

IN THE SUPREME COURT OF OHIO

STATE OF OHIO ex rel. GARRY McBEE,)	Case No. 2010-2288
)	
Relator-Appellee,)	Appeal from the Franklin County Court of Appeals, Tenth Appellate District
)	
-vs-)	
)	Court of Appeals
INDUSTRIAL COMMISSION OF OHIO, et al.,)	Case No. 09 AP 239
)	
Respondent-Appellant.)	

MERIT BRIEF OF RELATOR-APPELLEE, GARRY K. McBEE

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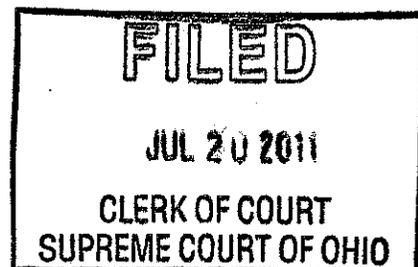


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STATEMENT OF THE CASE

This is an appeal by Respondent-Appellant, Industrial Commission of Ohio (hereafter referred to as "Respondent") from a Decision of the Tenth District Court of Appeals granting a Petition for a Writ of Mandamus filed by Relator-Appellee, Garry K. McBee. Appellee's employer, Blue Ribbon Rentals, was also a Respondent in the Court below, but is not an Appellant in this appeal.

On October 27, 2004 Relator filed an application for workers compensation benefits.

On November 26, 2004 Relator's claim was allowed for a sprained shoulder, and Temporary Total Disability (TTD) was granted from October 30, 2004.

On March 30, 2007 Respondent, Industrial Commission of Ohio filed a C-86 motion requesting that Temporary Total Compensation payments be terminated, an overpayment be deducted, and a finding of fraud be made.

On July 16, 2007 the C-86 Motion came on for hearing before District Hearing Officer Lynne Nolte. On July 17, the C-86 Motion was granted in part, but the request for a finding of fraud was denied.

Respondents, Industrial Commission of Ohio and Blue Ribbon Rentals, appealed and Relator cross appealed.

On January 16, 2008, the C-86 Motion came for a new hearing before Staff Hearing Officer Mara Lanzinger Spidel, who took the matter under advisement.

On February 5, 2008 the C-86 motion was granted in its entirety and a finding of fraud was made.

On February 14, 2008 Relator filed an appeal.

On March 1, 2008 Relator's appeal was denied.

On March 17, 2008 Relator filed a Motion for Reconsideration.

On April 4, 2008 Relator's Motion for Reconsideration was denied.

On March 9, 2009, having exhausted his administrative remedies and having no adequate remedy in the ordinary course of law, Relator filed a Petition for a Writ of Mandamus before the Tenth District Court of Appeals. The Court below referred the matter to Magistrate Kenneth W. Macke.

On April 23, 2010, the Magistrate issued a Decision that a Writ of Mandamus be issued.

On May 14, 2010, Respondent, Industrial Commission of Ohio, filed Objections to the Magistrate's Decision.

On November 16, 2010, the Court of Appeals, in a 2-1 Decision by Judge Brown with Judge Bryant concurring and Judge McGrath concurring in part and dissenting in part, adopted the Magistrate's Decision and granted a Writ of Mandamus.

On December 30, 2010, Respondent, Industrial Commission filed its Notice of Appeal to the Ohio Supreme Court.

STATEMENT OF THE FACTS

This is an appeal by Respondent-Appellant, Industrial Commission of Ohio (hereafter referred to as "Respondent") from a decision of the Tenth District Court of Appeals issuing a Writ of Mandamus ordering Respondent to amend a Staff Hearing Officers order by deleting a finding that the compensation paid to Relator-Appellee, Garry K. McBee (hereafter referred to as "Relator") was fraudulently obtained and entering a finding that the evidence of record fails to show that said compensation was fraudulently obtained.

Since the judicial proceedings in this case began as an original action in

mandamus before the Tenth District Court of Appeals, the Record of Proceedings before the Industrial Commission was compiled and presented to the Court below by stipulation.

The Record of Stipulated Evidence in this case is extensive, consisting of seven (7) binders of documents denominated Volume I, Volume II, Volume III, Volume IV, Volume V, Volume VI, and Volume VII, respectively. Each volume has a table of contents and Volume I also has a complete table of contents for all volumes. The Record of Stipulated Evidence will be cited as "R." followed by a roman numeral designating the particular volume referred to (e.g., "R.I" refers to Volume I of the Record of Stipulated Evidence).

The essential facts of this case are, for the most part, not in dispute. Relator was injured on October 27, 2004, while in the course of his employment with Blue Ribbon Rentals, Inc. (R.I.). The claim was ultimately allowed for sprain, right shoulder. (R.I.). TTC was subsequently requested and awarded, beginning October 28, 2004. (R.I; R.II).

