

IN THE SUPREME COURT OF OHIO

STATE, EX REL. : Supreme Court No. 15-1074
OHIO PRESBYTERIAN RETIREMENT
SERVICES, INC., :
APPELLANT, : On Appeal from the Franklin
v. : County Court of Appeals,
Tenth Appellate District
INDUSTRIAL COMMISSION OF OHIO : Court of Appeals
and : Case No. 14AP-624
SHERRY L. REDWINE, :
APPELLEES.

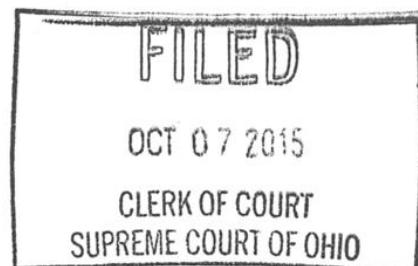
**BRIEF OF *AMICI CURIAE* OHIO CHAMBER OF COMMERCE
AND OHIO SELF-INSURERS ASSOCIATION IN SUPPORT OF APPELLANT
OHIO PRESBYTERIAN RETIREMENT SERVICES, INC.**

ANDREW J. ALATIS (0042401)
Assistant Attorney General
Workers' Compensation Section
150 East Gay Street, 22nd Floor
Columbus, Ohio 43215-3130
(614) 466-6696
(614) 752-2538 Facsimile
andrew.alatis@ohioattorneygeneral.com

*Counsel for Appellee,
Industrial Commission of Ohio*

ROSEMARY D. WELSH (0064790)
Vorys, Sater, Seymour and Pease LLP
301 East Fourth Street
Suite 3500, Great American Tower
Cincinnati, Ohio 45202
(513) 723-4487
(513) 723-8559 Facsimile
rdwelsh@vorys.com

*Counsel for Appellant, Ohio
Presbyterian Retirement Services, Inc.*



ROBERT A. MUEHLEISEN (0061924)
8899 Brookside Avenue, Suite 202A
West Chester, Ohio 45069-7112
(513) 844-8778
(513) 844-8780 Facsimile
ram@fioptics.com

Counsel for Appellee, Sherry L. Redwine

ROBERT A. MINOR (0018371)
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
(614) 464-6410
(614) 719-4874 Facsimile
raminor@vorys.com

*Counsel for Amicus Curiae, Ohio
Self-Insurers Association*

PRESTON J. GARVIN (0018641)
MICHAEL J. HICKEY (0021410)
Garvin & Hickey, LLC
181 East Livingston Avenue
Columbus, Ohio 43215
(614) 225-9000
(614) 225-9080 Facsimile
wclaw@garvin-hickey.com

*Counsel for Amicus Curiae,
Ohio Chamber of Commerce*

TABLE OF CONTENTS

| | |
|---------------------------------------|---|
| STATEMENT OF INTEREST | 1 |
| STATEMENT OF THE CASE AND FACTS | 1 |
| PROPOSITIONS OF LAW..... | 1 |
| ARGUMENT | 2 |
| CONCLUSION..... | 5 |
| CERTIFICATE OF SERVICE..... | 7 |

TABLE OF AUTHORITIES

Cases

| | |
|---|---|
| <i>Madjorous v. State of Ohio</i> , 113 Ohio St. 427, 149 N.E. 393 (1925) | 4 |
| R.C. 4123.58..... | 6 |
| <i>State, ex rel. Doughty v. Indus. Comm.</i> (1991), 61 Ohio St.3d 736 | 5 |

Rules

| | |
|----------------------|---------|
| R.C. 4123.56..... | 3 |
| R.C. 4123.56(A)..... | 2 |
| R.C. 4123.56(B)..... | 2, 3 |
| R.C. 4123.57..... | 3 |
| R.C. 4123.57(A)..... | 2, 3, 6 |
| R.C. 4123.57(B)..... | 3, 4 |
| R.C. 4123.57(C)..... | 3 |
| R.C. 4123.58..... | 3, 6 |
| R.C. 4123.58(C)..... | 3 |
| R.C. 4123.95..... | 4 |

STATEMENT OF INTEREST

The Ohio Chamber of Commerce (OCC) is a trade association of businesses and professional organizations in 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 Ohio, the OCC represents business, trade, and professional organizations doing business within the State and has frequently participated in legislative and administrative proceedings and as *amicus curiae* in issues involving employer liability.

