

{¶2} Pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth District Court of Appeals, this matter was referred to a magistrate who issued a decision, including findings of fact and conclusions of law, which is appended hereto. The magistrate found that there was some evidence supporting the commission's determination that relator was engaged in sustained remunerative employment at Izzy's Drive-Thru. The magistrate noted that relator was observed on multiple occasions opening and closing the establishment, waiting on customers, running the cash register, stocking product, meeting with vendors, taking deliveries, making bank deposits, sweeping and shoveling snow. Therefore, the magistrate concluded that the commission did not abuse its discretion in finding that these activities constituted sustained remunerative employment. The magistrate also found that the commission did not abuse its discretion when it determined that relator's activities at Izzy's were medically inconsistent with the restrictions contained in Dr. Prada's report. However, the magistrate determined that the commission abused its discretion when it relied on evidence not in the record in finding fraud. Therefore, the magistrate has recommended that we deny relator's request for a writ of mandamus except for the portion that seeks to vacate the commission's finding of fraud, and remand the matter to the commission to reconsider the fraud determination based solely on evidence contained in the record.

{¶3} Relator has filed an objection to the portion of the magistrate's decision that addresses whether relator engaged in sustained remunerative employment.¹ Relator first

¹ No party filed objections to the portion of the magistrate's decision that vacates the commission's fraud finding and remands the matter for a redetermination of fraud based upon the evidence in the record.

argues that the magistrate's recommendation is based on a clear mistake of fact. Relator contends that he could not have been working at Izzy's "for some time" because Izzy's did not open for business until December 1, 2004. Relator's argument is unpersuasive.

{¶4} As the magistrate points out, there was considerable evidence that relator's activities at Izzy's were not minimal and sporadic. Most of the evidence relied upon by the commission involved relator's activities after Izzy's opened for business. On multiple occasions, relator was observed opening and closing the establishment, waiting on customers, running the cash register, stocking product, meeting with vendors, taking deliveries, making bank deposits, sweeping and shoveling snow. Relator's signature on a November 2004 invoice to Izzy's is also some evidence that relator's work activities at Izzy's began at that time. The magistrate did not err by noting that evidence. Nor did the magistrate err in finding that there was some evidence that relator was engaged in work activities at Izzy's for some time.

{¶5} Second, relator argues that the commission erred in relying on inconsistencies between relator's activities at Izzy's and the restrictions in Dr. Prada's February 5, 2004 report as a basis for revoking relator's PTD compensation. Relator argues that any inconsistencies between his activities at Izzy's and Dr. Prada's report are irrelevant because Dr. Prada's report was not part of the medical evidence underlying relator's award. Even if relator is correct, the commission's finding that relator engaged in sustained remunerative employment is an independent basis to support the revocation of PTD compensation. Therefore, any possible error associated with the commission's reference to Dr. Prada's February 5, 2004 report was harmless and of no consequence.

{¶6} Lastly, relator argues that the commission abused its discretion when it determined that relator's activities at Izzy's constituted a regular pattern of work activity. Essentially, relator wants this court to reweigh the evidence. However, our role is not to reweigh the evidence. For the same reasons we previously noted, there is some evidence in the record to support the commission's finding that relator engaged in sustained work. Therefore, the commission did not abuse its discretion.

{¶7} For these reasons, we overrule relator's objection.

{¶8} Following an independent review of this matter, we find that the magistrate has properly determined the facts and applied the appropriate law. Therefore, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein. In accordance with the magistrate's decision, we grant relator's request for a writ of mandamus only to the extent that we order the commission to vacate its finding of fraud, and to reconsider the fraud determination based solely on evidence contained in the record.

*Objections overruled;
writ of mandamus granted in part.*

FRENCH, P.J., and McGRATH, J., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio ex rel. Joel L. Wombold,	:	
	:	
Relator,	:	
	:	
v.	:	No. 08AP-806
	:	
Industrial Commission of Ohio	:	(REGULAR CALENDAR)
and Trans World Airlines, Inc.,	:	
	:	
Respondents.	:	
	:	

MAGISTRATE'S DECISION

Rendered on July 15, 2009

E.S. Gallon & Associates, Joseph R. Ebenger and Corey L. Kleinhenz, for relator.

Richard Cordray, Attorney General, and Joseph C. Mastrangelo, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶9} Relator, Joel L. Wombold, 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 terminated his permanent total disability ("PTD") compensation after finding that he engaged in a regular pattern of activity constituting job duties as a regular employee at Izzy's Drive-Thru and making a finding of fraud and

ordering the commission to find that his PTD compensation should not be terminated or, at the least, finding that the commission did not make a proper finding of fraud.

