

ORIGINAL

In the Supreme Court of Ohio

CASE NO.
2013-0509

STATE OF OHIO, ex rel. JOSEPH METZ,

Appellee and Cross-Appellant

-vs-

GTC INC. and

INDUSTRIAL COMMISSION OF OHIO,

Appellant and Cross-Appellee

FILED
NOV 19 2013
CLERK OF COURT
SUPREME COURT OF OHIO

SECOND BRIEF

MERIT BRIEF OF APPELLEE/CROSS-APPELLANT JOSEPH METZ

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STATEMENT OF FACTS

Appellee/Cross-Appellant, Joseph Metz ("Metz"), began working as a truck driver when he was 19 years old. (Stip. 3-5). Metz did not complete high school (Stip. 3), nor did he complete a General Educational Development test (GED). (Stip. 3). He worked continuously as a truck driver for 20 years. (Stip. 3-5). His work as a truck driver ended only because he was seriously injured in the course and scope of his employment. (Stip. 1; 56-57).

Metz filed a workers' compensation claim with the Ohio Bureau of Workers' Compensation ("Bureau"), which was allowed for the following conditions:

- (847.0) sprain of neck
- (847.1) sprain thoracic region
- (840.8) sprain or strain left trapezius muscle
- (722.2) protruding disc C6-C7
- (722.0) herniated disc C6-C7
- (726.10) supraspinatus tendonopathy left shoulder
- (716.91) acromioclavicular joint hypertrophy
- (726.2) impingement left shoulder
- (296.30) major depressive disorder recurrent. (Stip. 1; 56-57).

Metz has not returned to work since his work related injury. His physicians have never released him to work. Metz underwent a diskectomy and a fusion; used a catheter for a trial period of intrathecal opioid therapy; and received facet blocks to relieve his pain. (Stip. 4; 56-57). His attempt at rehabilitation was unsuccessful. (Stip. 4). So, on February 15, 2011, Metz filed an application for compensation for permanent total disability. In his application, he explained that he could not read, write, or do basic math well; had trouble with his concentration; was limited in his driving due to medications that made it unsafe for him to drive; had problems moving his left arm and turning his head; engaged in no daily activities, no recreation activities, and no hobbies. (Stip. 3-10).

On repeated occasions, Metz's physician, Bradley A. Fell, M.D., opined that Metz was permanently and totally disabled from engaging in any work. (Stip. 11-14). Dr. Fell's opinion was based solely upon Metz's physical conditions. Metz's treating psychologist, Marian Chatterjee Ph.D., also concluded that, based on his psychological impairments alone, Metz was unable to work. (Stip. 26-30).

The Social Security Administration agreed and issued a decision based on Metz's work injuries, which concluded that he was unable to engage in any employment. (Stip. 15-25).

The vocational evidence submitted to the Commission consisted only of the report of John Ruth, M.S., C.D.M.S., a vocational expert. Ruth concluded that "Metz will be unable to successfully seek or sustain remunerative employment now or in the future." (Stip. 48-52).

The Appellant/Cross-Appellee, Industrial Commission of Ohio, had Metz examined by Karl Metz, M.D. Dr. Metz provided a report. (Stip. 31-37). Although Dr. Metz checked a box indicating Metz was capable of sedentary work activities, the body of his report placed additional restrictions upon Metz by stating that Metz is "unable to *** perform repetitive lifting, carrying, or bending activities." (Stip. 35).

The Industrial Commission also had Metz examined by Steven Van Auken, Ph.D., who submitted a report. (Stip. 38-47). Dr. Van Auken placed the following restrictions upon Metz:

- No more than moderate demands in terms of:
 - frequency of contact with the general public
 - decision-making
 - productivity requirements

Dr. Van Auken also identified the following restrictions:

- deadline pressures
- tenuous short-term memory
- could only recall one or three objects after 5 minutes
- could not complete any of the serial 7 subtraction exercise
- struggled with simple non-numeric measure of attentiveness. (Stip. 38-47).

