In the
Supreme Court of Ohio

STATE OF OHIO, ex rel. ROBERT LOWE,	:	Case No. 08-1954
Appellant,	:	On Appeal from the Franklin County Court of Appeals, Tenth Appellate District
vs.	:	Case No.: 07AP-850
INDUSTRIAL COMMISSION OF OHIO, and CINCINNATI INC.,	:	
Appellees.	:	

BRIEF OF APPELLEE,
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INTRODUCTION

This case is an appeal of right from the Tenth District Court of Appeals' denial of issuance of a writ of mandamus. *State ex rel. Lowe v. Indus. Comm.*, Franklin App. No. 07-APD10-850, 2008-Ohio-4891. The Court correctly found appellee, Industrial Commission of Ohio ("Commission"), did not abuse its discretion when it found new and changed circumstances justifying a termination of appellant Robert Lowe's ("Lowe") permanent total disability ("PTD") compensation. The Court also correctly found the Commission properly applied *State ex rel. Lawson v. Mondie Forge,* 104 Ohio St.3d, 2004-Ohio-6086 to this case.

A finding by the Commission of an injured worker's entitlement to compensation for PTD under R.C. 4123.58 is not barred from later review, with possible termination of the award. R.C. 4123.52 gives the Commission the authority and responsibility to exercise its continuing jurisdiction to make modifications to prior findings and orders "as, in its opinion is justified."

Here, in 2003, the Commission found Lowe entitled to compensation for PTD resulting from injuries sustained in 1998 in the course of his employment with appellee Cincinnati, Inc. ("Cincinnati"). [Second Supplement to the Merit Brief, pp. 1-4 (hereinafter, "Supp #")]. Cincinnati obtained surveillance video of Lowe which it submitted to the Commission in support of its motion that PTD compensation be terminated. (Supp. 5-12). A Commission Staff Hearing Officer ("SHO") deemed the evidence sufficient "to demonstrate that there may have been a change in circumstances sufficient to warrant the stopping of the Permanent and Total Disability award," and the matter was referred for a medical examination. (Supp. 13). Lowe presented additional

medical reports supporting PTD and he attended the hearing. The SHO found that further PTD compensation was not warranted.

The issue here is whether the Commission's determination is legally sound. There clearly being evidence that supports the finding that Lowe was able to engage in sustained remunerative employment, the Commission submits that its revocation of the earlier finding of PTD should not be disturbed by the Court.

STATEMENT OF THE CASE AND FACTS

Lowe contends the Commission abused its discretion by finding new and changed circumstances that would warrant the Commission's exercise of continuing jurisdiction to modify the original award which granted PTD status. Lowe avers that the Commission acted outside the bounds of its authorities in terminating his PTD award. The Court of Appeals found that the Commission was justified in finding new and changed circumstances and did not abuse its discretion when it terminated Lowe's PTD compensation. *State ex rel. Lowe, supra.*

An SHO had granted Lowe PTD compensation on Oct. 1, 2003. The SHO described in his order Lowe's testimony regarding his pain and disability:

> The injured worker testified at hearing that he continues to suffer from pain despite four surgical procedures on his left shoulder. The injured worker testified that the pain that he experiences is so severe that it interferes with his ability to ambulate as well as his ability to concentrate. The injured worker further testified that he is unable to take care of his activities of daily living and needs help from his wife in dressing and feeding.

(Supp. 2-3). Thus, Lowe contends that the pain prevents him from the activity of daily life. On November 1, 2005, Cincinnati moved to terminate Lowe's PTD compensation by submitting a video of Lowe performing yard work at his residence. (Supp. 5-12). On

January 3, 2006 an SHO found this video to be sufficient evidence to demonstrate that there may have been a change in circumstances sufficient to warrant revisiting the case. The SHO instructed a physician to examine Lowe. (Supp. 13).

Lowe was examined by Andrew Freeman, M.D. who reported that Lowe "is able to dress himself and perform personal hygiene tasks." (Supp. 16). Dr. Freeman also indicated that Lowe can perform "sedentary work" with "no reaching or overhead work with the left arm." (Supp. 21).

