

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

State of Ohio ex rel.	:	
Con-Way Freight, Inc.,	:	
	:	
Relator,	:	
	:	
v.	:	No. 10AP-706
	:	
Industrial Commission of Ohio	:	(REGULAR CALENDAR)
and Michael Schmitt,	:	
	:	
Respondents.	:	

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D E C I S I O N

Rendered on September 8, 2011

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*Scheuer Mackin & Breslin LLC, J. Kent Breslin, and Robert S. Corker*, for relator.

*Michael DeWine*, Attorney General, and *Rachel L. Lawless*, for respondent Industrial Commission of Ohio.

*Scott Kalish & Associates*, and *Mark M. Sturik*, for respondent Michael Schmitt.

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IN MANDAMUS

BROWN, J.

{¶1} Relator, Con-Way Freight, Inc., has filed an original action requesting that this court issue a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its order granting permanent total disability ("PTD") compensation to respondent, Michael Schmitt ("claimant"), and ordering the commission

to find that claimant was not entitled to PTD compensation because he refused to accept a bona fide job offer made by relator.

{¶2} This matter was referred to a magistrate of this court pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate issued a decision which is appended to this decision, including findings of fact and conclusions of law, recommending that this court deny relator's request for a writ of mandamus. No objections have been filed to that decision.

{¶3} Finding no error of law or other defect on the face of the magistrate's decision, this court adopts the magistrate's decision as our own, including the findings of fact and conclusions of law. In accordance with the magistrate's recommendation, relator's requested writ of mandamus is denied.

*Writ of mandamus denied.*

SADLER and FRENCH, JJ., concur.

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APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel.	:	
Con-Way Freight, Inc.,	:	
Relator,	:	
v.	:	No. 10AP-706
Industrial Commission of Ohio	:	(REGULAR CALENDAR)
and Michael Schmitt,	:	
Respondents.	:	

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MAGISTRATE'S DECISION

Rendered on May 31, 2011

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*Scheuer Mackin & Breslin LLC, J. Kent Breslin and Robert S. Corker*, for relator.

*Michael DeWine*, Attorney General, and *Rachel L. Lawless*, for respondent Industrial Commission of Ohio.

*Scott Kalish & Associates*, and *Mark Sturik*, for respondent Michael Schmitt.

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IN MANDAMUS

{¶4} Relator, Con-Way Freight, Inc., 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 Michael Schmitt ("claimant") and ordering the commission to find that claimant was not entitled to PTD compensation because he refused to accept a bona fide job offer made by relator.

Findings of Fact:

{¶5} 1. Claimant has sustained several work-related injuries, and his workers' compensation claims have been allowed for the following conditions:

06-833674: Cervical strain; right ulnar nerve injury at cubital tunnel; aggravation of pre-existing cervical degenerative disc disease at C6-7; right rotator cuff tendinopathy[.] \* \* \*

00-361593: Right knee strain and right anterior cruciate tear.

01-882637: Sprain left knee; anterior cruciate ligament tear, left knee; post traumatic arthrosis of the left knee; post traumatic arthrosis of the left knee [sic].

03-881663: Left lateral meniscus tear; tear of medical meniscus, left knee.

04-890908: Strain to the left knee.

05-880335: Lumbar sprain/strain; aggravation of pre-existing lumbar spondylosis; depressive disorder.

{¶6} 2. On April 8, 2009, claimant filed an application for PTD compensation.

{¶7} 3. Relator had claimant examined by Sheldon Kaffen, M.D., for his allowed physical conditions. In his June 25, 2009 report, Dr. Kaffen identified the allowed conditions in claimant's claims, provided his physical findings upon examination, identified the medical records which he reviewed, and opined that, in his opinion, claimant's allowed conditions had reached maximum medical improvement ("MMI"), and claimant was capable of engaging in sustained remunerative employment at a sedentary level as follows:

\* \* \* It is my medical opinion based on the allowed orthopedic conditions in these four claims that Mr. Schmitt's restrictions consist of no prolonged weight bearing activities. His work should be mainly sitting. He should be allowed to sit and stand at will, continue to use his cane for any ambulation. He has total restrictions of squatting and kneeling and working at heights, maximum lifting should be approximately 5 to 10 pounds and only occasional bending.

{¶8} 4. Relator had claimant examined by Robert L. Byrnes, Ph.D., for his allowed psychological condition. In his May 29, 2009 report, Dr. Byrnes identified the allowed conditions, the medical records which he reviewed, and his findings from his psychological assessment and concluded that claimant's allowed psychological condition did not prevent him from engaging in sustained remunerative employment. Dr. Byrnes

opined that claimant had no work restrictions arising from his allowed psychological condition; however, Dr. Byrnes noted that claimant was presently under a great deal of stress, some of which was totally unrelated to his work injuries.