Despite these restrictions as identified by the Industrial Commission's own experts, the Industrial Commission concluded Metz could perform any sedentary work "in a non-stressful, non-demanding work environment." (Stip. 54). Also, relying exclusively upon the reports of Dr. Metz and Dr. Van Auken, the Industrial Commission concluded Metz was capable of "exerting up to 10 pounds of force frequent [sic] to lift, carry, push, pull, or otherwise move objects *** in a non-stressful, non-demanding work environment." (Stip. 53, 54). Based on these conclusions, the Industrial Commission denied Metz's application for benefits.

Metz filed a complaint in mandamus with the Tenth District Court of Appeals challenging the Industrial Commission's decision. Metz argued the Industrial Commission abused its discretion and that its decision was contrary to established law because the Industrial Commission did not consider Dr. Metz's opinion that Metz is "unable to *** perform repetitive lifting, carrying, or bending activities." (Stip. 35). Further, Metz argued the Industrial Commission failed to even discuss, and certainly did not explain, how despite all of the specific conditions placed upon Metz by Dr. Van Auken, the Industrial Commission concluded Metz could still work.

The Tenth District Court of Appeals assigned the case to its Magistrate, who agreed with Metz's basic proposition:

Upon review, the magistrate finds that relator [Metz] is correct to assert that the commission did not mention Dr. Metz's *additional restrictions* that he refrain from repetitive lifting, carrying, or bending activities. Magistrate's Decision, ¶35. (Emphasis added.)

But the Magistrate then engaged in her own fact finding and weighing of the evidence and concluded that Dr. Metz's restrictions did not preclude Metz from performing sedentary work. Further, like the Industrial Commission, the Magistrate did not give any consideration to the significant psychological restrictions placed upon Metz by Dr. Van Auken.

As a result of the Magistrate's errors, Metz filed objections to the Magistrate's report. The Court of Appeals considered those objections and concluded:

We adopt the findings of fact in the magistrate's decision. We also adopt the portions of the conclusions of law which define sedentary employment and addresses the psychological issues. However, we vacate the denial of PTD compensation and return the case to the commission to cause Dr. Metz's restrictions and opinions to be clarified or to obtain additional medical evidence as to Joseph Metz's limitations and capacity for sedentary work. *State ex rel. Joseph Metz v. Indus. Comm. of Ohio*, 10 Dist. Case No. 12 AP-56, ¶10, 2013-Ohio-461.

The Commission appealed to this Court and now asks this Court to either condone the reweighing of the evidence by the Magistrate below and/or engage in its own reweighing of the evidence. Metz cross-appealed because both the Industrial Commission and the Tenth District Court of Appeals failed to consider and explain how Metz could possibly do even sedentary work with the additional psychological restrictions placed upon him by the Industrial Commission's expert, Dr. Van Auken.

Law and Argument

1. RESPONSE TO APPELLANT'S PROPOSITION OF LAW

The Industrial Commission may not rely on its medical expert's bottom line conclusion as to a claimant's ability to perform sedentary work when the expert's report includes restrictions in addition to the bottom line conclusion.

A. The law applicable to this case is firmly established.

It is well-settled, indeed indisputable, "that the determination of disputed facts and the weighing of evidence are exclusively within the jurisdiction and authority of the Industrial Commission." *State ex rel. Frigidaire Div., General Motors Corp. v. Ind. Commn. of Ohio*, 35 Ohio St.3d 105, 106, 518 N.E.2d 1194 (1988). Despite this black letter law, the Magistrate below improperly determined disputed facts and weighed the evidence to find a way to support the Industrial Commission's decision. Now, the Industrial Commission asks this Court to disregard clear case law and do the same weighing of evidence, or approve of the Magistrate doing so.

