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
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FOURTH BRIEF
REPLY BRIEF OF APPELLEE/CROSS-APPELLANT JOSEPH METZ

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Statement of Facts

Metz filed this cross-appeal because the Industrial Commission of Ohio did not consider the multiple limitations the Industrial Commission's own psychologist placed upon Metz's ability to work when it denied Metz's claim for permanent total disability benefits. More importantly, the Industrial Commission made no attempt to explain how, despite these multiple restrictions, Metz could nonetheless work.

Metz raised this issue before the Tenth District Court of Appeals. Metz pointed out that the Commission's order simply reports some of Dr. Van Auken's restrictions and provides no explanation. Without offering any reason, the Court of Appeals's Magistrate concluded that the quoting of restrictions from Dr. Van Auken's report was enough of an "explanation."

Metz objected to the Magistrate's decision. The majority opinion of the Court of Appeals does not even mention Dr. Van Auken. Metz assumes that the reason for this is because the Court of Appeals found other error in the Commission's decision and ordered this matter remanded. The Commission appealed. Metz then filed this cross-appeal with regard to the Commission's failure to explain how Metz could work despite Dr. Van Auken's restrictions.

Argument

In his Second Brief, Metz listed the numerous and severe restrictions Dr. Van Auken placed upon him, to wit: limited frequency of contact with the general public, decision-making, productivity requirements, and 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 five minutes, could not complete any of the Serial Sevens Subtraction Exercises, and struggled with simple non-numeric measures of attentiveness. (Stip. 38-46). Dr. Van Auken explained that Metz had additional problems that affect his ability to work: 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). The Industrial Commission does not deny that Metz has these limitations as the result of his industrial injury. Instead, without citing where in its order these restrictions are considered and where in its order there is an explanation of how Metz can work despite these restrictions, the Industrial Commission boldly asserts – "the commission did, indeed, consider all the restrictions placed upon Metz by Dr. Van Auken." (Third Merit Brief, p. 7). One must ask rhetorically – where?

The Industrial Commission's bold assertion is simply not true. Below is the entirety of what the Industrial Commission said in its order about the limitations imposed by Dr. Van Auken. The Commission's order simply recites small parts of Dr. Van Auken's report and contains no explanation of how, despite the above restrictions, Metz can work:

> Dr. Steven Van Auken, Ph.D., who examined the Injured Worker on behalf of the Industrial Commission strictly regarding the Injured Worker's psychiatric condition only also indicates that the injured Workers' psychiatric condition has reached maximum medical improvement, and that he can not return to his former position of employment, but would be able to return to some sustained renumerative [sic] employment 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. He further states that the Injured Worker has 35 percent permanent partial impairment with respect to the whole person as it relates to the Injured Worker's psychiatric condition only…the Staff Hearing Officer concludes on a whole that the Injured Worker is medically capable of performing some sustained renumerative [sic] employment, i.e. sedentary work in a non-stressful, non-demanding work environment.
>
> ***

> ...and Dr. Van Auken, Ph.D. who indicate[d] that the Injured Worker can perform sedentary work in a non-stressful, non-demanding work environment.

This is the Industrial Commission's *entire* explanation.

Instead of addressing its above failure, the Industrial Commission now maliciously seeks to divert this Court's attention from the legal issue before it by selecting items from Dr. Van Auken's report that reflect negatively upon Metz and listing them ad nauseam in its brief. (Third Merit Brief, pp. 7-8). The Industrial Commission then seemingly attempts to argue that Metz has failed to discuss these negative facts in his cross-appeal. The Industrial Commission asserts – "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." (Third Merit Brief, pp. 8-9).

No, Metz did not discuss these. Metz did not discuss these items for numerous reasons. First, the issue before this Court is the sufficiency of the Industrial Commission's order denying Metz permanent total disability benefits. The Industrial Commission's order makes absolutely **no** reference to the list of items it now spends three pages discussing. The entire language in the Industrial Commission's order is quoted above. These items are not in that order and are therefore simply irrelevant. Second, the Industrial Commission states that its order is based on Dr. Van Auken's report. Dr. Van Auken is the Industrial Commission's psychologist. (Marian Chatterjee, Ph.D., Metz's psychologist, confirmed unequivocally that Metz was permanently and totally disabled. (Stip. 30)). Until now, the Industrial Commission has *never* claimed that any limitations identified by Dr. Van Auken are the result of something other than Metz's work injuries. If this is the Commission's position now, then its reliance on Dr. Van Auken to deny Metz the benefits to which he is entitled is contrary to law and its order must be vacated.

Significantly, Dr. Van Auken states that his "opinion is based on today's history and examination, review of the records provided, and **only the allowed conditions** I have been asked to evaluate in this claim." (Stip. 43, emphasis added). In addition to the restrictions already highlighted by Metz in his Second Brief, Dr. Van Auken also provides:

> The depressive symptoms that he has are considered quite likely to persist indefinitely from this point...
>
> ***
>
> It does appear that some feelings of discouragement, and also irritability, associated with the work injury-connected aspects of his depression, do limit his participation in some activities.
>
> ***
>
> The amount of impairment in this area realistically attributable to the work-connected aspect of his depression, including consequent irritability and diminished social tolerance, is in the Class II, mild range.
>
> ***
>
> It is likely that his irritability and his discouragement, as aspects of his depression, do limit his functioning in this area to some degree. The amount of impairment here realistically attributable to his work-connected depressive symptoms again is in the mild range.
>
> In regard to his adaption to changing life circumstances, again we see a similar picture. It is certainly the case that his reserves of adaptive flexibility are low...The amount of impairment in this area realistically attributable to his work injury related to present symptoms, again, is in the mild range.
>
> In consideration of the elements of functioning described above, we find that Mr. Metz is experiencing Class II, mild psychological impairment, attributable to his work-connected "major depressive disorder recurrent." (Stip. 44-45).