{¶9} 5. The commission had claimant examined by Donald J. Tosi, Ph.D., for his allowed psychological condition. In his July 31, 2009 report, Dr. Tosi set forth the allowed conditions, identified the medical records which he reviewed, and concluded that claimant had a moderate impairment regarding social interaction, adaptation, as well as concentration, persistence and pace, and a mild impairment concerning daily activities. Ultimately, Dr. Tosi concluded that claimant's allowed psychological condition had reached MMI, assessed a 30 percent whole person impairment, and concluded that claimant would be able to work with the following limitations: "The Injured Worker is able to work in a low stress work situation. Tasks should be simple and repetitive. He would require close supervision."

{¶10} 6. The commission also had claimant examined by Kirby J. Flanagan, M.D., for his allowed physical conditions. In his August 14, 2009 report, Dr. Flanagan correctly set forth the allowed conditions as well as claimant's treatment and current complaints. Thereafter, Dr. Flanagan provided his physical findings upon examination and concluded that relator's allowed physical conditions had reached MMI, assessed a 50 percent whole person impairment for all the allowed physical conditions, and opined that claimant was capable of working at a sedentary work level with the following restrictions:

\* \* \* It is my opinion that he is capable of work in the sedentary category of *Dictionary of Occupational Titles* based on his history of anterior cervical instrumented fusion and bilateral knee surgeries. His walking is significantly limited. His lifting is significantly limited both by the injury to the cervical spine and to the lumbar spine. Therefore,

maximum lifting is limited to 10 pounds occasionally at waist level. He should be allowed to sit or stand as needed. He should avoid repetitive bending and lifting below waist level and lifting above shoulder level.

{¶11} 7. The record also contains a letter dated August 17, 2009, from legal counsel for relator addressed to claimant's legal counsel concerning a job offer.

Specifically, that letter provides:

Your client is being offered a position as a "Customer Service/Surveyor" through Expediter. A copy of the job duties and responsibilities, as well as the available accommodations, is enclosed. This position is entirely sub-sedentary, and will allow your client to work from home making business-to-business and customer service telephone calls from lists provided by the employer. The position involves no sales or solicitations of any kind. The employer will provide all necessary equipment, including the use of a cordless hands-free headset telephone. There is no standing, walking, lifting, bending, carrying, or other physical labor required.

Mr. Schmitt was recently examined by Doctors Kaffen and Byrnes in regards to his ability to engage in sustained remunerative employment secondary to his workers' compensation claims. Both doctors have reviewed the job description, and indicated that Mr. Schmitt is capable of performing the job duties. The employer will honor the restrictions established by the doctors in their examinations, and can also honor almost any restrictions necessary. The position will involve working 8-hour shifts, 40-hours per week. Flextime schedules are available for all employees. Your client will be paid \$8.00 per hour.

{¶12} 8. Relator followed up this correspondence by supplying counsel with copies of the medical reports of Drs. Kaffen and Byrnes and offered to contact claimant's treating physicians to determine whether or not the offered job was within his capabilities.

{¶13} 9. In a letter dated October 13, 2009, relator informed counsel that if they did not hear from him by October 23, 2009, relator would assume that claimant was not interested in the position.

{¶14} 10. After claimant's claim had been additionally allowed for the condition of post-traumatic arthrosis of the left knee, Drs. Kaffen and Flannagan authored addendums to their original reports. Dr. Flanagan considered the additional claim allowance and, in a report dated March 14, 2010, opined that, when considering the additional allowance, claimant now had a 54 percent whole person impairment and that his opinion that claimant could perform some sedentary work within the previously noted restrictions remained the same. In his addendum dated March 24, 2010, Dr. Kaffen opined that his opinion that claimant could perform some sedentary employment remained unchanged.

{¶15} 11. Claimant's application for PTD compensation was heard before a staff hearing officer ("SHO") on April 8, 2010 and was granted. The SHO specifically relied on the medical reports of Drs. Flanagan and Tosi, who concluded that claimant could work at sedentary work with both physical and psychological restrictions. The SHO considered the nonmedical disability factors:

Mr. Schmitt appeared at the hearing with his attorney, wife and daughter. He testified that he is 54 years of age and has a 10th grade education. His entire work history has been that of a truck driver, the last 16 years of which was for this employer. He last worked on 12/06/2006. He described the truck driver position as heavy work with lifting of over 50 pounds occasionally when he was loading and unloading the truck. He drives very little now although he still has an Ohio drivers license. He was driven to the hearing today by his wife. The Hearing Officer finds that the age of 54 is a neutral factor. The Injured Worker's age in and of itself would not prevent the Injured Worker from obtaining and performing sustained remunerative employment and therefore the Injured Worker's age is viewed overall as a positive

vocational asset. His educational level, 10th grade, is viewed as a barrier to employability. While he had a valid commercial drivers license and had to do some paperwork that is associated with being a truck driver, he has no experience in any type of occupation that is consistent with his current limitations to sedentary employment. Likewise his work experience, restricted to one occupation, other than his remote military service, did not result in the Injured Worker developing skills consistent with his current limitations.