The issue presented here is whether the Industrial Commission can rely upon a physician's "bottom line" conclusion regarding the physical exertional capabilities of an injured worker when that same physician, in the same report, places additional restrictions upon the worker, that contradict the bottom line conclusion. In other words, must the Industrial Commission address the additional restrictions in its order and explain why the additional restrictions do, or do not, render the injured worker permanently totally disabled. Or, can the Industrial Commission completely ignore those additional restrictions?

This issue has been decided in other cases, and those cases hold that the Industrial Commission cannot rely on only the bottom line conclusion. See, *State ex rel. Seitaridis v. Indus. Comm.*, 10th Dist. No. 10AP-494, 2011-Ohio-3593, ¶14, citing with

approval *State ex rel. O'Brien v. Cincinnati, Inc.* 10th Dist. No. 07AP-825, 2008-Ohio-2841, ¶9. In *Seitaridis*, the court held:

If the physician imposes *specific* restrictions, “the commission must review the doctor’s report and actually make certain that any physical restrictions the doctor listed correspond with an ability to actually perform at the exertional level indicated by the doctor.” *Id.* at ¶14, quoting *O'Brien*, at ¶10.

B. The Industrial Commission’s Decision

The Industrial Commission concluded that Metz was capable of performing a full range of “sedentary work”. (Stip. 53-54). Specifically, the Commission decided that Metz:

is capable of *** exerting up to 10 pounds of force frequent [sic] to lift, carry, push, pull, or otherwise move objects. (Stip. 53).

The Commission does not dispute that this conclusion is based solely upon the report of its expert, Karl V. Metz, M.D. (Stip. 53-55).¹ But in the body of his report, Dr. Metz opined that Metz, “*** is unable to ***perform repetitive lifting, carrying, or bending activities.” (Stip. 35). The Industrial Commission did not mention or consider these additional restrictions when it denied Metz’s application for benefits. The Industrial Commission did not explain why Metz could work even with these additional restrictions. The Industrial Commission’s failure to even consider these additional restrictions is contrary to law, as the Court of Appeals found.

¹ In its brief, the Industrial Commission seems to suggest that its conclusion with regard to physical restrictions was also based upon the report of Steven Van Auken, Ph.D. See, e.g., Brief of Appellant, pp. 6-7, 9. However, this is contradicted by the Commission’s actual Order (Stip. 53-55) and the fact that Steven Van Auken is a psychologist and not qualified to render an opinion with regard to physical limitations of an injured worker. Dr. Van Auken’s report reflects the same. (See Stip. 38-47).

C. The Magistrate's Decision

The Magistrate below agreed with Metz's argument that the Industrial Commission failed to consider the additional restrictions imposed by Dr. Metz. The Magistrate held:

Upon review, the magistrate finds that relator [Metz] is correct to assert that the commission did not mention Dr. Metz's *additional restrictions* that he refrain from repetitive lifting, carrying, or bending activities. (Magistrate's Decision, ¶35, emphasis added.)

The Magistrate also identified the law applicable to the Industrial Commission's error. The Magistrate explained:

*** the commission cannot simply rely on a physician's "bottom line" identification of an exertional category without examining the specific restrictions imposed by the physician in the body of the report. (Magistrate's Decision, ¶¶38-39, citing *State ex rel. Owens Corning Fiberglass v. Indus. Comm.*, 10th Dist. No. 03AP-684, 2004-Ohio-3841 and *State ex rel. Howard v. Millennium Inorganic Chems.*, 10th Dist. No. 03AP-637, 2004-Ohio-6603.)

See, also, *State ex rel. Seitaridis v. Indus. Comm.*, 10th Dist. No. 10AP-494, 2011-Ohio-3593, ¶14, citing with approval *State ex rel. O'Brien v. Cincinnati, Inc.* 10th Dist. No. 07AP-825, 2008-Ohio-2841, ¶9.

