[Cite as *State ex rel. Abrusci v. Indus. Comm.*, 2009-Ohio-4381.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Tony Abrusci,	:	
Relator,	:	
v.	:	No. 08AP-765
Industrial Commission of Ohio and Chandler Machine Co.,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on August 27, 2009

Bentoff & Duber Co., L.P.A., and *Glen S. Richardson*, 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

BROWN, J.

{¶1} Relator, Tony Abrusci, 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 that denied relator's permanent total disability ("PTD") application, and ordering the commission to process his application for PTD compensation.

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

{¶3} Relator presents two specific objections. In his first objection, relator argues that the commission failed to clarify and outline how relator's prior jobs, education, and training qualified him to return to work within the restrictions outlined by the examining physicians. Relator claims the commission failed to explain how his prior work history, education, and training qualified him to engage in low stress sedentary work that permitted him to change positions as needed, which was the work level and restrictions Drs. Jess Bond and Robert Byrnes found relator was capable of engaging in. We disagree with relator's contention. The commission did explain how relator's prior work history, education, and training would allow him to engage in low stress, sedentary work that permitted him to change positions as needed. The commission's staff hearing officer ("SHO"), found that relator's mental acumen to perform sedentary work was evinced by his obtainment of his GED; his abilities to read, write, and perform math; and his ability to complete college level coursework. The SHO also cited some of relator's earlier jobs and found that they demonstrated his ability to direct and control others through his supervisory experience. Furthermore, the SHO found that relator's computer training would be helpful in the performance of entry level sedentary work. The SHO also cited several prior jobs and found relator's years of experience in a skilled profession demonstrated his ability to perform entry level sedentary work. The commission's

explanations, while brief, were sufficient to explain why relator's education, prior work experience, and training would allow him to engage in sedentary work. Relator's experience and training clearly qualify him for sedentary work.

{¶4} As for the restriction that the sedentary work be "low stress," the commission found Dr. Byrne's psychological assessment persuasive. Relator maintains that the commission failed to "connect the dots" between the high stress jobs that he had in the past and how they qualified him for low stress positions now. However, we fail to understand relator's point. The only relevance of relator's prior high stress jobs was that they demonstrated relator was capable of handling high levels of stress prior to his present claims. In other words, if prior to relator's present claims he had never been capable of handling even a low stress job, it would have been improper for the commission to find that he was now able to handle a low stress job post-injury. For these reasons, relator's first objection is overruled.

{¶5} Relator argues in his second objection that the magistrate erred when he found that the commission is the expert on vocational factors. Relator asks this court to part with the well-established precedent established by the Supreme Court of Ohio that the commission is the expert on vocational factors. See, e.g., *State ex rel. Jackson v. Indus. Comm.*, 79 Ohio St.3d 266, 271, 1997-Ohio-152 (commission is the expert on vocational factors). However, this court must adhere to the decisions of the Supreme Court of Ohio. See *State v. Horton*, 10th Dist. No. 06AP-311, 2007-Ohio-4309, ¶60 (noting a court of appeals is bound by and must follow decisions of the Supreme Court of Ohio unless and until they are reversed or overruled); *Sanders v. Mt. Sinai Hosp.* (1985), 21 Ohio App.3d 249, 257 (stating intermediate appellate courts should follow prior Ohio

Supreme Court rulings unless they have good reason to know those rulings no longer apply). We decline relator's request to ignore the Supreme Court's precedent. Therefore, relator's second objection is overruled.

{¶6} After an examination of the magistrate's decision, an independent review of the evidence, pursuant to Civ.R. 53, and due consideration of relator's objections, we overrule relator's objections. Accordingly, we adopt the magistrate's decision as our own with regard to the findings of fact and conclusions of law, and deny relator's request for a writ of mandamus.

Objections overruled; writ denied.

FRENCH, P.J., and KLATT, J., concur.

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[Cite as *State ex rel. Abrusci v. Indus. Comm.*, 2009-Ohio-4381.]

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Tony Abrusci,	:	
Relator,	:	
v.	:	No. 08AP-765
Industrial Commission of Ohio and Chandler Machine Co.,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on April 29, 2009

Bentoff & Duber Co., L.P.A., and *Glen S. Richardson*, for relator.

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

IN MANDAMUS

{¶7} In this original action, relator, Tony Abrusci, 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.

Findings of Fact:

{¶8} 1. On April 10, 1998, relator sustained an industrial injury while employed as a machinist. The industrial claim (No. 98-374936) is allowed for:

> Sprain lumbar region; L5-S1 protruding disc; radiculitis; aggravation of pre-existing degenerative disc disease L5-S1; herniated disc L4-5; aggravation of pre-existing degenerative disc disease L4-5; dysthymic disorder; spinal epidural fibrotic adhesions; arachnoiditis; back scar neuroma.

