

ORIGINAL

In the
Supreme Court of Ohio

STATE OF OHIO, EX REL.,	:	Case No. 2010-2288
GARRY K. McBEE,	:	
	:	
Relator-Appellee,	:	On Appeal from the
	:	Franklin County
	:	Court of Appeals,
vs.	:	Tenth Appellate District
	:	
INDUSTRIAL COMMISSION OF OHIO,	:	Court of Appeals
et al.,	:	Case No. 09AP-239
	:	
Respondents-Appellants.	:	

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INTRODUCTION

The question presented in this appeal of right from a workers' compensation mandamus action originating in the Tenth District Court of Appeals is very narrow: whether Appellant, Industrial Commission of Ohio ("commission") can rely on oral testimony of a claimant and his spouse to infer knowledge and intent to deceive in support of its finding of fraud. The answer to the question is "yes."

A claimant who receives temporary total disability compensation ("TTD") by knowingly concealing his work activities is guilty of civil fraud. The key factor in this case is McBee's knowledge. Appellee-Relator Garry McBee attended auctions to buy and sell vehicles for his wife's used car business. *State ex rel. McBee v. Indus. Comm.*, Franklin App. No. 09AP-239, 2010-Ohio-5547. McBee argues that his activities were not work—that is, they were not of benefit to McBee Sales—to prove that he did not know that his activities were prohibited while receiving TTD.

McBee concealed his work activities for his wife's business in at least two commission hearings before the fraud hearing. First, McBee concealed his work activities for McBee Sales when he asked the commission to divide his previous year's earnings by eight rather than 52 weeks of employment because he was "unemployed" during the rest of the year. Following the investigation, the commission and the BWC learned that McBee worked as the general manager for his wife's business for 40 of the excluded 44 weeks. Notably, McBee concealed these activities from the hearing officer, who later also heard his fraud case. McBee continued to conceal his activities for McBee Sales during hearings regarding his continued entitlement to TTD.

The commission can reasonably infer that McBee *knew* his activities benefited his wife's business, and thus were work, given his years of used-car industry experience and given that the same hearing officer had the chance to observe both McBee and his wife at multiple hearings. Moreover, the commission can reasonably infer that McBee concealed his McBee Sales activities knowing that he would be ineligible for TTD if the commission learned of those activities. The appellate court usurped the commission's role as fact-finder, inappropriately substituting the court's judgment for that of the commission when it in found that McBee's knowledge that he was working could not be inferred.

The court of appeals erred when it found that the commission could not rely on McBee's and his wife's untranscribed oral testimony to infer knowledge of falsity, to satisfy the knowledge requirement of fraud. As explained by the minority opinion of the appellate court, the commission hearing officer heard testimony from McBee and his wife and was in the best position to observe their demeanor and credibility. The minority opinion concluded that, from those observations, the hearing officer could reasonably infer that McBee knew his activities for his wife's business were prohibited "work" making him ineligible for TTD when he repeatedly applied for additional TTD and told examining physicians and hearing officers that he had not returned to work. "Some evidence," along with reasonable inferences, support the commission's order finding that McBee fraudulently received TTD while he worked in his wife's business. Accordingly, this court should overrule the portion of the appellate court decision that vacated the finding of fraud and vacate the writ of mandamus issued by that court.

ARGUMENT

In a mandamus action, the court cannot reweigh the evidence or substitute its judgment for that of the commission. A mandamus proceeding is not a de novo review of the evidence, with

the court substituting its judgment for that of the commission. *State ex rel. Mobley v. Indus. Comm.* (1997) 78 Ohio St. 3d 579, 584. A writ of mandamus will issue “only where the relator shows that the commission abused its discretion by entering an order which is not supported by any evidence in the record.” *State ex rel. Taylor v. Indus. Comm.*, 150 Ohio App.3d 309, 2002-Ohio-6451, at ¶ 21, emphasis added. Abuse of discretion, which is necessary to justify an interference with the exercise of the commission’s discretionary power, implies not merely error of judgment, but perversity of will, passion, prejudice, partiality or moral delinquency. *State ex rel. Commercial Lovelace Motor Freight v. Lancaster* (1986), 22 Ohio St.3d 191.

Questions of the weight and credibility of the evidence are reserved solely to the commission and should not be disturbed by the reviewing court. The commission is the sole fact-finder and the exclusive evaluator of evidentiary weight and credibility. *State ex rel. Moss v. Indus. Comm.* (1996), 75 Ohio St.3d 414, 416. This court has long held that “the weight of the evidence and the credibility of the witnesses are issues primarily for the trier of fact.” *State v. DeHass* (1967), 10 Ohio St.2d 230. Moreover, the fact-finder is entitled to draw inferences, even if the inferences are based in part on another inference. *Hurt v. Charles J. Rogers Transp. Co.* (1955), 164 Ohio St. 329. A writ should not issue if a commission order is supported by “some evidence,” and the reasonable inferences therefrom, even if contrary evidence of greater quality and/or quantity was presented. *State ex rel. Pass v. C.S.T. Extraction Co.* (1996), 74 Ohio St.3d 373, 376. A commission order relying on the oral testimony of the claimant should be afforded the same deference as an order relying on written evidence and should not be disturbed when supported by “some evidence.” The commission order here is supported by “some evidence” and should not be disturbed.

