

[Cite as *State ex rel. Sagenich v. Indus. Comm.*, 2004-Ohio-2841.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State ex rel. Richard Sagenich, :
Relator, :
v. : No. 03AP-742
Industrial Commission of Ohio and : (REGULAR CALENDAR)
Howell Industries, Inc./Oxford Automotive, :
Respondents. :
:

D E C I S I O N

Rendered on June 3, 2004

Heller, Maas, Moro & Magill Co., L.P.A., and C. Douglas Ames, for relator.

Jim Petro, Attorney General, and *Erica L. Bass*, for respondent Industrial Commission of Ohio.

Hanna, Campbell & Powell, LLP, and *Lori A. Fricke*, for respondent Howell Industries, Inc./Oxford Automotive.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

BROWN, J.

{¶1} Relator, Richard Sagenich, has filed this original action requesting that this court issue a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its order finding that he had obtained compensation for temporary total disability ("TTD") fraudulently and to issue a new order terminating TTD only as of the date of the hearing, thus denying only future TTD compensation.

{¶2} This matter was referred to a court-appointed magistrate pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate issued a decision, including findings of fact and conclusions of law, and recommended that this court deny relator's request for a writ of mandamus. Relator has filed objections to the magistrate's decision.

{¶3} Relator presents several arguments in his objections. Relator first asserts that the magistrate did not address his argument that the decision of the staff hearing officer ("SHO") was inconsistent in that it found relator had committed fraud as of July 4, 1999, but then also found that there were C-84 forms in the file from relator's doctor certifying his disability during the period from October 8, 1999 to October 10, 1999. It is true that the SHO found that relator's doctor had certified disability for an additional period based upon the allowed conditions from October 8, 1999 to October 10, 1999. However, the SHO made this finding solely in the context of addressing the employer's defense that relator voluntarily abandoned his employment during this 3-day period. As the commission points out, the voluntary abandonment issue was addressed prior to the fraud issue, and the SHO accepted the C-84 forms at face value as being valid only for purposes of addressing the voluntary abandonment claim. Whether these C-84 disability certifications were, in fact, obtained by relator based upon fraud was not addressed until

after determining the voluntary abandonment issue and was addressed independently of the voluntary abandonment issue. Thus, the SHO's decision was not inconsistent.

{¶4} As for relator's remaining arguments regarding the commission's finding of fraud and the possible "chilling effect" of its determination on future compensation claims, we have reviewed the magistrate's decision and the record, and we agree with the magistrate's well-reasoned explanation and final determination relating to these issues. Therefore, these arguments are without merit.

{¶5} After an examination of the magistrate's decision, an independent review of the record pursuant to Civ.R. 53, and due consideration of relator's objections, we overrule the objections and find that the magistrate sufficiently discussed and determined the issues raised. Accordingly, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained in it, and deny relator's request for a writ of mandamus.

Objections overruled; writ of mandamus denied.

BOWMAN and WATSON, JJ., concur.

APPENDIX A

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Richard Sagenich, :

Relator,	:	
v.	:	No. 03AP-742
Industrial Commission of Ohio and Howell Industries, Inc./Oxford Automotive,	:	(REGULAR CALENDAR)
Respondents.	:	

MAGISTRATE'S DECISION

Rendered on December 24, 2003

Heller, Maas, Moro & Magill Co., L.P.A., and C. Douglas Ames, for relator.

Jim Petro, Attorney General, and Erica L. Bass, for respondent Industrial Commission of Ohio.

Hanna, Campbell & Powell, LLP, and Lori A. Fricke, for respondent Howell Industries, Inc./Oxford Automotive.

IN MANDAMUS

{¶6} In this original action in mandamus, relator, Richard Sagenich, asks the court to issue a writ compelling respondent Industrial Commission of Ohio ("commission") to vacate its order finding that he had obtained compensation for temporary total disability ("TTD") fraudulently, and to issue a new order terminating TTD only as of the date of the hearing, thus denying only future TTD compensation.

Findings of Fact:

{¶7} 1. In April 1998, Richard Sagenich ("claimant") sustained an industrial injury while working as a welder, and his claim was allowed for conditions of the right upper extremity—a bruise and sprain of the right thumb, radial styloid tenosynovitis, sprain of an ulnar collateral ligament, and venous thrombosis. Due to limited use of the extremity, claimant was awarded TTD. The claim was additionally allowed for reflex sympathetic dystrophy in 1999.

{¶8} 2. In April 1999, Theresa A. Rodgers, a former co-worker, saw claimant using his right hand and arm to yank the starter cord on a lawn mower. He proceeded to use the walk-behind mower on uneven ground that required him to use his right hand and arm to maneuver the mower.

