

ORIGINAL

In the
Supreme Court of Ohio

STATE OF OHIO, ex rel.
FORD MOTOR COMPANY,
SHARONVILLE TRANSMISSION
PLANT,

Appellant,

v.

EMMA R. JOHNSON, et al.,

Appellees.

Case No. 2008-2220

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

Court of Appeals Case No. 07AP-1084

BRIEF OF APPELLEE, INDUSTRIAL COMMISSION OF OHIO

ERIC G. BRUESTLE (0024111)
WILLIAM P. COLEY, II (0033595)
RYAN E. BONINA (0079552)
Roetzel & Andress
250 East Fifth Street, Suite 310
Cincinnati, Ohio 45202
513-361-8292
513-361-0335 (fax)
ebruestle@ralaw.com
bcoley@ralaw.com
rbonina@ralaw.com

Counsel for Appellant,
Ford Motor Company

RICHARD CORDRAY
Ohio Attorney General

DOUGLAS R. UNVER* (0051624)
Assistant Attorney General

**Counsel of Record*

150 East Gay Street, 22nd Floor
Columbus, Ohio 43215-3130

614-466-6696

614-728-9535 (fax)

douglas.unver@ohioattorneygeneral.gov

Counsel for Appellee,
Industrial Commission of Ohio

ANDREA L. BURNS (0068205)
Harris & Burgin, LPA

9545 Kenwood Road, Suite 301
Cincinnati, Ohio 45242

513-891-3270

513-891-3266 (fax)

alb@harris-burgin.com

Counsel for Appellee,
Emma Johnson

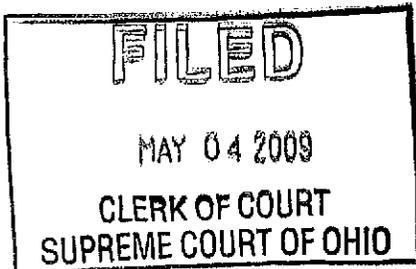


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INTRODUCTION

The issue before the court is whether the Tenth District Court of Appeals correctly held that the commission did not abuse its discretion when it found that Appellee, Emma R. Johnson, lacked the capability to perform sustained remunerative employment due to the allowed conditions in her claims and was, therefore, entitled to permanent total disability compensation (“PTD”).

Appellant Ford Motor Company, based on misapplied case law and on evidence found unpersuasive by the commission, invited the appellate court to reweigh the evidence and issue a writ vacating Johnson’s PTD, an action proscribed by well-settled Ohio law. The appellate court overruled Ford’s objections and unanimously adopted its magistrate’s decision, including findings of fact, conclusions of law, as well as the recommendation to issue a limited writ ordering the commission to amend its February 16, 2005 order by eliminating reliance on H. Paul Lewis, M.D.’s report and starting Johnson’s PTD award as of May 4, 2004, the date of James T. Lutz, M.D.’s examination, rather than January 6, 2004, the date of Dr. Lewis’s report.

As the record contained “some evidence” on which the commission could and did rely, particularly the May 4, 2004, report by Dr. Lutz, the appellate court properly held that the commission did not abuse its discretion in granting PTD. This court must reject Ford’s appeal as a matter of law and affirm the decision of the Tenth District Court of Appeals denying the requested writ of mandamus.

STATEMENT OF THE FACTS AND OF THE CASE

Johnson sustained three industrial injuries while employed by Ford which bear on the matter before the court. Second Supplement at pages 4-7. (“SS. ____.”) These injuries spanned the time period 1989 through 1998, and resulted in three separate allowed claims. *Id.* Claim number L224950-22 was allowed for the condition of right wrist sprain. SS. 4. Claim number

L255437-22 was allowed for left supraspinatus tendonitis and left lateral epicondylitis. SS. 6. Claim number 98-417901 was allowed for lumbar strain, and herniated discs at L4-L5 and L5-S1. SS. 4. Johnson last worked on May 13, 1998, the date of her most recent injury at Ford. SS. 15.

