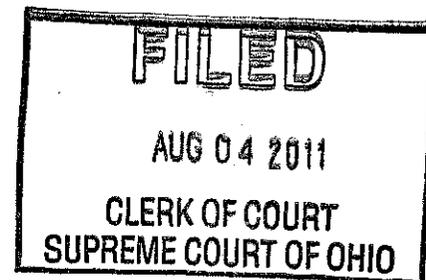


IN THE SUPREME COURT OF OHIO

STATE ex rel. VILLAGE OF OAKWOOD, : CASE NO. 2011-0060
Appellant, : Appeal of Right from the Franklin
County Court of Appeals, Tenth
v. : Appellate District
INDUSTRIAL COMMISSION OF OHIO, et al. : (Tenth Dist. App. No. 09AP-999)
Appellees. : (BWC Claim No. 08-830514)

BRIEF OF APPELLEE, KOKOSING CONSTRUCTION CO., INC.



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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF FACTS	1
ARGUMENT	4
<p><u>Proposition of Law:</u> A writ of mandamus will not issue when the Industrial Commission's decision is supported by some evidence and based upon an analysis of the totality of circumstances.</p>	
CONCLUSION	12
PROOF OF SERVICE	13
APPENDIX	N/A

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>State ex rel. American Standard, Inc. v. Boehler</i> , 99 Ohio St.3d 39, 2003–Ohio-2457, 788 N.E.2d 1053	6
<i>State ex rel. Burley v. Coil Packing, Inc.</i> (1987), 31 Ohio St.3d 18, 508 N.E.2d 936	5-7
<i>Cooper v. City of Dayton</i> (1997), 120 Ohio App.3d 34, 696 N.E.2d 640	3,10-11
<i>State ex rel. Eberhardt v. Flxible Corp.</i> (1994), 70 Ohio St.3d 649, 640 N.E.2d 815	5
<i>State ex rel. Elliott v. Indus. Comm.</i> (1986), 26 Ohio St.3d 76, 497 N.E.2d 70	4
<i>Fisher v. Mayfield</i> (1990), 49 Ohio St.3d 275, 551 N.E.2d 1271	8
<i>Lord v. Daugherty</i> (1981), 66 Ohio St.2d 441, 423 N.E.2d 96	3,8-10
<i>State ex rel. Pass v. C.S.T. Extraction Co.</i> (1996), 74 Ohio St.3d 373, 658 N.E.2d 1055	6
<i>State ex rel. Pressley v. Indus. Comm.</i> (1967), 11 Ohio St.2d 141, 228 N.E.2d 631	4
<i>Ruckman v. Cubby Drilling, Inc.</i> (1998), 81 Ohio St.3d 117, 689 N.E.2d 917	8
<i>State ex rel. Teece v. Indus. Comm.</i> (1981), 68 Ohio St.2d 165, 429 N.E.2d 433	4
<i>State ex rel. Walters v. Indus. Comm.</i> (1985), 20 Ohio St.3d 71, 486 N.E.2d 94	7
<i>State ex rel. Yancey v. Firestone Tire & Rubber Co.</i> (1997), 77 Ohio St.3d 367, N.E.2d 1374	4-5

STATEMENT OF FACTS

This is an appeal of right pursuant to Supreme Court Rule II, Section 1(A)(1), whereby Appellant Village of Oakwood (“Oakwood”) appealed the Tenth District Court of Appeals’ unanimous decision dated December 2, 2010, which refused Oakwood’s application for a writ of mandamus to vacate the finding of the Industrial Commission of Ohio (“Commission”) that established Oakwood and not Kokosing Construction Co., Inc. (“Kokosing”) as the responsible employer applicable to the work-related injury of Craig Ali (“Ali”).

