ORIGINAL

In the
Supreme Court of Ohio

STATE OF OHIO, ex rel. OLD DOMINION FREIGHT LINE, INC., APPELLANT, vs. INDUSTRIAL COMMISSION OF OHIO, et al., APPELLEES.	:	Case No. 2012-1193 On Appeal from the Franklin County Court of Appeals, Tenth Appellate District, Case No. 11 APD 04 350

BRIEF OF APPELLEE, INDUSTRIAL COMMISSION OF OHIO

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INTRODUCTION

This original action in mandamus was brought by Appellant, Old Dominion Freight Line, Inc. (hereinafter, Old Dominion). Old Dominion alleges that the Industrial Commission of Ohio (hereinafter, "commission") abused its discretion by awarding Appellee, Robert L. Mason (hearinafter, "Mason") Permanent and Total Disability (hereinafter, "PTD") compensation. The commission maintains that its order is legally valid, Old Dominion has no clear legal right to the relief requested, and the commission has no clear legal duty to provide Old Dominion the relief requested. Thus, Old Dominion's request for the extraordinary relief provided by mandamus must be denied, as the lower court held.

STATEMENT OF THE CASE AND FACTS

Mason was injured in the course of his employment with Appellant, Old Dominion Freight Line, Inc. (hereinafter, "Old Dominion") on January 18, 2005. Mason filed a worker's compensation claim for his injuries, which was assigned Bureau of Workers' Compensation (hereinafter, "BWC") claim number 05-806440. His BWC claim is currently allowed for the following conditions: hip fracture; left intertrochanteric femur fracture; left femoral neck fracture; depressive disorder; left short leg syndrome; lumbar sprain; and, post-traumatic stress disorder. (Supplement to the Briefs, 477)(hereinafter, "Supp.__").

Mason has twice filed applications for PTD compensation. His first application was filed on April 26, 2006. (Supp. 21-29). That application was denied by the commission on February 28, 2007. (Supp. 65-67).

Mason filed his second PTD application on July 22, 2009. (Supp. 359-366). In support of this application, Mason attached the reports of Charles May, D.O., Richard M. Ward, M.D., and Lee Howard, Ph.D. (Supp. 167-168, 207-210 and 224-240, respectively). On July 24, 2009, the commission mailed a letter to the parties to inform them that the PTD application had been

filed. (Supp. 371-372). In the acknowledgment letter, the commission informed Old Dominion that it could submit additional medical evidence by September 22, 2009. Id. If Old Dominion intended to submit medical evidence, it was required to notify the commission, in writing, by September 7, 2009.

Old Dominion timely notified the commission of its intent to submit medical evidence. (Supp. 374). Old Dominion engaged Oscar F. Sterle, M.D., and Michael A. Murphy, Ph.D., to examine Mason and Richard H. Clary, M.D., to conduct a review of Mason's medical file. All were asked to opine on whether Mason was permanently and totally disabled. The reports of Drs. Sterle, Clary and Murphy (Supp. 391-400, 387- 388, and 401-410, respectively) were submitted to the commission September 22, 2009, the deadline established by the commission's acknowledgement letter. Id.

A Statement of Facts, concerning Mason's application for PTD, was prepared by the commission on September 6, 2009. (Supp. 379). The Statement of Facts listed the medical evidence included in Mason's PTD application and listed "None" for both "Employer's Medical Evidence" and "BWC Medical Evidence." Id.

The commission retained William R. Fitz, M.D., and John M. Malinky, Ph.D., to conduct an independent medical examination of Mason, "to assist the Industrial Commission of Ohio in its consideration of the Injured Workers' application for a determination of permanent total disability." (Supp. 411 and 415, respectively). The letters to Drs. Fitz and Malinky stated, "Pertinent medical records are enclosed." Id. The commission acknowledges that it initially failed to forward copies of Old Dominion's experts, Drs. Sterle, Clary and Murphy, to Drs. Fitz and Malinky.

Dr. Fitz performed an independent medical examination of Mason on October 7, 2009. (Supp. 417). He obtained a medical history from Mason, reviewed the admittedly incomplete medical records that had been provided to him and physically examined Mason. The examination included measuring Mason's height and weight, taking his blood pressure and pulse, measuring lumbar extension and flexion and bending, lower extremity reflexes, lower extremity strength, straight leg raise, and measuring the circumference of his calves and thighs. (Supp. 418). Dr. Fitz opined that Mason had reached maximum medical improvement for his allowed physical conditions and provided an estimated percentage of whole person impairment for each allowed condition. (Supp. 418-419). Dr. Fitz concluded, based solely on the allowed conditions in the claim that were within his specialty, "[t]his injured worker is incapable of work." (Supp. 420).

