[Cite as *State ex rel. Scarborough v. Indus. Comm.*, 2010-Ohio-4020.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Richard Scarborough,	:	
Relator,	:	
v.	:	No. 09AP-1041
Industrial Commission of Ohio and Delhi Township,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on August 26, 2010

Crowley, Ahlers & Roth Co., L.P.A., and *Edward C. Ahlers*, for relator.

Richard Cordray, Attorney General, and *Allan K. Showalter*, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

FRENCH, J.

{¶1} Relator, Richard Scarborough, 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, which denied relator's

application for permanent total disability compensation, and to enter an order granting that compensation.

{¶2} We 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.

{¶3} Relator filed objections to the magistrate's decision. In these objections, relator raises the same issues he raised before the magistrate, i.e., (1) the commission's decision violates *State ex rel. Noll v. Indus. Comm.* (1991), 57 Ohio St.3d 203; and (2) the commission erred in its application of *State ex rel. Stephenson v. Indus. Comm.* (1987), 31 Ohio St.3d 167. We agree, however, with the magistrate's analysis of these issues and her legal conclusions. Therefore, we overrule relator's objections.

{¶4} Based on our independent review of this matter, we adopt the magistrate's decision, including the findings of fact and conclusions of law contained in it, as our own, except that we delete ¶24 and the first sentence of ¶25 as unnecessary to the analysis. Accordingly, the requested writ of mandamus is denied.

Objections overruled,
writ of mandamus denied.

BROWN and HENDRICKSON, JJ., concur.

HENDRICKSON, J., of the Twelfth Appellate District, sitting by assignment in the Tenth Appellate District.

A P P E N D I X

IN THE COURT OF APPEALS OF OHIO

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State of Ohio ex rel. Richard Scarborough,	:	
Relator,	:	
v.	:	No. 09AP-1041
Industrial Commission of Ohio and Delhi Township,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on May 12, 2010

Crowley, Ahlers & Roth Co., L.P.A., and *Edward C. Ahlers*, for relator.

Richard Cordray, Attorney General, and *Allan K. Showalter*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶5} Relator, Richard Scarborough, 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 application for permanent total

disability ("PTD") compensation, and ordering the commission to find that he is entitled to that compensation.

Findings of Fact:

{¶6} 1. Relator sustained a work-related injury on October 15, 1992, and his workers' compensation claim has been allowed for "lumbar strain; aggravation of pre-existing lumbar spondylosis."

{¶7} 2. At the time of his injuries, relator was working as a police officer. As a result of his injuries, relator was not able to return to work as a police officer.

{¶8} 3. Following his injury and back surgery, relator worked as a golf course attendant and school security guard.

{¶9} 4. In May 2009, relator left his job with the Cincinnati Public Schools and filed his application for PTD compensation in June 2009.

{¶10} 5. At the time he filed his application, relator was 62 years of age, completed high school, received vocational or special training, and indicated that he could read, write, and perform basic math.

{¶11} 6. Relator's application was supported by the June 2, 2009 report of his treating physician, Set Shahbabian, M.D., who noted that relator had been his patient since 1992. Dr. Shahbabian referenced an independent evaluation in September 2007, wherein it had been recommended that relator not lift more than five pounds, that he be re-evaluated in three to four months, and indicated that relator was waiting to return to work as a security guard. Dr. Shahbabian saw relator again in December 2007. At that time, relator informed him that he was not able to walk long distances or stand for long periods of time. Dr. Shahbabian recommended that relator wait until Christmas

vacation was over before he returned to work. In March 2009, relator informed Dr. Shahbabian that his back was hurting and that any activity produced more back pain. It was at that time that Dr. Shahbabian recommended that relator consider applying for permanent and total disability. In conclusion, Dr. Shahbabian opined that relator's condition had progressed to the point where he was permanently and totally disabled from sustained gainful employment.

{¶12} 7. Relator was examined by Steven S. Wunder, M.D., on behalf of the commission. In his August 5, 2009 report, Dr. Wunder discussed relator's medical history, identified the records which he reviewed, provided his physical findings upon examination, opined that relator had reached maximum medical improvement, assessed a 28 percent whole person impairment, and opined that relator was capable of performing at a sedentary work level.

{¶13} 8. A vocational evaluation was prepared by Robert E. Breslin, M.S., C.R.C., on October 5, 2009. After identifying the records which he reviewed and noting relator's educational and vocational history, Breslin discussed the effect relator's age, education, and work experience on his ability to perform sustained remunerative employment. Breslin stated:

> Mr. Scarborough's age of 63 is in the range of customary retirement age in the U.S.
>
> Mr. Scarborough's high school education does not allow for direct entry into skilled work activity.
>
> Mr. Scarborough's work experience has primarily been in light work since he was forced to retire from police work. He does not have skills that would allow him direct entry into skilled or semi-skilled sedentary jobs that would allow him a significant degree of control over his working posture.