On May 23, 2008, Ali wore his Oakwood police officer uniform, operated an Oakwood police cruiser with its red, white and blue strobes flashing and performed traffic duties within the Oakwood jurisdiction when he was injured by a passing vehicle that struck the Oakwood cruiser in which he was seated (Supplement filed 7/5/11 (“Supp.”), pp.1,16-18). Thereafter, Ali submitted three separate claim forms for workers’ compensation benefits naming Oakwood as his employer and documenting his injury: the first, dated May 24, 2008; the second dated May 28, 2008; and the third dated June 3, 2008, (the “Applications”). (Supp. p.1 (providing only one of the Applications in an effort to avoid redundancy)) On each of the Applications, Oakwood was listed as Ali’s employer. (Supp. p.1) The Bureau of Workers’ Compensation assigned Claim No. 08-830514 (“Claim”), awarded Ali benefits, applied the Claim to Oakwood’s workers’ compensation policy, but subsequently reassigned the Claim to Kokosing’s policy at Oakwood’s instruction. (Supp. pp.2-11)

When Kokosing appealed the reassignment of the Claim to its policy, the Commission adjudicated the matter and ultimately determined that Oakwood was the correct employer. The Commission’s first-level hearing before a District Hearing Officer (“DHO”) on October 1, 2008, confirmed the Claim’s assignment to Kokosing (“DHO Order”). (Supp. pp.14-15) On appeal in a

de novo hearing on December 8, 2008, a Staff Hearing Officer (“SHO”) considered the matter and issued an Order that vacated the prior decision and found Oakwood was the correct employer (“SHO Order”). (Supp. pp.16-18) The SHO Order expressly cited the basis and the evidence for its decision, including

- the “unrefuted testimony” that Oakwood required Kokosing to “utilize Oakwood Village police officers for traffic control duties within the geographic boundaries of Oakwood Village and to not follow Kokosing’s usual practice of using Ohio State Highway Patrol officers for such duties”;
- Oakwood “identified claimant as an officer appropriate for such duty”;
- Oakwood “arranged for claimant’s use of an Oakwood Village police cruiser during his activities relative to traffic control at the Kokosing Construction jobsite”;
- Ali “wore his Oakwood Village police uniform”;
- Ali “was at the site ... for purposes of maintaining traffic control, an activity not performed by Kokosing Construction.”

(Supp. pp.16-17). In fact, the Commission expressly stated that Ali **“would not have been engaged in traffic control...on 5/23/08 were he not an Oakwood Village police officer, in uniform and in a police cruiser, having been specifically authorized to engage in such activity by his usual employer, Sergeant Biggam/Oakwood Village.”** (Supp. p.17, emphasis added) The Commission refused further appeal of the SHO Order. (Supp. pp.19-20)

Oakwood filed an action in mandamus with the Tenth District Court of Appeals (Case No. 09-APP-999) on October 28, 2009. (Appendix to Oakwood’s Merit Brief (“Appendix”) pp.1-3) In this action, Oakwood asserted a single erroneous issue, namely “whether there exists some evidence...demonstrating that Respondent Kokosing Construction Co., Inc. is the proper employer...rather than Realtor Village of Oakwood.” Based upon that asserted issue, Oakwood requested a writ vacating the SHO Order and ordering the Commission to find Kokosing the responsible employer. However, the issue should have been whether there was “some evidence” to demonstrate that Oakwood was the proper employer. That was the correct standard of review.

In considering this matter, the magistrate below acknowledged that the SHO Order included “some relevant analysis.” Nevertheless, without specifically citing an abuse of discretion, the magistrate recommended a writ requiring the Commission to provide a more complete analysis of the “totality of circumstances” test (“Magistrate’s Decision”). (Appendix pp.11-22, at 21-22)

Kokosing and the Commission objected to the Magistrate’s Decision. In a unanimous decision dated December 2, 2010, the Court of Appeals sustained those objections, finding “the three factors identified in *Lord* and *Cooper*, while helpful...are not exhaustive, and we do not believe the Commission must be required to apply the factors in every case...” (“Appellate Decision”). (Appendix pp.4-10, at 9) The Appellate Decision applied the correct standard of review and concluded that the SHO Order was supported by some evidence. Therefore, the Commission did not abuse its discretion, and Oakwood was not entitled to a writ. (Appendix pp.9-10)

Oakwood appealed the Appellate Decision on January 12, 2011, and the matter now comes before this Court as an appeal of right. (Appendix pp.1-3)

ARGUMENT

Proposition of Law:

A writ of mandamus will not issue when the Industrial Commission's decision is supported by some evidence and based upon an analysis of the totality of circumstances.