Findings of Fact:

{¶10} 1. Relator sustained a work-related injury on October 6, 1979 and his claim has been allowed for the following conditions: "major depressive disorder recurrent episode; lumbar disc displacement; sprain of knee & leg; sprain of back."

{¶11} 2. In 1998 relator filed an application for PTD compensation.

{¶12} 3. On March 14, 1994, relator's application was heard before a staff hearing officer ("SHO") and was granted:

Dr. Louis, neurologist, who examined the claimant at the request of the Industrial Commission, stated the industrial injury prohibits the claimant from engaging in sustained remunerative employment.

Dr. Flexman, clinical neuropsychologist, examined the claimant at the request of the Industrial Commission on 5/14/92. Dr. Flexman opined that claimant's permanent partial impairment resulting from the allowed "major depression["] condition is 30% of the body as a whole.

Dr. Fierra, in a combined effects review for the Industrial Commission, opined that the claimant's current functional capacities restrictions include the inability to engage in work activities that involve more than mild emotional or mental stress. Dr. Fierra further opined that the claimant's restrictions include the inability of lifting objects weighing more than 20 pounds, repetitive lifting of objects weighing more than 10 pounds, lifting from below the waist level, bending to floor or knee level, carrying, pushing or pulling of heavy objects, and standing for more than 6 hours and walking for more than 3 hours per 8 hour work day.

The Staff Hearing Officers find the claimant is a 49 year old high school graduate who has a previous work experience as a baggage handler, ramp service person and claimant's work experience does not provide him with any transferable

skills to become re-employed given the physical restrictions due to the industrial injury herein.

The Staff Hearing Officers find that given the claimant's education and lack of transferable work skills, and the medical restrictions due to the allowed conditions in this claim, the claimant is unable to engage in sustained remunerative employment and is permanently and totally disabled.

Permanent and total disability compensation is hereby awarded from 5/17/88[.] * * *

* * *

This order is based particularly upon the report(s) of Dr. Louis, Dr. Flexman, and Dr. Fierra.

{¶13} 4. In January 2005, the Ohio Bureau of Workers' Compensation ("BWC") Special Investigations Unit ("SIU") initiated an investigation after receiving information from an anonymous source indicating that relator was working at Izzy's Drive-Thru ("Izzy's") in West Milton, Ohio.

{¶14} 5. The SIU prepared a report dated August 15, 2007, wherein the investigators detailed their surveillance, copies of statements from witnesses, and other documents. The SIU listed the activities observed:

During the course of the investigation, the SIU conducted surveillance of WOMBOLD as well as undercover purchases from WOMBOLD at Izzy's Drive-Thru. The activity observed was recorded by surveillance logs, video recordings, audio recordings, and still images; they include the following work activity:

- Opening the drive-thru
- Closing the drive-thru
- Making bank deposits
- Meeting with vendors / taking deliveries
- Stocking product
- Waiting on customers
- Running cash register

- Counting money at day's end
- Snow removal
- Sweeping inside drive lane

{¶15} 6. The witness statements contained in the record include statements from Chief Tracey Hendricks and Officer Kim Oaks of the West Milton Police Department. Chief Hendricks indicated that he was a customer of Izzy's and that relator was present at Izzy's on at least half of the occasions that Hendricks was there and that relator was present alone at Izzy's approximately one-fourth of the time that Hendricks was there. Both Hendricks and Oaks indicated that relator works alone at Izzy's in the mornings until approximately 11:00 a.m. or 12:00 p.m.

{¶16} 7. Several bank employees provided statements indicating that relator is a signor on the Izzy's account and that he regularly makes deposits for Izzy's.

{¶17} 8. The record also contains approximately 50 invoices signed by relator for various deliveries made to Izzy's.

{¶18} 9. The BWC filed a motion seeking to terminate relator's PTD compensation and asking for a finding of fraud.

{¶19} 10. The BWC's motion was heard before an SHO on November 21, 2007 and resulted in an order granting the BWC's motion. Specifically, the SHO made the following findings with regards to relator's activities:

* * * The Staff Hearing Officer finds that the injured worker returned to work at a business owned by his spouse, i.e., Izzy's Drive Thru, as of 11/15/2004, engaging in sustained remunerative employment while receiving permanent total disability compensation benefits. * * * The Staff Hearing Officer finds that the injured worker on a day to day basis, having engaged in a regular pattern of activity, did return to employment waiting on customers at the drive-thru, signing invoices, as well as participating in other activities in and around the drive-thru which would constitute the injured

worker performing the job duties of a regular employee, if not the owner of the drive-thru.