{¶14} Breslin concluded that relator would be unable to perform competitive work activity due to his age, education, work history, acquired skills, and residual functional abilities. Breslin opined that unskilled sedentary jobs typically require that the individual maintain a sitting posture for the majority of the day and would not provide relator with the opportunity to alternate between sitting and standing.

{¶15} 9. Relator's application was heard before a staff hearing officer ("SHO") on October 19, 2009. The SHO relied upon the medical report of Dr. Wunder and concluded that relator was capable of performing at a sedentary work level. Thereafter, the SHO considered the nonmedical disability factors. Specifically, the SHO found that relator's age of 63 years was a mild barrier to his ability to return to and compete in the workforce. However, the SHO found that relator's high school education and skilled vocational training were assets with regard to his ability to return to and compete in the workforce. The SHO also found that relator's history of performing skilled employment was evidence that he should be capable of performing at least unskilled to semi-skilled employment activities in the future and that his academic skills would be assets regarding his ability to learn new work skills, work procedures, and use tools necessary to learn to perform some other type of employment. The SHO also noted that, while relator's work history provided him with some skills which would be transferable to lighter employment, such as writing reports and completing documents, his prior work experience did not provide him with many skills that would be transferable to sedentary employment activities. However, the SHO noted that there was no reason to believe that relator would not be able to benefit from on-the-job training. As such, the SHO denied relator's application for PTD compensation.

{¶16} 10. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶17} 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.

{¶18} Relator does not challenge the commission's reliance on the report of Dr. Wunder. Instead, relator criticizes the commission's analysis of the nonmedical disability factors. Specifically, relator criticizes the commission's vocational analysis and the lack of any reference to Breslin's report. Relator contends that the commission's analysis is so lacking in explanation that it violates the requirements of *Noll*.

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

{¶20} In making his argument, relator continuously points to the vocational report of Breslin and compares it to the commission's analysis. First, Breslin noted that the majority of unskilled sedentary jobs are performed while sitting for the majority of the day. Relator needs to alternate between sitting and standing. Relator argues that the

commission did not consider this. Breslin also opined that relator's work history did not provide him with any skills that would transfer to sedentary occupations that would allow him to alternate between sitting and standing. By comparison, the commission indicated that he had some (unidentified) skills which would transfer to sedentary work. Lastly, relator specifically argues that, although the commission is regarded as a vocational expert, it is not. Instead, in his brief, relator argues that the proposition that the commission is a vocational expert has never made sense because:

> * * * The three members of the Industrial Commission of Ohio are not vocational experts, they just happen to be the labor, employee and public interest representatives appointed to the Commission. Likewise, the Industrial Commission's Staff Hearing Officers are not vocational experts, **they are attorneys.**

(Relator's brief at 10; emphasis sic.)

{¶21} Relator uses the analogy that hearing officers are not allowed to substitute their medical opinions because they are not doctors. Likewise, relator contends that hearing officers should not be allowed to substitute their vocational opinions because they are not truly vocational experts.

{¶22} Regarding the factors to be considered and determined by the commission in determining whether or not a claimant is capable of performing any sustained remunerative employment, the Supreme Court of Ohio stated in *Stephenson*:

> In making a determination of the degree to which the claimant's ability to work has been impaired, and to answer the query as to whether the claimant is unfit to work at any sustained remunerative employment, the commission must look to a broad number of pertinent factors. It must review all the evidence in the record including the doctors' reports and opinions. The commission must also review any evidence relative to the claimant's age, education, work record, psychological or psychiatric factors if present, and that of a

> sociological nature. The commission should consider any other factors that might be important to its determination of whether this specific claimant may return to the job market by utilizing her past employment skills, or those skills which may be reasonably developed.

Id. at 170.

{¶23} To gain insight into a claimant's physical and/or psychological ability, the commission relies on doctors' reports. Such information includes an examination of the claimant and a medical analysis of the physical/psychological condition. The doctors' determination of the severity of the allowed condition generally presents a conclusion as to the claimant's percentage of impairment or function. While doctors today regularly use the terms "disability" and "impairment" interchangeably, the "disability" is the effect that the impairment has on the claimant's ability to work, which is determined by the commission and its hearing officers. The commission has the ultimate authority and duty to determine the totality and permanency of the allowed injury. Further, the "commission is not required to accept the factual findings stated in a medical report at face value and, without questioning such, adopt the conclusions as those of the commission." Id. at 171.

{¶24} ~~As above noted, the commission is considered to have a certain amount of medical expertise and the commission is not required to adopt a doctor's conclusions. As such, contrary to relator's assertion that, as attorneys, hearing officers lack medical expertise, the commission's hearing officers do have some medical expertise and are expected to use it.~~

{¶25} ~~It is no different with the commission's consideration of the vocational evidence.~~ As the *Stephenson* court stated:

> We reiterate that the determination of permanent total disability, and whether or not the claimant could return to any other remunerative employment, is an ultimate finding, totally within the province of the commission. We hold it to be necessary that the commission look at the claimant's age, education, work record, and all other factors, such as physical, psychological, and sociological, that are contained within the record in making its determination of permanent total disability.

