

ORIGINAL

IN THE SUPREME COURT OF OHIO

JEFF ROHR,

Relator,

v.

**THE INDUSTRIAL COMMISSION
OF OHIO**

and

**THE GERSTENSLAGER
COMPANY,**

Respondents.

:
: **CASE NO. 09-0659**
:
: **Original Action for Writ of Prohibition**
:

FILED
MAY 01 2009
CLERK OF COURT
SUPREME COURT OF OHIO

RESPONDENT THE GERSTENSLAGER COMPANY'S MOTION TO DISMISS

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RESPONDENT THE GERSTENSLAGER COMPANY'S MOTION TO DISMISS

Respondent-Employer, The Gerstenslager Company, moves to dismiss Relator's 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 (the "Complaint"). Relator seeks to prevent the Ohio Industrial Commission from suspending his workers' compensation claim due to his refusal to attend a medical examination, which the Industrial Commission previously ordered him to attend. Relator's Complaint fails to state a claim upon which relief can be granted because it appears beyond a doubt, after presuming the truth of all material factual allegations in the Complaint and making all reasonable inferences in Relator's favor, that Relator cannot establish any of the three elements required for the Court to grant a writ of prohibition.

First, the action Relator seeks to prohibit has already occurred, making this action untimely. Second, the Ohio Supreme Court has explicitly held that the Industrial Commission may suspend a workers' compensation claim when the claimant refuses to attend a medical examination. Because of that authority, Relator cannot establish that the Industrial Commission's exercise of judicial or quasi-judicial power is unauthorized by law. Finally, Relator's Complaint fails to state a claim upon which relief can be granted because denying the writ will not result in an injury for which no other adequate remedy exists in the ordinary course of law.

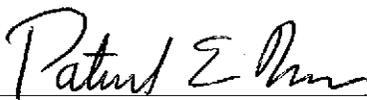
The Industrial Commission only suspended the payment of compensation—it specifically declined to suspend treatment or the payment for any treatment or medication—and only until the Relator complies with Ohio law by attending the medical examination ordered by the Industrial Commission. Relator has already availed himself of the remedy provided by law by filing a request for a writ of mandamus challenging the Industrial Commission's order

compelling him to attend a medical exam. The suspension of compensation can be remedied in the ordinary course of law without resort to an extraordinary writ of prohibition.

Accordingly, Relator is not entitled to a writ of prohibition and his Complaint should be dismissed pursuant to Civil Rule 12(B)(6) and S.Ct. R. X. The reasons for this motion are set forth in more detail in the Brief in Support of Motion to Dismiss, filed separately with the Court.

Respectfully submitted,

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By: 

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Motion to Dismiss* was served upon Colleen Cottrell Erdman, Assistant Attorney General, Workers' Compensation Section, The Industrial Commission of Ohio, 150 East Gay Street, 22nd Floor, Columbus, Ohio 43215, and M. Blake Stone, Attorney for Relator, M. Blake Stone, L.P.A., 231 North Buckeye Street, P.O. Box 1011, Wooster, Ohio 44691 this 30th day of April, 2009.



Patrick E. Noser