{¶9} 3. On June 21, 1999, claimant visited his physician, Tracy L. Neuendorf, D.O., who reported that claimant suffered from chronic reflex sympathetic dystrophy of the right arm. Claimant was in significant distress, guarding his right arm so aggressively that no one could touch it. The sensitivity exhibited by claimant was so extreme that Dr. Neuendorf was unable to touch the arm to test for temperature or other examination.

{¶10} 4. Following that visit, Dr. Neuendorf submitted a C-84 certification of TTD in August 1999, stating that claimant was disabled beginning April 11, 1998, with an estimated return-to-work date of December 15, 1999. He left blank the space that asked the date of the last examination or treatment. When asked whether claimant could return to light duty work, alternative work, modified work or transitional work, Dr. Neuendorf answered, "No."

{¶11} 5. In the meantime, due to Ms. Rodgers' allegations, the employer had placed the claimant under surveillance. On July 3, 1999, claimant was observed leaving

his residence riding a motorcycle and was seen returning on it. On July 4, 1999, claimant was observed using his right hand and arm to vacuum a pool. A videotape shows the claimant rolling up a long hose, using both hands/arms, and later carrying equipment with both arms, without apparent difficulty.

{¶12} 6. On August 24, 1999, claimant was examined at the employer's request for Richard N. Kepple, M.D., who reported that claimant asserted that he was unable to grasp items with his hand and could not make a fist. Claimant complained of "severe pain in his right arm" when it was "touched or moved." Claimant held his hand "in a claw-like manner," and he "cradled his right arm protectively against his body." Whenever claimant moved his right upper extremity, "he reacted as if in severe pain." Dr. Kepple found "hypersensitivity" of the hand and forearm, and "[l]ight touch produced a marked pain response."

{¶13} Dr. Kepple then provided a medical assessment of the physical activities shown on the videotape. He stated that claimant's physical symptoms as presented in his office would have rendered it "physically impossible" for claimant to ride a motorcycle, clean the pool, or manipulate the equipment as shown. Dr. Kepple opined that the only "medical" explanation, if the symptoms displayed in his office were real, would be a new injury after the videotape was made.

{¶14} 7. In a supplemental report, Dr. Kepple found that claimant had reached maximum medical improvement ("MMI") as of July 4, 1999, based on the activities observed on the videotape, which he found to be the more reliable portrayal of claimant's capabilities. Dr. Kepple opined that the videotape showed full and unfettered use of his

right upper extremity, with no impairment of his right upper extremity, in direct contrast to the symptoms displayed in his office in August 1999.

{¶15} 8. On October 13, 1999, claimant was examined by E.A. DeChellis, D.O., who found no evidence of reflex sympathetic dystrophy based on lack of pain, swelling, stiffness or discoloration.

{¶16} 9. Numerous other medical reports are included in the record, including a subsequent C-84 certification of TTD by Dr. Neuendorf.

{¶17} 10. On October 29, 1999, the employer filed a motion requesting termination of TTD compensation and a finding of overpayment of prior awards of TTD based on fraud.

{¶18} 11. On April 5, 2000, a hearing was held, and a district hearing officer granted the motion to the extent that claimant was not entitled to TTD compensation paid after July 4, 1999, that compensation after that date was obtained fraudulently, and that such compensation was overpaid:

* * * [C]laimant was not entitled to receive temporary total compensation as of 07/04/1999 as a result of his fraudulent acts.

* * * [T]here are six prima facie elements of fraud. * * * The hearing officer finds that these six elements have been met in the instant case.

First, the claimant has made representations to both his treating physician and the employer's independent medical examiner that his right upper extremity was severely disabling him. During the relevant period, Dr. Neuendorf was the claimant's physician of record and had been completing the C-84's upon which the claimant's temporary total benefits were predicated. On 06/21/99, the claimant's presented to Dr. Neuendorf * * *. According to the 07/10/1999 report from the 06/21/1999 treatment, the claimant presented to the office in

"significant distress." The claimant presented his arm as being very tender to touch. Dr. Neuendorf specifically states that ". . . he guards it aggressively so no one will touch it. . . I cannot even touch him on his arm because of his sensitivity to touch in order to test his arm..."

On 08/24/1999, Dr. Kepple examined the claimant on behalf of the employer. At that examination, the claimant "complained of severe pain in his right arm below the elbow when it was touched or moved." The claimant further stated that "he was unable to grasp small items with his hand and could not close his hand to make a fist." The claimant presented to Dr. Kepple holding his hand "in a claw-like manner" and he cradled it protectively against his body. When physically examined by Dr. Kepple, the claimant "reacted as if in severe pain when he moved his right upper extremity" and even light touch produced "marked pain."

