

[Cite as *State ex rel. Formica Corp. v. Indus. Comm.*, 2011-Ohio-2484.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State ex rel. Formica Corporation,	:	
Relator,	:	
v.	:	No. 10AP-242
Industrial Commission of Ohio and Tony L. Thompson,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on May 24, 2011

Dinsmore & Shohl, LLP, and Joan M. Verchot, for relator.

*Michael DeWine, Attorney General, and Derrick Knapp, for
respondent Industrial Commission of Ohio.*

*White Getgey & Meyer Co., LPA, and Glenda Morgan
Hertzman, for respondent Tony L. Thompson.*

IN MANDAMUS

SADLER, J.

{¶1} Relator Formica Corporation commenced this original action requesting this court to issue a writ of mandamus ordering respondent Industrial Commission of Ohio to vacate its order granting permanent total disability ("PTD") compensation to respondent-

claimant Tony L. Thompson and ordering the commission to redetermine whether or not claimant is entitled to PTD compensation after considering his vocational rehabilitation efforts.

{¶2} Pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth Appellate District, this matter was referred to a magistrate who considered the action on its merits and issued a decision, including findings of fact and conclusions of law, which is appended hereto. The magistrate noted that the commission conceded that it failed to properly consider claimant's ability to participate in vocational rehabilitation as required by law. The magistrate determined that it was incumbent upon the commission, given that there was evidence of vocational rehabilitation in the record, to determine whether or not claimant could have developed skills or pursued other avenues to increase his potential to be reemployed. Thus, the magistrate concluded that relator has demonstrated that the commission abused its discretion by failing to consider claimant's efforts to improve his reemployment potential. Accordingly, the magistrate recommended this court issue a writ of mandamus ordering the commission to vacate its order granting claimant PTD compensation and ordering the commission to redetermine PTD compensation after consideration of the evidence of vocational rehabilitation.

{¶3} No objections have been filed to the magistrate's decision.

{¶4} Having conducted an independent review of the record in this matter, and finding no error of law or other defect in the magistrate's decision, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law therein. In accordance with the magistrate's decision, the requested writ of mandamus is granted, and the commission is ordered to vacate its order granting claimant PTD

compensation and to redetermine the request for PTD compensation after considering the vocational evidence.

Writ of mandamus granted.

KLATT and CONNOR, JJ., concur.

A P P E N D I X

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Formica Corporation,	:	
	:	
Relator,	:	
	:	
v.	:	No. 10AP-242
	:	
Industrial Commission of Ohio	:	(REGULAR CALENDAR)
and Tony L. Thompson,	:	
	:	
Respondents.	:	
	:	

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

Rendered on February 28, 2011

Dinsmore & Shohl, LLP, and Joan M. Verchot, for relator.

Michael DeWine, Attorney General, and Derrick Knapp, for respondent Industrial Commission of Ohio.

White Getgey & Meyer Co., LPA, and Glenda Morgan Hertzman, for respondent Tony L. Thompson

IN MANDAMUS

{¶5} Relator, Formica Corporation, 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 which granted permanent total disability ("PTD") compensation to respondent Tony L. Thompson ("claimant") and ordering the

commission to re-determine whether or not claimant is entitled to PTD compensation after considering his vocational rehabilitation efforts.

Findings of Fact:

{¶6} 1. Claimant sustained a work-related injury on January 19, 1994, and his workers' compensation claim has been allowed for "right side low back sprain; herniated disc L5-S1 – right side; S1 radiculopathy."

{¶7} 2. Claimant was able to return to work with relator until January 6, 2008, when he did not have a satisfactory result following back surgery.

{¶8} 3. Claimant filed an application for PTD compensation on February 9, 2009. A review of that application reveals that claimant was 40 years old at the time he was injured and 56 years old when he filed his application for PTD compensation. Claimant indicated that he had applied for Social Security Disability Benefits; however, he had not yet been approved. Claimant graduated from high school and indicated that he could read, write, and perform basic math. Claimant's work history included manufacturing work at a burglar and fire alarm business, at a store and at a gas station. While working for relator, claimant performed different positions including work as a treater operator. According to his application, his job involved frequently lifting over 50 pounds and occasionally lifting over 100 pounds.