{¶9} 2. On September 17, 2007, relator filed an application for PTD compensation.

{¶10} Under the education section of the application form, relator indicates that the 11th grade is the highest grade of school he has completed. Although he did not graduate from high school, he has obtained a certificate for passing the General Educational Development (GED) test.

{¶11} The application form asks the applicant: "Have you gone to trade or vocational school or had any type of special training?" Relator responded by marking the "yes" box. The application form then asks: "[W]hat type of trade school or special training have you received and when?" In response, relator wrote: "State of Ohio Machinest [sic] Journey Person School – 4 yr program 1985-89 Certificate #13490 Basic Training Program – EDM Training."

{¶12} The application form also asks the applicant: "Can you read?" "Can you write?" "Can you do basic math?" Given a choice of "yes," "not well," and "no," relator selected the "yes" response to all three queries.

{¶13} The application form also asks the applicant to provide information regarding work history. Relator indicated that he held the job of "Supervisor/Foreman-Machinest" [sic] from July 1985 to June 2003.

{¶14} The application form presents six queries to the applicant regarding each job listed. As a "Supervisor/Foreman-Machinest," [sic] relator responded to the six queries as follows:

> 1 Your basic duties[:] Job Scheduling, Machining, Training, Shipping & Receiving, Customer Relations, Some quoting.
>
> 2 Machines, tools, equipment you used[:] Vertical Shaper, Lathing, Grinders, Tow motor, Presision [sic] Measuring Equipment, Horizontal Shaper, Vertical Mill, Benching Tools.
>
> 3 Exact operations you performed[:] Internal & External Key slotting & splines, Tool making, Inspection, Repairs, Mating of Internal & External Splines.
>
> 4 Technical knowledge and skills you used[:] Mathematics, Print Reading Calibration of machine tools & instruments, Employee & Customer Relations.
>
> 5 Reading / Writing you did[:] Blueprints, quotes, inspection Reports, Employee Evaluations, job specifications.
>
> 6 Number of people you supervised[:] 4-8[.]

{¶15} 3. On January 21, 2008, at the commission's request, relator was examined by Jess G. Bond, M.D., who specializes in occupational medicine. In his three-page narrative report, Dr. Bond opined that the allowed physical conditions of the claim produced a 26 percent whole person impairment.

{¶16} 4. On January 21, 2008, Dr. Bond completed a physical strength rating form on which he indicated that relator is capable of sedentary work with the limitation that relator "need[s] to be able to change position as needed."

{¶17} 5. On February 8, 2008, at the commission's request, relator was examined by psychologist Robert L. Byrnes, Ph.D. In his four-page narrative report, Dr. Byrnes opined: "In my opinion this examinee's overall impairment is mild to moderate and I assign a 20% to 25% whole person impairment for his allowed mental condition only."

{¶18} 6. On February 8, 2008, Dr. Byrnes completed a form captioned "Occupational Activity Assessment[,] Mental & Behavioral Examination." On the form, Dr. Byrnes indicated by checkmark: "This injured worker is capable of work with the limitation(s) / modification(s) noted below." In his own hand, Dr. Byrnes wrote: "This [injured worker's] allowed mental condition, in and of itself[,] would not prevent his return to work in low stress positions for which he is otherwise qualified."

{¶19} 7. In support of his PTD application, relator submitted a six-page narrative report from vocational expert Brett Salkin. Dated April 3, 2008, the Salkin report states:

> The combined vocational impact of allowed medical and psychological conditions on residual physical capacity, non-exertional functional abilities, and acquired job skills transferability would be expected to preclude reasonable ability to perform entry employment.

{¶20} 8. Following a May 27, 2008 hearing, a staff hearing officer ("SHO") issued an order denying relator's PTD application. The SHO's order explains:

> The claimant sustained an industrial injury on 04/10/1998 while working as a machinist. The claimant was lifting parts and sustained a low back injury. This claim is also recognized for a psychological condition, dysthymic disorder.
>
> Dr. Bond examined claimant on 01/21/2008 with respect to the allowed physical conditions. Dr. Bond assigned a 26% whole person impairment to the claimant. He completed a physical strength rating report on 01/21/2008. Dr. Bond opined the claimant can perform sedentary work with the restriction of being able to change position as needed.

The Hearing Officer finds the opinion of Dr. Bond is supported by his findings upon physical examination. Therefore, the opinion of Dr. Bond is found persuasive.

