

**RESPONDENT THE GERSTENSLAGER COMPANY'S
BRIEF IN SUPPORT OF MOTION TO DISMISS**

I. INTRODUCTION

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") should be dismissed because, after all factual allegations of the complaint are presumed true and all reasonable inferences are made in his favor, it appears beyond doubt that Relator can prove no set of facts warranting the requested extraordinary relief in prohibition. Indeed, Relator can satisfy none of the three elements established by the Ohio Supreme Court for issuing such a writ.

Moreover, the policy underlying Relator's position has been explicitly rejected by this Court. If the Court adopts Relator's position in this action, then the Industrial Commission would be unable to take any action—either to enforce its previously issued orders or to ensure the orderly administration of a workers' compensation claim—whenever a mandamus action is filed that relates to an order in the workers' compensation claim. Relator effectively seeks an automatic stay of the Industrial Commission's jurisdiction in a workers' compensation claim upon the filing of an action for extraordinary relief, not just upon the filing of direct appeal. Relator's argument fails as a matter of law and the policy he espouses has been rejected by this Court. Accordingly, Relator's Complaint should be dismissed for failure to state a claim upon which relief can be granted.

II. PROCEDURAL AND FACTUAL BACKGROUND

The facts of this action are simple and undisputed. On February 13, 1997, Relator was injured in the course and scope of his employment with Respondent The Gerstenslager Company. (Complaint, ¶ 3). In 2004, he was granted Permanent Total Disability benefits for his injury. (Complaint, ¶ 5). On January 23, 2008, Respondent Gerstenslager filed a motion requesting the Industrial Commission to invoke its continuing jurisdiction and order Relator to attend two medical exams, one with a physician and one with a psychiatrist. (Complaint, ¶ 6). The Ohio Industrial Commission ordered Relator to attend a medical examination with a psychiatrist. (Complaint, ¶¶ 7-8). Relator eventually filed a petition for writ of mandamus in the Tenth District Court of Appeals, challenging the Industrial Commission's decision to compel him to attend a psychiatric examination. (Complaint, ¶ 10). This mandamus action is still pending in the Court of Appeals.

Because of Relator's refusal to comply with a final order of the Industrial Commission, Gerstenslager filed a motion to suspend Relator's workers' compensation claim. (Complaint, ¶ 11). The Industrial Commission granted this motion and suspended Relator's claim on February 4, 2009. (Complaint, ¶ 12). Relator objected to this decision and, on February 12, 2009, a Staff Hearing Officer conducted a hearing and suspended the payment of compensation in Relator's claim. (Complaint, ¶ 13-14). As noted in the Relator's Complaint, the Order at issue only suspends payment of compensation; the Order explicitly directs that the Relator's ability to receive treatment for the allowed conditions will not be affected by the suspension of the claim. (Complaint, ¶ 14). Thus, during the time Relator refuses to attend the ordered medical examination, his treatment and medication are still being paid for in the workers' compensation claim. Only the payment of compensation is suspended.

In his Complaint for a writ of prohibition, Relator argues that the Industrial Commission should be prohibited from suspending his workers' compensation claim while his mandamus action is pending, in which he challenges the Industrial Commission's decision to compel him to attend a psychiatric examination. (Complaint, ¶ 15-19).

III. ARGUMENT

A. Relator is not entitled to extraordinary relief in prohibition.

Dismissal of a complaint for a writ of prohibition is required if it appears beyond doubt, after presuming the truth of all material factual allegations in the complaint and making all reasonable inferences in a relator's favor, that the relator is not entitled to the requested extraordinary relief in prohibition. *See State ex rel. Beane v. Dayton*, 112 Ohio St.3d 553, 2007-Ohio-811, ¶ 26; *see also* Civil Rule 12(B)(6); *State ex rel. United States Steel Corp. v. Zaleski*, 98 Ohio St. 3d 395, 2003-Ohio-1630, ¶ 8 (*citing State ex rel. Suburban Constr. Co. v. Skok* (1999), 85 Ohio St.3d 645, 646, 1999 Ohio 329, 710 N.E.2d 710).

