

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State ex rel. Sophia Stevens, :
 :
 Relator, :
 :
 v. : No. 10AP-1147
 :
 Industrial Commission of Ohio and : (REGULAR CALENDAR)
 Fountain Park Nursing Home, :
 :
 Respondents. :
 :

D E C I S I O N

Rendered on June 13, 2013

Portman, Foley & Flint, LLP, and Frederic A. Portman, for relator.

Michael DeWine, Attorney General, and John R. Smart, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

SADLER, J.

{¶ 1} Relator, Sophia Stevens, filed an original action seeking a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its order denying her application for permanent total disability ("PTD") compensation and to enter an order granting her application.

I. BACKGROUND

{¶ 2} Pursuant to Civ.R. 53 and Loc.R. 13(M) of the Tenth District Court of Appeals, this matter was referred to a magistrate. The magistrate issued detailed findings of fact that were adopted in their entirety by this court in *State ex rel. Stevens v. Indus.*

Comm., 10th Dist. No. 10AP-1147, 2012-Ohio-4408 ("*Stevens I*"). We incorporate those findings of fact here, but for ease of discussion, provide a brief recitation of the facts relevant to this decision.

{¶ 3} After a staff hearing officer ("SHO") granted relator's request for PTD compensation, the Administrator of the Ohio Bureau of Workers' Compensation ("administrator") requested reconsideration. Subsequent to a hearing held on July 15, 2010, the commission vacated the SHO's order and denied relator's application for PTD compensation. Specifically, the commission found that although relator did not voluntarily abandon her employment, she was nonetheless not entitled to PTD compensation because she was found able to perform sustained remunerative employment. With respect to the order, chairperson Gary M. DiCegelio voted "no," commissioner Jodie M. Taylor voted "yes," and commissioner Kevin R. Abrams, who was absent from the hearing, voted "yes." As set forth in *Stevens I*, Abrams' addendum to the order states:

On 08/10/2010, I discussed this matter with Regina Miller who was present at the 07/15/2010 hearing. Staff Hearing Officer Regina Miller summarized the testimony, evidence and arguments presented at hearing. After this discussion and a review of all of the evidence contained with the claim file, I vote to grant Administrator's reconsideration, filed 04-13-2010. I vote to vacate the Staff Hearing Officer's order, issued 03/31/2010. I vote to deny the Injured Worker's application for permanent and total disability, filed 10/08/2009.

Stevens I at ¶ 43.

{¶ 4} This mandamus action followed. The magistrate concluded the commission did not have continuing jurisdiction over the SHO's March 29, 2010 order and, therefore, recommended that this court grant relator's requested writ of mandamus. In *Stevens I*, this court sustained the objection of the commission and denied relator's request for a writ of mandamus on the question of continuing jurisdiction. Additionally, this court returned the matter to the magistrate to determine whether relator had met her burden of proving that the commission abused its discretion by denying PTD compensation.

{¶ 5} The magistrate's decision rendered in response to *Stevens I* is appended to this decision. The magistrate's decision incorporates the findings of fact set forth in

Stevens I, and sets forth conclusions of law. The magistrate addressed two issues: (1) whether the vote of commissioner Abrams, who was absent from the July 15, 2010 hearing, deprived relator of due process of law under *State ex rel. Ormet Corp. v. Indus. Comm.*, 54 Ohio St.3d 102 (1990), and its progeny, and (2) whether the commission examined relator for all the allowed conditions of the industrial claim. In conclusion, the magistrate recommends that this court issue a writ of mandamus ordering the commission to vacate the portion of its July 15, 2010 order determining that relator is not permanently and totally disabled, to conduct an additional hearing on relator's PTD application with all three commissioners present and participating, or conduct an additional hearing with a sufficient record of proceedings such that the necessary credibility determinations can be made by all the commissioners.

II. COMMISSION'S OBJECTIONS

{¶ 6} The commission has filed the following two objections to the magistrate's decision:

Where this Court has held the commission did not abuse its discretion in issuing an order exercising continuing jurisdiction, it has also determined that the commission provided the claimant with meaningful consideration of the issues presented at hearing. The magistrate erred when it then found the order violated the claimant's due process rights.

