

**From:** Don Drinko  
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**Gallagher Sharp Shop Talk: Workers' Compensation**

**Question:** Can a court in a *mandamus* action conclude that the opinions of a physician contained in an IME report do not constitute “some evidence” to support an IC order, even when the conclusions are not the result of a mistake?

Most attorneys and Industrial Commission hearing officers are not physicians. Therefore, we must rely upon the findings and conclusions of physicians (including the treating doctors and independent physicians retained by the BWC or employer) in making decisions. Recently, the Supreme Court of Ohio decided a case which brought into question whether a medical report completed by a licensed, independent physician was so internally inconsistent between its findings and conclusions that it did not constitute “some evidence” upon which an Industrial Commission order could be based.

*State ex rel. Wyrick v. Indus. Comm.*, Slip Op. No. 2014-Ohio-541, involved a claimant who injured his left shoulder in 2006, while working as a carpenter. A workers' compensation claim was filed and allowed for “dislocated left shoulder and torn left-rotator cuff,” among other conditions. In 2010, the claimant filed a motion seeking an award for “loss of use” of his left-upper extremity. (The statute does not differentiate between “upper” and “lower” extremity, so the application was actually for “loss of use, left arm.”) The BWC authorized an exam by Dr. Ann Middaugh, who concluded that the application should be denied. Dr. Middaugh agreed that the claimant had lost the use of his rotator cuff, but found that he had “significant remaining function” of his left wrist, hand, and forearm, but only as long as “the elbow is maintained at wrist level.” The matter proceeded to hearing, at which the SHO denied the motion, citing Dr. Middaugh's report as a basis. The claimant brought a *mandamus* action, alleging that Dr. Middaugh's report did not constitute “some evidence” upon which to base the award because (1) the doctor used the wrong standard by omitting the phrase “for all practical purposes;” and (2) that the doctor's report was so internally inconsistent that it could not be relied upon. The Tenth District Court of Appeals denied the writ, prompting an appeal as of right to the Supreme Court.

A badly divided Supreme Court reversed the Court of Appeals and granted the writ vacating the SHO order, concluding that while Dr. Middaugh used the correct standard, her findings were so inconsistent with her conclusions that they could not constitute “some evidence” upon which to base the order. The Court cited extensively to these findings, including that while Dr. Middaugh concludes that the claimant had “significant remaining function in his upper extremity,” she acknowledged that the claimant had to keep his arm at his side, with his elbow next to his body at waist level, in order to use his forearm or hand. She also noted a complete inability to lift his arm without assistance. The majority concluded that remand back to the Industrial Commission would be unnecessary because the claimant's medical report contained many of the same findings, and concluded that the claimant should receive the award. In a strong dissent joined by two other judges, J. O'Donnell argued forcefully that the standard in a *mandamus* appeal is abuse of discretion, and that the Court should have deferred to the judgment of the Industrial Commission and its hearing officer's evaluation of the medical evidence.

*Wyrick* is unusual, in a number of ways. First, it is unusual for the Supreme Court to evaluate medical evidence (some might say, practice medicine) in the manner done here, as the Court's normal practice is to defer to the judgment of the Industrial Commission on evidentiary issues. It is also unusual for the Court to vacate a denial and grant the compensation, rather than refer the matter back for another hearing. If you would like to submit a question to Shop Talk, or would like to discuss this or any other workers' compensation issues, please feel free to contact me.

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