The matters presented for adjudication in the mandamus action arose in September, 2005, when the Bureau of Workers Compensation, Special Investigations Unit (SIU) filed a C-86 motion alleging that Relator, Garry K. McBee, had committed fraud by reporting that he had not returned to work in the C-84 forms filed May 21, 2005 and May 21, 2006 because he had attended some used car auctions on behalf of his wife's used car business, McBee Sales, and participated in some of those auctions (R.II). It was alleged that Relator had attended 46 auctions and that 46 vehicles had been sold for an aggregate amount of \$226,978.00 and 43 vehicles had been purchased at an aggregate price of \$240,000.00. Subsequently the motion was supplemented with an allegation that Relator had attended the auctions in place of his

wife, Sandra, because she held a job that prevented her from being present at any of the auctions (R.III). The motion was also supported by copies of bank records from the McBee Sales business checking account and the joint checking account which Relator maintained with his wife, Sandra (R.III, R.IV, and R.V).

Relator's wife, Sandra, has experience working in the used car business since 1968. Sandra owned and operated a used car business known as McBee Sales from November, 2003 until it ceased operating in March, 2006 and formally closed in December, 2006. Relator had no ownership interest in his wife's business, but he did work in the McBee Sales business until he became employed by Blue Ribbon Rentals in August of 2004. Relator never worked for McBee Sales after he started working for Blue Ribbon Rentals (R.VI, Affidavit of Garry K. McBee attached to Motion for Reconsideration summarizing testimony given before the Hearing Officers).

During the time Relator was receiving TTD, he was on medication that made him dizzy and he remained at home for long periods of time, unable to do much of anything. Relator explained that he had attended 36 used car auction because he was bored and wanted something to do (R.VI, Affidavit of Garry K. McBee). The first auction Relator attended was on November 16, 2004. An itemized list of the auctions Relator had attended was submitted (R.VI, EXHIBIT B). On all but six (6) of these occasions, Relator rode along with Louis Magyar, an employee of McBee Sales who was hired to drive the vehicles to and from the auctions (R.VI, EXHIBIT D). The side effects of Relator's medication made him dizzy rendering him unable to drive. However, when he would have to drive to see his physician for office visits, and on the six (6) occasions he drove vehicles to the auctions himself, he stopped taking his medication for the day so he would be able to drive safely. Relator was paid no compensation for going to the

auctions, and, except in the six (6) occasions he drove vehicles himself to assist his wife, McBee Sales business saved no money as a result of his going to the auctions (R.VI, Affidavit of Garry K. McBee).

An itemized list of auctions that Sandra McBee attended herself was also presented (R.VI, EXHIBIT A), reflecting that during evenings and her days off she personally had attended 34 auctions at which Relator was not present. An itemized list of all vehicles bought and sold was submitted (R.VI, EXHIBIT C), along with the printed policies of the various auctions establishing that it was not necessary for a representative of McBee Sales to be personally present in order to buy or sell vehicles at the auctions (R.VI, EXHIBITS E and F).

The bank statements and checking account records submitted in support of the C-86 motion were supplemented with copies of all other bank statements, deposit items and source information for the deposits into both the McBee Sales checking account and the joint personal checking account of Relator and his wife. Many of the deposits were credit card advances, since the business was operating at a loss (R.VI, EXHIBITS G through IIII and KKKK).

Tax returns were submitted indicating that for the year 2004, Relator's wife's business, McBee Sales, operated at a net loss of \$62,334.00 and operated at a net loss of \$72,692.00 for the tax year 2007 (R.VII). Relator and his wife ultimately declared bankruptcy (R.VI EXHIBIT JJJJ). Relator received no compensation for his attendance at any of the auctions. At the first hearing on the C-86 motion before District Hearing Officer, Lynn Nolte, the following determination was made:

It is the order of the District Hearing Officer that the C-86 Motion filed by BWC on 3/30/07 is GRANTED to the extent of this order.

The injured worker is found to have been engaged in work activities while receiving temporary total disability from 10/30/04 through 3/9/06. Therefore, this period of temporary total is found to be overpaid. Specifically, injured worker attended auto auctions to assist his wife's business. He actively participated in these auctions by providing the amounts of minimum bids to the auctioneer. The BWC provided records in the Special Investigations Unit (SIU) file from 10-30-04 through 3-9-06. There were no records provided from 3/10/06 through 8/27/06. Therefore, this period remains properly paid.

The request for a finding of fraud is DENIED. The Bureau failed to establish intent to deceive on the part of the injured worker. The injured worker testified credibly that he went along to the auctions for something to do. He did not consider this work. The overpayment is therefore to be collected in the same manner as an overpayment, pursuant to O.R.C. 4123.511 (J).

A copy of the Record of Proceedings containing District Hearing Officer Nolte's decision is appended hereto since it is not included in the Supplement to Merit Brief of Appellant.

Respondents appealed from the denial of the finding of fraud. Relator appealed from the finding that Relator had been overpaid. A second hearing was held before Staff Hearing Officer Mara Lanzinger Spidel, and the following determination was made:

The order of the District Hearing Officer, from the hearing dated July 16, 2007, is VACATED.

Therefore, the C-86 motion filed by the Bureau of Workers' Compensation on March 30, 2007, is GRANTED to the extent of this order.

The injured worker is found to have been engaged in work activities while receiving temporary total disability compensation from October 30, 2004 to March 9, 2006. Therefore, this period of temporary total is found to be overpaid.

