


# OHIO TRIAL

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## A LOOK INSIDE THE CHANGING ATTORNEY-CLIENT RELATIONSHIP

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## MANDAMUS ACTIONS IN WORKERS' COMPENSATION: CHALLENGES & PITFALLS

By Stacey Stefanik, Esq.

Dworken & Bernstein received a rare and extraordinary result for one of the firm's workers' compensation clients through a mandamus action that was litigated to a successful result before Ohio's Supreme Court. The decision and opinion are in the case titled *State ex rel. Pilarczyk v. Geauga County*, 157 Ohio St.3d 191, 134 N.E.3d 142, 2019-Ohio-2880, (2019), which was published on July 18, 2019.

Only seven cases involving workers' compensation mandamus actions were decided by the Supreme Court in 2019. This speaks to just how extraordinary it is to have a successful mandamus in the Ohio Supreme Court.

Winning a mandamus requires attention to detail at every level of the administrative and litigation process. As we all know, we cannot choose the facts or the record that a new client brings to us when meeting for an initial consult. We can, however, choose whether to pursue a mandamus action for a new client. It is critical to evaluate the strength of a case for mandamus before going through the time consuming and demanding process.

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In early 2017, Joshua Pilarczyk came to Dworken & Bernstein as a new client with a final Industrial Commission order denying permanent total disability benefits. His administrative appeals were exhausted. The only remaining options were to pursue a mandamus or not. Upon review of the claim, it was clear that the Industrial Commission relied upon an equivocal report to support its decision to deny Mr. Pilarczyk benefits. However, with the high standard of review, promising a client to file a mandamus still requires evaluation due to the significant commitment that a successful mandamus action requires.

After evaluation and discussion with Mr. Pilarczyk, I filed the petition for writ of mandamus on March 7, 2017 and ultimately the

Supreme Court decision was issued on July 18, 2019.<sup>1</sup> The Tenth District Court of Appeals and the Supreme Court determined that the Industrial Commission relied upon an equivocal medical report when denying my client benefits. The case was remanded to the Industrial Commission to vacate its decision and enter a new order in conformity with the court's decision.

When preparing the argument, my biggest frustration was that the Industrial Commission ignored its own doctor who evaluated Mr. Pilarczyk and concluded that he was permanently and totally disabled. That report was not even cited in the decision. However, since the Industrial Commission is not required to explain why it does not rely on certain evidence in the record, I knew it would be a losing argument. Instead, I focused on the report that the Industrial Commission relied on and argued that it did not rise to the standard required to be considered evidence. Ultimately, both appellate courts agreed and my client received an extraordinary result. His permanent and total disability benefits were granted.

Although the Court's opinion was the right decision for Mr. Pilarczyk, it was still exceptional because of the strict mandamus standard and the extensive training hearing officers receive on writing their decisions to comply with the standard.

For instance, the Industrial Commission District Hearing Officer Training Manual educates hearing officers on precise order writing, telling them to write for readers, and take the time to write their orders to comply with the mandamus standard. The manual specifically notes to remember one reader is, "[t]he Tenth District to determine if your decision is based on some evidence."<sup>2</sup> Also, the Industrial Commission Staff Hearing Officer Training Manual warns about a possible mandamus in the setting of a safety violation, "It is suggested that you do not list the reasons [for the percentage of award], as that opens up the possibility of a factual error that could be the basis for a reconsideration or mandamus action."<sup>3</sup> In addition, the Adjudications Before the Industrial Commission, Memo S5 reminds hearing officers that, "Every determination on an 'extent of disability' matter must be supported by 'some evidence,' which is referenced in the order unless the injured worker has submitted 'no evidence' to support payment of the requested compensation or benefit." (emphasis added)

Since these hearing officers are trained to bulletproof their orders against appeal, to successfully pursue a mandamus, one must be familiar with the procedures, standard on review and current case law.

This all deserves a context and explanation of procedure, which follows below with mention of a few specific mandamus cases that have impacted workers' compensation against injured workers in the last few years.



