

ORIGINAL
COMPUTER - J

IN THE SUPREME COURT OF
THE STATE OF OHIO

09-0659

STATE OF OHIO, EX. REL.

CASE NO.

JEFF ROHR
2159 S. Honeytown Road
Wooster, Ohio 44691

Relator

vs.

RECEIVED
MAR 31 2009
CLERK OF COURT
SUPREME COURT OF OHIO

THE INDUSTRIAL COMMISSION OF OHIO
30 West Spring Street
Columbus, Ohio 43266

and

THE GERSTENSLAGER COMPANY
200 Old Wilson Bridge Road
Worthington, Ohio 43085-2247

Respondents

COMPLAINT FOR WRIT OF
PROHIBITION TO PREVENT
INDUSTRIAL COMMISSION
OF OHIO FROM ORDERING
SUSPENSION OF CLAIM
NO. 97-631195 AND ALLOWING
RESPONDENT-EMPLOYER TO
STOP PAYMENT OF ALL
PERMANENT TOTAL DISABILITY
COMPENSATION

FILED
APR 10 2009
CLERK OF COURT
SUPREME COURT OF OHIO

M. BLAKE STONE, L.P.A.
231 NORTH BUCKEYE STREET
WOOSTER, OHIO 44691
(330) 262-5246 FAX (330) 263-4271

Now comes the Relator, Jeff Rohr who, seeking a Writ of Prohibition, states as follows:

1. Respondent, Industrial Commission of Ohio, is duly constituted Board, established pursuant to Article II, Section 35 of the Constitution of the State of Ohio, and Chapter 4121 of the Ohio Revised Code. It is charged with the Administration of the Workers' Compensation Law of Ohio, as set forth in Chapter 4123 of the Ohio Revised Code, and is empowered to render final determinations in disputes of workers' compensation claims and applications for disability benefits associated therewith.

2. The Respondent, The Gerstenslager Company, was the Relator's employer at the time of the accident upon which Claim 97-631195 was based. At the time of the

accidental injury, The Gerstenslager Company was amendable and was a complying employer having obtained self insurance privileges under the Workers' Compensation Law of Ohio.

3. Jeff Rohr, the Relator, was injured on February 13, 1997. His claim has been allowed for LUMBAR SPRAIN/STRAIN; HERNIATED NUCLEUS PULPOSUS L5, S1; SEIZURE DISORDER; MAJOR DEPRESSIVE EPISODE, RECURRENT, MODERATE SEVERITY; DYSTHYMIC DISORDER; PAIN DISORDER DUE TO A COMBINATION OF MEDICAL AND PSYCHOLOGICAL FACTORS.

4. Jeff Rohr, the Relator, filed for Permanent and Total Disability on May 21, 2004.

5. On November 10, 2004, the Staff Hearing Officer granted the Relator's claim for Permanent and Total Disability, granting benefits beginning September 27, 2002. One hundred percent (100%) of the cost was assigned to Claim 97-631195. A reconsideration was filed, but it was denied on December 27, 2004.

6. On January 23, 2008, Respondent filed a motion requesting the Industrial Commission to invoke its continuing jurisdiction and order the Relator to attend two medical exams, one with a physical doctor and the other with a psychiatrist. Relator had earlier refused to attend such examinations. Surveillance evidence was attached to this motion.

7. On November 18, 2008, a hearing was held before a Staff Hearing Officer.

8. In an order mailed November 28, 2008, the Staff Hearing Officer granted Respondent's motion and ordered the Relator to attend the medical examination done by a psychiatrist of the Respondent's choosing.

9. Relator then filed a request for reconsideration on December 15, 2008. On January 20, 2009, the Industrial Commission denied Relator's Request for Reconsideration, upheld the Staff Hearing Officer's order and ordered the Relator to attend the Respondent's psychiatric examination.

10. The Relator filed a Writ of Mandamus in the Tenth Circuit Court of Appeals on January 29, 2009 under Case No. 09-APL-1-0094 contending that the Industrial Commission abused its discretion by ordering the Relator attend this examination. That case is still pending.

11. On February 2, 2009, the Respondent-Employer filed a motion to suspend the claim with the Industrial Commission.

12. On February 4, 2009, the Industrial Commission issued a Compliance Order suspending all activity, including the payment of all compensation, medical and drug bills in Claim 97-631195.

13. On February 9, 2009, the Relator-Injured Worker filed an objection to the suspension.

14. On February 12, 2009, the Industrial Commission Staff Hearing Officer suspended the claim and issued an order suspending Permanent Total Disability compensation pursuant to ORC 4123.651(C) until such time as the Relator actually attends the Respondent Employer's scheduled psychological examination.

