

ORIGINAL

In the
Supreme Court of Ohio

STATE OF OHIO, ex rel.	:	
JOSEPH METZ,	:	
	:	Case No. 13-0509
Appellee/Cross-Appellant,	:	
	:	On Appeal from the
v.	:	Franklin County Court of Appeals,
	:	Tenth Appellate District,
INDUSTRIAL COMMISSION OF OHIO,	:	
	:	Court of Appeals
Appellant/Cross-Appellee,	:	Case No. 12AP-56
	:	
and	:	
	:	
GTC INC.,	:	
	:	
Appellee.	:	

**THIRD MERIT BRIEF
REPLY BRIEF OF APPELLANT/RESPONSE BRIEF OF CROSS-APPELLEE,
INDUSTRIAL COMMISSION OF OHIO**

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LAW AND ARGUMENT

I. APPELLANT'S REPLY TO APPELLEE'S RESPONSE BRIEF

Appellant's Proposition of Law No. 1

A medical report is not inherently inconsistent with the physical demands classifications of the Ohio Administrative Code for sedentary work by simply finding a claimant unable to perform repetitive lifting, especially in light of the lack of evidence to the contrary, the well-established "presumption of regularity" attaching to the commission's orders, and the presumption that the commission considered all the evidence before it.

The Court of Appeals erred in finding that Dr. Metz's restriction regarding Appellee/Cross-Appellant, Joseph Metz ("Metz"), being unable to perform repetitive lifting, "on its face," "could be construed" to bar sedentary employment. (Decision, ¶9). First, the lower court's basis of a "possible tension" that "could be construed..." is not the requisite basis of a "clear legal duty" or "clear legal right" required to command a writ of mandamus. In order to grant an extraordinary writ of mandamus, the court must find that: 1) Metz, as the relator, had a clear legal right to the grant of permanent total disability ("PTD") benefits and 2) the commission had a clear legal duty to award Metz PTD benefits. *State ex rel. Pressley v. Indus. Comm.*, 11 Ohio St.2d 141 (1967). Here, the lower court made no such findings.

Second, the lower court erred in failing to apply the definition of "sedentary work" as set forth in the Ohio Administrative Code. In Ohio Adm. Code 4121-3-34(B)(2)(a), "sedentary work," is specifically defined to allow: "exerting up to ten pounds of force occasionally to lift, carry, push or pull objects." Dr. Metz's report included one statement that said Metz is unable to perform "repetitive lifting, carrying or bending activities." However, "occasional lifting" and "repetitive lifting" are not the same. Yet, Metz and the lower court incorrectly assert the commission abused its

discretion in finding, per Dr. Metz's report, that Metz is capable of "sedentary work" ("occasional lifting"), but is unable to perform "repetitive lifting, carrying or bending activities."

Similarly, Dr. Metz's analysis, diagnosis, and statement is not an "additional restriction" but falls within the confines of Ohio Adm. Code 4121-3-34(B)(2)(a). Dr. Metz's finding does not contradict the physical demand classifications of sedentary work but is compatible with sedentary employment.

Ohio Adm. Code 4121-3-34(B)(2)(a) states:

"Sedentary work" means exerting up to ten pounds of force *occasionally* (occasionally: activity or condition exists up to one-third of the time) and/or a negligible amount of force *frequently* (frequently: activity or condition exists from one-third to two-thirds of the time) to lift, carry, push, pull, or otherwise move objects. Sedentary work involves sitting most of the time, but may involve walking or standing for brief periods of time. Jobs are sedentary if walking and standing are required only occasionally and all other sedentary criteria are met. [Emphasis added.]

Dr. Metz stated that Metz is capable of "sedentary work," which by definition includes "exerting up to ten pounds of force *occasionally*" or "a negligible amount of force *frequently*" "...to lift, carry, push, pull, or otherwise move objects." In his report, Dr. Metz states that Metz is unable to perform "repetitive lifting, carrying or bending activities." Again, (contrary to Metz's arguments), "repetitive lifting" and "occasionally exerting up to ten pounds of force" to lift are not the same. Metz's arguments fail by the plain meaning of the words. Similarly, "repetitive lifting" and "frequently exerting a negligible amount of force" to lift are not the same activities.

