

ORIGINAL

IN THE SUPREME COURT OF OHIO

|                                |   |                           |
|--------------------------------|---|---------------------------|
| STATE ex.rel. FORD MOTOR       | : | CASE NO. 08-2220          |
| COMPANY, SHARONVILLE           | : |                           |
| TRANSMISSION PLANT,            | : | (ON APPEAL FROM TENTH     |
|                                | : | DISTRICT COURT OF APPEALS |
| APPELLANT,                     | : | CASE NO. 07AP-1084)       |
|                                | : |                           |
| v.                             | : |                           |
|                                | : |                           |
| EMMA JOHNSON                   | : |                           |
|                                | : |                           |
| And                            | : |                           |
|                                | : |                           |
| INDUSTRIAL COMMISSION OF OHIO, | : |                           |
|                                | : |                           |
| APPELLEES.                     | : |                           |

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MERIT BRIEF OF APPELLEE EMMA R. JOHNSON

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## INTRODUCTION

Respondent, Emma Johnson, requests the denial of Relator, Ford Motor Company's (Ford), request for a writ of mandamus asking the Industrial Commission (Commission) to vacate its order granting permanent total disability (PTD). Respondent asserts that the Commission relied on "some evidence" to support a finding of permanent total disability such that Ford's arguments have no merit.

The Commission's reliance on two medical reports as the basis for its determination that Ms. Johnson is PTD based on her allowed conditions demonstrates Relator's mandamus appeal must be denied. Ford's assertion that the SHO improperly relied on flawed medical reports in granting PTD is not grounds for mandamus as the reports were unambiguous and proper in form.

As the Commission relied on some evidence to find Respondent PTD no other issues need be considered. However, Ford also sets forth a meritless argument that an award of Social Security Disability (SSDI) prior to the filing of Ms. Johnson's request for PTD prevents an award of PTD. This argument cannot be accepted, as the decision of an administrative law judge (ALJ) has no relevance to a workers' compensation claim. Moreover, Ford's argument regarding the ALJ decision – that the ALJ found disability solely on conditions non-allowed in the claim – is incorrect, as the ALJ clearly relied on conditions which are allowed in Respondent's workers' compensation claim. Accordingly, Relator's request for a writ of mandamus must be denied.

One additional issue which has become relevant is the lower court's decision to order the Commission to alter the start date for PTD from the date of Dr. Lewis' report to May 4, 2005, the date of Dr. Lutz report. Respondent asserts that in its review of Dr. Lewis' report it will find that Dr. Lewis' report is clearly some evidence to support PTD, such that changing the start date was

inappropriate. If the Court does find that Dr. Lewis' report constitutes "some evidence" then the start date applied by the Commission should be upheld.

## **II. STATEMENT OF FACTS**

Respondent, Emma Johnson, suffered three industrial injuries germane to this proceeding. On June 5, 1989, Ms. Johnson suffered a right wrist sprain on the job, allowed as part of claim L224950-22. *Stip Rec* at 52. Ms. Johnson later developed left supraspinatus tendonitis and left lateral epicondylitis due to a 1994 work-related injury, allowed as claim L255437-22. *Id* at 54. Ms. Johnson suffered her most serious injury when she ran into transmission racks while driving a hi-lo machine. This injury led to claim 98-417901, which is allowed for lumbar strain, and disc herniations at L4-5 and L5-1. *Id* at 52.

In February 2003, Ms. Johnson underwent a two-level posterior lumbar interbody fusion with threaded cages in February 2003. *Id* at 65. Soon after the fusion surgery, Ms. Johnson developed severe neuropathic pain in her lower extremities, including numbness and parasthesia. Ms. Johnson filed an application for PTD on January 26, 2005. *Id* at 56.

This application for PTD was supported by treating physician Dr. H. Paul Lewis and the BWC state medical examiner, Dr. James Lutz. *Id* at 42, 65. The only physician to find Ms. Johnson capable of work following the fusion surgery was Dr. Arthur Hughes, who conducted an exam on behalf of the employer. *Id* at 46. The application for PTD was heard by an SHO on February 16, 2005. *Id* at 3. The SHO granted the application based on the medical reports of Dr. Lewis and Dr. Lutz. Relator's request for reconsideration was denied by the commission. *Id* at 1.

