

ORIGINAL

IN THE SUPREME COURT  
FOR THE STATE OF OHIO  
CASE NUMBER: 2010-1770

DONALD MCNEA, JR. )

RELATOR-APPELLANT )

vs. )

CITY OF PARMA, et. al., )

RESPONDENTS-APPELLEES )

) On Appeal from the  
) Franklin County Court  
) of Appeals, Tenth  
) Appellate District

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REPLY BRIEF OF RELATOR-APPELLANT  
(ORAL ARGUMENT REQUESTED)

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## STATEMENT OF FACTS

The Appellant, Donald McNea, Jr., hereinafter referred to as Appellant realleges and incorporates his Statement of Facts set forth in his Brief of Relator-Appellant, filed June 6, 2011.

Further, in reply to the briefs filed by the Appellees, Industrial Commission of Ohio and City of Parma, hereinafter referred to as Appellees, the Appellant submits the following additional facts.

On December 17, 2007, the Bureau of Workers' Compensation filed a C-86 Motion seeking the exercise of continuing jurisdiction by the Industrial Commission of Ohio pursuant to Ohio Revised Code Section 4123.52. The basis upon which the Bureau's motion filed was "fraud" (Exhibit 2). From pages 4 through 52 of the Bureau's motion, the majority of the Bureau's argument was directed towards what they perceived to be fraud in the initiation of Claim Numbers 00-458933 and 03-337494. Both of these claims were recognized as a legitimate and "a finding of fraud with accompanying overpayment determinations [was] not indicated". (Exhibits 20 and 21). The issue of the Appellant's drug activity was only casually made reference to. (Exhibit 2, page 10).

Thereafter, on September 30, 2008 the Staff Hearing Officer had occasion to address the issue of the Bureau's C-86 Motion.

Specifically, the Bureau sought the following:

- 1) that the Industrial Commission disallow claims 00-458922 and 03-337494 in their entirety;
- 2) that the Industrial Commission terminate PTD benefits in claims 00-458922 and 03-337494, effective 08-25-04;
- 3) that the Industrial Commission declare PTD benefits overpaid in claims 00-

458922 and 03-337494 from 08-25-04 through the present;

4) that the Industrial Commission declare all medical benefits overpaid in claims 00-458922 and 03-337494; and,

5) the Industrial Commission declare a finding of fraud.

This was the extent of what the Bureau sought.

Having found that Claim Numbers 00-458922 and 03-337494 were legitimate the extent of the Staff Hearing Officer's inquiry on September 30, 2008 was whether there was "fraud" in regard to the issue of the allowance of permanent total disability to the Appellant. The Bureau's motion was so inartfully drafted that no other conclusion could be drawn.

Accordingly, the Staff Hearing Officer on September 30, 2008 acknowledged the holding in *State ex. rel. Lynch vs. Industrial Commission (2007)*, 116 Ohio St. 3d. 342, that exchanging labor for pay on a sustained basis constitutes remunerative employment sufficient to terminate permanent total disability, even when the labor is illegal selling of drugs. He further acknowledged that, the Appellant was convicted of selling illegal drugs and was sentenced to prison on 09/05/07. Accordingly, he terminated permanent total disability benefits effective that date.

Moreover, the Staff Hearing Officer was asked by the Bureau to make a finding of fraud. He declined to do so. He readily acknowledged that "while the Bureau now presents evidence that the injured worker was being investigated for selling drugs, before the date of the permanent and disability order there was no proof that the injured worker was involved in sustained remunerative employment at the time of the permanent and total disability hearing". Accordingly, he found no fraud. (Exhibit 12).

Therefore, the facts are simple. The Bureau sought a declaration of fraud. Although, there was evidence to consider in this regard, the Staff Hearing Officer made the evidentiary

determination that there was no proof of fraud. He therefore considered the Bureau's motion and found it to be without merit. The Appellee, Bureau of Workers' Compensation sought reconsideration of the Staff Hearing Officer's order in a request filed October 15, 2008. (Exhibit 13). This request for reconsideration was filed pursuant to R-05-1-02 and alleged a mistake of fact and law in the Staff Hearing Officer's order above-described. (Exhibit 13).