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 twelve hundred self-insuring employers in Ohio. Ohio's self-insuring employers represent a significant part of the Ohio workforce and its payroll. The OSIA routinely files briefs *amicus curiae* to present its members' interests to the Ohio Supreme Court as well as other courts throughout the state.

Amici's members are concerned about the imposition of additional costs on the workers' compensation system created by the lower court's decision in this case.

STATEMENT OF THE CASE AND FACTS

Amici curiae the Ohio Chamber of Commerce and the Ohio Self-Insurers Association concur in the presentation of the background of this case as set forth in the Brief of Appellant, Ohio Presbyterian Retirement Services, Inc.

PROPOSITIONS OF LAW

Amici also concur in both of Appellant's Propositions of Law and the Arguments made in support thereof.

ARGUMENT

Appellant has cogently and efficiently addressed the issue presented in this case and has correctly analyzed the relevant decisional authority. *Amici* will not duplicate those efforts and would only add the following. The General Assembly devised a comprehensive scheme for compensating the losses sustained by Ohio workers whose injuries occur in the course of and arise out of their employment. The decisions of the Industrial Commission and the court below are inconsistent with that scheme. The Ohio workers' compensation system includes the following forms of compensation¹:

- Temporary total disability compensation, which is typically paid during a period of recovery at 72 percent of the injured worker's full weekly wage for the first 12 weeks of disability and, then, at two-thirds of the injured worker's average weekly wage thereafter (R.C. 4123.56(A));
- Wage loss compensation, which is paid when an injured worker suffers a diminution in earnings at two-thirds of the difference between the injured worker's post-injury earnings and pre-injury wages, not to exceed two-thirds of the injured worker's average weekly wage (R.C. 4123.56(B));
- Permanent partial disability compensation for permanent impairment, which is paid at a maximum of two-thirds of the injured worker's average weekly wage under a formula whereby each percentage point of impairment entitles the injured worker to two weeks of compensation (R.C. 4123.57(A));
- Permanent total disability compensation for permanent inability to work, which is paid at two-thirds of the injured worker's average weekly wage for life; and

¹ All weekly rates of compensation are subject to a maximum weekly rate based on the statewide average weekly wage for the year of injury, or a percentage thereof.

- Scheduled loss compensation for the loss, or loss of use, of a body part, which is paid in accordance with a legislatively prescribed schedule at the statewide average weekly wage irrespective of the injured worker's wages (R.C. 4123.57(B)).

The General Assembly set forth when the various forms of compensation may be paid simultaneously in a claim. For example, at R.C. 4123.57(C), the Legislature provided that permanent partial disability compensation and scheduled loss compensation may be paid in addition to temporary total disability compensation and wage loss benefits:

Compensation for partial impairment under divisions (A) and (B) of this section is in addition to the compensation paid the employee pursuant to section 4123.56 of the Revised Code. A claimant may receive compensation under divisions (A) and (B) of this section.

The Legislature also set forth when partial disability compensation may be paid to an injured worker who is receiving permanent, total disability compensation.

R.C. 4123.58(C) provides:

Compensation payable under this section for permanent total disability is in addition to benefits payable under division (B) of section 4123.57 of the Revised Code.

Thus, the Legislature specifically provided that the forms of compensation which are payable at R.C. 4123.57(A) and (B) could be paid in addition to compensation that is payable under R.C. 4123.56. However, the Legislature limited the form of partial disability compensation that may be paid in addition to permanent, total disability compensation to scheduled loss benefits.

The doctrine of *expressio unius est exclusio alterius* is a well-settled rule of statutory interpretation in Ohio law. See, e.g., *Madjorous v. State of Ohio*, 113 Ohio St.

427, 149 N.E. 393 (1925). The application of that doctrine would dictate that only scheduled loss benefits can be paid concurrently with permanent total disability compensation. The Industrial Commission, and the court below, incorrectly ignored both that doctrine of statutory interpretation and the express and unambiguous language of the statute. Further, the court of appeals sought support for its decision in the mandate of liberal construction found at R.C. 4123.95. As set forth in Appellant's brief, that doctrine of construction does not permit ignoring the plain language of a statute. Here, the General Assembly prescribed the circumstances under which permanent total disability compensation and partial disability compensation could be paid and limited the form of partial disability compensation to be paid concurrently to scheduled loss benefits at R.C. 4123.57(B).