The Magistrate also explained:

This court held in *Owens Corning* and *Howard* that the commission cannot simply rely upon a determination that an injured worker can perform at a certain strength level; rather, *the commission must review the doctor's report and actually make certain that any physical restrictions the doctor listed correspond with an ability to actually perform at the exertional level indicated by the doctor.* (Magistrate's Decision, ¶39, emphasis added.)

Here, the Magistrate determined that the Industrial Commission failed to consider the additional restrictions listed by Dr. Metz and that its failure to do so was contrary to

law. Having made this determination, the Magistrate should have found an abuse of discretion and either awarded permanent total disability benefits or, as the Tenth District Court of Appeals did, remanded this case for a proper consideration of these additional restrictions.

Unfortunately, the Magistrate did not do this. Instead, without citing any authority, with no explanation, and with no citation to any evidence to support the conclusion, the Magistrate acted as a “super-commissioner,” reweighed the evidence and concluded a writ should not issue because the additional restrictions would not preclude sedentary work. (Magistrate’s Decision, ¶40).

Metz filed an objection and the Court of Appeals agreed. Thus, the lower court correctly ordered the matter remanded to the Industrial Commission with instructions to properly weigh all the evidence.

D. The Industrial Commission’s Argument

As noted above, and as the Tenth District concluded, it is the job of the Industrial Commission, not the courts, to weigh and evaluate the evidence, and determine disability. But in doing so, the Industrial Commission cannot rely solely on the expert’s bottom line conclusion. Here, the Industrial Commission not only asks this Court to sanction the Magistrate’s error and condone a court’s weighing and evaluating of the evidence, the Industrial Commission asks this Court to consider evidence not even in the record.

For example, without citing a shred of evidence in or out of the record, the Industrial Commission suggests that this Court can conclude that the additional restrictions placed upon Metz would allow him to work “as a cashier, window clerk, or other such sedentary job *** sit at a cash register and as part of his job, exert a negligible amount of force to lift a roll of coins from the drawer, push in the cash register

drawer, and pull money from the drawer.” (Brief of Appellant, p. 9.) Simply put, this is not a finding of the Industrial Commission. It is not in the record. There is no evidence or law to support such speculation. To suggest this conclusion here is inappropriate. This Court should reject this invitation.

E. Conclusion

The Tenth District Court of Appeals properly applied well-settled law. It found the Industrial Commission had failed to properly consider the restrictions imposed by Dr. Metz and remanded this matter for further proceedings before the Industrial Commission.

2. APPELLANT’S PROPOSITION OF LAW ON CROSS-APPEAL

The Industrial Commission must consider the opinions rendered by its experts and must articulate and explain the impact of such opinions when it fails to award benefits.

A. Introduction

The basis of Metz’s cross-appeal is that both the Industrial Commission and the Tenth District Court of Appeals failed to address or explain Metz’s psychological restrictions as determined by the Industrial Commission’s expert, Steven Van Auken, Ph.D., upon whom the Commission allegedly relied. Those restrictions are significant and, even if Metz can perform sedentary work, the additional restrictions placed upon him by Dr. Van Auken nonetheless render him permanently totally disabled. Thus, Metz asks this Court to award him the permanent total disability benefits to which he is entitled pursuant to *State ex rel. Gay v. Mihm*, 68 Ohio St.3d 315, 1994-Ohio-296, 626 N.E. 2d 666.

B. Law and Argument

The decision of the Tenth District Court of Appeals did not address Metz's psychological restrictions. Its Magistrate similarly failed to address these significant restrictions. And, the Industrial Commission's decision, while quoting Dr. Van Auken's restrictions, fails to explain how, in spite of Dr. Van Auken's restrictions, Metz can perform any work.

Dr. Van Auken placed the following restrictions upon Metz:

No more than moderate demands in terms of:

- frequency of contact with the general public
- decision-making
- productivity requirements
- deadline pressures. (Stip. 47).

Dr. Van Auken also opined that Metz had other restrictions:

- Tenuous short-term memory
- Could only recall one of three objects after 5 minutes
- Could not complete any of the serial 7 subtraction exercise
- Struggled with simple non-numeric measure of attentiveness. (Stip. 38-46).