Appellant maintains that there was no clear mistake of fact nor clear mistake of law and that a Writ of Mandamus should issue reinstating the order of the Staff Hearing Officer.

## APPELLANT'S REPLY TO APPEELES' BRIEFS AS TO

### PROPOSITION OF LAW, NUMBER I

**When an injured worker engages in activity which is alleged to be inconsistent with an award of permanent and total disability, such activity must be of such character so as to be sustained remunerative employment.**

The Appellees based their respective arguments on the authority of *State ex. rel. Lynch vs. Industrial Commission* (2007), 116 Ohio St. 3d. 342. To characterize the situation in *Lynch*, to that of Appellant as "strikingly similar facts" is to totally disregard any rational or legitimate interpretation of these strikingly dissimilar cases.

As the Staff Hearing Officer acknowledged "exchanging labor for pay on a sustained basis constitutes remunerative employment sufficient to terminate permanent total disability, even when the labor is the illegal selling of drugs". (Exhibit 12, page 78). Certainly, the conduct of the Appellant herein was grossly dissimilar to that of *Lynch* who sold between Three Hundred Dollars (\$300.00) to Four Hundred Dollars (\$400.00) worth of cocaine weekly between 1992 and 1994. Although, the Commission is permitted to draw inferences from the evidence, this does not permit the Commission to engage in wild unbridled speculation. To suggest that the Appellant would continue to engage in a criminal enterprise had he not been convicted is gross speculation and not a reasonable inference and to extrapolate specific figures as to sales in the future is grossly speculative.

Therefore, on close examination it appears that regardless of how Appellees try to characterize it, the complaint with the Staff Hearing Officer's order dated September 30, 2008 was an evidentiary one. The Staff Hearing Officer acknowledged the holding in *Lynch*, acknowledged that the Appellant was convicted of selling drugs and further acknowledged that there was evidence



of Appellant's drug activity before the date of the permanent and total disability hearing as well as after. This evidence did not establish proof of sustained remunerative employment and accordingly, the Staff Hearing Officer declined to find "fraud" as he had been requested by the Bureau. (Exhibit 10). *State ex. rel. Royal vs. Industrial Commission* (2002), 95 Ohio St. 3d. 97.

Certainly the Appellees don't contend that the sale of illicit drugs automatically amounts to sustained remunerative employment, no matter how often such sales take place, no matter what the quantity of sale is and no matter the price. The determination of whether the activity was actually sustained is a question of evidentiary interpretation. Therefore, the commission's "legitimate disagreement" as to such an interpretation cannot establish a clear error of fact or law. *Royal*, supra.

Appellant is not asking this court to reevaluate the evidence and come to a different conclusion than that of the Commission. Appellant is asking this court to recognize that no matter how the Commission characterized it, its complaint with the Staff Hearing Officer's order was an evidentiary one and that a legitimate disagreement as to an evidentiary interpretation does not mean that one of them was mistaken and does not at a minimum, establish that an error was "clear". *Royal* at page 100.

Further, Appellees failed to explain their contention, that the "Staff Hearing Officer ruling had misconstrued Lynch, overlooked critical evidence and improperly focused on too brief a time interval". The Staff Hearing Officer properly stated the law of *Lynch*, considered the Appellant's activities prior to the permanent and total disability hearing, the investigation of the Appellant as well as his subsequent criminal convictions. Simply put the Staff Hearing Officer's interpretation of the evidence is an interpretation of the quality of evidence and his interpretation of the quality of

evidence does not support the preconceived notion of the Appellees of fraud and does not mean he committed clear mistakes of law or fact.