Amici concur in Appellant's analysis of the cases construing this area of the law. The effect of the Industrial Commission's ignoring the General Assembly's statutory scheme will be to increase costs and litigation in furtherance of no identifiable goal set by the General Assembly. There are two likely scenarios that will result from the Industrial Commission's ruling. First, claim files will be searched to see if an assertion can be made that the Industrial Commission's award of permanent total disability compensation did not rest on a particular condition allowed in the claim in which permanent total disability compensation is being paid. Second, additional conditions may be pursued after the award of permanent total disability compensation, such as those conditions that flow from the original conditions on which the award for permanent total disability was based. In both such instances, applications for permanent partial

disability will be filed and processed, medical examinations will be undertaken, and hearings will be held, all of which will burden the system with additional expense.

As pointed out above, the Legislature has prescribed the form of compensation to be awarded an injured worker who is permanently unable to engage in sustained remunerative employment as a result of the allowed conditions in his claim. It is permanent total disability compensation. The Legislature also provided that scheduled loss compensation could be paid in addition to permanent total disability compensation, but declined to extend concurrent payment to permanent partial disability compensation.² If the General Assembly decides that it is appropriate to permit the payment of permanent partial disability compensation and permanent total disability compensation in a claim, it knows how to do it and it would be a simple legislative change. It is not up to the Industrial Commission to invade the province of the General Assembly by creating a rule in derogation of a statute.

CONCLUSION

For the reasons set forth in the Brief of Appellant and those set forth above, *amici curiae* the Ohio Chamber of Commerce and the Ohio Self-Insurers Association

² This Court has characterized scheduled loss benefits as bearing a closer resemblance to damages than compensation for loss of earnings. See, *State, ex rel. Doughty v. Indus. Comm.* (1991), 61 Ohio St.3d 736. Thus, the Legislature's permitting the simultaneous payment of scheduled loss benefits and permanent total disability benefits is consistent with the overall legislative scheme for compensating economic loss.

respectfully request that the Court reverse the judgment of the Court of Appeals and hold that the unambiguous language of R.C. 4123.58 does not permit the concurrent payment of permanent total disability compensation and permanent partial disability compensation under R.C. 4123.57(A).

Respectfully submitted,



Robert A. Minor (0018371)
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
Telephone: (614) 464-6410
Facsimile: (614) 719-4874
raminor@vorys.com

Counsel for Amicus Curiae
Ohio Self-Insurers Association



Preston J. Garvin (0018641)
Michael J. Hickey (0021410)
Garvin & Hickey, LLC
181 East Livingston Avenue
Columbus, Ohio 43215
Telephone: (614) 225-9000
Facsimile: (614) 225-9080
wclaw@garvin-hickey.com

Counsel for Amicus Curiae
Ohio Chamber of Commerce

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing has been served upon counsel for Appellee Sherry L. Redwine:

Robert A. Muehleisen (0061924)
8899 Brookside Avenue, Suite 202A
West Chester, Ohio 45069-7112

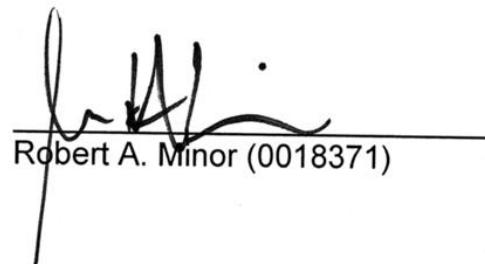
upon counsel for Appellee Industrial Commission of Ohio:

Andrew J. Alatis (0042401)
Assistant Attorney General
Workers' Compensation Section
150 East Gay Street, 22nd Floor
Columbus, Ohio 43215-3130

and upon counsel for Appellant Ohio Presbyterian Retirement Services:

Rosemary D. Welsh (0064790)
Vorys, Sater, Seymour and Pease LLP
301 East Fourth Street
Suite 3500, Great American Tower
Cincinnati, Ohio 45202

by depositing the same in the United States mail, postage prepaid, this 7 day of October, 2015.



Robert A. Minor (0018371)