{¶9} 4. Claimant submitted the January 13, 2009 report from Marc P. Orlando, M.D. In that report, Dr. Orlando noted that conservative management with physical therapy, nerve stabilizing medications, epidural steroid injections, and pain medications had failed. Surgery was performed in August 2008; however, since that time, claimant continued with right leg pain, discomfort, and radiculopathy. Dr. Orlando noted that

claimant currently needed narcotic medication to treat his pain. Dr. Orlando concluded as follows:

In my professional medical opinion it is a direct causal relation to the patient's Workers' Compensation injury and the allowed conditions and the subsequent surgery for his allowed conditions. The patient is suffering from chronic intractable back pain and lumbar radicular pain and is with a reasonable degree of medical probability permanently and totally disabled. This is based on the fact that he cannot tolerate simple daily activities as filled out on the forms listed, and he needs narcotic agents which would not allow him to continue to work secondary to the nature of narcotic agents causing mental slowness, side effects, constipation and confusion. It also would be unsafe for him to continue using medications and drive back and forth to work.

At this point in time I am in support of him filing for Social Security disability and in support of him being permanently totally disabled from this point forward in regards to his back condition. He still is not at maximal medical improvement as there is stil [sic] some further testing and further procedural attempts that we are going to make to reduce his pain, but even if we are able to get his pain reduced, I still doubt that this will change the fact that he will be permanently and totally disabled for his lifetime.

{¶10} 5. Relator had claimant evaluated by Stephen D. Haverkos, M.D. In his April 10, 2009 report, Dr. Haverkos provided his physical findings upon examination, listed the medical records which he reviewed and concluded that claimant would be able to perform some work. Thereafter, Dr. Haverkos opined that for the herniated disc with radiculopathy, claimant would have restrictions with regard to weight, position and other activity including the necessity of changing positions frequently, climbing, and with safety issues.

{¶11} 6. In response to Dr. Haverkos' report, Dr. Orlando authored a second report dated April 18, 2009. Dr. Orlando stated that, in his opinion, claimant's current

medical treatment was appropriate, there were further treatments which could improve his condition and that claimant was unable to return to work activity due to his continued intractable right leg pain, his continued need for further treatment, and his use of high-dose narcotic medications. Dr. Orlando indicated that claimant was not able to stand for longer than 10 to 15 minutes, nor sit for longer than 20 to 30 minutes. He indicated further that claimant has severe restrictions in lifting, pushing and pulling.

{¶12} 7. Thereafter, claimant was examined by Thomas E. Forte, D.O. In his May 26, 2009 report, Dr. Forte provided his physical findings upon examination, identified the medical records which he reviewed, and concluded that claimant was able to perform work at a sedentary level. Dr. Forte completed an addendum dated June 10, 2009 wherein he opined that claimant had a 16 percent whole person impairment and again concluded that claimant could perform at a sedentary work level.

{¶13} 8. A vocational evaluation was prepared by George W. Lester, Psy.D. In his June 16, 2009 report, Dr. Lester noted that claimant had been receiving Social Security Disability payments since January 2009. Ultimately, Dr. Lester concluded as follows:

Taking into account factors such as the claimant's age of 56, a work history limited primarily to medium physical demand level jobs, and no additional education or training beyond high school, his vocational options would appear very limited. While he scored within the average range in all academic areas measured today, he scored below average in half of the aptitude areas measured. Medical records reviewed indicate that at best, Mr. Thompson would be limited to sedentary work with numerous physical restrictions. His treating physician, Dr. Orlando, however, indicated that he is permanently and totally disabled providing numerous restrictions related to his physical condition, as well as impaired cognition due to his use of

prescription narcotic medications. While neither Drs. Forte and liaverkos [sic] found Mr. Thompson to be precluded from all types of work, they did indicate numerous limitations for various activities such as sitting, standing, walking, bending, stooping, lifting, climbing, driving, maintaining safe employment for himself or others, and cognitive impairments due to medication. Finally, upon performing a transferability analysis, zero post access job matches were found. In view of such factors, it can be stated with a reasonable degree of vocational certainty that this claimant would be considered as permanently and totally incapable of sustained remunerative employment.

