

In the
Supreme Court of Ohio

STATE OF OHIO, ex rel.	:	Case No. 2013-0349
GARY W. ROBERTS,	:	
	:	
Appellant,	:	On Appeal from the
	:	Franklin County Court of Appeals,
	:	Tenth Appellate District
vs.	:	
	:	
STEPHENS PIPE & STEEL, LLC, et al.,	:	Court of Appeals
	:	Case No. 12AP-298
	:	
Appellees.	:	

MERIT BRIEF OF APPELLEE, INDUSTRIAL COMMISSION OF OHIO

ROBERT M. ROBINSON (0066439)
 Agee, Clymer, Mitchell & Laret
 226 N. Fifth Street, 5th Floor
 Columbus, Ohio 43215
 (614) 221-3318 – Tel.
 (614) 221-7308 – Fax
 brobinson@ageeclymer.com

Counsel for Appellant,
 Gary W. Roberts

MICHAEL DEWINE (0009181)
 Ohio Attorney General

JUSTINE S. CASSELLE (0088144)
 Assistant Attorney General
 Workers' Compensation Section
 150 East Gay Street, 22nd Floor
 Columbus, Ohio 43215
 (614) 466-6696 – Tel.
 (614) 752-2538 – Fax
 Justine.Casselle@OhioAttorneyGeneral.gov

Counsel for Appellee,
 Industrial Commission of Ohio

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INTRODUCTION

This workers' compensation case addresses the denial of Appellant, Gary W. Robert's ("Robert"), application for permanent and total disability ("PTD") compensation. Appellee, Industrial Commission of Ohio ("commission"), denied Robert's PTD application after it determined that neither his allowed physical conditions, nor his allowed psychological condition, foreclose sustained remunerative employment at a sedentary level. Given Robert's age, education, and work history that include transferable skills, the commission found that he was not precluded from securing a sedentary work position. The commission respectfully asks this Court to affirm the Tenth District Court of Appeals' decision and deny the requested writ of mandamus.

STATEMENT OF THE CASE AND FACTS

In 2003, Roberts was injured while working for Appellant, Stephens Pipe & Steel, LLC ("Stephens Pipe"). (Second Supplement submitted by the Industrial Commission of Ohio at 14, hereinafter "S.S. ___"). His workers' compensation claim was allowed for lumbosacral ligamentous sprain/strain; right sciatic neuritis; herniated disc at L4-5; L3-4 protruding disc; aggravation of pre-existing degenerative disc disease L3-S1; depression; annular tear at L5-S1 by flow-through causation; degenerative joint disease (facet arthritis) L3, L4, L5 and S1 by flow-through causation; and spondylosis L3, L4, L5 and S1 by flow-through causation. (S.S. 1).

Roberts' filed a PTD application, which was denied by a commission staff hearing officer ("SHO") after considering both the allowed physical and psychological conditions in the claim, his non-medical factors, and his lack of vocational rehabilitation efforts. (S.S. 1-3). The SHO found that Roberts was not permanently and totally disabled from all sustained remunerative employment. (S.S. 1).

Regarding Roberts' allowed physical conditions, the SHO relied on the findings of Robert Whitten, Jr., M.D., and Steven Wunder, M.D. *Id.* Dr. Whitten found that Roberts is "limited to light duty only," but further found that "sitting would be unrestricted" if he is "given the ability to go from sit to stand as needed for relief of discomfort." (S.S. 24). Roberts was found to have "no additional restrictions on the use of [his] hands or feet." *Id.* Dr. Wunder found that Roberts "should be functionally capable of a full range of sedentary occupations." (S.S. 10). Dr. Wunder further noted that, with a sedentary position, "he would have the opportunity to alternate sitting and standing." *Id.*

Regarding Roberts' allowed psychological condition, the SHO relied on the opinion of Ralph Skillings, Ph.D., who found that, although Roberts is "permanently unable to return to the performance of his former occupation, [he] could perform some other substantial gainful activity." (S.S. 17). Dr. Skillings found that Roberts' activities of daily living are only mildly impaired. (S.S. 18). He reported that Roberts is able to do activities of daily living which include driving independently, riding a lawnmower, fishing and engaging in sedentary activities. (S.S. 15, 18). Additionally, Dr. Skillings found no impairment with Roberts' social functioning as a result of his allowed psychological condition. (S.S. 18). He concluded that while Roberts "tends to stay away from other people and not socialize," this personality characteristic preceded his work injury. *Id.* Dr. Skillings ultimately concluded that, "[p]hysical pain experience appears to be setting the primary limitations from employment. Severity of [Roberts'] depression condition does not preclude employment." *Id.* The SHO, relying on Dr. Skillings' report, found Roberts' psychological condition "does not preclude, nor restrict, employment." (S.S. 2).

