

[Cite as *State ex rel. Bilaver v. Indus. Comm.*, 2010-Ohio-2224.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Frank Bilaver,	:	
	:	
Relator,	:	
	:	
v.	:	No. 09AP-723
	:	
Industrial Commission of Ohio	:	(REGULAR CALENDAR)
and Fluid Line Products,	:	
	:	
Respondents.	:	
	:	

D E C I S I O N

Rendered on May 20, 2010

Mitchell A. Stern, for relator.

Richard Cordray, Attorney General, and *Elise Porter*, for respondent Industrial Commission of Ohio.

Ross, Brittain & Schonberg Co., LPA, and *Scott Coghlan*, for respondent Fluid Line Products.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

FRENCH, J.

{¶1} Relator, Frank Bilaver, filed an original action in mandamus requesting this court to issue a writ of mandamus ordering respondent, Industrial Commission of Ohio

("commission"), to vacate its order that denied relator temporary total disability compensation, and to enter an order granting that compensation.

{¶2} This court referred this matter to a magistrate pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate issued a decision, which includes findings of fact and conclusions of law and is appended to this decision, recommending that this court deny the requested writ. Specifically, the magistrate concluded that the commission had not abused its discretion by determining that relator had voluntarily abandoned his employment. Relator filed objections to the magistrate's decision.

{¶3} Relator argues, first, that the magistrate failed to follow the standard articulated by the Supreme Court of Ohio in *State ex rel. Diversitech Gen. Plastic Film Div. v. Indus. Comm.* (1989), 45 Ohio St.3d 381, 382, which states that the question of abandonment is primarily a question of intent. Relator also contends that the magistrate erred in concluding that *State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.*, 72 Ohio St.3d 401, 1995-Ohio-153, does not apply in this case. We disagree on both counts.

{¶4} The commission made a factual determination that relator abandoned his employment when he left his job and traveled to Croatia for medical treatment unrelated to his allowed condition of low back sprain. While relator argues that the commission should have made a different determination, the commission's factual findings are supported by some evidence in the record. Regardless of relator's intent to return to his job upon his return from Croatia, there is no question that he intended to leave his job

for seven weeks, and he did so without approval from his employer. Therefore, the commission did not err by concluding that he had abandoned his employment.

{¶5} Relator also argues that the commission and the magistrate erred by refusing to consider the records of Heather S. Mullen, M.D. We agree with the magistrate, however, that Dr. Mullen's records, dated September 24, 2007, state only that relator should be "off work for a few days." Dr. Mullen did not complete a C-84 form, nor did Dr. Mullen indicate a specific return-to-work date. The commission found abandonment as of September 27, 2007, which is a few days after relator's injury on September 24 and is also the day he left for Croatia. For all these reasons, we overrule relator's objections.

{¶6} Having conducted an independent review of the record in this matter, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained in it. Accordingly, relator's request for a writ of mandamus is denied.

*Objections overruled,
writ of mandamus denied.*

KLATT and McGRATH, JJ., concur.

A P P E N D I X

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and Fluid Line Products,	:	
	:	
Respondents.	:	
	:	

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

Rendered on January 26, 2010

Mitchell A. Stern, for relator.

Richard Cordray, Attorney General, and *Elise Porter*, for respondent Industrial Commission of Ohio.

Ross, Brittain & Schonberg Co., LPA, and *Scott Coghlan*, for respondent Fluid Line Products, Inc.

IN MANDAMUS

{¶7} Relator, Frank Bilaver, 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 denied his request for temporary total disability

("TTD") compensation and ordering the commission to find that he is entitled to that compensation.

Findings of Fact:

{¶8} 1. Relator was employed as a machinist with respondent Fluid Line Products, Inc. ("employer").

{¶9} 2. On September 10, 2007, relator filed a leave request form seeking leave for 35 workdays indicating: "I need to take Leave of Absence for 35 working days. I have emergency stuff to do for my eye in Croatia."

{¶10} 3. Relator's request was denied for the following reasons: "Vacation time has already been used"; "already had 1 leave of absence this year"; and "excessive workload."

{¶11} 4. According to a note written by John Skalicki, relator informed Skalicki that his plans were already in place and that he needed to go. Skalicki asked relator if this was his two-weeks notice and relator responded affirmatively and indicated that he had anticipated that he might not be given approval.

{¶12} 5. One week later, on September 24, 2007, relator sustained a work-related injury while carrying a steel bar with a co-worker. Relator's workers' compensation claim was allowed for "sprain sacroiliac."

{¶13} 6. On September 27, 2007, relator left for Croatia. Relator's daughter provided Skalicki with a letter from relator indicating that he was taking an emergency leave of absence and indicating that Skalicki told him to take an emergency leave of

absence because, according to the employer's manual, relator had a right to an emergency leave of absence.

{¶14} 7. The employer terminated relator's employment on October 8, 2007 due to his unauthorized leave of absence.

{¶15} 8. The employer received a copy of a first report of an injury form from CareWorks on September 28, 2007. According to other medical records also submitted to the employer on that day, relator was seen by Heather S. Mullen, M.D., on September 24, 2007 complaining of sudden onset of left sided neck and back pain. Dr. Mullen diagnosed relator with an acute low back injury and recommended that he remain off work for a few days. In her notes, Dr. Mullen also indicated relator was traveling to Europe shortly.