Dr. Van Auken explained that Metz had additional problems that affect his ability to work:

- Had a severe level of depression
- Was discouraged about the future
- Had thoughts of self harm
- Had persistent feelings of guilt and worthlessness

- Had a loss of appetite
- Was persistently irritable
- Suffered from insomnia
- Diminishment in concentration and energy level. (Stip. 43).

At no stage of these proceedings has the Industrial Commission explained how someone with these significant restrictions can perform any type of sedentary work. (Stip. 15-25).

In its brief, the Industrial Commission urges this Court to accept a federal circuit court of appeals's attempt, in a social security case, to define substantive differences in the meaning of the words "repetitive", "constant", and "frequent" and apply them to Ohio law. Metz respectfully suggests that this Court also, then, consider the conclusion reached by the Social Security Administration in this case. The Social Security Administration determined that Metz was permanently and totally disabled as a result of his work injuries. The Social Security Administration's Administrative Law Judge made the following finding:

The claimant has the residual functional capacity to perform sedentary work as defined in 20 CFR 404.1567(a) except that, during any given 8 hour period, the claimant cannot climb; balance; stoop; crouch; crawl; or kneel; the claimant cannot use his left arm for more than a guide; the claimant cannot work around hazards, such as moving machinery, unprotected heights, or commercial driving; the claimant cannot perform work involving rapid head movements; the claimant can only perform work in which all neck movement is accomplished by turning the entire body; the claimant is limited to performing only simple math, such as addition and subtraction; the claimant is limited to performing simple, routine, repetitive tasks not performed in a fast-paced productions environment, involving only simple, work-related decisions, and, in general, relatively few work-place changes; and the claimant cannot sit, stand or

walk, in combination, for eight hours during any given 8 hour period. (Stip. 22).

Dr. Van Auken's conclusion was that Metz was limited:

to work environments that offered no more than moderate demands in terms of deadline pressures, productivity requirements, the need for frequent decision-making and frequency of contact with the general public. (Stip. 47).

The above are all in accord and compel the same conclusion – Metz is permanently and totally disabled.

The Industrial Commission concluded that Metz can do a full range of sedentary work despite the additional restrictions discussed above. Assuming arguendo that Metz can perform a full range of sedentary work from an exertional perspective, the Industrial Commission completely failed to explain if the additional psychological limitations narrowed Metz's work ability further and why or why not. A fair reading of the Industrial Commission's decision and the lower court's decision clearly demonstrates this failure.

The court of appeals did not address this issue since it concluded that the Industrial's Commission's finding that Metz can (from an exertional standpoint alone) do sedentary work was an abuse of discretion. It ordered the matter remanded to the Industrial Commission for a proper consideration of the evidence with regard to physical exertion.

This Court has made it clear that the Industrial Commission's practice of simply citing the evidence upon which it relies is not sufficient. There must be a rational basis between the evidence cited and the conclusion reached and an explanation. This Court has repeatedly held that the law: "requires that the commission **explain** why the claimant is or is not entitled to the benefits requested." *State ex rel. Gay v. Mihm*, 68 Ohio St.3d 315, 320, 1994-Ohio-296, 626 N.E.2d 666 (emphasis added); *See also, State ex rel. Mitchell v. Robbins & Myers, Inc.*, 6 Ohio St.3d 481, 483-484 (1983); *State*

ex rel. Noll v. Indus. Comm., 57 Ohio St.3d 203 (1991); and *State ex rel. Stephenson v. Indus. Comm.*, 31 Ohio St.3d 167 (1987).

In *Gay*, this Court notes:

The history of our seemingly constant battle to have the commission explain the reasoning for its decisions is long and storied. *Gay* at 319.

