

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, EX REL.  
ROBERT LOWE

Relator

v.

CINCINNATI, INC., et al.

Respondents

CASE NO. 08-1954

On Appeal from the Franklin County  
Court of Appeals, Tenth Appellate  
District

Case No. 07-AP-850

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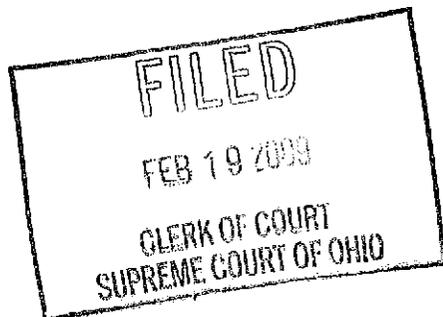
**REPLY BRIEF OF RELATOR-APPELLANT, ROBERT LOWE**

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**I. First Proposition of Law:**

**THE INDUSTRIAL COMMISSION OF OHIO ABUSED ITS DISCRETION WHEN IT EXERCISED CONTINUING JURISDICTION AS ITS DECISION IN THIS REGARD IS NOT SUPPORTED BY ANY EVIDENCE IN THE RECORD AND IS CONTRARY TO LAW.<sup>1</sup>**

- A. **The Briefs of the Industrial Commission and Cincinnati, Inc. incorrectly assert that the Tenth District Court of Appeals concluded that the Industrial Commission relied on both the second and third components of the test developed in *Lawson v. Mondie Forge*, as a basis for terminating Mr. Lowe's permanent total disability benefits. It is clear that the Franklin County Court of Appeals concluded that the Industrial Commission relied only upon the third component of the *Lawson* test.**

The Supreme Court, in *State ex rel. Lawson v. Mondie Forge*,<sup>2</sup> set forth a three part test with respect to the exercise of continuing jurisdiction by the Industrial Commission in re-visiting previously awarded awards of permanent total disability. In *Lawson*, this court concluded that payment of PTD is inappropriate where there is evidence of (1) actual sustained remunerative employment (2) the physical ability to do sustained remunerative employment or (3) activities so medically inconsistent with the disability evidence that they impeach the medical evidence underlying the award.

In its decision, the Franklin County Court of Appeals specifically stated, "The Magistrate concluded that the Commission's findings were based on the third factor in

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<sup>1</sup> Relator's First and Second Proposition of Law as written in its initial Merit Brief contained a typographical error wherein the word "discretion" was inadvertently inserted in place of decision.

<sup>2</sup> 104 Ohio St. 3d 39, 2004-Ohio-6086.

*Lawson*, specifically that the evidence from the videotape was so medically inconsistent with the evidence offered in support of the initial PTD award as to impeach the credibility of the medical evidence underlying the award.”<sup>3</sup>

Nowhere in the decision of the Franklin County Court of Appeals is it asserted that the Industrial Commission exercised continuing jurisdiction based upon the perceived physical ability of the Relator to do sustained remunerative employment. The assertions by the Industrial Commission and Cincinnati, Inc. are incorrect in this regard and thus the focus of this court must be on the third criteria of the *Lawson* test. Specifically, the issue in this case is whether a 19 minute videotape of the injured worker performing light yard chores consistent with the restrictions of his treating physician, constitute activity so medically inconsistent with the disability evidence that the activities impeach the medical evidence underlying the award.

**B. The initial decision of the Industrial Commission to re-litigate the issue of Relator’s award of permanent total disability was flawed and involved an incorrect application of the Industrial Commission’s exercise of continuing jurisdiction. This decision was premised upon the Staff Hearing Officer’s conclusion that there may have been a change of circumstances sufficient to warrant the stopping of the permanent total disability award. The exercise of continuing jurisdiction in this regard is improper and contrary to law.**

As noted in Relator’s Brief, the Staff Hearing Officer of the Industrial Commission, upon review of the 19 minute videotape in question, held that the employer had presented sufficient evidence to demonstrate that there **may** have been a change in

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<sup>3</sup> Supp. 9 at ¶12.

circumstances sufficient to warrant the stopping of the permanent total disability award. The Staff Hearing Officer then referred Relator to an examination with an Industrial Commission physician on the issue as to whether the Relator was capable of performing sustained remunerative employment.

Essentially, by ruling in this manner, the Staff Hearing Officer gave Respondent Cincinnati, Inc. a second bite at the apple as to the determination as to whether the Relator qualified for permanent total disability benefits. As noted in the decision of the Magistrate of the Franklin County Court of Appeals, the exercise of continuing jurisdiction on the part of the Industrial Commission is not unlimited. Its prerequisites are (1) new and changed circumstances; (2) fraud, (3) clear mistake of fact, (4) clear mistake of law, (5) error by an inferior tribunal. The test does not state that continuing jurisdiction can be granted where there **may** have been new and changed circumstances as opposed to a determination that there has been an actual new and changed circumstance.