Second, the Hearing Officer finds that the claimant's representations are material to the transaction at hand since his continued receipt of temporary total disability benefits have been dependent upon his representations of his physical condition to examining physicians.

Third, the Hearing Officer finds that the claimant's representations were made falsely and the claimant had knowledge of the falsity of his representations. The videotape of the claimant's activities on 07/04/1999, which was taken between his examinations by Dr. Neuendorf and Dr. Kepple, clearly demonstrates that the claimant has significant and active use of his right upper extremity. * * * The claimant is shown using his right arm extensively. He is able to grasp the metal pole of a pool vacuum that is at least ten feet long with his right hand and move the entire arm extensively including above shoulder height. The tape shows him rolling up a hose with both hands, holding a cordless telephone with the right hand, and reaching into the pool to grab debris with the right hand and flicking it away. The claimant is further shown gesturing with the arm, pointing with his right finger and making the number three with his right hand. On this tape, the Hearing Officer did not observe the claimant having any apparent difficulties performing a wide variety of actions with his right hand and arm.

As stated above, the claimant represented to Dr. Kepple on 08/24/1999 that he experienced "extreme pain" in his right arm whenever it was touched or moved. He represented that he could not grasp small objects or make a fist. * * * Even light touch by Dr. Kepple produced "marked pain." When examined by Dr. Neuendorf on 06/21/1999, the claimant would not even permit the doctor to touch the arm due to the alleged pain. After viewing the claimant's demonstrated physical capabilities on the 07/04/1999 videotape, it is apparent that these representations to the examining physicians were false.

Dr. Kepple * * * states that the claimant's activities in the videotape indicate that the claimant "had full and unfettered use of his right upper extremity eight weeks prior to [his] examination, which is in direct contrast and contradictory to his presentation at [his] office on August 24, 1999." In Dr. Kepple's initial report from the 08/24/1999 exam, he also addressed to claimant's activities on the videotape. Dr. Kepple states that as the claimant presented himself at the examination, "the condition of his right upper extremity would have rendered it physically impossible for him to perform the activities recorded in the surveillance report and seen on the video." Dr. Kepple further indicates that if the claimant's presentation at the examination were real, the only reasonable medical conclusion that he could make is that the claimant experienced an intervening injury or developed another medical condition between July and September which would be unrelated to his employment with the instant employer. Dr. Kepple concludes, based upon his examination of the claimant and a review of the videotape, that the allowed conditions in this claim reached maximum medical improvement by July 1999. The Hearing Officer finds Dr. Kepple's opinions to be persuasive.

Fourth, the Hearing Officer finds that the claimant had the intent to mislead his physician and the employer's examining physician into believing that his physical condition was much worse than in actuality in order to continue to obtain temporary total disability benefits. The gross disparity between the claimant's representations to Drs. Neuendorf and Kepple and his physical capabilities demonstrated on the videotape makes it evident that the claimant actively concealed his true physical condition.

Fifth, the Hearing Officer finds that Dr. Neuendorf justifiably relied upon the claimant's false representations as his basis for continuing to complete C-84's disabling the claimant since he had no reason not to believe the claimant's subjective complaints. It was not until the employer conducted surveillance of the claimant that evidence became available to place the claimant's honesty in doubt.

Sixth, the Hearing Officer finds that there was a resulting injury in the form of payment of temporary total compensation that the claimant was not entitled to receive. This injury was caused by Dr. Neuendorf's reliance upon the claimant's false representations and concealment of his true physical condition and the Administrator's reliance upon Dr. Neuendorf's C-84 reports * * *.

* * * [T]he claimant is declared overpaid for temporary total compensation paid subsequent to 07/04/1999, the date of the videotape surveillance. The Hearing Officer finds this date to be appropriate, as this is the first evidence of the claimant's deception relative to his true physical condition. The Hearing Officer further finds [an] absence of objective evidence to establish that the allowed conditions worsened subsequent to the date of Dr. Kepple's 08/24/1999 examination such as to establish that the allowed conditions once again became temporarily and totally disabling in nature. Therefore, the Hearing Officer finds this entire period to be overpaid.

* * *

This decision is based upon the following evidence contained in the claim file: a review of the videotape from 07/04/1999, the 08/24/1999 and 10/13/1999 addendum reports from Dr. Kepple, a review of the 06/21/1999 treatment record from Dr. Neuendorf, and the 07/12/1999 investigator's report.

{¶19} 12. On April 16, 2000, a staff hearing officer affirmed as follows:

The Staff Hearing Officer accepts and adopts the rationale as well as the findings reached in concluding that each of the six elements have been satisfied.

