

TENTH APPELLATE DISTRICT

State of Ohio ex rel.	:	
Cinergy Corp./Duke Energy,	:	
Relator,	:	
v.	:	No. 09AP-964
Arthur Heber and	:	(REGULAR CALENDAR)
Industrial Commission of Ohio,	:	
Respondents.	:	

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D E C I S I O N

Rendered on July 27, 2010

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*Frost Brown Todd LLC, and Julie M. Bruns, for relator.*

*Butkovich & Crosthwaite & Gast Co., L.P.A., Joseph A. Butkovich, and Erin C. McCune, for respondent Arthur Heber.*

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

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IN MANDAMUS  
ON OBJECTION TO THE MAGISTRATE'S DECISION

KLATT, J.

{¶1} Relator, Cinergy Corp./Duke Energy, commenced this original action in mandamus seeking an order compelling respondent, Industrial Commission of Ohio ("commission"), to vacate its order granting permanent total disability ("PTD") compensation to respondent, Arthur Heber ("claimant"), and to order the commission to

re-determine claimant's eligibility for PTD compensation after determining whether or not claimant's retirement was voluntary.

{¶2} Pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth District Court of Appeals, we referred this matter to a magistrate who issued a decision, including findings of fact and conclusions of law, which is appended hereto. The magistrate found that the commission failed to properly address the issue of claimant's retirement and its effect on his eligibility for PTD compensation. Therefore, the magistrate has recommended that we grant relator a writ of mandamus ordering the commission to vacate its order granting PTD compensation and to enter a new order either granting or denying PTD compensation after thoroughly examining the impact of claimant's retirement on his eligibility for said compensation.

{¶3} The claimant has filed an objection to the magistrate's decision. The claimant argues there is some evidence to support the commission's decision. Specifically, the claimant points to the timing of his retirement, his medical history and the statement he provided to the commission as evidence supporting the commission's decision. Therefore, the claimant contends that the commission did not abuse its discretion and this court should deny relator's request for a writ of mandamus. We disagree.

{¶4} The claimant originally sustained a work-related injury in 1970 and the commission allowed his claim for a number of conditions. The claimant continued working for relator until he retired in 1989 after 42 years of service. Claimant was 60-years old at the time of his retirement. In February 2008, claimant filed an application for PTD compensation.

{¶5} Ohio Adm.Code 4121-3-34(D)(1)(d) states:

If, after hearing, the adjudicator finds that the injured worker voluntarily removed himself from the work force, the injured worker shall be found not to be permanently and totally disabled. If evidence of voluntary removal or retirement is brought into issue, the adjudicator shall consider evidence that is submitted of the injured worker's medical condition at or near the time of removal/retirement.

{¶6} Relator presented evidence that the claimant's retirement was voluntary and not related to his allowed conditions. Therefore, pursuant to Oho Adm.Code 4121-3-34(D)(1)(d), the commission was required to consider evidence of claimant's medical condition at or near the time of his retirement. As noted by the magistrate, there is no indication that claimant presented any medical evidence relating to his condition at or near the time of his retirement. Nor did the commission clearly address the issue of claimant's retirement in its decision. This failure constituted an abuse of discretion. Therefore, we overrule the claimant's objection.

{¶7} Following an independent review of this matter, we find that the magistrate 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 and order the commission to vacate its decision granting PTD compensation. We also order the commission to enter a new order either granting or denying the requested compensation after thoroughly examining the issue of whether claimant's retirement was voluntary.

*Objection overruled;  
writ of mandamus granted.*

SADLER and FRENCH, JJ., concur.

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**APPENDIX**

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel.	:	
Cinergy Corp./Duke Energy,	:	
	:	
Relator,	:	
	:	
v.	:	No. 09AP-964
	:	
Arthur Heber and	:	(REGULAR CALENDAR)
Industrial Commission of Ohio,	:	
	:	
Respondents.	:	

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MAGISTRATE'S DECISION

Rendered on March 22, 2010

*Frost Brown Todd LLC, and Julie M. Bruns, for relator.*

*Butkovich & Crosthwaite Co., L.P.A., Joseph A. Butkovich, and Erin C. Enderle, for respondent Arthur Heber.*

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

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IN MANDAMUS

{¶8} Relator, Cinergy Corp./Duke Energy, has filed this original action requesting that this court issue a writ of mandamus vacating its order, which granted permanent total disability ("PTD") compensation to respondent Arthur Heber ("claimant") without addressing the nature of his retirement and ordering the commission to re-determine claimant's eligibility for PTD compensation after determining whether or not his retirement was voluntary.

Findings of Fact:

{¶9} 1. Claimant sustained a work-related injury on April 30, 1970, and his claim has been allowed for the following condition: "MULTIPLE LACERATIONS OF FACE; DEGENERATIVE JOINT DISEASE BILATERAL KNEE; CONTUSION, RIB; TOOTH FRACTURE #1; CONTUSION, LEFT HAND; LACERATION MOUTH/CHIN WITH INFECTION; CERVICAL STRAIN AND SPONDYLOSIS."