On September 5, 2006, the SHO granted Cincinnati's request that Lowe's PTD compensation be terminated due to a change in circumstances. The SHO stated that the videotape demonstrated that Lowe's condition had changed:

> The Staff Hearing Officer finds that the Staff Hearing Officer [originally finding Lowe PTD] **relied upon the injured worker's testimony that he was not able to perform the activities of daily living,** including dressing and feeding and that he had a limited ability to walk due to pain in finding that the injured worker was permanently and totally disabled. The Staff hearing Officer finds that the videotape demonstrates that **the injured worker's condition has changed since the original Permanent and Total Disability hearing and that the injured worker has greater functional capacities than he testified to at the original hearing.**

(Emphasis added). (Supp. 23). Based on the original SHO order, Dr. Freeman's report, Dr. Bernard Bacevich's report (who also evaluated Lowe), and the video, the SHO terminated Lowe's present entitlement to PTD compensation. (Supp. 22-25).

LAW AND ARGUMENT

I. Standard of Review:

"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. A relator's 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 respondent; and (3) the lack of an adequate remedy for the relator in the ordinary course of the law. *State ex rel. Moore v. Malone* (2002), 96 Ohio St.3d 417, 420. A writ is not the appellate review of a decision with which a party disagrees, nor is a writ of mandamus a de novo review. "Mandamus is not a substitute for an appeal, nor can it be used to create an appeal in cases where an appeal is not provided by law." *State ex rel. Marshall v. Keller* (1968), 15 Ohio St.2d 203.

The Industrial Commission is the exclusive evaluator of evidentiary weight and credibility. See *State ex rel. Teece v. Indus. Comm.* (1981), 68 Ohio St.2d 165. To establish a basis for mandamus relief concerning a factual matter, a relator must show the Industrial Commission abused its discretion by issuing an order that is contrary to law or not supported by any evidence in the administrative record. *State ex rel. Elliott v. Indus. Comm.* (1986), 26 Ohio St.3d 76, 78-79. The Commission's actions are presumed to be valid and performed in good faith and judgment, unless shown to be otherwise; as long as some evidence supports its findings, its orders will not be overturned. *State ex rel. Stephenson v. Indus. Comm.* (1987), 31 Ohio St.3d 167, 170.

A writ will not be granted if an Industrial Commission order is supported by "some evidence," even if contrary evidence of greater quality and/or quantity was presented at the administrative hearing. *State ex rel. Pass v. C.S.T. Extraction Co.* (1996), 74 Ohio St.3d 373, 376. Further, an abuse of discretion is "not merely an error in judgment but a perversity of will, passion, prejudice, partiality, or moral delinquency, to be found only where there is no evidence upon which the Commission could have based

its decision." *State ex rel. Commercial Lovelace Motor Freight v. Lancaster* (1986), 22 Ohio St.3d 191, 193. Lowe clearly fails to establish an entitlement to a writ of mandamus.

II. Appellee Commission's Proposition of Law:

Engaging in activities medically inconsistent with an original PTD award justifies the exercise of continuing jurisdiction by the Commission to revisit the PTD award.

An injured worker's *capacity* for sustained remunerative work is the relevant issue in the consideration of entitlement to compensation for PTD under to R.C. 4123.58. *State ex rel. Lopez v. Indus. Comm.* (1994), 69 Ohio St.3d 445, 449; *State ex rel. Domjancic v. Indus. Comm.* (1994), 69 Ohio St.3d 693, 695. Once made by the Industrial Commission, a PTD award remains subject to review. "The character of a permanent total disability award does not, however, mean that the award is completely immune from later review. If, for example, the commission learns that the claimant is working or engaging in activity inconsistent with his permanent total disability status, the commission can use its continuing jurisdiction under R.C. 4123.52 to reopen the matter." *State ex rel. Smothers v. Mihm* (1994), 69 Ohio St.3d 566, 567-568. Retention of the potential for a later review is delineated in Lowe's original PTD order. Expressly stated therein is the provision that such compensation shall "continue without suspension *unless future facts or circumstances should warrant the stopping of payment*." (Emphasis added). (Supp. 2).

