999), 87 Ohio St.3d 325, 334. Entitlement to a writ of mandamus requires: (1) a clear legal right to the requested relief; (2) a corresponding clear legal duty on the part of the commission; and (3) the lack of an adequate remedy in the ordinary course of the law. *State ex rel. Moore v. Malone* (2002), 96 Ohio St.3d 417, 420. “A clear legal right to a writ of mandamus exists only where the relator shows that the [respondent] abused its discretion by entering an order which is not supported by any evidence in the record.” *State ex rel. Taylor v. Indus. Comm.* 150 Ohio App.3d 309, 2002-Ohio-6451, at ¶ 21. “Abuse of discretion, and especially gross and palpable abuse of discretion, which are the terms ordinarily employed to justify an interference with the exercise of discretionary power, implies not merely

error of judgment, but perversity of will, passion, prejudice, partiality or moral delinquency.”

State ex rel. Shafer v. Ohio Turnpike Commission (1953), 159 Ohio St. 581.

No such perversity or delinquency exists here.

Industrial Commission’s Proposition of Law:

A mere finding that the injured worker will never be able to return to her previous position of employment is not a criterion for the termination of temporary total disability compensation; rather, temporary total compensation may be terminated when the injured worker has reached maximum medical improvement, defined as “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.”

Daimler would, in effect, turn back the clock on handling temporary total disability compensation law as it has developed since 1982. Daimler’s argument completely ignores significant developments in this area of law as far back as 1986.

Specifically, Daimler’s reliance on *State ex rel. Ramirez v. Indus. Comm.* (1982), 69 Ohio St.2d 630 is misplaced, as noted by the Court of Appeals. First, *Ramirez* was decided in 1982, before the 1986 amendments to R.C. 4123.56. The TTD enabling statute, R.C. 4123.56, at that time did not mention MMI; the term “maximum medical improvement” came into being with the 1986 amendments. R.C. 4123.56(A) provides for the continuation of the payment of TTD, with supporting medical evidence. The statute, however, now indicates that certain events can lead to the termination of TTD entitlement:

[P]ayment 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.*

R.C. 4123.56(A)(Emphasis added.) Unlike in 1982, MMI is now a well-established doctrine in Ohio workers’ compensation law.

Second, as the court below pointed out, the dispositive cases here are *State ex rel. Vulcan Materials Co. v. Indus. Comm.* (1986), 25 Ohio St.3d 31 and *State ex rel. Matlack, Inc. v. Indus. Comm.* (1991), 73 Ohio App.3d 648. (Apx. at pg. 14, ¶ 30.) The *Vulcan* Court specifically discussed the termination criteria for TTD, and held that it is the longevity of the condition, not the claimant's ability to perform the tasks involved in the former job, that determines whether an injury is temporary or permanent:

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.

25 Ohio St.3d at 33. (Emphasis added). The *Matlack* Court specifically equated the permanency concept introduced in *Vulcan* with the determination of MMI:

The concept of permanency [with regard to termination of TTD] relates to the perceived longevity of the condition. . . . A permanent condition is one which will, with reasonable probability, continue for an indefinite period of time without any indication of recovery therefrom.

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.

73 Ohio App.3d at 654-655 (quotes and cites omitted). Thus, statutory, administrative and case law establish that TTD is terminated when an injured worker's condition has stabilized, and she can seek other types of compensation, *not when a doctor states that she can no longer return to her previous position*. Cutting off TTD before an injured worker's condition has stabilized would leave her with no alternative wage replacement benefits during her recuperation.

Indeed, this Court has also equated the updated concept of “maximum medical improvement” with the old concept of “permanence” of injuries. *State ex rel. Youghiogheny & Ohio Coal Co. v. Kohler* (1990), 55 Ohio St.3d 109. Permanency for purposes of TTD has long been defined as a condition that “will, . . . with reasonable probability, continue for an indefinite period of time without any present indication of recovery therefrom.” 55 Ohio St.3d at 110, quoting *Vulcan; State ex rel. Logsdon v. Indus. Comm.* (1944), 143 Ohio St. 508. Finally, in clarifying the right to receive TTD benefits, this Court held that “so long as the claimant’s condition has not stabilized, and further medical improvement can be expected, TTD benefits are payable.” *State ex rel. Eberhardt, v. Flxible Corporation* (1994) 70 Ohio St.3d 649 at ** ____.

In support of the updated statute and recent case law, Ohio Adm.Code 4121-3-32 defines “maximum medical improvement” as 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.”

Moreover, *State ex rel. Advantage Tank Lines v. Indus. Comm.* (2005), 107 Ohio St.3d. 16, 2005-Ohio-5829—relied on by Daimler—is inapposite here. Daimler argues that TTD awards are based exclusively on a claimant’s ability to return to his/her former job and that a disability is permanent when the condition will never improve to the point where the claimant can resume his former position, based on one paragraph in *Advantage*:

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. Com.* (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.

107 Ohio St. 3d at 18, 2005-Ohio-5829 at ¶ 8. However, the issue in *Advantage* was whether a permanent total disability (“PTD”) award is payable *concurrent* with TTD benefits. The

language Daimler relies on is dicta describing the differences between the two types of awards, not a holding changing the Supreme Court's long-standing definition of MMI.

The commission's decision to continue Ms. Moran's TTD benefits is entirely based on the statutory language and case law in effect at the time of Ms. Moran's injury and it was made based on evidence before it. When Ms. Moran was injured on March 11, 1999, R.C. 4123.56 read in relevant part that "temporary total disability payments shall not be made for the period *when . . . the employee has reached maximum medical improvement.*" (Emphasis added.) MMI is a factor separate and apart from a projection of the injured worker's ability to return to his or her former position of employment.

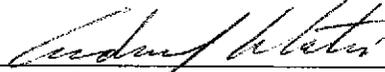
At Daimler's request, Dr. Purewall did an orthopedic evaluation of Ms. Moran on January 11, 2006. He opined that Ms. Moran has not yet reached maximum medical improvement and that it would take up to one year for the fusion at C6-7 to be considered at MMI. The doctor also noted Ms. Moran would need a rehabilitative exercise program to strengthen her upper extremities. This report provides "some evidence" that Ms. Moran had not yet reached MMI and for the continuation of her TTD benefits.

CONCLUSION

For the above reasons, the Court should affirm the decision and judgment of the Court of Appeals.

Respectfully submitted,

MARC DANN (0039425)
Attorney General of Ohio



ANDREW J. ALATIS
Assistant Attorney General
Workers' Compensation Section
150 East Gay Street, 22nd Floor
Columbus, Ohio 43215-3130
614-466-6696
614-752-2538 fax
aalatis@ag.state.oh.us

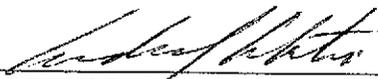
Counsel for Appellee,
Industrial Commission of Ohio

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Merit Brief of Appellee, Industrial Commission of Ohio, was sent by U.S. mail, postage pre-paid, on this 11 day of April, 2008 to the following:

THOMAS J. GIBNEY (0029992)
A. BROOKE PHELPS (0075605)
Eastman & Smith Ltd.
One SeaGate, 24th Floor
P.O. Box 10032
Toledo, Ohio 43699-0032

JOHN R. POLOFKA (0011822)
Polofka and Van Berkom
500 Madison Ave., Suite 605
Toledo, Ohio 43604-1242



ANDREW J. ALATIS
Assistant Attorney General