Ford granted Johnson disability retirement effective November 1998, when it found that she met Ford's requirements of having been totally disabled from engaging in any regular employment with the company for a period of at least five months. SS. 30. The medical evidence Ford relied on when it approved her disability (a narrative report of medical examination dated October 28, 1998, by James J. Kreindler, M.D.) specifically cited "a diagnosis of herniated lumbar discs of the L4-5 and L5-S1 discs" with impingement on the nerve roots at those levels as the primary reason disability was granted. SS. 29. These are conditions allowed in Johnson's claims and are apparently the primary reason she initially departed the work force, according to Ford's own internal evidence. *Id.*

Johnson applied for and was denied Social Security disability benefits as of January 8, 1999, which prompted Ford to rescind its award of disability retirement benefits. SS. 30-31. Johnson appealed the Social Security Administration's ("SSA") decision denying disability benefits and, on January 21, 2000, received a fully favorable judgment from a SSA administrative law judge ("ALJ") declaring her disabled effective May 13, 1998. SS. 8. The judge evaluated Johnson's case under the Social Security Act and Regulations, finding she had the severe impairments of degenerative disc disease of the lumbar spine, DeQuervain's syndrome, right tennis elbow, and chronic pain syndrome. SS. 10. The judge found these impairments prevented Johnson from performing even sedentary work and granted her request for disability benefits. SS. 14. The judge also noted that the opinions of the treating and consulting physicians were based on objective medical evidence, such as the MRI showing

herniated discs at L4-5 and L5-S1, which are conditions specifically allowed in one of Johnson's claims. SS. 11. After Johnson's social security disability benefits were reinstated on appeal, Ford, in a letter dated "03-00", also reinstated her disability retirement benefits. SS. 33. This retirement was not voluntary, as it had been precipitated by impairments, including conditions allowed in Johnson's workers compensation claims, which resulted in a disability as defined within the provisions of the federal Social Security Act.

In August 1999, Johnson filed an application for PTD with the commission. A commission Staff Hearing Officer ("SHO") denied the application, relying on the report of an independent medical examination conducted on behalf of the commission by Dr. William Fitz. SS. 26-27. The SHO found that Johnson was not permanently and totally disabled due to the allowed conditions in her claims, and could return to her former position of employment, foreclosing any entitlement to PTD. *Id.*

Johnson filed another application for PTD in January 2004. SS. 15-22. A commission SHO heard this application in February 2005 and granted PTD from January 6, 2004, to continue without suspension unless warranted, based on the medical reports of Drs. Lewis and Lutz. SS. 1-3. In his January 6, 2004, report, Dr. Lewis opined that, within a reasonable medical certainty, Johnson was totally disabled from performing any sustained remunerative employment. Dr. Lutz opined in a May 4, 2004, report that Johnson was unable to engage in physical work activity based solely on the allowed conditions in her claims. SS. 23-26. Ford requested that the members of the commission reconsider the award of PTD to Johnson. The commission denied Ford's request by majority vote and so informed the parties in an order mailed April 14, 2005.

Ford then initiated a complaint in mandamus in the Tenth District Court of Appeals which contended the commission abused its discretion in granting PTD and sought a writ ordering the commission to vacate its order and issue another denying Johnson's PTD. The

appellate court held that the commission properly relied on the report of Dr. Lutz in granting PTD, but did issue a limited writ ordering the commission to modify the PTD order to eliminate reliance on Dr. Lewis's report and begin Johnson's PTD effective May 4, 2004, the date of Dr. Lutz's examination. *State ex rel Ford Motor Company v. Indus. Comm.*, Franklin App. No. 07AP-1084, 2008-Ohio-4890, at paragraph 25. Ford appealed to this court as of right from the appellate court decision.

LAW AND ARGUMENT

Industrial Commission's Proposition of Law

The Industrial Commission of Ohio does not abuse its discretion when it finds, based on some evidence, that a workers' compensation claimant lacks the capability to perform sustained remunerative employment and is, therefore, entitled to permanent total disability compensation.

