

ORIGINAL

In the
Supreme Court of Ohio

STATE OF OHIO, ex rel.	:	Case No. 09-0659
JEFF T. ROHR,	:	
	:	
Relator,	:	
	:	
vs.	:	
	:	
INDUSTRIAL COMMISSION OF OHIO,	:	
et al.,	:	
	:	
Respondents.	:	

**MOTION FOR JUDGMENT ON THE PLEADINGS OF
RESPONDENT, INDUSTRIAL COMMISSION OF OHIO**

Respondent, the Industrial Commission of Ohio (“commission”) moves this Court for judgment on the pleadings under Civ.R. 12(C) for failure to state a claim upon which relief can be granted. This motion is more fully explained in the accompanying memorandum.

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MEMORANDUM IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS

INTRODUCTION

Relator, Jeff Rohr ("Rohr"), seeks an extraordinary writ of prohibition to negate an order of the commission suspending his permanent total disability ("PTD") compensation because of his refusal to attend an independent medical examination ("IME"). Because the commission was authorized by statute to order Rohr to attend the IME, and permitted to suspend compensation for failure to attend, he cannot prove entitlement to the writ of prohibition. Moreover, Rohr has a mandamus case pending before the 10th District Court of Appeals to determine the commission's authority to compel the IME. Even if the commission erroneously ordered Rohr to attend the exam, a writ of prohibition is not warranted because the commission acted within its power to suspend compensation.

Additionally, Rohr has an adequate remedy that does not involve prohibition. He has the option to proceed with the pending mandamus case to obtain a decision on the commission's authority to compel a new IME or file a separate mandamus case determining the commission's authority to suspend compensation. He need not file for prohibition to obtain the outcome he seeks.

After presuming the truth of all material factual allegations of the complaint, and making all reasonable inferences in Rohr's favor, Rohr still is not entitled to a writ of prohibition. Thus, the commission respectfully requests this Court grant its motion for judgment on the pleadings.

STATEMENT OF FACTS AND STATEMENT OF THE CASE

This is an original action in prohibition brought by Rohr to challenge the commission's authority to suspend his PTD compensation after he refused to attend a commission ordered IME. Rohr presently has an action pending before the 10th District Court of Appeals, captioned

State ex rel. Jeff Rohr v. Indus. Comm., Franklin App. No 09AP-094, in which he has requested a writ of mandamus to order the commission to negate its order invoking continuing jurisdiction. In that case, the commission granted the request of Respondent, Gerstenslager Company (“Gerstenslager”), to order Rohr to attend an IME addressing a psychological issue, following new evidence of improvement to Rohr’s psychological condition.

Rohr’s workers’ compensation claim has been allowed for lumbar strain/sprain, herniated nucleus pulposus at L5-S1, seizure disorder, major depressive episode, recurrent, moderate severity, dysthymic disorder, and pain disorder due to a combination of medical and psychological factors. (Complaint at ¶3).

In November 2004, a Staff Hearing Officer (“SHO”) awarded Rohr PTD compensation. (Complaint at ¶5). In early 2008, Gerstenslager filed a motion requesting the commission to invoke continuing jurisdiction and order Rohr to appear for two IMEs, one with a medical doctor and one with a psychiatrist or neurologist. (Complaint at ¶6). A hearing was held before an SHO, and Gerstenslager’s motion was granted, in part. Having met its burden to prove that the commission’s exercise of continuing jurisdiction was warranted, Gerstenslager was permitted to schedule an IME with a psychiatrist of its choosing. (Complaint at ¶8). Rohr’s subsequent request for reconsideration was denied. (Complaint at ¶9).

Rohr filed a mandamus action, on January 26, 2009, challenging the commission’s finding that he must undergo a new psychological IME, and that action has been briefed and is pending before a magistrate of the 10th Appellate District. (Complaint at ¶10).

Gerstenslager moved to suspend Rohr’s claim after he failed to submit to the exam, and the commission granted this motion by issuing a compliance letter suspending the claim’s activity. (Complaint at ¶¶11-12). Following Rohr’s objection to the compliance letter, the

commission held a hearing on the matter during which it found that only the payment of PTD compensation was suspended until Rohr attends the IME. (Complaint at ¶¶13-14). Rohr then filed this action.

