[Cite as *State ex rel. Hughes v. Indus. Comm.*, 2009-Ohio-5580.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Larry D. Hughes,	:	
Relator,	:	
v.	:	No. 09AP-49
Penry Stone Company Inc. and Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
	:	
Respondents.	:	

D E C I S I O N

Rendered on October 22, 2009

Michael J. Muldoon, for relator.

Richard Cordray, Attorney General, and *John R. Smart*, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

McGRATH, J.

{¶1} Relator, Larry D. Hughes, 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 denying him permanent total disability ("PTD") compensation, and to enter an order granting said compensation. In the alternative, relator requests that this court issue a writ of mandamus ordering the commission to vacate its orders denying him PTD compensation and his motion to depose Michael A.

Murphy, Ph.D., and to enter an order granting his motion to depose Dr. Murphy followed by a new order that adjudicates the PTD application.

{¶2} This matter was referred to a magistrate of this court pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate examined the evidence and issued a decision, including findings of fact and conclusions of law, which is appended to this decision. Therein, the magistrate concluded the commission did not abuse its discretion in denying relator's request for PTD compensation. Specifically, the magistrate concluded that the commission did not abuse its discretion in denying the motion to depose Dr. Murphy, and the commission did not abuse its discretion in its analysis of nonmedical factors. Therefore, the magistrate recommended that this court deny the requested writ of mandamus.

{¶3} Relator does not delineate a specific objection, but essentially argues that because there is a substantial disparity between the reports of the examining physicians, he should have been allowed to depose Dr. Murphy. Relator's contention that the commission abused its discretion in denying his motion to depose Dr. Murphy is a re-argument of that submitted to and thoroughly addressed by the magistrate. Upon review, and for the reasons set forth in the magistrate's decision, we do not find relator's position to be well-taken.

{¶4} Following an independent review of this matter, we find that the magistrate has properly determined the facts and applied the appropriate law. Therefore, relator's objections to the magistrate's decision are overruled, and we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained

therein. In accordance with the magistrate's decision, we deny the requested writ of mandamus.

Objections overruled; writ denied.

KLATT and CONNOR, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Larry D. Hughes, :

Relator, :

v. : No. 09AP-49

Penry Stone Company Inc. and Industrial Commission of Ohio, : (REGULAR CALENDAR)

:

Respondents.

:

M A G I S T R A T E ' S D E C I S I O N

Rendered on July 17, 2009

Michael J. Muldoon, for relator.

Richard Cordray, Attorney General, and *John R. Smart*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶5} In this original action, relator, Larry D. Hughes, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order denying him permanent total disability ("PTD") compensation, and to enter an order granting said compensation. In the alternative, relator requests that the writ order the commission to vacate its orders denying him PTD compensation and his motion to

depose Dr. Murphy and to enter an order granting his motion to depose Dr. Murphy followed by a new order that adjudicates the PTD application.

Findings of Fact:

{¶6} 1. On April 7, 1998, relator sustained an industrial injury while employed as a crane operator for respondent Penry Stone Company, Inc., a state-fund employer. The industrial claim (No. 98-375019) is allowed for:

> Cervicalgia; contusion back; cervical and lumbar strain; anxiety disorder with features of depression; aggravation of pre-existing lumbar degenerative changes L3-4, L4-5 and L5-S1 causing denervation changes lumbar paraspinal bilateral and right lower extremity muscles; aggravation of pre-existing degenerative changes in the cervical spine. Disallowed for: sprain/strain left shoulder/arm.

{¶7} 2. On March 11, 2008, treating psychologist Michael Drown, Ph.D., wrote:

> Based on all available information of it is reasonable that his work related injuries renders him to be permanently and totally disabled. In reference to the AMA Guide (Fourth Edition) regarding mental and behavior disorders, his psychiatric impairment falls within the marked range.

{¶8} 3. On April 22, 2008, relator filed an application for PTD compensation. In support, relator submitted the March 11, 2008 report of Dr. Drown.

{¶9} 4. On May 22, 2008, at the commission's request, relator was examined by psychologist Michael A. Murphy, Ph.D. In his eight-page narrative report, Dr. Murphy wrote: "The Injured Worker's condition is of mild severity and not work prohibitive. The Injured Worker is capable of his former position as a crane operator."