**APPELLANT'S REPLY TO APPEELES' BRIEFS AS TO  
PROPOSITION OF LAW NUMBER II**

**The basis for continuing jurisdiction of the Industrial Commission is not unlimited and must be clearly articulated and adjudicated on the basis chosen by the moving party seeking to invoke continuing jurisdiction.**

In *State ex. rel. Gobich vs. Industrial Commission* (2004), 103 Ohio St. 3d. 585, the court stated that continuing jurisdiction can be invoked only when one of these preconditions exist: (1) new and changed circumstances, (2) fraud, (3) clear mistake of fact, (4) clear mistake of law, or (5) error by an inferior tribunal. *Gobich*, supra at page 14.

On December 17, 2007 the Bureau of Workers' Compensation sought to invoke the continuing jurisdiction of the Industrial Commission on the sole basis of "fraud". (Exhibit 3).

Thereafter, on September 30, 2008, the Staff Hearing Officer addressed the Bureau's C-86 motion and specifically the Bureau's sole contention for invoking continuing jurisdiction i.e. fraud. The Staff Hearing Officer found no fraud to exist.

The Bureau, filed a request for reconsideration on October 15, 2008 pursuant to R-05-1-02 alleging that the Staff Hearing Officer's failure to find fraud was a mistake of fact and law. It is interesting to note however, that there was no allegation of a "clear" mistake of fact, nor allegation of a "clear" mistake of law as required by the appropriate resolution.

As previously noted, the Bureau based its initial request for continuing jurisdiction on the basis of fraud. The elements of fraud are (1) a representation or, where there is a duty to disclose, concealment of a fact, (2) which is material to the transaction at hand; (3) made falsely with knowledge of its falsity or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred; (4) with the intent of misleading another into relying upon it; (5)

justifiable reliance upon the representation or concealment; and, (6) a resulting injury approximately caused by reliance. *Gaines vs. Preterm-Cleveland, Inc.* (1987), 33 Ohio St. 3d 54.

Accordingly, the issue to be determined is whether the exercise of continuing jurisdiction by the Industrial Commission upon the Bureau's request for reconsideration was error: was there a clear mistake of law and/or clear mistake of fact in the Staff Hearing Officer's finding of no fraud?

The Commission in its order of March 17, 2009 never addresses the issues of fraud. They never addressed the elements of fraud. They never addressed the issue of any representations made by the Appellant. They never addressed the issue of disclosure or concealment of a fact, and whether such disclosure or concealment was material. They never addressed whether the Appellant made any false statements or was reckless in that regard. They never addressed the issue of Appellant's intent to mislead nor the Industrial Commission's reliance upon any representation or misrepresentation. The Appellees argue that the Commission exercised continuing jurisdiction because the Appellee engaged in sustained remunerative employment. This is not a basis for invoking continuing jurisdiction of the Commission pursuant to 4123.52, Resolution 05-1-02 and *Gobich, supra*.

Further, Appellee, the Industrial Commission argues that "the fraudulent filing of the original PTD application was not the issue of the hearing and never is the issue in PTD termination hearings". (Page 14 of Appellee Industrial Commission's Brief). A review of the Bureau's C-86 motion filed November 5, 2007, Exhibit 2 suggests otherwise. How can the Appellee Industrial Commission of Ohio now argue that "the Staff Hearing Officer's discussion of fraud was completely off topic from the reason for the hearing" when the Bureau actually asked that the Industrial Commission declare a finding of fraud? (Exhibit 2).

The Appellee, City of Parma argues "that not even a logical argument has been offered for

arguing and why the Commission must forever be confined to the Bureau's initial identification of the grounds for continuing jurisdiction". What the Appellee chooses to forget is that the initial basis was in fact chosen by the Bureau. It was fraud. The concepts of due process and notice dictate that the rules not be changed in the middle of the litigation. Further, the standard of review by the Commission upon the Bureau's motion for reconsideration did change. Although the issue before the Staff Hearing Officer concerning exercise of continuing jurisdiction was "fraud", the basis on the request for reconsideration was clear error of fact and clear error of law, as it relates to the Staff Hearing Officer's finding of no fraud.