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## Workers' Compensation Hearing Decisions

In the workers' compensation system, when a dispute arises in a claim, the Industrial Commission of Ohio is the administrative agency that holds hearings and issues final determinations. It conducts over 130,000 workers' compensation hearings annually.<sup>4</sup>

The Industrial Commission is not bound by traditional rules of evidence that are employed in a courtroom.<sup>5</sup> For example, hearsay can be evidence for the Industrial Commission. Further, it has exclusive jurisdiction to make determinations on disputed issues of fact and to weigh the evidence before it with broad discretion on evidentiary issues.<sup>6</sup> Despite this, the Industrial Commission still has a clear legal duty to base its decisions on some evidence.<sup>7</sup>

Upon a final Industrial Commission order and after exhaustion of all appeals, either party can appeal to the Court of Common Pleas or proceed in filing a mandamus action against the Industrial Commission. The matter at issue governs which route the party pursues. Decisions that are appealable to the Court of Common Pleas pursuant to R.C. 4123.512 are those that involve an employee's right to participate or to continue to participate in the workers' compensation fund.<sup>8</sup>

In practice, appeals for claim allowance and additional medical conditions requested in a claim are appealed to the Court of Common Pleas. These appeals result in a trial if the matter is not resolved by settlement or other action. Most other issues are handled through a mandamus action.

### Writ of Mandamus

A writ of mandamus is special relief "issued in the name of the state to an inferior tribunal, a corporation, board, or person, commanding the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station."<sup>9</sup> A writ will not be issued when there is a plain and adequate remedy in the ordinary course of law.<sup>10</sup> It is an "**extraordinary remedy**."<sup>11</sup> (emphasis added)

The Supreme Court has consistently held that to establish a right to a writ of mandamus, the filing party ("Relator") must prove: a clear legal right to the requested relief, a clear legal duty on the respondent to provide the requested relief, and lack of remedy in the ordinary courts of law.<sup>12</sup>

A clear legal right exists where the relator shows that the commission abused its discretion by entering an order that is not based on some evidence.<sup>13</sup> The Court of Appeals and Supreme Court focus on whether the Industrial Commission relied on some evidence. This is a high standard and overcoming this would essentially be achieved if the Relator could show that the record contained no evidence to support the final hearing order.<sup>14 15</sup>

Further, the Industrial Commission is not required to explain its reasoning for not relying on contradictory evidence. The Industrial Commission could rely on a single document, even if that document was not intended to speak to the specific issue at hearing. It is not an abuse of discretion to rely on one document even if several favorable extensive reports were in the record and never

mentioned.<sup>16</sup>

The reviewing court does not reweigh the evidence, but simply determines whether there was some evidence to support the Industrial Commission's decision. Appellate review focuses on the Industrial Commission order and does not search for evidence in the record. Consequently, the Court does not have to consider evidence that is not cited in the final order. It has stated that it is not a "super commission" there to reweigh the evidence in every case.<sup>17</sup> This narrows the focus of the court and makes the likelihood of convincing an appellate court of an abuse of discretion even more challenging.

Even if the Relator is successful, it may not mean a guaranteed success. Rather, the Court of Appeals or Supreme Court usually remands the case to the Industrial Commission for further action in accordance with its decision. So, the claim could be remanded, and the Relator could still receive an unfavorable decision from the Industrial Commission based upon an alternate rationale.

### Basic Procedure

After exhaustion of administrative remedies, either party can file a petition in the name of the state on behalf of the person filing for relief. Venue for mandamus actions is in Franklin County, which is where the Industrial Commission maintains its principal office. Although a petition may be filed in the Ohio Supreme Court, most practitioners file a complaint of mandamus in the Tenth District Court of Appeals in Columbus since there will be appeal as a matter of right to the Ohio Supreme Court.

The petitioner must name the Ohio Industrial Commission, failure to name the administrative agency is grounds for dismissal. Also, there is no specific timeframe for appeal. However, it is not good practice to wear on the Court's patience. Once several years has passed, the defense of laches will most likely be put forth as a defense.

A request for an oral argument must be made in writing at the time of the filing of the party's original pleading and must be noted on the front of the pleading.<sup>18</sup> Before briefing, Relator must file the evidence from the administrative file that will be referenced in the brief. If this evidence is not filed, Relator has nothing to



cite to in the brief. At the minimum, the Staff Hearing Officer order must be filed so that the Court can evaluate whether there is some evidence. I recommend that an attorney submit a time-stamped copy of relevant evidence, as this shows it was on file at the time the order was issued. After briefing is done, the court will schedule an oral argument before the magistrate.

In order to pursue a mandamus action, the Relator must have exhausted its administrative remedies.<sup>19</sup> Further, in order to raise an issue, the filing party must have raised an issue at the administrative level.<sup>20</sup>

A party waives an issue on review if it was not raised administratively.<sup>21</sup> Further a party may not change its theory of the case and raise new arguments for the first time on appeal or advance new arguments in its reply brief.<sup>22</sup>

After the magistrate's decision is issued, a party must timely object for a review by the three-judge panel in the Tenth District Court of Appeals.<sup>23</sup> And upon that decision, any party can appeal to the Ohio Supreme Court as a matter of right.

