

ORIGINAL

IN THE SUPREME COURT OF OHIO

State of Ohio ex rel.
Marlon R. Ferguson,

Appellant,

v.

Industrial Commission of Ohio

&

National Machinery &
Farmland Foods, Inc.

Appellees

*
* ON APPEAL FROM THE
* FRANKLIN COUNTY
* COURT OF APPEALS,
* TENTH APPELLATE
* DISTRICT

* Supreme Court
* Case No. 2009-2359
*

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REPLY BRIEF OF APPELLANT, MARLON R. FERGUSON

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RECEIVED
AUG 20 2010
CLERK OF COURT
SUPREME COURT OF OHIO

FILED
AUG 20 2010
CLERK OF COURT
SUPREME COURT OF OHIO

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LAW AND ARGUMENT IN REPLY TO APPELLEE'S MERIT BRIEF

In its Merit Brief, the Industrial Commission (hereinafter "commission") contends that it properly relied on the reports of Drs. Richetta and Query, that said reports are not inconsistent with one another, and that its reliance on both the report of Dr. Richetta and the vocational report of Ms. O'Connor was proper. The discussion below will demonstrate that the commission's contentions are without merit.

I. PROPOSITION OF LAW #1: An Industrial Commission order which explicitly relies on two reports whose findings and opinions regarding the impairment caused by the allowed conditions contradict one another fails to make clear what the Commission's findings were and fails to provide a sufficient explanation of the rationale for its decision.

A. A commission order must provide an explanation as to the evidence relied upon in coming to its conclusion and why a claimant is or is not entitled to benefits.

The commission argues that the Staff Hearing Officer ("SHO") "relied upon Dr. Query's report for Ferguson's functional capacity percentage and upon Dr. Richetta's report for his psychosocial employment restrictions." (Merit Brief of Appellee, p.6). This explanation of the use of each report is nowhere to be found within the four corners of the SHO order. In fact, the SHO order, after merely reciting the findings of each doctor, concludes that "based upon the reports of Doctors Richetta, Query and Alfonso...the Staff Hearing Officer finds...the injured worker is capable of returning to work consistent with the restrictions." (Merit Brief of Appellant, Appendix, p. 39). The phrase "consistent with the restrictions" demonstrates the inherent ambiguity in the SHO's rationale in denying Appellant's application for PTD.

Dr. Query opined that Appellant would have no work restrictions based on his allowed psychological condition. Dr. Richetta, however, found Appellant to have

restrictions in several vocationally significant areas of cognitive and social functioning, including concentration, persistence, pace, adaptation to stress in a work-like setting and ability to handle personal interactions in the work environment. (Supp., p. 142-144). Dr. Richetta concluded that Appellant would be limited to working in a setting with few social demands where he would not have to engage in rapid decision making or be required to process information quickly. (Id.). Because the reports are so incongruent as to Appellant's cognitive and social functioning, acceptance of one necessarily precludes acceptance of the other. The SHO order, however, not only failed to choose between the two clearly conflicting opinions, but failed to offer any explanation at all as to how the obvious conflict might be reconciled. It cannot be determined from the face of the SHO order whether the hearing officer concluded that Appellant does or does not have work restrictions attributable to his allowed psychological condition.

The commission further contends that both Drs. Querry and Richetta agreed that Appellant had the ability to perform sedentary work. (Merit Brief of Appellee, p.6-7). A psychological evaluation does not determine whether the injured worker has the *physical* capacity for work because "residual functional capacity for sedentary work" is established based on physical conditions. In fact, a review of both reports finds no reference to sedentary work in either one. (Supplement to Merit Brief of Appellant, p.118-129, 137-144). Both reports merely evaluate Appellant's residual functional capacity with regard to the allowed psychological condition. With respect to a psychological condition, the issue is whether the condition results in additional limitations, not related to the degree of physical exertion an injured worker can perform, which would further restrict the injured worker's ability to perform sustained

remunerative employment. Here, Query found no such restrictions. Richetta, on the other hand, found restrictions in numerous aspects of cognitive and social functioning which, taken together, present significant *non-exertional* limitations which further reduce Appellant's work-capacity.

The commission also argues that Appellant asserts it abused its discretion in relying on the two doctors' reports "because the two reports are contradictory with respect to Ferguson's whole-person impairment percentage and restrictions. Ferguson's focus on whole person impairment percentages misses the point." (Merit Brief of Appellee, p.6). While Appellant has pointed out the significant disparity in percentage ratings, the thrust of Appellant's argument is not that the two psychologists gave different numerical impairment ratings. The fact that Dr. Query rated Appellant's impairment at 3%, while Dr. Richetta placed it at 30%, is simply one additional indication that these two reports present such different impressions as to the nature and extent of Appellant's psychological impairment that concurrent reliance on both is not possible. The meat of this issue, and the point actually emphasized, is that Drs. Query and Richetta reach irreconcilably different conclusions regarding the effect of the psychological conditions on Appellant's capacity to function in a work-place setting. As Judge Tyack observed, "Drs. Richetta and Query seem to be describing two different people." (Merit Brief of Appellant, Appendix, p. 10). It is this difference that the commission fails to address or reconcile in either the SHO order or its Merit Brief.