LAW AND ARGUMENT

I. The commission is entitled to judgment on the pleadings because Rohr has alleged no facts proving that he is entitled to a writ of prohibition.

“Prohibition is an extraordinary remedy which is customarily granted with caution and restraint, and is issued only in cases of necessity arising from the inadequacy of other remedies.” *State ex rel. Henry v. Britt* (1981), 67 Ohio St.2d 71, 73. To prove his entitlement to the writ, Rohr must establish that (1) the commission is about to exercise quasi-judicial power, (2) the commission’s action is not authorized by law, and (3) denying the writ will result in harm to Rohr for which there is no adequate remedy at law. See *Tatman v. Fairfield County Bd. of Elections*, 102 Ohio St.3d 425, 2004-Ohio-3701.

Rohr cannot meet his burden for the following reasons. Primarily, Rohr has an adequate remedy because the mandamus action regarding the validity of the commission’s actions in ordering the IME is currently pending before the appellate court, and he continues to receive medical treatment for the allowed conditions in his claim. Furthermore, he has the option of filing a mandamus case on the issue before this Court, rather than requesting prohibition. Additionally, Rohr cannot prove that the commission is going to exercise its quasi-judicial power, because it has *already exercised* its power by suspending Rohr’s PTD compensation. Moreover, the commission’s actions are statutorily authorized. Even if it is irrelevant that the commission has already acted, prohibition is not warranted as retrospective relief where the commission has acted within its jurisdiction.

Judgment on the pleadings is appropriate in this case because it appears beyond doubt that after presuming the truth of all material factual allegations of the complaint, and making all reasonable inferences in Rohr's favor, Rohr is not entitled to a writ of prohibition. *State ex rel. Beane v. City of Dayton*, 112 Ohio St.3d 553, 2007-Ohio-811.

A. The commission's action was authorized by law.

Prohibition is not appropriate in this case as it "tests and determines 'solely and only' the subject matter jurisdiction of the inferior tribunal." *State ex rel. Eaton Corp. v. Lancaster*, (1988), 40 Ohio St.3d 404, 410 (citing *State ex rel. Staton, v. Common Pleas Court* (1965), 5 Ohio St.2d 17, 21). "Where the tribunal has such jurisdiction, prohibition is not available to prevent or correct an erroneous decision. It is also not a remedy for an abuse of discretion." *Id.* at 410 (citations omitted).

Here, Rohr is not entitled to a writ because the commission can invoke continuing jurisdiction over its orders. In invoking its continuing jurisdiction here, the commission ordered Rohr to attend an IME due to new and changed circumstances. Following Gerstenslager's motion to suspend the activity in Rohr's claim, the commission issued a compliance letter suspending payments for Rohr's failure to attend the scheduled IME. Rohr objected to the compliance letter, and following a hearing on the matter a week later, the commission suspended Rohr's PTD compensation until Rohr submits to a psychological exam.

When Rohr refused to submit to the exam, the commission suspended compensation, as authorized by statute. R.C. 4123.651(A). Even if Rohr is correct that his compensation should not have been suspended, the writ of prohibition is not warranted because the commission acted well within its jurisdiction.

1. **The commission is statutorily authorized to suspend compensation until Rohr submits to the IME.**

R.C. 4123.58 establishes a claimant's right to on-going compensation once permanent total disability is found. However, that finding is subject to the commission's continuing jurisdiction under R.C. 4123.52. *State ex rel. Didiano v. Beshara* (1992), 65 Ohio St.3d 256, 257; *State ex rel. Brewer v. Indus. Comm.* (1984), 12 Ohio St.3d 23. The statute provides that the commission's jurisdiction "over each case shall be continuing, and the commission may make such modification or change with respect to former findings or orders with respect thereto, as, in its opinion is justified." R.C. 4123.52.