In *State ex rel. Lawson v. Mondie Forge*, 104 Ohio St.3d 39, 41, 2004-Ohio-6086, the Supreme Court articulated criteria to determine when the "payment of PTD is inappropriate," i.e., whether an injured worker is *capable* of sustained remunerative

employment, under which the continued payment of compensation for PTD would be inappropriate:

> (1) evidence of actual sustained remunerative employment;
>
> (2) evidence of the physical ability to do sustained remunerative employment;
>
> (3) evidence of the injured worker's doing activities that are so medically inconsistent with the disability evidence that they impeach the medical evidence underlying the award.

Id. at ¶16. This listing is set forth in the alternative, that is, the presence of *any one* of these criteria could justify the disqualification and termination of PTD status. Here, evidence presented to the Commission indicates satisfaction of the latter two criteria, justifying the termination of PTD benefits.

"Sustained" work is demonstrated by an ongoing pattern of activity. *State ex rel. Schultz v. Indus. Comm.* 96 Ohio St.3d 27, 2002-Ohio-3316, at ¶63 (where the claimant worked, without pay, a few days a week in her daughter's retail store). However, evidence that work has been "sustained" need not demonstrate daily, regular employment; evidence of irregular employment-like activity, with or without pay, can support a finding that a claimant has performed or is capable of performing sustained remunerative employment. *Schultz*; supra; *State ex rel. Kirby v. Indus. Comm.* 97 Ohio St.3d 427, 2002-Ohio-6668; *State ex rel. Alesci v. Indus. Comm.*, 97 Ohio St.3d 210, 2002-Ohio-5932. Sustained remunerative employment includes part-time work, and the capacity for part-time work renders a person ineligible for PTD. *State ex rel. Toth v. Indus. Comm.* (1997), 80 Ohio St.3d. 360.

Lowe's workers' compensation claim has been allowed for "strain/sprain left shoulder; rotator cuff tear; aggravation of pre-existing arthritis to the left glenohumeral

joint," and he, no doubt, has residual disability arising from these medical conditions. The video surveillance shows Lowe cutting his lawn and trimming hedges, both for reasonable periods of time. At no time in the video was there an indication of his having a difficult time performing any of the yard chores, nor did it ever appear that Lowe had to stop doing the work because of a problem with his left shoulder. The evidence displays Lowe's performance of acts that are "medically inconsistent" with the alleged extreme disability claimed from his allowed left shoulder conditions.

In denying PTD, the SHO relied on reports from Andrew Freeman, M.D., and Bernard B. Bacevich, M.D., both of whom had viewed the video. Dr. Freeman acknowledged the medical conditions allowed in the claim, and observed that in the June 25, 2005 video his actions show no evidence of pain or loss of range of movement:

> [Lowe] is seen to move both arms in a rapid fashion. There is no physical evidence of pain such as grimacing. Mr. Lowe is seen to move the hedge clipper, use a rake in his yard, and reach to connect and disconnect his hose. He also moves the hose during this period of time. His range of motion in the left shoulder is observed to be at least 30 degrees of extension, at least 20 degrees of adduction, at least 90 degrees of abduction, and at least 100 degrees of forward flexion. He is observed at one point during the video to throw a hose with his arm rapidly going from a point of 0 degrees of forward flexion to 100 degrees of forward flexion in the active tossing of the hose.

(Supp. 16). From the May 12, 2006 physical examination Dr. Freeman reports, inter alia, that Lowe "is able to dress himself and perform personal hygiene tasks" (Supp. 17), a radical change from the time of the initial PTD determination. (Supp. 5). Dr. Freeman opined that the allowed medical conditions have resulted in a 20% impairment. (Supp. 19). Dr. Freeman, who is board certified in occupational medicine, expressed his belief that Lowe is capable of performing sedentary work. (Supp. 21).

Dr. Bacevich had first examined Lowe on April 30, 2003. After reviewing the videotape, Dr. Bacevich reported that Lowe "demonstrated physical capabilities that were much different than the findings on that were *much different than the findings on my examination on April 30, 2003*." (Emphasis added.) (Supp. 11). The doctor was of the opinion that Lowe "is capable of gainful sustained remunerative employment." Id.