A writ of prohibition may be awarded only to prevent the unlawful usurpation of jurisdiction and does not lie to prevent the enforcement of a claimed erroneous judgment or administrative act. *See State ex rel. Ohio Stove Co. v. Coffinberry* (1948), 149 Ohio St. 400, 405. To be entitled to a writ of prohibition, a relator must establish that (1) the respondent is about to exercise judicial or quasi-judicial power, (2) the exercise of that power is unauthorized by law, and (3) denying the writ will result in injury for which no other adequate remedy exists in the ordinary course of law. *State ex rel. Furnas v. Monnin* (2008), 120 Ohio St. 3d 279, 2008-Ohio-5569, ¶ 10 (*citing State ex rel. Sliwinski v. Burnham Unruh*, 118 Ohio St.3d 76, 2008-Ohio-1734, ¶ 7). Assuming the allegations in Relator's Complaint are true, he still cannot satisfy any of the necessary elements of this three part test.

1. Neither Respondent is “about to” exercise judicial or quasi-judicial power.

“Quasi-judicial authority is the power to hear and determine controversies between the public and individuals that require a hearing resembling a judicial trial.” *State ex rel. Wright v. Cuyahoga County Bd. of Elections*, 120 Ohio St. 3d 92, 2008-Ohio-5553, ¶ 7. The Industrial Commission has already exercised quasi-judicial power by suspending Relator’s workers’ compensation payments. As this Court has noted: “A writ of prohibition prevents a tribunal from proceeding in a matter it is not authorized to hear.” *State ex rel. Wilson v. Ohio*, 2002-Ohio-7448, ¶ 16 (Davidson, Magistrate) (citing *Marsh v. Goldthorpe* (1930), 123 Ohio St.103, 106, 174 N.E. 246). “As such, it may be invoked only to prevent a future act and not to undo an act that has already been performed.” *Id.* (citations omitted).

Once an order of the Industrial Commission is an accomplished fact, as is the case here, a writ of prohibition is not the appropriate remedy to prohibit the enforcement of that order. *Ohio Stove Co.*, 149 Ohio St. at 405-06. Because the act Relator seeks to prohibit has already occurred, and because neither Respondent is “about to” exercise any judicial or quasi-judicial power, the Complaint for a writ of prohibition fails to state a claim upon which relief can be granted. Thus, the Complaint should be dismissed.

2. The Industrial Commission’s exercise of power was authorized by law.

The second element of the three-part test for a writ of prohibition, that the exercise of power is unauthorized by law, requires a court to determine whether a respondent acted fraudulently or corruptly, abused its discretion, or clearly disregarded applicable law. *State ex rel. Wellington v. Mahoning County Bd. of Elections* (2008), 120 Ohio St. 3d 198, 2008-Ohio-5510, ¶ 11 (citing *State ex rel. Brown v. Butler Cty. Bd. of Elections*, 109 Ohio St.3d 63, 2006-Ohio-1292, ¶ 23). “An abuse of discretion implies an unreasonable, arbitrary, or unconscionable attitude.” *Id.* (citing *State ex rel. Cooker Restaurant Corp. v. Montgomery Cty. Bd. of Elections*

(1997), 80 Ohio St.3d 302, 305, 1997-Ohio-315, 686 N.E.2d 238). Relator has made no allegation of fraud or corruption.

Ohio Revised Code Section 4123.53 states: “The administrator of workers’ compensation or the industrial commission may require any employee claiming the right to receive compensation to submit to a medical examination . . . at any time, and from time to time...” This statute goes on to provide the proper sanction for an employee’s failure to comply with its provisions: “If an employee refuses to submit to any medical examination... or obstructs the same . . . the employee’s right to ... receive any payment for compensation theretofore granted, is suspended during the period of the refusal or obstruction.” These rules are also part of the Administrative Code: “When the bureau or the commission orders an injured or disabled employee to submit to medical examination and such employee refuses to be examined or in any way obstructs the examination, the employee’s claim for compensation *shall* be suspended during the period of his refusal or obstruction.” O.A.C. § 4121-3-12 (emphasis added).

In this case, the Industrial Commission is absolutely within its jurisdiction to suspend Relator’s claim for his refusal to attend a medical examination. The Industrial Commission cannot refuse to hear a claim, but it can suspend a claim. The Industrial Commission is under a clear legal duty to consider a claim without restricting a claimant’s substantive rights. For example, where a claimant must waive the physician-patient privilege as a condition precedent to consideration of his claim, an abuse of discretion has been shown, and a writ of mandamus is appropriate. *State ex rel. Holman v. Dayton Press, Inc.* (1984), 11 Ohio St. 3d 66, 69 (citing *State ex rel. Galloway v. Indus. Comm.*, (1938), 134 Ohio St. 496.).

