

**IN THE SUPREME COURT OF OHIO**  
**CASE NO.: 2007-2020**

STATE ex rel. DAIMLERCHRYSLER CORPORATION,	:	
et al.,	:	
Appellant/Relator,	:	On Appeal from the
	:	Tenth Appellate District
vs.	:	Case No. 06AP 968
	:	
INDUSTRIAL COMMISSION AND	:	
KATHLEEN E. MORAN,	:	
et al.	:	
Appellees/Respondents.	:	

---

**MERIT BRIEF OF THE OHIO ASSOCIATION FOR JUSTICE, FORMERLY THE  
OHIO ACADEMY OF TRIAL LAWYERS, AS *AMICUS CURIAE*, IN SUPPORT OF  
APPELLEE/RESPONDENT, KATHLEEN E. MORAN**

---

**COUNSEL FOR APPELLANT,  
DAIMLERCHRYSLER LLC**  
Thomas J. Gibney (0029992)  
A. Brooke Phelps (0075605)  
EASTMAN & SMITH LTD.  
One SeaGate, 24<sup>th</sup> Floor  
P.O. Box 10032  
Toledo, OH 43699-0032  
(419) 241-6000 FAX: (419) 247-1777  
tjgibney@eastmansmith.com  
abphelps@eastmansmith.com

**COUNSEL FOR APPELLEE/RESPONDENT,  
INDUSTRIAL COMMISSION OF OHIO**  
MARC DANN  
ATTORNEY GENERAL OF OHIO  
Andrew J. Alatis (0042401)  
AAlatis@ag.state.oh.us  
Assistant Attorney General  
Workers' Compensation Section  
150 E. Gay Street, 22<sup>nd</sup> Flr.  
Columbus, OH 43215-3130  
(614) 466-6696 FAX (614) 728-9535

**COUNSEL FOR APPELLEE,  
KATHLEEN E. MORAN**  
John R. Polofka (0011822)  
POLOFKA AND VAN BERKOM  
500 Madison Ave., Ste. 605  
Toledo, OH 43604-1242  
(419)241-7900 FAX: (419) 241-1530  
Jpolofka@aol.com

**COUNSEL FOR AMICUS CURIAE,  
OHIO ASSOCIATION FOR JUSTICE**  
Philip J. Fulton (0008722)  
Phil@fultonlaw.com  
PHILIP J. FULTON LAW OFFICE  
89 E. Nationwide Blvd., Suite 300  
Columbus, OH 43215  
(614)224-3838 FAX (614) 224-3933

**FILED**  
APR 14 2003  
CLERK OF COURT  
SUPREME COURT OF OHIO

TABLE OF CONTENTS

TABLE OF CONTENTS ..... i

TABLE OF AUTHORITIES ..... ii

STATEMENT OF INTEREST AND OF THE FACTS ..... 1

LAW AND ARGUMENT ..... 2

IT IS THE ROLE OF THE LEGISLATURE TO CARVE OUT EXCEPTIONS TO  
A CLAIMANT’S ELIGIBILITY FOR TEMPORARY TOTAL DISABILITY.  
THUS, R.C. § 4123.56(A) PROVIDES THE ONLY EXCEPTIONS TO  
ENTITLEMENT. .... 2

CONCLUSION ..... 4

CERTIFICATE OF SERVICE ..... 5

APPENDIX .....