{¶14} 9. A separate vocational evaluation was performed by Howard L. Caston, Ph.D. In his July 10, 2009 report, Dr. Caston identified the medical records he reviewed and claimant's work history. Ultimately, Dr. Caston opined that claimant would be able to perform or be trained to engage in sustained remunerative employment such as less strenuous production work, cashiering, data entry and related work activity. He opined that claimant should be able to learn basic computer skills commonly used in offices today.

{¶15} 10. Claimant's application was heard before a staff hearing officer ("SHO") on September 9, 2009 and was granted. The SHO ultimately concluded that, while claimant retained the residual functional capacity to perform sedentary work, and that he had the ability to undergo on-the-job training on a short-term basis to learn the work rules and procedures which may be required to return to work, claimant was unable to engage in sustained remunerative employment. The SHO found claimant's age to be a neutral factor and his high school education to be a positive factor. However, the SHO concluded that claimant's work history was a negative factor

specifically because the majority of claimant's job duties had involved heavy work and he had never held an office job, nor a strictly clerical position.

{¶16} 11. Relator appealed and specifically argued that the SHO had failed to consider claimant's vocational rehabilitation efforts or, rather, the lack thereof.

{¶17} 12. In response to relator's argument, counsel for claimant submitted a letter explaining as follows:

Please be advised this letter is in response to the self-insured employer's letter dated October 2, 1009. In that letter, counsel for the self-insured employed [sic] indicated that the claimant had not sought vocational rehabilitation. Mr. Thompson was referred to Independent Vocational Services on or about April 17, 2009. Counsel for the self-insured employer was notified of that referral on or about April 24, 2009. Independent Vocational Services contacted Mr. Thompson on or about April 28, 2009 and at that time requested a referral from Dr. Orlando for rehabilitation. Dr. Orlando never completed a request for rehabilitation as he was of the opinion that Mr. Thompson was permanently and totally disabled.

{¶18} 13. Relator's appeal from the granting of PTD compensation was denied by order of the commission mailed October 29, 2009.

{¶19} 14. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶20} The single issue raised in this case is whether the commission abused its discretion by failing to discuss whether or not claimant had made a reasonable effort to participate in vocational rehabilitation to improve his reemployment potential prior to awarding him PTD compensation.

{¶21} In its brief, the commission concedes that it failed to properly consider claimant's ability to participate in vocational rehabilitation as required by law. Claimant

contends that the commission was not required to consider or refer to his vocational rehabilitation efforts.

{¶22} The magistrate determines that the commission did abuse its discretion by failing to consider and discuss claimant's ability to participate in vocational rehabilitation to enhance his reemployment potential and to consider whatever efforts claimant made to do so.

{¶23} The relevant inquiry in a determination of permanent total disability is the claimant's ability to do any sustained remunerative employment. *State ex rel. Domjancic v. Indus. Comm.* (1994), 69 Ohio St.3d 693. Generally, in making this determination, the commission must consider not only medical impairments, but also the claimant's age, education, work record and other relevant nonmedical factors. *State ex rel. Stephenson v. Indus. Comm.* (1987), 31 Ohio St.3d 167. Thus, a claimant's medical capacity to work is not dispositive if the claimant's nonmedical factors foreclose employability. *State ex rel. Gay v. Mihm* (1994), 68 Ohio St.3d 315. The commission must also specify in its order what evidence has been relied upon and briefly explain the reasoning for its decision. *State ex rel. Noll v. Indus. Comm.* (1991), 57 Ohio St.3d 203.

{¶24} In *State ex rel. Wilson v. Indus. Comm.* (1997), 80 Ohio St.3d 250, the Supreme Court of Ohio made it clear that the relevant vocational inquiry is whether the claimant may return to the job market by using past employment skills or those skills which the claimant may reasonably develop. The *Wilson* court stated further:

We view permanent total disability compensation as compensation of last resort, to be awarded only when all reasonable avenues of accomplishing a return to sustained remunerative employment have failed. Thus, it is not unreasonable to expect a claimant to participate in return-to-

work efforts to the best of his or her abilities or to take the initiative to improve reemployment potential. While extenuating circumstances can excuse a claimant's non-participation in reeducation or retraining efforts, claimants should no longer assume that a participatory role, or lack thereof, will go unscrutinized.