In an entirely separate proceeding, Ford approved a disability retirement for Ms. Johnson based on a January 21, 2000 decision granting SSDI. *Id* at 94. The ALJ’s decision references a 1998 MRI showing disc herniations at L5-S1 and L4-5, an opinion of Dr. Stern opining that the two disc herniations were directly related to her 1998 work injury, and a medical examination of Dr. Wachendorf, who found chronic back pain related to herniated discs at L4-5 and L5-S1. *Id* at 75-76. The decision briefly mentions degenerative disc disease (DDD) in one sentence; although that condition is not referenced in any of the medical evidence cited in the decision. The ALJ concludes that the restrictions agreed on by both physicians were based on “objective medical evidence such as the MRI showing a herniated disc at L4-5 and L5-S1, and thus entitled to controlling weight.” *Id*.

### **III. LAW AND ARGUMENT**

A writ of mandamus is an extraordinary remedy. *State ex rel. Haylett v. Ohio Bureau of Workers’ Comp.* (1999), 87 Ohio St.3d 325,334. A writ of mandamus may only be granted when Relator establishes: (1) a clear legal right to the requested relief; (2) a corresponding clear legal duty on the part of the commission; and (3) the lack of an adequate remedy in the ordinary course of the law. *State ex rel. Moore v. Malone* (2002), 96 Ohio St.3d 417, 420. To receive a writ of mandamus, Ford must show that the commission abused its discretion by issuing an order unsupported by any evidence in the administrative record. *State ex rel. Elliott v. Indus. Comm* (1986), 26 Ohio St.3d 76, 78-79. A mere error in judgment will not suffice. *Id*.

The commission possesses the sole right to evaluate the evidentiary weight and credibility of a claim. *State ex rel. Teece v. Indus. Comm.* (1981), 68 Ohio St.2d 165. A commission decision must merely be supported by “some evidence,” even if the evidence on the contrary is of far greater quality. *State ex rel. Pass v. C.S.T. Extraction Co.* (1996), 74 Ohio St.3d 373, 376. The

court must presume the validity and good faith of commission orders unless proven otherwise; as long as “some evidence” supports the commission’s findings, its orders must not be overturned. *State ex rel. Stephenson v. Indus. Comm.* (1987), 31 Ohio St.3d 167, 170.

In the case at bar, the Commission clearly relied upon “some evidence” – the reports of Dr. Lewis and Dr. Lutz – to support its PTD finding. As such, there is no grounds for any writ of mandamus. Despite this fact, Ford has set forth two arguments, neither of which merit setting aside the Commission’s order. First, Ford argues that a prior decision regarding SSDI barred the Commission from finding Ms. Johnson PTD. Ford’s argument clearly cannot be accepted as it asks the Court to order that the Commission cede the authority it alone possesses for determining permanent disability. Ford’s arguments are also factually misguided, as they assert that SSDI was granted exclusively on conditions unrelated to the workers’ compensation case, when that is clearly not the case (in fact, the Commission addressed and rejected Ford’s argument). Ford also sets forth a second, equally unpersuasive argument, asserting that the medical reports relied upon by the Commission are not some evidence. The flaw in this argument, in which Ford asserts that the medical reports base their conclusions on non-allowed conditions, is simply not true. Both physicians who found Ms. Johnson PTD based their opinions on the allowed conditions only. Consequently, the Commission’s reliance on the reports is without error. Clearly, Ford has no grounds for mandamus relief.

**Proposition of Law No. I:**

**THE INDUSTRIAL COMMISSION RELIED UPON “SOME EVIDENCE” WHEN IT AWARDED PERMANENT TOTAL DISABILITY COMPENSATION TO EMMA JOHNSON.**

In finding Respondent PTD, the Commission relied upon the medical opinions of Dr. Lewis and Dr. Lutz. *Id.* at 3-5. The Commission determined that both of these physicians found Ms.

Johnson PTD based upon the allowed conditions of her claims. *Id.* The opinions of Dr. Lewis and Dr. Lutz are clearly “some evidence” of PTD which the Commission could rely upon to find PTD, and, based on this appropriate reliance alone, Relator’s request for a writ of mandamus should be denied.

