

In the
Supreme Court of Ohio

STATE OF OHIO, ex rel.
MICHAEL SCHLOTMAN,

Plaintiff-Appellant,

vs.

INDUSTRIAL COMMISSION OF OHIO,
et al.,

Defendant-Appellee.

: Case No. 2007-0482
:
: On Appeal from the
: Franklin County Court of Appeals,
: Tenth Appellate District
:
: Court of Appeals Case
: No. 05APD10 1076
:
:

MOTION TO DISMISS

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JUN 04 2007

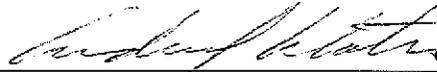
MARCIA J MENGEL, CLERK
SUPREME COURT OF OHIO

MOTION TO DISMISS

Appellee, Industrial Commission of Ohio, moves this Court to dismiss the appeal of Appellant, Michael Schlotman ("Mr. Schlotman"), due to the failure of Mr. Schlotman to object to the decision of the magistrate in the court below as required by Civil Rule 53. The Court's attention is respectfully directed to the accompanying memorandum in support.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

The court below referred this matter to a magistrate, without limitation of the powers specified in Civ.R. 53. As an original action in the court below, this matter proceeded in accordance with the Civil Rules. Civ. R. 53 (E)(3)(b) provides in relevant part:

A party shall not assign as an error on appeal the court's adoption of any finding of fact or conclusion of law unless the party has objected to the finding or conclusion under this rule.

Mr. Schlotman failed to file objections to the magistrate's decision. The Court of Appeals noted Mr. Schlotman's failure to file objections to the magistrate's decision. Specifically, the Court's Memorandum Decision of October 26, 2006, states:

Pursuant to former Loc. R. 12(M) of the Tenth District Court of Appeals, this court appointed a magistrate without limitation of powers specified in former Civ.R. 53(C) to consider relator's cause of action. The magistrate examined the evidence and issued a decision, wherein he made findings of fact and conclusions of law. * * * In his decision, the magistrate recommended denial of relator's request for a writ of mandamus.

No party has filed objections to the magistrate's decision.

(Emphasis provided.) Court of Appeals Memorandum Decision, ¶¶ 2 and 3. (Copies of the Court of Appeals Memorandum Decision, Magistrate's Decision, and Judgment Entry are attached hereto.)

In addition, the Judgment Entry of the court below states:

For the reasons stated in the memorandum decision of this court rendered herein on January 30, 2007, the decision of the magistrate is approved and adopted by the court as its own, with exception to the defect in the magistrate's eleventh finding of fact as noted in our decision.¹

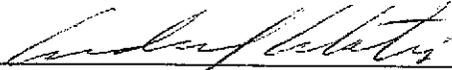
¹ The defect was found to be as follows: "According to the evidence, however, the hearing before the district hearing officer was held on August 4, 2003, not on August 14, 2003." ¶4 of the Memorandum Decision.

This Court has repeatedly recognized that it cannot proceed in review of an appeal if objections were not timely filed in the court below. *State ex rel. Abate v. Indus. Comm.*, 96 Ohio St.3d 343, 2002-Ohio-4796; *State ex rel. Booher v. Indus. Comm.*, 88 Ohio St.3d 52, 2000-Ohio-269. However, Mr. Schlotman is now assigning as error on appeal to this Court the conclusions of law of the magistrate that were adopted by the Court of Appeals. His arguments to this Court derive directly from the conclusions of law contained in the magistrate's decision. Mr. Schlotman should have made those arguments to the Court of Appeals.

For the foregoing reasons, Mr. Schlotman's appeal should be dismissed.

Respectfully submitted,

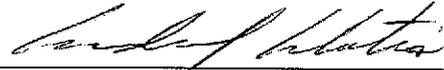
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Industrial Commission of Ohio

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Answer was served by regular U.S. Mail, postage prepaid, this 4th day of June, 2007, upon the following Counsel for Plaintiff-Appellant, Howard D. Cade III, Becker & Cade, 526-A Wards Corner Road, Loveland, Ohio 45140.



ANDREW J. ALATIS
Assistant Attorney General

FILED
COURT OF APPEALS
FRANKLIN COUNTY OHIO

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

2007 FEB -1 PM 12:06
CLERK OF COURTS

State of Ohio ex rel. Michael Schlotman, :
Relator, :
v. :
Industrial Commission of Ohio and :
3 Rivers Custom Contractors, :
Respondents. :

No. 05AP-1076
(REGULAR CALENDAR)

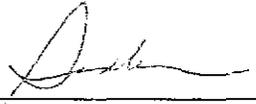
JUDGMENT ENTRY

For the reasons stated in the memorandum decision of this court rendered herein on January 30, 2007, the decision of the magistrate is approved and adopted by the court as its own, with exception to the defect in the magistrate's eleventh finding of fact as noted in our decision. It is the judgment and order of this court that the requested writ of mandamus is denied. Costs are assessed against relator.