Dr. Malinky performed a psychological evaluation of Mason on October 21, 2009. The evaluation consisted of a one-hour face to face interview and 55 minutes of psychological testing. (Supp. 421). In the course of his interview of Mason, Dr. Malinky considered his physical appearance and discussed Mason's chief complaints, the history of his present illness, and his educational history, military history, past medical history, family and developmental history, marital history, life stressors, social history, drug and alcohol history and daily activities. (Supp. 422-424). Dr. Malinky's mental status examination of Mason included an evaluation of Mason's appearance and behavior, his flow of speech and conversation, his affect and mood, his mental content, his sensorium and cognitive functioning and his insight and judgment. (Supp. 424-425). Mason was given a Personality Assessment Inventory. Dr. Malinky also itemized the medical records that he reviewed. In his report, Dr. Malinky diagnosed Mason as having depressive disorder and post-traumatic stress disorder. (Supp. 427). In his assessment of the

severity of his diagnoses, in terms of Mason's functional limitations, Dr. Malinky rated him as having "Class 3, moderate impairment, in the areas of activities of daily living, social functioning, concentration, persistence, and pace, and decompensation in work or work-like settings. (Supp. 428). Dr. Malinky opined that, based solely on the allowed "mental and behavioral conditions" in the claim, Mason was "incapable of work." (Supp. 429).

The commission acknowledges that it inadvertently failed to forward copies of Old Dominion's experts, Drs. Sterle, Clary and Murphy, to Drs. Fitz and Malinky. The commission rectified this oversight prior to Mason's PTD hearing. The commission forwarded Old Dominion's medical evidence to its specialists, Drs. Fitz and Malinky, for their review and asked whether the additional information changed their original opinions. (Supp. 467-470). Dr. Fitz reviewed the reports of Drs. Sterle and Murphy and they did not change the opinion expressed in his report. (Supp. 470). Dr. Malinky reviewed the reports of Drs. Murphy, Sterle and Clary and stated that his original opinion was unchanged. (Supp. 467, 468).

Mason's application for PTD compensation was heard by a commission staff hearing officer (hereinafter, "SHO") on March 16, 2010. The SHO granted Mason's application for PTD compensation. (Supp. 477-479). The SHO relied on the reports of Dr. Fitz, who examined Mason with respect to his allowed physical conditions, and Dr. Murphy, whose examination of Mason was limited to his allowed psychological conditions. Id. Old Dominion's motion for reconsideration of the SHO order was denied by the commission. (Supp. 505-506).

Old Dominion filed a complaint in mandamus in the Tenth District Court of Appeals. On December 16, 2011, Magistrate Ken Macke issued a decision recommending that Old Dominion's request for a writ of mandamus be granted. (App. 24). Mason and the commission filed objections to the magistrate's decision; Old Dominion did not. (App. 6). The Tenth

District Court of Appeals sustained the commission's objections and Mason's first and second objections and remanded the matter to the magistrate to determine the remaining issues of the case.[1] (App. 4). Old Dominion filed a notice of appeal from the lower court's entry to this Court on July 16, 2012. (App. 1-3).

ARGUMENT

I. STANDARD OF REVIEW

For a writ of mandamus to be issued, Old Dominion must demonstrate there is a clear legal right to the relief sought, and the commission had a clear legal duty to provide such relief. *State ex rel. Pressley v. Indus. Comm.*, 11 Ohio St.2d 141, 162 (1967). A writ of mandamus will not be granted if an order of the commission is supported by "some evidence." *State ex rel. Pass v. C.S.T. Extraction Co.*, 74 Ohio St.3d 373, 376 (1996).

The determination of disputed facts is within the final jurisdiction of the commission, subject to correction by an action in mandamus upon a showing of abuse of discretion. *State ex rel. Allerton v. Indus. Comm.*, 69 Ohio St.2d 396, 397 (1982). The commission alone is responsible for evaluating the weight and credibility of evidence before it and has the exclusive authority to determine disputed facts. *State ex rel. Burley v. Coil Packaging Inc.*, 31 Ohio St. 3d 18 (1987); *State ex rel. Records v. Indus. Comm.*, 1996-Ohio-129. "An abuse of discretion 'implies not merely an error of judgment, but perversity of will, passion, prejudice, partiality, or moral delinquency.'*** "An abuse of discretion will be found only where there exists no evidence upon which the commission could have based its decision." (citations omitted.)" *State ex rel. Commercial Lovelace Motor Freight v. Lancaster*, 22 Ohio St.3d 191, 193 (1986).