The magistrate erred in requiring an absent commissioner to review a record transcript in order to vote on Stevens' PTD application. Due process requires a commissioner who was absent from a hearing to "meaningfully consider" the issues raised at hearing before voting. A "meaningful consideration" is not limited to a review of a transcript, audio or videotape, but may include a written or verbal report or summary prepared by a commission staff member who had attended the hearing.

(Emphasis deleted.)

III. DISCUSSION

{¶ 7} In its first objection, the commission contends the magistrate's decision is inconsistent with this court's decision rendered in *Stevens I* because, in that decision, this

court made the specific finding that the commission's July 15, 2010 order was valid. We do not find the commission's position well-taken.

{¶ 8} The issue before this court in *Stevens I* was whether the magistrate was correct in his conclusion that the record contained no evidence that the issue of voluntary abandonment had been raised before the SHO. This court determined the commission's order constituted evidence that the issue had been previously raised. In *Stevens I*, whether the record established that the voluntary abandonment issue had been timely raised was not dependent upon a credibility determination, which is the basis for both the magistrate's recommendation and his finding that relator was deprived of due process. Contrary to the commission's assertion, this court in *Stevens I* did not determine the appropriateness of the commission's finding that relator did not voluntarily abandon the workforce as that finding has not been challenged either in *Stevens I* or at this juncture.

{¶ 9} To the extent the commission is challenging the magistrate's lead statement in paragraph 28 of the magistrate's decision, i.e., "[w]hile relator's testimony was found to be credible on the voluntary abandonment issue," we agree that said statement is in error since relator's testimony regarding voluntary abandonment has neither been assessed nor challenged. Therefore, we strike said phrase from paragraph 28 of the magistrate's decision. However, we disagree with the commission's contention that this requires a rejection of the magistrate's decision as being inconsistent with the decision rendered in *Stevens I* and conclude the magistrate's decision is not inconsistent with the same.

{¶ 10} Accordingly, the commission's first objection is overruled.

{¶ 11} In its second objection, the commission challenges the magistrate's conclusion that relator was denied due process. This issue has been thoroughly addressed in the magistrate's decision and we agree with the magistrate's application of recent decisions from this court to the matter currently before us. For the reasons stated in the magistrate's decision, we do not find merit to the commission's arguments raised in the second objection to the magistrate's decision.

{¶ 12} Accordingly, the commission's second objection is overruled.

IV. MOTIONS

{¶ 13} This court rendered its decision in *Stevens I* on September 27, 2012. On May 10, 2013, relator filed a motion asking this court to reconsider said decision. On May 28, the commission filed a motion to strike relator's motion for reconsideration as both improper and untimely. Relator has filed a memorandum in response. Relator's motion for reconsideration is a nullity because her mandamus action was filed originally in the court of appeals rendering App.R. 26(A) inapplicable. *State ex rel. Washington v. Crush*, 106 Ohio St.3d 60, 2005-Ohio-3675, ¶ 5, citing *State ex rel. Burnes v. Athens Cty. Clerk of Courts*, 83 Ohio St.3d 523, 524 (1998); *State ex rel. Clark v. Lile*, 80 Ohio St.3d 220, 221 (1997). Accordingly, we grant the commission's motion to strike relator's motion for reconsideration.

V. CONCLUSION

{¶ 14} In conclusion, the commission's motion to strike relator's motion for reconsideration is granted. After review of the magistrate's decision, an independent review of the record, and due consideration of the commission's objections, we find the magistrate has properly determined the pertinent facts and applied the appropriate law. We, therefore, overrule the commission's objections to the magistrate's decision and adopt the magistrate's decision as our own, including the findings of fact and conclusions of law, as amended in paragraph nine of this decision.

{¶ 15} In accordance with the magistrate's decision, we issue a writ of mandamus ordering the commission to vacate the portion of its July 15, 2010 order determining that relator is not permanently and totally disabled and order the commission to conduct an additional hearing on relator's PTD application with all three commissioners present and participating, or conduct an additional hearing with a sufficient record of the proceedings such that the necessary credibility determinations can be made by all the commissioners.

