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Judicial Review of Decisions of the Industrial Commission of Ohio: Is Some Evidence A Non-Existent Standard?

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JUDICIAL REVIEW OF DECISIONS OF THE INDUSTRIAL COMMISSION OF OHIO: IS SOME EVIDENCE A NON-EXISTENT STANDARD?

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I. INTRODUCTION

The Ohio Supreme Court issues more decisions dealing with workers' compensation than any other area of law, with the possible exception of criminal law. The reason for this is quite simple: Final decisions of the Industrial Commission of Ohio in Workers' Compensation claims which involve "extent of disability" are not appealable to Common Pleas Courts under Ohio Revised Code section 4123.519.[1] Rather, such decisions are properly appealed by filing an action in mandamus in the Court of Appeals for the Tenth Appellate District located in Franklin County, Ohio.[2]

Such an action provides an appeal, as of right, to the Ohio Supreme Court and gives rise to the large number of decisions issued by the court dealing with workers' compensation issues.[3] The standard of review which the Court uses in such appeals has come to be known as the "some evidence" rule.[4]

Recently, the some evidence rule has come under attack and has sparked heated controversy among members of the Ohio Supreme Court as to whether some evidence is the proper standard of review to

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1. OHIO REVISED CODE section 4123.519 provides that "[t]he claimant or the employer may appeal a decision of the industrial commission . . . in any injury or occupational disease case, other than a decision as to the extent of disability, to the court of common pleas of the county in which the injury was inflicted . . . ." OHIO REVISED CODE ANN. § 4123.519 (Anderson Supp. 1986). Although it is not always clear what decisions involve "extent of disability," it is generally held that decisions which involve the "right to participate" in the workers' compensation fund are appealable to common pleas court under OHIO REVISED CODE section 4123.519, whereas decisions which involve the extent of such participation or the amount of benefits to which a claimant is entitled are properly reviewed by an action in mandamus. State *ex rel.* Gen. Motors Corp. v. Indus. Comm'n, 42 Ohio St. 2d 278, 328 N.E.2d 387 (1975).

2. State *ex rel.* Hawley v. Indus. Comm'n, 137 Ohio St. 332, 30 N.E.2d 332 (1940).

3. OHIO CONST. art. 4, § 2 (1851, amended 1968).

4. State *ex rel.* Hudson v. Indus. Comm'n, 12 Ohio St. 3d 169, 170 465 N.E.2d 1289, 1291 (1984) ("Where the record contains some evidence to support the commission's factual findings, such findings will remain undisturbed and are not subject to an action in mandamus.").

be applied in such cases.[5] This article will examine the origin and development of the some evidence rule and will assess its validity by comparison with standards of review in mandamus actions involving other areas of law.

II. MANDAMUS ACTIONS IN GENERAL

In Ohio, an action in mandamus is statutorily defined as "a writ, 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 joins as a duty resulting from an office, trust, or station."[6] Although statutorily defined, mandamus relief is not predicated solely upon a statutory right; one must examine the common law to ascertain when mandamus relief is proper.[7] As a general rule, mandamus will issue only where the relator proves a clear right to the relief sought and a clear legal duty on the part of the respondent to perform the act.[8] Furthermore, one seeking mandamus relief must also show that there does not exist any other plain and adequate remedy in the ordinary course of the law.[9]

It is well settled law that the issuance of a writ of mandamus lies within the sound discretion of the court to which application for the writ is made.[10] However, it is also well settled that "the exercise of discretion must be consistent with legal right and must not be so exercised as to defeat the rights of persons clearly recognized and supported by sound and well-established principles of law."[11] What is not clear, however, is what standards should be applied by the court in the exercise of such discretion.

Ohio law specifically provides that issues of fact raised by the pleadings in a mandamus action must be tried in the same manner as in civil actions,[12] and it therefore appears that the Ohio Rules of Civil Procedure apply in an original action in mandamus,[13] with the excep-

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5. *See, e.g.*, State *ex rel.* Rouch v. Eagle Tool & Mach. Co., 26 Ohio St. 3d 197, 498 N.E.2d 464 (1986); State *ex rel.* Brady v. Indus. Comm'n, 28 Ohio St. 3d 241, 503 N.E.2d 173 (1986).

6. OHIO REV. CODE ANN. § 2731.01 (Anderson Supp. 1986).

7. 67 OHIO JUR. 3D *Mandamus, Procedendo, and Prohibition* § 1 (1986).

8. State *ex rel.* Long v. Bettman, 24 Ohio St. 2d 16, 17, 262 N.E.2d 859, 860 (1970).

9. OHIO REV. CODE ANN. § 2731.05 (Anderson 1981).

10. 67 OHIO JUR. 3D *Mandamus, Procedendo, and Prohibition* § 39 (1986). *See* State *ex rel.* Pressley v. Indus. Comm'n, 11 Ohio St. 2d 141, 161, 228 N.E.2d 631, 647 (1967) (citing an edition of OHIO JUR. which has been revised).

11. 67 OHIO JUR. 3D *Mandamus, Procedendo, and Prohibition* § 39 (1986). *See Pressley*, 11 Ohio St. 2d at 162, 228 N.E.2d at 647 (citing an edition of OHIO JUR. which has been revised).