{¶10} 5. On May 22, 2008, at the commission's request, relator was examined by John W. Cunningham, M.D. Dr. Cunningham conducted a physical examination only. In his four-page narrative report, Dr. Cunningham opined:

> * * * In my medical opinion this individual has 26% whole person permanent partial impairment on a non-psychiatric, non-emotional basis. * * * In my medical opinion, this individual is capable of light physical work activity, provided he is not asked to use his arms above shoulder level in the course of his physical activity. * * *

{¶11} 6. Dr. Cunningham also completed a physical strength rating form on which he indicated by his mark that relator is capable of "light work." For further limitations, Dr. Cunningham wrote: "No use [of] arms above shoulder level."

{¶12} 7. On June 4, 2008, Dr. Murphy completed a form captioned "Occupational Activity Assessment[,] Mental & Behavioral Examination." On the form, Dr. Murphy indicated by his mark: "This injured worker has no work limitations."

{¶13} 8. On June 13, 2008, claiming "substantial disparity" between the reports of Drs. Murphy and Drown, relator moved to depose Dr. Murphy.

{¶14} 9. Following a July 22, 2008 hearing, a staff hearing officer ("SHO") issued an order denying the motion to depose. The order explains:

> The request to depose Dr. Murphy is denied and is found to be unreasonable.
>
> At hearing, no specific evidence was provided as to why Dr. Murphy should be deposed regarding his 5/22/2008 report, other than the fact that Dr. Murphy's conclusion as to permanent total impairment differs from that of Dr. Drown. The Staff Hearing Officer finds that the mere difference in the physicians' conclusions is not the basis for a deposition. The difference in opinion of Dr. Murphy regarding the injured worker's ability to work on a psychological basis, as opposed to the report of Dr. Drown, can be argued at the Staff Hearing Officer hearing regarding permanent total disability. Therefore, the request for a deposition of Dr. Murphy is denied.

{¶15} 10. Relator requested reconsideration of the SHO's order of July 22, 2008. On August 28, 2008, the three-member commission unanimously denied the request for reconsideration.

{¶16} 11. Following a December 12, 2008 hearing, an SHO issued an order denying relator's PTD application. The order explains:

> After full consideration of the issue it is the order of the Staff Hearing Officer that the Application filed 04/22/2008, for Permanent and Total Disability Compensation, be denied. This decision is based on the reports of Drs. Cunningham and Murphy and the consideration of the injured worker's non-medical disability factors.
>
> The injured worker was evaluated by Dr. Cunningham on 05/22/2008 regarding the allowed physical conditions of this claim. Dr. Cunningham noted the absence of surgery in this claim, indicated the allowed physical conditions had reached maximum medical improvement, opined the allowed conditions resulted in 26% whole person impairment, and indicated as a result of the allowed physical conditions of this claim the injured worker was limited to light work with the added restriction of no use of the arms above shoulder level.
>
> "Light work" means exerting up to twenty pounds of force occasionally, and/or up to ten pounds of force frequently, and/or a negligible amount of force constantly (constantly: activity or condition exists two-thirds or more of the time) to move objects. Physical demands may be rated light work: (1) when it requires walking or standing to a significant degree; or (2) when it requires sitting most of the time but entails pushing and/or pulling or arm or leg controls; and/or (3) when the job requires working at a production rate pace entailing the constant pushing and/or pulling of materials even though the weight of those materials is negligible.
>
> The injured worker was evaluated by Dr. Murphy on 05/22/2008 regarding the allowed psychological condition of this claim, anxiety disorder with features of depression. Dr. Murphy performed a clinical interview and administered the MCMI-III, noting the injured worker had been receiving psychological counseling and medications since 2003. It was

the opinion of Dr. Murphy that the allowed psychological condition had reached maximum medical improvement, resulted in 14% whole person impairment, and presented no work limitations for the injured worker.

The reports of Drs. Cunningham and Murphy are found persuasive. As the medical evidence is not dispositive of the permanent total disability issue, a discussion of the injured worker's non-medical disability factors is necessary. State, ex rel. Stephenson v. Industrial Commission (1987), 31 Ohio St. 3d 167.