15. The denial of the request to suspend the claim for failure by the claimant to execute a new medical release is not appealable as denial of the right to participate and is properly reviewable in Mandamus, *Felty v. At&T Technologies, Inc.*, 65 Ohio St. 3d 234, 1992-Ohio-60, 602 N.E.2d 1141 (1992). Under the reasoning in the *Felty*, the suspension of the claim for failure to attend an employer's exam should also be

reviewable in Mandamus. Since the Writ of Mandamus has already been filed under Case No. 09-APL-1-0094, the Industrial Commission should be prohibited under *Felty* from suspending the Payment of Permanent Total Disability compensation while the Writ of Mandamus is pending. The Relator, has the right to exhaust his appeals to the Court of Appeals and the Ohio Supreme Court. The filing of the Writ of Mandamus deprived the Industrial Commission of jurisdiction over this claim until such time as the Writ was ruled upon. As such, all exercise of jurisdiction by the Industrial Commission on this claim after January 29, 2009 has been improper and inappropriate.

16. Under the case of *State ex rel Spohn v. Industrial Commission (2007)*, 115 Ohio St. 3d 329, 2007-Ohio-5027, any medical examination going to the question of extent of disability automatically reopens the permanent and total disability issue.

17. In *Spohn*, the injured worker failed to preserve for judicial review, the assertion that the Industrial Commission lacked jurisdiction to reopen the issue of whether the claimant remained entitled to Permanent Total Disability benefits, when the claimant failed to file an administrative appeal from a District Hearing Officer's order that required the claimant to appear at employer's medical exam or risk losing his benefits. If the Relator attends the medical exam scheduled by the respondent employer, he automatically reopens the Permanent and Total Disability under *Spohn*. Any further litigation under 09-APL-1-0094 (the Writ of Mandamus contending that the Industrial Commission abused its discretion by ordering him to attend the employer scheduled medical exam) would be moot. The act of being examined would reopen the Permanent Total Disability issue. The Respondent employer would win without having to go through the Writ of Mandamus appeal process.

18. Prohibition will lie to prevent an administrative agency from exercising

judicial or quasi-judicial power which is clearly unauthorized by law, *State ex rel Republic Steel Corp. v. Environmental Board of Review*, 54 Ohio St. 2d 75, 8 Ohio Op. 3d 79 (1978). That is the situation here.

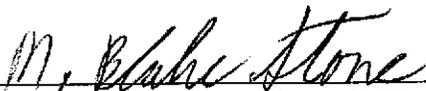
19. Prohibition lies in this case because it meets the three prerequisites for the issue of Writ of Prohibition. First, The Industrial Commission had no jurisdiction to entertain a motion suspending the relator's claim 97-631195 to cut off payment of compensation. The filing of the Writ of Mandamus in Case 09-APL-1-0094 terminated the jurisdiction of the Industrial Commission over the issue of whether the Relator should be compelled to attend the medical examination, *State ex rel Rodriguez v. Indus. Comm.*, 67 Ohio St. 3d 210, 1993-Ohio-89, 616 N.E.2d 929 (1993). Second, the exercise of this power is clearly unauthorized by law because it is not ripe, *State ex rel Elyria Foundry Company v. Indus. Comm.*, 82 Ohio St. 3d 88, 694 N.E.2d 459, 1998-Ohio-366. The Relator is still pursuing his appeal rights in the Tenth Circuit Court of Appeals for Ohio. The exercise, by the Industrial Commission, of any power over this claim would deprive him of his appeal rights. Third, the refusal of this writ would result in an injury for which there is no adequate remedy in the ordinary course of law, i.e., the Relator would be deprived of the funds with which to pay his living expenses while he is pursuing the Writ of Mandamus. The Industrial Commission proposes to suspend his claim which is a power that it does not have pending a resolution of the Writ of Mandamus in Case No. 09-APL-1-0094. The exercise of the Industrial Commission's power to suspend the claim is not yet ripe for the Industrial Commission to use. The Respondent-Employer has already suspend the Permanent Total Disability payments as of February 20, 2009 per the March 4, 2009 letter from the Employer's counsel.

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WHEREFORE, Relator prays for (1) Writ of Prohibition to prohibit the Respondent-Industrial Commission from allowing Respondent-Employer to suspend the payment of Permanent and Total Disability benefits of injured worker because he has refused to attend the employer's medical examination until all appeals concerning the Writ of Mandamus have been exhausted; (2) to prohibit the Industrial Commission from exercising any jurisdiction over this claim as long as the Writ of Mandamus adjudication has not been completed and all appeal rights have not been completely exhausted; and (3) to order the Relator-Employer to restore the benefits that were terminated on February 20, 2009 by a wrongful exercise of jurisdiction by the Industrial Commission; (4) cost of this application; and (5) for such other and further relief as may be just and proper.

Additionally, pursuant to Supreme Court Rule X, §5, Relator asks this Court to issue an alternative writ staying all Industrial Commission proceedings on this claim and staying the operation of all orders of the Industrial Commission which issued after January 29, 2009.

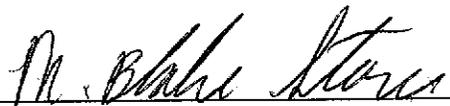
Respectfully submitted,


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INSTRUCTIONS FOR SERVICE

TO THE CLERK:

Please serve Respondents by certified mail, return receipt requested, at the addresses shown in the caption of the Writ of Prohibition.



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