Further, the Hearing Officer finds injured worker committed fraud and orders temporary total benefits TERMINATED as

of October 30, 2004.

* * *

Therefore, because Hearing Officer finds the injured worker performed income generating activity, for McBee Auto Sales, for the period October 30, 2004 through March 9, 2006, and orders temporary total compensation TERMINATED as of October 30, 2004, and makes a finding of fraud.

No finding is made for the period from 3/10/06 through 8/26/06. No records were provided for that period.

The Record of Proceedings before SHO Spidel is included in the Supplement to Merit Brief of Appellant at 37-40.

In said Record of Proceedings, SHO Spidel found that Relator had a Dealer Application signed March 29, 2004 and an Agent Authorization Form signed December 8, 2004, which entitled him to represent McBee Sales at auctions. However, an examination of the record reveals that these documents were prepared, signed and submitted by Relator's wife, Sandra McBee, not by Relator (R.II., Attachment 3, Page 3).

It is true that Relator was identified as General Manager and/or an additional authorized employee who will buy/sell at auctions and was designated as an authorized agent in applications submitted by his wife. However, none of those documents were signed by Relator. All of them were signed by Relator's wife, Sandra (R.II, Attachment 3, Pages 3 and 4). Further, each of these documents were prepared in March of 2004. Relator began to work for Blue Ribbon Rentals in August, 2004, was not injured at work until October 27, 2004, was not granted TTD Benefits until October 30, 2004, and was not actually paid any benefits until January 13, 2005, all of which dates are later in time than the dates upon which any of the aforementioned forms had been completed and signed by Relator's wife.

Regarding the second agent authorization form dated December 8, 2004, that document was also signed by Relator's wife, Sandra McBee, and not by Relator (R.II, Attachment 3, page 59). Although it was signed by Relator's wife on December 8, 2004, after Relator had applied for Workers' Compensation Benefits, the record clearly establishes that Relator did not actually start to receive benefits until January 13, 2005, when the first payment was made to him (R.II, Attachment 2, page 43, WARRANT DATA FORM FOR INDEMNITY PAYMENTS BY CLAIM, Claim Number 04-419232).

In summary, none of the Applications or other forms signed by Relator's wife on behalf of McBee Sales were completed after Relator began to receive TTD Benefits, none of these forms were prepared or signed by Relator, and all but one of them were prepared before Relator began to work for Blue Ribbon Rentals and before his injury.

In the Record of Proceedings before DHO Spidel (Supplement to Merit Brief of Appellant at 36), DHO Spidel placed considerable weight on the Applications and Forms signed by Relator's wife, and appears to also have been under the mistaken impression that these documents had been signed by Relator. DHO Spidel also appears to have overlooked the fact that these forms were all submitted before Relator was paid any TTD Benefits, and all but one of them were prepared long before Relator sustained the work related injury that resulted in his application for TTD Benefits.

In the Record of Proceedings, DHO Spidel also goes on at considerable length describing Relator's presence at some auctions as work activity. However, the Record of Proceedings omits to describe the nature of this activity. Included as part of the evidence is a summary of automobile auction process (R.VI, EXHIBIT E, page 3), which describes the auction process in the following terms:

Auctions bring qualified buyers and motivated sellers

together in an open, live, competitive environment.
Professional auctioneers lead the bidding process. On average a vehicle is sold about every 30 seconds in each lane.

[emphasis supplied]

It appears that Relator did little more than stand around as the vehicles were being sold at auction.

McBee Sales saved no money by reason of Relator's presence at the auctions. In all but a very few instances, McBee Sales paid a driver to deliver the vehicles and Relator was present because he rode along with the driver for something to do (R.VI, EXHIBIT B; R.VI, Affidavit of Garry K. McBee). A field representative at the Auction could have represented the vehicles during the 30 seconds or so the vehicles were on the auction block, and there is no extra charge for this service made by the auction (R.VI, EXHIBIT V, page 3). There was absolutely no evidence to support the DHO's conclusion that "there would have been a charge to use someone for the auction house", (Supplement to Merit Brief of Appellant at 39).

Of course, since the personal checking account maintained by Relator and his wife was a joint account, the money generated by McBee Sales (meager as it may have been) was deposited into that account. The business checking account of McBee Sales was a separate account maintained by Relator's wife (R.IV; R.V; R.VI).

The C-86 Motion itself made the following allegations regarding the existence of the scienter elements of the alleged fraud claim (RI at page 2, C-86 Motion, paragraphs 3 and 4, Supplement to Merit Brief of Appellant at 32-33):

* * *

3) Made falsely with the knowledge of its falsity, or with such utter disregard or recklessness as to whether it is true or false that knowledge may be inferred:

MCBEE's submission of false documentation, his omissions, and his statements clearly demonstrates purposeful conduct on the claimant's part.

