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I. COUNTER STATEMENT OF THE FACTS

The factual background of the instant case is accurately set forth in Appellant's "Statement of the Facts." (Brief of Relator-Appellant, at 1-7). However, contrary to Appellant's assertions, the Industrial Commission's order is supported by "some evidence" in the record, and the Commission acted well within its discretion in terminating Appellant's permanent total disability compensation.

II. INTRODUCTION

On October 1, 2003, a Staff Hearing Officer awarded Appellant permanent total disability benefits expressly based on Appellant's testimony regarding his physical limitations. On October 5, 2005, the employer filed a motion to terminate Mr. Lowe's permanent total disability benefits based on evidence of new and changed circumstances. On September 5, 2006, a Staff Hearing Officer granted the employer's motion and terminated Mr. Lowe's benefits based on video surveillance and the medical reports of Dr. Bernard Bacevich and Dr. Andrew Frecman. The Tenth District denied Appellant's complaint in mandamus, and this matter is now before this Court on Appellant's appeal of the Tenth District's decision wherein Appellant seeks a writ of mandamus ordering the Commission to vacate its order terminating permanent total disability compensation and reinstatement of those benefits. (Brief of Relator-Appellant, at 1-7).

Contrary to Appellant's assertions, the surveillance video, the report of Dr. Bacevich, and the report of Dr. Freeman each independently constitute "some evidence" upon which the Industrial Commission could rely in terminating Mr. Lowe's permanent total disability benefits. The combination of this evidence provided a compelling case and accordingly, the Staff Hearing Officer found that Mr. Lowe retained the physical functional capacity to perform employment activities that are at least sedentary in nature. (Magistrate's Decision at 11). Such a factual

finding by the Commission cannot be disturbed by the Court where there is "some evidence" to support the decision. State, ex rel. Humble v. Mark Concepts, Inc.(1979), 60 Ohio St.2d 77, 397 N.E.2d 403.

Mandamus is only appropriate when the relator proves "there is no evidence upon which the commission could have based its factual conclusion." State ex rel. Paragon v. Indus. Comm. (1983), 5 Ohio St.3d 72, 74, 448 N.E.2d 1372. The extraordinary writ of mandamus may only be issued where the relator has demonstrated a clear legal right to the relief sought, and the Commission has a clear legal duty to provide such relief. State, ex rel. Elliott v. Indus. Comm. (1986), 26 Ohio St.3d 76, 497 N.E.2d 70; State, ex rel. Teece v. Indus. Comm. (1981), 68 Ohio St.2d 165, 429 N.E.2d 433; State, ex rel. Pressley v. Indus. Comm. (1967), 11 Ohio St.2d 141, 228 N.E.2d 631. The video tape evidence and medical reports of both Dr. Bacevich and Dr. Freeman each constitute "some evidence" in support of terminating Mr. Lowe's permanent total disability award. As such, the Commission's order is supported by "some evidence," and mandamus is not an appropriate remedy in this case.¹

¹ In seeking a writ of mandamus, Mr. Lowe must show that the Commission abused its discretion. State, ex rel. Hutton v. Indus. Comm. (1972), 29 Ohio St.2d 9, 13, 278 N.E.2d 34. The abuse of discretion standard has been repeatedly defined as a showing that the Industrial Commission's decision was rendered without "some evidence" to support the decision. State, ex rel. Rouch v. Eagle Tool & Machine Company (1986), 26 Ohio St.3d 197, 198, 498 N.E.2d 464; State, ex rel. Milburn v. Indus. Comm. (1986), 26 Ohio St.3d 119, 121, 498 N.E.2d 440. Therefore, where there is "some evidence" in the record to support the Commission's order, there is no abuse of discretion and mandamus is not appropriate. State, ex rel. Burley v. Coil Packing, Inc. (1987), 31 Ohio St.3d 18, 508 N.E.2d 936.

III. ARGUMENT

A. Counter Statement of Law No. I:

Because the Surveillance Videos from August 3, 2004 and June 25, 2005 Depict Appellant's Physical Capabilities, They Constitute "Some Evidence" to Support Termination of Permanent Total Disability Benefits.