The Commission in its order of March 17, 2009 simply engaged in a "knee jerk" reaction to what was admittedly reprehensible behavior engaged in by the Appellant. They transcended the permissible scope of their inquiry, took what was manifestly a legitimate disagreement as to evidentiary interpretation by the Staff Hearing Officer and thereafter manufactured a "clear mistake of fact and clear mistake of law" when there was none. The Commission's choice to characterize the Appellant's behavior as "sustained remunerative employment" was speculative at best and certainly not "clear". The Staff Hearing Officer's recognition of *Lynch*, his recognition of the Appellant's behavior both prior to and subsequent to the permanent and total disability hearing clearly indicates his recognition of the law, his consideration of the facts and his conclusion that the Bureau had not proven fraud.

Therefore, there was no clear mistake of fact nor clear mistake of law and the exercise of continuing jurisdiction by the Commission was error.

## CONCLUSION

In light of the foregoing, the Commission's exercise of continuing jurisdiction was error. The Commission's finding of a clear mistake of law and clear mistake of fact was error. The decision of the Tenth District Court of Appeals should be reversed and a Writ of Mandamus should issue to the Industrial Commission of Ohio to reinstate the order of the Staff Hearing Officer dated September 30, 2008 as the same relates to the Appellant's permanent and total disability.

Respectfully submitted,



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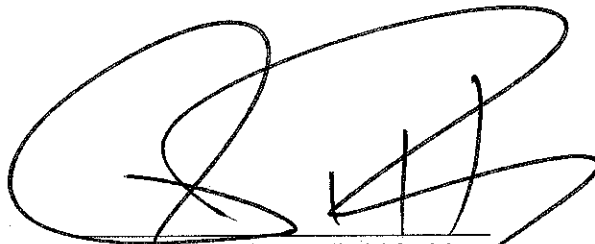
## SERVICE

The undersigned hereby certifies that a copy of the foregoing Brief of Relator (Oral Argument Requested) was served by Ordinary U.S. Mail to the offices of the Attorney for Respondents:

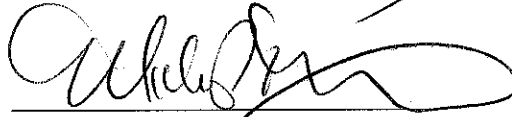
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## **APPENDIX**

Ohio Revised Code Section 4123.52

Industrial Commission R-05-1-02



## **4123.52 [Effective Until 7/29/2011] Continuing jurisdiction of commission.**

The jurisdiction of the industrial commission and the authority of the administrator of workers' compensation over each case is 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. No modification or change nor any finding or award in respect of any claim shall be made with respect to disability, compensation, dependency, or benefits, after five years from the date of injury in the absence of the payment of medical benefits under this chapter or in the absence of payment of compensation under section 4123.57, 4123.58, or division (A) or (B) of section 4123.56 of the Revised Code or wages in lieu of compensation in a manner so as to satisfy the requirements of section 4123.84 of the Revised Code, in which event the modification, change, finding, or award shall be made within five years from the date of the last payment of compensation or from the date of death, nor unless written notice of claim for the specific part or parts of the body injured or disabled has been given as provided in section 4123.84 or 4123.85 of the Revised Code. The commission shall not make any modification, change, finding, or award which shall award compensation for a back period in excess of two years prior to the date of filing application therefor. This section does not affect the right of a claimant to compensation accruing subsequent to the filing of any such application, provided the application is filed within the time limit provided in this section.

This section does not deprive the commission of its continuing jurisdiction to determine the questions raised by any application for modification of award which has been filed with the commission after June 1, 1932, and prior to the expiration of the applicable period but in respect to which no award has been granted or denied during the applicable period.

The commission may, by general rules, provide for the destruction of files of cases in which no further action may be taken.

The commission and administrator of workers' compensation each may, by general rules, provide for the retention and destruction of all other records in their possession or under their control pursuant to section 121.211 and sections 149.34 to 149.36 of the Revised Code. The bureau of workers' compensation may purchase or rent required equipment for the document retention media, as determined necessary to preserve the records. Photographs, microphotographs, microfilm, films, or other direct document retention media, when properly identified, have the same effect as the original record and may be offered in like manner and may be received as evidence in proceedings before the industrial commission, staff hearing officers, and district hearing officers, and in any court where the original record could have been introduced.