Appellant Industrial Commission's Proposition of Law:

Oral testimony at a hearing, whether transcribed or not, may serve as "some evidence" to support the Industrial Commission's decision.

The appellate court found that "some evidence" supported the commission's findings as to five of six elements of fraud. McBee did not appeal the decision below that found he met five of six elements. Thus, the only issue before the Court is whether "some evidence" supports the commission's finding that McBee concealed his work activity with McBee Sales *with knowledge* that his activity was work, satisfying the third element of fraud.

A claimant fraudulently receives TTD when he conceals facts that would render him ineligible for TTD. Fraud occurs when: (1) there is a representation, or, where there is a duty to disclose, concealment of a fact; (2) material to the transaction at hand; (3) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred; (4) made with the intent of misleading another into relying upon it; (5) there is justifiable reliance on the representation or concealment; and (6) a resulting injury caused by the reliance. *Gaines v. Preterm Cleveland, Inc.* (1987), 33 Ohio St.3d 54. TTD is paid when a claimant is temporarily unable to return to his former employment due to the industrial injury and is terminated when, inter alia, work within the claimant's physical capabilities is made available. R.C. 4123.56.

Payment of TTD is inappropriate where there is evidence of: (1) actual sustained remunerative employment; (2) the physical ability to do sustained remunerative employment; or (3) activities so medically inconsistent with the disability evidence that they impeach the medical evidence underlying the award. *State ex rel. Ford Motor Co. v. Indus. Comm.*, 98 Ohio St.3d 20, 2002-Ohio-7038, ¶ 18, adopting the standards applied to PTD from *State ex rel. Lawson v. Mondie Forge*, 104 Ohio St.3d 39, 2004-Ohio-6086. A worker "need not receive 'wages' for his

activities to have a preclusive effect on TTD compensation. Rather, the issue here is whether his activities generated income directly for the business.” *State ex rel. Meade v. Indus. Comm.*, Franklin App. No. 04AP-1184, 2005-Ohio-6206, ¶ 7 citing *State ex rel. Cassano v. Indus. Comm.*, Franklin App. No. 03AP-1227, 2005-Ohio-68. Thus, McBee committed fraud when he concealed his activities at McBee Sales with knowledge that those activities are work that generates income for McBee Sales.

The appellate court’s majority improperly discounted the value of the oral testimony when it held that the commission could not infer knowledge of falsity from the written evidence. *McBee* at ¶ 77. This court has long held that “the weight of the evidence and the credibility of the witnesses are issues primarily for the trier of fact.” *State v. DeHass* (1967), 10 Ohio St.2d 230. As an appellate court explained:

The fact-finder . . . occupies a superior position in determining credibility. The fact-finder can hear and see as well as observe the body language, evaluate voice inflections, observe hand gestures, perceive the interplay between the witness and the examiner, and watch the witness’s reaction to exhibits and the like. Determining credibility from a sterile transcript is a Herculean endeavor. A reviewing court must, therefore, accord due deference to the credibility determinations made by the fact-finder.

State v. Thompson (1998), 127 Ohio App.3d 511, 529. An administrative agency receives the same deference when it acts as the trier-of-fact. *Chirila v. Ohio State Chiropractic Bd.* (2001), 145 Ohio App.3d 589. Based on the oral testimony and hearing officer’s ability to observe the witnesses, the commission may properly infer that, with his extensive used car industry experience, McBee knew that he would not receive TTD if the commission learned of his activities for McBee Sales and, despite that knowledge, he concealed his activity.

Moreover, the commission’s recitation of the SIU’s report of the prior hearing history supports, rather than discounts, the conclusion that the commission relied on the testimony, or

the omission of testimony, of McBee and his wife to reach its decision. The court should not disturb the commission's fraud finding when the order is supported by "some evidence," including oral testimony, and the reasonable inferences drawn from that testimony.

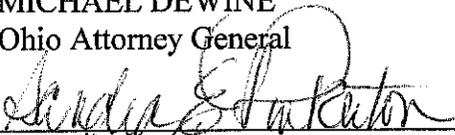
A commission's order supported by oral testimony is still supported by "some evidence" and should not be disturbed. Accordingly, the decision and judgment of the appellate court should be overruled and the requested writ denied.

CONCLUSION

The Tenth District's majority opinion improperly found that the commission order, supported by oral testimony, is not supported by "some evidence." The commission alone judges the weight and credibility of the witnesses and may draw reasonable inferences from their testimony. A reviewing court must defer to the commission's assessment of the credibility of the witnesses and the inferences from their testimony. A commission order is not invalid simply because it is supported by oral testimony. Oral testimony can serve as "some evidence" to sustain the commission's order. The appellate court's decision should be overruled and the requested writ of mandamus should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Reply Brief of Appellant, Industrial Commission of Ohio, was served by postage-paid regular mail this 9 day of August 2011, on:

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