The injured worker was born on 04/01/1957 and is currently 51 years of age. This is classified as a "person of middle age" and is found to be a vocationally-neutral factor. While some employers prefer an employee with more work life remaining, other employers prefer an employee with more work and life experiences.

The injured worker completed the eighth grade in school and testified at hearing that he quit to go to work. The injured worker further testified that he was a poor student and therefore did no[t] pursue his GED. The injured worker's education is classified as "limited." This is considered to be a negative vocational factor. Generally, a limited education means the ability in reasoning, arithmetic, and language skills but not enough to allow an injured worker with these qualifications to do most of the complicated job duties needed in semi-skilled and skilled work.

The injured worker's employment history is consistent with his educational level. The injured worker was a construction laborer (heavy, skilled) from 1986 to 1989 and performed a variety of work including mixing mortar, hanging siding, laying block, and demolition. The injured worker was a crane operator (light, skilled), the former position of employment in this claim, from 1989 to 2000.

The injured worker's employment history is found to be a positive vocational factor. It demonstrates the injured worker's ability to learn and perform a variety of work that was consistent with, if not exceeding, his educational level.

The injured worker's residual functional capacity for light work as found by Dr. Cunningham would preclude the injured worker's return to work at his former position of

employment or any of the jobs he previously performed. While the injured worker's former position of employment of crane operator is classified as light, the additional limitation imposed by Dr. Cunningham of no use of the arms above shoulder level would impact the injured worker's ability to climb in and out of the crane cab.

As the injured worker cannot return to work at his former position of employment, his effort to be vocationally retrained for less exertional work is a factor to be considered in this permanent total disability determination. The injured worker has had three opportunities to participate in vocational rehabilitation, the first in 2002. A closure report dated 05/31/2002 indicates the injured worker did not return phone calls from his case manager and states the reason for closure was the "refusal of services."

The second referral to vocational rehabilitation was closed on 01/10/2007 due to the terminal illness of the injured worker's brother. The injured worker's vocational rehabilitation file was reopened in April of 2007 but participation was delayed as the physician of record, Dr. Lundeen, changed the injured worker's restrictions from sedentary, as noted in the Medco 14 dated 01/02/2007, to temporarily and totally disabled in the Medco 14 dated 04/27/2007. The closure report dated 05/14/2007 indicates the vocational rehabilitation file was ultimately closed as the injured worker again indicated he did not wish to participate.

Permanent total disability is a compensation "of last resort, to be awarded only when all reasonable avenues of accomplishing a return to sustained remunerative employment have failed." State, ex rel. Wilson v. Industrial Commission (1997), 80 Ohio St. 3d 250, 253. The injured worker's residual functional capacity for light work with no use of the arms above shoulder level, age, and varied work experience make him a candidate for rehabilitation and re-entry into the workforce. The failure to fully participate in vocational rehabilitation is a significant factor in denying this benefit of last resort.

Based on on [sic] the above-listed physical capacities and non-medical disability factors, the Staff Hearing Officer finds the injured worker's disability is not total, and that the injured worker is capable of engaging in sustained remunerative employment, or being retrained to engage in sustained

> remunerative employment. Therefore, the injured worker's request for an award of permanent disability benefits is denied.

{¶17} 12. On January 16, 2009, relator, Larry D. Hughes, filed this mandamus action.

Conclusions of Law:

{¶18} Two issues are presented: (1) whether the commission abused its discretion in denying relator's motion to depose Dr. Murphy, and (2) whether the commission abused its discretion in its analysis of the nonmedical factors, and particularly with respect to relator's work history.

{¶19} The magistrate finds: (1) the commission did not abuse its discretion in denying the motion to depose Dr. Murphy, and (2) the commission did not abuse its discretion in its analysis of the nonmedical factors.

{¶20} Accordingly, it is the magistrate's decision that this court deny relator's request for a writ of mandamus, as more fully explained below.

{¶21} Turning to the first issue, R.C. 4123.09 provides that the commission "may cause depositions of witnesses * * * to be taken."