Effective Date: 06-14-2000; 2006 SB7 10-11-2006

This section is set out twice. See also § 4123.52, as amended by 129th General Assembly File No. 16, HB 123, § 101, eff. 7/29/2011.

### **4123.52 [Effective 7/29/2011] Continuing jurisdiction of commission**

(A) The jurisdiction of the industrial commission and the authority of the administrator of workers' compensation over each case is 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. No modification or change nor any finding or award in respect of any claim shall be made with respect to

disability, compensation, dependency, or benefits, after five years from the date of injury in the absence of the payment of medical benefits under this chapter or in the absence of payment of compensation under section 4123.57, 4123.58, or division (A) or (B) of section 4123.56 of the Revised Code or wages in lieu of compensation in a manner so as to satisfy the requirements of section 4123.84 of the Revised Code, in which event the modification, change, finding, or award shall be made within five years from the date of the last payment of compensation or from the date of death, nor unless written notice of claim for the specific part or parts of the body injured or disabled has been given as provided in section 4123.84 or 4123.85 of the Revised Code. The commission shall not make any modification, change, finding, or award which shall award compensation for a back period in excess of two years prior to the date of filing application therefor.

(B) Notwithstanding division (A) of this section, and except as otherwise provided in a rule that shall be adopted by the administrator, with the advice and consent of the bureau of workers' compensation board of directors, neither the administrator nor the commission shall make any finding or award for payment of medical or vocational rehabilitation services submitted for payment more than one year after the date the services were rendered or more than one year after the date the services became payable under division (I) of section 4123.511 of the Revised Code, whichever is later. No medical or vocational rehabilitation provider shall bill a claimant for services rendered if the administrator or commission is prohibited from making that payment under this division.

(C) Division (B) of this section does not apply to requests made by the centers for medicare and medicaid services in the United States department of health and human services for reimbursement of conditional payments made pursuant to section 1395y(b)(2) of title 42, United States Code (commonly known as the "Medicare Secondary Payer Act").

(D) This section does not affect the right of a claimant to compensation accruing subsequent to the filing of any such application, provided the application is filed within the time limit provided in this section.

(E) This section does not deprive the commission of its continuing jurisdiction to determine the questions raised by any application for modification of award which has been filed with the commission after June 1, 1932, and prior to the expiration of the applicable period but in respect to which no award has been granted or denied during the applicable period.

(F) The commission may, by general rules, provide for the destruction of files of cases in which no further action may be taken.

(G) The commission and administrator of workers' compensation each may, by general rules, provide for the retention and destruction of all other records in their possession or under their control pursuant to section 121.211 and sections 149.34 to 149.36 of the Revised Code. The bureau of workers' compensation may purchase or rent required equipment for the document retention media, as determined necessary to preserve the records. Photographs, microphotographs, microfilm, films, or other direct document retention media, when properly identified, have the same effect as the original record and may be offered in like manner and may be received as evidence in proceedings before the industrial commission, staff hearing officers, and district hearing officers, and in any court where the original record could have been introduced.

Amended by 129th General Assembly File No. 16, HB 123, § 101, eff. 7/29/2011.

Effective Date: 06-14-2000; 2006 SB7 10-11-2006

This section is set out twice. See also § 4123.52, effective until 7/29/2011.

## Reconsideration Guidelines

WHEREAS, the Industrial Commission issued Resolution R98-1-03 on May 6, 1998 adopting guidelines that apply to requests for reconsideration of final Industrial Commission orders; and

WHEREAS, Section 4123.52 of the Ohio Revised Code provides that the jurisdiction of the Industrial Commission over each case is continuing and the Industrial Commission may make such modification or change with respect to former findings or orders with respect thereto, as, in its opinion is justified; and

WHEREAS, the decision of State, ex rel. Gatlin v. Yellow Freight Company (1985), 18 Ohio St.3d 246, found that regardless of the existence of a legislatively prescribed court appeal, the Industrial Commission has continuing jurisdiction to reconsider its orders for a reasonable period of time absent statutory regulations restricting the exercise of reconsideration; and