The Staff Hearing Officer finds that the Bureau of Workers' Compensation has submitted a surveillance log, which documents the injured worker's activity at the beverage drive-thru, as well as having vendors and distributors who deliver to Izzy's Drive Thru, sign affidavits of the injured worker performing day to day work activities usual and customary to a drive-thru; waiting on customers, ringing in at the cash register, cashing out, opening the business, etc. The Staff Hearing Officer finds that the injured worker worked on a day to day basis performing the actual activities of working at a drive-thru while receiving his permanent and total disability benefits, which the Staff Hearing Officer finds to be sustained remunerative employment, and that the injured worker in doing so, showed not only the actual physical ability to perform these sustained remunerative duties of employment, but also the psychological ability to involve himself in the day to day activities of sustained remunerative employment in a public business, working with the public one on one, in exchange of conversation and consistent the business practices of signing invoices, counting money, checking inventories.

The Staff Hearing Officer finds this to be medically inconsistent with the psychological evidence provided by Dr. Prada in his medical report dated 02/05/2004, where Dr. Prada states the the [sic] injured worker would need life-long psychotherapy with medication maintenance to help him maintain and live on a day to day basis.

The SHO also made a finding of fraud as follows:

It is the finding of the Staff Hearing Officer that any overpayment declared may be collected pursuant to the fraud provisions of ORC 4123.511(K). * * * The Staff Hearing Officer finds that the injured worker intentionally failed to inform the Bureau of Workers' Compensation or the Industrial Commission of his return to work as of 11/15/2004 in his wife's business Izzy's Drive Thru. * * *

* * *

The Staff Hearing Officer finds that the injured worker returned to employment without informing the Bureau of

Workers' Compensation and has continued misleading to his physician of record, as well as to the Bureau by filling out C-84s, signing the warrant documents, and not informing his physician of record of his ability to return to work, meets the prima facia elements of fraud, including his concealment of fact of his employment when there is a duty to disclose, especially when that disclosure is material to the transaction at home, i.e., the injured worker's ability to return to work, and his concealment which enabled him to receive benefits in this claim. The concealment of his return to employment, and the documentation on the C-84s were false and made with the knowledge that they were false, and that the injured worker intentionally misled the Bureau of Workers' Compensation, as well as his physician of record, into relying upon those false statements of his inability to return to work and his failure to notify the Bureau of Workers' Compensation of his employment, caused the Bureau of Workers' Compensation to justifiably rely upon the representations made by the injured worker's C-84s and medical evidence, causing an injury to the Bureau of Workers' Compensation by paying out benefits to which the injured worker was not entitled.

{¶20} 11. Relator filed a motion for reconsideration which was denied by order of the commission mailed January 31, 2008.

{¶21} 12. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶22} The Supreme Court of Ohio has set forth three requirements which must be met in establishing a right to a writ of mandamus: (1) that relator has a clear legal right to the relief prayed for; (2) that respondent is under a clear legal duty to perform the act requested; and (3) that relator has no plain and adequate remedy in the ordinary course of the law. *State ex rel. Berger v. McMonagle* (1983), 6 Ohio St.3d 28.

{¶23} In order for this court to issue a writ of mandamus as a remedy from a determination of the commission, relator must show a clear legal right to the relief sought and that the commission has a clear legal duty to provide such relief. *State ex rel.*

Pressley v. Indus. Comm. (1967), 11 Ohio St.2d 141. A clear legal right to a writ of mandamus exists where the relator shows that the commission abused its discretion by entering an order which is not supported by any evidence in the record. *State ex rel. Elliott v. Indus. Comm.* (1986), 26 Ohio St.3d 76. On the other hand, where the record contains some evidence to support the commission's findings, there has been no abuse of discretion and mandamus is not appropriate. *State ex rel. Lewis v. Diamond Foundry Co.* (1987), 29 Ohio St.3d 56. Furthermore, questions of credibility and the weight to be given evidence are clearly within the discretion of the commission as fact finder. *State ex rel. Teece v. Indus. Comm.* (1981), 68 Ohio St.2d 165.

{¶24} 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.