This Court has recognized that the commission is vested with broad, although not unlimited, authority to exercise this continuing jurisdiction. *State ex rel. Gobich v. Indus. Comm.*, 103 Ohio St.3d 585, 2004-Ohio-5990. One ground upon which continuing jurisdiction may be premised is the presence of new and changed circumstances. *Id.* A new circumstance is defined as "a change since the initial award that merits re-examination of the earlier decision." *State ex rel. Smothers v. Mihm* (1994), 69 Ohio St.3d 566, 568.

The 2004 order deeming Rohr totally disabled notified him that his PTD status was subject to change, as PTD compensation was "to continue without suspension unless future acts or circumstances should warrant the stopping of the award." (November 16, 2004 commission order). In 2008, due to new and changed circumstances, the commission ordered Rohr to attend a new IME. Again, whether this action is within the commission's discretion is pending before the appellate court, however it is well settled law that the commission is permitted, and sometimes required, to suspend compensation where a claimant refuses to attend an IME. *State ex rel. AT&T Technologies, Inc. v. Felty* (1993), 67 Ohio St.3d 118; *State ex rel. Groves v. Sysco Corp.*, Franklin App. No 04AP-284, 2005-Ohio-197.

R.C. 4123.651(A) permits an employer to request that a claimant attend an IME. Should the claimant fail to attend the IME, the statute provides that:

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.

R.C. 4123.651(C) (emphasis added). This section covers those medical exams initiated by the employer.

Similarly, when the Bureau of Workers' Compensation, or the commission, requests a claimant attend an IME, and the claimant refuses, suspension of compensation is warranted during the period in which the claimant refuses to attend the exam. R.C. 4123.53. Under this statute, the commission created a rule requiring suspension of the claimant's claim for compensation when the claimant refuses to submit to an exam. Ohio Adm.Code 4121-2-12.

- 2. The commission is authorized to suspend compensation for Rohr's failure to attend the IME even if the validity of the order compelling Rohr to attend the IME is being judicially challenged.**

This Court has previously stated that R.C. 42123.53 "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." *State ex rel. Molden v. Callander Cleaners Co.* (1983), 6 Ohio St.3d 292, 294. In *Molden*, the claimant appealed an order to the regional board adjudicating her entitlement to temporary total disability compensation. While that appeal was pending, the commission ordered her to attend an IME, but she refused, citing the commission's lack of jurisdiction due to the appeal. The

commission suspended her compensation until she appeared at the exam. In finding no abuse of discretion, this Court stated that “the statute contains no reference whatsoever that an appeal from an order of a district hearing officer operates to suspend the commission’s jurisdiction to order claimants to submit to medical examinations.” *Id.*

Contrary to Rohr’s assertions, the commission retains jurisdiction over his claim despite the mandamus case pending before the 10th Appellate District, even if it does not retain jurisdiction over the particular order issued requiring Rohr to attend the IME. *State ex rel. Rodriguez v. Indus. Comm.* (1993), 67 Ohio St.3d 210. In *Rodriguez*, in recognizing that the commission retains continuing jurisdiction over its orders, the Court noted that this jurisdiction is limited substantively and temporally. *Id.* at 213. While the commission retains jurisdiction over nonappealable orders for a reasonable period of time, this Court has found that “‘a reasonable period of time’ cannot extend beyond the filing of a mandamus complaint.” *Id.* at 213 (citing *State ex rel. Gatlin v. Yellow Freight Systems, Inc.* (1985), 18 Ohio St.3d 246).

If the commission were to find that it erred in ordering Rohr to attend the IME, it lacks jurisdiction to correct that order while the mandamus case is pending. However, according to *Molden*, the commission is permitted to suspend Rohr’s compensation for his failure to attend the IME, even while the order is being judicially challenged. Rohr’s allegation that the commission lacks the authority to suspend the claim, citing that is not yet ripe, ignores the holding in *Molden*. Moreover, prohibition is not the proper remedy even if the commission erred in suspending compensation. *State ex rel. Eaton Corp.*, *supra* at 410.

B. Rohr has an adequate remedy as his challenge to the commission’s exercise of continuing jurisdiction is currently pending before the 10th Appellate District.