12. OHIO REV. CODE ANN. § 2731.09 (Anderson 1981).

13. 67 OHIO JUR. 3D *Mandamus, Procedendo, and Prohibition* § 114 (1986).

tion of a special statutory action or right to trial by jury.[14] The burden of proof in a mandamus action is upon the relator, and he must establish by plain, clear, and convincing evidence that there exists a clear legal right to the relief which is sought.[15]

A final judgment issued in a mandamus action is subject to review by appellate courts, similar to other types of actions. A mandamus action which originated in a court of appeals shall be reviewed by the Supreme Court of Ohio as if the action had been filed originally in the supreme court, and in so doing, will examine the following issues:

(a) Is the respondent under a clear legal duty to perform an official act?

(b) Is there a plain and adequate remedy in the ordinary course of the law?

(c) Does the petition, although in the form of a proceeding in mandamus, in effect seek an injunction?

(d) Whether, on the question of the allowance of denial of the writ on the merits, the Court of Appeals abused its discretion.[16]

By definition, actions in mandamus may be sought against all three branches of government, as well as against state and local administrative bodies. As a general rule, mandamus will not issue against a public official where such official is exercising judgment or discretion in the performance of duties. However, if the action sought to be compelled is required to be done by constitution or statute, or if the action is purely ministerial in nature, mandamus may issue.[17]

Administrative bodies established by constitutional or statutory authority may also be subject to mandamus in certain circumstances. Where an administrative board, commission, or officer has been granted the authority and discretion to make and enforce rules and regulations and to render factual decisions on conflicting issues, mandamus will not issue unless such rules, regulations, or decisions can be shown to constitute an abuse of discretion.[18] In such a case, under the rules discussed earlier, the relator would have the burden of proving by plain, clear, and convincing evidence, that the action of the administrative body constituted an abuse of discretion.

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14. *Id.* § 146.

15. State *ex rel.* Pressley, 11 Ohio St. 2d at 141, 161, 228 N.E.2d 647 (1967); State *ex rel.* Tarpy v. Bd. of Educ. of Wash. Court House, 151 Ohio St. 81, 84 N.E.2d 276 (1949).

16. *Pressley* 11 Ohio St. 2d at 164, 228 N.E.2d at 649.

17. *See* 67 OHIO JUR. 3D *Mandamus, Procedendo, and Prohibition* §§ 54–60 (1986).

18. *Id.* § 61.

III. MANDAMUS ACTIONS IN WORKERS' COMPENSATION CASES

A. *The "Some Evidence" Rule*

As a general rule, mandamus actions seeking review of decisions of the Industrial Commission of Ohio are subject to the "abuse of discretion" standard discussed above. It is the determination of what constitutes an abuse of discretion by the Industrial Commission that has sparked judicial debate since at least 1968.[19] Currently, the majority of the Justices of the Ohio Supreme Court believe that the decision of the Industrial Commission should be upheld if there is some evidence to support that decision.[20]

The evolution of the some evidence rule is very interesting. Early cases reviewing decisions of the Industrial Commission spoke only about whether the decision was an abuse of discretion. One of the earliest decisions to discuss this issue is *State ex rel. Coen v. Industrial Commission.*[21] The relator in *Coen* sought a writ of mandamus compelling the Industrial Commission to pay him compensation for permanent total disability. The Ohio Supreme Court unanimously held that the issue before the court was: "Has the Industrial Commission so grossly abused its discretion as to require this court to issue the peremptory writ of mandamus?"[22] In reaching the conclusion that the Industrial Commission did not abuse its discretion, Justice Day made several important observations regarding the extent of review which the court could conduct.

First, Justice Day noted that the Industrial Commission had been granted the authority by constitution and statutes to decide all questions of fact within its jurisdiction, and that in doing so, the Industrial Commission was entitled to give to each piece of evidence the weight which the commission believes appropriate. The Industrial Commission therefore, was not bound by the conclusion of any person in weighing the evidence and resolving disputed questions of fact.[23]

Secondly, Justice Day pointed out that the Industrial Commission had the opportunity to see the claimant, hear his testimony, and give personal observation in the premises. If the court were to substitute its judgment, on the record before it, for that of the Industrial Commis-

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19. *See* State *ex rel.* Szekely v. Indus. Comm'n, 15 Ohio St. 2d 237, 241, 239 N.E.2d 665, 667 (1968) (Herbert, J., dissenting).

20. State *ex rel.* Rouch v. Eagle Tool & Mach. Co., 26 Ohio St. 3d 197, 198, 498 N.E.2d 464, 466 (1986); *see also* State *ex rel.* Hudson v. Indus. Comm'n, 12 Ohio St. 3d 169, 171, 465 N.E.2d 1289, 1291 (1984).

21. 126 Ohio St. 550, 186 N.E. 398 (1933).

22. *Id.* at 551, 186 N.E. at 398 (Day, J., majority).