Ohio Admin. Code § 4121-3-32 ..... Appendix page 1

R.C. § 4121.32(C)(8) ..... Appendix page 3

R.C. § 4123.56 (A) ..... Appendix page 5

**TABLE OF AUTHORITIES**

**CASE:**

*McCrone v. Bank One Corp.*, 107 Ohio St.3d 272, 2005-Ohio-6505, 339 N.E.2d ..... 2

*State ex rel. Cuyahoga County Hospital v. Ohio Bureau of Workers' Compensation* (1986),  
27 Ohio St.3d 25, 500 N.E.3d 1370 ..... 3

*State ex rel. Gross v. Indus. Comm.*, 115 Ohio St.3d 249,  
2007-Ohio-4916, 874 N.E.2d 1162 ..... 2

*State ex rel. Kroger Co. v. Stover* (1987), 31 Ohio St.3d 229, 510 N.E.2d 356 ..... 4

**RULES AND STATUTES:**

Ohio Admin. Code § 4121-3-32 ..... 3, 4

R.C. § 4121.32(C)(8) ..... 3

R.C. § 4123.56 (A) ..... 1, 2

## STATEMENT OF INTEREST AND OF THE FACTS

The Ohio Association for Justice, formerly known as the Ohio Academy of Trial Lawyers (OAJ), was founded in 1954. It is an organization of over 1,900 attorneys dedicated to the protection of Ohio's consumers, workers and families. In furtherance of its ideals, OAJ has appeared in numerous cases before the Ohio Supreme Court through the submission of *Amicus Curiae* Briefs. Inasmuch as OAJ was originally known as the National Association of Claimant's Counsel, Ohio Chapter, it appreciates the opportunity to submit this brief as *amicus curiae*.

The Ohio Association for Justice files this Merit Brief to ask this Court to affirm the Industrial Commission's award of temporary total disability benefits to Appellee/Respondent Kathleen E. Moran. The Industrial Commission could not legally terminate her benefits because one of the exceptions to eligibility found in R.C. § 4123.56 (A) had not been met.

The Association for Justice adopts the statement of facts set forth in Appellee/Respondent's, Kathleen E. Moran, Merit Brief.

## LAW AND ARGUMENT

### PROPOSITION OF LAW ONE:

**IT IS THE ROLE OF THE LEGISLATURE TO CARVE OUT EXCEPTIONS TO A CLAIMANT'S ELIGIBILITY FOR TEMPORARY TOTAL DISABILITY. THUS, R.C. § 4123.56(A) PROVIDES THE ONLY EXCEPTIONS TO ENTITLEMENT.**

DaimlerChrysler's arguments are rather surprising for their total lack of reliance on the workers' compensation statute. Since it is the General Assembly which is charged by the Ohio Constitution to make public policy choices for the workers' compensation fund, *McCrone v. Bank One Corp.*, 107 Ohio St.3d 272, 2005-Ohio-6505, 339 N.E.2d, DaimlerChrysler's writ of mandamus must be denied due to this failure to recognize that this Court defers to the legislature on workers' compensation policy and will refute any attempt to legislate from the bench.

Just recently in *State ex rel. Gross v. Indus. Comm.*, 115 Ohio St.3d 249, 2007-Ohio-4916, 874 N.E.2d 1162, this Court announced that "it is the role of the legislature, not the judiciary, to carve out exceptions to a claimant's eligibility for temporary total disability." Accordingly, in R.C. § 4123.56(A), temporary total disability benefits are terminated when:

- 1.) the employee has returned to work;
- 2.) the employee's treating physician has made a written statement that the employee is capable of returning to the employee's former position of employment;
- 3.) work within the physical capabilities of the employee is made available by the employer or another employer; or
- 4.) the employee has reached maximum medical improvement.

This is the policy choice the General Assembly has made in determining what factors terminate temporary total disability payments. Clearly, DaimlerChrysler's proposition of law has not been chosen by the legislature. Good or bad, this is the legislature's policy choice.

The General Assembly has also directed the administrative agencies to adopt rules covering

operating procedure and criteria for decision-making, supplemented with operating manuals, including “determining temporary total disability.” R.C. § 4121.32(C)(8). Consistent with this mandate, the Industrial Commission promulgated Ohio Admin. Code § 4121-3-32, “Temporary disability.” In this rule, the Industrial Commission has reiterated the statute’s exceptions to a claimant’s eligibility for temporary total disability.