*Commission's motion to strike granted;
objections overruled; writ of mandamus granted.*

BROWN and CONNOR, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Sophia Stevens,	:	
	:	
Relator,	:	
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v.	:	No. 10AP-1147
	:	
Industrial Commission of Ohio and	:	(REGULAR CALENDAR)
Fountain Park Nursing Home,	:	
	:	
Respondents.	:	
	:	

MAGISTRATE'S DECISION

Rendered on October 15, 2012

Portman, Foley & Flint LLP and Frederic A. Portman, for relator.

Michael DeWine, Attorney General, and John R. Smart, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶16} This is the second decision of the magistrate in this action. On September 27, 2012, in *State ex rel. Stevens v. Indus. Comm.*, 10th Dist. No. 10AP-1147, 2012-Ohio-4408, this court reviewed the first decision of the magistrate. In that decision, followed by its journal entry of October 1, 2012, this court sustained the objection of respondent, Industrial Commission of Ohio ("commission"), and denied relator's request for a writ of mandamus on the question of continuing jurisdiction. This court returned the matter to the magistrate to determine whether relator has met her burden to prove

that the commission abused its discretion by denying permanent total disability ("PTD") compensation. This court adopted the magistrate's findings of fact but declined to adopt his conclusions of law.

{¶17} As stated at the outset of the first magistrate's decision, in this original action, relator, Sophia Stevens, requests a writ of mandamus ordering the commission to vacate its order denying her PTD compensation by the exercise of R.C. 4123.52 continuing jurisdiction over the March 29, 2010 order of its staff hearing officer ("SHO") that had awarded PTD compensation, and to enter an order reinstating the SHO's order.

{¶18} The magistrate hereby incorporates his findings of fact contained in his magistrate's decision filed January 20, 2012 that were adopted by this court in its decision of September 27, 2012. Those findings of facts shall not be repeated in this second decision of the magistrate.

Conclusions of Law:

{¶19} The first issue is whether the vote of commissioner Kevin Abrams, who was absent from the July 15, 2010 hearing, deprived relator of due process of law under *State ex rel. Ormet Corp. v. Indus. Comm.*, 54 Ohio St.3d 102 (1990), and its progeny, notwithstanding Abrams' discussion on August 10, 2010 with SHO Regina Miller.

{¶20} Finding that Abrams' vote with respect to the July 15, 2010 order of the commission deprived relator of due process of law, it is the magistrate's decision that this court issue a writ of mandamus, as more fully explained below.

{¶21} In *State ex rel. Sigler v. Lubrizol Corp.*, 10th Dist. No. 10AP-255, 2011-Ohio-4917, this court, applying *Ormet*, held that the claimant, Terry W. Sigler ("Sigler") was denied due process of law when commissioner Abrams, who was absent at a July 28, 2009 hearing, joined another commissioner in a two-to-one vote to exercise continuing jurisdiction over an SHO's order granting PTD compensation, and then denied the PTD application.

{¶22} In *Sigler*, immediately above Abrams' signature on the order, Abrams indicated that he had discussed the matter with Bob Cromley who was present at the July 28, 2009 hearing. Cromley summarized the testimony, evidence and arguments presented at the hearing. Also, in the mandamus action, the commission filed an affidavit of Robert Cromley aka Bob Cromley in which Cromley averred that he has long been

employed as a commission hearing officer and that, at times, he assists the commissioners when they preside at hearings. Cromley further averred that he took handwritten notes during the hearing and used those notes as a reference when discussing the case with Abrams.

{¶23} Finding that Abrams' vote denied Sigler due process of law, this court explained:

Sigler testified at the hearing held before the two other commissioners. He testified about his physical condition. He testified about his attempts at vocational rehabilitation. He also testified about future medical procedures which were contemplated, including a second surgery to his injured back.

The order signed by two of the commissioners is critical of Sigler's efforts at rehabilitation. Evaluating Sigler's past efforts at rehabilitation and his ability to benefit from future rehabilitation efforts seems to be key to the finding that Sigler is or is not entitled to PTD compensation. The third commissioner should have been in a position to evaluate Sigler's credibility on these issues, not rely on the impressions and notes of a commission employee and that employee's summaries of what occurred.

* * *

Credibility, especially the credibility of a claimant, can be key to reaching a just decision in important workers' compensation cases. As long as the commission and the courts are willing to consider failure to fully pursue rehabilitation efforts as a negative factor in deciding PTD cases, the injured worker should be able to explain how he or she has done all he or she can do in pursuing rehabilitation.