23. *Id.* at 551–52, 186 N.E. at 399.

sion, the court would be doing so without the benefit of personal observation of the claimant. Justice Day held that because mandamus was such an extraordinary remedy, it "cannot be granted where the effect of its issue would be to substitute the command of the superior for the judicial discretion of the inferior tribunal . . . unless an abuse of such discretion affirmatively appears."[24]

Few of the decisions following *Coen* contain as thorough a discussion of the authority granted the Industrial Commission and the court's role in reviewing their decisions as is found in *Coen*. Most cases simply contained a recognition that the Ohio General Assembly had given the Industrial Commission the power to determine the extent of disability and the compensation to be paid, and that such decisions were final absent an abuse of discretion on the part of the Industrial Commission.[25] These decisions, however, did not delineate factors or criteria describing what the court felt would constitute an abuse of discretion.[26]

The debate among the Ohio Supreme Court Justices as to this issue began with the decision rendered in *State ex rel Szekely v. Industrial Commission*.[27] Although *Szekely* is often cited in support of the some evidence standard, paragraph four of the court's syllabus states: "[w]here there is substantial evidence to support the finding by the Industrial Commission on a question of fact, a court cannot, as an essential basis for awarding a writ of mandamus, substitute its finding on that question of fact for that finding by the Industrial Commission."[28] After thoroughly reviewing the evidence presented to the Industrial Commission, the court denied the writ of mandamus because there was "substantial evidence to support the conclusion of the Industrial Commission."[29]

Two Justices dissented, however, with Justice Herbert writing a rather lengthy dissenting opinion in which he criticized the majority for restricting and limiting the original jurisdiction conferred upon the Ohio appellate courts by the Ohio Constitution.[30] Justice Herbert opined that the role of the appellate court in an original action in mandamus was that of the trier of fact as well as the law, and that the court should not limit its role in reviewing decisions of the Industrial Commission.[31]

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24. *Id.* at 553–54, 186 N.E. at 399.
25. *See e.g., Szekely*, 15 Ohio St. 2d 237, 239 N.E.2d 665 (1968).
26. *See, e.g.*, State *ex rel.* Bevis v. Coffinberry, 151 Ohio St. 293, 85 N.E.2d 519 (1949).
27. 15 Ohio St. 2d 237, 239 N.E.2d 665 (1968).
28. *Id.* at 237, 239 N.E.2d at 666.
29. *Id.* at 243, 239 N.E.2d at 670.
30. *Id.* at 245, 239 N.E.2d at 671 (Herbert, J., dissenting).
31. *Id.*

> I do not believe that it is consistent with the Constitution for this court to hold that the decision of an administrative agency is final in the field of facts merely because there may be some slight evidence to support such decision. If the original jurisdiction of the Courts of Appeals in mandamus is to be so limited, considerable confusion may result when such limitation is recognized by the hundreds of agencies of government in Ohio, each with some decision-making power.
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> I believe that the Court of Appeals should make its own decisions upon the evidence presented to it in an original action in mandamus, and if supported by probative evidence the writ should issue.[32]

Several years later, in *State ex rel Campbell v. Industrial Commission*,[33] Justice Herbert had the opportunity to apply the "probative evidence" rule he articulated in his dissenting opinion in *Szekely*. In *Campbell*, Justice Herbert delivered a unanimous opinion in which the writ of mandamus was denied because there was "probative evidence" supporting the decision of the Industrial Commission.[34]

The confusion among the members of the Ohio Supreme Court as to what standard should be applied in reviewing decisions of the Industrial Commission is probably best illustrated by the short life of the probative evidence rule. Just over a month after the decision in *Campbell*, the court decided *Hutton v. Industrial Commission*,[35] a case which involved a decision of the Industrial Commission awarding permanent partial disability benefits. Both parties in *Hutton* stipulated to the evidence before the court and the record as presented by the stipulations contained no evidence supporting an award in the amount ordered by the Industrial Commission. Because of the obvious deficiency in evidence, the Ohio Supreme Court granted a writ of mandamus and quoted paragraph four of its syllabus in *Szekely*[36] as support for the court's decision. As was pointed out earlier, the *Szekely* decision held that mandamus was not proper where there is substantial evidence to support the decision of the Industrial Commission, and it was precisely that language from *Szekely* which the court quoted in *Hutton*.[37] The confusion developed because in applying the *Szekely* decision to the evidence as presented Justice Leach observed that "[w]here, however, there is *no evidence* in the record, either 'substantial' or 'insubstantial,' to support or justify an order of the Industrial Commission . . . the action . . . constitutes an abuse of discretion, subject to correction by

32. *Id.*
33. 28 Ohio St. 2d 154, 277 N.E.2d 219 (1971).
34. *Id.* at 157, 277 N.E.2d at 221.
35. 29 Ohio St. 2d 9, 278 N.E.2d 34 (1972).
36. 15 Ohio St. 2d 237, 239 N.E.2d 665 (1968).
37. 29 Ohio St. 2d at 13, 278 N.E.2d at 36.

an action in mandamus."[38]

Several weeks after the court decided *Hutton*, two cases, *State ex rel. Hughes v. Industrial Commission* and *State ex rel. Romine v. Industrial Commission*,[39] both involving a denial of permanent and total disability by the Industrial Commission, were considered together by the Ohio Supreme Court. In a unanimous decision, the court again quoted and applied the substantial evidence paragraph from the syllabus of *Szekely*.[40] In agreeing with the court of appeals, the Ohio Supreme Court found "that there was substantial evidence in each case, both pro and con, and thus the matter lay within the sound discretion of the commission."[41]

It would appear after the decisions in *Szekely*, *Campbell*, *Hutton*, and *Hughes*, that the standard which the court would apply in reviewing decisions of the Industrial Commission would be a "substantial evidence" test. These decisions continued to be favorably cited, and the substantial evidence test continued to be applied in decisions over the next several years.[42]

In light of the above cited decisions, it becomes apparent that the some evidence rule may have had its genesis in an innocent piece of poor legal draftsmanship. In *State ex rel. General Motors v. Industrial Commission*,[43] the Ohio Supreme Court refused to issue a writ of mandamus, holding that "where the record contains evidence which supports the commission's factual findings, this court will not disturb that determination."[44] Was the deletion of the word "substantial" which modified "evidence" a deliberate attempt on the part of the Ohio Supreme Court to lessen the standard? It is doubtful because if such were the case, the court certainly could have simply overruled *Szekely*. If one looks at who sat on the bench when *General Motors* was decided, it becomes even more doubtful. Chief Justice O'Neill concurred with the majority in *Szekely* and was the only justice from the majority in *Szekely* still on the court when the *General Motors* decision was issued. Justice Herbert, of course, dissented in *Szekely*, but his dissent was due to his reasoning that the evidence supporting the conclusion reached by the majority was "slight evidence."[45] He did not disagree

38. *Id.* at 13, 278 N.E.2d at 36–37.

