

enter an order reinstating her compensation and declare that the job offered was not within her restrictions.

{¶2} This matter was referred to a magistrate of this court pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate examined the evidence and issued a decision, including findings of fact and conclusions of law, which is appended to this decision. Therein, the magistrate concluded the commission did not abuse its discretion in denying relator's request for TTD compensation. Therefore, the magistrate recommended that this court deny the requested writ of mandamus.

{¶3} Relator filed objections to the magistrate's decision, but, upon review, the arguments contained in relator's objections are essentially the same issues raised to and addressed by the magistrate. For the reasons set forth in the magistrate's decision, we do not find relator's objections to be well-taken.

{¶4} Following an independent review of this matter, we find that the magistrate has properly determined the facts and applied the appropriate law. Therefore, relator's objections to the magistrate's decision are overruled, and 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 deny the requested writ of mandamus.

Objections overruled; writ of mandamus denied.

KLATT and SADLER, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Alba Rivera,	:	
	:	
Relator,	:	
	:	
v.	:	No. 09AP-1137
	:	
Industrial Commission of Ohio and	:	(REGULAR CALENDAR)
Cuyahoga County Commissioner[s],	:	
	:	
Respondents.	:	
	:	

MAGISTRATE'S DECISION

Rendered on May 18, 2010

Shapiro, Marnecheck, Riemer & Palnik, Philip A. Marnecheck, and Matthew Palnik, for relator.

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

Frantz Ward LLP, and Steven R. Yoo, for respondent Cuyahoga County Commissioners.

IN MANDAMUS

{¶5} Relator, Alba Rivera, 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 her temporary total disability ("TTD") compensation based upon a finding that she had refused a good-faith job offer, and

ordering the commission to reinstate her compensation and find that the job offered was not within her restrictions.

Findings of Fact:

{¶6} 1. Relator sustained a work-related injury on April 23, 2009, and her claim has been allowed for sprain shoulder right; sprain forearm right.

{¶7} 2. At the time she was injured, relator worked as an adult program specialist and her job was described as follows:

PRIMARY FUNCTION: Supervise and train an adult or a group of adults with moderate to profound mental retardation and/or developmental disabilities in work and habilitative activities to maximize normalization. Adults may exhibit special behavioral, emotional, or daily living problems.

UNUSUAL WORKING CONDITIONS: May require heavy lifting, toileting, changing of clothing, and other assignments of personal care, direct and frequent behavior interventions, and may include some risk to personal safety; close monitoring and supervision of individual(s) may be required and may result in limited program participation with other staff and individuals; assignment to different work sites within a region as individual needs arise, as determined by AAC managers.

QUALIFICATIONS: High School Diploma or GED certificate of high school equivalency; one year experience in a rehabilitation program and/or a program which serves individuals with emotional disturbances, with emphasis in behavior management and direct personal care, or six months substituting in CCBMR/DD AACs; experience with persons with mental retardation and developmental disabilities and/or severe behavioral problems, highly desirable; Ohio Department of MR/DD registration required for the position (may be obtained after hire).

UNUSUAL REQUIREMENTS: Fluency in Spanish.

{¶8} 3. Relator's injury occurred when she needed to restrain a mentally challenged male with difficult behaviors.

{¶9} 4. At the time of her injury, relator was employed as an adult program specialist. In that capacity, relator performed the following tasks:

PRIMARY FUNCTION: Supervise and train an adult or a group of adults with moderate to profound mental retardation and/or developmental disabilities in work and habilitative activities to maximize normalization. Adults may exhibit special behavioral, emotional, or daily living problems.

UNUSUAL WORKING CONDITIONS: May require heavy lifting, toileting, changing of clothing, and other assignments of personal care, direct and frequent behavior interventions, and may include some risk to personal safety; close monitoring and supervision of individual(s) may be required and may result in limited program participation with other staff and individuals; assignment to different work sites within a region as individual needs arise, as determined by AAC managers.

UNUSUAL REQUIREMENTS: Fluency in Spanish.