{¶25} PTD compensation cannot be paid to a claimant who is (1) engaged in sustained remunerative employment; (2) medically able to engage in sustained remunerative employment; and (3) engaged in activities so medically inconsistent with the

purported disability as to impeach the medical evidence underlying the award. *State ex rel. Lawson v. Mondie Forge*, 104 Ohio St.3d 39, 2004-Ohio-6086.

{¶26} In the present case, the commission determined that relator had returned to work and that his activities were medically inconsistent with the psychological evidence provided by his treating physician, German V. Prada, M.D. Specifically, in his February 5, 2004 report, which was included with a C-9 request for additional therapy, Dr. Prada stated:

Mr. Joel Wombold is a 59 year old married male, medically retired from TransWorld Airlines due to a severe back injury. Mr. Wombold was referred to my office by Dr. Trevino, after his retirement, and seeing Mr. Wombold for eight years.

It took 14 years for Mr. Wombold to get his disability. His pain, anger, kidney problems, constant pain, and his severe depression that I was treating on a monthly basis would barely help him live in a day to day basis.

Our goals are to help Mr. Wombold reduce his anger, despair, and pain. We also need to maintain him to be without suicidal ideation. Mr. Wombold will need life long psychotherapy with medication maintenance[.]

{¶27} In this mandamus action, relator argues that the commission abused its discretion by finding that he had engaged in or showed the capacity to engage in sustained remunerative employment beginning November 15, 2004 based solely upon the fact that he signed an invoice in connection with his wife's business, Izzy's. Relator argues that he did not sign any further invoices until March 24, 2005. As such, relator contends that the evidence was insufficient to find that he was either engaged in or capable of performing sustained remunerative employment at that time. Relator further argues that the surveillance evidence gathered is insufficient, as a matter of law, to show

that he was engaged in anything other than minimal and sporadic activities at Izzy's. For the reasons that follow, this magistrate disagrees.

{¶28} The *Lawson* case involved the termination of PTD compensation of a claimant who had performed civil, but largely sedentary, activities in connection with his position as a Village Councilman. The BWC learned of his activities and succeeded in having his PTD compensation stopped. In reinstating his PTD compensation, the Supreme Court of Ohio discredited the common, yet unspoken, belief that recipients of PTD compensation are effectively required to remain housebound in order to preserve their eligibility for compensation. Instead, the court stated:

* * * PTD exempts no one from life's daily demands. Groceries must be purchased and meals cooked. Errands must be run and appointments kept. The yard must be tended and the dog walked. Where children are involved, there may be significant chauffeur time. For some, family and friends shoulder much of the burden. Others, on the other hand, lack such support, leaving the onus of these chores on the PTD claimant.

These simple activities can nevertheless often generate considerable controversy. That is because all of these tasks are potentially remunerative. From the school cafeteria to the four-star restaurant, people are paid to prepare meals. People are paid for lawn and child care. Many people earn their living behind the wheel. *State ex rel. Parma Comm. Gen. Hosp. v. Jankowski*, 95 Ohio St.3d 340, 2002-Ohio-2336, 767 N.E.2d 1143, acknowledged this and cautioned against an automatic disqualification from compensation based on the performance of routine tasks, regardless of their potential for payment. * * *

Id. at ¶20-21.

{¶29} In the present case, relator was observed doing more than just routine tasks of daily living. Further, although he argues that his time at Izzy's was merely social, the evidence submitted by the BWC shows otherwise. As stated previously, relator was

observed opening and closing the establishment, waiting on customers, running the cash register, stocking product, meeting with vendors and taking deliveries, making bank deposits, sweeping, and shoveling snow. Further, according to statements in the record, there was some evidence indicating that relator was present at Izzy's virtually every morning. These activities are more than merely incidental and could certainly be described as tasks which would be assigned to a paid employee. As such, the magistrate finds that the commission did not abuse its discretion in finding that these activities constitute work.

{¶30} The commission also found that relator's activities were inconsistent with his restrictions, specifically with the restrictions of his treating psychiatrist, Dr. Prada. In his February 5, 2004 report, Dr. Prada indicated that, because of his severe depression, relator's monthly treatment would barely help him live on a day-to-day basis. Dr. Prada noted further that relator would require life long psychotherapy and medication to simply maintain his current status. The magistrate finds that it was not an abuse of discretion for the commission to find that relator's activities at Izzy's were beyond the level anticipated by Dr. Prada.