The term "occasional" is defined, for purposes of identifying a sedentary work range, as an activity that exists up to one-third of the time. The term "frequent" is defined as an activity that exists from one-third to two-thirds of the time. Ohio Adm.

Code 4121-3-34(B)(2)(a). However, the term “repetitive” is not part of the definition of sedentary work at all. However, the word “repetitive” generally means “happening again and again; repeated many times.” Merriam-Webster Dictionary. Such distinctions are consistent with the federal law cited by the dissenting opinion of the lower court’s opinion. As Judge Sadler noted:

***federal courts have, in social security cases involving a similar definition of sedentary work, repeatedly declined to equate the term *repetitive* with the word *frequent*. As stated by the Ninth Circuit, “ ‘repetitively’ *** appears to refer to a *qualitative* characteristic –i.e., *how* one uses his hands, or *what type* of motion is required –whereas ‘constantly’ or ‘frequently’ seem to describe a *quantitative* characteristic – i.e., *how often* one uses his hands in a certain manner.” (Emphasis sic.) *Gardner v. Astrue*, 257 Fed.Appx. 28, 30, fn. 5 (9th Cir.2007); *see also Gallegos v. Barnhart*, 99 Fed.Appx. 222, 224-25 (10th Cir.2004) (“frequent” and “repetitive” are not synonymous).

Metz cites *State ex rel. Seitaridis v. Indus. Comm.*, 10th Dist. No. 10AP-494, 2011-Ohio-3593, at ¶ 14 for the proposition that, if the relied-upon medical report imposes specific restrictions, the commission is obligated to make certain that such restrictions do not preclude the ability to perform work at the exertional level indicated.

As previously indicated, limited repetitive lifting, carrying or bending activities are compatible to Ohio Adm.Code 4121-3-34(B)(2)(a). As noted by the Magistrate in the court below, Dr. Metz's additional restrictions would not preclude sedentary work and would not be so limiting that only limited periods of work would be possible. Having cited to both *State ex rel. Owens Corning Fiberglass v. Indus. Comm.*, 10th Dist. Franklin No. 03AP-684, 2004-Ohio-3841, and *State ex rel. Howard v. Millennium Inorganic Chems.*, 10th Dist. Franklin No. 03AP-637, 2004-Ohio-6603, the Magistrate reasoned, “[s]ince sedentary work is defined as involving sitting most of the time, neither repetitive lifting, carrying, nor bending would ordinarily fall within the definition of sedentary

work. The magistrate finds that Dr. Metz's additional restrictions are compatible with sedentary employment and do not rise to the level which would require the commission to provide additional analysis." (App. 16).

Last, the Commission, as the "exclusive evaluator of disability", must have the ability to weigh and evaluate the individual facts of each individual person's disability. In its order, the Commission did list Dr. Van Auken's limitations based on Metz's work-injury related depressive symptoms, which limited him to a work environment that would offer him no more than moderate demands in terms of deadline pressure, and productivity requirements due to his diminished concentration, energy, and stress tolerance. (S. 15-16).

The Commission then evaluated both Dr. Metz's report and Dr. Van Auken's report to conclude on a whole that Metz is capable of sustained remunerative employment. (S.16). The Commission must only state what evidence it relied upon. *State ex rel. Mitchell v. Robbins & Myers, Inc.* (1983), 6 Ohio St.3d 481; 453 N.E.2d 721. The commission is not required to provide an exhaustive analysis of the evidence. *Mitchell* at 6 Ohio St.3d at 484; 453 N.E.2d at 724.

It is important to note, when discussing the limitations in Dr. Van Auken's report, as Metz has asked this Court to do, Dr. Van Auken opines that part of Metz's impairment is due to his alcohol dependence. Dr. Van Auken also makes it a point to note that 1) there is a pattern of multiple causations of his impairments; 2) most of his impairments are attributable to his work injury on a mild range, and; 3) concerning his concentration and social isolation, Metz did not appear to have particular difficulty relating in the context of the exam. (S. 24-25).