Within three (3) days from the filing hereof, the clerk of this court is hereby ordered to serve upon all parties not in default for failure to appear notice of this judgment and its date of entry upon the journal.



Judge Charles R. Petree



Judge Lisa L. Sadler, P.J.



Judge William A. Klatt

ON COMPUTER 12

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IN THE COURT OF APPEALS OF OHIO

CLERK OF COURTS

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Michael Schlotman, :

Relator, :

v. :

No. 05AP-1076

Industrial Commission of Ohio and
3 Rivers Custom Contractors, :

(REGULAR CALENDAR)

Respondents. :

MEMORANDUM DECISION

Rendered on January 30, 2007

Becker & Cade, and Howard D. Cade, III, for relator.

*Marc Dann, Attorney General, and Andrew J. Alatis, for
respondent Industrial Commission of Ohio.*

IN MANDAMUS

PETREE, J.

ON COMPUTER 12

{¶1} Relator, Michael Schlotman, seeks a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate an order to the extent that it denies him temporary total disability ("TTD") compensation for a closed period of

June 8, 1999, through July 13, 2002, and to enter an amended order granting TTD compensation for that closed period.¹

{¶2} Pursuant to former Loc. R. 12(M) of the Tenth District Court of Appeals, this court appointed a magistrate without limitation of powers specified in former Civ.R. 53(C) to consider relator's cause of action.² The magistrate examined the evidence and issued a decision, wherein he made findings of fact and conclusions of law. (Attached as Appendix A.) In his decision, the magistrate recommended denial of relator's request for a writ of mandamus.

{¶3} No party has filed objections to the magistrate's decision.³ See, generally, Civ.R. 53(D)(3)(b).

{¶4} Based upon our independent review, we find a defect on the face of the magistrate's decision concerning the magistrate's eleventh finding of fact. In his eleventh finding of fact, the magistrate states that a hearing was held on August 14, 2003, before a district hearing officer. According to the evidence, however, the hearing before the district hearing officer was held on August 4, 2003, not on August 14, 2003.

{¶5} Finding no other defect or error of law on the face of the magistrate's decision, we adopt the magistrate's decision as our own, including the magistrate's

¹ According to relator's complaint, relator seeks a writ of mandamus ordering the commission to vacate its order denying TTD compensation for the period of June 7, 1999, to April 14, 2003, and to award TTD compensation for this period. Alternatively, relator seeks a writ of mandamus remanding the matter to the commission for further hearing. However, relator was awarded TTD compensation from June 14, 2002, through September 8, 2003. Relator was denied TTD compensation from June 8, 1999, through July 13, 2002.

² Since the matter was referred to the magistrate, the Local Rules of the Tenth District Court of Appeals and Civ.R 53 were amended, effective May 1, 2006, and July 1, 2006, respectively.

³ According to our review of the record, respondent 3 Rivers Custom Contractors was not successfully served with relator's complaint.

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findings of fact, except as previously indicated, and the magistrate's conclusions of law. See, generally, Civ.R. 53(D)(4)(c). In accordance with the magistrate's recommendation, we deny relator's request for a writ of mandamus.

Writ denied.

SADLER, P.J., and KLATT, J., concur.

APPENDIX A
IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio ex rel. Michael Schlotman, :
Relator, :
v. : No. 05AP-1076
Industrial Commission of Ohio and : (REGULAR CALENDAR)
3 Rivers Custom Contractors, :
Respondents. :

MAGISTRATE'S DECISION
Rendered on September 20, 2006

Becker & Cade, and Howard D. Cade, III, for relator.

*Jim Petro, Attorney General, and Andrew J. Alatis, for
respondent Industrial Commission of Ohio.*

IN MANDAMUS

{¶6} In this original action, relator, Michael Schlotman, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order to the extent that it denies him temporary total disability ("TTD") compensation for the closed period June 8, 1999 through July 13, 2002, and to enter an amended order granting TTD compensation for that closed period.

Findings of Fact:

{¶7} 1. On June 7, 1999, relator sustained a lumbar fracture and forehead laceration when he fell from a roof.

{¶8} 2. On the date of injury, relator was employed by 3 Rivers Custom Contractors which was apparently a sole proprietorship owned and operated by relator.