A. Standard of review

To obtain a writ of mandamus as a remedy from an order of the commission, Ford must demonstrate a clear legal right to the relief sought as well as the commission's clear legal duty to provide such relief. *State ex rel. Pressley v. Indus. Comm.* (1967), 11 Ohio St.2d 141. A clear legal right to a writ of mandamus would exist if Ford could show that the commission abused its discretion by entering an order not supported by any evidence in the record. *State ex rel. Elliott v. Indus. Comm.* (1986), 26 Ohio St.3d 76. Where the record contains some evidence to support the commission's findings, there has been no abuse of discretion and mandamus is not appropriate. *State ex rel. Lewis v. Diamond Foundry Co.* (1987), 29 Ohio St.3d 56. This Court has reiterated, in *State ex rel. Athey v. Indus. Comm.* (2000), 89 Ohio St.3d 473, that "the commission is the *exclusive evaluator of weight and credibility*" of the evidence presented to it. (Emphasis added). Further, the commission is the "exclusive evaluator of disability," and its decisions are deemed to be final. *State ex rel. Moss v. Indus. Comm.* (1996), 75 Ohio St.3d 414.

The Tenth District Court of Appeals correctly held that the commission decision in this case complies with appropriate case law and is supported by some evidence, except as specified in the limited writ. *Ford Motor Company*, supra. The appellate court properly denied Ford's writ in this case and its holding must be affirmed as a matter of law.

B. The commission did not abuse its discretion when it granted Johnson's application for PTD, as some evidence supported its finding that Johnson no longer had the capability to perform any sustained remunerative employment due to the allowed conditions in her claims.

The relevant inquiry in a determination of permanent total disability is the claimant's ability to do any sustained remunerative employment. *State ex rel. Domjancic v. Indus. Comm.* (1994), 69 Ohio St.3d 693. If evidence indicates a claimant is not permanently and totally disabled by medical conditions alone, the commission must then consider the claimant's age, education, work record and other relevant non-medical factors. *State ex rel. Stephenson v. Indus. Comm.* (1987), 31 Ohio St.3d 167. However, the commission may dispense with consideration of the *Stephenson* factors if the claimant is found to be medically incapable of sustained remunerative employment based on the allowed conditions alone. *State ex rel. Eaton Corp. v. Indus. Comm.* (1997), 80 Ohio St.3d 352, citing *State ex rel. Lawrence v. Am. Lubricants Co.* (1988), 40 Ohio St.3d 321.

In Johnson's case, the commission, through its SHO, found from evidence in the record that Johnson could no longer perform sustained remunerative employment based on her allowed conditions alone and granted her application for PTD. Following an examination of Johnson, Dr. Lutz opined that Johnson was not capable of sustained remunerative employment due to the allowed conditions in her claim. The federal ALJ determined that Johnson was PTD under Social Security guidelines based on the medical evidence before him and specifically noted Johnson's herniated discs at L4-5 and L5-S1 (shown on an MRI) as contributing to that

disability. The commission initially also relied on a report by Dr. Lewis, who also opined that Johnson was PTD, but that reliance was eliminated by order of the Tenth District Court of Appeals in a limited writ. *Ford Motor Company*, supra. The court of appeals held, however, that both the ALJ's decision and Dr. Lutz' report did constitute "some evidence" for the commission to weigh and upon which the commission could rely to support its PTD finding, and that the commission did not abuse its discretion in making that finding. Id. at paragraphs 13, 22.

Ford's arguments against the commission's decision have already been rejected both administratively and in mandamus proceedings below. Ford's first proposition of law contends that the commission abused its discretion because Johnson's departure from the workforce was based on medical conditions not allowed in her various claims, precluding a PTD award under R.C. 4123.58(D). This statute provides that PTD shall not be awarded based on "impairments of the employee that are not the result of an allowed injury or occupational disease" or where "the employee retired or otherwise voluntarily abandoned the workforce for reasons unrelated to the allowed injury or occupational disease."