The *Holman* decision indicates that the Industrial Commission may—and in fact should—suspend a claim, as opposed to refusing to hear a claim, when a claimant refuses to attend a medical exam. The *Holman* court discussed *State ex rel. Galloway v. Indus. Comm.*

(1938), 134 Ohio St. 496, in which this Court was faced with the issue of whether the Industrial Commission was authorized under its rule-making power to require an applicant, as a condition precedent to a consideration of his claim, to sign and file a waiver. The *Galloway* Court held in paragraph two of the syllabus that: "The provisions of Section 11494, General Code [R.C. 2317.02(B)], protecting as privileged the communications of patient and physician in that relation, confer a substantial right, waiver of which may not be required by the state Industrial Commission as a condition precedent to the consideration of an application for workmen's compensation." *Holman*, 11 Ohio St. 3d at 69.

In citing *Galloway* approvingly, the *Holman* court stated:

If, as appellants contend, the workers' compensation system could not function properly for lack of the medical evidence, then the commission may order appellee to submit to a medical examination or, if he refuses, suspend consideration of the claim pursuant to R.C. 4123.53. They cannot, however, now avoid their duty to consider appellee's claim for lack of medical evidence.

Id.

The Tenth District Court of Appeals has also held that the Industrial Commission has the right to suspend action on a claim when a claimant refuses to attend a medical exam, relying on *Holman* and *State ex rel. AT & T Technologies, Inc. v. Felty* (1993), 67 Ohio St.3d 118, 616 N.E.2d 226:

In the present case, we have an employer who requested that an employee attend a medical examination and execute medical releases. The employee refused to do both and the commission put on an order suspending further consideration of the employee's claim. Based upon the above-cited authorities, the commission had the right to suspend further action on the employee's claim and this court cannot conclude, based upon the extremely limited record before us, that the commission abused its discretion in this matter. As such, appellant's sole assignment of error is not well-taken and is overruled.

White v. Industrial Comm'n of Ohio. (Franklin County), 1995 Ohio App. LEXIS 2448, * 10.

The claimant in *White* did not seek a writ of prohibition. He filed a complaint against the Ohio Industrial Commission and his employer for a declaratory judgment and for injunctive relief after the Commission suspended his workers' compensation claim. *Id.* at *1. But it is still dispositive of Relator's Complaint for a writ of prohibition because it supports the well established principle that the Industrial Commission's decision to suspend his claim certainly was within its power authorized by law.

a. Relator's reliance on *Rodriguez* is misplaced.

Relator apparently relies on *State ex rel. Rodriguez v. Industrial Comm'n of Ohio* for the position that his filing a petition for a writ of mandamus in the Tenth District Court of Appeals terminated the Industrial Commission's jurisdiction over the issue of whether Relator should be compelled to attend a medical examination. (Complaint, ¶ 19). In *Rodriguez*, the claimant challenged an order denying permanent total disability compensation by filing an action in mandamus. *State ex rel. Rodriguez v. Industrial Comm'n of Ohio* (1993), 67 Ohio St. 3d 210, 212-213. Dissatisfied with the remedial action that the appellate court ordered, the Claimant appealed to the Ohio Supreme Court. *Id.* The Industrial Commission, meanwhile, prepared a second order incorporating the appellate court's instructions. *Id.* *Rodriguez* contested the Commission's authority to issue the later order. *Id.* The Ohio Supreme Court agreed with the claimant's assertions, but declined to issue a writ of mandamus because to do so would have been to compel a vain act. *Id.* at 214.

This claim is dissimilar to *Rodriguez* for several reasons. First, the Industrial Commission action in *Rodriguez* occurred while a court of appeals' decision was on appeal to the Ohio Supreme Court. In this case, a mandamus action is pending but no decision has issued from the original court, the Tenth District Court of Appeals. Second, this action only involves the Claimant's duty to attend a medical exam and the Industrial Commission's authority to

suspend a claim for ignoring its order compelling the exam, whereas *Rodriguez* involved the actual Permanent Total Disability award. Thus, this situation is more similar to *State ex rel. Molden v. Callander Cleaners Co.* (1983), 6 Ohio St.3d 292, which was cited and relied upon by the Industrial Commission in its Order suspending the claim.