39. 29 Ohio St. 2d 91, 278 N.E.2d 667 (1972).

40. *Id.* at 93, 278 N.E.2d at 668 (quoting *Szekely*, 15 Ohio St. 2d at 237, 239 N.E.2d at 666).

41. *Id.*

42. *See, e.g.*, State *ex rel.* Goodyear Tire & Rubber Co. v. Indus. Comm'n, 38 Ohio St. 2d 57, 310 N.E.2d 240 (1974).

43. 42 Ohio St. 2d 278, 328 N.E.2d 387 (1975) (per curium).

44. *Id.* at 283, 328 N.E.2d at 390 (*citing Coen*, 126 Ohio St. at 550, 186 N.E. at 398.

45. *Szekely*, 15 Ohio St. 2d at 245, 239 N.E.2d at 671 (Herbert, J., dissenting).

with the test, *per se*, but merely disagreed with how the evidence was interpreted. Obviously, from the tone of Justice Herbert's dissent in *Szekely*, he would not have supported any weakening of the standard of review.

Justices Corrigan and Stern were not on the bench when *Szkeley* was decided; both of these justices, however, voted with the majority in the *Hutton*, *Hughes*, and *Goodyear Tire & Rubber* decisions.

Justice Paul W. Brown concurred with the "substantial evidence" paragraph of the syllabus of *Szekely* and concurred in the opinion in *Goodyear Tire & Rubber*. He did not participate in the *Hutton* and *Hughes* decisions.

Justices Celebrezze and William Brown were not members of the court for any of the decisions prior to *Goodyear Tire & Rubber*, but both justices concurred in the *Goodyear Tire & Rubber* decision. In addition, Justice Celebrezze has, in recent decisions, severely criticized the some evidence rule, even going so far as to call the rule "distorted."[46]

The members of the Ohio Supreme Court sitting for the *General Motors* case could not have intended the creation of a new, less strict standard of evidentiary review to be applied in reviewing decisions of the Industrial Commission. Yet just two years later, the court issued another decision involving General Motors, in which the court stated that "[m]andamus will not lie to correct such determinations so long as there is some evidence to support them."[47] Interestingly enough, the court cited its previous *General Motors* decision as support for that proposition, despite the fact that the term "some evidence" does not appear in that decision. The only change in the composition of the court between the two *General Motors* decisions was that Justices Corrigan and Stern had been replaced by Justices Sweeney and Locher. Justice Sweeney, it should be noted, concurred with Justice Celebreeze's criticism of the some evidence rule in *Rouch*.[48]

Subsequent decisions of the Ohio Supreme Court have routinely either granted mandamus or denied mandamus on the basis of whether there was some evidence to support the decision of the Industrial Commission.[49] However, even after pronouncing the some evidence rule, the court has concluded that as long as "[a] clear legal right to a writ of

46. *See, e.g., Rouch*, 26 Ohio St. 3d at 217 n.6, 498 N.E.2d at 480 n.6.

47. State *ex rel.* Gen. Motors Corp. v. Indus. Comm'n, 50 Ohio St. 2d 155, 157, 363 N.E.2d 737, 739 (1977).

48. 26 Ohio St. 3d at 221, 498 N.E.2d at 483.

49. *See e.g.*, State *ex rel.* Dodson v. Indus. Comm'n, 62 Ohio St. 2d 408, 410, 406 N.E.2d 513, 514 (1980); State *ex rel.* Humble v. Mark Concepts, Inc., 60 Ohio St. 2d 77,79, 397 N.E.2d 403, 404 (1979);

mandamus [has] been established in accordance with [*Szekely,*] the judgment of the Court of Appeals [will be] affirmed."[50]

The application of the some evidence rule did not go unchallenged. After only three months on the supreme court, Justice Clifford Brown, in a dissenting opinion in which he was joined by Justice Sweeney, launched a vicious attack on the use of the some evidence rule.[51]

> This some evidence standard applied to Industrial Commission determinations on the extent of disabilities sinks such determinations into the morass of a Serbonian bog and destroys any meaningful judicial review. It is the equivalent of no judicial review. It is high time for this court to fashion a new and realistic standard of judicial review.
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> This some evidence test and its twin brother, the "abuse of discretion" concept, used in mandamus actions to grant or deny relief in extent of disability determinations by the Industrial Commission serves only to rubber stamp with approval the bureaucratic maze of the commission. It thwarts justice. It fails to attain it.[52]

Although Justice Brown was unable to persuade a majority of the court to join him, he continued to attack the some evidence rule in several subsequent decisions.[53] In *State ex rel. Teece v. Industrial Commission,*[54] for example, Justice Brown pointed out that the some evidence rule "grew like Topsy, uncontrolled and unexplained."[55] In its place, Justice Brown proposed that the court require decisions of the Industrial Commission to be supported by reliable, probative, and substantial evidence, without which evidence the decision would constitute an abuse of discretion.[56]

Rather than join Justice Brown in disposing of the some evidence rule, the majority of the court fashioned several rules governing the sufficiency of medical reports relied on by the Industrial Commission, the net result of which usually meant there was no evidence to support the Commission's finding. For example, in *State ex rel. Wallace v. Industrial Commission,*[57] the court held that a non-examining physician must accept all the findings of the examining physicians, and that without such adoption of findings, the report of a non-examining physician

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50. *Humble,* 60 Ohio St. 2d at 80, 397 N.E.2d at 405.