At the hearing, relator did argue that it had made a bona fide good-faith job offer to claimant which he rejected. As such, relator argued that PTD compensation should be denied. The SHO addressed relator's argument and rejected it as follows:

[Relator] submitted a report from Howard Kaston [sic], Ph.D., a vocational expert who conducted a review of the files on 11/03/2009. This report is flawed because the jobs that he suggested that the Injured Worker is capable of performing either require a high school education, or require computer skills such as excel, word, and outlook, excellent interpersonal communication skills, and/or the ability to remain patient with customers while listening to their concerns and problems. [Relator] has provided a job offer to the Injured Worker from a company called EXPEDITER which apparently is a company owned by [relator] in whole or in part. This is a company with a Pennsylvania address and involves customer service completing five surveys per hour. While the position appears to be within the Injured Worker's physical capacity, the relied on psychological specialist, Dr. Tosi, indicates that tasks should be simple and that he would require close supervision. The job would be based at the Injured Worker's home and the supervisor would be in Pennsylvania. Therefore the Hearing Officer finds that the requirement of close supervision would not be met by this job.

{¶16} 12. Relator filed a request for reconsideration which was denied by order of the commission mailed June 2, 2010.

{¶17} 13. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:



{¶18} Relator argues that the commission abused its discretion when it concluded that claimant was not capable of performing some sustained remunerative employment and awarding him PTD compensation based on the medical reports and the commission's analysis of the nonmedical disability factors. Relator also contends that the commission abused its discretion when it awarded claimant PTD compensation after he refused a legitimate bona fide good-faith job offer that was clearly within his physical and psychological capabilities.

{¶19} The magistrate finds that the commission did not abuse its discretion. The commission identified the medical records upon which it relied and provided an analysis of the nonmedical disability factors. Further, the commission did not abuse its discretion in determining that relator's job offer was not within claimant's capabilities and, as such, did not preclude the receipt of PTD compensation.

{¶20} The relevant inquiry in a determination of permanent total disability is 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.

{¶21} Relator's challenge to the commission's treatment of the medical evidence and the nonmedical disability factors is that the commission's analysis of the nonmedical disability factors was not supported by any vocational evidence in the file. Specifically, relator notes that the commission had before it a vocational report from Dr. Caston, who concluded that claimant's education and prior work experience indicate that he has the ability to perform jobs that include truck driving, operating a forklift, shipping/receiving clerk, dispatcher, and related jobs. Dr. Caston also noted that claimant had performed some clerical duties and that it was reasonable to assume that he could learn basic office skills and perform entry-level clerical jobs that are sedentary in nature. Dr. Caston also found claimant's age of 53 years, his long and stable work history, and his ability to perform basic self-care needs to be positive factors in terms of re-employment. While Dr. Caston did note the impact of claimant's vocational limitations, including his reduced functional capacities, depression, the possibility of adjustment factors, his lack of a high school diploma or GED, and the recent economic downturn, Dr. Caston opined that claimant was capable of returning to employment and attached a list of job openings which he believed claimant could perform.

{¶22} Here, relator contends that the commission concocted facts to support its conclusion. Specifically, relator points to that portion of the order wherein the SHO explained, in part, the reason for not relying on Dr. Caston's report—Dr. Caston's "report is flawed because the jobs that he suggested that the [claimant] is capable of performing either require a high school education, or require computer skills such as excel, word, and outlook, excellent interpersonal communication skills, and/or the ability to remain patient

with customers while listening to their concerns and problems." Relator contends that this "evidence" is not in the record.

{¶23} A review of Dr. Caston's report reveals that the SHO was correct. Dr. Caston listed 12 potential jobs that claimant could perform after considering the restrictions of Drs. Hochman, Flanagan, Kaffen and the psychological opinions of Drs. Byrnes, Richetta and Tosi. The magistrate notes that 3 jobs specifically require computer skills, two jobs require a high school education, and 5 jobs require good interpersonal skills and the ability to deal with customers. Only two of the jobs specifically recommended require none of the aforementioned qualifications. And, further, contrary to relator's argument, the commission did not concoct the requirements. Instead, the job requirements for each of the jobs are provided in the report. Further, the determination of whether or not the claimant can perform any of the listed jobs is a factual vocational determination and this court should not substitute its determination for that of the commission. Relator's argument is not supported by the evidence.