{¶10} 5. Relator was unable to return to her former position of employment immediately following her injury. She was assessed at Concentra Medical Center for her injuries, was limited to no lifting, pushing or pulling more than ten pounds and the use of her right hand for repetitive grasping was limited, and directed to return for re-evaluation on Monday.

{¶11} 6. In June 2009, relator began treating with Cyril Marshall, M.D. In his June 16, 2009 report, Dr. Marshall noted that relator had been off work since April 23, and that the range of motion of her right shoulder was still limited. He noted that she had full range of motion of her right knee and her right ankle and that the range of motion of her right elbow was within normal limits. He further found that her lumbosacral range of

motion was limited by 30 percent. He concluded that relator's right shoulder sprain remained symptomatic; however, the remainder of her pending conditions had resolved. Finally, Dr. Marshall stated that he would re-evaluate relator on June 22, 2009, with an eye towards returning her to work with restrictions related to her right shoulder.

{¶12} 7. Following his re-examination of relator on June 22, 2009, Dr. Marshall concluded that she was capable of returning to work as of June 29 with restrictions related to her right shoulder.

{¶13} 8. Dr. Marshall completed a MEDCO-14 form on June 22, 2009 indicating that relator could return to work with restrictions on June 29 through July 29, 2009, provided she not be required to lift no greater than 15 pounds and that she be limited to a four-hour work day.

{¶14} 9. After receiving Dr. Marshall's MEDCO-14, relator's employer, Cuyahoga County Commissioners (Cuyahoga County Board of Developmental Disabilities) ("CCC"), sent relator a letter dated June 30, 2009 providing her with an offer of alternative work. Specifically, the letter provides:

In compliance with your current restrictions, you are expected to return to work on Monday, July 6, 2009. You will work under the Alternative Work Program (AWP) until released to full duty or no longer than 12 weeks. Your AWP assignment will be APS/Translator (accommodations to your current position). Please report to Karen Fifelski/designee on July 6th.

During your AWP period, you will not be expected to perform any duties you are restricted from performing. Your current restrictions are that you cannot lift greater than 15 pounds and you are limited to working four hours per day. Please call me to discuss whether you wish to be docked for the remaining four hours per day or if you would like our temporary disability benefits.

{¶15} 10. Dr. Marshall completed a second MEDCO-14 on July 1, 2009, indicating that relator was temporarily totally disabled from July 11 through August 10, 2009. Dr. Marshall listed the conditions which disabled relator as sprain right shoulder, sprain right elbow/forearm, sprain right knee, and sprain right ankle. (By order mailed May 7, 2009, the Bureau of Workers' Compensation ("BWC") had disallowed relator's claim for the conditions related to the sprain of her knee and ankle.)

{¶16} 11. On August 20, 2009, relator's appeal from the formerly disallowed conditions was heard before a district hearing officer ("DHO") on August 20, 2009. At that time, the DHO determined that her claim was now allowed for lumbar strain, right shoulder strain/sprain, right elbow and forearm sprain/strain, and that relator was withdrawing her request for the allowance of right knee and ankle sprain/strain. Thereafter, the DHO awarded relator TTD compensation beginning April 28, 2009 and continuing. CCC's argument that relator was not entitled to TTD compensation because she refused to return to work pursuant to an alternative work program was found not well taken based on a lack of evidence submitted by CCC.

{¶17} 12. CCC appealed and the matter was heard before a staff hearing officer ("SHO") on September 29, 2009. At that hearing, Donna Robb from CCC's Human Resources Department appeared and testified. Following the hearing, the SHO determined that TTD compensation should be granted for the closed period from April 28 through July 5, 2009, but that TTD compensation would be terminated thereafter on the following grounds:

[T]he Injured Worker was offered a viable, comporting light duty job, effective 07/06/2009, which she refused. The

Employer sent this light duty offer, by certified mail, return receipt requested, on 06/30/2009. This offer comported with the light duty work restrictions on the 6/22/09 MEDCO-14 of Dr. Marshall. Dr. Marshall's subsequent retraction of his light duty certification is unsupported by any persuasive or sufficient medical evidence.