{¶9} 3. On June 10, 1999, three days after the injury, relator filed an application for workers' compensation benefits on a form published by the Ohio Bureau of Workers' Compensation ("bureau"). The form is captioned "First Report of Injury, Occupational Disease or Death" and is sometimes referred to as the "FROI-1." On the FROI-1, "L1 fracture/forehead laceration" was listed as the diagnosis. On the form, relator stated that he had fallen ten to 15 feet from a roof on June 7, 1999.

{¶10} 4. On July 6, 1999, the bureau issued an order denying the allowance of the claim for the reason that:

The injured worker is not covered by Ohio Workers compensation because the employee is a sole proprietor/partner who has not elected to have coverage for him or herself on the date of injury.

This decision is based on: No C116 coverage at the time of injury. The injured worker is the owner.

{¶11} 5. Ultimately, following an R.C. 4123.512 appeal to the Hamilton County Court of Common Pleas, relator obtained a judgment on August 12, 2002, granting him the right to participate for "[l]umbar fracture (L-1) and forehead laceration."

{¶12} 6. On September 25, 2002, the commission, through one of its staff hearing officers ("SHO"), mailed an order recognizing relator's right to participate based upon the judgment entry of the common pleas court.

{13} 7. Earlier, on June 14, 2002, relator was first examined by George D.J. Griffin, III, M.D. On that date, Dr. Griffin wrote:

HISTORY: The patient is a 47 year old male who is seen for consultation for an injury he sustained at work on 7 June 1999. He had a house truss fall on him fracturing four lumbar vertebrae. He had surgery in June 1999 by Dr. Daganio at U.C. It was an anterior approach at the level of his stomach. They removed 1/2 of the tenth rib and put in a spine wire that poked out the stomach. He said that the emergency room cut it off and now he has two loose wires floating inside him. Since the emergency room visit a year ago when they pulled the wire, he has gotten local "swelling" which is an apparent hernia. He also treated with Dr. Rosenthal also from U.C. He has complaints of constant pain in the front of his abdomen and around his ribs where the surgery was done. He has some complaints of back pain. His pain is increased with bending, stooping, lifting, sitting, standing, and walking. He gets severe local pain possibly at the T10 level with any valsalva maneuvers. The pain starts at the top of his hernia area and radiates down the T10 nerve root distribution. He has dull aching pain in his back that is nearly constant.

PHYSICAL EXAMINATION: LUMBAR SPINE: The patient is unsteady getting up secondary to pain in his side, industrial injury and fusion. The patient ambulates bearing 100% of the weight on both lower extremities. There is no evidence of any muscle weakness or muscle wasting on examination today. There is 5+ muscle strength in the flexor and extensor muscle groups of both lower extremities. Sensation is intact to light touch over both lower extremities. The patient has a flat back on examination today. Range of motion of the spine: flexion 35 degrees, extension 5 degrees, right and left lateral bending 20 degrees each. There is a scar over the left anterior groin to the left posterior rib cage. There is bilateral paraspinous muscle tenderness but no paraspinous muscle spasm. There is no vertebral tenderness on examination today. Straight leg raising sign is positive at 90 degrees bilaterally. Deep tendon reflexes are +1 at the knees and +1 at the ankles.

IMPRESSION: Lumbar fracture, (805.4). Incisional hernia and neuroma secondary to surgery.

OPINION: It is my medical opinion, to a reasonable degree of medical certainty, that the patient needs pain management and further evaluation of his lumbar spine residual injury.

{¶14} 8. Relator returned to Dr. Griffin's office for examinations on August 28, 2002, September 4, 2002, December 16, 2002 and January 20, 2003. Dr. Griffin's office notes for each visit are contained in the record.

{¶15} 9. On January 28, 2003, Dr. Griffin completed form C-84 on which he certified a period of TTD beginning June 7, 1999 to an estimated return-to-work date of April 14, 2003. On the C-84, Dr. Griffin lists January 20, 2003 as the date of last examination. Apparently, the C-84 was filed on January 28, 2003.

{¶16} The C-84 form asks the examining physician whether the injury has reached maximum medical improvement ("MMI"). In response, Dr. Griffin marked the "yes" box and listed October 8, 2002 as the MMI date. In subsequent C-84s, Dr. Griffin extended the estimated return-to-work date.

{¶17} 10. On May 14, 2003, relator moved for TTD compensation. Relator moved the commission to order the bureau to "pay" Dr. Griffin's C-84 dated January 28, 2003.