Rohr is not without a remedy. Rohr’s request for a writ of prohibition stems from his refusal to attend a previously ordered IME. Whether the commission was correct in ordering

Rohr to attend the IME is still being adjudicated. However, even if Rohr is successful in his pursuit of a writ of mandamus, and the court finds that the commission abused its discretion in ordering him to attend an IME, he cannot flagrantly refuse to submit to an IME without consequence. Moreover, Rohr could file a separate mandamus action challenging the suspension of his compensation, as Rohr has stated in his complaint. (Complaint ¶18).

In *State ex rel. Spohn v. Indus. Comm.*, 115 Ohio St.3d 329, 2007-Ohio-5027, this Court found no abuse of discretion where the commission reopened the issue of a claimant's eligibility for PTD compensation based on new and changed circumstances. The employer requested that the claimant undergo a new IME following surveillance it performed of the claimant. This Court reiterated that a medical exam going to the extent of the claimant's disability necessarily reopened the claimant's entitlement to PTD compensation. *Id.* at 333 (citing to *State ex rel. Smothers v. Mihm* (1994), 69 Ohio St.3d 566). Referencing *Spohn* in his complaint, Rohr complains that his submission to the IME necessarily reopens his entitlement to PTD compensation; however, his fear of losing PTD compensation does not warrant his refusal to attend the IME. In fact, Rohr's argument that his attendance at the IME will reopen entitlement to PTD compensation is immaterial to this action.

Even if Rohr refuses to submit to a medical examination until he exhausts his appeals in the mandamus case, Rohr continues to receive payment for medical bills stemming from the allowed conditions in his claim. It is solely the compensation that is suspended. (Complaint at ¶¶13-14). If Rohr submits to the IME, his compensation will be reinstated, and he may receive retroactive compensation. *State ex rel. Apcompower, Inc. v. Indus. Comm.*, 108 Ohio St.3d 196, 2006-Ohio-659.

C. The commission has already exercised its quasi-judicial power.

Rohr is unable to prove that the commission is “about to” exercise its quasi-judicial power for the reason that it has already acted by issuing a final order suspending PTD compensation. A writ of prohibition is meant to prevent a tribunal from exceeding its jurisdiction. *State ex rel. Moss v. Clair* (1947), 148 Ohio St. 642, 646. “Being preventive rather than corrective it may only be invoked to prevent the commission of a future act and not to undo an act which is already performed.” *Id.* (citing to *Marsh v. Goldthorpe, Mayor* (1930), 123 Ohio St. 103). Although the commission’s action could qualify as a quasi-judicial power because it has “the power to hear and determine controversies between the public and individuals that require a hearing resembling a judicial trial,” the commission’s action was within its power and, therefore, Rohr is not entitled to a writ of prohibition. *State ex rel. Wright v. Ohio Bur. of Motor Vehicles* (1999), 87 Ohio St.3d 184, 186.

Notably, Rohr’s complaint for a writ of prohibition does not assert that the commission acted in a quasi-judicial nature, nor does it assert that the commission is about to exercise its quasi-judicial power. For that reason alone, judgment on the pleadings is warranted. Even if Rohr is able to show that the commission is going to act quasi-judicially, he is unable to prove that the commission acted or will act outside the scope of its jurisdiction.

CONCLUSION

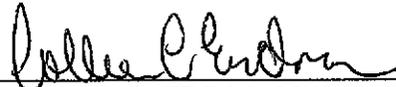
Judgment on the pleadings in favor of Respondents is appropriate because Rohr has not asserted a set of facts that establishes an entitlement to a writ of prohibition. Even presuming the truth of all material factual allegations of the complaint, and making all reasonable inferences in Rohr’s favor, Rohr is not entitled to a writ of prohibition.

The commission is not about to act in a quasi-judicial manner, as the commission has already acted. Even if it is immaterial that the commission has already acted, the commission’s

exercise of power was valid, as it followed the statutes addressing suspension of PTD compensation. Lastly, Rohr continues to receive medical benefits, and his petition for a writ of mandamus on the IME issue is pending before the appellate court. Accordingly, Rohr has failed to establish an entitlement to a writ of prohibition, and judgment on the pleadings is warranted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Motion for Judgment on the Pleadings of Respondent, Industrial Commission of Ohio, was sent by regular U.S. mail, postage prepaid, on this 5th day of May, 2009 to:

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