{¶22} Supplementing the statute, former Ohio Adm.Code 4121-3-09(A)(6) set forth a procedure for obtaining depositions of a commission or bureau physician. Deposition requests were evaluated under a reasonableness standard. Former Ohio Adm.Code 4121-3-09(A)(6)(c) and (d); *State ex rel. Cox v. Greyhound Food Mgt., Inc.*, 95 Ohio St.3d 353, 355, 2002-Ohio-2335.

{¶23} Former Ohio Adm.Code 4121-3-09(A)(6)(d) stated:

> The factors to be considered by the hearing administrator when determining the reasonableness of the request for deposition and interrogatories include whether a substantial disparity exists between various medical reports on the issue that is under contest, whether one medical report was relied upon to the exclusion of others, and whether the request is for harassment or delay. * * *

{¶24} After extensively discussing the deficiencies of the "substantial disparity" and "exclusive reliance" criteria, the *Cox* court concluded that the former code's first two criteria, in most cases, were not very useful in determining the reasonableness of a deposition request. *Cox*, at 356. The court stated that, fortunately, the former code implies that other factors may be considered as circumstances dictate. In *Cox*, the court relied upon two other criteria to judge the reasonableness of the deposition request: (1) does a defect exist that can be cured by deposition; and (2) is the disability hearing an equally reasonable option for resolution?

{¶25} Presumably, the *Cox* case prompted the commission to amend Ohio Adm.Code 4121-3-09 effective April 1, 2004. The provision of former Ohio Adm.Code 4121-3-09(A)(6)(d), quoted above, was deleted.

{¶26} Currently, Ohio Adm.Code 4121-3-09(A)(7)(c) provides that the hearing administrator shall determine whether the deposition request "is a reasonable one." Currently, Ohio Adm.Code 4121-3-09(A)(7)(d), effective April 4, 2004, provides:

> * * * [W]hen determining the reasonableness of the request for deposition or interrogatories the hearing administrator shall consider whether the alleged defect or potential problem raised by the applicant can be adequately addressed or resolved by the claims examiner, hearing administrator, or hearing officer through the adjudicatory process within the commission or the claims process within the bureau of workers' compensation.

{¶27} Notably, the "substantial disparity" criteria was removed from the commission's rules effective April 1, 2004.

{¶28} However, the new rule does not appear to preclude a party from claiming substantial disparity as a basis for a deposition request under the reasonableness standard.

{¶29} Thus, the magistrate shall not presume that the commission's amendment of its deposition rule automatically precludes a party from arguing substantial disparity.

{¶30} Noteworthy here, the *Cox* court criticized the "substantial disparity" criteria:

> * * * [T]he substantial-disparity criterion often does not recognize the fundamentals of the hearing process. Disability hearings occur precisely because there *is* a disparity in the medical evidence. Unanimity does not usually generate a hearing. To the contrary, the need for a hearing generally arises when one doctor says that a claimant can work and the other disagrees. They are completely opposite opinions and that is why there is a hearing—to debate a disputed report's strengths and weaknesses. Once the hearing is concluded, the commission can accept the disputed report or reject it as unpersuasive.

Id. at ¶19. (Emphasis sic.)

{¶31} In this case, it can certainly be argued that a substantial disparity exists between the reports of Drs. Murphy and Drown. Dr. Murphy opined that the psychological claim allowance is not work-prohibitive and that relator is capable of returning to his former position of employment as a crane operator. On the other hand, Dr. Drown opined that the psychological claim allowance renders relator permanently and totally disabled.

{¶32} However, that a substantial disparity exists between the reports of Drs. Murphy and Drown does not give relator a clear legal right to depose Dr. Murphy. As the *Cox* court explains, that is why there is a hearing. While relator did point out the

"substantial disparity" between the two reports, relator has not made an argument, either before the commission or before this court, as to why the hearing on the merits of the PTD application fails to provide an equally reasonable option for resolution of the issues presented by the two disparate reports. Accordingly, substantial disparity between the two reports does not compel the conclusion that the commission abused its discretion in denying the motion to depose. See *State ex rel. Sears Roebuck Co. v. Indus. Comm.*, 10th Dist. No. 05AP-1135, 2007-Ohio-838.