Id. at 253-54.

{¶25} Further, Ohio Adm.Code 4121-3-34(D)(2) requires such consideration by the commission. Specifically, Ohio Adm.Code 4121-3-34(D)(2) provides:

(b) If, after hearing, the adjudicator finds that the injured worker, based on the medical impairment resulting from the allowed conditions is unable to return to the former position of employment but may be able to engage in sustained remunerative employment, the non-medical factors shall be considered by the adjudicator.

The non-medical factors that are to be reviewed are the injured worker's age, education, work record, and all other factors, such as physical, psychological, and sociological, that are contained within the record that might be important to the determination as to whether the injured worker may return to the job market by using past employment skills or those skills which may be reasonably developed. (Vocational factors are defined in paragraph (B) of this rule).

(c) If, after hearing and review of relevant vocational evidence and non-medical disability factors, as described in paragraph (D)(2)(b) of this rule the adjudicator finds that the injured worker can return to sustained remunerative employment by using past employment skills or those skills which may be reasonably developed through retraining or through rehabilitation, the injured worker shall be found not to be permanently and totally disabled.

{¶26} Claimant asserts that the commission is never *required* to consider rehabilitation efforts in granting or denying PTD compensation and cites this court's decision in *State ex rel. Walter v. Indus. Comm.*, 10th Dist. No. 09AP-225, 2009-Ohio-5974. In *Walter*, the injured worker, Allen Walter, was referred for vocational

rehabilitation several times; however, for various reasons, Walter never actually participated in rehabilitation.

{¶27} The following scenario from *Walter* follows:

* * * [Allen Walter] did engage in vocational rehabilitation services through the BWC and an IVRP was prepared in order to help him become reemployed. That plan was to include job search training and other services. Because Dr. Rohmiller wanted relator to undergo an FCE, relator's file was closed in May 2007.

His rehabilitation file was reopened in August 2007; however, several delays followed. First, relator refused to sign the vocational rehabilitation agreement. Then, Dr. Rohmiller wanted relator to obtain a TENS unit and a lumbar corset before he began job search services. Relator was out of town for several weeks and eventually signed the vocational evaluation agreement on September 14, 2007. At relator's request, his vocational evaluation was then scheduled for October 2, 2007. Thereafter, on October 24, 2007, an IVRP was prepared for relator. The plan included JSST three times a week for three weeks (10/17/07 – 11/4/07) followed by JSJD/PS three times a week for four weeks (10/29/07 – 11/25/07) which would include 15 weekly face-to-face contacts with employers and the payment of living maintenance through November 25, 2007. However, before relator began engaging in any of the services, the BWC was informed that relator was seeking to have his claim allowed for additional conditions. As such, his rehabilitation file was placed in Medical Interrupt status for two weeks from October 24 through November 6, 2007. Medical Interrupt was continued for another two weeks, through November 22, 2007. Because Dr. Rohmiller then sought additional diagnostic testing, relator's rehabilitation file was again closed on November 20, 2007.

Relator's next efforts at vocational rehabilitation began on January 24, 2008, when Dr. Rohmiller submitted a C-9 requesting vocational rehabilitation and job search services. Thereafter, in an office note dated March 6, 2008, Dr. Rohmiller confirmed that relator had yet to go through with any vocational rehabilitation, job search, or any sort of work conditioning. Dr. Rohmiller opined that if these services were

unsuccessful, then relator was permanently and totally disabled. Ultimately, relator's file was closed for the last time on March 17, 2008 due to a lack of plan potential.

While relator did initiate contact with the BWC for vocational rehabilitation, for various reasons, he never actually engaged in any of the recommended services. As such, in closing his vocational rehabilitation file, the BWC never made a finding that relator was not a feasible candidate for rehabilitation, nor did the BWC make a finding that relator would be unable to secure any employment.