Roberts' non-medical factors were also considered. At the time of the hearing, Roberts was 53 years old and a high school graduate. (S.S. 2). Both his age and level of education were

considered to be assets. Id. Additionally at hearing, Roberts indicated that he did “factory work, followed by construction and janitorial positions. Thereafter he was a maintenance man and a gas station clerk/auto repairman.” Id. His work history “also includes work as a truck driver, tree trimmer, and lawn mower repairman.” Id. Despite the lack of specific experience in sedentary occupations, the SHO noted that Roberts’ prior employment in semiskilled trade (auto and lawn mower repair) “demonstrates some vocational aptitude.” Id.

The SHO further noted Roberts’ failure to participate in vocational rehabilitation services. (S.S. 2). Relying on this Court’s decisions outlining the rule of law concerning vocational rehabilitation and an injured worker’s lack of participation in such, the SHO found that Roberts was “expected to improve his reemployment potential through vocational services prior to finding that he was precluded from all work.” Id. While Roberts has transferable skills and other positive assets to qualify for a sedentary employment position, Roberts last worked in August 2003 at the age of 46. Id. At the time of his PTD application, Roberts had made no attempt at vocational rehabilitation. Id. The SHO acknowledged that Roberts was actively pursuing treatment for his allowed physical and psychological conditions since 2003. Id. Even with a review of the rehabilitation assessments from March and July 2009, the SHO did not find them persuasive enough to determine that Roberts was permanently and totally disabled, and unable to ever secure sustained remunerative employment. Id. Based upon the allowed physical and psychological conditions in the claim, his non-medical factors, and his lack of vocational rehabilitation efforts, the commission found that Roberts was capable of and vocationally qualified for sedentary employment. (S.S. 1-2).

Roberts initiated this mandamus action in the Tenth District Court of Appeals after the commission denied his PTD application. The Court of Appeals assigned the case to a magistrate,

who concluded that the SHO misread Dr. Skillings' report and recommended that a writ of mandamus be issued, vacating the SHO's order and returning the matter to the commission for a new order. (Appellant's Appendix, p. 18). The commission objected to the magistrate's recommendation on the basis that the magistrate misapplied the standard of review by failing to analyze whether there was "some evidence" to support the commission's decision. The Court of Appeals sustained the commission's objections and found *State ex rel. Wyrick v. Indus. Comm.*, 10th Dist. No. 08AP-275, 2009-Ohio-635, ¶ 4, to be dispositive. The court found that "Dr. Skillings' report unambiguously indicates that [Roberts] was capable of performing work within the psychological restrictions," and that mandamus relief is not justified because the reports of Drs. Whitten, Wunder, and Skillings constitute "some evidence" supporting the commission's denial of Roberts' PTD application. (Appellant's Appendix, pp. 7, 8 at ¶¶ 9, 12). Ultimately, the court rejected the magistrate's recommendation and denied the requested writ. *Id.* at ¶ 13. Roberts then appealed to this Court.

ARGUMENT

For the Court to issue a writ of mandamus, Roberts must demonstrate a clear legal right to the relief sought as well as demonstrate that the commission had a clear legal duty to provide such relief. *State ex rel. Pressley v. Indus. Comm.*, 11 Ohio St.2d 141 (1967). To prevail, Roberts must show the commission abused its discretion by issuing an order that is not supported by evidence in the administrative record. *State ex rel. Elliott v. Indus. Comm.*, 26 Ohio St.3d 76, 78-79 (1986). An abuse of discretion is "not merely an error in judgment but a perversity of will, passion, prejudice, partiality, or moral delinquency, to be found only where there is no evidence upon which the commission could have based its decision." *State ex rel. Commercial Lovelace Motor Freight v. Lancaster*, 22 Ohio St.3d 191, 193 (1986). 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.*, 78 Ohio St.3d 579, 584 (1997). The commission is the sole fact-finder and the “exclusive evaluator of disability,” evidentiary weight and credibility. *State ex rel. Moss v. Indus. Comm.*, 75 Ohio St.3d 414, 416 (1996). Thus, evidence should not be reweighed where some evidence supports the commission’s determination. *State ex rel. Commercial Lovelace Motor Freight*, 22 Ohio St.3d at 194. This Court has previously stated that “so long as there is some evidence in the file to support its findings and orders, this Court will not overturn such.” *State ex rel. Stephenson v. Indus. Comm.*, 31 Ohio St.3d 167, 170 (1987).