Consistent with long-held precedent, a Commission decision withstands scrutiny when some evidence exists to support the decision. Oakwood ignores precedent and would arbitrarily impose requirements exceeding the Commission's obligations to issue decisions supported by "some evidence." Because some evidence exists to support the SHO Order, Oakwood fails to expose an abuse of discretion and equally fails to substantiate a clear right to a writ of mandamus. Oakwood's appeal of right should be dismissed, and the SHO Order permitted to stand undisturbed.

A. Standard of Review

To justify a writ of mandamus, Oakwood must demonstrate "a clear legal right to mandamus relief." *State ex rel. Pressley v. Indus. Comm.* (1967), 11 Ohio St.2d 141, 228 N.E.2d 631. In fact, Oakwood characterizes its obligation as one that exposes that "the Commission acted from perversity of will, passion, prejudice, partiality, or moral delinquency." (Oakwood's Merit Brief filed 7/5/11 ("Oakwood's Brief") p.10) A writ of mandamus is an "extraordinary remedy," and a clear legal right to relief does not exist, nor is there abuse of discretion, where there is some evidence to support the Commission's decision. *State ex rel. Teece v. Indus. Comm.* (1981), 68 Ohio St.2d 165, 429 N.E.2d 433; *State ex rel. Elliott v. Indus. Comm.* (1986), 26 Ohio St.3d 76, 497 N.E.2d 70. A writ of mandamus is limited to those instances in which "no evidence supports the Commission's order." *State ex rel. Yancey v. Firestone Tire & Rubber Co.* (1997), 77 Ohio St.3d 367, 673 N.E.2d 1374. "Where the record contains some evidence to

support the Commission's conclusions, its decision will not be disrupted in mandamus." *Id.*, at 371; *State ex rel. Eberhardt v. Flxible Corp.* (1994), 70 Ohio St.3d 649, 640 N.E.2d 815.

Review of the SHO Order verifies that evidence supports the Commission's finding that Oakwood is the correct employer. Therefore, the SHO Order passes scrutiny and no abuse of discretion arises. The Commission very clearly articulates the "unrefuted" evidence that supports the finding that Oakwood is the responsible employer, stating:

Per the **unrefuted testimony** of Kokosing supervisor Mr. Schloss, Kokosing Construction was directed by Sergeant Biggam of the Oakwood Village Police Department to utilize Oakwood Village police officers for traffic control duties within the geographic boundaries of Oakwood Village and to not follow Kokosing's usual practice of using Ohio State Highway Patrol officers for such duties. Sergeant Biggam identified Claimant as an officer appropriate for such duty and arranged for Claimant's use of an Oakwood Village police cruiser during his activities relative to traffic control at the Kokosing Construction job site. Claimant wore his Oakwood Village police uniform and was at the site of the accident for purposes of maintaining traffic control, an activity not performed by Kokosing Construction. **Claimant would not have been engaged in traffic control functions on May 23, 2008, were he not an Oakwood Village police officer, in uniform and in a police cruiser, having been specifically authorized to engage in such activity by his usual employer, Sergeant Biggam/Oakwood Village.**

(Supp. pp. 16-17, emphasis added).

The unrefuted witness testimony constitutes "some evidence" upon which the Commission based its decision. Therefore, the SHO Order should remain undisturbed.