### Examples of Mandamus Actions in Workers' Compensation

Most mandamus actions directed at the Industrial Commission revolve around compensation benefits granted or denied to an injured worker. However, several other workers' compensation issues can be addressed, too.

For example, there were 10 decisions issued by the Supreme Court on workers compensation mandamus actions in 2017 and 3 involved violations of a specific safety requirement. In 2018, the Supreme Court issued 8 decisions that covered violations of a specific safety requirement, issues with an employer's premium, permanent total disability allocation among several different claims, and continuing jurisdiction of the Bureau of Workers' Compensation and Industrial Commission. And in 2019, the Supreme Court issued 7 decisions, which covered issues such as medical evidence required to show loss of vision, a wage rate recalculation issue, and whether the Industrial Commission could order additional medical examinations on the issue of permanent total disability.

In the last 3 years, two mandamus actions have resulted in signif-

icant changes in workers' compensation law. Specifically, *State ex rel. Ohio Presbyterian Retirement Services, Inc. v. Industrial Commission* and *State ex rel. Klein v. Precision Excavating & Grading Co.*<sup>24</sup> Both decisions are unfavorable to injured workers.

### Ohio Presbyterian

Prior to *Ohio Presbyterian*, an injured worker was permitted to receive permanent total disability and permanent partial disability for different conditions at the same time. This means if physical or psychological conditions that were not allowed in a claim at the time permanent total disability was awarded, an injured worker could apply for those separate benefits. Or, if the Industrial Commission granted permanent total disability solely on physical conditions in a claim, a claimant could file an application for a permanent partial disability on the psychological conditions and vice versa.

This Supreme Court decision now prevents injured workers from receiving benefits for approved conditions not considered when the permanent total disability was granted. This is a total reversal on this issue and means less compensation for the workers who are permanently unable to work due to their work injuries.

### Klein

*Klein* overruled prior Supreme Court Cases *State ex rel. Reitter Stucco, Inc. v. Indus. Comm.* and *State ex rel. OmniSource Corp. v. Indus. Comm.*<sup>25</sup> and added another wrinkle to the "voluntary abandonment" case law in Ohio. The Court held that when a claimant voluntarily removes himself from his former position of employment for reasons unrelated to a workplace injury, the claimant is no longer eligible for temporary total disability compensation, even if the claimant remains disabled at the time of his separation from employment.

Prior to *Klein*, an injured worker who left the workforce was still entitled to disability payments if he was medically incapable of returning to work at the time of the abandonment of the workforce.

### Closing Thoughts

Through *Pilarczyk*, Dworken & Bernstein has prevailed and made law on the some evidence rule.

A mandamus action is time consuming and difficult because of the stringent standard associated with overcoming the mandamus standard. Analyzing, understanding and evaluating the high threshold required to meet this standard and the challenges to defeat a finding based on the some evidence standard is essential before making a decision to proceed with a mandamus. It is the first step in obtaining a successful result. The time and effort it takes to succeed in the mandamus process is significant. Not pursuing a mandamus and preventing possibly damaging case law is just as important as creating good law.

If you are not experienced in this action, selecting a co-counsel before filing is a smart decision. Since there is no set deadline for filing this action, you have time to choose a co-counsel and pick and choose wisely about what cases support filing a mandamus. We are willing to assist lawyers in the prosecution of such claims and



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offer our experience with these actions.



**Stacy Stefanik's** main focus is workers' compensation, both administratively and in litigation, as well as unemployment matters. She has argued before the Court of Appeals, and briefed cases in the Court of Appeals and the Ohio Supreme Court.

Stacy graduated from Calvin College in 2003 with a Bachelor of Arts degree in English and Japanese. She received her Juris Doctorate from Cleveland-Marshall College of Law and was admitted to practice law in Ohio in November 2010 and to the United States District Court, Northern District of Ohio in 2011. She is a member of Ohio Association for Justice and Cuyahoga County Bar Association.

She handled the briefing and oral argument at the Court of Appeals and Supreme Court in *State ex rel. Pilarczyk v. Geauga County*, 157 Ohio St.3d 191, 134 N.E.3d 142, 2019-Ohio-2880, (2019).