{¶24} Relator's argument that the commission should have relied on the vocational report of Dr. Caston because it was the *only* vocational evidence in the record has been rejected numerous times. It is undisputed that the commission has the discretion to accept one vocational report while rejecting another vocational report, or that the commission may reject all the vocational evidence and render its own determination. *State ex rel. Jackson v. Indus. Comm.* (1997), 79 Ohio St.3d 266. In *State ex rel. Singleton v. Indus. Comm.* (1994), 71 Ohio St.3d 117, the Supreme Court of Ohio noted that binding the commission to a rehabilitation report's conclusions would make the rehabilitation division, and not the commission, the ultimate evaluator of disability,

contrary to *Stephenson*. See also *State ex rel. Ewart v. Indus. Comm.*, 76 Ohio St.3d 139, 1996-Ohio-316, wherein the Supreme Court of Ohio indicated that the commission has the freedom to independently evaluate the nonmedical disability factors because those factors are often subject to different interpretations.

{¶25} In this case, this magistrate finds that the commission adequately considered claimant's age, education, and work experience and provided a sufficient explanation in its order and that the commission did not abuse its discretion in this regard.

{¶26} Relator's second argument is that claimant's application for PTD compensation should have been denied because relator made a bona fide good-faith offer of employment to claimant that was within his physical and psychological abilities, which claimant refused.

{¶27} Ohio Adm.Code 4121-3-34(D)(1)(e) provides:

If, after hearing, the adjudicator finds that the injured worker is offered and refuses and/or fails to accept a bona fide offer of sustained remunerative employment that is made prior to the pre-hearing conference described in paragraph (C)(9) of this rule where there is a written job offer detailing the specific physical/mental requirements and duties of the job that are within the physical/mental capabilities of the injured worker, the injured worker shall be found not to be permanently and totally disabled.

{¶28} Relator contends that it is clear that the offer of employment which it made to claimant was within his physical and psychological capabilities and that the commission abused its discretion by finding that it was not.

{¶29} As indicated in the findings of fact, the commission did consider the job offer relator made to claimant. However, the commission determined that it was not a bona

vide offer because it was not within claimant's restrictions. Specifically, the commission stated:

[Relator] submitted a report from Howard Kaston [sic], Ph.D., a vocational expert who conducted a review of the files on 11/03/2009. This report is flawed because the jobs that he suggested that the Injured Worker is capable of performing either require a high school education, or require computer skills such as excel, word, and outlook, excellent interpersonal communication skills, and/or the ability to remain patient with customers while listening to their concerns and problems. [Relator] has provided a job offer to the Injured Worker from a company called EXPEDITER which apparently is a company owned by [relator] in whole or in part. This is a company with a Pennsylvania address and involves customer service completing five surveys per hour. While the position appears to be within the Injured Worker's physical capacity, the relied on psychological specialist, Dr. Tosi, indicates that tasks should be simple and that he would require close supervision. The job would be based at the Injured Worker's home and the supervisor would be in Pennsylvania. Therefore the Hearing Officer finds that the requirement of close supervision would not be met by this job.

{¶30} While the commission agreed that the position appeared to be within claimant's physical capabilities, the commission determined that it was not within claimant's psychological capabilities. Specifically, the commission noted that Dr. Tosi opined that claimant could perform simple tasks and that he would need close supervision. Because claimant's supervisor would be in Pennsylvania while claimant would be in Ohio, the commission determined that the job offered by relator was not within claimant's capabilities and that claimant's refusal of that job offer did not constitute grounds upon which to deny his application for PTD compensation.

{¶31} Relator argues further that the commission's determination that the job offered was not within claimant's restrictions was an abuse of discretion because the

SHO incorrectly stated that "EXPEDITER \* \* \* [appears to be] a company owned by [relator] in whole or in part." Relator contends that this statement clearly shows that the intent of the SHO was solely to find in claimant's favor.

{¶32} While acknowledging that the statement is incorrect, this magistrate finds that this does not establish that the SHO had an agenda. The reasons given by the SHO are adequate and do not demonstrate bias.

{¶33} Finding that the commission did consider the issue and explained the reasons why the proffered job was not within claimant's psychological capabilities, this magistrate cannot say that the commission abused its discretion by finding that the offer precluded claimant from receiving PTD compensation.

{¶34} Based on the foregoing, it is this magistrate's decision that relator has not demonstrated that the commission abused its discretion in awarding PTD compensation to claimant, and relator's request for a writ of mandamus should be denied.

/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).