{¶33} As previously noted, the second issue is whether the commission abused its discretion in its analysis of the nonmedical factors, and particularly with respect to relator's work history. Citing and quoting from four cases, i.e., *State ex rel. Bruner v. Indus. Comm.*, 77 Ohio St.3d 243, 1997-Ohio-43; *State ex rel. Pierce v. Indus. Comm.*, 77 Ohio St.3d 275, 1997-Ohio-41; *State ex rel. Haddix v. Indus. Comm.*, 70 Ohio St.3d 59, 1994-Ohio-443; *State ex rel. Mann v. Indus. Comm.*, 80 Ohio St.3d 656, 1998-Ohio-660, relator claims, in a very general fashion, that the commission's "rationale in this case is not supported by evidence." (Relator's brief, at 10.) The commission addressed relator's work history as follows:

> The injured worker's employment history is consistent with his educational level. The injured worker was a construction laborer (heavy, skilled) from 1986 to 1989 and performed a variety of work including mixing mortar, hanging siding, laying block, and demolition. The injured worker was a crane operator (light, skilled), the former position of employment in this claim, from 1989 to 2000.
>
> The injured worker's employment history is found to be a positive vocational factor. It demonstrates the injured worker's ability to learn and perform a variety of work that was consistent with, if not exceeding, his educational level.

{¶34} As quoted by relator, the *Bruner* court stated:

> We are disturbed by the increasing frequency with which the commission has denied permanent total disability compensation based on "transferable skills" that the commission refuses to identify. This lack of specificity is even more troubling when those "skills" are derived from traditionally unskilled jobs. As such, we find that the commission's explanation of claimant's vocational potential in this case is too brief to withstand scrutiny.

Id. at 245.

{¶35} As quoted by relator, the *Pierce* court stated:

> The commission's discussion of claimant's work history is also inadequate. With increasing, and disturbing, frequency we are finding that no matter what claimant's employment background is, the commission finds skills—almost always unidentified—that are allegedly transferable to sedentary work. In some cases, depending on the claimant's background, these skills are self-evident. In many cases, they are not.

Id. at 277.

{¶36} As quoted by relator, the *Haddix* court stated:

> The commission determined that claimant's prior work as a gas station attendant and press operator provided him with skills transferable to sedentary employment. The commission's order, however, does not identify what those skills are. Such elaboration is critical in this case, since common sense suggests that neither prior work is, in and of itself, sedentary.

Id. at 61.

{¶37} As quoted by relator, the *Mann* court stated:

> The commission, in finding claimant capable of work, relies overwhelmingly on claimant's past employment. Its discussion is flawed because, despite excessive verbiage, it is no more than a recitation of claimant's nonmedical profile. The commission lists claimant's work history three times but

> never explains how those nonsedentary jobs equip claimant for a sedentary position. Moreover, the commission's reference to "sedentary low stress positions in the food service industry" merits further explanation. While the commission is generally not required to enumerate the jobs of which it believes claimant to be capable, its assertion that claimant could do low stress sedentary work in an industry that is traditionally considered neither low stress nor sedentary requires further exploration.

Id. at 659.

{¶38} Clearly, relator's reliance on the above four cases is misplaced. Here, the commission did not find transferability of skills from relator's former position of employment or his other past work. Thus, there was no transferable skills for the commission to identify. Rather, the commission found that relator has demonstrated an "ability to learn" a variety of work that is consistent with his educational level. As the court noted in *State ex rel. Ewart v. Indus. Comm.* (1996), 76 Ohio St.3d 139, 142, a lack of transferable skills does not mandate a PTD award. Thus, the commission offered some evidence and an explanation to support its finding that the work history presented a positive factor.

{¶39} Moreover, unlike the situations in the four cases from which relator quotes, the commission determined here that relator was a candidate for vocational rehabilitation but he failed to fully participate in vocational rehabilitation. The commission found this to be a significant factor. Relator does not challenge the commission's finding that he failed, without justification, to fully participate in vocational rehabilitation.

{¶40} Based upon the above analysis, the magistrate finds that relator has failed to show that the commission abused its discretion with respect to the nonmedical factors.

{¶41} Accordingly, it is the magistrate's decision that this court deny relator's request for a writ of mandamus.

/s/ *Kenneth W. Macke*
KENNETH W. MACKE
MAGISTRATE

NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).