These conclusions and the rationale expressed in reaching these conclusion, were adequately supported and the Staff Hearing Officer accepts the prior decision as his own.

However, as regards to the finding of Fraud, the Staff Hearing Officer in addition to the findings and conclusion reached by the District Hearing Officer, also finds the following evidence to be persuasive.

First. The only C-84 contemporaneous to the period in issue, is from Dr. Neuendorf, D.O., who indicates claimant's disability from 4/11/98, to be due to all of the allowed conditions except, Reflex Sympathetic Dystrophy of the Right Upper Extremity.

The C-84 report was filed 11/7/99, but is undated by Dr. Neuendorf and fails to indicate the "date of last exam or treatment." It lists an estimated return to work date of 1/15/2000.

Second. Claimant's presentation of symptoms to Dr. Kepple, M.D. on 8/24/99, as specified in his report and addendums thereto, as well as by the District Hearing Officer in the prior decision, were of such a nature and magnitude, that he could only perform a cursory exam, and he concluded that they could only be attributable to the Reflex Sympathetic Dystrophy, a condition for which Dr. Neuendorf was not disabling claimant for this period.

Third. The Staff Hearing Officer also relies upon the 10/13/99 opinion of Dr. DeChellis, D.O., who examined claimant on behalf of the Bureau of Workers' Compensation. Dr. DeChellis concluded that claimant had reached maximum medical improvement, and more importantly, also opined that he found no evidence of the allowed Reflex Sympathetic Dystrophy condition at his examination, thereby supporting Dr. Kepple's ultimate opinion that claimant had reached maximum medical improvement.

Fourth. The Staff Hearing Officer finds claimant's presentation of symptoms to Dr. Neuendorf, D.O., on 6/21/99, to be inconsistent with his physical activities on 4/23/99 and 7/4/99.

Per the 4/26/99 statement of Ms. Theresa Rodgers, in file, a former employee of the employer herein, she personally

viewed claimant on April 23, 1999, using his right arm to pull the starter cord of a walk behind lawn mower.

Claimant's presentation to Dr. Neuendorf on 6/21/99, was previously described, in part, in the prior decision as: Claimant presented to the office in "significant distress." Dr. Neuendorf specifically states that "... he guards it aggressively so no one will touch it...I cannot even touch him on his arm because of his sensitivity to touch in order to test his arm..."

Then, just thirteen days later, (7/4/99), claimant, per the subject video tape, is seen cleaning, (vacuuming), his above ground pool, then putting away all the cleaning tools, fully utilizing his right upper extremity and in no acute distress during the entire video tape.

While the video tape in and of itself does not conclusively demonstrate that claimant was capable of returning to work at his former position of employment as a welder, said video tape was reviewed by Dr. Kepple, who had examined claimant on 08/24/99, and based upon his review of the video tape and examination findings, he concluded that medically, claimant's physical activities clearly demonstrate that claimant had reached maximum medical improvement as of 7/4/99.

Said opinion, is found persuasive.

The August 11, 2000 opinion of Dr. Uberti, D.O., was read and evaluated, but not found persuasive. * * *

* * *

The overpayment of compensation as declared by the District Hearing Officer in the prior decision as well as the means for recoupment, is affirmed.

{¶20} 13. Further appeal was refused.

Conclusions of Law:

{¶21} In this original action, the claimant contends that the commission abused its discretion in terminating TTD as of July 4, 1999, and declaring that TTD compensation paid after that time was an overpayment.

{¶22} In his brief, claimant does not dispute that the videotape shows him engaging in activities that were entirely inconsistent with the presentations he made to the doctors in June 1999 and August 1999. Rather, he argues that there was no evidence that he was engaging in any *remunerative* activity. In addition, based on *State ex rel. Russell v. Indus. Comm.* (1998), 82 Ohio St.3d 516, claimant argues that TTD could not be terminated until the date of the hearing in April 2000.

{¶23} The magistrate concludes that the commission's finding of fraud was based on some evidence as cited in the orders: Ms. Rodgers' observations in April 1999, Dr. Neuendorf's report regarding the June 1999 visit, the content of the videotape and investigators' report regarding activities in July 1999, Dr. Kepple's description of his interview and examination in August 1999, and his medical assessment of the activities shown on the videotape. These items provided clear and convincing evidence that claimant was intentionally misrepresenting his physical capacities with the intent to defraud the physicians, his employer, and the Bureau of Workers' Compensation ("BWC").