{¶18} 11. Following an August 14, 2003 hearing, a district hearing officer ("DHO") issued an order granting relator's motion in part. The DHO's order states:

The District Hearing Officer orders that temporary total disability compensation be paid from 06/14/2002 to 08/04/2003 and to continue based upon the medical evidence of Dr. Griffin who finds injured worker unable to perform his prior job due to this claim. The District Hearing Officer does not award temporary total disability compensa-

tion from 06/08/1999 to 06/13/2002 due to the lack of certification of disability and or request for temporary total disability compensation prior to this date by a medical doctor.

This order is based on the reports of Dr. University Hospital 06/29/1999 and George Griffin 3rd [sic].

{¶19} 12. Relator administratively appealed the DHO's order of August 14, 2003.

{¶20} 13. On July 7, 2003, Dr. Griffin wrote:

I have reviewed Michael Schlotman's previous medical records and based upon these medical records and my personal evaluation, and ongoing treatment of this patient; it is my opinion to a reasonable degree of medical certainty that Michael Schlotman has been disabled since 7 June 1999.

{¶21} 14. Following a September 8, 2003 hearing, an SHO issued an order

stating:

The order of the District Hearing Officer, from the hearing dated 08/04/2003, is modified to the following extent.

The Staff Hearing Officer finds that the injured worker has been unable to return to and perform the duties of his former position of employment beginning 06/14/2002 as a result of the allowed conditions in the claim. Therefore, the injured worker is awarded Temporary Total Disability Compensation for the period 06/14/2002 through 09/08/2003.

The Staff Hearing Officer finds that Dr. Griffin, the injured worker's treating physician has indicated on numerous C-84 forms that the injured worker has reached Maximum Medical Improvement effective 10/08/2002. The Staff Hearing Officer finds that such indication is in conflict with his completion of the disability date on the same form, wherein he provides dates for the injured worker's "temporary total" disability.

The Staff Hearing Officer finds that the injured worker has reached Maximum Medical Improvement considering the allowed conditions in the claim based on Dr. Griffin's notation on numerous C-84 forms to that effect. Therefore Temporary

Total Disability Compensation is terminated on that basis effective the date of this hearing, 09/08/2003.

The Staff Hearing Officer denies the injured worker's request for Temporary Total Disability Compensation for the period 06/08/1999 through 7/13/2002. The Staff Hearing Officer finds that the Industrial Commission is without jurisdiction to consider a request for compensation prior to two years before the date of its request. The Staff Hearing Officer finds that the request for Temporary Total Disability Compensation was first made on a C-84 form filed 01/8/2003. Accordingly, the Industrial Commission has no jurisdiction to consider the request for compensation prior to 01/28/2001. The Staff Hearing Officer further finds that the injured worker was not under the care of Dr. Griffin for the period 01/28/2001 through 06/13/2002. Accordingly, the Staff Hearing Officer finds that there is no supporting medical evidence of the injured worker's disability for the period 01/28/2001 through 06/13/2002.

This order is based on the medical records and reports of Dr. Griffin.

{¶22} 15. On October 11, 2003, another SHO mailed an order refusing relator's administrative appeal from the SHO's order of September 8, 2003.

{¶23} 16. On October 11, 2005, relator, Michael Schlotman, filed this mandamus action.

Conclusions of Law:

{¶24} The main issue is whether the commission abused its discretion in denying TTD compensation for the closed period June 8, 1999 through July 13, 2002. This closed period begins the day following the industrial injury and ends the day prior to Dr. Griffin's initial examination.

{¶25} The commission awarded TTD compensation beginning July 14, 2002, the date of Dr. Griffin's initial examination. The commission's award of TTD compensation beginning July 14, 2002, is not at issue in this action.

{¶26} Because there was no medical evidence upon which the commission could rely to support an award of TTD compensation for any period prior to July 14, 2002, it is the magistrate's decision that this court deny relator's request for a writ of mandamus, as more fully explained below.

{¶27} *State ex rel. Bowie v. Greater Regional Transit Auth.* (1996), 75 Ohio St.3d 458, is dispositive.

{¶28} In *Bowie*, the commission denied the claimant's request for TTD compensation based in part on a report from Dr. Katz who examined the claimant on July 12, 1990, almost seven months after the industrial injury. In his report, Dr. Katz opined that the claimant "should [not] have been out of work at any time after" the date of injury. *Id.* at 459. Dr. Katz's retrospective opinion was based upon emergency room records on the date of injury and his examination of the claimant.