Metz also asks this Court to further evaluate evidence and consider the Social Security Administration's decision finding Metz disabled. The commission has no duty to explain why one opinion is rejected in favor of another, or to set forth the reasons for finding one report more persuasive than another. *State ex rel. Bell v. Indus. Comm.*, 72 Ohio St.3d 575, 1995-Ohio-121. Further, it has long been held that the commission has no duty to list specific jobs that the injured worker can perform. The Commission need only identify the level at which an injured worker can function and need not identify any particular job. *State ex rel. Longlott v. Indus. Comm.* (Apr. 4, 2001), Franklin App. No. 99AP-881, unreported, affirmed 91 Ohio St 3d 247, 2001-Ohio-30, 744 N.E.2d 188. The medical reports and other information in the record provided more than "some evidence" to support the denial of PTD benefits.

As indicated, the Court of Appeals erred in granting the writ of mandamus based on an assertion of a "possible tension" that "could be construed..." This is not the requisite basis of a "clear legal duty" or "clear legal right" required to command a writ of mandamus.

Further, "sedentary work," by definition, allows for "exerting up to ten pounds of force *occasionally*." Dr. Metz found that Metz is unable to perform "*repetitive* lifting," but was able to do the "sedentary work" of "occasional lifting." "Occasional lifting" and "repetitive lifting" are not the same. A bar to "repetitive lifting" does not mean Metz cannot do "occasional" lifting.

As stated above, the Commission, as the "exclusive evaluator of disability," must have the ability to weigh and evaluate the individual facts of each individual person's disability. The medical reports and other information in the record provided more than

“some evidence” to support the denial of PTD benefits. For all of the above reasons, this Court should reverse the decision of the court of appeals and deny the requested writ of mandamus

II. CROSS-APPELLEE’S RESPONSE TO CROSS-APPELLANT’S PROPOSITION OF LAW

Appellant/Cross-Appellee’s Proposition of Law No. 2:

The Industrial Commission, in determining an issue of disability, need only state that evidence which has been relied upon and a brief explanation stating why the claimant is or is not entitled to the benefits requested.

In his cross-appeal before this Court, Metz contends the commission as well as the Tenth District Court of Appeals did not address Metz’s psychological restrictions per Van Auken, Ph.D. Metz is mistaken. In its order, the commission lists Dr. Van Auken’s opinion which was based on Metz’s work-injury related depressive symptoms. Dr. Van Auken opined that Metz was limited to a work environment that would offer him no more than moderate demands in terms of deadline pressure, and productivity requirements due to his diminished concentration, energy, and stress tolerance. (S. 15-16). The commission then evaluated both Dr. Metz’s report and Dr. Van Auken’s report to conclude, on a whole, that Metz is capable of sustained remunerative employment. (S. 16). The commission is only required to state the evidence it relied upon. *State ex rel. Mitchell v. Robbins & Myers, Inc.*, 6 Ohio St.3d 481, 453 N.E.2d 721 (1983). The commission is not required to provide an exhaustive analysis of the evidence. *Mitchell* at 6 Ohio St.3d at 484; 453 N.E.2d at 724.

As both the Magistrate and the Court of Appeals noted, the commission did, indeed, consider all the restrictions placed upon Metz by Dr. Van Auken. App. 7, 14. Metz, however, improperly asks this Court to reweigh the evidence in this regard, contrary to the holdings of this Court in such cases as *State ex rel. Moss v. Indus. Comm.*, 75 Ohio St.3d 414, 416, 1996-Ohio-306.

Even if this were proper, Metz's arguments ignore the following non-work related stressors and psychological difficulties that Dr. Van Auken noted:

1. In 2000 (five years before Metz's 2005 work injury), Dr. Van Auken's report notes that Metz "was at the wheel of his vehicle in 2000, when, while intoxicated, he was involved in an accident which took the life of his wife," the mother of their four children. (S. 23.)
2. For that alcohol related fatality, Metz was convicted of "DUI with death" and served time in prison. (S. 22.)
3. In Dr. Van Auken's examination of Metz, particularly regarding this tragic and profoundly life changing event, Metz stated: "I live it every day." (S. 21-22)
4. Metz is alienated from his parents, and three of his four children. He is estranged from his 19 year old daughter, Megan, (he states he does not even know where she lives); and Dr. Van Auken's report further states that "as far as his [25 year old] daughter Ashley is concerned, '[t]he last time I heard, she was still' in southern Ohio." (S. 21-22.)