4) With the intent of misleading another into relying upon it:

MCBEE signed C-84 forms between May 21, 2005 and May 21, 2006, wherein he indicated that he had not returned to work in any capacity despite the fraud warning that you are not permitted to work and receive TT disability benefits. In addition, a TT entitlement letter was mailed to MCBEE on May 10, 2005, wherein MCBEE was notified that he was not entitled to TT benefits if he returned to any type of work. MCBEE was present at both the District and Staff Hearings on January 6, 2005 and April 25, 2005, wherein TT was granted from October 28, 2004 to January 17, 2005, and to continue, and apparently did not advise the hearing officers of his work activity with McBee Sales. MCBEE was also present at the Staff Hearing on May 16, 2006, and advised the hearing officer that he was in the car business for nine years until March 2003, when the company went out of business. MCBEE apparently did not mention his work activity with McBee Sales. During an IME on April 28, 2006, MCBEE stated he has not returned to work since the date of injury. MCBEE also stated that he is unable to drive to work because of the potential for drowsiness related to his medications despite his current work activities with McBee Sales. MCBEE was interviewed on September 18, 2006, and denied any work activity since his date of injury and denied having a dealer's license despite evidence to the contrary. MCBEE also signed BWC warrants which also contained the fraud warning that one is not entitled to TT benefits if working in any capacity.

* * *

[emphasis in original]

While the C-86 Motion was supported by elaborate and extensive documentation, there is absolutely nothing in the record that Relator engaged in any conduct that might be construed as an effort to hide, disguise, or conceal what he was doing. Actually, there was no evidence in the record that the Relator actually knew or understood that what he was doing constituted "work" (*i.e.*, sustained remunerative activity), nor was there any evidence that Defendant's denials that he had returned to

work were made with intent to deceive. These matters were addressed by the Court below in the Magistrate's Decision (Appendix to Brief of Appellant, 32-33):

Two of the elements of fraud seem pertinent here. First, the false representation or concealment of fact must be made with knowledge of the falsity or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred. Secondly, there must be an intent of misleading another into reliance.

That is, the claimant must have the knowledge that his activities constitute work that precludes TTD compensation, and he must have the intent to mislead the bureau into paying for compensation to which he is legally not entitled. Knowledge and intent are key components of fraud.

Where a claimant receives wages or other direct compensation for activities performed, it is easy to infer that the claimant has knowledge that his activities constitute work. If the claimant conceals his receipt of wages, it is again easy to infer the requisite intent. But the inference to knowledge and intent is not so easy when the claimant receives no wages or direct compensation for activities performed. Where it is determined on a case-by-case basis that the claimant has engaged in activities that generate income to a business he does not own, and on that basis, work is the conclusion, the inference to knowledge and intent is not so easy.

At issue here, is the inference that the May 10, 2005 bureau warning letter or the query on the C-84s clearly conveyed to relator the knowledge that, even in the absence of wages or direct compensation, activities that generate income to his wife's business can be held to be work that bars TTD compensation. In the magistrate's view, the inference is not supported by the record.

Given the above analysis, there is no evidence in the record upon which the commission relied to support the requisite elements of knowledge and intent with respect to finding of fraud.

Thus, the magistrate finds that the commission abused its discretion in finding that the compensation was fraudulently obtained.

Accordingly, it is the magistrate's decision that this court issue a writ of mandamus ordering the commission to amend its SHO's order of January 16, 2008, by deleting the finding that compensation was fraudulently obtained, and by entering a finding that the evidence fails to show that the compensation was fraudulently obtained.

The Magistrate's Decision was adopted by the Court below (Decision of the Tenth District Court of Appeals, Appendix to Brief of Appellant at 5, *et seq.*).

Respondent, Industrial Commission, now appeals from the Decision of the Court below, arguing that the Relator's verbal denials that he had not returned to work established intent to deceive, pointing to the following portion of the Record of Proceedings from SHO Spidel as "testimony" constituting "some evidence" from which an inference of fraudulent intent could have been made (Supplement to Brief of Appellant at 38):

. . . He [Relator] was also present at the District and Staff Hearings on January 6, 2005 and April 25, 2005 when temporary total was granted from October 28, 2004 to January 17, 2005 and to continue and did not indicate that he was involved in work activity with McBee Sales.

At the Staff Hearing on May 16, 2006, injured worker advised the Hearing Officer that he was in the car business for nine years until March of 2003 when the company went out of business. He did not mention his work activity with McBee Sales.

In the Record of Proceedings, the SHO does not explain why Relator's failure to speak up at the January 6 and April 25 proceedings and the Relator's verbal denials at the May 16 proceedings were any different from the various denials that had been made by Relator in writing. That such denials were made is not disputed. They are consistent with Relator's failure to appreciate or consider that his open and obvious attendance at auctions actually constituted sustained remunerative activity or "work".

However, nowhere in the Record of Proceedings does the SHO state that Relator's "testimony" was being relied upon support of a finding that Relator had made the denials that he was engaged in work with knowledge that such denials were false, or that he knew that his sporadic attendance at auctions actually constituted work.

In fact, the SHO apparently did not rely upon the verbal testimony of Relator in making her finding of fraud. With respect to the fraud finding, the SHO stated as follows (Supplement to Appellant's Merit Brief at 40):

This finding is based upon the SIU Report in the file, as well as the addendum, dated August 22, 2007, the Memoranda of interviews with injured worker and Robert Burton, former General Manager at Montpelier Auto Auctions.

All evidence was reviewed and considered.