Whether or not an injured worker can ever work again is an important decision that affects not only the injured worker and his employer, but the institutional integrity of both the Industrial Commission and the courts in the State of Ohio. This Court explained in *Gay*:

The courts in this state are charged with the responsibility to administer justice without denial or delay, and we will simply not allow the Industrial Commission to continue to operate in the manner demonstrated in this case *** accordingly, in a workers' compensation case involving permanent total disability, where the facts of the case indicate that there is a substantial likelihood that a claimant is permanently and totally disabled, courts are not and will not be precluded from ordering the Industrial Commission, in a mandamus action, to award permanent total disability benefits **notwithstanding the so-called "some evidence rule."** *Gay* at 323 (emphasis added).

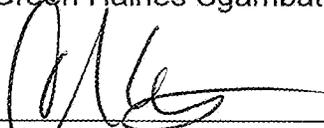
Here, Metz began working when he was 19 years old. He did not finish high school. He did not obtain a GED. The Industrial Commission determined that he has no transferrable work skills. As instructed by his physicians, he has not worked since the day he was injured. At best, the Industrial Commission argues that he is, from an exertional standpoint, capable of only sedentary work. Dr. Van Auken, the Commissions' own expert places significant psychological restrictions on Metz's ability to perform even sedentary. The Social Security Administration, considering essentially the same limitations, concluded that Metz could not work.

C. Conclusion

Here, there is more than a substantial likelihood that Metz is permanently and totally disabled. Accordingly, Metz asks this Court, notwithstanding the so-called "some evidence rule", to award Metz the permanent total disability benefits to which he is entitled.

Respectfully submitted,

Green Haines Sgambati, Co., L.P.A.



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Certificate of Service

I hereby certify that a copy of the foregoing was served on this 18th day of November, 2013, to:

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APPENDIX

Notice of Appeal - 3/28/13 Included in Appendix to Appellant’s Brief

Judgment Entry - 2/12/13 Included in Appendix to Appellant’s Brief

Decision of 2/12/13..... Included in Appendix to Appellant’s Brief

Magistrate’s Decision - 8/10/12 Included in Appendix to Appellant’s Brief

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No. 12AP-56

v.

INDUSTRIAL COMMISSION OF OHIO,

Respondent-Appellant and Cross-Appellee

and

GTC INC.,

Respondent-Appellee.

NOTICE OF CROSS APPEAL

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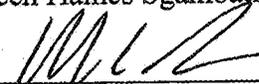
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SUPREME COURT OF OHIO

Relator-Appellee and Cross-Appellant, Joseph Metz, appeals to the Supreme Court of Ohio from the judgment of the Court of Appeals of Ohio, Tenth Appellate District, entered in Case No. 12AP-56 on February 12, 2013, and decision entered on February 12, 2013. A copy of the Judgment Entry is attached. This case originated in the Court of Appeals and is an appeal as of right under Sup.Ct.Prac.R.5.01(A)(3).

Respectfully submitted,

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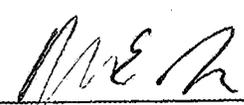
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IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio ex rel. Joseph Metz,

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v.

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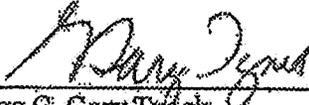
No. 12AP-56

(REGULAR CALENDAR)

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on February 12, 2013, the decision of the magistrate is approved in part. We sustain the objection in part. The findings of fact of the magistrate are adopted. However, we vacate the denial of PTSD compensation and return the case to the commission to cause Dr. Metz's restrictions and opinions to be clarified or to obtain additional medical evidence as to Joseph Metz's limitations and capacity for sedentary work. Costs shall be assessed against respondents.

Within three (3) days from the filing hereof, the clerk of this court is hereby ordered to serve upon all parties not in default for failure to appear notice of this judgment and its date of entry upon the journal.



Judge G. Gary Tyack



Judge Julia L. Dorrian

Bek

Franklin County Ohio Court of Appeals Clerk of Courts- 2013 Feb 12 2:45 PM-12AP000056