51. State *ex rel.* Manley v. Indus. Comm'n, 66 Ohio St. 2d 40, 43–44, 418 N.E.2d 1385, 1388 (1981) (Brown, J., dissenting).

52. *Id.* at 43–44, 418 N.E.2d at 1388.

53. *See e.g.*, State *ex rel.* Hudson v. Indus. Comm'n 12 Ohio St. 3d 169, 171–72, 465 N.E.2d 1289, 1292 (1984) (C. Brown, J., dissenting); State *ex rel.* Teece v. Indus. Comm'n, 68 Ohio St. 2d 165, 171–74 429 N.E.2d 433, 437–39 (1981) (Brown, J., dissenting).

54. 68 Ohio St. 2d 165, 429 N.E.2d 433 (1981).

55. *Id.* at 171, 429 N.E.2d at 437.

56. *Id.* at 174, 429 N.E.2d at 439.

57. 57 Ohio St. 2d 55, 386 N.E.2d 1109 (1979).

does not constitute evidence upon which the Industrial Commission could rely.[58] Likewise, in *State ex rel Anderson v. Industrial Commission*,[59] the court held that medical testimony not evaluating the combined effect of all of the claimants' allowed conditions cannot constitute evidence that the claimant is not permanently and totally disabled.[60]

In addition, in *State ex rel. Mitchell v. Robbins & Myers, Inc.*,[61] the court instructed the Industrial Commission to include in its decisions a statement specifying only the evidence relied upon and a brief explanation as to why the benefits requested are being denied or granted.[62] The court further stated that it would no longer "search the commission's file for 'some evidence' to support an order of the commission not otherwise specified as a basis for its decision."[63]

Despite the limitations on evidence created by these decisions, the majority continued to espouse the some evidence rule.[64] However, there was growing debate and confusion among the justices on what standard would be applied. On August 9, 1985, the Ohio Supreme Court issued two decisions. In *State ex rel. Ish v. Industrial Commission*,[65] the court upheld the Industrial Commission's decision by holding that there was an abuse of discretion where facts were disputed only when there was no evidence to support the Commission's order.[66]

On the same day, however, Justice Brown wrote an opinion in *State ex rel. Thompson v. Fenix & Scisson, Inc.*,[67] in which it appeared that the some evidence rule had been replaced by the "reliable, probative and substantial evidence rule" that he had long endorsed.[68]

Joining Justice Brown in the *Thompson* majority were Justices Celebrezze, Sweeney, and Douglas. This combination of justices is rather interesting, considering the numerous decisions in which all three of those justices had supported the some evidence rule. Chief Jus-

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58. *Id.* at 59–60, 386 N.E.2d at 1112.
59. 62 Ohio St. 2d 166, 404 N.E.2d 153 (1980).
60. *Id.* at 168–69, 404 N.E.2d at 155.
61. 6 Ohio St. 3d 481, 453 N.E.2d 721 (1983).
62. *Id.* at 483–84, 453 N.E.2d at 724.
63. *Id.* at 484, 453 N.E.2d at 724.
64. *See e.g.*, State *ex rel.* Hudson v. Indus. Comm'n, 12 Ohio St. 3d 169, 171, 465 N.E.2d 1289, 1291 (1984) (per curiam).
65. 19 Ohio St. 3d 28, 482 N.E.2d 941 (1985).
66. *Id.* at 31, 482 N.E.2d at 944.
67. 19 Ohio St. 3d 76, 482 N.E.2d 1241 (1985).
68. Justice Brown wrote in his *Thompson* opinion:

> [W]here the record before the Industrial Commission contains reliable, probative, and substantial evidence in accordance with the law to support a factual finding and determination that a claimant is permanently and totally disabled, and there is no evidence to the contrary which meets such standards, a determination of the commission that the claimant is not permanently and totally disabled is an abuse of discretion by the commission . . .

tice Celebrezze, in fact, had the same day in *Ish* apparently gone to great lengths to reaffirm his commitment to the some evidence rule in his dissenting opinion.[69]

Despite the apparent contradiction, Chief Justice Celebrezze had, in fact, joined with Justice Brown to set forth a new test for reviewing decisions of the Industrial Commission. This test was made clearer four months later in *State ex rel. Walters v. Industrial Commission.*[70] The *Walters* decision, while usually cited for the proposition that the Industrial Commission cannot rely on a medical report which contains an opinion that is later repudiated during deposition, contains further explanation of the test. In writing for the same majority as in *Thompson*, Chief Justice Celebrezze stated:

> This court has held that when there is no evidence upon which the commission could have based its order, there is an abuse of discretion and mandamus is appropriate. Conversely, where the record contains some evidence supporting the commission's finding that the claimant is not totally disabled, its findings will not be disturbed unless the claimant has produced "reliable, probative, and substantial" evidence to support his claim of permanent total disability. In such a case, the commission must show some evidence to the contrary which "meets such standards" in order to justify its order denying those benefits.[71]

Once again, Justices Locher, Holmes, and Wright dissented. However, their dissent attacked the majority's characterization of the doctor's deposition testimony and made no mention of the new standard which the majority had proposed.