Industrial Commission’s Proposition of Law:

The Industrial Commission is within its discretion to deny an application for PTD compensation where evidence in the record supports a finding that a claimant’s permanent medical impairments due to the industrial injury and non-medical disability factors do not foreclose sustained remunerative employment.

The commission’s decision is supported by both physical and psychological medical evidence that reveals Roberts is still a candidate for vocational rehabilitation and re-entry into the workforce. In determining entitlement to PTD compensation, the dispositive question is whether the claimant is unfit for sustained remunerative employment as a result of industrial injuries. *State ex rel. Paragon v. Indus. Comm.*, 5 Ohio St.3d 72 (1983). Where medical evidence establishes that a claimant’s permanent impairment due to industrial injury is only partial, the commission must deny PTD unless the claimant’s age, work experience, education, or other relevant characteristics (i.e., the “*Stephenson* factors”), foreclose sustained remunerative employment. *State ex rel. Hopkins v. Indus. Comm.*, 70 Ohio St.3d 36 (1994). Here, Drs. Whitten, Wunder and Skillings each found Roberts capable of returning to some form of sustained remunerative employment.

In this appeal, Roberts solely challenges the commission's statement that, according to Dr. Skillings' report, the allowed psychological condition "does not preclude, nor restrict, employment." As the Court of Appeals found:

Initially, it is unclear whether the SHO did in fact misstate Dr. Skillings' report. Although the SHO stated that Dr. Skillings' report indicates that the psychological condition does not restrict employment, the context of the SHO's order suggests that the SHO was referring to *sedentary* employment – not any and all forms of employment. The sentence immediately preceding the alleged misstatement states that "the allowed physical conditions restrict [relator] to employment of a *sedentary* nature that includes the opportunity to alternate sitting and standing as needed." (S.S. 1, 2). In context, the SHO's statement regarding Dr. Skillings' report can reasonably be interpreted to an acknowledgement that relator's conditions limit him to performing sedentary work.

State ex rel. Roberts v. Indus. Comm., 10th Dist. No. 12AP-298, 2013-Ohio-287, ¶8. (Emphasis in original.) Thus, the lower court held that Roberts' assertion that the SHO had incorrectly represented Dr. Skillings' opinion was incorrect. This is further bolstered by a clear reading of Dr. Skillings' report. While Dr. Skillings did find that Roberts had some problems in daily functioning as the result of his allowed psychological condition, he did not find that Roberts was restricted from any type of employment. In this regard, Dr. Skillings specifically noted, "[p]hysical pain experience appears to be setting the primary limitations from employment. Severity of [Roberts'] depression condition does not preclude employment." (S.S. 24). Thus, Dr. Skillings found that only the physical conditions limited Roberts from all forms of employment.

The Court of Appeals further correctly found that, even if the SHO had misstated that portion of Dr. Skillings' report, it would not follow that the SHO failed to properly consider Dr. Skillings' report. *State ex rel. Roberts*, 2013-Ohio-287 at ¶ 9. The court found, as did the SHO, that "Dr. Skillings' report unambiguously indicates that [Roberts] was capable of performing

work within the psychological restrictions. In fact, Dr. Skillings opined that the majority of the relator's pacing limitations were due to physical pain 'rather than psychological causation.'" Id.