WHEREAS, the decision of State, ex rel. Nicholls v. Industrial Commission (1998), 81 Ohio St.3d 454, stated that continuing jurisdiction of the Industrial Commission is not unlimited and that its prerequisites are: (1) new and changed circumstances; (2) fraud; (3) clear mistake of fact; (4) clear mistake of law; or (5) error by inferior tribunal; and

WHEREAS, the Industrial Commission recognizes the technological advance in the retrieval of Industrial Commission and Bureau orders from electronic databases within the Bureau of Workers' Compensation and the Industrial Commission; and

WHEREAS, Section 4121.03(E)(1) of the Ohio Revised Code provides that the Industrial Commission is responsible for the establishment of the overall adjudicatory policy of the Industrial Commission; and

WHEREAS, the Industrial Commission finds it necessary and proper to adopt revised guidelines to apply to requests for reconsideration of final Industrial Commission orders.

THEREFORE BE IT RESOLVED that the following guidelines shall be adopted by the Industrial Commission and shall apply to requests for reconsideration of final Industrial Commission decisions:

1. A party to a claim who desires to file a request for reconsideration of a Industrial Commission decision must file the request for reconsideration within fourteen days from the date of receipt of:

1. An order issued by the members of the Industrial Commission;
2. A final order issued by a staff hearing officer except for an order issued by a staff hearing officer under Section 4121.35(B)(2) and Section 4123.511(D) of the Ohio Revised Code; or
3. An order issued pursuant to Section 4123.511(E) of the Ohio Revised Code refusing to hear an appeal from a decision of a staff hearing officer issued under Section 4123.511(D) of the Ohio Revised Code.

2. All requests for reconsideration shall include the following:
  1. A recitation of the specific grounds upon which reconsideration is sought; and
  2. Identification of the relevant orders of the Administrator and the Industrial Commission from which reconsideration is sought as well as any other underlying orders addressing the issue in controversy; and
  3. Identification of relevant documents and proof contained within the claim file and, where appropriate, citations to the legal authorities relied upon to support the request for reconsideration; and
  4. If there exists newly discovered evidence which by due diligence could not have been discovered and filed by the appellant prior to the date of the order from which reconsideration is sought, such evidence shall be filed with the request for reconsideration.

Failure to comply with Section (B) may result in a denial of the reconsideration request.

1. C. A copy of the request for reconsideration shall be sent to the opposing party and opposing party's authorized representative by the party that requests reconsideration at the time the request for reconsideration is filed with the Industrial Commission. Should the opposing party desire to reply, the

written reply must be filed with the Industrial Commission within fourteen days of that party's receipt of the request for reconsideration.

1. If the requirements of Sections (A) and (B) are satisfied, hearing officers designated by the Industrial Commission shall review the request for reconsideration pursuant to the following criteria:

1. A request for reconsideration shall be considered only in the following cases:
  1. New and changed circumstances occurring subsequent to the date of the order from which reconsideration is sought. For example, there exists newly discovered evidence which by due diligence could not have been discovered and filed by the appellant prior to the date of the order from which reconsideration is sought. Newly discovered evidence shall be relevant to the issue in controversy but shall not be merely corroborative of evidence that was submitted prior to the date of the order from which reconsideration is sought.
  2. There is evidence of fraud in the claim.
  3. There is a clear mistake of fact in the order from which reconsideration is sought.
  4. The order from which reconsideration is sought contains a clear mistake of law of such character that remedial action would clearly follow.
  5. There is an error by the inferior administrative agent or subordinate hearing officer in the order from which reconsideration is sought which renders the order defective.

1. Requests for reconsideration that do not comport with the aforementioned criteria will be denied by a staff hearing officer without being presented to the Industrial Commission members.

BE IT FURTHER RESOLVED that the guidelines set forth in Resolution R05-1-02 are to become effective and shall apply to all final orders of the Industrial Commission published on or after September 6, 2005.