**Proposition of Law No. II:**

**THE DECISION OF AN ADMINISTRATIVE LAW JUDGE REGARDING SOCIAL SECURITY DISABILITY IS IRRELEVANT AND NOT GROUNDS FOR MANDAMUS WHERE THE INDUSTRIAL COMMISSION FINDS “SOME EVIDENCE” SUPPORTING PTD.**

Despite the clear existence of “some evidence” supporting the granting of PTD, Relator accuses the Commission of an abuse of discretion based on issues which are peripheral at best. Specifically, Ford asserts that a prior finding of SSDI barred the Commission from finding Ms. Johnson PTD. This decision is a curious challenge of the Commission’s discretion as: 1) an ALJ decision has no impact on a workers’ compensation PTD determination (which is judged on its own merits); and, 2) the Commission specifically addressed the ALJ decision in its order and appropriately rejected the very same argument Relator attempts to make on mandamus.

- 1. An ALJ decision is not evidence which the Commission must consider in determining permanent total disability.**

Before even considering the Commission’s analysis of the ALJ decision, it is important for the Court to recognize that the Commission’s finding of PTD based on the reports of Dr. Lewis and Dr. Lutz should render this issue irrelevant. As the Commission specifically determined that Dr. Lewis and Dr. Lutz found Ms. Johnson PTD based solely on allowed conditions, the Commission met its burden of relying on some evidence to support a finding of PTD. There is no requirement that the Commission consider the independent findings of an ALJ, who is a separate determiner of fact in a different system. Yet Ford requests that the Commission cede its

discretionary authority to the ALJ in this case. As the Commission has sole discretion to determine the validity of PTD claims, Ford's request is inappropriate and must be rejected.

**2. Even if the ALJ decision has evidentiary value, the ALJ decision in this case demonstrates nothing which could demonstrate an abuse of discretion.**

Even if the ALJ decision were relevant, the Commission appropriately dealt with the decision in its order. To fully understand this issue, it is important to recognize that Relator's claims regarding relevance of the ALJ's findings in this case are misleading. Ford asserts, based on a misrepresentation of *State ex rel. Consolidation Coal Co. v. Yance*, (1992) 63 Ohio St.3d 460, 461, that the ALJ's granting of SSDI demonstrates a voluntarily removal from the workplace and prevents subsequent award of PTD. What *Consolidation Coal* actually holds is "if [a] claimant voluntarily removed himself from the workplace for reasons *unrelated* to his industrial condition, he is ineligible for permanent total disability." *Id.* The case has nothing to do with an ALJ decision. The true holding of *Consolidation Coal* demonstrates that if the Commission finds that an individual's departure from the workplace relates to the allowed conditions of a workplace injury, it is not a voluntary abandonment.

Consequently, the question is how the Commission handled the issue of whether disability was caused by the allowed conditions. Fortunately, in the case at bar, the Commission specifically addressed the issue. The Commission's order demonstrates that it considered Ford's argument and that it "rejects the employer's argument that the injured worker was removed from the workforce due to non-allowed conditions." *Stip.* at 4. Thereafter, the Commission concluded that "based solely on the allowed conditions in the claim, without consideration of non-allowed conditions, that the injured worker is permanently and totally disabled and unable to engage in any type of sustained remunerative employment." *Id.* at 5. The Commission appropriately

considered Ford's argument about non-allowed conditions, and used its discretionary authority to weigh the evidence and reject Relator's position. No abuse of discretion is demonstrated by such process.

While this discussion alone fulfilled the Commission's obligation, the Commission went even further than it needed to by specifically rejecting Ford's claims that the ALJ based its SSDI award solely on non-allowed conditions. *Id.* at 4. In fact, the Commission found that ALJ's decision was based largely upon the allowed conditons and supported its finding by citing to portions of the ALJ order. *Id.* As such, the Commission rejected Relator's argument that the ALJ's decision demonstrates a voluntarily departure from the workplace based solely on non-allowed conditions. *Id.* The Commission weighed the language of the ALJ opinion on SSDI and determined that its consideration of the allowed conditions demonstrated that Ms. Johnson's departure from the work force related to the conditions resulting from her work injury. As it was within the Commission's decision making authority to reach such a conclusion based on this evidence, Respondent's argument has no merit, and a writ of mandamus on this issue would be inappropriate.

**Proposition of Law No. III:**

**THE MEDICAL REPORTS RELIED UPON BY THE INDUSTRIAL COMMISSION CONSTITUTE "SOME EVIDENCE" SUPPORTING PERMANENT TOTAL DISABILITY.**

Ford follows up its arguments about the SSDI decision by desperately asserting that the two reports relied upon by the Commission were fatally flawed. Ford argues that the report of Dr. Lewis fails to make an adequate determination as to the permanency of Ms. Johnson's condition, and that Dr. Lutz relied on non-allowed conditions in making his determination as to the totality

of Ms. Johnson's conditions. In truth, neither report is flawed. Therefore, Ford's request for a writ of mandamus must be denied.