B. Commission is Final Arbiter of Credibility and Weight of Evidence

In its effort to establish the Commission's "perversity of will" that justifies a writ, Oakwood questions the credibility and weight of the evidence upon which the Commission relied. Oakwood's argument is directly contrary to this Court's refusal to assume a role of "Super-Commission" and to re-evaluate the evidence presented to the Commission, because to

do so undermines the Commission's adjudicatory function. *State ex rel. Burley v. Coil Packing, Inc.* (1987), 31 Ohio St.3d 18, 508 N.E.2d 936. In fact, this Court announced

The commission **alone** shall be responsible for the evaluation of the weight and credibility of the evidence before it. This court's role in the review of mandamus actions challenging the Industrial Commission's decision as to the extent of disability in cases involving multiple allowed conditions shall henceforth be limited to a determination as to whether there is some evidence in the record to support the commission's stated basis for its decision.

Id., 20-21 (emphasis added); *State ex rel. Pass v. C.S.T. Extraction Co.* (1996), 74 Ohio St.3d 373, 658 N.E.2d 1055 (finding "the Commission *alone* is responsible for evaluating evidentiary weight and credibility"). Moreover, deference is given to the Commission's evaluations and "the Commission's decision to find one medical report more persuasive than another...will not be second-guessed," regardless of whether the record includes contrary evidence that is arguably greater in quantity and/or quality than the evidence upon which the Commission relied. In other words, contrary evidence is immaterial, so long as some evidence supports the Commission's decision. *Id.*, 373; *State ex rel. American Standard, Inc. v. Boehler*, 99 Ohio St.3d 39, 44, 2003-Ohio-2457, 788 N.E.2d 1053.

In the instant case, the Commission weighed the evidence and determined that Oakwood was the proper employer. The SHO who presided over the hearing is in the best position to evaluate witness testimony presented at that hearing, and his evaluation of such evidence is entitled to deference. To hold otherwise, would open the flood gates and grant access to appeals courts for re-evaluation of every Commission decision, usurp the Commission of its authority and void any efforts at judicial economy.

Oakwood urges re-evaluation of the weight and credibility of the evidence presented to the Commission, regardless of the restraint upon judicial review. Despite *Burley* and its progeny, Oakwood insists justification for re-weighing evidence arises in a Commission decision that

“considers only some of the evidence and ignores other salient evidence... in the record required to satisfy a prong of a test.” (Oakwood’s Brief, p.10) Oakwood erroneously cites *State ex rel. Walters v. Indus. Comm.* (1985), 20 Ohio St.3d 71, 486 N.E.2d 94, in support of a finding of abuse of discretion when “the record contains probative, reliable and substantial evidence” contrary to a Commission finding, which was based upon limited “facts [selected] out of a vast amount of evidence.” (Oakwood’s Brief, p.10) Oakwood distorts this Court’s holding in the *Walters* case, a closer reading of which reveals that the Commission abuses its discretion when it relies upon a medical report that “was demonstrably not reliable, probative or substantial because of [the physician-author’s] equivocation in deposition.” *Id.*, at 73. In fact, *Burley* and its progeny protect precisely those Commission decisions in which the Commission exercises its exclusive authority to rely upon some evidence and reject other evidence. Here, there is no equivocation of Mr. Schloss’ testimony, which the SHO found to be credible and unrefuted.

While Oakwood challenges the evidence upon which the Commission relied, Oakwood fails to strip the evidence of its credibility. Oakwood baldly asserts that the testimony of Kokosing’s supervisor regarding Oakwood’s “police sergeant that arranged for secondary duty details of Oakwood police officers” is unreliable and insists that greater weight should be given to other evidence. (Oakwood’s Brief pp.12-13) However, the Commission characterized the testimony upon which it relied as “unrefuted,” and this Court should reject Oakwood’s demand that unrecorded testimony of its law director and Ali is somehow more valuable. (Supp. p.16) Moreover, the Commission’s second-level hearings are *de novo*, and therefore there is no basis for Oakwood’s insistence that the SHO Order “ignored” the DHO Order’s findings and the prior testimony of Ali – particularly in light of the fact that Ali did not even attend the *de novo* SHO hearing. (Oakwood’s Brief pp.12-13; Supp. pp.16-18 (noting only “Bolmeyer” in Appearance for

the Injured Worker)) It is equally noteworthy that this was not a record hearing, though Oakwood could, but elected not to, have a court reporter present.