This Court has held that permanent total disability is inappropriate where there is evidence of (1) actual sustained remunerative employment, (2) claimant's physical ability to do sustained remunerative employment, or (3) activities so medically inconsistent with the disability evidence that it impeaches the evidence underlying the award. State, ex. rel Lawson v. Mondie Forge, 104 Ohio St. 3d 39, ¶ 16, 2004-Ohio-6086, 817 N.E.2d 880. The issue thus becomes whether there is "some evidence" to support the termination of Mr. Lowe's permanent total disability benefits under either of the three prongs in Lawson. The first prong of the Lawson test is not at issue, as there is no assertion that Mr. Lowe engaged in actual sustained remunerative employment. However, contrary to Appellant's assertion, the surveillance video constitutes "some evidence" in support of the Staff Hearing Officer's decision to terminate Mr. Lowe's benefits under either or both the second and third prongs of Lawson.

In his brief, Mr. Lowe focuses on the length of time captured on the video tape in asserting that it does not show he is capable of performing remunerative employment on a "sustained" basis. First, remunerative employment includes "occasional or sporadic" employment and evidence of such employment is sufficient so long as it demonstrates a "capacity for sustained remunerative employment." State, ex rel. Alesci v. Indus. Comm., 97 Ohio St. 3d 210, 2002-Ohio-5932, 777 N.E.2d 835. Contrary to Mr. Lowe's testimony at the hearing on October 1, 2003, the video evidence shows that he is quite capable of walking and picking up rakes and hoses. He is likewise capable of pushing a lawn mower and operating a

hedge trimmer without any sign of physical discomfort. Because permanent total disability is inappropriate when a claimant is capable of performing remunerative employment, based on the video evidence, termination of Mr. Lowe's permanent total disability benefits was proper under the second prong of Lawson.

Moreover, under the third prong of Lawson--an issue never addressed by Appellant--permanent total disability is likewise not supported where the claimant's activities are demonstrated to be so medically inconsistent with the evidence supporting the disability award, they impeach the evidence underlying the award. In other words, under the third prong of Lawson, the video is "some evidence" that impeaches Mr. Lowe's testimony regarding his physical limitations, the same testimony which formed the basis of the Commission order granting permanent total disability benefits.²

Specifically, when Mr. Lowe was initially granted permanent total disability benefits, the Staff Hearing Officer expressly relied on Mr. Lowe's testimony that, due to the injury to his left shoulder, his pain was so "severe that it interfer[ed] with his ability to ambulate" and made it impossible to "take care of his activities of daily living." Mr. Lowe claimed that the pain was so bad he "need[ed] help from his wife in dressing and feeding." (Magistrate's Decision at 9).

Mr. Lowe's testimony is directly controverted by what can be seen on the August 3, 2004 and June 25, 2004 surveillance clips. In the video Mr. Lowe can be seen using both arms to operate a power mower. The power mower is the type that must be pushed and pulled to cut the grass. The video shows him using both arms to move the mower around trees. Mr. Lowe can also be seen using hedge clippers. There are several instances where he picks up the hedge

² Medical evidence that supported an original permanent total disability award may be impeached by subsequent evidence. State, ex rel. Schultz v. Indus. Comm., 96 Ohio St.3d 27, 2002-Ohio-3316, 770 N.E.2d 576 (upholding the commission's termination of permanent total disability based on the fact that claimant was capable of sustained activity due to her work with her daughter).

clippers with his left arm. He can also be seen raking debris from the top of his bushes. The video therefore constitutes "some evidence" to support the third Lawson prong that Mr. Lowe's activities are completely inconsistent with, and thus impeaches Mr. Lowe's testimony, which the Staff Hearing Officer previously relied upon in awarding permanent total disability benefits.

In essence, what Appellant raises is a factual dispute, arguing that, in reaching her decision to terminate permanent total benefits, the Staff Hearing Officer favored some evidence over other evidence. However, it is well-established that it is within the exclusive discretion of the Commission "to determine disputed facts and weight of the evidence." State, ex rel. Noll v. Indus. Comm. (1991), 57 Ohio St.3d 203, 206, 567 N.E.2d 245; See State, ex rel. Fiber-Lite Corp. v. Indus. Comm. (1988), 36 Ohio St.3d 202, 522 N.E.2d 548. Under the second and/or third prong of Lawson, the video evidence is "some evidence" which supports the termination of Mr. Lowe's permanent total disability award, and the Staff Hearing Officer's decision to accept this evidence over the evidence presented by Appellant was within her discretion and should not be disturbed on appeal. State, ex rel. Humble (1979), 60 Ohio St.2d 77, 397 N.E.2d 403.

