

I. STATEMENT OF FACTS

Appellee Kathleen E. Moran (“Moran”) received uninterrupted temporary total compensation (“TTC”) for nearly four consecutive years, from April 12, 1999 through March 18, 2003, until the Industrial Commission of Ohio determined that she had reached maximum medical improvement. (Supp. 3; Supp. 33-34.) After Moran underwent surgery on May 26, 2005, appellant Chrysler LLC (“Chrysler”) voluntarily resumed paying TTC pursuant to certifications of disability from Dr. Andreshak. (Supp. 79.) Dr. Andreshak’s C-84 certifying Moran’s temporary disability expired on March 6, 2006, and Chrysler sent Dr. Andreshak a letter on March 8, 2006 inquiring as to whether Moran would ever return to her former position of employment. (Supp. 79; Supp. 91.) Dr. Andreshak opined that Moran would never return to the former position of employment. (Supp. 91.) Upon receipt of this statement from Dr. Andreshak and after voluntarily paying Moran TTC for an additional nine months, Chrysler filed a motion requesting approval to terminate Moran’s TTC. (Supp. 90-91.) Any claim that Moran’s treatment was unfair or that Chrysler’s request was unconscionable is bereft of factual support.

II. ARGUMENT

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

Appellee Industrial Commission of Ohio (“Industrial Commission”), *amicus curiae* Ohio Association for Justice (“OAJ”), and *amicus curiae* Ohio AFL-CIO concede the distinction between a claimant’s permanent inability to return to her former position of employment (“*Ramirez* permanency”) and the concept of maximum medical improvement

("MMI"), even though these concepts were conflated by the staff hearing officer. (IC Brief, p. 1; OAJ Brief, p.2-3; AFL-CIO Brief, p. 6-7.) These parties then argue that the listing of four bases for terminating temporary total compensation ("TTC") in the first paragraph of R.C. §4123.56(A), as amended in 1986, and thereafter repeated in OAC 4121-3-32(B), is an exclusive listing of reasons for terminating TTC. (IC Brief, p. 5; OAJ Brief, p.2-3; AFL-CIO Brief, p. 6-7.) This is clearly wrong and *Ramirez* permanency remains a valid basis for terminating TTC despite the 1986 legislation adding MMI as a basis. This argument is addressed more fully below in Part 2 at pages 6-7. First, however, appellee Kathleen Moran continues to ignore the acknowledged distinction between *Ramirez* permanency and MMI. (Moran Brief, p. 10.) The important distinctions between *Ramirez* permanency and MMI underscore why *Ramirez* permanency remains, and should remain, a basis upon which TTC must be terminated.

a. Reliance on *Matlack* is misplaced.

In *State ex rel. Matlack v. Indus. Comm.* (1991), 73 Ohio App.3d 648, the court explained that "permanency" relates to a "perceived longevity." *Matlack*, supra at 655, quoting *Logsdon v. Indus. Comm.* (1944), 143 Ohio St. 508. The principal issue there was "how long," not "what" was being measured. The facts were that "what" was being measured was the claimant's ability to improve medically. *Matlack*, supra at 655-59. While that court struggled with competing interpretations of the word "irreversible," in this case no one contests that the "perceived longevity" of "never" is that Moran's inability to return to her former position was "permanent."

Because the *Matlack* court was measuring medical improvement, its statement that the claimant's ability to return to work was not at issue is understandable. Chrysler's

position is a corollary. Because Moran's inability to return to her former position (*i.e.* her disability) was permanent, whether she had reached maximum medical improvement was not at issue.

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

Ramirez permanency is described by this Court in *State ex rel. Ramirez v. Indus. Comm.* (1982), 9 Ohio St.2d 630, and concerns whether a claimant can return to her former position of employment. MMI was created by the legislature in the 1986 amendments to R.C. 4123.56 and concerns the progress of a claimant's medical condition. OAC 4121-3-32(A)(1); *Matlack*, *supra*. Often these issues develop along the same track, but sometimes they diverge.

The AFL-CIO argues that TTC is exclusively intended to compensate for the time required to "heal." (AFL-CIO Brief, pp. 3-4.) This argument is wrong in several important respects. First, TTC is intended to provide a substitute for lost wages when an employee is "temporarily" unable to perform the former position of employment. *See Brown v. Indus. Comm.* (1993), 68 Ohio St.3d 45, 47; *Ramirez*, 69 Ohio St. 2d at 631. Second, a return to work often precedes the conclusion of and is part of the healing process. Thus, compensation often stops before the "healing process" is concluded.