Accordingly, the Hearing Officer finds the claimant retains the ability to perform sedentary work with the restriction of being able to change position as needed. Sedentary work is defined as follows:

Exerting up to ten pounds of force occasionally (occasionally: activity or condition exists up to one-third of the time) and/or a negligible amount of force frequently (frequently: activity or condition exists from one-third or two-thirds of the time) to lift, carry, push, pull or otherwise move objects. Sedentary work involves sitting most of the time, but may involve walking or standing for brief periods of time.

Dr. Byrnes examined claimant on 02/08/2008 with respect to the allowed psychological condition. Dr. Byrnes concluded the claimant suffers a 20-25% whole person impairment due to the allowed psychological condition. Dr. Byrnes completed an occupational activity assessment report on 02/08/2008 and opined the claimant is capable of work in a low stress position.

The opinion of Dr. Byrnes is found persuasive as his opinion is supported by his findings upon examination.

Thus, the Hearing Officer finds the claimant remains capable of working in low stress positions.

After reviewing the reports of Drs. Bond and Byrnes, the Hearing Officer finds the claimant retains the ability to perform sedentary work activity within the restrictions of Drs. Bond and Byrnes.

It is appropriate to review the claimant's non-medical disability factors. After reviewing claimant's age, education, and work experience, the Hearing Officer finds the claimant retains the ability to perform work consistent with the restrictions of Drs. Bond and Byrnes.

The claimant is 56 years of age. Although the claimant is not classified as a younger individual, age alone is not a bar to employment. In fact, many employer's prefer mature workers with experience.

The claimant completed 11 years of formal education and obtained his GED. This accomplishment evidences claimant's mental acumen to perform the basic tasks associated with entry level sedentary work.

Moreover, claimant reported on the IC-2 application that he can read, write, and perform basic math equations. Again, these skills are helpful in the performance of entry level sedentary work.

The claimant also testified he attended a computer aided design course for two days. The ability to use a computer is helpful in the performance of entry level sedentary work.

The claimant also testified he completed 12 credit hours at the University of Akron in 2002, earning average grades. The claimant's ability to complete college level course work is a positive factor and evidences his mental ability.

In addition to claimant's positive education, the claimant has a positive work history. The claimant has a history of working at skilled positions. The claimant has worked as a benchman, mold engraver, and machinist supervisor.

The claimant has experienced running machinery, including horizontal mills and drill presses. The claimant completed a four year program from 1985 through 1989 wherein he earned his machinist certificate.

The claimant also has extensive experience with supervision, supervising approximately four to eight individuals. The claimant scheduled employees, performed employee evaluations, trained employees, worked in customer relations, and made job quotes.

The claimant also reported that he calibrated machine tools and instruments. The claimant has experienced working with lathes, grinders, and benching tools.

Clearly, the claimant has demonstrated his ability to direct and control others through his supervisory experience. The claimant has completed paper work and performed inspections as well as completing multiple technical machining tasks.

> Given the claimant's education level of completing college course work as well as his years of experience in a skilled profession, including supervisory experience, the Hearing Officer finds the claimant retains the skills necessary to perform entry level sedentary work within the restrictions of Drs. Bond and Byrnes.
>
> Based on the above listed physical capacities and non-medical disability factors, the Hearing Officer finds that the claimant's disability is not total, and that the claimant is capable of engaging in sustained remunerative employment, or being retrained to engage in sustained remunerative employment. Therefore, the claimant's request for an award of permanent total disability is denied.

{¶21} 9. On July 10, 2008, the three-member commission mailed an order denying relator's request for reconsideration.

{¶22} 10. On September 2, 2008, relator, Tony Abrusci, filed this mandamus action.

Conclusions of Law:

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

{¶24} For its determination of residual functional capacity, the commission relied upon the reports of Drs. Bond and Byrnes. Dr. Bond opined that relator can perform sedentary employment that permits change of positions as needed. Dr. Byrnes opined that the psychological condition restricts relator to "low stress" employment.

{¶25} Relator does not challenge the commission's reliance upon the reports of Drs. Bond and Byrnes for the determination of residual functional capacity. However, relator does challenge the commission's consideration of the nonmedical factors.

{¶26} Even though relator does not cite to any commission rule, it is helpful to briefly review the commission rules applicable to this action.

{¶27} Ohio Adm.Code 4121-3-34 sets forth the commission's rules applicable to the adjudication of PTD applications. Ohio Adm.Code 4121-3-34(B) sets forth definitions applicable to the adjudication of PTD applications. Ohio Adm.Code 4121-3-34(B)(3) is captioned "Vocational factors." Ohio Adm.Code 4121-3-34(B)(3)(c) is captioned "Work experience." Thereunder are found the following provisions:

> (iv) "Transferability of skills" are skills which can be used in other work activities. Transferability will depend upon the similarity of occupational work activities that have been performed by the injured worker. Skills which an individual has obtained through working at past relevant work may qualify individuals for some other type of employment.
>
> (v) "Previous work experience" is to include the injured worker's usual occupation, other past occupations, and the skills and abilities acquired through past employment which demonstrate the type of work the injured worker may be able to perform. Evidence may show that an injured worker has the training or past work experience which enables the injured worker to engage in sustained remunerative employment in another occupation. The relevance and transferability of previous work skills are to be addressed by the adjudicator.