* * *

This order is made based on the 04/23/2009 Concentra records, the MEDCO-14s on file, the light duty offer of the employer, made on 6/30/09, and the testimony of Ms. Robb at hearing.

{¶18} 13. Relator's further appeal was refused by order of the commission mailed October 28, 2009.

{¶19} 14. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶20} Relator argues that CCC did not make a good-faith job offer to her because the job offered was not within the restrictions provided by her doctor. Specifically, relator argues that the job being offered would require her to work one-on-one with clients, including the individual who caused her injuries.

{¶21} The magistrate finds that the commission did not abuse its discretion because: (1) the evidence indicates that the job offered was as a translator only; and (2) there is no evidence to indicate that, in reality, the job offered would require her to work one-on-one with people including the individual who caused her injuries.

{¶22} TTD compensation is designed to compensate a claimant when the claimant's injury prevents a return to the former position of employment. TTD compensation ceases when the employer makes work within the claimant's physical

capabilities available. R.C. 4123.56(A); *State ex rel. Ramirez v. Indus. Comm.* (1982), 69 Ohio St.2d 630.

{¶23} CCC offered relator a job and the question is whether it constituted a good-faith job offer.

{¶24} Ohio Adm.Code 4121-3-32(A)(6) defines "job offer" as follows:

"Job offer" means a proposal, made in good faith, of suitable employment within a reasonable proximity of the injured worker's residence. If the injured worker refuses an oral job offer and the employer intends to initiate proceedings to terminate temporary total disability compensation, the employer must give the injured worker a written job offer at least forty-eight hours prior to initiating proceedings. If the employer files a motion with the industrial commission to terminate payment of compensation, a copy of the written offer must accompany the employer's initial filing.

{¶25} Ohio Adm.Code 4121-3-31(B)(2)(d) provides further:

(2) Except as provided in paragraph (B)(1) of this rule, temporary total disability compensation may be terminated after a hearing as follows:

* * *

(d) Upon the finding of a district hearing officer that the employee has received a written job offer of suitable employment.

{¶26} In this mandamus action, relator argues that CCC's job offer was not a good-faith job offer and did not comply with the Ohio Administrative Code or case law for the following sole reason:

The employer offered Ms. Rivera a job which involved one-on-one interaction with the individual who caused her injury on April 23, 2009.

{¶27} In so arguing, relator identifies two pieces of evidence. First, at page 20, relator points to the April 29, 2009 e-mail from Donna Robb, which provides, in pertinent part:

Alba was injured at work on 4/23 while assisting in a restraint.

The doctor released her back to work with restrictions on 4/24.

Al Trefney talked to her on 4/23 after she had seen the doctor and told her we would like her to report to work on 4/24 to translate (she would not be expected to do anything her doctor gave her restrictions for). She could work just as a translator until she was released without restrictions.

Alba called in sick on 4/24, 4/27 and 4/28.

I called her on 4/28 and told her we would like her to return to work on 4/29. I explained our light duty program – she could work with restrictions until released to full duty by her doctor. I explained to her that, per my conversation with Al, they just wanted her to come in and translate.

Alba called off sick on 4/29. I called her again and explained to her that if she does not come to work with her restrictions, she may be jeopardizing her workers' comp benefits. I've attached a copy of the AWP agreement that was sent to her today explaining how the AWP works.

{¶28} Second, relator references page 22, the AWP agreement identified in the e-mail which was sent to relator. Although relator does not point to a specific item on that page, the magistrate assumes that relator is pointing to the following:

Position: Adult Program Specialist
(with accommodations)

Although not entirely clear from her brief, it appears that by identifying her former position of employment (Adult Program Specialist), relator has concluded that she will be required to work in the exact same capacity in which she worked before, which involved the

potential for restraining patients and which would require her to work specifically with the individual who caused her injury. Relator asserts that the medical evidence demonstrates that she cannot do this.

