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INTRODUCTION

Appellant Ford Motor Company, Sharonville Transmission Plant (hereinafter "Ford") hereby submits its Reply Brief in response to the Brief that was filed on May 4, 2009 by Appellee Industrial Commission of Ohio (hereinafter the "Commission") and the Brief that was filed on May 5, 2009 by Appellee Emma R. Johnson (hereinafter "Claimant").

The Commission and Claimant have not provided any argument which would refute Ford's contention that the decision of the Tenth District Court of Appeals should be reversed and a writ of mandamus should be issued denying Claimant's Application for Permanent Total Disability.

ARGUMENT

Proposition of Law No. I:

The Industrial Commission Abused Its Discretion When It Awarded Permanent Total Disability Compensation Where The Claimant Was Previously Found Permanently Totally Disabled Due To Non-Allowed Medical Conditions.

All parties to this action agree permanent total disability compensation is only to be awarded to those individuals permanently unable to perform any sustained remunerative employment as a result of the medical conditions allowed in their workers' compensation claims. As set forth in Ford's Merit Brief, the Ohio Supreme Court has emphasized that "a finding of permanent total disability requires a claimant to prove that his or her inability to perform sustained remunerative employment arises exclusively from the claim's allowed conditions." *State ex rel. Wean United, Inc. v. Indus. Comm.* (1993), 66 Ohio St.3d 272, 274, emphasis in original. Therefore, the issue before this Court is one of causal relationship, specifically whether it was the allowed conditions in Claimant's workers' compensation claim that caused her to be permanently removed from the labor market. The critical piece of evidence relevant to

answering this question is the October 13, 2001 decision of the commission denying Claimant's first motion for permanent total disability.

Neither the Commission nor the Claimant elected to challenge the uncontroverted facts set forth in Ford's Merit Brief:

1. January 20, 2000, Social Security found Claimant permanently totally disabled due to all of her medical conditions and impairments effective May 1998.

2. There is no evidence Claimant's non-industrial medical conditions (those conditions not allowed in her claims) have improved since then.

3. As of October 13, 2001, when considering only the medical conditions allowed in her claims, Claimant was capable of sustained, remunerative employment and actually was able to return to her former position of employment. Claimant was not totally disabled due to her allowed conditions.

To these facts the Claimant adds that in 2003, Claimant underwent lumbar fusion surgery and thereafter developed severe neuropathic pain in her lower extremities, including numbness and paresthesia, leading to the filing of Claimant's second application for PTD on January 27, 2004. *See* Claimant's Brief at p. 4, Stipulated Evidence (Stip. Evid.) at p. 65, Second Supplement (S.S.) at 15. To the extent Claimant alleges a worsening of her allowed conditions after the commission ruled they were non-disabling in 2001, this cannot be the basis for a PTD award. A claimant removed from the workforce for reasons unrelated to the allowed conditions is ineligible for permanent total disability "even if his condition later deteriorates to the point where the claimant would be medically unable to work." *State ex rel. Consolidation Coal Co. v. Yance* (1992), 63 Ohio St.3d 460, 461-62.

The Claimant, apparently unable to refute Ford's arguments as to the key significance of the October 13, 2001 Industrial Commission decision, makes absolutely no mention of this decision in her Brief. The Commission at page 7 of its Brief, inaccurately summarizes Ford's argument by stating "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 Commission goes on to state that res judicata does not apply if the issue is the claimant's physical condition or disability at two different times. The Commission's argument misses the point. Two different times are not involved here. Ford contends only that the decision of the Industrial Commission ruling Claimant could perform sustained, remunerative employment and even return to her former position of employment as of October 2001 is res judicata. As the Commission has acknowledged, 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. Therefore, the Industrial Commission, when evaluating Claimant's January 2004 application for PTD, was required to conclude that as of October 2001, Claimant's allowed conditions did not prevent her from performing sustained, remunerative employment or her former position of employment. This Court must also accept that conclusion.

The October 12, 2001 decision of the Industrial Commission conclusively establishes that whatever role Claimant's allowed conditions may have played in the granting of Claimant's application for social security disability and in the granting of Claimant's application for Ford disability retirement, that disability was only temporary.

The Commission acknowledges R.C. 4123.58(D) provides permanent total disability shall not be awarded to an employee who voluntarily abandons the workforce for reasons

unrelated to the allowed injury. The Commission also acknowledges that any abandonment of the workforce for reasons other than the allowed conditions is viewed as a “voluntary” abandonment precluding a finding of permanent total disability.