No mention is made of any purported reliance upon Relator's testimony at prior proceedings as constituting a purported basis for the findings of knowledge of falsity and intent to deceive which are essential elements necessary to support a finding of fraud.

Such further facts as may be pertinent to the issues presented for review are set forth under the Proposition of Law, *infra*.

PROPOSITION OF LAW

Oral testimony at a hearing, whether transcribed or not, may serve as "some evidence" to support a decision of the Industrial Commission if such testimony is described, considered and tends to prove the matter which it is being relied upon to prove

As a general principal, fraud is never presumed, but must be proven by the party asserting it. *Buckeye State Bldg. & Loan Co. vs. Schmidt*, 131 Ohio St.3d 132 at 139 (1936). The mere existence of a misrepresentation does not constitute fraud. Fraud is not established unless the person makes the misrepresentation knowing of its falsity

and with the intent of misleading another to rely on it. Gaines vs. Preterm-Cleveland, Inc., 33 Ohio St.3d 54 at 56 (1987). The Court below issued a Writ of Mandamus because Respondent had found the existence of fraud based solely upon the fact that misrepresentations were made without any evidence that those misrepresentations were made with knowledge of their falsity and with intent to deceive. The mere existence of a misrepresentation does not, by itself, constitute fraud.

Respondent argues that oral testimony at a hearing whether transcribed or not, may constitute "some evidence" to support a finding of fraud. As an abstract proposition, this contention appears to be correct. However, there was no such testimony considered or relied upon in the instant case.

In general, Staff Hearing Officers must specifically state which evidence has been relied upon to reach their conclusion or findings. State ex rel. Mitchell vs. Robbins & Myers, Inc., 6 Ohio St.3d 481 at 483-484 (1983); State ex rel. Noll vs. Industrial Commission, 57 Ohio St.3d 203 (1991). SHO Spidel did so in the instant case, stating as follows (Supplement to Appellant's Merit Brief at 40):

This finding is based on the SIU Report in the file, as well as the addendum, dated August 22, 2007, the Memorandum of interviews with injured worker Robert Burton, former General Manager at Montpelier Auto Auctions.

All evidence was reviewed and considered.

Nowhere does the SHO state that she was relying upon any testimony from Relator on his wife to support her findings that Relator made misrepresentation with knowledge of their falsity and intent to deceive.

Respondent argues that the SHO did rely on the testimony and conduct of Relator, citing the following excerpt from the SHO's decision (Supplement to Brief of

Appellant at 38):

. . . He [Relator] was also present at the District and Staff Hearings on January 6, 2005 and April 25, 2005, when temporary total was granted from October 28, 2004 to January 17, 2005 and did not indicate that he was involved in work activity with McBee Sales.

At the Staff Hearing on May 16, 2006, injured worker advised the Hearing Officer that he was in the car business for nine years until March of 2003 when the company went out of business. He did not mention his work activity with McBee Sales.

The foregoing does not constitute an evaluation by the SHO of Relator's testimony and conduct from which a credibility determination was made. Rather, these excerpts from the SHO's Decision constitute a substantially verbatim repetition of what was set forth in the C-86 Motion, Paragraph 4, Supplement to Merit Brief of Appellant at 33:

. . . McBee was present at both the District and Staff Hearings on January 6, 2005 and April 25, 2005, wherein TT was granted from October 28, 2004 to January 17, 2005, and to continue, and apparently did not advise the hearing officers of his work activity with McBee Sales. McBee was also present at the Staff Hearing on May 16, 2006, and advised the hearing officer that he was in the car business for nine years until March 2003, when the company went out of business. McBee apparently did not mention his work activity with McBee Sales. . .

[emphasis in original]

The SHO did not consider and evaluate the credibility of Relator's testimony and omissions to speak up at the January 6, 2005, April 25, 2005, and May 16, 2006 proceedings. Rather, the SHO considered and accepted the summary of those proceedings set forth in the C-86 Motion. This is consistent with the SHO's statement that her fraud finding was "based upon the SIU Report in the file". The SHO did not make any credibility findings based upon her personal evaluation of Relator's testimony, nor did the SHO state that she had made any such credibility determination or that she

had relied upon same as evidence to support her decision.

Indeed, the testimony and omissions on the part of Relator as described in the C-86 Motion are consistent with all of the written representations made by Relator that he was not working. There is nothing in Relator's testimony that was substantively or qualitatively different from his written representations to that effect.

The omission of SHO Spidel to identify Relator's testimony as evidence from which credibility determinations were made are in stark contrast with the finding that had previously been made by DHO Nolte (Appendix to Merit Brief of Appellee at 2):

The Bureau failed to establish intent to deceive on the part of the injured worker. The injured worker testified credibly that he went along to the auctions for something to do. He did not consider this as work.

When DHO Nolte based her decision on testimony from Relator and made credibility determinations from her own observations, she identified the testimony, briefly described it, and specifically set forth her finding regarding the credibility of the testimony that she was relying upon. SHO Spidel did not identify any testimony from Relator or his wife that she observed nor did she specifically set forth any findings regarding credibility. The SHO merely copied the description of Relator's testimony from the C-86 Motion.