**1. Dr. Lutz's report is "some evidence" supporting the granting of Permanent Total Disability.**

Ford argues that the report of Dr. Lutz is flawed because he acknowledges non-allowed conditions and fails to recognize other non-allowed conditions. *Stip Rec* at 42. Ford's argument disproves itself. Ford claims the report is flawed because Dr. Lutz examined the right wrist and discussed non-allowed carpal tunnel syndrome as a "disability factor." *Id* at 42. Then Ford argues in the same breath that Dr. Lutz's report is flawed because he fails to take into account or examine on the non-allowed condition of degenerative disc disease of the lumbar spine. *Id* at 43. Therefore, Ford would ask you to find the report of Dr. Lutz flawed no matter how he handles non-allowed conditions, whether he acknowledges or fails to acknowledge, discusses or does not discuss, examines or does not examine. This double standard is meant to obscure the simple fact that Dr. Lutz handled the so-called non-allowed condition in exactly the appropriate manner.

Nevertheless, Respondent will reply first to Ford's assertions regarding Dr. Lutz's lack of reference to degenerative disc disease because that issue has been clearly determined by the Ohio Supreme Court. The Court held that "a doctor is not required to expressly state that a nonallowed condition was not factored into his/her impairment assessment. It is enough for the doctor to attribute the impairment to the allowed conditions." *State ex rel. Eaton v. Indus. Comm.* (1997), 80 Ohio St.3d 352, 355 686 N.E.2d 507. The Court has even specifically held that a report is "some evidence" supporting PTD when it does not discuss a non-allowed degenerative back condition. *State ex rel. Eaton v. Indus. Comm.* (1997), 687 N.E.2d 444, 80 Ohio St.3d 479, 1997-Ohio-289. The two *Eaton* cases demonstrate that Relator's argument regarding Dr. Lutz report is invalid. The Court has clearly held that a physician need not discuss

non-allowed conditions if he finds permanent total disability based on the allowed conditions of a claim. As Dr. Lutz based his opinion of permanent disability on the allowed conditions, the Commission's reliance on Dr. Lutz was appropriate.

Ford's argument regarding the non-allowed conditions Dr. Lutz did address is also flawed. In regard to his discussion of the non-allowed right carpal tunnel system, Dr. Lutz was once again consistent with the law, as he goes out of its way to make it clear that he has differentiated between problems related to Ms. Johnson's allowed arm conditions and her non-allowed carpal tunnel.

For instance, Dr. Lutz writes Ms. Johnson "complains of intermittent, but daily right wrist pain . . . although this is probably related to her non-allowed right carpal tunnel syndrome." *Id* at 42. Ford argues that this acknowledgment of right carpal tunnel syndrome shows that Ms. Johnson was found to be PTD based on non-allowed conditions. But Dr. Lutz clearly distinguished between the disability factors related to the right wrist sprain and those related to the right carpal tunnel syndrome because Dr. Lutz went on to award 0% impairment for the "range of motion, neurosensory, neuromotor, and specific disorders" related to the right wrist sprain. *Id* at 44. The 0% impairment related to the wrist shows that Dr. Lutz only made his disability findings regarding the right wrist based on the allowed conditions in the claim; he clearly excluded any factors related to the non-allowed carpal tunnel syndrome. As his report demonstrates, Dr. Lutz went out of his way to make sure he did not ascribe disability to any condition which was not allowed in the claim.

Dr. Lutz made a proper disability finding regarding each allowed condition in the claim and also took the time to ensure that he didn't improperly take into account non-allowed disability factors. *Id* at 44. This is exactly the proper examination procedure, and the SHO correctly found

“that Dr. Lutz properly confined himself to an opinion with regard only to the allowed conditions in the claim and concluded that the injured worker was unable to engage in physical work activity.” *Id* at 3. *Staff Hearing Officer Kalafut was not the only hearing officer to find Dr. Lutz’s report to be proper and acceptable. Staff Hearing Officer Crum also found that, “the report of Dr. Lutz is not flawed in any way that would require clarification. The Staff Hearing Officer further finds that the opinion of Dr. Lutz is clear, is not ambiguous and is supported by adequate findings.” Id* at 9. *The SHO did not abuse his discretion in relying on the report Dr. Lutz and the writ of mandamus must be denied.*

