

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE, ex rel. RONALD CORMAN,

Relator-Appellant,

vs.

ALLIED HOLDINGS, INC., and
THE INDUSTRIAL COMMISSION OF OHIO,

Respondents-Appellees.

Case No. 2010-2002

BRIEF OF AMICI CURIAE
OHIO CHAMBER OF COMMERCE,
OHIO SELF-INSURERS ASSOCIATION, AND OHIO CHAPTER OF THE
NATIONAL FEDERATION OF INDEPENDENT BUSINESS
IN SUPPORT OF RESPONDENTS-APPELLEES

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STATEMENT OF INTEREST

The Ohio Chamber of Commerce (OCC) is a trade association of businesses and professional organizations in the State of Ohio with direct business membership in excess of 4,500 business firms and individuals. A non-profit corporation organized and existing under the laws of the State of Ohio, the OCC represents business, trade, and professional organizations doing business within the state and has frequently participated as amicus curiae.

The Ohio Self-Insurers Association (OSIA) was formed in 1974 to represent Ohio's self-insuring employers in workers' compensation and employer liability issues. It is the only statewide organization that represents self-insured employers exclusively and is devoted to the issue of workers' compensation and employer liability. There are over one thousand self-insured employers in the State of Ohio. Ohio's self-insured employers represent a significant part of the Ohio work force and its payroll. OSIA routinely files amicus briefs to assist its members in presenting arguments to the Ohio Supreme Court as well as other courts throughout the state.

The Ohio Chapter of the National Federation of Independent Business (NFIB) is an association with more than 24,000 governing members, making it the state's largest association dedicated exclusively to the interests of small and independent business owners. NFIB's members typically employ fewer than ten (10) people and record annual gross sales of less than \$500,000. NFIB's members are almost exclusively state fund employers.

All of these organizations and their members are vitally concerned about the issue presented in this case.

STATEMENT OF THE CASE

Amici curiae concur in the recitation of the Statement of the Case as set forth in the Brief of Respondent-Appellee Allied Holdings, Inc.

ARGUMENT

Proposition of Law No. 1

An injured worker is not entitled to temporary total disability compensation unless there is a loss of earnings directly caused by an injury sustained in the course of and arising out of the injured worker's employment.

This case involves a fundamental principle of workers' compensation: there must be an economic loss that is directly related to an injury in order for total disability compensation to be paid. Amici curiae concur in the arguments of Respondent-Appellee Allied Holdings, Inc., and in the decision of the court below. Amici would add the following: The basic purpose of the Ohio workers' compensation system is to compensate workers for losses occasioned by injuries sustained in the workplace. Article II, Section 35, Ohio Constitution. In order for total disability compensation to be awarded, there must be a causal relation between an injury which arises in the course of and out of an injured worker's employment and the claimed period of compensable disability. See, e.g., State, ex rel. Thompson, v. Roadway Express, Inc. (1984), 12 Ohio State 3d 76. This fundamental principle was reviewed and affirmed in State, ex rel. Staton, v. Indus. Comm. (2001), 91 Ohio State 3d 407, in the context of temporary total disability compensation. The Court noted:

Thus, the claimant who vacates the workforce for non-injury reasons not related to the allowed condition and who later alleges an inability to return to the former position of employment cannot get temporary total disability. This of course makes sense. One cannot credibly allege the loss of wages for which temporary total disability is meant to compensate when the practical possibility of employment no longer exists.

There was discussion and argument below about this Court's decisions involving voluntary and involuntary abandonment of the workplace and the effect that an abandonment might have on an injured worker's entitlement to disability compensation. Reference was also made to cases where injured workers were receiving temporary total disability compensation at the time of their separation from employment. See, e.g., State, ex rel. OmniSource Corp., v. Indus. Comm., 113 Ohio State 3d 303, 207-Ohio-1951.

The basic question that was addressed in those cases is how the nature of the termination of employment might affect the injured worker's entitlement to a specific form of compensation. For example, this Court answered one of the questions raised in the termination cases by holding that where someone is off work and receiving temporary total disability compensation, the change in his employment status doesn't affect his entitlement to on-going temporary total disability benefits. That is because in such instances, the injured worker's economic situation was not changed by the termination of employment. His temporary economic loss was caused by the industrial injury and the ending of his employment status was not an event that this Court found would break the link between economic loss and injury.¹

¹ The statutory and case law criteria for terminating temporary total disability compensation were not met in those cases.

The inquiry in this case is fundamental: namely, what caused the injured worker's loss of earnings for which temporary total disability compensation has been claimed? Mr. Corman's employment was ended by his retirement. His retirement had no effect on his receipt of on-going temporary total disability compensation and those benefits continued because the retirement did not change his immediate economic status. His entitlement to temporary total disability compensation was later terminated for one of the well-settled reasons, his having been found to have reached maximum medical improvement. Six years passed, a new condition was allowed in his claim, and surgery was authorized. The claimant was thus no longer at maximum medical improvement; he again experienced a temporary impairment. However, there is nothing to support any argument that the claimant's economic situation was changed by the surgery that was undergone some six years after retirement; there was simply no loss of earnings caused by the surgery. His economic situation was the same before and after his surgery. Where there is no temporary loss of earnings attributable to an industrial injury, there is no reason to look back to review the reason for the claimant's leaving the workforce in a case involving temporary total disability compensation.²