Ohio Admin. Code § 4121-3-32(B) provides as follows:

- (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 find 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.

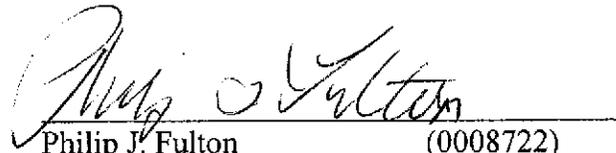
Because administrative rules issued pursuant to a statutory grant of authority have the force and effect of law, administrative agencies are bound by their own rules. *State ex rel. Cuyahoga County Hospital v. Ohio Bureau of Workers’ Compensation* (1986), 27 Ohio St.3d 25, 500 N.E.3d 1370. Thus, the Industrial Commission had no legal authority, despite DaimlerChrysler’s assertions, to terminate appellee’s temporary total disability benefits because of the permanency of a claimant’s inability to return to the former position of employment. Furthermore, since courts are required to

give due deference to an administrative agency's interpretation of its own rules and regulations, *State ex rel. Kroger Co. v. Stover* (1987), 31 Ohio St.3d 229, 510 N.E.2d 356, DaimlerChrysler has no legal authority to ask this Court to substitute its proposition of law for Ohio Admin. Code § 4121-3-32.

### CONCLUSION

Consistent with the proud heritage and philosophy of this Court- rooted not in judicial activism but the constitutional deference owed to the legislative branch- it has been this Court's consensus to defer to the legislature in workers' compensation policy. Likewise, this Court has consistently given due deference to the Industrial Commission in promulgating rules interpreting these policies. Thus, DaimlerChrysler's attempt to change these policy choices and administrative interpretations must be denied. Otherwise, it is taking away from the policymakers a power that is rightfully theirs and a heritage of this court that is rightfully yours.

Respectfully submitted,



Philip J. Fulton (0008722)

[Phil@Fultonlaw.com](mailto:Phil@Fultonlaw.com)

PHILIP J. FULTON LAW OFFICE

89 East Nationwide Boulevard, Suite 300

(614) 224-3838 FAX: (614) 224-3933

Counsel for *Amicus Curiae*,

Ohio Association for Justice, formerly the

Ohio Academy of Trial Lawyers

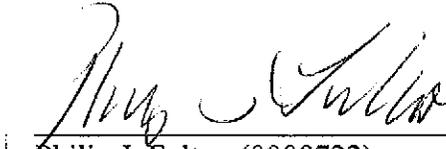
**CERTIFICATE OF SERVICE**

The undersigned certifies that a true copy of the foregoing "Merit Brief of the Ohio Association for Justice, formerly the Ohio Academy of Trial Lawyers, As *Amicus Curiae*, in Support of Appellee/Respondent, Kathleen E. Moran," was served upon the following, postage prepaid, by regular U.S. Mail, this 14 day of April, 2008:

Thomas J. Gibney  
A. Brooke Phelps  
EASTMANT & SMITH LTD.  
One SeaGate, 24<sup>th</sup> Floor  
P.O. Box 10032  
Toledo, OH 43699-0032

MARC DANN  
ATTORNEY GENERAL OF OHIO  
Andrew J. Alatis  
Assistant Attorney General  
Workers' Compensation Section  
150 E. Gay Street, 22<sup>nd</sup> Flr.  
Columbus, OH 43215-3130

John R. Polofka  
POLOFKA AND VAN BERKOM  
500 Madison Ave., Ste. 605  
Toledo, OH 43604-1242

  
Philip J. Fulton (0008722)

**APPENDIX**

**4121-3-32**

**Ohio Administrative Code**

**4121 Industrial Commission**

**Chapter 4121-3 Claims Procedures**

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

---

**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.

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

---

© Lawriter Corporation. All rights reserved.

