

In the  
**SUPREME COURT OF OHIO**

STATE ex rel. DAIMLER CHRYSLER CORPORATION, :  
et al., :

Appellant/Relator, :

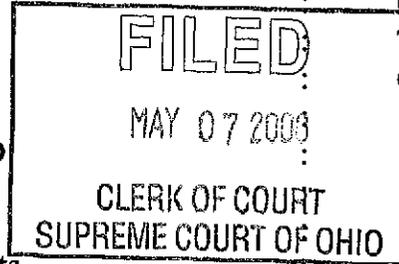
vs.

INDUSTRIAL COMMISSION AND  
KATHLEEN E. MORAN,  
et al.,

Appellees/Respondents.

Case No. 2007-2020

On Appeal from the  
Tenth Appellate District  
Case No. 06AP 968



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REPLY BRIEF OF AMICI CURIAE  
OHIO CHAMBER OF COMMERCE  
AND OHIO SELF-INSURED ASSOCIATION  
NATIONAL FEDERATION OF INDEPENDENT BUSINESS,  
IN SUPPORT OF APPELLANT/RELATOR DAIMLER CHRYSLER, LLC

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## STATEMENT OF INTEREST

The Ohio Chamber of Commerce (OCC) is a trade association of businesses and professional organizations in the State of Ohio with direct business membership in excess of 4,500 business firms and individuals. A non-profit corporation organized and existing under the laws of the State of Ohio, the OCC represents business, trade, and professional organizations doing business within the State and has frequently participated as *amicus curiae*.

The Ohio Self-Insurers Association (OSIA) was formed in 1974 to represent Ohio's self-insuring employers in workers' compensation and employer liability issues. It is the only statewide organization that represents self-insured employers exclusively and is devoted to the issue of workers' compensation and employer liability. There are over one thousand self-insured employers in the State of Ohio. Ohio's self-insured employers represent a significant part of the Ohio work force and its payroll. OSIA routinely files *amicus* briefs to assist its members in presenting arguments to the Ohio Supreme Court as well as other courts throughout the state.

The Ohio Chapter of the National Federation of Independent Business (NFIB) is an association with more than 25,000 governing members, making it the state's largest association dedicated exclusively to the interests of small and independent business owners. NFIB's members typically employ fewer than ten (10) people and record annual gross sales of less than \$450,000. NFIB's members are almost exclusively state fund employers

All of these organizations and their members are vitally concerned about the issues presented in this case.

## **STATEMENT OF FACTS**

Amici Curiae concur in the recitation of the Statement of Facts as set forth in the Merit Brief of Appellant, Daimler Chrysler Corporation.

## ARGUMENT

### PROPOSITION OF LAW

#### **THE PERMANENCY OF CLAIMANT'S INABILITY TO RETURN TO THE FORMER POSITION OF EMPLOYMENT REQUIRES TERMINATION OF TEMPORARY TOTAL COMPENSATION.**

In this case, the evidence established that the Appellee/Respondent, Kathleen Moran would never return to her former position of employment. When the evidence establishes that an injured worker is capable of working but will not return to his or her former position of employment, then the worker has reached a level of permanency and is not entitled to further temporary total disability compensation. When this occurs, the injured worker can seek employment in a different occupation and be eligible for wage loss compensation.

The Respondents and their supporting Amici argue that a claimant should be entitled to ongoing temporary total disability compensation and should not be required to seek any other employment, even when the evidence establishes that the claimant will never return to the former position of employment. To arrive at this conclusion, they argue that permanency as set forth in *State ex rel. Ramirez v. Indus. Comm.* (1982) 69 Ohio St. 2d 630, is no longer the law and that the legislature in changing the definition of temporary total disability compensation in 1986 reversed this Court's decision. This is not true.

This Court, in *State ex rel. Ramirez*, held that temporary total disability compensation is defined as a disability which prevents the worker from returning to his former position of employment. The *Ramirez* decision bases the payment of temporary total compensation on the claimant's ability to return to his former position of employment. This Court went on to state that

“an employee is entitled to be paid temporary total disability compensation when injured and unable to work until one of the following three things 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) temporary total disability has become permanent.”

Respondent and her supporting Amici argue that the General Assembly in 1986, legislatively reversed the Supreme Court’s decision in *Ramirez* and substituted a standard of maximum medical improvement in place of permanency. A review of the 1986 legislation and the statute itself do not support this argument. The *Ramirez* case had been decided more than four years before the 1986 legislation. The Legislature did not address the question of permanency since this standard was already established by the Supreme Court. Had the General Assembly wanted to eliminate the permanency standard as a means of terminating temporary total disability compensation, it could have done so by simply providing a definition of permanency. It did not so do. Further, the General Assembly could have stated that the only basis for terminating temporary total disability compensation was set forth in ORC 4123.56. Again, the General Assembly did not do so. Therefore, this legislation can only be read as providing additional means for terminating temporary total disability compensation.

Author, Philip J. Fulton, in his book Ohio Workers’ Compensation Law, 2<sup>nd</sup> Edition, (1998)

Anderson Publishing, states as follows:

“...the Ohio Supreme Court in *State ex rel. Ramirez vs. Indus. Comm.* ruled that payment of temporary total disability compensation must cease in the following circumstances:

- 1) The claimant returns to work;
- 2) The treating physician has made a written statement indicating that the claimant’s capability (sic) to return to the former position of employment; or

- 3) The temporary total disability has become permanent.

Effective August 22, 1986, Am. Sub. S.B. 307 identified two additional circumstances justifying termination of temporary total disability compensation:

- 4) Work is made available to the claimant by the affected employer or another employer within the claimant's capabilities;
- 5) The employee has reached maximum medical improvement..." (Section 9.7)

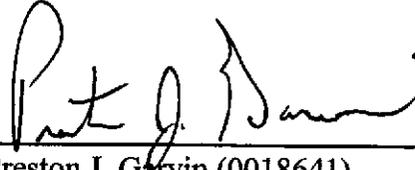
Mr. Fulton, in his book, states that the Court created additional circumstances for terminating temporary total. The finding of maximum medical improvement is in addition to and separate from a finding of permanency. The Respondent and her Amici now state that the General Assembly in 1986 either reversed the Supreme Court's decision in *Ramirez* or that permanency and maximum medical improvement are the same. This is incorrect. Permanency and maximum medical improvement are different and this fact was recognized by Mr. Fulton in his book.

Temporary total disability compensation should be terminated when the employee reaches maximum medical improvement or when the temporary disability becomes permanent. This Court found in *Ramirez* that the ability to return to work is a key element in the payment of compensation. When it is established that the claimant is capable of work but permanently unable to return to the former position of employment, then he or she should not be entitled to ongoing temporary total disability compensation.

**CONCLUSION**

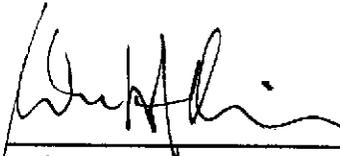
For the foregoing reasons as well as the reasons set forth in the Relator's brief, we submit that a claimant is not entitled to temporary total disability compensation when the evidence establishes that the claimant is capable of work but permanently unable to return to the former position of employment.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

The undersigned certifies that the foregoing has been served upon the following this 7<sup>th</sup> day of May, 2008:

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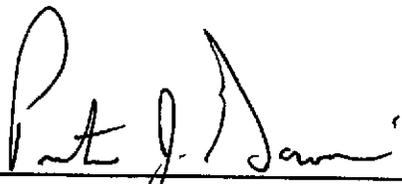
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