{¶29} In support of her argument that she cannot work one-on-one with clients at this time, relator points to the following comment contained in the July 2, 2009 letter of Dr. Marshall, wherein he stated:

She cannot perform her regular job at this time due to the right shoulder injury. Until she is allowed some physical therapy to get her range of motion improved, avoiding patient contact, in her work environment, is appropriate.

{¶30} Relator also points to the September 24, 2009 report of Amardeep Chauhan, D.O., who stated:

[A]ssuming that the employer is able to provide assistance so that the injured worker is not in a situation where she is dealing with clients or patients that have behavioral issues, I do feel she is able to continue to be employed.

* * *

I do recommend that she avoid patient care where she is left to deal with behaviorally challenged individuals one on one until her shoulder strength improves.

{¶31} In *State ex rel. Coxson v. Dairy Mart Stores of Ohio, Inc.*, 90 Ohio St.3d 428, 2000-Ohio-188, the commission denied Marlyne Coxson her request for TTD compensation on grounds that she had refused her employer's offers of light-duty employment. The *Coxson* court held that the letters offering employment could not be considered offers of suitable employment because: (1) the letters did not identify the position offered or describe its duties; and (2) some of the terms used by the employer in its letters were ambiguous or vague.

{¶32} In *State ex rel. Professional Restaffing of Ohio, Inc. v. Indus. Comm.*, 152 Ohio App.3d 245, 2003-Ohio-1453, this court had occasion to apply the *Coxson* requirements. This court stated:

Here, relator offered claimant a "left-handed position" without identifying the specific position or the duties required of that position. Although claimant's medical restrictions relate to the use of his right hand, the job offer extended by relator is not specific enough to allow claimant, his doctor or the commission to assess whether the job is, in fact, within claimant's restrictions. As noted by *Coxson*, for a job offer to be sufficient to terminate TTD compensation, it must be clear that the job is indeed within claimant's restrictions. The only way to assess this is to know the position being offered and the general nature of the duties required of the position.

Id. at 248.

{¶33} In the instant case, the medical evidence is clear: both Drs. Marshall and Chauhan have indicated that relator can return to employment within certain physical restrictions provided that she not be put in a position of having to deal one-on-one with behaviorally challenged individuals. CCC offered relator a position solely as a translator, CCC was aware of her restrictions, and CCC indicated that she would not need to work outside her restrictions. This is very different from the description of relator's former position of employment wherein her primary function included the supervision and training of adults or group of adults with moderate to profound mental retardation and/or developmental disabilities and work and habilitative activities. It is also very different from the working conditions identified in her job description, which includes the possibility of heavy lifting, toileting, changing of clothing, and other assignments of personal care, direct and frequent behavior interventions, and close monitoring and supervision of individuals. While fluency in Spanish is required of a person performing relator's former

position of employment, it is obvious that her former position of employment involved significant contact with individuals and constituted work as much more than simply a translator. There simply is no evidence in the record to support relator's contention that she will be required to work one-on-one with any clients, including the one who caused her injuries.

{¶34} Relator did not attend the SHO hearing; however, Ms. Robb from CCC's Human Resources Department did. In finding that the job offer CCC made to relator was a good-faith job offer within her restrictions, the SHO relied in part on the testimony Ms. Robb provided at the hearing.

{¶35} In finding that CCC made a good-faith job offer, the commission relied on the April 30, 2009 Concentra records, the MEDCO-14s on file, the light-duty offer of the employer made on June 30, 2009, and the testimony of Ms. Robb. The Concentra records and the MEDCO-14s set out relator's restrictions. The June 30, 2009 offer of employment was as an "APS/Translator" and specifically indicated that relator would not be expected to perform any duties outside her current restrictions: "you cannot lift greater than 15 pounds and you are limited to working four hours per day." (R. 59.)

{¶36} The magistrate finds that the evidence complies with the requirements of *Coxson*: (1) the job is specifically identified, and (2) her specific restrictions are correctly identified, and it is clear relator will not be expected to work outside those restrictions.

{¶37} Based on the foregoing, 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).