The videotape evidence and the aforementioned doctors' reports support the Commission's denial of PTD status. While there may exist other evidence suggesting contrary views, the fact-finding determination rests exclusively with the Commission and its hearing officers, and not the injured worker's treating physician or the judiciary. "Some evidence" supports the Industrial Commission's determination, and it should not be disturbed in mandamus. *State ex rel. Burley v. Coil Packing, Inc.* (1981), 31 Ohio St.3d 18.

The circumstances here are significantly different than other cases cited by Lowe, and which addressed *Lawson*. In *State ex rel. Stettler v. Mid Atlantic Canners Assn., Inc.*, Franklin App. No. 04AP-1290, 2005-Ohio-5646, the claim had been allowed for an extensive list of medical conditions. *Stettler*, at ¶15. Mr. Stettler spent several hours a day at a friend's used car lot, "answering the telephone and acting as the so-called 'go between' with [the lot's owner] and the other dealers calling in their prices for automobiles." Id. at ¶9. He was not paid, but was allowed to drive one of the lot cars. A writ was issued by the Court of Appeals since "the evidence falls short of constituting some evidence supporting a determination that relator was engaged in sustained remunerative employment." Id. at ¶10.

In *State ex rel. Bentley v. Indus. Comm.,* Franklin App. No. 05AP-336, 2005-Ohio-6755, the claim was allowed for a contusion to the right upper arm, tear of pectoralis major muscle right, and depression. *Bentley*, at ¶7. In 2002, the injured worker was found by the Commission to be PTD, which was terminated on a finding that he was working as a part-time van driver for a city school system. The Court of Appeals found that Bentley's driving with his *left* arm did not constitute activities inconsistent with his restrictions. Id. at ¶28.

Here, however, the activities presented were definitely inconsistent with the restrictions of Lowe's medical conditions. Lowe claims significant disability in his left shoulder of such degree that he is unable to engage in any sustained employment. Yet, he was able to mow his lawn and do hedge-cutting, both activities that involve extensive upper torso movement, without evidence of difficulty. He had the opportunity to persuade the fact-finding body that these observations were aberrations, which he attempted to do, without success. For the SHO, the abilities displayed in the video, supported by the medical reports, substantiate Lowe's ability to engage in employment such that PTD compensation under to R.C. 4123.58 is not warranted. In Lowe's claim, changes, facts, and circumstances warrant the termination of PTD.

"An award of permanent total disability compensation should be reserved for the most severely disabled workers and should be allowed only when there is no possibility for re-employment." *State ex rel. B.F. Goodrich Co. v. Indus. Comm.* (1995), 73 Ohio St.3d 525, 529. Lowe does not appear to fall in this category. The video, and the medical reports referred to, fail to display a severely disabled claimant with no possibility for employment.

The Commission has jurisdiction to make modifications to prior findings and orders as, in its opinion, is justified. R.C. 4123.52. While recognizing that this authority is not without some limitations [*State ex rel. Nicholls v. Indus. Comm.* (1998), 81 Ohio St.3d 454], the facts and circumstances here justify the termination of Lowe's entitlement to PTD. The SHO found that Lowe "retains the physical functional capacity to perform employment activities that are sedentary in nature with no reaching or overhead work with the left arm." (Supp. 24). The Court should not disturb that determination. *State ex rel. Spohn v. Indus. Comm.* 115 Ohio St.3d 329, 2007-Ohio-5027, at ¶33.

CONCLUSION

For the foregoing reasons, the Commission did not abuse its discretion, the appellate decision should be affirmed, and the requested writ should be denied.

Respectfully submitted,

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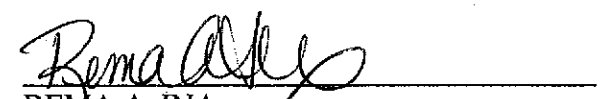
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of Appellee, Industrial Commission of Ohio was served by U.S. Mail this 30th day of January, 2009, upon: Mark B. Weisser, Esq., 1014 Vine Street, Suite 2510, Cincinnati, Ohio 45202 and Gary E. Becker, Esq., DINSMORE & SHOHL LLP, 255 East Fifth Street, Suite 1900, Cincinnati, Ohio 45202.



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