Id. at ¶40-43.

{¶28} Walter had argued that the commission was required to find that he actively pursued vocational rehabilitation and that the BWC determined that rehabilitation was not feasible. The commission denied him PTD compensation and Walter sought a writ of mandamus in this court arguing that the commission abused its discretion by completely failing to discuss his rehabilitation efforts in contravention of *State ex rel. Wilson v. Indus. Comm.* (1997), 80 Ohio St.3d 250.

{¶29} This court disagreed:

* * * *Wilson* does not indicate that the vocational rehabilitation efforts made by an injured worker "must" be considered. The passage merely forewarns claimants that courts may look at rehabilitation efforts and should not assume rehabilitation efforts will not be considered by the court. We can find no authority to support relator's interpretation of *Wilson*, and relator cites none. This court has before interpreted *Wilson* as holding that a claimant's failure to undergo rehabilitation or retraining "can be" a factor for the commission's consideration in a PTD adjudication. See, e.g., *State ex rel. Kay v. Indus. Comm.*, 10th Dist. No. 08AP-31, 2009-Ohio-326, ¶ 36 (the Supreme Court of Ohio has repeatedly held that a claimant's failure to undergo rehabilitation or retraining "can be" a factor for the commission's consideration in a PTD adjudication); *State ex rel. Felty v. Gen. Motors*, 10th Dist. No. 08AP-156, 2008-Ohio-5694, ¶ 25 (it is undisputed that the commission "can"

demand accountability of claimants who, despite time and medical ability to do so, never tried to further their education or learn new skills); *State ex rel. McGill v. Clark Bros. Felt Co., Inc.*, 10th Dist. No. 07AP-138, 2007-Ohio-5014, ¶ 24 (failure to undergo retraining "can" be a factor); *State ex rel. Slater v. Indus. Comm.*, 10th Dist. No. 06AP-1137, 2007-Ohio-4413, ¶ 27 (failure to undergo retraining "can" be a factor). The Supreme Court has also reiterated that the claimant's failure to undergo rehabilitation "can be" a factor in considering PTD. See *State ex rel. Paraskevopoulos v. Indus. Comm.* (1998), 83 Ohio St.3d 189, 193 (stating that a claimant's failure to make reasonable efforts to enhance his/her rehabilitation re-employment potential "can be" a factor in a PTD determination). We fail to find any authority for the proposition that a court or the commission must consider such factor or necessarily reference evidence of such in its decision.

Id. at ¶4.

{¶30} This court noted that "because this evidence did not contradict any of the commission's findings, the commission did not have to address the rehabilitation efforts evidence in its decision." Id. at ¶7.

{¶31} Unlike the situation in *Walter*, the commission made findings here which opened the door to some discussion of claimant's rehabilitation efforts. Certainly the commission can consider them and still grant claimant PTD compensation; however, when the commission's findings open the door to some discussion of claimant's efforts at vocational rehabilitation, the commission needs to make that analysis.

{¶32} While recognizing that claimant has significant restrictions, the commission did rely on medical evidence that he was capable of performing sedentary work within those restrictions, acknowledged that his age and education were positive factors and that claimant had the ability to undergo on-the-job training. Considering that there is vocational evidence in the record which would support the conclusion that

claimant could perform less strenuous production work, cashiering, data entry and other related work activity, it was incumbent upon the commission to determine whether or not claimant could have developed skills or pursued other avenues to increase his potential to be reemployed. Further, claimant was 40 years of age when he was injured and 56 years of age when he applied for PTD compensation. While the record does indicate that claimant was referred for vocational rehabilitation in 2009, he did so only after he applied for PTD compensation and approximately one and one-half years after he last worked.

{¶33} Based on the foregoing, it is this magistrate's decision that relator has demonstrated that the commission abused its discretion by failing to consider claimant's efforts to improve his reemployment potential and this court should grant a writ of mandamus ordering the commission to vacate its order granting claimant PTD compensation and ordering the commission to redetermine the issue after considering the vocational evidence.

/s/ Stephanie Bisca Brooks

STEPHANIE BISCA BROOKS
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).