{¶16} 9. Relator next sought medical attention for his injury on December 18, 2007. Jeffrey Kirschman, M.D., completed a C-84 certifying that relator was temporarily and totally disabled from September 24, 2007 through an estimated return-to-work date of January 16, 2008.

{¶17} 10. Relator's request for TTD compensation was heard before a district hearing officer ("DHO") on January 23, 2008 and was denied. The DHO determined that relator had abandoned his employment effective September 27, 2007 when he left the country for reasons unrelated to his workers' compensation claim.

{¶18} 11. Relator appealed and the matter was heard before a staff hearing officer ("SHO") on February 26, 2008. The SHO affirmed the prior DHO's order as follows:

* * * [T]he injured worker abandoned his employment effective 09/27/2007 when he decided to leave the country due to reasons unrelated to his allowed workers' compensation claim and that he has not met his burden of proof by providing persuasive medical evidence.

In early September of 2007[,] the injured worker requested to take leave from work for a trip to Croatia for medical treatment unrelated to this [workers'] compensation claim. This leave was denied at that time. The injured worker did sustain a workers' compensation injury on 09/24/2007. On 09/27/2007[,] the injured worker decided to go to Croatia for reasons that are not related to the allowed condition of low back sprain. * * *

* * *

Secondly, the Staff Hearing Officer does acknowledge that a workers' compensation claim with a date of injury of 09/24/2007 does exist but the Staff Hearing Officer finds that temporary total disability cannot be medically supported as this long period of requested temporary total disability compensation is based on evidence that post dates the commencement of this requested period by almost three months. Furthermore, the Staff Hearing Officer finds that the injured worker was not able to return to work due to his trip to Croatia and not a soft tissue injury as currently allowed in the claim. * * *

{¶19} 12. Relator's further appeal was refused by order of the commission mailed March 13, 2008.

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

Conclusions of Law:

{¶21} 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.

{¶22} TTD compensation awarded pursuant to R.C. 4123.56 has been defined as compensation for wages lost where a claimant's injury prevents a return to the former position of employment. Upon that predicate, TTD compensation shall be paid to a claimant until one of four things occurs: (1) claimant has returned to work; (2) claimant's treating physician has made a written statement that claimant is able to return to the former position of employment; (3) when work within the physical capabilities of claimant is made available by the employer or another employer; or (4) claimant has reached maximum medical improvement. See R.C. 4123.56(A); *State ex rel. Ramirez v. Indus. Comm.* (1982), 69 Ohio St.2d 630.

{¶23} For the reasons that follow, it is this magistrate's decision that this court should deny relator's request for a writ of mandamus.

{¶24} Relator makes two arguments. First, relator contends that the commission abused its discretion by applying the voluntary abandonment doctrine when there is no

evidence that he violated any written work rule. Second, relator contends that he could not have abandoned his employment on September 27, 2007, because the medical evidence he presented demonstrates that, at that time, he was unable to return to his former position of employment.

{¶25} Relator contends that the commission abused its discretion by applying *State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.* (1995), 72 Ohio St.3d 401, and finding that he voluntarily abandoned his employment. However, although the commission did state in its order that relator "abandoned his employment effective 09/27/2007 when he decided to leave the country due to reasons unrelated to his allowed workers' compensation claim," this finding is not synonymous with the finding that relator voluntarily abandoned his employment under *Louisiana-Pacific*. *Louisiana-Pacific* does not apply to the facts of this case and the commission did not apply it. Instead, the commission determined that relator left his employment with the employer when he chose not to come to work and, instead, fly to Croatia for an extended period of time. The commission determined that his inability to return to work was not due to his injury, but due to the fact that he left the country for reasons unrelated to the injury.

{¶26} Relator next contends that he could not have abandoned his employment on September 27, 2007 because he was unable to return to his former position of employment for medical reasons. Relator asserts that the statement from Dr. Mullen, who saw him on September 24, 2007, recommended that he be off work for a few days is proof that he was unable to return to his former position of employment on September 27, 2007.

{¶27} In order for relator to succeed here, he would need to have medical evidence from Dr. Mullen or someone else indicating that, three days after the injury, he was not able to return to work. Dr. Mullen only recommended that relator be off work for a few days; she did not place any restrictions on him. Dr. Mullen did not indicate whether relator could or could not perform his job, nor did she indicate how many days he should remain off work. The only other medical evidence relator presented is the December 18, 2007 C-84 of Dr. Kirschman certifying that relator had been temporarily and totally disabled since the date of injury. However, because Dr. Kirschman did not examine relator until December 2007, he is not qualified to render an opinion as to whether or not relator was disabled three months earlier.

{¶28} In the present case, the magistrate finds that the commission did not abuse its discretion in first finding that relator had abandoned his employment when he left the country for Croatia, and second finding that relator's medical evidence was insufficient to support the requested period of disability. As such, it is this magistrate's decision that this court should deny relator's request for a writ of mandamus.

/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).