In *Molden*, this Court held that an injured worker's appeal of an administrative order did not suspend the Industrial Commission's jurisdiction to order the worker to submit to a medical examination. *Molden*, 6 Ohio St. 3d at 294. The Ohio Supreme Court quoted O.R.C. § 4123.53 (also quoted above) and held: "The statute is clear and unambiguous, specifically authorizing the commission to require any claimant seeking benefits under the Workers' Compensation Act to submit to a medical examination 'at any time, and from time to time' at the risk, *inter alia*, of forfeiting the right to receive compensation theretofore granted." *Id.* The Supreme Court noted that this statute contains no exceptions or reference whatsoever to the suspension of the Industrial Commission's jurisdiction to order claimants to submit to medical examinations during a pending appeal or during a pending mandamus action. *Id.*

Essentially what Relator seeks is an automatic stay on the enforcement of Industrial Commission rulings upon the filing of an appeal or an action challenging the order. That is not the law. Indeed, as this Court has stated: "Implicit within appellant's argument is an invitation that this court insert the following phrase into the statute: 'But no medical examination shall be conducted while a claimant's appeal is pending before a regional board of review or the Industrial Commission.' We categorically reject this invitation." *Id.*

The problems that would arise from adopting Relator's "automatic stay" argument are apparent. For one thing, the Industrial Commission would lose the authority to encourage the orderly administration of workers' compensation claims by losing the power to suspend claims when a Claimant refuses to comply with Industrial Commission orders. Another likely result

would be the encouragement of mandamus actions to stay the enforcement of legitimate Industrial Commission orders. While *Rodriguez* may indicate that the filing of a mandamus action prevents the Industrial Commission from modifying an order denying PTD while a court of appeals' decision is on appeal to the Supreme Court and that exact order is challenged on mandamus, *Rodriguez* does not support the much broader rule advocated by Relator that the filing of a mandamus action allows him to ignore the Industrial Commission's orders and rules. This Court rejected Relator's argument in *Molden* and this Court should do so once again.

b. Relator's "ripeness" argument is wholly without merit.

Relator also argues that the Industrial Commission's exercise of authority to suspend payment of compensation in his claim was unauthorized by law because it was not ripe. (Complaint, ¶ 19). Relator relies on *State ex rel. Elyria Foundry Co. v. Indus. Comm.*, 82 Ohio St. 3d 88, 694 N.E.2d 459, 1998-Ohio-366. This "ripeness" argument is not supported by the allegations in the Complaint or the *Elyria Foundry* decision.

In *Elyria Foundry*, an employer simultaneously filed two actions challenging an Industrial Commission order allowing a workers' compensation claim for silicosis and granting a temporary total disability award ("TTD"): an appeal, pursuant to O.R.C. 4123.512, challenging the allowance of the claim to the Lorain County Common Pleas Court and a mandamus action in the Court of Appeals for Franklin County, challenging the commission's award of TTD. *Id.* This Court denied the writ because the matter was not ripe: the relator was asking the Court to address a question that was "abstract and the hypothetical . . . if the claim is allowed, and if it is allowed only for silicosis, is claimant entitled to temporary total disability compensation?" *Id.* at 89. Thus, the facts of *Elyria Foundry* are not remotely similar to the present case. Here, the Industrial Commission's authority to suspend the claim was ripe because it had previously ordered him to attend an examination and he unequivocally refused to do so.

Moreover, Relator states that the suspension of his claim was not ripe because he “is still pursuing his appeal rights in the Tenth Circuit Court of Appeals for Ohio.” (Complaint, ¶ 19). This is obviously incorrect because Relator is not pursuing “appeal” rights but has instead filed for an extraordinary writ of mandamus in the court of appeals, challenging the order that he submit to medical examination. In general, even appeals do not automatically stay execution on the challenged judgment, at least without the posting of a bond. *See* Civil Rule 62(B). To suggest it is not “ripe” to enforce an order until all possible avenues of challenging the order—not just all direct appeals but even all actions for extraordinary relief—are exhausted is to suggest a crippling of the workers’ compensation system.