Ford accurately quotes the statute and properly points out that case law establishes that a departure from the work force solely for non-injury reasons or non-allowed conditions constitutes a voluntary departure. Appellant's brief at pages 9-10. However, Ford's argument that Johnson's departure was voluntary is fatally flawed. Ford neglects medical evidence from an October 28, 1998, report of examination by Dr. Kreindler contained in its own retirement file on Johnson, which establishes that her departure from the workforce was as a result of herniated discs at L4-5 and L5-S1. SS. 29. Based on Dr. Kreindler's report, Ford granted Johnson disability retirement effective November 1, 1998. SS. 30. These same herniated discs are conditions allowed in Johnson's claim no. 98-417901. SS. 1.

Ford's argument that Johnson's departure from the workforce was voluntary and not based on conditions allowed in her claims is contradicted by its own evidence and is, therefore, disingenuous at best. Because Johnson's application for social security disability benefits ("SSD") was denied after Ford granted disability retirement, Ford hastily withdrew its own grant of disability retirement from Johnson. Although SSD was later granted to Johnson on appeal by the ALJ and Ford reinstated Johnson in its own disability retirement plan shortly thereafter, Ford continues to argue that Johnson's departure from the workforce was voluntary and not related to allowed conditions in her claims, an argument properly rejected by the commission, the magistrate, and the appellate court. *Ford Motor Company* at pages 5-7.

Ford also argues that the SHO abused his discretion by re-writing or overruling earlier decisions of the SSA and the commission. Appellant's brief at page 8. First, neither the SHO nor the commission has any authority to re-write or overrule a SSA decision and neither attempted to do so. The SSA and the commission serve different masters and exist to serve independent public policy goals. Each agency acts independently within its own administrative, evidentiary, and statutory framework. Therefore, it is not outside the realm of possibility that a disability decision made by Social Security would be materially different from a commission disability decision. Apart from the SHO drawing some pertinent evidence from the SSD decision to support the commission's finding that Johnson did not leave the workforce voluntarily, there is no operative connection between the two decisions. SS. 2, and *Ford Motor Company* at paragraphs 12, 13.

Secondly, Ford incorrectly argues that the commission's 2001 decision to deny Johnson PTD foreclosed any later consideration, and the commission violated the doctrine of res judicata by granting her second PTD application. The doctrine of res judicata applies to administrative proceedings, but has only limited application to compensation cases. *State ex rel. B.O.C. Group*

v. Indus. Comm. (1991), 58 Ohio St.3d 199. “It is almost too obvious for comment that res judicata does not apply if the issue is claimant’s physical condition or degree of disability at two entirely different times***.” *Id.* at 201.

Here, the appellate court observes that whether the claimant voluntarily retired was not an issue addressed when the commission denied Johnson’s PTD application in 2001. *Ford Motor Company* at paragraph 18. On authority of *B.O.C. Group* and other law cited, the appellate court correctly held that the 2005 SHO order granting PTD “did not overrule, re-write, or impermissibly ignore the commission’s 2001 order denying PTD compensation to claimant.” *Id.* Ford’s arguments concerning res judicata fail as a matter of law.

Relying on *State ex rel. Wean United, Inc. v. Indus. Comm.* (1993), 66 Ohio St.3d 272, Ford’s second proposition of law argues that the commission abused its discretion by relying on evidence based on non-allowed conditions to grant PTD. This argument attacks the commission’s reliance on the ALJ decision and the reports of Dr. Lutz and Dr. Lewis to support its award of PTD. The commission accepts the appellate court decision that Dr. Lewis’s report does not constitute “some evidence” upon which the commission may rely to support its PTD award. However, the appellate court carefully analyzed Dr. Lutz’s report and found that it did constitute “some evidence.” A claimant cannot be compensated for a disability unrelated to an allowed condition. *State ex rel. Fields v. Indus. Comm.* (1993), 66 Ohio St.3d 437. However, “this is not to say that the mere presence of non-allowed conditions automatically bars” PTD. *State ex rel. Waddle v. Indus. Comm.* (1993), 67 Ohio St.3d 452. The Ohio Supreme Court observed in *Waddle* that Ohio case law did not inherently prohibit PTD to claimants concurrently disabled due to non-allowed conditions. *Id.* Ford correctly notes the SSD decision is based on multiple conditions, some of which are not allowed in the Johnson’s BWC claims. However, this fact is of no consequence here, as the commission’s reliance on the ALJ decision extended