{¶10} 2. Claimant continued working for relator until he retired in 1989. Claimant notified relator of his intent to retire in a note dated May 1, 1989, providing: "This is to inform you that after almost 42 years of service[,] [i]t is my intention to retire Nov. 1, 1989."

{¶11} 3. On September 5, 1989, relator completed a request for early retirement form and he listed the following reason for his retirement: "Personal."

{¶12} 4. The only other document completed contemporaneous with relator is a payroll change authorization form which provides the following explanation for claimant's retirement:

\* \* \* Retired with a monthly pension effective 11-1-89 at the voluntary retirement age of 60 years 5 months in accordance with Company non-contributory pension plan. Vacation pay earned in previous calendar year paid 11-1-89 through 12-7-89. Vacation pay earned in current calendar year paid 12-8-89 through 1-10-90.

5. On February 28, 2008, claimant filed an application for PTD compensation. At the time, claimant was 79 years old and indicated that he last worked in November 1989. On that application, relator noted that four surgical procedures had been performed on one or both knees in 1984, 1986, 1989, and 1998. Relator listed the following additional non-allowed medical conditions which prevented him from working: "Heart failure, extreme pain in multiple places in joints."

{¶13} 6. In support of his application, relator provided the January 30, 2008 report of Peter J. Fagerland, D.C. In his report, Dr. Fagerland concluded as follows:

\* \* \* It is my professional opinion that based upon the patient's subjective complaints of pain, discomfort, and muscle weakness, in addition to the objective findings of muscle spasms, decreased range of motion, loss of muscle strength, and positive orthopedic findings, the patient is permanently and totally disabled and unable to perform any type of remunerative employment.

{¶14} 7. An independent medical evaluation was performed by Troy D. Lowell, M.D. In his August 20, 2008 report, Dr. Lowell identified the medical evidence he reviewed, provided his findings upon examination, and concluded that claimant was not permanently and totally disabled. Specifically, Dr. Lowell stated as follows:

\* \* \* Mr. Heber's current diagnoses include cervical spondylosis without myelopathy, and bilateral knee replacements. Neither of these conditions should prevent sustained remunerative employment. Given that Mr. Heber is 79 years old and considering his diagnoses, the level of his employment would need to be limited to the light or light-medium level. \* \* \* I do not believe that he is by any means in need of permanent total disability due to his allowed claim conditions.

\* \* \* I believe that Mr. Heber should have restrictions against repetitive lifting or carrying, repetitive overhead activity, walking more than 4 hours in an 8 hour shift. These restrictions are based on his allowed claim conditions, which are essentially at this point purely degenerative in nature.

\* \* \*

\* \* \* Mr. Heber is certainly stable enough to participate in rehabilitation. However, I do not believe that it is necessary. It is unlikely to significantly impact the natural history of his conditions, which are essentially related to age and degeneration.

{¶15} 8. The commission had claimant examined by Joan M. Watkins, D.O. In her October 13, 2008 report, Dr. Watkins reviewed claimant's history, provided her

physical findings upon examination, opined that claimant had a 43 percent whole person impairment, and that he was capable of performing sedentary work for no more than four hours a day.

{¶16} 9. Two separate vocational reports were prepared. One evaluator concluded that, given his age, work history, physical abilities and his lack of transferable skills, claimant was not employable. However, the other evaluator concluded that claimant was capable of performing sedentary to light work activities, had directly transferable skills, and was capable of both skilled and semi-skilled work.

{¶17} 10. In a letter to his attorney dated March 9, 2009, claimant indicated that his 1989 retirement was due to the pain he was having from his allowed conditions. Specifically, claimant stated:

In 1989, after six knee surgeries and numerous neck therapies as a result of my earlier automobile accident in a Company owned vehicle, I was offered early retirement at the age of 60.

After careful consideration and much thought, I decided to accept the Company's early retirement. My decision was based mostly on my physical limitations of being able to perform the duties of my job at an acceptable performance level without too much physical pain. My job required getting in and out of the Company car numerous times a day, which caused me pain. Also, the Company expected me to be able to drive safely. Due to the continuing problems with my neck, I could not turn my head properly. Therefore, I felt that I could not drive the many hours required in doing my job safely.

Also, as part of my job, I had to sit at a desk and do paper work. This caused pain both in my knees and my neck. As a result, the Company, at a doctor's request, had to acquire a higher back chair for my use.

I took all of the above mentioned facts into consideration when deciding to retire early. Also, at that time and as part of my decision, I was assured that the Company would be

financially responsible for all of my medical needs as a result of the accident until the end of my life.

In 1997, I had to have both knees replaced and several therapies on my neck. All of the expenses for these, as per the Company's agreement to be responsible, were paid for by the Company.