Roberts misapplies the court's reasoning in *State ex rel. Alexander v. Indus. Comm.*, 10th Dist. No. 10AP-1041, 2011-Ohio-6659, when arguing that the SHO failed to reconcile the psychological restrictions identified by Dr. Skillings with his work history. (Appellant's Brief, p. 9). First, Roberts fails to note the *Alexander* court held that "in determining that relator could engage in *some* forms of employment, the SHO considered both her physical and psychological conditions." *Alexander*, 2011-Ohio-6659 at ¶ 8. Unlike this case, the SHO's order in *Alexander* included a non-exhaustive list of job titles that would fall within sedentary employment restrictions. Id. at ¶ 9. The SHO order specifically stated the listed jobs were the "types of employment falling within the allowed *physical* restrictions of the Injured Worker." Id. It was for this specific reason the court noted that "it is unclear from the SHO's order whether she considered relator's psychological conditions in determining that relator could perform these types of occupations." Id. The court then held that, in accordance with *Stephenson*, *supra*, "the Commission must consider psychological or psychiatric factors, if present, in determining whether a claimant is capable of sustained remunerative employment." Id.

In this case, the SHO found Roberts to be physically and psychologically capable of employment within the range of sedentary work. Roberts does not dispute the finding that he is capable of sedentary work. His sole request in this appeal is for the SHO to "correct" the phrase "does not preclude, nor restrict, employment." Even if the statement had been incorrect, a request for mandamus relief on this basis is a request for a vain act. This Court has consistently refused to "issue a writ of mandamus to compel a vain act." *State ex rel. Carter v. Penske Truck Leasing, Inc.*, 94 Ohio St.3d 208, 209 (2002). As the Court of Appeals acknowledged, "where

the SHO merely misstates a portion of a medical report, mandamus relief is not justified if the report plainly indicates that the claimant is capable of sedentary work.” *State ex rel. Roberts*, 2013-Ohio-287 at ¶ 10; *see State ex rel. Wyrick*, 2009-Ohio-635 at ¶ 4. The Court of Appeals further held that “[a]ny order to the commission to further consider [relator’s] claim would be a vain act, since the same result would be inevitable.” *Id.* at ¶ 11, citing *State ex rel. Menough v. Indus. Comm.*, 10th Dist. No. 01AP-1031, 2002-Ohio-3253, ¶ 4. Compelling the commission to “correct” the SHO order would be a vain act because the commission would reach the same conclusion. As discussed above, Roberts’ physical and psychological conditions permit him to work in a sedentary position, and his non-medical factors positively favor such sustained remunerative employment. “Because Dr. Skillings’ report fully supports the SHO’s determination that [Roberts] is capable of performing sedentary work, it would be futile to grant a writ ordering the commission to re-read that report and arrive at the very same determination.” *Id.* at ¶ 12.

The commission relied on “some evidence” and did not abuse its discretion in weighing the medical and non-medical factors to deny Roberts’ PTD application. Any misstatement by the SHO does not constitute an abuse of discretion and does not compel the issuance of an extraordinary writ to return the matter to the commission. The commission appropriately weighed the evidence before it and the appellate court came to the correct conclusion. Therefore, the commission’s denial of Roberts’ PTD application should be upheld.

CONCLUSION

The commission's order denying Roberts' PTD compensation is supported by ample evidence and analysis. Roberts failed to show that he has a clear legal right to relief, nor did he establish that the commission had a clear legal obligation to grant him PTD compensation. The commission appropriately considered the psychological conditions in conjunction with the physical conditions and non-medical factors. Within its responsibilities, the commission has weighed the evidence in this case and concluded that Roberts is capable of sustained remunerative employment of a sedentary nature. Any misstatement present in the SHO's order is insufficient to compel a return of this matter to the commission. There was no abuse of discretion, therefore, the commission respectfully requests this Court uphold the Court of Appeals' decision and deny Roberts' request for a writ of mandamus.

Respectfully submitted,

MICHAEL DEWINE (0009181)
Ohio Attorney General


JUSTINE S. CASSELLE (0088144)
Assistant Attorney General
150 East Gay Street, 22nd Floor
Columbus, Ohio 43215
(614) 466-6696 – Tel.
(614) 728-9535 – Fax
Justine.Casselle@OhioAttorneyGeneral.gov

Counsel for Respondent,
Industrial Commission of Ohio

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent on this 26th day of September,

2013 to:

Via U.S. Mail

Robert M. Robinson
Agee, Clymer, Mitchell & Laret
226 N. Fifth Street, 5th Floor
Columbus, Ohio 43215

Counsel for Appellant,
Gary W. Roberts



JUSTINE S. CASSELLE (0088144)
Assistant Attorney General