Oakwood's attempt to divest the Commission of its **exclusive authority to stand as final arbiter** of the credibility and weight of the evidence must be rejected. The Commission's evaluation of the evidence must not be second-guessed, and the adjudicatory authority of the Commission must be protected.

C. Totality of Circumstances

Oakwood would have this Court enforce an exacting implementation of the "totality of circumstances" analysis and require that every case analyze "benefit, control, and proximity" based on *Lord v. Daugherty* (1981), 66 Ohio St.2d 441, 423 N.E.2d 96. However, Oakwood's argument is in direct opposition to this Court's clarification:

We note that when applying [totality of circumstances] analysis ... a reviewing court must examine the separate and distinct facts of each case...because workers' compensation cases are, to a large extent, very fact specific. As such, no one test or analysis can be said to apply to each and every factual possibility. Nor can only one factor be considered controlling. Rather, a flexible and analytically sound approach to these cases is preferable. Otherwise, the application of hard and fast rules can lead to unsound and unfair results.

Fisher v. Mayfield (1990), 49 Ohio St.3d 275, 551 N.E.2d 1271. Elsewhere, this Court advises, "when applying the *Lord* test the enumerated factors are not intended to be exhaustive." *Ruckman v. Cubby Drilling, Inc.* (1998), 81 Ohio St.3d 117, 122, 689 N.E.2d 917 (citing *Fisher*, supra). In its Appellate Decision, the lower court correctly enforces this Court's directive to place substance over form and properly held that "the three [*Lord*] factors...while helpful...are not exhaustive, and we do not believe the commission must be required to apply the factors in every case in which the identity of the correct employer is uncertain." (Appendix, p.9)

Oakwood's insistence on form over substance disregards the SHO's lengthy analysis and falsely accuses the Commission of failing to utilize the "totality of circumstances" test. As the Appellate Decision correctly explains, although the SHO Order does not expressly label its analysis as "totality of circumstances," the explanation for the basis of the decision reveals such consideration. (Appendix, p.9) The SHO Order frames its findings in language that satisfies the totality of circumstances test and establishes Oakwood's proximity and control. (Appendix, p.9) These two elements are established by the following SHO finding:

Kokosing Construction was directed by Sergeant Biggam of the Oakwood Village Police Department to utilize Oakwood Village police officers for traffic control duties within the geographic boundaries of Oakwood Village and not to follow Kokosing's usual practice of using Ohio State Highway Patrol officers for such duties.

(Supp. p.16, emphasis added) Oakwood's control is further exhibited in the SHO finding that **Oakwood "identified** claimant as an officer appropriate for such duties" and that Ali was cloaked in his **Oakwood uniform** and seated in the **Oakwood police cruiser** (Supp. pp.16-17, emphasis added) Finally, as the Appellate Decision correctly points out, the SHO Order analyzes the "totality of circumstances" in its essential conclusion that "but for claimant's employment by the Oakwood Police Department, he would not have been present at the scene of the accident." (Appendix, p.9)

The Appellate Decision below is consistent with this Court's directive that the *Lord* factors are helpful, but not mandatory. Nevertheless, Oakwood flagrantly ignores this Court's instructions when it insists that the SHO Order rises to the level of abuse of discretion, because the decision does not expressly analyze the "benefit" to Oakwood. (Oakwood's Brief pp.11-13) While *Lord* and its progeny leave little room for doubt that a flexible analysis is appropriate, the SHO Order confirms that Oakwood received "benefit" from the tangled relationship it foisted

upon Kokosing. The Commission clearly articulated that, but for Oakwood's requirement that it use Oakwood's personnel while within Oakwood's geographic boundaries, Kokosing would have retained other law enforcement services. (Supp. p.16) Common sense dictates that but for some "benefit" to Oakwood and its personnel, Oakwood would not have interfered with Kokosing's "usual practice of using Ohio State Highway Patrol officers."