In the C-86 Motion, the mere fact that Relator had denied working and his omission to affirmatively state that he had been working were treated as proof that Relator had acted with knowledge of falsity and intent to deceive. SHO Spidel also premised her findings of knowledge of falsity and fraudulent intent based solely on the fact that misrepresentations were made by Relator about his having engaged in work. The Court below properly found that the mere existence of such misrepresentations

and omissions to disclose are not sufficient in and of themselves to establish the scienter elements of fraud. The description of what had occurred at January 6, 2005, April 25, 2005, and May 16, 2006 proceedings which are set forth in Paragraph 4 of the C-86 motion and repeated almost verbatim in SHO Spidel's decision are nothing more than further instances of the same sort of misrepresentations and omissions that Relator had made in writing. Even if the descriptions in the C-86 Motion are characterized as "testimony", such "testimony" only constitutes additional evidence of the fact that Relator claimed not to have been working when he attended auctions as a representative of McBee Sales. It does not constitute evidence that Relator knew that his activities constituted work.

That SHO Spidel was the hearing officer at the May 16, 2006 proceedings adds nothing to the evidentiary equation. In the Record of Proceedings occurring on January 16, 2008, which contain SHO Spidel's finding of fraud, SHO Spidel does not make any credibility findings based on her personal observation of testimony, but instead relies solely upon the C-86 Motion and supporting materials and the summary of the May 16, 2006 proceedings set forth in paragraph 3 of the C-86 Motion. Whether SHO Spidel had any recollection of her observations at the May 16, 2006 proceedings or what those observations may have been does not appear in the record. Nor did SHO Spidel make any credibility findings based on the testimony received at the May 16, 2006 proceedings, or the January 16, 2008 proceedings when the finding of fraud was made.

In fact, there is no discussion of testimony given by Relator and his wife by the SHO in the proceedings of January 16, 2008. The SHO did not summarize the testimony of Relator or his witness and made no credibility findings against Relator or Relator's witness. A credibility determination cannot be premised upon the mere

presence of a party and a witness at a proceeding. The SHO simply concluded that because misrepresentations and nondisclosures were made, fraud existed, without any evidence of knowledge of falsity or intent to deceive on the part of Relator. The SHO seems to have assumed that Relator must have known that his activities constituted "work". On this record, the Court below correctly concluded that there was no evidence in the record upon which Respondent could rely to support the existence of knowledge of falsity and intent to deceive on the part of Relator which are, of course, essential elements necessary to establish the existence of fraud.

While Relator has not appealed that part of the Court of Appeals' decision which held his activities on behalf of McBee Sales constituted "work", Relator certainly does not concede that he understood or believed that he was engaged in work at the time.

There is no dispute that Relator attended some auctions; that at some of these auctions, cars were bought or sold by his wife's business, that Relator provided bid information to the auctioneer, and that money generated by the sale of cars was deposited into the McBee Sales business account from which some disbursements were made to Mr. and Mrs. McBee's joint personal checking accounts. It is also undisputed that the business ran at a loss and that Relator and his wife declared bankruptcy. But while these facts may be sufficient to demonstrate that Relator was working while receiving TTD, they do not automatically demonstrate knowledge on his part that his activities constituted "working" under the Workers Compensation statutory scheme. See, e.g., State ex rel. Stettler vs. Mid Atlantic Cannery Association, Inc., 10th District, 2005-Ohio-5646 at ¶63:

While this set of facts can be construed as "work" under the caselaw relating to TTD Compensation, the legally unsophisticated may not view it as work. In fact, relator

himself stated that he did not consider it to be "work". Under such circumstances, that relator circled "No" to the bureau's work query is not dispositive of fraudulent intent.

That Relator signed a C-84 form and made other representations that he was not working are not by themselves sufficient to support a finding of fraud. State ex rel. Allied Holdings, Inc. vs. Meade, 10th District, 2007-Ohio-5010 at ¶26. In this regard, it is significant that Relator (like the Claimant in Meade) made absolutely no effort to hide, conceal or disguise what he was doing when he attended auctions on behalf of McBee Sales.

"The elements of an action in actual fraud are: (a) a representation or, when there is a duty to disclose, concealment of a fact, (b) which is material to the transaction at hand, (c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether its true or false that knowledge may be inferred, (d) with the intent of misleading another into relying upon it, (e) justifiable reliance upon the representation or concealment, and (f) a resulting injury proximately caused by the reliance." Gaines v. Preterm-Cleveland, Inc., 33 Ohio St.3d 54 at 55 (1987).

Two elements of fraud are pertinent to this case. First, the false representation or concealment of fact must be made with knowledge of the falsity or with such utter disregard and recklessness as to whether it is true or false that knowledge of falsity may be inferred, and secondly, there must be an intent of misleading another into reliance. The Court below properly found that there was no evidence supporting either of those elements in the record.