II. <u>PROPOSITION OF LAW NO. 1: The commission does not abuse its discretion by obtaining addendum reports from its doctors because a claimant is not prejudiced when examining physicians consider supplemental evidence.</u>

This case involves a one-time, inadvertent failure to send medical evidence submitted by an employer to physicians engaged by the commission to perform independent medical examinations. The commission cured this oversight by submitting Old Dominion's medical

[1] By Journal Entry, dated October 29, 2012, the Tenth District Court of Appeals stated, "the magistrate shall not conduct further proceedings in until such time as relator's appeal is resolved in the Supreme Court of Ohio."

evidence to Drs. Fitz and Malinky and asking them for addendum opinions. (Supp. 467-470). The Tenth District Court of Appeals correctly determined there is "no specific rule prohibiting the commission from submitting supplemental medical evidence when its failure to do so was due to an honest error ***." (App. 8).

The rules governing PTD compensation are found in Ohio Adm. Code 4121-3-34. The commission is required to serve a copy of the PTD application and supporting evidence, along with a letter acknowledging receipt of the application, upon the employer or its representative. Ohio Adm. Code 4121-3-34(C)(2). The employer is then given an opportunity to submit additional evidence relating to the PTD application. The employer is given fourteen days from the date of the commission's acknowledgement letter "to notify the commission if the employer intends to submit medical evidence relating to the issue of permanent total disability compensation to the commission." Ohio Adm. Code 4121-3-34(C)(4)(b). The employer has sixty days to submit medical evidence to the commission, without regard to whether it timely submitted its written intent. "Should the employer make such written notification the employer shall submit such medical evidence to the commission within sixty days after the date of the commission acknowledgment letter ***. Should the employer fail to make such written notification *** the employer shall be provided sixty days after the date of the commission acknowledgement letter to submit medical evidence relating to the issue of permanent total disability compensation ***." Id. However, if an employer fails to submit written notification of its intent to submit evidence, the commission may schedule appropriate medical examinations of the claimant "without delay." Id.

The responsibilities of the claims examiner, relative to scheduling medical examinations and submitting medical records to the examining physicians are set forth in Ohio Adm. Code 4121-3-34(C)(5)(a):

> Following the date of filing of the permanent and total disability application, the claims examiner shall perform the following activities:
>
> (i) Obtain all the claim files identified by the injured worker on the permanent total disability application and any additional claim files involving the same body part(s) as those claims identified on the permanent total disability application.
>
> (ii) Copy all relevant documents as deemed pertinent by the commission including evidence provided under paragraphs (C)(1) and (C)(4) of this rule and submit the same to an examining physician to be selected by the claims examiner.
>
> (iii) Schedule appropriate medical examination(s) by physician(s) to be selected by the commission provided that the scheduling of said exams shall not be delayed where the employer fails to notify the commission within fourteen days after the date of the commission acknowledgement letter that it intends to submit medical evidence to the commission relating to the issue of permanent total disability compensation.
>
> (iv) Prepare a statement of facts. A copy shall be mailed to the parties and their representatives by the commission.

These two sections of the Ohio Administrative Code are silent as to specific timing of the events that must be accomplished relative to medical evaluations of claimants seeking PTD compensation. The rules do not mandate when a medical examination must be scheduled or that all medical records must be submitted prior to the date of a claimant's examination by a commission physician.

The Ohio Administrative Code clearly contemplates occasions when the employer's medical evidence may be submitted to the commission's examining physicians after a claimant has been examined. When an employer fails to make written notification to the commission, within fourteen days of receipt of the acknowledgement letter, of its intent to submit medical evidence, "the scheduling of the injured worker for appropriate medical

examinations by physicians selected by the commission under paragraph (C)(5)(a)(iii) of this rule will proceed without delay." Ohio Adm. Code 4121-3-34(C)(4)(b). The cited subsection also specifies "that the scheduling of said exams shall not be delayed where the employer fails to notify the commission within fourteen days after the date of the commission acknowledgement letter that it intends to submit medical evidence to the commission ***." Ohio Adm. Code 4121-3-34(C)(5)(a)(iii). In those cases, the employer may still submit medical evidence to the commission up to sixty days after the date of the commission acknowledgement letter. Ohio Adm. Code 4121-3-34(C)(4)(b). Because the claims examiner is directed to schedule examinations of the claimant without delay, it may often be the case that medical records received within the sixty day period will be submitted to the examining physician, under Ohio Adm. Code (C)(5)(a)(ii), after the examination has been performed. As the Tenth District Court of Appeals pointed out, the operation of the rules in this scenario "demonstrates, as a general proposition, that it is not prejudicial for a doctor to be asked to consider additional medical records after the doctor has performed the examination." (App. 8).