Moreover, Moran could have been pursued other types of compensation if her TTC had been appropriately terminated. *State ex rel. Chora v. Indus. Comm.* (1996), 74 Ohio St. 3d 238, 240-241. Moran could have returned to other employment and sought working wage loss compensation, looked for other employment and sought non-working wage loss compensation, trained for looking for or obtaining other employment in a vocational rehabilitation plan and sought living maintenance compensation, or sought one or more of the

several forms of permanent disability compensation. The termination of Moran's TTC based on her permanent inability to return to her former position of employment was not an attempt by Chrysler to "deprive" Moran of any compensation to which she was entitled under Ohio's workers' compensation law. The AFL-CIO's "fairness" argument ignores the overall statutory scheme and the multiple types of available compensation.

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

OAC 4123-19-03(K)(8) provides, "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....**" Only the AFL-CIO addresses this regulatory confirmation of the continuing significance of *Ramirez* permanency. (AFL-CIO Brief, p. 11.) The AFL-CIO, however, simply denies the import of the words by arguing the *Ramirez* permanency is not included in the brief listing of bases to terminate TTC in the first paragraph of R.C. 4123.56(A). (Id.) As established below in Part 2 on pages 6-7, the brief list in R.C. 4123.56(A) is not exclusive. Moreover, the AFL-CIO ignores the use of the disjunctive "or" in the rule. This construction underscores the difference between the two concepts and the continuing viability of both.

2. *Ramirez* permanency has not been overruled and remains a viable basis for terminating TTC.

After conceding that MMI and *Ramirez* permanency are distinct concepts, the Industrial Commission, the OAJ, and the AFL-CIO argue that the 1986 amendments to R.C. 4123.56 established an exclusive, four-point list of the bases to terminate TTC. Of note, none of these parties argue that the 1986 amendments explicitly rejected *Ramirez*. Instead, they derive significance from the fact that *Ramirez* permanency is not included in the four point list

in the first paragraph of R.C. 4123.56(A) or in OAC 4121-3-32(B). (Industrial Commission Brief, pp. 5-6, OAJ Brief, p. 3, AFL-CIO Brief, p. 7.) Their reliance on this omission is wrong for several reasons.

First, R.C. 4123.56(A) explicitly addresses termination of TTC based on permanency in the second paragraph of the statute when it states, “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.” If *Ramirez* permanency was eliminated by the 1986 amendments, then the legislature would not have retained the mandate in R.C. 4123.56(A) that a claimant be evaluated regarding the permanency of her disability after receiving two-hundred weeks of TTC.

Second, the Ohio Supreme Court and the legislature have established several scenarios where TTC must be terminated that are not listed in R.C. 4123.56(A) or OAC 4121-3-32(B). For example, a claimant’s incarceration precludes the receipt of TTC. *State ex rel. Ashcraft v. Indus. Comm.* (1987), 34 Ohio St.3d 42, 44; R.C. 4123.54. Likewise, a claimant is no longer eligible for TTC if she is terminated from the employer and the termination was “generated by the claimant’s violation of a written work rule or policy that (1) clearly defined the prohibited conduct, (2) had been previously identified by the employer as a dischargeable offense, and (3) was known or should have been known to the employee.” *State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.* (1995), 72 Ohio St.3d 401, 403. Voluntary retirement also precludes receipt of TTC. *State ex rel. General American Transp. Corp. v. Indus. Comm.* (1990), 48 Ohio St.3d 25, 26. Additionally, a hearing officer may terminate TTC if there is evidence that a claimant is performing activity that demonstrates an ability to return to her prior

job duties. *State ex rel. Kirkendall v. Indus. Comm.* (1999), 87 Ohio St.3d 182, 183. None of these bases are included in the limited listing on R.C. 4123.56(A) and OAC 4121-3-32(B), and the listings are clearly not exclusive. *Ramirez* permanency is as viable a basis to terminate TTC as any of these other reasons not listed in either R.C. 4123.56(A) or OAC 4121-3-32(B).

Indeed, the continued relevance of the concept of *Ramirez* permanency was highlighted when this Court cited *Ramirez* in *Advantage Tank Lines*, supra, and reiterated that when a claimant can never return to her former position of employment, her disability is permanent and TTC must stop.

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

The language from *Advantage Tank Lines* which Chrysler asks the Court to apply to terminate Moran’s TTC is not mere *dicta*. Moran and the Industrial Commission ignore this Court’s express indication in *Advantage Tank Lines* that the outcome determinative issue was whether “permanency” had different meanings in different contexts. *Advantage Tank Lines*, supra at 17. Because this Court’s description of the different meanings of permanency was necessary to reach its actual decision, 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.

III. CONCLUSION

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.

Respectfully submitted,

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IV. CERTIFICATE OF SERVICE

I certify that a copy of this **Reply Brief of Appellant Chrysler LLC** was sent by ordinary U.S. Mail on this 8th day of May, 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, 22nd Floor, Columbus, Ohio 43215, attorney for Respondent Industrial Commission of Ohio.



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