B. Counter Statement of Law No. II:

The Reports of Dr. Bacevich and Dr. Freeman Also Constitute "Some Evidence" to Support Termination of Appellant's Permanent Total Disability Award.

Even without the video evidence, the reports of Dr. Bacevich and Dr. Freeman each independently constitute "some evidence" upon which the Commission could rely in terminating Mr. Lowe's permanent total disability compensation. The combination of this evidence provided a compelling case and accordingly, the Staff Hearing Officer found that "based upon the reports of Dr. Bacevich and Dr. Freeman, [the] injured worker retains the physical functional capacity to perform employment activities that are sedentary in nature." (Magistrate's Decision at 11);

See State, ex. rel Schultz, 96 Ohio St.3d 27, ¶ 62, 2002-Ohio-3316, 770 N.E.2d 576. Such a factual finding by the Commission cannot be disturbed by the court where there is "some evidence" to support the decision. State, ex. rel Humble (1979), 60 Ohio St.2d 77, 397 N.E.2d 403.

Specifically, the medical reports of Dr. Bacevich and Dr. Freeman, individually and collectively satisfy the second prong of Lawson, and constitute "some evidence" that Mr. Lowe "has the physical ability" to engage in sustained remunerative employment. Dr. Bacevich, who initially performed an IME on the claimant on April 30, 2003 (before either video was recorded), stated in his "post video" addendum that the evidence demonstrated that Mr. Lowe could now "use his left arm for many activities which are fairly strenuous" and that the video "demonstrate[d] physical capabilities that [are] much different than the findings" in Lowe's examination on April 30, 2003. He further stated that Mr. Lowe "has either had a miraculous recovery between April 30, 2003 and the first portion of the video dated August 3, 2004 or that he was demonstrating marked symptom magnification during [his] examination." (October 5, 2005 Report of Dr. Bacevich at 2). Either way, in the opinion of Dr. Bacevich, Mr. Lowe was capable of engaging in sustained remunerative employment. (Magistrate's Decision at 12). Furthermore, Dr. Freeman, who performed an exam on behalf of the state, concluded that Mr. Lowe had reached medical maximum improvement for the allowed conditions and was capable of sedentary employment. (Magistrate's Decision at 11). Indeed, Dr. Freeman's ultimate conclusion that Mr. Lowe is capable of engaging in sedentary work was based on the doctor's independent examination of the claimant, not on the video.

The Staff Hearing Officer expressly relied on the addendum of Dr. Bacevich, and independent evaluation of Dr. Freeman in finding that Mr. Lowe is capable of sustained remunerative employment. It is immaterial whether there was other evidence, even if greater in quality and/or quantity, that could support a decision to the contrary. All that is required is that there was "some evidence" to support the Commission's decision to terminate permanent total disability benefits. The medical reports of Dr. Bacevich and Dr. Freeman clearly meet this

standard. As the sole evaluator of the weight and credibility of the evidence, it was well within the Commission's discretion to favor the medical reports of Dr. Bacevich and Dr. Freeman over that of Mr. Lowe's treating physician, Dr. Swanson. Because there is "some evidence" in the record to support the Commission's findings, the Commission did not abuse its discretion in terminating Mr. Lowe's permanent total disability compensation. Therefore, Appellant's request for writ of mandamus should be denied.

V. CONCLUSION

The Commission, through its Staff Hearing Officer, was well within its discretion in terminating Mr. Lowe's permanent total disability compensation. The surveillance video, the report of Dr. Bacevich, and the report of Dr. Freeman, each independently constitute "some evidence" upon which the Commission could rely on in issuing its decision. The combination of this evidence provides much more than "some evidence" required and thus, it does not matter that there was contrary evidence available. The Staff Hearing Officer fully explained the basis for her findings, those findings were supported by "some evidence," and, as such, Appellant's request for mandamus relief should be denied.

Respectfully Submitted,

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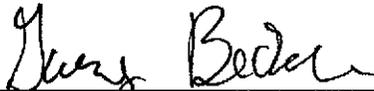
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served by regular United States mail, postage prepaid this ~~27~~^{27th} day of January, 2009.

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