² In contrast, if Mr. Corman later applied for permanent total disability compensation, there might be occasion to examine whether his permanent departure from the workplace had been voluntary or involuntary. This highlights the distinction between this case and situations involving claims to permanent total disability compensation. Temporary total disability compensation is measured, in part, on the ability of the injured worker to perform actual jobs. That is, an injured worker is not entitled to temporary total disability compensation when he regains the capability of performing the duties and responsibilities of his former position of employment. See, e.g., State, ex rel. Ramirez, v. Indus. Comm. (1982), 69 Ohio State 2d 630. Similarly, an injured worker is not entitled to temporary total disability compensation when actual work within his physical capabilities is offered to him. See, e.g., R.C. 4123.56(A). Permanent total disability compensation is designed to compensate the injured worker who is unable to perform any sustained remunerative employment, not necessarily available work. See, e.g., State, ex rel. Stephenson, v. Indus. Comm. (1987) 31 Ohio State 3d 167. Whether an injured worker should be entitled to permanent total disability compensation might make an inquiry into the voluntary versus involuntary nature of his leaving the workforce relevant. This would be because, of course, in such an

There are other situations that illustrate that a basic part of determining whether total disability compensation may be paid is identifying the cause of the claimed economic loss. Here is one example. Let us take the case of an injured worker who is off work and receiving temporary total disability compensation. His employer downsizes while he is off and his job is eliminated. No one would argue that his receipt of temporary total disability compensation should end because he no longer has a job to return to. Rather, his economic loss would have been caused by his industrial injury and, so long as he does not meet the criteria for the termination of temporary total disability compensation, under Ohio law he would continue to receive temporary total disability compensation despite the fact that there would be no job for him to return to. See, e.g., OmniSource Corp., supra. Let us say further, that the same injured worker is no longer eligible for temporary total disability compensation because one of the statutory or case law criteria for termination has occurred and that the injured worker neither returns to work nor chooses to look for work. Three years later the injured worker has an additional condition allowed in his claim and requests surgery for the condition, which is approved. That injured worker's condition would likely no longer be at maximum medical improvement nor would he likely be able to return to his former position of employment. However, he should not receive temporary total disability compensation because there would be no injury-related loss of earnings to be indemnified. His economic situation would be unaffected by the surgery.

instance the injured worker's economic loss could be occasioned by the industrial injury or it could be caused by his leaving the workplace voluntarily. However, in Mr. Corman's situation, the surgery had no impact on his economic situation and there was no economic loss to be compensated. Whether he left work voluntarily or involuntarily six years before his surgery is irrelevant.

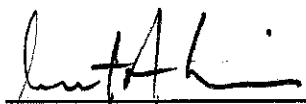
The inquiry as to whether an injured worker's leaving the workplace was voluntary or involuntary is only one way of determining whether a work related injury has caused a loss of earnings that may be compensated under the Ohio workers' compensation law. Where, as here, there is no loss of earnings caused by the industrial injury, whether Mr. Corman's retirement was voluntary or involuntary is irrelevant; there is no loss to be indemnified. Different labels may be put on the areas of inquiry to determine whether there is a relation between an injury and a loss of earnings, such as voluntary or involuntary abandonment. However, they are only labels which may be meaningless in the content of a particular situation. The focus should be on whether the work related injury has caused a loss of earnings. When a temporary loss of earnings is directly caused by an industrial injury, then Ohio law would permit the claimant to be compensated for the loss, most likely via temporary total disability benefits. Where, however, as here, an injured worker's economic situation is completely unaffected by an event in his workers' compensation claim (such as surgery) and he experiences no resulting loss of earnings, then "one cannot credibly allege the loss of wages for which temporary total disability is meant to compensate." Staton, supra. Compensation was properly denied to Mr. Corman.

CONCLUSION

For the reasons set forth above and in the brief of Respondent-Appellee, Allied Holdings, Inc., Amici Curiae the Ohio Chamber of Commerce, the Ohio Self-Insurers Association, and the Ohio Chapter of the National Federation of Independent Business respectfully urge that the decision below be affirmed.

Respectfully submitted,

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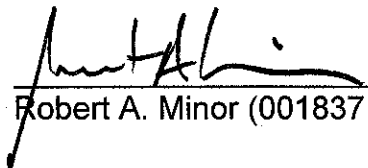
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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing has been served upon: Mr. William E. Clements and Mr. Paul A. Lewandowski, Clements, Mahin & Cohen, LPA., Co., 35 E. Seventh Street, Suite 710, Cincinnati, Ohio 45202 Attorneys for Relator, Ronald R. Corman; Mr. William J. Wahoff and Mr. Richard Goldberg, Scott, Scriven & Wahoff, LLP, 50 W. Broad Street, Suite 2500, Columbus, Ohio 43215 Attorneys for Respondent, Allied Holdings, Inc.; Mr. Philip J. Fulton and Mr. Ross R. Fulton, Philip J. Fulton Law Office, 89 East Nationwide Blvd., Suite 300, Columbus, Ohio 43215, Counsel for Amicus Curiae, Ohio Association of Claimants' Council Ohio Association for Justice; Ms. Charissa D. Payer, Assistant Attorney General, Workers' Compensation Section, 150 East Gay Street, 22nd Floor, Columbus, Ohio 43215-6001, Attorney for Respondent, Industrial Commission of Ohio this 23rd day of May, 2011 by depositing same in the United States mail, postage pre-paid.


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