The dissenting justices in *Thompson* and *Walters* finally gave their recognition to the reliable, probative, and substantial test in *State ex rel. Adkins v. Industrial Commission.*[72] In *Adkins*, Justices Sweeney, Locher, Holmes, Douglas, and Wright concurred in phrasing the issue presented as whether there is "substantial, reliable and probative evidence" supporting the order of the commission.[73] After reviewing the evidence, the court concluded that the decision was "supported by reliable, probative and substantial evidence."[74] The dissent of Justices Brown and Celebrezze was based not upon any disagreement with the test used by the majority, but upon the fact that they felt the evidence was not reliable, probative and substantial.

Shortly after *Adkins*, the same five justices joined together in

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69. *Ish*, 19 Ohio St. 3d at 33, 482 N.E.2d at 945 (Celebrezze, C.J., dissenting).
70. 20 Ohio St. 3d 71, 486 N.E.2d 94 (1985).
71. *Id.* at 73, 486 N.E.2d at 96 (citations omitted).
72. 24 Ohio St. 3d 180, 494 N.E.2d 1105 (1986) (per curium).
73. *Id.* at 181, 494 N.E.2d at 1107.
74. *Id.* at 182, 494 N.E.2d at 1107.

State ex rel. McLean v. Industrial Commission,[75] a case in which the Justices applied every possible standard in upholding the decision of the Industrial Commission.

> This burden can only be met upon a showing that there is no evidence upon which the commission could have based its conclusion. Where some evidence exists which supports the finding of the commission, mandamus will not lie. Accordingly, since there is substantial probative and reliable evidence supporting the commission's decision, we affirm the judgment of the court of appeals . . . .[76]

During the final months of Chief Justice Celebrezze's tenure, the court continued to shift from one standard to the other. For example, on August 13, 1986, the court applied the substantial, reliable, and probative evidence test in *State ex rel. Kirk v. Owens-Illinois, Inc.*,[77] reverted to the some evidence rule one week later in *State ex rel. Elliott v. Industrial Commission*,[78] and then five days later again used the "reliable, probative, and substantial" evidence test in *State ex rel. Riggs v. Oak Lake Farms, Inc.*[79]

B. *The* Rouch *Decision*

The internal disagreements among members of the Ohio Supreme Court regarding proper test to use erupted into scathing, personal attacks among the Justices in *State ex rel. Rouch v. Eagle Tool & Machine Co.*[80] In *Rouch*, the Industrial Commission had issued a decision terminating the claimant's temporary total disability benefits. Justices Locher, Holmes, and Wright concurred in another *per curiam* decision in which they attempted to clarify and reinstate the some evidence rule. In a footnote, the Ohio Supreme Court stated: "We wish to clarify that the 'some evidence' test is and has for years been the appropriate standard for review of the Industrial Commissions' findings."[81] The remainder of the decision involved a discussion of whether the medical evidence relied on by the Industrial Commission met the requirements of *State ex rel. Anderson v. Industrial Commission*,[82] *State ex rel. Teece v. Industrial Commission*,[83] and *State ex rel. Thompson v. Fenix &*

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75. 25 Ohio St. 3d 90, 495 N.E.2d 370 (1986).
76. *Id.* at 93–94, 495 N.E.2d at 373 (citations omitted).
77. 25 Ohio St. 3d 360, 496 N.E.2d 893 (1986).
78. 26 Ohio St. 3d 76, 497 N.E.2d 70 (1986).
79. 26 Ohio St. 3d 173, 497 N.E.2d 720 (1986).
80. 26 Ohio St. 3d 197, 498 N.E.2d 464 (1986).
81. *Id.* at 198 n.1, 498 N.E.2d at 466 n.1 (citations omitted).
82. 62 Ohio St. 2d 166, 404 N.E.2d 153 (1980) (holding that a medical report which does not evaluate the combined effect of all of a claimant's recognized conditions cannot constitute evidence that the claimant is not permanently and totally disabled).
83. 68 Ohio St. 2d 165, 429 N.E.2d 433 (1981) (holding that a medical report which did

Scisson, Inc,[84]—all of which had placed restrictions on what evidence may be relied on by the Industrial Commission. In modifying those previous decisions, the Ohio Supreme Court observed:

> [I]t is impracticable to require, through hypertechnical evidentiary rules, that physicians pretend to be specialists in all fields of medicine. This court should not usurp the role of the commission in determining disability by creating arbitrary exclusionary rules that eliminate evidence the commission may deem credible and relevant. . . . The evidence submitted to the commission must be relevant to the issue presented, but the commission, as always, is the ultimate arbiter of the credibility and the weight to be given to submitted evidence.[85]

In addition, the justices recognized that a growing number of mandamus actions seeking review of decisions of the Industrial Commission had inundated the court, and that "many of the complaints for writs deal entirely with purely evidentiary questions. . .predicated upon allegations that certain evidence should not have been considered by the commission."[86] Furthermore, the justices observed that instead of being able to send a case back to the commission for reconsideration or clarification of their decision, the court "has been placed in the incongruous position of compelling the commission to make a finding of disability and to award relief accordingly—a determination which by Constitution and statute should be vested solely within the discretion of the commission."[87]