{¶31} As stated previously, relator contends that there is insufficient evidence to find that he was engaged in sustained remunerative employment as early as November 2004 and that the evidence was insufficient to show a pattern of sustained activity. Although the surveillance did not begin until January 2005, relator was, thereafter, observed performing all the tasks described previously. Relator signed more than 50 invoices and was specifically observed waiting on customers at least 12 times. Further, some of those days relator was observed were consecutive (September 12, 13, 14,

and 19, 2006). The magistrate finds it was not an abuse of discretion for the commission to find that if relator signed 50 invoices from March 2005 on, the fact that he signed an invoice in November 2004 was some evidence that he had been performing these activities for some time. Further, relator makes much of the fact that the investigators only observed him at Izzy's for approximately 15 minutes at a time. This is because the investigators were unable to observe for longer periods of time without arousing suspicions. Although he was only observed for approximately 15 minutes at a time, relator was present at Izzy's before and after he was specifically observed. It is not an abuse of discretion for the commission to infer that relator was waiting on customers both before and after the investigators actually made their undercover purchases. As such, the magistrate finds that relator has not demonstrated that the commission abused its discretion in finding that he was engaged in sustained work-related activities which were also medically inconsistent with his restrictions.

{¶32} Relator also contends that the commission abused its discretion in finding fraud.

{¶33} The elements of fraud are: (1) a representation or, where there is a duty to disclose, concealment of a fact; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred; (4) with the intent of misleading another into relying upon it; (5) justifiable reliance upon the representation or concealment; and (6) a resulting injury proximately caused by the reliance. *Gaines v. Preterm-Cleveland, Inc.* (1987), 33 Ohio St.3d 54, 55.

{¶34} In making the finding of fraud, the commission stated:

The Staff Hearing Officer finds that the injured worker returned to employment without informing the Bureau of Workers' Compensation and has continued misleading to his physician of record, as well as to the Bureau by filling out C-84s, signing the warrant documents, and not informing his physician of record of his ability to return to work, meets the prima facie elements of fraud, including his concealment of fact of his employment when there is a duty to disclose, especially when that disclosure is material to the transaction at home, i.e., the injured worker's ability to return to work, and his concealment which enabled him to receive benefits in this claim. The concealment of his return to employment, and the documentation on the C-84s were false and made with the knowledge that they were false, and that he injured worker intentionally misled the Bureau of Workers' Compensation, as well as his physician of record, into relying upon those false statements of his inability to return to work and his failure to notify the Bureau of Workers' Compensation of his employment, caused the Bureau of Workers' Compensation to justifiably rely upon the representations made by the injured worker's C-84s and medical evidence, causing an injury to the Bureau of Workers' Compensation by paying out benefits to which the injured worker was not entitled.

It is therefore the order of the Staff Hearing Officer that the injured worker has committed fraud in receiving his permanent total disability benefits.

{¶35} As above noted, the commission relied on the fact that relator filled out C-84s, signed warrant documents, and failed to inform his physician of record of his ability to return to work as evidence of relator's representation of fraud. However, there are no C-84s contained in the stipulated evidence. In its brief, the commission asserts that the SHO intended to cite the numerous annual contact letters which informed relator that he must notify the BWC if he is working; however, the SHO did not cite this evidence. Further, the SHO also cited warrant documents which relator signed; however, those documents are likewise not contained within the stipulated evidence. In the SIU report, one of the documents purportedly attached is a commission order dated November 7,

2003 which granted an increase in relator's PTD benefit rate. The report indicates that relator's benefit rate was increased from \$160.67 to \$241 and that, pursuant to this order, relator was issued the BWC warrant in the amount of \$52,538. Apparently, this warrant was endorsed and negotiated by relator. However, in spite of a thorough review of the stipulated evidence, the magistrate has not been able to locate this document. As such, the evidence upon which the commission specifically relied in making the finding of fraud is not contained in the record and cannot be reviewed. To the extent that the evidence is not contained in the record, the magistrate finds that the commission abused its discretion in making the finding of fraud and a writ of mandamus should be issued ordering the commission to reconsider whether or not fraud has been established by the documents contained within the record.

{¶36} Based on the foregoing, it is this magistrate's conclusion that relator has not demonstrated that the commission abused its discretion in finding that he was engaged in activities which were inconsistent with his restrictions and which constituted some sustained remunerative employment. In this regard, relator's request for a writ of mandamus should be denied. However, because the documentation cited by the commission in its order finding fraud is not contained within the stipulated evidence, a writ of mandamus should be issued ordering the commission to vacate its finding of fraud and to reconsider the evidence contained in the record to determine whether or not fraud was established.

/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).