{¶24} Claimant argues, however, that unless he was working for gain, his fraud does not render him ineligible for TTD compensation. The magistrate disagrees. The mere fact that most cases involving fraud in a TTD case have involved allegations of gainful employment does not automatically mean that engaging in gainful employment is the only type of fraud that can result in a termination of TTD compensation as of the date

on which fraud is demonstrated. Here, the commission found that claimant committed fraud during his medical examinations, thus rendering the medical evidence on which TTD had been based wholly unreliable and incapable of constituting "some evidence" to support an award. Thus, there was no credible medical evidence on file to support TTD as of July 4, 1999. Indeed, the commission could probably have found that the medical evidence was unreliable as of Dr. Neuendorf's June 1999 "examination," but, in any event, the commission was well within its discretion to conclude that there was no credible medical evidence of TTD as of July 4, 1999.

{¶25} As for *Russell*, supra, that case was based on materially different facts. The circumstances in *Russell* involved a routinely occurring situation in which a physician retained by the BWC or the employer rendered a medical opinion that the claimant had reached MMI, whereas the claimant's treating physician was still certifying temporary disability. By the time a hearing could be held, the claimant had often received many months of TTD, and, if the hearing officer decided to rely on the opinion of the employer's or bureau's doctor, the claimant was facing the burden of a substantial overpayment of benefits. *Russell* cases have nothing to do with fraud but with overpayments that could burden a claimant who, relying on his treating physician in good faith, had reason to believe he was entitled to the TTD benefits he was receiving.

{¶26} Likewise, the magistrate concludes that the facts were materially different in *State ex rel. Parma Community Gen. Hosp. v. Jankowski*, 95 Ohio St.3d 340, 2002-Ohio-2336. That case involved a claimant receiving TTD compensation who never denied that she openly went to a child-support agency and did some telephone work and clerical

work to help her brother, who was having personal problems, and to help herself develop office experience that could assist her in returning to a different type of work.

{¶27} In the present action, the commission did not rely on a finding that the claimant was engaging in activities that were physically inconsistent with his claimed inability to perform his former position of employment. Rather, the present action was based on a conclusion regarding the medical reports on which TTD had been based—that they lacked a factual foundation due to fraud. The commission found that claimant's clear fraud removed the factual basis underlying the opinions certifying TTD and negated the medical basis for the TTD award. The magistrate finds no abuse of discretion in the commission's legal basis for terminating the award as of July 4, 1999.

{¶28} Likewise, the magistrate finds the rationale in *State ex rel. Ford Motor Co. v. Indus. Comm.*, 98 Ohio St.3d 20, 2002-Ohio-7038, to be inapplicable. In that case, the Ohio Supreme Court recognized that, where the injured worker had a preexisting business to which he had given substantial labor and supervision before the injury, and where he was forced to hire laborers to replace his physical contribution during his recuperation, the claimant could engage in some supervisory activities and minimal physical activities to preserve his business without losing eligibility for TTD compensation.

{¶29} In recommending denial of the requested writ, the magistrate is mindful of the argument raised by claimant that claimants receiving TTD will be chilled in engaging in ordinary activities. Claimant argues:

To find fraud in this matter sets a dangerous precedent. * * *
Where do we draw the line? Can a claimant pick up a bag of groceries, can a claimant pick up a fallen grandchild, can a claimant attempt to mow his law, can a claimant attempt to wash an automobile? * * *

(Relator's brief at 9.)

{¶30} The magistrate finds this concern unwarranted. Here, the claimant did not merely pick up a bag of groceries or assist a fallen toddler. The commission did not merely find that claimant engaged in a brief activity that was allegedly inconsistent with his claimed disability. Here, the commission had clear and convincing evidence that claimant made material and gross misrepresentations to two physicians who examined him, including the physician on whom the commission had relied in awarding TTD. Through no fault of the physician, the C-84 report falsely asserted that claimant was incapable of any work as of July 4, 1999. The C-84 reports were not "some evidence" upon which TTD could be awarded, and the award was, therefore, not supported by medical evidence as of July 4, 1999. Moreover, the employer was deprived of the opportunity to provide alternative work to the claimant within his restrictions, if there were any.

{¶31} A claimant receiving TTD is not expected to cease the activities of daily living, and hearing officers are well qualified to understand that and to rule that picking up a bag or two of groceries on occasion does not mean that the person can lift that amount of weight on a regular basis at his former position of employment. Likewise, doing some cleaning at home does not necessarily mean a claimant can do his former job, a principle that the commission explicitly recognized in its decision. Similarly, bending a few times to help a toddler does not prove that the claimant perpetrated a fraud on the examining physicians by complaining to them that bending has been painful and limited. The commission and the courts can sort out fraudulent and nonfraudulent conduct on a case-