5. Of his one minor child, 14 year old Brandon, Metz noted to Dr. Van Auken: "I'm not allowed to see Brandon." "My parents took Brandon away from me two years ago. They're not my parents no more." (S. 21.)
6. Metz spends his time lying in bed and watching TV. (S. 21.)
7. Metz says: "I have no one to take care of me," and that at the Greenfield, Ohio facility, Metz is prescribed methadone. (S. 20.)
8. From his personal examination and psychological testing of Metz, Dr. Van Auken found indication of "symptom magnification" by Metz on his psychological test scores and much of Metz's limitations were due to physical (non- psychological) and non-work related issues. (S. 23-25.)
9. For example, Dr. Van Auken found: "[t]he depressive symptoms that he has are considered quite likely to persist indefinitely from this point, in parallel with his experience of pain and loss of valued capabilities, including employment, and **also in parallel with non-injury related factors, especially alienation from family in consequence of actions related to his alcohol dependence,** which he reports is currently in remission." [Emphasis added.] (S. 24.)
10. Although Metz stated his alcohol dependence was in "remission by self-report," despite his 2000 DUI where his wife was killed, Metz continued his alcohol abuse for years, with a DUI conviction as late as February 2009. (Supp. 25.)

Metz's cross-appeal based on Dr. Van Auken's report does not include these numerous, deep, personal, non-work related psychological and emotional conditions

challenging Metz. In fact, this Court has clearly held that it would be error for the commission (or a court) to use these non-allowed conditions as a basis for PTD considerations. *State ex rel. Bradley v. Indus. Comm.*, 77 Ohio St. 3d 239, 242, 1997-Ohio-48 at ¶ 6-7. (A claimant cannot be compensated for disability caused by conditions unrelated to his employment injury or resulting from non-allowed medical conditions.) *State ex rel. LTV Steel Co. v. Indus. Comm.*, 65 Ohio St.3d 22, 599 N.E.2d 265 (1992).

As indicated, Metz inappropriately asks this Court to reweigh evidence and consider the Social Security Administration's decision finding Metz disabled. Such an individual decision of an unrelated federal agency may be based on a host of factors not relevant to Ohio's workers' compensation law. That is one reason why the commission has no duty to explain why one opinion may be rejected in favor of another, or to set forth the reasons for finding one report more persuasive than another. *State ex rel. Bell v. Indus. Comm.*, 72 Ohio St.3d 575, 1995-Ohio-121. Likewise, it has long been held that the commission has no duty to list specific jobs that the injured worker can perform. The Commission need only identify the level at which an injured worker can function and need not identify any particular job. *State ex rel. Longlott v. Indus. Comm.*, 10th Dist. Franklin No. 99AP-881, (August 3, 2000); affirmed 91 Ohio St.3d 247, 2001-Ohio-30, 744 N.E.2d 188.

Contrary to Metz's arguments, relief under *Gay v. Mihm*, 68 Ohio St. 3d 315, 626 N.E.2d 666 (1994), is not appropriate here, because this case does not present the requisite one-sidedness of evidence discussed in *Gay*. This Court in *Gay* did not abandon the "some evidence" rule articulated in *State ex rel. Burley v. Coil Packing, Inc.*, 31 Ohio St. 3d 18, 508 N.E.2d 936 (1987). *State ex rel. Pass v. C.S.T. Extraction Company*, 74

Ohio St. 3d 373, 376, 658 N.E.2d 1055 (1996). *Gay v. Mihm* is not an occasion for *de novo* evidentiary review. Under *Gay*, the court defers to the commission's expertise in disability matters. The commission's decision to find one medical report more persuasive than another, for example, will not be second-guessed. *Id.* *Gay* relief was intended as a narrow exception to the general rule of returning *Noll*-deficient orders to the commission. *Gay* relief will be granted only in extraordinary circumstances revealing an abuse of discretion. *Id.* In *State ex rel. LeVan v. Indus. Comm.*, 80 Ohio St. 3d 55, 47, 684 N.E.2d 327, 329 (1997), this Court denied *Gay* relief, holding "Gay relief is intended for only the most egregious of situations, where the evidence is so one-sided as to compel but one result." *Id.* Here, this is not the case.