This is a critical distinction and will have far reaching consequences in the event this court allows the decision of the Industrial Commission to stand. If the court allows the Industrial Commission to require an injured worker to attend an examination regarding the continued receipt of PTD benefits based upon evidence which **may** constitute new and changed circumstances, this will encourage employers throughout the State of Ohio to re-visit previously awarded PTD claims based upon evidence which will not meet the previously established threshold requirements as to continuing jurisdiction. For example, the observation or videotaping of an injured worker who has been awarded PTD benefits doing any number of activities would suffice to meet the threshold that

there may have been a change in circumstances sufficient to warrant another medical exam, and in turn, a re-litigation of the initial award of PTD benefits. This is the exact result which this court sought to discourage in its opinion rendered in *Lawson*.

**II. Second Proposition of Law:**

**THE INDUSTRIAL COMMISSION OF OHIO  
ABUSED ITS DISCRETION WHEN IT  
TERMINATED PERMANENT TOTAL DISABILITY  
AS ITS DECISION IS NOT SUPPORTED BY ANY  
EVIDENCE CONTAINED IN THE RECORD AND IS  
CONTRARY TO LAW.**

In *Lawson*, the injured worker was awarded PTD benefits in 1994. In 2001 the Bureau of Workers' Compensation challenged Mr. Lawson's continued receipt of PTD benefits based upon an activity spreadsheet that contained 207 activities he had engaged in between 1993 and 2001. Specifically, Mr. Lawson was alleged to have engaged in several activities on behalf of the Village of West Elkton, Ohio. Further, there was a surveillance videotape showing Mr. Lawson participating in the annual village cleanup, which documented him loading items into a dump truck, as well as driving the dump truck.

The Industrial Commission terminated PTD benefits. The order terminating PTD benefits was affirmed by the Franklin County Court of Appeals.

In its decision re-instating PTD benefits, the Ohio Supreme Court set forth the three part test previously referenced in this brief. The court also noted that the issues contained in the *Lawson* case revolved around a single critical issue which to some

extent is present with respect to the award of PTD benefits in every case. Specifically the court asked: “How active can a person be and still be deemed eligible for PTD?”<sup>4</sup>

In its holding reinstating PTD benefits, this court noted that while some activities engaged in by Lawson were beyond his restrictions, the vast majority were not. Again, perhaps the most essential quote from the *Lawson* case is as follows:

**“One of the most enduring (though not often explicitly stated) misconceptions about PTD is that once it is granted, the recipient must thereafter remain virtually housebound. This is a fallacy. PTD exempts no one from life’s daily demands. Groceries must be purchased and meals cooked. Errands must be run and appointments kept. The yard must be tended and the dog walked. Where children are involved, there may be significant chauffeur time. For some, family and friends shoulder much of the burden. Others, on the other hand lack such support, leaving the onus of these chores on the PTD claimant.”**<sup>5</sup>

The court then noted that these activities can nevertheless often generate considerable controversy. In attempting to resolve such controversies, the court stated:

**“We instead compare the activities with claimant’s medical restrictions to determine whether they were so inconsistent as to impeach the medical evidence underlying the disability award.”**<sup>6</sup>

In the case at bar, there is no assertion that the activities contained in the 19 minute videotape fall outside the claimant’s medical restrictions. In fact, the evidence is to the contrary. The medical evidence submitted by the claimant’s orthopaedic surgeon, who performed several of his shoulder surgeries, indicate that the activities performed by Mr. Lowe were entirely within his medical restrictions, and in fact, encouraged by the

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<sup>4</sup> Lawson at P. 41, ¶16.

<sup>5</sup> Lawson at P. 42, ¶20.

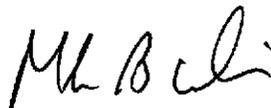
<sup>6</sup> Lawson at P. 42, ¶21.

doctor so as to strengthen his arm.<sup>7</sup> Thus, applying this court's analysis in *Lawson* to the facts in this case, Mr. Lowe's PTD benefits must be reinstated.

### CONCLUSION

The decision of the Franklin County Court of Appeals should be reversed and Mr. Lowe's permanent total disability benefits should be reinstated. The Industrial Commission improperly exercised continuing jurisdiction when it determined there may have been a change in circumstances as opposed to an actual change in circumstances. The Franklin County Court of Appeals improperly applied the *Lawson* case and its progeny by finding that the 19 minutes of yard chores engaged in by Mr. Lowe constituted evidence so medically inconsistent with the disability evidence that they impeach the medical evidence underlying the award. To allow PTD benefits to be terminated in this case will result in the re-litigation of permanent total disability awards throughout the State of Ohio. It is for all of the reasons that the decision of the Franklin County Court of Appeals should be reversed and Mr. Lowe's PTD benefits should be reinstated.

Respectfully submitted,



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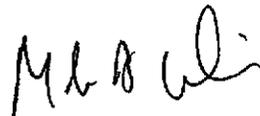
<sup>7</sup> (Supp. At 47-48)

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing document was sent to the following individual this the 18<sup>th</sup> day of February, 2009 by ordinary U.S. mail service.

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