B. Appellant's reliance on *Frigidaire, Lopez and Zollner* is proper where the commission relied on conflicting reports with no further explanation.

The commission further argues that Appellant's reliance on *State ex rel. Frigidaire Div., General Motors Corp. v. Industrial Commission, State ex rel. Lopez v.*

Industrial Commission, and *State ex rel. Zollner v. Industrial Commission* is misplaced. (Merit Brief of Appellee, p. 6). This argument is without merit, as the discussion below will show.

While *Frigidaire* stands for the proposition that a report must not take into consideration nonallowed conditions, it also supports the contention that the commission must provide an explanation of how it arrived at its decision when granting or denying benefits. *State ex rel. Frigidaire Div., General Motors Corp. v. Indus. Comm.*, 35 Ohio St. 3d 105 (1988). This proposition is further supported by *State ex rel. Zollner v. Industrial Commission* when the court of appeals held that it would “not sanction the commission’s mere citation of doctor’s reports as justification for its decisions if those reports are in conflict.” *State ex rel. Zollner v. Industrial Com. of Ohio*, 1989 Ohio App. LEXIS 3985, at 8 (Ohio Ct. App., Franklin County Oct. 19, 1989). This concern is precisely the issue in the present case as the SHO order merely restates the findings of the doctors’ reports without any explanation as to how the obvious conflicts between them can be reconciled. Further, though *Lopez* involved a single report, the rationale for the court’s decision in that case can be applied to the commission’s purported acceptance of two reports which reach contradictory conclusions. *State ex rel. Lopez v. Indus. Comm.*, 69 Ohio St. 3d 445 (1994). Simply, the commission cannot simultaneously hold that “A” and “Not A” are both true without even an attempt at reconciliation of the discrepancies. Therefore, Appellant’s reliance upon *Lopez*, as well as *Frigidaire* and *Zollner*, is, in fact, justified.

This Court has long required the commission to clearly identify the evidence relied upon and the rationale underlying its decisions. *See State ex rel. Mitchell v.*

Robbins & Myers, Inc., 6 Ohio St. 3d 481, 484 (1983); and *State ex rel. Noll v. Indus. Comm.*, 57 Ohio St. 3d 203 (1991). The sum and substance of the cases dealing with reliance on multiple reports, as well as those addressing reliance upon a single internally inconsistent report, is that the commission's endorsement of inconsistent factual propositions necessarily renders the commission's factual conclusions – and therefore the rationale for its decision – unclear. An order which leaves the reader unable to ascertain what the commission believes the facts to be is, necessarily, a legally deficient order pursuant to *Mitchell and Noll*.

II. PROPOSITION OF LAW #2: A vocational expert's opinion regarding transferrable skills which is based solely on work activities which the injured worker performed prior to his injury, and which conflicts with medical or psychological evidence relied on by the commission which shows that the injured worker has significant impairments directly affecting his ability to perform the skills involved in his pre-injury employment, is not 'some evidence' to support denial of PTD.

The O'Connor vocational report contains a transferrable skills analysis (TSA). On its face, O'Connor's report states plainly that the the transferrable skills analysis was "based on [Appellant's] education, work history, and capabilities" and that "the TSA was performed using sedentary strength based on Mr. Ferguson's *past work*." (Supp., p. 157). (Emphasis added). O'Connor's report contains brief summaries of reports from eight different psychologists spanning a period between August 2005 and February 2008 and containing a variety of opinions regarding the nature and extent of Appellant's psychological condition on his ability to work or be retained. (Supp., pp. 155-56).

While O'Connor clearly states that she looked for transferrable skills relevant to sedentary work, there is nothing in her report that explains what, if any, psychological restrictions on work activity were taken into consideration. Indeed, in expressing her

ultimate opinion regarding Appellant's employability, Ms. O'Connor does not mention *any* of the psychological reports or give any indication that she took any psychological restrictions into account. Ms. O'Connor concluded her report by stating, "it is this specialist's opinion, based on the claimant's education, *physical* abilities, skills, age and prior work experience, that the claimant is capable of sustained remunerative employment." (Supp., p. 160). Conspicuously absent from this statement is any indication that O'Connor's opinion was based on – or even considered – the psychological and cognitive restrictions set forth in the report of Dr. Richetta. Despite the complete failure of O'Connor's report to reflect her acknowledgement of any psychological restrictions, the commission, in its merit brief, says that "Ms. O'Connor took into account the most severe psychological restrictions found in the professional reports, those of Dr. Richetta...." (Merit Brief of Appellee, p. 8). As noted above, even a cursory reading of the vocational report fails to substantiate this claim.