The representations or concealments described by the SHO Spidel at pages 2 and 3 of her decision, do not constitute evidence of fraud because they do not demonstrate knowledge on the part of Relator that his largely passive activities, for

which he was not paid, constituted work under the applicable law, or that, by failing to disclose his activities, Relator had acted with intent to deceive. Mere representations that he was not working do not in and of themselves demonstrate that such representations were made with knowledge of their falsity or with utter disregard and recklessness as to whether they were true or false. There was absolutely no evidence that Relator attempted to conceal or disguise what he was doing or that Relator considered his activities to constitute work. Without evidence of knowledge on the part of Relator that his activities constituted work, or utter disregard and recklessness as to whether his activities constituted work, there can be no inference that he was attempting to conceal material facts, or was deliberately misrepresenting any facts with intent to deceive.

As a matter of law, a TTC award is not automatically precluded by a claimant's activities at a business, even if some indirect or even minimal direct benefit is conferred upon the business, so long as the claimant receives no direct remuneration and the activities are not inconsistent with the claimant's medical restrictions. See, e.g., State ex rel. Parma Community Gen. Hosp. v. Jankowski, 95 Ohio St.3d 340 (2002), holding that the claimant was entitled to TTC while, without pay, she answered telephones and advised clients for a child support advocacy organization; State ex rel. Ford Motor Co. v. Indus. Comm., 98 Ohio St.3d 20 (2002), determining that the subject activities were minimal and did not generate business income directly; State ex rel. Griffith v. Indus. Comm., 109 Ohio St.3d 479 (2006), holding that only activities that are medically inconsistent with a claimant's medical restrictions are activities which constitute the exchange of labor for pay operate to disqualify a claimant from receiving a TTC award; Accord, State ex rel. Honda of Am. Mfg. Co. v. Indus. Comm., 113 Ohio St.3d 5 (2007).

Particularly instructive is the decision in State ex rel. American Standard, Inc. vs. Boehler, 99 Ohio St.3d 39 (2003). In Boehler, the claimant, while employed with American Standard, also maintained his own rental property business. Following an industrial injury which resulted in his being awarded TTD, the claimant was seen at his properties engaging in the following activities: directing workers, picking up tools and carrying them, passing tools, measuring, pouring paint into a paint spreader, helping to clean up after painting, helping cut boards and put paneling in place, delivering materials to the work site in a truck, and assisting workers to unload equipment. The Commission had determined that the claimant's activities were reasonable actions of a person who has a substantial passive capital investment in rental properties, and that such activity did not rise to a level of self-employment. This Court agreed.

Like the claimant in Boehler, Relator in the instant case was not paid money in direct exchange for labor. Compared to the claimant in Boehler, Relator's participation in his wife's business was passive and minimal. As found by the SHO, relator "performed activities such as signing title forms, stand [sic] "on the block" telling the auctioneer what the minimum bid was, and decided [sic] when to accept bids." (Supplement to the Brief of Appellant at 39). Further, while the activities of the claimant in Boehler clearly saved the business money, in that his extensive activities would otherwise have to have been performed by hired labor, there is absolutely no evidence in the instant case that Relator's participation in his wife's business saved the business any money since there would have been no charge for having an auction house employee stand by as proxy to perform the activities that had been performed by Relator.

Relator's denying that he engaged in work activity does not constitute evidence

that Relator knew that his activity constituted work, and such denials do not constitute evidence establishing the scienter elements of fraud that are at issue. Given the absence of evidence that Relator knew that he was engaged in work activity, the SHO's finding of fraud constitutes nothing more than her assumption or subjective belief that Relator necessarily MUST have known that he was engaging in work, just by the nature of his activities. But if the activities of the claimant in Boehler -- directing workers, picking up tools and carrying them, passing tools, measuring, pouring paint into a paint spreader, helping to clean up after painting, helping cut boards and put paneling in place, delivering materials to the work site in a truck, and assisting workers to unload equipment -- did not constitute work, how can someone in the position of Relator be presumed to have understood that his far more minimal passive activities constituted work?

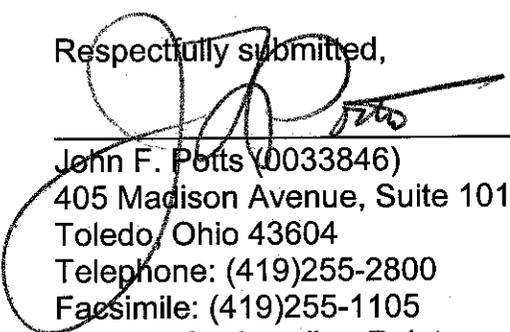
Certainly, the Industrial Commission of Ohio is exclusively responsible for evaluating evidentiary weight and credibility, and it may draw inference from evidence. State ex rel. Tracy vs. Indus. Comm., 121 Ohio St.3d at 481 (2009). However, the Commission's discretion to draw inferences is not unlimited. State ex rel. Lawson vs. Mondie Forge, 104 Ohio St.3d 39 at 44 (2004). Respondent argues that the testimony of Relator and his wife constituted "some evidence" from which inferences could properly be drawn. However, the Record of Proceedings in which the finding of fraud was made does not include any reference to testimony, nor does it include any credibility findings based on testimony. Further, what Respondent seeks to characterize as "testimony" consists of verbiage copied by the SHO from paragraph 3 of the C-86 Motion, the content of which simply provides examples of Relator's repetitive denials that he was engaged in "work". But such denials by themselves do not establish the

scienter elements of fraud. Accordingly, the Court below correctly concluded that there was no evidence to support the finding of fraud in this case and properly issued a Writ of Mandamus. While testimony may certainly constitute "some evidence" to support a decision of the Industrial Commission, whether or not it has been transcribed, there was no such testimony presented, described, considered, or relied upon to support the finding of fraud made by Respondent in the instant case.