3. Relator has other adequate remedies in the ordinary course of law.

Relator also cannot satisfy the third element of the test for a writ of prohibition, as he cannot prove that denying the writ will result in injury for which no other adequate remedy exists in the ordinary course of law. First, Relator has not even exhausted his appeal rights. Second, the Industrial Commission suspended the payment of compensation only and specifically ordered that his right to treat the allowed conditions would not be affected. Thus, if Relator wins his separate mandamus action and it is held that he need not attend the psychological examination, he will receive the compensation that is now being withheld pursuant to the Industrial Commission’s order. This is an adequate remedy for any harm caused by the Industrial Commission’s suspension order.

a. Relator did not appeal the suspension order to the full Industrial Commission and did not file a motion for reconsideration.

A relator must exhaust all appeal rights to demonstrate a lack of an adequate remedy at law. *State ex rel. Mason v. Burnside*, 117 Ohio St. 3d 1, 2007-Ohio-6754, ¶ 15; *see also State ex rel. Corrigan v. Griffin* (1984), 14 Ohio St.3d 26, 27, 470 N.E.2d 894 (right to appeal by leave of

court and file a motion to stay a discovery order precludes claim for extraordinary relief in prohibition because it is an adequate remedy at law). On the face of Relator's Complaint, it is apparent that he did not appeal the suspension of his claim to the full Industrial Commission and he did not file a request for reconsideration of the suspension. Thus, he failed to exhaust all appeal rights and has not demonstrated that he lacks an adequate remedy at law.

- b. Only the payment of monetary compensation was suspended, so Relator's "injury" will be remedied if it is determined that he should not have been ordered to attend a medical exam.

The Industrial Commission only suspended the payment of Permanent Total Disability compensation, all treatment was ordered to remain unaffected. This is not a case where a destitute worker will not receive necessary medical treatment while his mandamus action is pending. If Relator succeeds in his mandamus action and the Industrial Commission's order directing him to attend a psychological exam is vacated, he will be able to recoup the financial compensation that is being withheld pending the suspension of his claim. Denying Relator's requested writ, therefore, will not result in an injury for which there is no other adequate remedy in the ordinary course of law.

IV. CONCLUSION

After all factual allegations of Relator's Complaint are presumed true and all reasonable inferences are made in his favor, it appears beyond doubt that Relator can prove no set of facts warranting the requested extraordinary relief in prohibition. Indeed, he cannot meet any of the three elements for the issuance of a writ of prohibition. Relator cannot establish that (1) the Industrial Commission is about to exercise judicial or quasi-judicial power, (2) the exercise of that power is unauthorized by law, or (3) denying the writ will result in injury for which no other adequate remedy exists in the ordinary course of law. Accordingly, the Complaint for a writ of prohibition should be dismissed.

Respectfully Submitted,

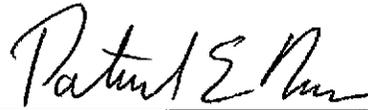
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By:  _____

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Brief in Support of 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, at 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



LEXSEE 1995 OHIO APP. LEXIS 2448

Jerome White, Plaintiff-Appellant, v. Industrial Commission of Ohio, Wes Trimble, Admr. of the Bureau of Workers' Compensation, and Duriron Company, Inc., Defendants-Appellees.

No. 94APE12-1803 (ACCELERATED CALENDAR)

COURT OF APPEALS OF OHIO, TENTH APPELLATE DISTRICT, FRANKLIN COUNTY

1995 Ohio App. LEXIS 2448

June 15, 1995, Rendered

NOTICE:

[*1] THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.

PRIOR HISTORY: APPEAL from the Franklin County Court of Common Pleas.

DISPOSITION: Judgment affirmed.

COUNSEL: John R. Workman, for appellant.

Betty D. Montgomery, Attorney General, and Dennis Hufstader, for appellees Industrial Commission of Ohio and Bureau of Workers' Compensation.

Chernesky, Heyman & Kress, and Melanie R. Mackin, for appellee Duriron Company, Inc.

JUDGES: YOUNG, J., PETREE and HOLMES, JJ., concur. HOLMES, J., retired, of the Ohio Supreme Court, assigned to active duty under authority of Section 6(C), Article IV, Ohio Constitution.

OPINION BY: YOUNG**OPINION**

OPINION

YOUNG, J.