only to those conditions which were also allowed in the BWC claims (herniated discs at L4-5 and L5-S1). SS. 2. The commission cited these conditions to contradict Ford's assertion that Johnson's SSD retirement was based on conditions not causally related to her claims, rendering her retirement voluntary and fatal to any subsequent PTD application. In addition to this evidence, as noted above, Ford's own files show that Johnson's first departure from the work force was solely related to the allowed conditions of herniated discs at L4-5 and L5-S1, and that the departure was under Ford's own disability retirement program. SS. 29, 30.

Finally, Ford argues that the commission abused its discretion by reliance on Dr. Lutz's report, asserting that Dr. Lutz based his opinion that Johnson was not capable of any physical work activity on non-allowed conditions. Appellant's brief at page 11. Dr. Lutz does include some discussion of Johnson's overall physical situation in his narrative, including some mention of conditions not allowed in her claims. However, Ford's argument fails upon plain reading of Dr. Lutz's opinion, which states: "My opinion....is indicated below and is based solely on the allowed condition(s) that falls [sic] within my specialty. The medical evidence supporting this opinion is presented in the narrative portion of my report.....This injured worker is not capable of physical work activity." SS. 26.

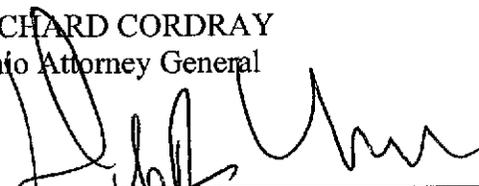
The court of appeals correctly held that the commission's decision awarding PTD to Johnson was based on "some evidence" and therefore did not constitute an abuse of discretion. *Ford Motor Company* at page 11. Absent an abuse of discretion, Ford has not shown a clear legal right to the requested relief, nor that the commission is under any legal duty to vacate its order granting PTD. *Pressley, Elliott, and Lewis*, supra.

CONCLUSION

The Tenth District Court of Appeals correctly determined the facts in this matter and applied appropriate case law when it held that the commission did not abuse its discretion in granting Johnson's application for PTD. The record contains "some evidence" supporting the commission's finding that Johnson lacks the capability to perform sustained remunerative employment and is, therefore, permanently and totally disabled. The decision of the Tenth District Court of Appeals to deny Ford's requested writ of mandamus must be affirmed as a matter of law.

Respectfully submitted,

RICHARD CORDRAY
Ohio Attorney General



DOUGLAS R. UNVER (0051624)
Assistant Attorney General
Workers' Compensation Section
150 East Gay Street, 22nd Floor
Columbus, Ohio 43215-3130
614-466-6696
614-728-9535 (fax)
douglas.unver@ohioattorneygeneral.gov

Counsel for Appellee,
Industrial Commission of Ohio

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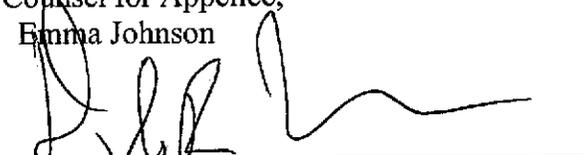
This is to certify that a copy of the foregoing Brief of Appellee, Industrial Commission of Ohio, was served by postage paid regular U.S. Mail, this 4 day of May, 2009, upon:

ERIC G. BRUESTLE, Esq.
Roetzel & Andress
250 East Fifth Street, Suite 310
Cincinnati, Ohio 45202

Counsel for Appellant,
Ford Motor Company

ANDREA L. BURNS, Esq.
Harris & Burgin, LPA
9545 Kenwood Road, Suite 301
Cincinnati, Ohio 45242

Counsel for Appellee,
Emma Johnson



DOUGLAS R. UNVER
Assistant Attorney General