{¶29} Concerned that Dr. Katz had not reviewed the reports of the claimant's treating chiropractor, Dr. McFadden, the *Bowie* court wrote:

* * * In this instance, the conspicuous reference to the emergency room reports coupled with the equally conspicuous lack of reference to Dr. McFadden's reports suggests to us that Dr. Katz may have overlooked the latter.

Id. at 460.

{¶30} The *Bowie* court issued a writ of mandamus returning the cause to the commission for its further consideration of the compensation request after removal of Dr. Katz's report from further evidentiary consideration. The *Bowie* court explains the law that underpins its decision:

There are parallels between an examining doctor who offers a retroactive opinion and a doctor who renders an opinion as

to a claimant's current status without examination. The evidentiary acceptability of the latter is long-settled, having been equated to an expert's response to a hypothetical question. *State ex rel. Wallace v. Indus. Comm.* (1979), 57 Ohio St.2d 55 * * *; *State ex rel. Hughes v. Goodyear Tire & Rubber Co.* (1986), 26 Ohio St.3d 71 * * *; *State ex rel. Lampkins v. Dayton Malleable, Inc.* (1989), 45 Ohio St.3d 14[.] * * *

As in the case of a non-examining physician, however, certain safeguards must apply when dealing with a report that is not based on an examination done contemporaneously with the claimed period of disability. We find it imperative, for example, that the doctor review all of the relevant medical evidence generated prior to that time. * * *

Id. at 460.

{¶31} Here, Dr. Griffin's July 7, 2003 retrospective opinion that relator has been disabled since the date of injury is based upon unidentified "previous medical records." Given that the records allegedly reviewed by Dr. Griffin are unidentified, the *Bowie* standard for acceptance of the retrospective opinion has not been met. Thus, Dr. Griffin's July 7, 2003 retrospective medical opinion does not constitute some evidence upon which the commission could rely. See *State ex rel. Wright v. Indus. Comm.*, Franklin App. No. 05AP-669, 2006-Ohio-2535.

{¶32} Perhaps it can be said that the SHO's order of September 8, 2003, suggests that the SHO was unaware that an examining physician can render a valid retrospective opinion as to disability if the *Bowie* standard is met. The SHO's order states in part:

* * * The Staff Hearing Officer further finds that the injured worker was not under the care of Dr. Griffin for the period 01/28/2001 through 06/13/2002. Accordingly, the Staff Hearing Officer finds that there is no supporting medical

evidence of the injured worker's disability for the period 01/28/2001 through 06/13/2002.

{¶33} Even if the SHO failed to recognize the law set forth in *Bowie*, and thus rejected Dr. Griffin's July 7, 2003 report for the wrong reason, there is no cause to issue a writ of mandamus. Again, regardless of the SHO's reasons for rejecting Dr. Griffin's July 7, 2003 report, the report clearly cannot constitute evidence under *Bowie*.

{¶34} The magistrate further notes that the commission found that it lacked jurisdiction under R.C. 4123.52 to award TTD compensation for the period prior to January 8, 2001.

{¶35} R.C. 4123.52 states in part: "[T]he commission shall not make any modification, change, finding, or award which shall award compensation for a back period in excess of two years prior to the date of filing application therefor."

{¶36} The commission determined that relator filed the "application" when he filed the C-84 on January 28, 2003. Thus, the commission determined that it had no jurisdiction under R.C. 4123.52 to award compensation prior to January 28, 2001.

{¶37} Here, relator claims that the commission abused its discretion by failing to view his FROI-1 filed on June 10, 1999 as his "application" for TTD compensation. Relator cites no cases to support his claim.

{¶38} Nevertheless, the commission here, citing *State ex rel. General Refractories Co. v. Indus. Comm.* (1989), 44 Ohio St.3d 82, argues that the FROI-1 cannot be viewed as an application for TTD compensation.

{¶39} In the magistrate's view, this court need not determine whether the commission abused its discretion in failing to determine that the FROI-1 constitutes the R.C. 4123.52 "application" for TTD compensation. Even if the commission is incorrect in

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holding that the "application" was filed on January 28, 2003 rather than on June 10, 1999, there is, as explained above, no medical evidence of TTD upon which the commission can rely to award TTD compensation during the period prior to January 28, 2001. Thus, the jurisdictional issue under R.C. 4123.52 is rendered moot by relator's failure to submit medical evidence upon which the commission could rely for the period at issue under R.C. 4123.52.

{¶40} Accordingly, for all the above reasons, it is the magistrate's decision that this court deny relator's request for a writ of mandamus.

/s/ Kenneth W. Macke

KENNETH W. MACKE
MAGISTRATE