The rules allow supplemental medical records to be submitted to the examining physician(s) without any prejudicial effect when the employer fails to timely notify the commission of its intent to submit medical evidence. There is no principled reason why the rules should not allow the submission of supplemental medical evidence in this case. This is particularly true since, as the Tenth District Court of Appeals noted, "it is common for physicians to issue addendum reports upon receiving additional medical records after their initial examination." (App. 8).

The supplemental medical records the commission provided to the examining physicians were the medical reports of Drs. Sterle, Murphy and Clary. Dr. Fitz completed a thorough,

independent medical examination of Mason. He obtained a medical history from Mason, gave him a complete physical examination and issued his report. (Supp. 417-420). After the issuance of his report, Dr. Fitz reviewed the supplemental medical reports of Drs. Sterle and Murphy and issued an addendum report stating his opinion was unchanged. (Supp. 470). Likewise, Dr. Malinky conducted a thorough examination of Mason and issued a report. (Supp. 421- 429). After his examination of Mason, he reviewed the reports of Drs. Murphy, Sterle and Clary. Dr. Malinky issued two addendum reports stating his opinion was unchanged. (Supp. 467-468). The commission did not abuse its discretion when it relied on the reports of Drs. Fitz and Malinky to award PTD compensation to Mason.

Employers have sixty days from the date of commission's acknowledgment letter to submit medical records. This is true without regard to whether the employer has submitted a written intent to submit medical records. The records will be reviewed by the commission's examining physician(s). Old Dominion was not prejudiced by having its medical records submitted after the commission examinations were performed.

III. PROPOSITION OF LAW NO. 2: A party cannot assign as error, or argue, any finding of fact or conclusion of law unless the party objected to that finding or conclusion pursuant to Civ.R. 53(D)(3)(b)(iv).

This Court should not entertain any argument from Old Dominion concerning the commission's refusal to allow Old Dominion to depose Drs. Fitz and Malinky. Old Dominion failed to object to the Magistrate's report and should be precluded from arguing this issue.

Old Dominion requested authority from the commission to depose Drs. Malinky and Fitz. (Supp. 433 and 436, respectively). The commission denied both requests. (Supp. 451-454). The Magistrate mentioned the request and denial in his findings of fact but not in his conclusions of law. (App. 17, 21-24). Old Dominion did not object to the Magistrate's report. (App. 6).

Loc. R. 13(M)(3) of the Tenth Appellate Judicial District states, "[w]ithin fourteen days of a magistrate's decision, a party may file written objections to the magistrate's decision." The pertinent Civil Rule provides:

> Except on a claim of plain error, a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party has objected to that finding or conclusion as required by Civ. R. 53(D)(3)(b).

Civ. R. 53(D)(3)(b)(iv).

Mason's arguments derive from an issue not addressed in the magistrate's conclusion of law and from which he did not object. Under Civ. R. 53(D)(b)(3), this Court should not hear any argument on this issue. *State ex rel. Findlay Industries v. Indus. Comm.*, Slip Opinion No. 2009-Ohio-1674, ¶3.

The commission did not abuse its discretion when it denied Old Dominion's request to depose Drs. Fitz and Malinky. The commission is to apply a reasonableness standard when it determines whether to grant a request for an oral deposition of a commission or bureau physician. Ohio Adm. Code 4121-3-09(a)(7). In this case, the hearing officer and the hearing administrator remedied the alleged error by submitting Old Dominion's medical records to Drs. Fitz and Malinky and asking them to submit addendum reports. (Supp. 467-470). Having done so, the commission denied Old Dominion's requests as unreasonable. (Supp. 451). It did not abuse its discretion when it did so.

CONCLUSION

The commission's decision to grant Mason's application for PTD compensation was not an abuse of discretion. The medical reports of Drs. Fitz and Malinky are some evidence and the commission properly relied on them.

For these reasons, the commission respectfully requests this Court to deny Old Dominion's request for a writ of mandamus.

Respectfully submitted,

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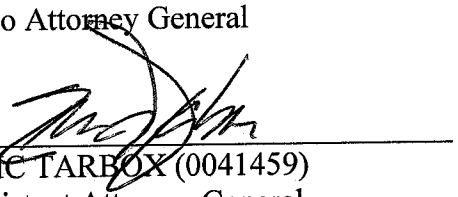

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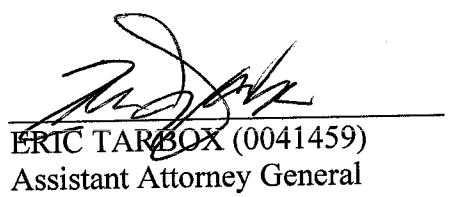

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