This matter is before this court upon the appeal of Jerome White, appellant, from the December 2, 1994 decision and entry of the Franklin County Court of

Common Pleas which granted the motion to dismiss appellant's declaratory judgment action filed by appellee, Duriron Company, Inc. ("employer"), and joined by appellee, Industrial Commission of Ohio ("commission"). Appellant raises one assignment of error on appeal:

"The Court of Common Pleas erred in dismissing Plaintiff-Appellant's complaint for [*2] declaratory relief. Ohio Revised Code § 4123.651 is a section which cannot constitutionally be retroactively applied to destroy the substantive rights of a workers' compensation claimant."

The trial court considered the following facts to be undisputed for purposes of its opinion: appellant was injured in June 1981 while employed by Duriron. The original claim was recognized by the commission and certain benefits had been paid. Duriron requested that appellant submit to a medical examination and sought medical releases from appellant in a C-86 motion filed with the commission. The hearing officer assigned to the matter determined that further action on appellant's claim be held in abeyance until receipt of medical releases and a medical examination. Upon review, the commission issued an order dated January 31, 1992, which affirmed the order of the hearing officer and the subsequent decision by the Dayton Regional Board of Review.

Thereafter, appellant filed a complaint for declaratory judgment and for injunctive relief in the trial court. Appellant asserted that the commission was retroactively applying R.C. 4123.651(B) and (C) to his claim because the commission was holding [*3] further action on his

claim in abeyance until such time as appellant submitted medical releases. Both Duriron and the commission have denied that the statute was applied and have asserted that the commission has the right to suspend action on a claim upon authority other than that section claimed to have been used by appellant.

Duriron filed a motion to dismiss to which the commission concurred. By decision and entry dated December 2, 1994, the trial court concluded that the resolution of the motion and the merits of appellant's claims did not rest upon the applicability or non-applicability of R.C. 4123.651. Instead, the court found that the commission had the right to suspend action on a claim pursuant to the authority of *State ex rel. AT & T Technologies, Inc. v. Felty* (1993), 67 Ohio St.3d 118, 616 N.E.2d 226. As such, the court granted the motion to dismiss and appellant appealed to this court.

In his assignment of error, appellant asks this court to determine that R.C. 4123.651 cannot constitutionally be retroactively applied to a claim of an employee for an injury which arose prior to the effective date of the statute. As a preliminary matter, this court notes that [*4] it is well-established that, where a case can be resolved upon other grounds, a constitutional question raised will not be determined. See *Rispo Realty & Dev. Co. v. Parma* (1990), 55 Ohio St.3d 101, 105, 564 N.E.2d 425; *Marich v. Knox Cty. Dept. of Human Serv.* (1989), 45 Ohio St.3d 163, 543 N.E.2d 776.

At the time that the commission ruled on Duriron's C-86 motion, the following version of R.C. 4123.651(C) was in effect:

"The bureau of workers' compensation shall prepare a form for the release of medical information, records, and reports relative to the issues necessary for the administration of a claim under this chapter. The claimant shall promptly provide a current signed release of the information, records, and reports when requested by the employer. The employer shall promptly provide copies of all medical information, records, and reports to the bureau and to the claimant or his representative upon request."

Thereafter, in 1993, R.C. 4123.651 was amended and provided, in pertinent part, as follows:

"(B) The bureau of workers' compensation shall prepare a form for the release of medical information, records, and reports relative to the issues necessary [*5] for

the administration of a claim under this chapter. The claimant promptly shall provide a current signed release of the information, records, and reports when requested by the employer. The employer promptly shall provide copies of all medical information, records, and reports to the bureau and to the claimant or his representative upon request.

"(C) If, without good cause, an employee refuses to submit to any examination scheduled under this section or refuses to release or execute a release for any medical information, record, or report that is required to be released under this section and involves an issue pertinent to the condition alleged in the claim, his right to have his claim for compensation or benefits considered, if his claim is pending before the administrator, commission, or a district or staff hearing officer, or to receive any payment for compensation or benefits previously granted, is suspended during the period of refusal." (Emphasis added.)

Prior to the 1989 and 1993 amendments, R.C. 4123.651 simply provided that any injured employee had the right to select a licensed physician of his choice regardless of whether his employer had elected [*6] to furnish him with medical attention and that an employee of a self-insurer could select a physician rather than having the physician furnished directly by his employer. There was no mention of either medical releases or the right of the employer to have the employee examined by a physician of the employer's choice.