Id. at 172-73.

{¶26} The commission is not required to accept the findings in a vocational report. The commission may credit offered vocational evidence; however, expert opinion is neither critical nor necessary because the commission is the expert on this issue. *State ex rel. Jackson v. Indus. Comm.* (1997), 79 Ohio St.3d 266. To bind the commission to a rehabilitation report's conclusions, makes the rehabilitation division, not the commission, the ultimate evaluator of disability contrary to *Stephenson*. *State ex rel. Singleton v. Indus. Comm.* (1994), 71 Ohio St.3d 117.

{¶27} According to the Supreme Court of Ohio, it is the responsibility of the commission, not the rehabilitation division or any other vocational expert, to examine the nonmedical disability factors contained in the record when determining permanent total disability.

{¶28} Returning to relator's arguments, relator notes that the commission found that his age was a mild barrier, but then, without any explanation, found that his education and work history would be assets regarding his ability to return to work. Further, relator objects to the commission's determination that he had some skills that were transferable to sedentary employment, and never explained how relator would be able to learn new skills. Relator contends that graduating from high school in 1965 and

serving in the military several years ago is not sufficient to explain how an individual can compete in today's modern work environment.

{¶29} Turning to the commission's order, the magistrate finds that the commission's analysis of the nonmedical disability factors is adequate and the order complies with the requirements of *Noll*. Regarding relator's age, there is a significant amount of case law stating that there is no maximum age at which reemployment is held to be a virtual impossibility as a matter of law. See, e.g., *State ex rel. Ellis v. McGraw Edison Co.* (1993), 66 Ohio St.3d 92. PTD benefits were never intended to compensate an injured worker for growing old. *State ex rel. Moss v. Indus. Comm.* (1996), 75 Ohio St.3d 414. Here, the commission concluded that his age of 63 years would be a mild barrier to reemployment. Thereafter, the commission considered relator's education. Relator is a high school graduate and indicated on his application that he could read, write, and perform basic math. Further, relator served in the armed services and had experience performing skilled employment in the past. Based on those factors, the commission concluded that relator could return to unskilled to semi-skilled work in the future and that there was no reason to believe that he could not benefit from on-the-job training. Relator's real argument is that Breslin's analysis is correct while the commission's analysis is obviously incorrect.

{¶30} 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. Relator is essentially asking this court to reweigh the evidence and to accept Breslin's analysis. That is not the role of this court.

{¶31} Relator cites eight cases from the Supreme Court of Ohio wherein the court granted the claimants relief pursuant to *Gay* even though those claimants, like relator herein, were found capable of performing unskilled, entry level sedentary work. Relator urges this court to grant him *Gay* relief here for the same reasons the Supreme Court did in his cited cases. However, in the cases cited by relator, the claimants had sixth, eighth, fifth, third, ninth, sixth, sixth, and seventh grade educations, respectively, no additional training and their prior work experience was primarily general laborer occupations. *State ex rel. Knox v. Indus. Comm.* (1994), 69 Ohio St.3d 360; *State ex rel. McGee v. Indus. Comm.* (1994), 69 Ohio St.3d 370; *State ex rel. Koonce v. Indus. Comm.* (1994), 69 Ohio St.3d 436; *State ex rel. Hopkins v. Indus. Comm.* (1994), 70 Ohio St.3d 36; *State ex rel. Davis v. Indus. Comm.* (1996), 76 Ohio St.3d 72; *State ex rel. McComas v. Indus. Comm*. (1997), 77 Ohio St.3d 362; *State ex rel. Hall v. Indus. Comm.* (1997), 80 Ohio St.3d 289; *State ex rel. Hartness v. Kroger Co.* (1998), 81 Ohio St.3d 445. Given his high school education, additional training, and work experience, relator's case is clearly distinguishable from each case relator cites.

{¶32} In *State ex rel. Dillon v. Indus. Comm.*, 10th Dist. No. 08AP-947, 2009-Ohio-5356, this court upheld an order of the commission denying PTD compensation to Dillon, a 65-year-old man, with an eighth grade education, and whose prior work experience was as a carpenter. The commission determined his age was a negative factor because he was closely approaching advance age but, that, in combination with his other vocational factors, it did not preclude re-employment. The commission considered his eighth grade education to be a positive factor in spite of the fact he could not read or write well. Dillon's education was sufficient to permit him to perform the less

complicated duties needed in semi-skilled and skilled work. Lastly, the commission found his work experience as a carpenter/supervisor demonstrated he could learn a skilled trade, was capable of handling the responsibilities for directing, controlling and planning work, and that Dillon had the temperament to supervise crews of various numbers.

{¶33} Relator's vocational factors are significantly more positive than Dillon's. The magistrate finds that the commission's analysis satisfies the requirements of *Stephenson* and *Noll*.

{¶34} Based on the foregoing, it is this magistrate's decision that relator has not demonstrated that the commission abused its discretion in denying his application for PTD compensation and 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).