Because of those concerns, Justices Locher, Holmes, and Wright emphasized that the court will not interfere with or control the exercise of the Industrial Commission's sound discretion "when there is some evidence in the record to support the commission's finding."[88] However, Justice Douglas concurred in judgment only and wrote a separate concurring opinion, thereby making the decision a plurality decision, which is not binding law.[89] Justices Celebrezze and Sweeney concurred in part, dissented in part, and dissented from the judgment, while Justice

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not meet the requirements of *Anderson* was still admissible as relevant evidence for the limited purpose of testing the credibility and reliability of reports which did comply with *Anderson*).

84. 19 Ohio St. 3d 76, 482 N.E.2d 1241 (1985) (requiring a physician who examined the claimant only for one of the claimant's allowed conditions to expressly adopt the findings of at least one physician who had examined the claimant with regard to the claimant's other conditions).

85. *Rouch*, 26 Ohio St. 3d 197, 199–200, 498 N.E.2d 464, 467.

86. *Id.* at 200, 498 N.E.2d at 467.

87. *Id.* (citing OHIO CONST. art. II, § 35; OHIO REV. CODE ANN. § 4121.131 (Anderson 1980).

88. *Id.* at 198, 498 N.E.2d at 466.

89. *Id.* at 218 n.7, 498 N.E.2d at 481 n.7 (Celebrezze, C.J., concurring in part, dissenting in part and from the judgment).

Brown dissented and authored a separate dissenting opinion in which he not only once again attacked the some evidence rule, but also launched a personal attack on Justice Douglas.[90] Justice Brown correctly pointed out that less than a year earlier, "Justice Douglas provided the fourth vote necessary to decide a case adopting the 'reliable, probative, and substantial evidence' standard."[91]

In response, Justice Douglas resisted the temptation to respond to Justice Brown's "unfair, unfounded, and inaccurate attacks" because he felt that a response "might tend to give his nonsense some credibility."[92] Instead, Justice Douglas recognized that the real issue underlying the decision of the plurality was the " 'some evidence' rule versus the 'reliable, probative, and substantial evidence rule.' "[93]

Justice Douglas first expressed his opinion that in making decisions involving issues of "extent of disability," the Industrial Commission has been vested with "sole and virtually conclusive discretion."[94] This opinion was based upon section 35, article II of the Ohio Constitution which empowered the Ohio General Assembly to establish the Bureau of Workers' Compensation and the Industrial Commission, and to grant to the Commission the authority "to determine all right of claimants thereto."[95] In addition, Justice Douglas noted that the Ohio Administrative Procedure Act expressly excluded decisions of the Industrial Commission and Bureau,[96] thereby lending additional support for his position that decisions of the Industrial Commission regarding extent of disability should be conclusive.[97]

The real difference in opinion between Justice Douglas and Justice Brown revolves around a philosophical difference as to the role of the court. Justice Douglas would prefer to restrict the number and type of cases which are brought before the court to cases involving issues such as interpretation of a statute or actions which are contrary to law; in Douglas' view, decisions of the Industrial Commission involving only "extent of [a] claimant's disability" would be final and not subject to any appeal.[98]

> This court should not be a "super commission" where we reweigh,

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90. *Id.* at 222 n.12, 498 N.E.2d at 483 n.12 (Brown, J., Dissenting).

91. *Id.* at 223, 498 N.E.2d at 485 (Brown, J., dissenting).

92. *Id.* at 201, 498 N.E.2d at 468.

93. *Id.*

94. *Id.* at 205–06, 498 N.E.2d at 470–71.

95. OHIO CONST art. II, § 35 (1851, amended 1923), *quoted in Rouch*, 26 Ohio St. at 204, 498 N.E.2d at 470 (Douglas, J., concurring).

96. OHIO REVISED CODE ANN. § 119.01(A) (Anderson 1984) (*cited in Rouch*, 26 Ohio St. at 205, 498 N.E.2d at 471 (Douglas, J., concurring)).

97. *Rouch*, 26 Ohio St. 3d 205, 498 N.E.2d at 471 (1986)(Douglas, J., concurring).

98. *Id.* at 202, 498 N.E.2d at 469 (Douglas, J., concurring).

> in every case, the evidence before the commission and if we can find by any rule or stretch of the imagination that it appears that the claimant's evidence might have more validity than that accorded to it by the commission, then the commission's determination can be reversed. Such a procedure ignores, of course, the time-honored right of the administrative agency to view the parties and the witnesses and to rely on its own experts and vast experiences in handling thousands of cases of a like nature.[99]

Justice Brown, on the other hand, believes that the court can review the decisions of the commission to insure that the "commission acts responsibly and fairly."[100] He objects to giving decisions of the commission a presumption of validity or allowing the commission to "seize on any report, no matter how unreliable or nonprobative, to 'support' its decision."[101]

It is interesting to note that this is the same issue that was debated nineteen years ago in *Szekely*.[102] Moreover, since the time of *Szekely*, there have been countless decisions by the court, as well as changes in the composition of the court itself. Yet, there has obviously been no resolution of this issue among the members of the state's highest court.