The commission's order cites the medical reports of Drs. Metz and Van Auken. (R. 90). The medical reports contain their evaluations of Metz and provide evidence that was not present in *Gay*. The medical reports and other evidence in the record provide Metz's history, diagnosis, employment analyses, physical and psychological restrictions and, as such, provide more than "some evidence" upon which the commission could deny PTSD. Furthermore, this Court has consistently held that the commission's decision to find certain medical reports more persuasive than others should not be disturbed. *State ex rel. Pass v. C.S.T. Extraction Company*, 74 Ohio St. 3d 373, 376, 658 N.E.2d 1055 (1996). As with any other factual issue, "questions of credibility and the weight to be given evidence are clearly within the commission's discretionary powers of fact-finding." *State ex rel. Teece v. Indus. Comm.*, 68 Ohio St.2d 165, 169, 429 NE.2d 433, 436 (1981). As to the non-medical factors under *State ex rel. Stephenson v. Indus. Comm.*, 31 Ohio St.3d 167; 509 N.E.2d 946 (1987), they too were adequately addressed and appropriately

discussed by the commission and are not challenged by Metz in mandamus. Thus, extraordinary relief under *Gay* is in no way appropriate in this case.

CONCLUSION

“Sedentary work,” by definition, allows for “exerting up to ten pounds of force occasionally.” Dr. Metz found that Metz is unable to perform “repetitive lifting.” but was able to do the “sedentary work” of “occasional lifting.” “Occasional lifting” and “repetitive lifting” are not the same. A bar to “repetitive lifting” does not mean Metz cannot do “occasional” lifting. Likewise, contrary to the Ohio Administrative Code, Metz’s arguments mixing the terms “frequent,” “occasional,” and “repetitive” fail.

Second, the Court of Appeals erred when it granted a writ of mandamus, particularly based on Dr. Metz’s restriction regarding Metz being unable to perform repetitive lifting and finding that “on its face,” it “*could* be construed” to bar “sedentary” employment. The lower court’s writ of mandamus based on an assertion of a “*possible* tension” that “*could* be construed” is not the requisite basis of a “clear legal duty” or “clear legal right” required to command a writ of mandamus.

Third, the Commission, as the “exclusive evaluator of disability”, must have the ability to weigh and evaluate the individual facts of each individual person’s disability. Further, the medical reports and other information in the record provided more than “some evidence” to support the denial of PTD benefits.

As to his cross-appeal, Metz’s arguments are based particularly on the psychiatric report of Dr. Van Auken. However, Metz’s arguments fail to consider the more significant mental, emotional and psychological stressors totally unrelated to (and many of them even predating) Metz’s 2005 work incident. These include causing his wife’s

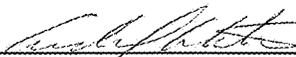
death in a car accident while intoxicated and “living it every day,” nevertheless continuing his alcohol dependency and resulting DUI’s, and being estranged and cut off from his children and closest relatives. Furthermore, relief under *Gay* is not appropriate because this case does not present the requisite one-sidedness of evidence discussed in *Gay* and this Court in *Gay* did not abandon the “some evidence” rule articulated in *State ex rel. Burley v. Coil Packing, Inc.*

As presented in the well-reasoned lower court’s dissenting opinion and the magistrate’s decision, and as articulated above, the lower court’s two person majority erred in disregarding the regulatory definition of “sedentary work.” Likewise, the cross-appeal must fail as the facts and law of this case do not even approach the requisite total one-sidedness seen in *Gay v. Mihm*.

For all of these reasons, this Court should reverse the decision and judgment of the court of appeals, deny the requested writ of mandamus, as well as deny the cross-appellant’s cross-appeal.

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I hereby certify that a copy of the foregoing was served on this 12/11 of December,

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