**2. Dr. Lewis’ report is “some evidence” supporting the granting of Permanent Total Disability.**

Ford also argues that the report of Dr. Lewis, the treating physician, is flawed because Dr. Lewis opines that Ms. Johnson’s “prognosis is *guarded* until we see how she responds to the prescribed treatment.” *Id* at 66. Ford asserts that this statement indicates that Dr. Lewis’s opinion lacks a finding of permanency. This assertion not only misinterprets the word “guarded” but also ignores Dr. Lewis clear assertion of PTD. The negative connotations of the term “guarded” indicate that Dr. Lewis has no expectation of significant recovery. The term *guarded* clearly shows that Dr. Lewis has no expectation that Ms. Johnson’s condition will improve to a point where she is able to perform sustained remunerative employment. This point is made clear by Dr. Lewis’s opinion regarding PTD. He states that Ms. Johnson “is totally disabled from performing any substantial remunerative employment.” *Stip Rec* at 66. His language demonstrates comprehension of the legal standard required for the granting of PTD. It was within the Commission’s discretion to determine that Dr. Lewis appropriately supported his assertion that Ms. Johnson was PTD. The fact that Relator does not understand the language used by Dr. Lewis is no grounds for overturning the Commission’s decision.

As long as **either** Dr. Lewis's report or Dr. Lutz's report is acceptable, then the commission relied on "some evidence" and the writ of mandamus must be denied. Ford must prove that both reports are flawed. Ford has not proven that either report is flawed, therefore, there is no abuse of discretion and the writ of mandamus must be denied.

**Proposition of Law No. IV:**

**IN DESIGNATING A START DATE FOR ITS PERMANENT TOTAL DISABILITY AWARD, THE INDUSTRIAL COMMISSION RELIED ON "SOME EVIDENCE".**

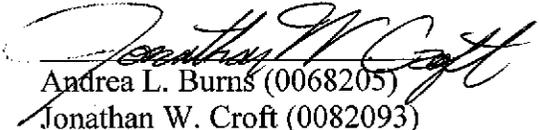
The Staff Hearing Officer granted PTD from the date January 6, 2004. This date stems from the report of H. Paul Lewis, M.D. In that report, Dr. Lewis states within reasonable medical certainty that Ms. Johnson "is totally disabled from performing any substantial remunerative employment." That report was the basis for filing PTD and the basis for the Commission's decision to commence the PTD award as of January 6, 2004. The SHO could legitimately interpret the report of Dr. Lewis and the statement as to Ms. Johnson's being "totally disabled" to mean there has been a treatment plateau. Dr. Lewis had examined Ms. Johnson on numerous occasions over the course of several years and while it is true that Dr. Lewis stated that upon last seeing her, he had felt that her pain would resolve with time and that she had been recovering satisfactorily, he had already stated his belief that Ms. Johnson had reached maximum medical improvement. Dr. Lewis states unequivocally that Ms. Johnson has reached maximum medical improvement in two C84 forms dated November 25 and November 26, 2003. Dr. Lewis even specifies the date on which he felt Ms. Johnson had reached a treatment plateau, that being November 19, 2003. Ms. Johnson was discharged from physical therapy due to a lack of progress, as shown in the progress report from NovaCare Rehabilitation Center from October 1, 2003. The therapy discharge was approved and signed off on by Dr. Lewis. Ms. Johnson's

temporary total compensation was terminated by the self-insured employer on September 28, 2003.

The SHO could legitimately rely on not only the report from January 6, 2004, in which Dr. Lewis states that the patient is totally disabled from performing any substantial remunerative employment but he could certainly consider the previous reports from Dr. Lewis which stated without equivocation that he felt that Ms. Johnson had reached maximum medical improvement. The Commission's decision to base the start date on the opinion of Dr. Lewis was within its discretion as fact finder.

#### **IV. CONCLUSION**

A writ of mandamus is an extraordinary legal remedy and Ford fails to give good cause for granting such an extraordinary remedy. Dr. Lewis' and Dr. Lutz's reports clearly demonstrate that the Commission had "some evidence" that Ms. Johnson is permanently and totally disabled as a result of her allowed conditions. Given that fact, Ford's arguments have no merit. As such, Relator's request for a writ of mandamus must be denied.

  
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and accurate copy of the foregoing has been served upon the following parties via regular U.S. Mail, postage prepaid this 4<sup>th</sup> day of May, 2009:

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