As long as there are disputes among medical professionals about a claimant's physical abilities, the claimant should be able to tell, in lay terms, what he or she can do. The claimant's credibility may help determine which medical reports the commission finds persuasive.

With today's technological capabilities, there is no reason the commission cannot have a complete record, even a video record, of the testimony before it. An absent commissioner could then make the appropriate decision without risking a violation of Due Process of Law.

Id. at ¶ 7-8, 11-13.

{¶24} It can be further noted that, in *State ex rel. Evert v. Indus. Comm.*, 10th Dist. No. 11AP-465, 2012-Ohio-2404, this court, citing *Sigler*, also found that the vote of an absent commissioner violated the claimant's right to due process of law. In *Evert*, this court states:

The commissioners' responsibility as to fact finding is at the heart of our *Sigler* decision and the opinion of the Supreme Court of Ohio in *State ex rel. Ormet Corp. v. Indus. Comm.* 54 Ohio St.3d 102 (1990) which *Sigler* followed. Both decisions are founded in the requirement that government entities provide Due Process of Law.

Counsel for the commission and BWC correctly note that the credibility of the claimant in the *Sigler* case was critical to a determination of whether or not *Sigler*, the claimant, was entitled to receive permanent total disability compensation.

Id. at ¶ 7-8.

{¶25} This court's decisions in *Sigler* and *Evert* are controlling here.

{¶26} Relator's credibility at the July 15, 2010 hearing was key to the commission reaching a decision on the merits of relator's PTD application. While the July 15, 2010 hearing was not recorded, the commission's order indicates that relator testified at the hearing.

{¶27} At two points in the order, the commission notes relator's testimony:

The Injured Worker testified that she treats with Charles May, D.O., approximately four times a year.

* * *

The Injured Worker testified at hearing that she left her employment because she was not able to stand for long periods of time and that she had some anxiety using the cash register. The Commission finds Injured Worker's testimony credible. Thus, the Commission finds the Injured Worker did not voluntarily abandon her employment.

{¶28} While relator's testimony was found to be credible on the voluntary abandonment issue, it is not clear what impact her testimony may have had on the commission's decision to rely on the reports of Drs. Hoover and Bloomfield and to reject the reports of Dr. May which were relied upon in the SHO's order of March 29, 2010 to grant PTD compensation without reference to the vocational factors.

{¶29} Because the July 15, 2010 order was not recorded, we do not know precisely relator's testimony. What we do know is that relator testified that she treats with Dr. May approximately four times a year.

{¶30} Relator's testimony regarding her treatments with Dr. May could have been key to the commission's decision to reject Dr. May's report.

{¶31} Under the circumstances here, due to his absence at the hearing, commissioner Abrams had no opportunity to weight the credibility and value of relator's testimony regarding her treatments with Dr. May. Thus, commissioner Abrams' vote denied relator due process of law under the *Sigler* rationale.

{¶32} Given that Abrams' vote with respect to the July 15, 2010 order violated relator's right to due process of law, it is the magistrate's decision that this court issue a writ of mandamus ordering the commission to vacate that portion of its July 15, 2010 order determining that relator is not permanently and totally disabled, to conduct an additional hearing on relator's PTD application with all three commissioners present and participating, or conduct an additional hearing with sufficient record of the proceedings such that the necessary credibility determinations can be made by all the commissioners.

{¶33} The second issue is whether the commission examined relator for all the allowed conditions of the industrial claim.

{¶34} At paragraph three of the complaint filed on December 10, 2010, relator alleges:

Relator states she filed an application for workers' compensation benefits with the Bureau of Workers' Compensation, and that said claim was assigned claim number 79-38946; and that said claim was ultimately allowed for the following conditions: CERVICAL STRAIN; LUMBAR STRAIN; PHLEBITIS IN RIGHT ARM AND RIGHT HAND; DYSPEPSIA; GASTRITIS; ESOPHAGITIS; AGGRAVATION OF HIATAL HERNIA; RIGHT SHOULDER

STRAIN/SPRAIN; RIGHT ELBOW AND FOREARM STRAIN/SPRAIN; RIGHT WRIST STRAIN/SPRAIN; CLOSED FRACTURE OF THE RIGHT MIDDLE FINGER; IMPINGEMENT SYNDROME RIGHT SHOULDER; DEGENERATIVE SPONDYLOSIS OF THE LUMBAR SPINE; LOW GRADE GLENOHUMERAL ARTHROPATHY, RIGHT SHOULDER.