IV. ALTERNATIVE STANDARDS

There are numerous administrative agencies in Ohio issuing decisions or making rules and regulations which are subject to judicial review. Many of these agencies are governed by the Administrative Procedure Act which provides for judicial review based upon a "reliable, probative, and substantial" evidence standard.[103] This standard is also used in judicial review of decisions from the Ohio Hazardous Waste Facility Board,[104] the Environmental Board of Review,[105] the Ohio Civil Rights Commission,[106] and appeals from rate determinations by the Ohio Bureau of Employment Services.[107] Other agency decisions are subjected to review by an "unlawful, unreasonable, or against the manifest weight of the evidence" standard.[108]

The some evidence rule, in contrast to the above standards, is obviously a much less strict standard of review. Is there a reason why deci-

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99. *Id.* at 215, 498 N.E.2d at 478 (Douglas, J., concurring).
100. *Id.* at 223, 498 N.E.2d at 485 (Brown, J., dissenting).
101. *Id.* at 222, 498 N.E.2d at 483–84.
102. 15 Ohio St. 2d at 237, 239 N.E.2d at 665.
103. OHIO REVISED CODE ANN. § 119.12 (Anderson Supp. 1986).
104. *Id.* § 3734.05 (c)(7).
105. *Id.* § 3745.06.
106. *Id.* § 4112.06(E).
107. *Id.* § 4141.26(B).
108. *Id.* § 4141.28(O).

sions of the Industrial Commission should be subjected to less judicial scrutiny? Justice Douglas' reliance upon the exclusion of decisions of the Industrial Commission from the Administrative Procedure Act to support limited judicial review is weakened by the fact that decisions of the Ohio Bureau of Employment Services are also specifically exempted from the Administrative Procedure Act,[109] yet such decisions are subjected to a much more stricter standard of judicial review.

Justice Douglas also relies on section 35, article II of the Ohio Constitution. In his opinion, the Industrial Commission is granted exclusive jurisdiction to determine the rights of all claimants to benefits under the Workers' Compensation laws. A close reading of that section, however, does not support such a theory, except in cases involving violations of specific safety requirements.

> Laws may be passed establishing a board which may be empowered to classify all occupations, according to their degree of hazard, to fix rates of contribution to such fund . . . and to collect, administer and distribute such fund, and to determine all rights of claimants thereto. . . . Such board shall have full power and authority to hear and determine whether or not an injury, disease, or death resulted because of the failure of the employer to comply with any specific requirement for the protection of the lives, health or safety of employees, enacted by the General Assembly or in the form of an order adapted by such board, and its decision shall be final . . . .[110]

It is clear that the phrase "its decision shall be final" refers only to decisions as to whether an injury occurred because of a violation of a specific safety requirement, not to all decisions made by the Industrial Commission under its power to "determine all right of claimants" to benefits from the workers' compensation fund.

Finally, Justice Douglas states that the decisions of the Industrial Commission should be accorded a presumption of regularity because of the special expertise and experience possessed by the members of the commission.[111] Although that point is clearly arguable, even if one were to concede that the commission contains such special knowledge in the field, can it be said that the Ohio Hazardous Waste Facility Board, the Environmental Board of Review, the Ohio Civil Rights Commission, or the Ohio Bureau of Employment Services are any less knowledgeable in their particular areas of expertise? One would think not, yet, those agencies, and countless others which are subject to the provisions of the

109. *Id.* § 119.01(A) (Anderson 1984).

110. OHIO CONST. art. II, § 35 (1851, amended 1923).

111. State *ex rel.* Rouch v. Eagle Tool & Mach. Co., 26 Ohio St. 3d 197, 216, 498 N.E.2d 464, 479 (1986) (Douglas, J., concurring).

Administrative Procedure Act, are subjected to much greater judicial review.

The criticism of the some evidence rule by Justice Herbert in the *Szekely* decision, and the ongoing criticism from Justice Brown in numerous decisions appear, on the other hand, to be more justified. As Justice Herbert pointed out, the role of the appellate court in an original action in mandamus is that of trier of fact, as well as of the law. The some evidence rule greatly restricts the court's role without any constitutional or statutory basis for such restriction.

Furthermore, the General Assembly has mandated that the Ohio Workers' Compensation Law be "liberally construed in favor of employees."[112] The practical effect of the some evidence rule would appear to contradict that statutory language. As Justice Brown observed, the Industrial Commission is free to "seize on any report no matter how unreliable or nonprobative,"[113] to support its decision and will be able to then point to some evidence in the file on appeal. In order to overcome the some evidence standard, a claimant is required to have unanimous evidence in support of his position or face the possibility of losing his claim for benefits because there is "some evidence," no matter how trivial, contrary to his position. Obviously, the General Assembly did not intend that a claimant be required to conclusively prove his rights to benefits.

IV. CONCLUSION

The foregoing review of judicial decisions has demonstrated that the some evidence rule does not have any constitutional or statutory basis and its origin is not such as would require strict adherence on the basis of *stare decisis*. The Ohio Supreme Court has used different tests on numerous occasions, and has had great difficulty agreeing on whether some evidence is the proper standard. However, absent action by the legislature, the some evidence standard will continue to be applied, and claimants and employers will have to live with the most strict standard of review that can be applied to review of agency decisions.

112. OHIO REVISED CODE ANN. § 4123.95 (Anderson 1980).

113. Ramm, 26 Ohio St. 3d 222, 498 N.E.2d 483–84 (Brown, J., dissenting).