Appellant maintains that, by requiring an injured employee to execute a medical release, R.C. 4123.651 destroys the right of confidentiality that a patient enjoys with their physician. As such, appellant maintains that his substantive rights are affected and that R.C. 4123.651 cannot be retroactively applied and the commission may not suspend further action on his claim.

Before going any further, this court feels compelled to make the following comments. Nowhere in the record has appellant attached a certified copy of the commission's orders about which he complains. As such, this court cannot assume that the commission has even applied R.C. 4123.651 in the present case. Appellant argues vehemently that the commission has applied R.C. 4123.651 and has suspended action on his claim by vir-

tue of the fact that he has refused to execute medical releases and yet, nowhere [*7] in the record is this fact established.

The commission has a great deal of discretion in the handling of an employee's claims and applications. Pursuant to other Ohio Revised Code sections and provisions of the Ohio Administrative Code, the commission has had long-standing authority to suspend action on an employee's claim in the event that the employee refused to submit sufficient medical evidence. For instance, R.C. 4123.53, the effective date of which was October 1, 1953, provided as follows:

"Any employee claiming the right to receive compensation may be required by the industrial commission to submit himself for medical examination at any time, and from time to time, at a place reasonably convenient for such employee, and as may be provided by the rules of the commission. *** If such employee refuses to submit to any such examination or obstructs the same, his right to have his claim for compensation considered, if his claim is pending before the commission, or to receive any payment for compensation theretofore granted, *shall be suspended during the period of such refusal or obstruction.*" (Emphasis added.)

Furthermore, two cases out of the Ohio Supreme Court [*8] support the authority of the commission to suspend action on an employee's claim when the employee has failed to execute a medical release. In *State ex rel. Holman v. Dayton Press, Inc.* (1984), 11 Ohio St.3d 66, 463 N.E.2d 1243, the employee was injured in 1981, and his employer requested that he execute a medical release. The employee refused and the employer filed a motion to take the employee's deposition and that of his treating physician or physicians for the purpose of obtaining his medical records. The commission granted the motion for the requested depositions and subpoena. The employee filed a mandamus action in this court seeking to compel the commission to consider his claim without requiring him to waive his physician-patient privilege. This court allowed the writ and both the employer and the commission appealed the action to the Ohio Supreme Court.

The Ohio Supreme Court determined that the scope of the order issued by the commission exceeded the authority of the commission to issue it. As such, the court found that an employee could not be forced to waive the physician-patient privilege as a condition precedent to consideration of his claim; however, the court also [*9]

found that, if the question was that there was a lack of medical evidence in the record, the commission had the authority to order the employee to submit to a medical examination or, if he refused, to suspend further consideration of the claim pursuant to R.C. 4123.53.

In *State ex rel. AT & T Technologies*, an employee was injured in 1976. In 1985, the employee switched doctors and revoked all prior medical releases and refused to execute a new release. This precluded the employee's employer from obtaining medical information from the employee's new physician. The employer moved the commission to suspend further action on the employee's claim, but that motion was denied. The employer filed a complaint in mandamus in this court and this court denied the writ. On appeal before the Ohio Supreme Court, the court affirmed the decision of this court on the basis that the commission could not be forced to suspend action on the employee's claim. Citing to Ohio Adm.Code 4121-3-12(B), the court found that the remedy for employee non-compliance was entrusted to the commission's sound discretion. As such, the commission could suspend further action on an employee's claim; however, the commission [*10] was not under a clear legal duty to do so.

In the present case, we have an employer who requested that an employee attend a medical examination and execute medical releases. The employee refused to do both and the commission put on an order suspending further consideration of the employee's claim. Based upon the above-cited authorities, the commission had the right to suspend further action on the employee's claim and this court cannot conclude, based upon the extremely limited record before us, that the commission abused its discretion in this matter. As such, appellant's sole assignment of error is not well-taken and is overruled.

Based on the foregoing, appellant's assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

PETREE and HOLMES, JJ., concur.

HOLMES, J., retired, of the Ohio Supreme Court, assigned to active duty under authority of Section 6(C), Article IV, Ohio Constitution.