CONCLUSION

For these reasons, the Decision of the Franklin County Court of Common Appeals from which this Appeal has been taken must be affirmed.

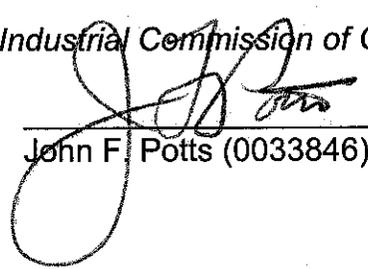
Respectfully submitted,



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Facsimile: (419)255-1105
Attorney for Appellee-Relator,
Garry K. McBee

CERTIFICATION

This is to certify that a copy of the foregoing has been served via ordinary U.S. mail this 19th day of July, 2011, to: Vincent S. Mezinko, Law Offices of Margelefsky & Mezinko, LLC, 709 Madison Avenue, Suite 301, Toledo, Ohio 43604, *Attorney for Respondent, Blue Ribbon Rentals, Inc.*; and Sandra E. Pinkerton, Assistant Attorney General, Workers' Compensation Section, 150 E. Gay Street, 22nd Floor, Columbus, Ohio 43215, *Attorney for Respondent, Industrial Commission of Ohio.*



John F. Potts (0033846)

APPENDIX

The Industrial Commission of Ohio
RECORD OF PROCEEDINGS

Claim Number: 04-419232
LT-ACC-OSIF-COV
PCN: 2071311 Garry K. McBee

Claims Heard: 04-419232

POLOFKA & VAN BERKOM
500 MADISON AVE STE 605
TOLEDO OH 43604-1241

Date of Injury: 10/27/2004

Risk Number: 1108743-0

This claim has been previously allowed for: SPRAIN RIGHT SHOULDER.
DISALLOWED: AGGRAVATION OF PRE-EXISTING RIGHT SHOULDER IMPINGEMENT
SYNDROME.

This matter was heard on 07/16/2007 before District Hearing Officer Lynne Nolte pursuant to the provisions of Ohio Revised Code Section 4121.34 and 4123.511 on the following:

C-86 Motion filed by BWC on 03/30/2007
Issue: 1) Request To Terminate Temporary Total
2) Fraud
3) Overpayment

Notices were mailed to the injured worker, the employer, their respective representatives and the Administrator of the Bureau of Workers' Compensation not less than 14 days prior to this date and the following were present for the hearing:

APPEARANCE FOR THE INJURED WORKER: Injured worker; Mr. Potts; Mrs. McBee
APPEARANCE FOR THE EMPLOYER: Mr. Mezinko
APPEARANCE FOR THE ADMINISTRATOR: Mr. Heyman; Ms. Mitchey; Ms. Ensign

It is the order of the District Hearing Officer that the C-86 Motion filed by BWC on 3/30/07 is GRANTED to the extent of this order.

The injured worker is found to have been engaged in work activities while receiving temporary total disability from 10/30/04 through 3/9/06. Therefore, this period of temporary total is found to be overpaid. Specifically, injured worker attended auto auctions to assist his wife's business. He actively participated in these auctions by providing the amounts of minimum bids to the auctioneer. The BWC provided records in the Special Investigations Unit (SIU) file from 10/30/04 through 3/9/06. There were no records provided from 3/10/06 through 8/27/06. Therefore, this period remains properly paid.

The request for a finding of fraud is DENIED. The Bureau failed to establish intent to deceive on the part of the injured worker. The injured worker testified credibly that he went along to the auctions for something to do. He did not consider this work. The overpayment is therefore to be collected in the same manner as an overpayment, pursuant to O.R.C. 4123.511(J).

All evidence in the record was reviewed and considered.

An Appeal from this order may be filed within 14 days of the receipt of the order. The Appeal may be filed online at www.ohioic.com or the Appeal (IC-12) may be sent to the Industrial Commission of Ohio,

RECORD OF PROCEEDINGS

Claim Number: 04-419232

Toledo District Office, One Government Center, Suite 1500, Toledo OH 43604.

Typed By: pae

Date Typed: 07/17/2007

Date Received: 03/31/2007

Notice of Contested Claim: 03/30/2007

Findings Mailed: 07/19/2007

Lynne Nolte
District Hearing Officer

Electronically signed by
Lynne Nolte

The parties and representatives listed below have been sent this record of proceedings. If you are not an authorized representative of either the injured worker or employer, please notify the Industrial Commission.

04-419232
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Monroe MI 48161-5758

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Polofka & Van Berkom
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Toledo OH 43604-1241

Risk No: 1108743-0
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Compmanagement, Inc.
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Dublin OH 43017-6884

ID No: 217308-80
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ID No: 14347-90
Michael Margelefsky
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BWC, Law - Toledo
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ID No: 2000-05
***BWC - Special Investigations Uni
30 W Spring St # L-28
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BWC, LAW DIRECTOR