**End Notes**

1. *State ex rel. Pilarczyk v. Geauga County*, 157 Ohio St.3d 191, 134 N.E.3d 142, 2019-Ohio-2880, (2019)
2. District Hearing Officer Training Manual, page 10
3. Staff Hearing Officer Training Manual, page 68
4. Industrial Commission of Ohio website: <https://www.ic.ohio.gov/news/news-info.html>
5. O.R.C. 4123.10
6. *State ex rel. Frigidaire Div. General Motors Corp. v. Industrial Commission* (1988), 35 Ohio St.3d 105, 518 N.E.2d 1194; *State ex rel. Hudson v. Industrial Com'n of Ohio* (1984), 12 Ohio St.3d 169, 465 N.E.2d 1289; *State ex rel. Roberts v. Industrial Com'n* (1984), 10 Ohio St. 3d 1, 460 N.E.2d 251
7. *State ex rel. Hughes v. Goodyear Tire & Rubber Co.*, 26 Ohio St.3d 71, 73 (1986); *State ex rel. Kokocinski v. Indus. Com'n*, 11 Ohio St.3d 186, 188 (1984)
8. *Clendenin v. Girl Scouts of Western Ohio*, 150 Ohio St.3d 300, 81 N.E.3d 438,

- 2017-Ohio-2830, (2017)
9. O.R.C. 2731.01
10. O.R.C. 2731.05
11. *State ex rel. Haylett v. Ohio Bur. of Workers' Comp.*, 87 Ohio St.3d 325, 334, 720 N.E.2d 901 (1999)
12. *State ex rel. Berger v. McMonagle*, 6 Ohio St.3d 28 (1983); *State ex rel. Moore v. Malone*, 96 Ohio St.3d 417, 420, 775 N.E.2d 812 (2002); *State ex rel. Pressley v. Industrial Commission*, 11 Ohio St.2d 141, 228 N.E.2d 631 (1967)
13. *State ex rel. Elliott v. Indus. Com'n*, 26 Ohio St.3d 76 (1986)
14. *State ex rel. Kramer v. Industrial Commission* (1979) 59 Ohio St. 2d 39, 391 N.D.2d 1015
15. *State ex rel. Hughes v. Goodyear Tire & Rubber Co.*, 26 Ohio St.3d 71, 73 (1986); *State ex rel. Kokocinski v. Indus. Com'n*, 11 Ohio St.3d 186, 188 (1984)
16. See *State ex rel. Wegman v. Ohio Police & Fire Pension Fund*, 155 Ohio St.3d 223, 2018- Ohio-4243 where despite several reports of evaluating physicians supporting disability, the decision cited two file review reports that were factually erroneous and failed to accept the exam findings of the evaluating physicians.
17. *State ex rel. Rouch v. Eagle Tool & Mach. Co.*, 26 Ohio St.3d 197, 498 N.E.2d 464, (1986)
18. Tenth District Court of Appeals Local Rules 13(L)
19. *Nemazee v. Mt. Sinai Medical Ctr.* (1990), 56 Ohio St. 3d 109, 564 N.E.3d 477
20. *State ex rel. Quarto Mining Co. v. Foreman*, 79 Ohio St. 3d 78, 1997 Ohio 71, 679 N.E.2d 706; *State ex rel. Nat'l Empls. Network Alliance v. Ryan*, 125 Ohio St. 3d 11, 2010 Ohio 578, 925 N.E.2d 947
21. *State ex rel. Quarto Mining Co. v. Foreman*, 79 Ohio St. 3d 78, 1997-Ohio-71, 679 N.E.2d 706 (1997)
22. *Clifton Care Ctr. V. Ohio Dept. of Job & Family Servs.*, (Ohio App. 10th Dist.), 2013-Ohio-2742, ¶; *State ex rel. Gutierrez v. Trumbull Cty. Bd. of Elections*, (1992), 65 Ohio St.3d 175, 177; *Am. Fiber Sys., Inc. v. Levin*, 125 Ohio St.3d 374, 2010-Ohio-1468, 928 N.E.2d 695, ¶ 21.
23. Ohio Civ.R. 53(D)(3)(a)(iii)
24. *State ex rel. Ohio Presbyterian Retirement Services, Inc. v. Industrial Commission*, 151 Ohio St.3d 92, 86 N.E.3d 294, 2017-Ohio-7577, (2017); *State ex rel. Klein v. Precision Excavating & Grading Co.*, 155 Ohio St.3d 78, 119 N.E.3d 386, 2018-Ohio-3890, (2018)
25. *State ex rel. Reitter Stucco, Inc. v. Indus. Comm.*, 117 Ohio St.3d 71, 2008-Ohio-499, and *State ex rel. OmniSource Corp. v. Indus. Comm.*, 113 Ohio St. 3d 303, 2007-Ohio-1951. *Reitter Stucco and OmniSource Corp*



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