Ms. O'Connor's report found Appellant possesses "transferrable skills" and the "ability to learn new skills" based on his previous work history, i.e., what he could do *before* he was cognitively and emotionally impaired. She did not have the benefit of an interview with Appellant, nor does her report indicate that her conclusions were based on any testing of Appellant or consideration of the psychological reports. Instead, her conclusions regarding transferrable skills were based on a review of Appellant's work history. Ms. O'Connor determined that Ferguson's pre-injury employment history demonstrated that he had acquired certain skills through his work which could be transferred to other types of work within his residual functional capacity for sedentary employment. This methodology may yield accurate and reliable results in cases

involving *only* physical impairments which limit the level of physical exertion in which a claimant may engage. Where, however, there is evidence specifically relied on by the commission which indicates that the injured worker suffers from cognitive and emotional deficits which directly affect the present capacity to perform the skilled tasks involved in his pre-injury employment, one cannot derive an accurate conclusion regarding *current* transferrable skills solely on the basis of identifying skills demonstrated by employment activities performed at a time when no such deficits were present.

Ms. O'Connor's vocational report, which the commission expressly relied upon, opines that Appellant has transferrable skills including the ability to perform repetitive work; deal with people; attain precise limits and tolerances; follow specific instructions; perform under stress; and make judgments and decisions. (Supp., p. 158). As noted above, Dr. Richetta's opinion indicated that Appellant is limited to work with few social demands; that his ability to process information is impaired such that he would be unable to make judgments and decisions quickly; that his ability to maintain concentration and remain on task is impaired; and that his capacity to adapt to stress in a work situation is limited. Simply put, many of the "transferrable skills" identified by Ms. O'Connor involve precisely those aspects of cognitive and emotional functioning which Dr. Richetta found to be significantly impaired as a result of the psychological conditions allowed in this claim. The commission asserts that it accepted Dr. Richetta's opinion regarding Appellant's psychological restrictions. It should not, therefore, be logically or legally permissible for the commission to conclude that Appellant currently possesses the same skills demonstrated in his pre-injury employment.

Acceptance of Dr. Richetta's opinion regarding Appellant's psychological restrictions would appear to preclude acceptance of Ms. O'Connor's conclusions regarding transferrable skills. This Court should hold that a vocational report which bases its conclusions regarding transferrable skills on claimant's pre-injury work history and fails to take into account psychological restrictions which suggest that claimant's pre-injury skills have been significantly impaired by claim-related psychological and cognitive difficulties is not "some evidence" to support the denial of PTD.

At the very least, the disparate opinions of Ms. O'Connor and Dr. Richetta regarding Appellant's cognitive abilities and skills require *some sort* of explanation as to the reliance on both by the commission. Instead, the commission's order is silent as to any such explanation and thus does not provide Appellant with the requisite explanation as to why his application for PTD was denied.

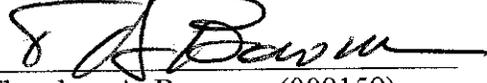
CONCLUSION

For the above reasons and those cited in his Merit Brief, Appellant respectfully submits that he has sustained his burden of proof demonstrating an abuse of discretion for which a writ of mandamus will lie. The commission failed to provide Appellant with the requisite explanation for its denial of benefits when it relied on two contradictory reports; a vocational report that found Appellant to be in possession of skills incompatible with the restrictions found in an accepted psychological report; and an internally ambiguous and flawed psychological report.

Appellant submits that this Court should issue a writ of mandamus compelling the Commission to vacate the June 9, 2008, order and to issue in its place an order granting Appellant's application for PTD compensation. In the alternative, and at a

minimum, this Court should issue a limited writ directing the Commission to vacate the June 9, 2008, order and to conduct further proceedings to determine Appellant's entitlement to Permanent Total Disability Compensation.

Respectfully submitted,



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CERTIFICATION

This is to certify that the foregoing was served upon Attorney for Respondent, Industrial Commission of Ohio, John R. Smart, Assistant Attorney General, 150 East Gay Street, 22nd Floor, Columbus, Ohio 43215-3130; and upon Respondent Employer, Farmland Foods, Inc., 27 South Perry Street, New Riegel, Ohio 44853-9778 by regular U.S. Mail this 17th day of August, 2010.



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