The Casemaker™ Online database is a compilation exclusively owned by Lawriter Corporation. The database is provided for use under the terms, notices and conditions as expressly stated under the online end user license agreement to which all users assent in order to access the database.

**4121.32****Statutes and Session Law****TITLE [41] XLI LABOR AND INDUSTRY****CHAPTER 4121: INDUSTRIAL COMMISSION; BUREAU OF WORKERS' COMPENSATION****4121.32 Supplementing rules with operating manuals.**

---

**4121.32 Supplementing rules with operating manuals.**

(A) The rules covering operating procedure and criteria for decision-making that the administrator of workers' compensation and the industrial commission are required to adopt pursuant to section 4121.31 of the Revised Code shall be supplemented with operating manuals setting forth the procedural steps in detail for performing each of the assigned tasks of each section of the bureau of workers' compensation and commission. The administrator and commission jointly shall adopt such manuals. No employee may deviate from manual procedures without authorization of the section chief.

(B) Manuals shall set forth the procedure for the assignment and transfer of claims within sections and be designed to provide performance objectives and may require employees to record sufficient data to reasonably measure the efficiency of functions in all sections. The bureau's division of research and statistics shall perform periodic cost-effectiveness analyses which shall be made available to the general assembly, the governor, and to the public during normal working hours.

(C) The bureau and commission jointly shall develop, adopt, and use a policy manual setting forth the guidelines and bases for decision-making for any decision which is the responsibility of the bureau, district hearing officers, staff hearing officers, or the commission. Guidelines shall be set forth in the policy manual by the bureau and commission to the extent of their respective jurisdictions for deciding at least the following specific matters:

- (1) Reasonable ambulance services;
- (2) Relationship of drugs to injury;
- (3) Awarding lump-sum advances for creditors;
- (4) Awarding lump-sum advances for attorney's fees;
- (5) Placing a claimant into rehabilitation;
- (6) Transferring costs of a claim from employer costs to the statutory surplus fund pursuant to section 4123.343 of the Revised Code;
- (7) Utilization of physician specialist reports;
- (8) Determining the percentage of permanent partial disability, temporary partial disability, temporary total disability, violations of specific safety requirements, an award under division (B) of section 4123.57 of the Revised Code, and permanent total disability.

(D) The bureau shall establish, adopt, and implement policy guidelines and bases for decisions involving reimbursement issues including, but not limited to, the adjustment of invoices, the reduction of payments for future services when an internal audit concludes that a health care provider was

overpaid or improperly paid for past services, reimbursement fees, or other adjustments to payments. These policy guidelines and bases for decisions, and any changes to the guidelines and bases, shall be set forth in a reimbursement manual and provider bulletins.

Neither the policy guidelines nor the bases set forth in the reimbursement manual or provider bulletins referred to in this division is a rule as defined in section 119.01 of the Revised Code.

(E) With respect to any determination of disability under Chapter 4123. of the Revised Code, when the physician makes a determination based upon statements or information furnished by the claimant or upon subjective evidence, he shall clearly indicate this fact in his report.

(F) The administrator shall publish the manuals and make copies of all manuals available to interested parties at cost.

---

© Lawriter Corporation. All rights reserved.

The Casemaker™ Online database is a compilation exclusively owned by Lawriter Corporation. The database is provided for use under the terms, notices and conditions as expressly stated under the online end user license agreement to which all users assent in order to access the database.

**4123.56****Statutes and Session Law****TITLE [41] XLI LABOR AND INDUSTRY****CHAPTER 4123: WORKERS' COMPENSATION****4123.56 Compensation in case of temporary disability.**

---

**4123.56 Compensation in case of temporary disability.**

(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 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.

Effective Date: 07-01-2000; (SB 7) 10-11-2006

The Casemaker™ Online database is a compilation exclusively owned by Lawriter Corporation. The database is provided for use under the terms, notices and conditions as expressly stated under the online end user license agreement to which all users assent in order to access the database.