Then, on October 2, 2007, I required additional therapy on my neck. At this time, Hunter Consulting (the Company's agent) refused payment. In addition, Jaime Byers, of Hunter Consulting, informed me that my future expenses would no longer be paid terminating the Company's previous agreement.

Since then, the pain has caused me to go to my orthopedic doctor, Dr. Brill. He sent me to see a neurologist, Dr. J. Gaudier. Dr. Gaudier sent me to get a CAT scan. As a result of the CAT scan, Dr. Gaudier sent me to a neuro surgeon, Dr. Juan Lora. Dr. Lora said that I will need surgery on my neck to relieve the pain and possibly regain some move ability. As a stop gap to surgery, I went to get physical therapy to help with pain relief. However, Medicare will only pay for one session per year.

In the near future, I fear I will need surgery on my neck and probably on my knees as the replacement parts are 12 years old.

I feel that the Company and/or its agent should honor its prior agreement and be responsible.

(Emphasis sic.)

{¶18} 11. Claimant's application for PTD compensation was heard before a staff hearing officer ("SHO") on March 16, 2009, and was granted. The SHO relied solely upon the medical report of Dr. Fagerland in concluding that claimant was incapable of performing any sustained remunerative activity. With regard to his retirement, the SHO merely stated the following: "The Injured Worker continued working until 1989 when his Employer offered early retirement. The Injured Worker advised that he retired at that time because of his injuries." Claimant was not present at the hearing to testify.



{¶19} 12. Relator filed a request for reconsideration arguing that claimant had voluntarily retired in 1989 after almost 42 years of service.

{¶20} 13. In an order mailed June 13, 2009, the commission denied relator's request for reconsideration.

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} The relevant inquiry in a determination of permanent total disability is claimant's ability to do any sustained remunerative employment. *State ex rel. Domjancic v. Indus. Comm.* (1994), 69 Ohio St.3d 693. Generally, in making this determination, the commission must consider not only medical impairments but, also, the claimant's age, education, work record and other relevant nonmedical factors. *State ex rel. Stephenson v. Indus. Comm.* (1987), 31 Ohio St.3d 167. Thus, a claimant's medical capacity to work is not dispositive if the claimant's nonmedical factors foreclose employability. *State ex rel.*

*Gay v. Mihm* (1994), 68 Ohio St.3d 315. The commission must also specify in its order what evidence has been relied upon and briefly explain the reasoning for its decision. *State ex rel. Noll v. Indus. Comm.* (1991), 57 Ohio St.3d 203.

{¶23} In the present case, relator contends that the commission did not properly address the issue of claimant's retirement and the effect of that retirement on his eligibility for PTD compensation. This magistrate agrees.

{¶24} Ohio Adm.Code 4121-3-34(D) sets forth the commission's guidelines for the adjudication of PTD applications. Ohio Adm.Code 4121-3-34(D)(1)(d) states:

If, after hearing, the adjudicator finds that the injured worker voluntarily removed himself from the work force, the injured worker shall be found not to be permanently and totally disabled. If evidence of voluntary removal or retirement is brought into issue, the adjudicator shall consider evidence that is submitted of the injured worker's medical condition at or near the time of removal/retirement.

{¶25} In *State ex rel. Baker Material Handling Corp. v. Indus. Comm.*, 69 Ohio St.3d 202, 1994-Ohio-437, paragraph two of the syllabus, the court held as follows:

An employee who retires prior to becoming permanently and totally disabled is precluded from eligibility for permanent total disability compensation only if the retirement is voluntary and constitutes an abandonment of the entire job market. \* \* \*

{¶26} In *State ex rel. Kinnear Div., Harsco Corp. v. Indus. Comm.*, 77 Ohio St.3d 258, 1997-Ohio-40, the court stated:

\* \* \* In order for retirement to preclude PTD compensation, the retirement must be taken before the claimant became permanently and totally disabled, it must have been voluntary, and it must have constituted an abandonment of the entire job market. \* \* \*

{¶27} In the present case, the issue of voluntary retirement was raised. Relator submitted evidence generated at the time of claimant's retirement and the claimant

submitted evidence which was generated at the time he filed for PTD compensation, approximately 20 years after he retired. There is no indication that claimant presented any medical evidence contemporaneous with the time period of his retirement and it is clear that the commission did not consider any medical evidence contemporaneous with the time of claimant's retirement. The commission was required to consider evidence concerning claimant's medical condition at the time he retired. The commission failed to do so and this failure constitutes an abuse of discretion.

{¶28} Based on the foregoing, it is this magistrate's conclusion that this court should grant a writ of mandamus ordering the Industrial Commission of Ohio to vacate its order which granted PTD compensation to claimant and the commission should enter a new order either granting or denying the requested compensation after thoroughly examining the issue of claimant's retirement 20 years prior to the filing of his PTD application and whether or not that retirement was voluntary.

/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).