In light of the SHO's findings, it is incredulous that Oakwood alleges there are "no facts...that demonstrate...Ali was acting in the guise of a policeman." (Oakwood's Brief, p.14) The findings of facts enumerated in the SHO Order demonstrate that the Commission employed reasoned analysis encompassing the "totality of circumstances" test. There is no evidence that the Commission's decision arises from perversity of will, passion, prejudice, partiality, or moral delinquency. As such, there is no evidence that the Commission's decision arises from abuse of discretion, and the SHO Order should stand undisturbed.

D. Other Jurisdictions

Frustrated at the lack of direct support within the immediate jurisdiction and in an additional effort to divest the Commission of its adjudicatory powers, Oakwood presents this Court with foreign precedent. (Oakwood's Brief, p.14 *et seq.*) In so doing, Oakwood asks this Court to turn a deaf ear to Ohio's Second District Court of Appeals' analysis and decision in *Cooper v. City of Dayton* (1997), 120 Ohio App.3d 34, 696 N.E.2d 640, that is remarkably on point. In *Cooper*, the court held that the city of Dayton was the proper employer of an off-duty police officer injured while working security in a retail store. *Id.* In doing so, the *Cooper* court analyzed the *Lord* "totality of circumstances" test and assigned the injured officer's claim for workers' compensation benefits to the city with which the officer was regularly employed. (Appendix pp.8-9, 18-21)

The facts of the case at bar are even more compelling than those in *Cooper*. Ali was selected for the duty by Oakwood, was wearing his Oakwood uniform, was seated in an Oakwood police cruiser with the lights operational, was within Oakwood jurisdiction, and was performing duties akin to those of his Oakwood employment. (Supp. pp.16-17) The holdings in foreign jurisdictions are non-binding and entirely irrelevant to the case at hand, particularly in light of the fact that the SHO Order is supported by some evidence that demonstrated analysis of the “totality of circumstances.” As such, there is no abuse of discretion to justify a writ and the SHO Order should remain undisturbed.

E. Public Policy

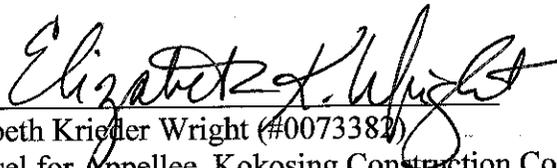
Oakwood’s half-hearted public policy argument must also be rejected. The concern that a “chilling effect” may arise from municipal responsibility for off-duty police officers is particularly disingenuous in light of Oakwood’s mandate that Kokosing utilize Oakwood officers instead of Ohio State Highway Patrol officers. (Oakwood’s Brief, p.17; Supp. p.16) Oakwood’s policy argument of possible economic burden completely disregards the control it maintains as primary employer to contain such liability through employment policies that clarify and limit its role in any secondary employment in which Oakwood employees engage. Oakwood’s concern about the cost to municipal corporations is overwhelmed when balanced against the need to uphold valid Commission decisions in a manner consistent with Ohio precedent.

CONCLUSION

The SHO Order and its finding that Oakwood is the responsible employer should stand undisturbed, in accord with long-held precedent establishing the Commission as sole arbiter of the weight and credibility of evidence, as well as the precedent that leaves undisturbed a Commission decision supported by some evidence. Oakwood fails to expose an abuse of discretion and equally fails to substantiate a clear right to a writ of mandamus. Oakwood's appeal of right should be dismissed, and the SHO Order permitted to stand undisturbed.

Respectfully submitted,

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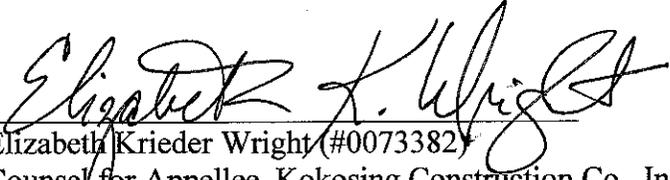
The undersigned hereby certifies that a copy of the foregoing Brief of Appellee, Kokosing Construction Co., Inc. was served upon the following via U.S. Regular Mail, postage prepaid, on this 4th day of August, 2011:

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