The Commission cites the October 28, 1998 report of Dr. Kreindler as evidence the Claimant was granted Ford retirement benefits based, in part, on allowed conditions. *See* the Commission’s Brief at p. 6. It should first be noted that Ford’s disability retirement is available to any person unable to work regular employment at Ford for a period of five months. This is certainly not the equivalent of an inability to perform all types of sustained, remunerative employment on a permanent basis. More importantly, even if Ford’s grant of disability retirement was based upon allowed conditions, the subsequent decision of the Industrial Commission that as of October 12, 2001, Claimant’s allowed conditions did not prevent her from returning to her former position of employment at Ford compels the conclusion that Dr. Kreindler found only a temporary disability. Indeed, Dr. Kreindler, examining the Claimant only five months post-injury, acknowledged “she may improve with physical therapy, time....” *Stip. Evid* at 95, *S.S.* at 29. It is indisputable that, as of October 12, 2001, Claimant’s condition had improved to the point none of Claimant’s allowed conditions were disabling. As such, this Court is required to find that Claimant’s permanent disability was due to non-allowed medical conditions which rendered her permanently totally disabled as of May 1998, and have done so on a continuous basis since then.

The Commission acknowledges the decision of the ALJ is based, in part, on conditions not allowed in Claimant’s workers compensation claims. *See* the Commission’s Brief at p. 8. Therefore, this decision cannot constitute some evidence on which the Staff Hearing Officer could rely. More importantly, any findings of the ALJ regarding disability due to the allowed

conditions must be considered findings of temporary as opposed to permanent impairment. Indeed, any findings of impairment due to the allowed conditions in 1998, 1999 or 2000 are trumped by the Commission's ruling that as of October 2001 those conditions were not disabling. At best, the findings of any physician who evaluated the allowed conditions prior to October 2001 represent findings of temporary impairment. For this Court to find otherwise requires the Court to overrule the October 12, 2001 decision of the Commission, a decision the Claimant has never challenged via mandamus or otherwise. That decision is not before the Court. It cannot be ignored. It cannot be overturned.

The Commission and Claimant have cited no evidence to suggest Claimant's non-allowed medical conditions improved after May 1998, and it is admitted Claimant has drawn permanent total disability under social security and Ford disability retirement since then on a continuous basis. Although there is great dispute as to the role the allowed conditions might have played in the awarding of those benefits initially, there can be no dispute that the disability from the allowed the conditions was only temporary. The only permanently disabling conditions were non-allowed medical conditions. Thus, the Claimant has been permanently totally disabled due to non-allowed conditions since 1998.

The Commission notes the Court below observed voluntary retirement was not an issue addressed by the commission in its denial of Claimant's 2001 application for permanent total disability. It is true the Commission did not reach that argument because, after considering only the allowed conditions, the commission ruled the Claimant had no disability whatsoever and could return to her former position of employment. Stip. Evid. at pp. 69-71, S.S. at p. 27. The Court below went on to conclude that because the commission had not denied the earlier PTD application on the basis of voluntary retirement, it did not overrule or impermissibly ignore the

2001 finding when granting the 2004 PTD application. Ford respectfully submits the Court below misunderstood the impact of the commission's 2001 ruling. The issue was not whether the commission had previously ruled Claimant's retirement was voluntary; the significance of the 2001 ruling is that, when read in conjunction with Claimant's continuous, permanent total disability since 1998 due to non-allowed medical conditions, it was an abuse of discretion for the Commission not to conclude Claimant had been removed from the labor market due to non-allowed conditions.

Under this principle, permanent total disability compensation could not be awarded because Claimant was permanently removed from the labor market three years before the commission ruled that Claimant's allowed conditions were not disabling. Claimant acknowledges that where an individual is removed from the work force for reasons unrelated to her industrial condition, she is not eligible for permanent total disability compensation. *See* Claimant's Brief at p. 8. The Industrial Commission and this Court are required to conclude that the allowed conditions were not disabling as of October 12, 2001. As such, the fact that Claimant's permanent total disability due to non-allowed medical conditions preceded her alleged permanent total disability due to allowed conditions precludes a subsequent finding that Claimant is permanently totally disabled due to the allowed conditions in her claim.

Because the Staff Hearing Officer ignored the earlier final decision of the Industrial Commission, did not properly explain his reasoning, and refused to accept the fact that Claimant was previously found to be permanently totally disabled due to several unrelated medical conditions, his decision constitutes an abuse of discretion.

Proposition of Law No. II:

The Industrial Commission Abused Its Discretion When It Awarded Permanent Total Disability Compensation Where The Staff Hearing Officer Relied Upon Evidence Based On Non-Allowed Conditions.

The Commission accepts the appellate court's decision that Dr. Lewis' report does not constitute some evidence upon which the Staff Hearing Officer could rely. *See* the Commission's Brief at p. 8. However, Claimant attempts to argue that the appellate court's decision with respect to Dr. Lewis was improper and that it constitutes some evidence. *See* Claimant's Brief at p. 12. Because Claimant did not appeal the decision of the appellate court, it is Ford's position that Claimant may not now raise this new issue in its Brief addressing Ford's appeal. However, for the sake of completeness, Claimant's argument will be briefly addressed.