{¶28} Relator does rely upon *State ex rel. Mann v. Indus. Comm.*, 80 Ohio St.3d 656, 657-658, 1998-Ohio-660. In that case, Elizabeth Mann had three industrial injuries. The two most serious of the allowed conditions were a right shoulder tendonitis and psychogenic pain disorder. Denying her PTD application, the commission's order stated:

> "* * * The Commission specifically finds that claimant is capable of sedentary low stress employment as supported by the medical evidence cited above. Furthermore, claimant is still three years from the normal age of retirement, has obtained a GED, and has work experience as a cook, cashier, and other various factory work, the Commission concludes

> the claimant has the vocational presentation to obtain low stress sedentary employment. The Commission specifically relies upon the claimant's work experience as a cook, cashier and restaurant worker to find that claimant has some skills in the food service industry that may transfer or apply to sedentary low stress positions in the food service industry."

{¶29} Finding that the commission's nonmedical analysis failed to comply with *State ex rel. Noll v. Indus. Comm.* (1991), 57 Ohio St.3d 203, the *Mann* court explained:

> 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.

{¶30} Quoting the *Mann* decision for support, relator asserts that the commission "spent a significant amount of time outlining Mr. Abrusci's past work history, yet it did not address how his prior work equipped him to engage in 'entry level sedentary work within the restrictions by Dr[s]. Bonds [sic] and Byrnes.' " (Relator's brief, at 6.)

{¶31} Relator further argues: "The question that the Staff Hearing Officer was obliged to address but failed to even approach was how Mr. Abrusci's prior experience and skills, which were outside the scope of the restrictions listed by Dr[s]. Bond and Byrnes, related to his ability to engage in entry level sedentary work." Id.

{¶32} The magistrate disagrees with relator's contention that the commission abused its discretion in addressing relator's work experience.

{¶33} Contrary to relator's suggestion, commission review of the work history need not be limited to a determination of the existence of transferable skills. *State ex rel. Ewart v. Indus. Comm.* (1996), 76 Ohio St.3d 139, 142. The lack of transferable skills does not mandate a PTD award. Id. The commission may also review the work history to draw reasonable inferences regarding the claimant's intellectual capacity. See *State ex rel. Tharp v. Indus. Comm.*, 10th Dist. No. 04AP-1190, 2005-Ohio-5080; *State ex rel. Rinck v. M. Bohlke Veneer Corp.*, 10th Dist. No. 05AP-1108, 2006-Ohio-4629.

{¶34} The second to last paragraph of the SHO's order concludes the nonmedical analysis:

> Given the claimant's education level of completing college course work as well as his years of experience in a skilled profession, including supervisory experience, the Hearing Officer finds the claimant retains the skills necessary to perform entry level sedentary work within the restrictions of Drs. Bond and Byrnes.

{¶35} The magistrate recognizes that the commission must identify the skills it finds to be transferable to other occupations. *State ex rel. Haddix v. Indus. Comm.* (1994), 70 Ohio St.3d 59. However, when the SHO states that relator "retains the skills," it appears that the SHO is using the word "skills" to mean something broader in scope than the rule definition of "transferability of skills."

{¶36} In the paragraph of the order indicating that relator testified to the completion of 12 credit hours at the University of Akron, the SHO states that this evidences his "mental ability."

{¶37} While the term "mental ability" is not employed further by the SHO in discussing relator's skilled work history, it seems obvious that the work history is impressive and that a significant intellectual capacity or mental ability has been demonstrated throughout the work history.

{¶38} Based upon the above analysis of the SHO's order, the magistrate concludes that, contrary to relator's contention, the commission indeed explained how relator's work history evidences a mental capacity to perform or to be retrained to perform at least entry-level sedentary work within the restrictions of Drs. Bond and Byrnes.

{¶39} In this action, relator further contends that the commission does not have the vocational expertise to render its findings regarding the nonmedical factors and, because the Salkin report is the only vocational report of record, only the Salkin report can provide the expertise upon which the commission can rely. Relator invites this court to reject the holding of *State ex rel. Jackson v. Indus. Comm.* (1997), 79 Ohio St.3d 266. *Jackson* holds that expert opinion is not critical or necessary and that the commission is the expert on the nonmedical factors. This court must decline relator's invitation to ignore *Jackson*'s holding.

{¶40} 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).