{¶35} In its answer filed on January 10, 2011, the commission admits paragraph three of the complaint.

{¶36} While the SHO's order of March 29, 2010 does not list "low grade glenohumeral arthropathy, right shoulder" as among the allowed conditions of the claim, the commission's order of July 15, 2010 does list the condition as allowed.

{¶37} In his December 29, 2009 report, under the section of his report captioned "Opinion," Dr. Hoover states:

Right shoulder strain/sprain and impingement syndrome right shoulder: All though there is some reduction of motion, this is not due to the impingement syndrome, but rather the glenohumeral arthritis it is also symmetric to the uninvolved side, in my opinion would not be due to the allowed conditions in the claim. Thus, Section 16-4 would not apply. Note there is applicable impairment in Section 16-7. Thus, for this it is 0%.

{¶38} Also, on the first page of his report, Dr. Hoover lists the allowed conditions of the claim. "[L]ow grade glenohumeral arthropathy, right shoulder" is not among the allowed conditions listed by Dr. Hoover.

{¶39} According to relator, Dr. Hoover failed to examine for "low grade glenohumeral arthropathy" which relator asserts is an allowed condition of the claim. Relator concludes that the commission failed to consider an allowed condition and thereby abused its discretion in adjudicating the PTD application. (Relator's brief, at 15.)

{¶40} Respondent commission fails to respond to relator's argument that the commission failed to examine for all the allowed conditions of the claim. Nevertheless, the magistrate finds that relator's argument must fail.

{¶41} Ohio Adm.Code 4121-3-34(C)(3)(c) provides:

If a motion requesting recognition of additional conditions is filed on or prior to the date of filing for permanent total

disability compensation, such motion(s) shall be processed prior to the processing of the application for permanent total disability compensation. However, if a motion for recognition of an additional condition is filed subsequent to the date of filing of the application of permanent total disability, the motions shall be processed subsequent to the determination of the application for permanent total disability compensation.

{¶42} With respect to relator's assertion that the industrial claim is allowed for "low grade glenohumeral arthropathy, right shoulder" the stipulated record before this court fails to disclose when the motion was filed that resulted in the alleged allowance of that condition.

{¶43} It is conceivable that the motion for an additional claim allowance was filed subsequent to the October 8, 2009 filing of the PTD application at issue here, and that the motion was processed and adjudicated subsequent to the SHO's order of March 29, 2010 granting PTD compensation. Under that scenario, the SHO's order of March 29, 2010 correctly lists the allowed conditions of the claim that were relevant to the adjudication of the PTD application, and Dr. Hoover's listing of the allowed conditions for which he was to examine are also correct. That is, under that scenario, the commission, through its SHO, did consider all of the allowed conditions that were relevant to the PTD application. Under that scenario, the commission was not required to consider "low grade glenohumeral arthropathy, right shoulder" as an allowed condition when it redetermined the PTD application following the July 15, 2010 hearing.

{¶44} Here, relator has the burden to show that the commission abused its discretion in failing to consider all the allowed conditions of the claim in connection with the adjudication of the PTD application filed October 8, 2009. Because relator has failed to submit evidence to this court that "low grade glenohumeral arthropathy, right shoulder" is an allowed condition resulting from a motion filed on or prior to the filing of the PTD application, relator's argument for a writ of mandamus must fail. That is, relator has failed to prove that the commission has failed to consider all the allowed conditions of the claim that the commission was required to consider in its adjudication of the PTD application.

{¶45} Accordingly, it is the magistrate's decision that this court issue a writ of mandamus ordering the commission to vacate that portion of its July 15, 2010 order determining that relator is not permanently and totally disabled, to conduct an additional hearing on relator's PTD application with all three commissioners present and participating, or conduct an additional hearing with sufficient record of the proceedings such that the necessary credibility determinations can be made by all the commissioners.

/S/ MAGISTRATE
KENNETH W. MACKE

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).