Essentially, Claimant argues that Dr. Lewis' language regarding Claimant's condition is sufficient to establish permanency. However, the plain language of Dr. Lewis' report indicates that he felt that Claimant's pain would resolve with time and that he considered her prognosis to be "guarded." *Stip. Evid.* at p. 66. Furthermore, Dr. Lewis failed to indicate that Claimant's alleged total disability was permanent. Dr. Lewis' report makes it clear that he does not consider Claimant's current medical state to be "permanent" as is required for a finding of permanent total disability. As such, the appellate court was correct in concluding that this report does not constitute some evidence upon which the Staff Hearing Officer could rely.

Both the Commission and Claimant argue that the report of Dr. Lutz did constitute some evidence on which the Staff Hearing Officer could rely. It must be noted, however, that the Commission does acknowledge that Dr. Lutz discusses conditions not allowed in Claimant's claim. *See* the Commission's Brief at p. 9. The Commission also acknowledges that a workers' compensation claimant cannot be compensated for a disability unrelated to an allowed condition.

Id. at p. 8. The Commission then dismisses these facts based on selected language from Dr. Lutz's report. *Id.* at p. 9. Claimant argues that because Dr. Lutz awarded a 0% impairment for Claimant's right wrist issues, there can be no argument that he based his decision in part on non-allowed conditions.

A more thorough description of Dr. Lutz's report is set forth in Ford's Brief. Of note, Dr. Lutz questioned Claimant extensively about her right wrist symptoms and concluded that these symptoms are "probably related to her non-allowed right carpal tunnel syndrome." Stip. Evid. at p. 42, S.S. at p. 23. He then performed an extensive examination of the non-allowed right wrist and elbow conditions. Importantly, Dr. Lutz characterizes Claimant's right carpal tunnel syndrome as a "disability factor." Stip. Evid. at p. 44, S.S. at p. 25. Regardless of the selected language relied upon by Claimant and the Commission, the plain language of Dr. Lutz's report indicates that Dr. Lutz specifically considers the non-allowed condition of right carpal tunnel syndrome in opining as to whether Claimant is permanently totally disabled. Because of this improper consideration of a non-allowed condition, the report of Dr. Lutz is not some evidence upon which the Staff Hearing Officer could rely.

There is no indication that Dr. Lutz was informed of Claimant's severe non-allowed conditions. Moreover, it should be noted that there is no indication that Dr. Lutz was aware that these significant non-allowed conditions removed Claimant from the work force.

Lastly, even if this Court finds that the opinion of Dr. Lutz is based solely on allowed conditions in Claimant's claim, this at best represents a finding that in 2004 the allowed conditions had worsened to a point where Claimant could not work. Dr. Lutz's report cannot constitute some evidence upon which the Staff Hearing Officer could rely due to the fact that Claimant had previously been removed from the work force due to non-allowed conditions. The

Claimant's permanent inability to perform sustained, remunerative employment occurred six years before Dr. Lutz examined her.

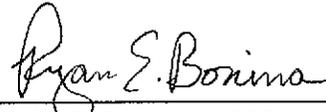
CONCLUSION

The Commission and Claimant cannot dispute the timeline of events. Claimant was permanently removed from the work force due to non-allowed conditions in 1998. In 2001, Claimant's allowed conditions did not prevent her from performing sustained, remunerative employment or from returning to her former position of employment. The October 12, 2001 decision of the Industrial Commission was not challenged by Claimant. Claimant underwent unsuccessful surgery in 2003, causing new symptoms, then filed her Application for Permanent Total Disability claiming disability beginning in 2004. To paraphrase this Court, one cannot credibly allege the loss of the ability to perform sustained, remunerative employment for which PTD is meant to compensate when the practical possibility of employment no longer exists. *State ex rel. Stanton v. Indus. Comm.* (2001), 91 Ohio St.3d 407 at 410; *State ex rel. Bartley v. Fahey Banking Co.*, 2007-Ohio-3623.

The Industrial Commission was not free to ignore the basic fact Claimant was previously removed from the work force due to significant, disabling, non-allowed conditions. Because the decision of the Staff Hearing Officer granting Claimant permanent total disability benefits constituted an abuse of discretion, the decision of the Tenth District Court of Appeals should be

reversed and a writ of mandamus should issue denying Claimant's Application for Permanent Total Disability.

Respectfully submitted,



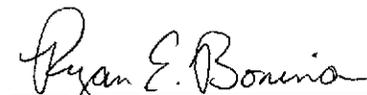
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CERTIFICATE OF SERVICE

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