Dr. Van Auken then summarized that Metz's work-injury-related depressive symptoms resulted in "diminishments in concentration, energy level, stress tolerance, and social tolerance" and limited him 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 Industrial Commission order challenged here by Metz did not provide any explanation as to how someone limited to, at most, sedentary work, with the additional restrictions set-forth above, and in Metz's Second Brief, could possibly work. Simply put, to now list facts not in the Commission's order that reflect negatively upon Metz as a human being is nothing more than a bold attempt to divert this Court from the issues before it.

Over twenty-two years ago, this Court held that it was important for the Industrial Commission to not only cite the evidence upon which it relied, but to provide a "brief explanation stating why the claimant is or is not entitled to the benefits requested." *State ex rel. Noll v. Indus. Comm. of Ohio* 57, Ohio St.3d 203, 204 (1991). This Court explained that it was "most important" that the Industrial Commission explain the basis of its decision. *Id.* at 206. This Court stated:

> We are acutely aware of the vast number of cases which arise involving these issues. Additional work will of necessity be encountered. *However, we can never simply use expedience in resolving these cases, for by doing so, justice and fairness would be lost.* (Emphasis added.) *Id.*

In his concurring opinion, Justice Douglas expanded upon the thoughts of the majority:

> It is well to remember that we are dealing with the very existence of real live human beings who have suffered an industrial injury. They are not just another number to be dealt with in some perfunctory way. *Id.* at 210

See also *State ex rel. Mitchell v. Robbins & Myers, Inc.* 6 Ohio St.3d 481 (1983) and *State ex rel. Burley v. Coil Packing, Inc.*, 31 Ohio St.3d 18 (1987).

The Magistrate's decision offered no more of an explanation than did the Industrial Commission. In her findings of fact, at paragraph 28, the Magistrate simply quoted part of Dr. Van Auken's report. Then, at paragraphs 34 and 35, again doing nothing more than quoting parts of Dr. Van Auken's reports, the Magistrate held that since some of the restrictions placed upon Metz by Dr. Van Auken were, in fact, quoted in the Industrial Commission's decision, this was enough. But quoting Dr. Van Auken's restrictions is not an explanation. Indeed, Dr. Van Auken placed serious restrictions upon Metz's ability to work. How Metz could still perform some type of sedentary employment needs an explanation.

The decision of the Court of Appeals (other than a vague reference in the dissent) does not even mention Dr. Van Auken. This is probably because the Court of Appeals agreed with the Magistrate that the Industrial Commission failed to consider the additional physical restrictions placed upon Metz by Karl V. Metz, M.D. and ordered the matter returned to the Industrial Commission for proper consideration of the evidence. Clearly, there has never been an explanation as to how someone with such serious psychological restrictions can engage in some type of sedentary employment.

The Industrial Commission also asserts that "[t]he commission is not required to provide an exhaustive analysis of the evidence." (Third Merit Brief, p.6). Metz agrees. However, the Industrial Commission is required to provide *some* type of explanation. Here, it has provided none.

Next, the Industrial Commission complains about Metz's reference to the decision of the Social Security Administration's finding Metz permanently and totally disabled. Metz

recognizes that this decision is not binding upon the Industrial Commission (although it is persuasive). Metz raised this issue in response to the Industrial Commission's argument that this Court should adopt a federal circuit court of appeals's attempt to define substantive differences in the meaning of the words "repetitive", "constant", and "frequent" for Ohio workers' compensation cases. Metz simply suggests that, if those definitions are binding upon this Court, then the decision of the Social Security Administration that Metz is permanently and totally disabled should also be binding.

The Industrial Commission also argues that it has the authority "to find one medical report more persuasive than another***" (Third Merit Brief, p. 10). That issue is not presented here, and Metz has not raised it. Despite what the Industrial Commission argues, the matter presented here is not whether one medical report is more persuasive than another. There are no questions of credibility. There is no question of weighing the evidence. Metz's position is that the Industrial Commission's expert's report, i.e. Dr. Van Auken, places multiple restrictions upon Metz's ability to work that requires the Industrial Commission to *explain* why the multiplicity of restrictions placed upon him by Dr. Van Auken do not prevent Metz from working.

Lastly, Metz disagrees that this case "does not present the requisite one-sidedness of evidence discussed in *Gay*." (Third Merit Brief, p.9). Indeed it does. As illustrated in all of the pleadings before this Court, 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 transferable work skills. As instructed by his physicians, he has not worked since the day he was injured. At best, the Industrial Commission argues that Metz is, from an exertion standpoint, capable of only sedentary work. Dr. Van Auken, the Industrial Commission's own expert, places

significant psychological restrictions on Metz's ability to perform even sedentary work. The Social Security Administration, considering the same limitations, concluded that Metz could not work. Metz's own physicians have all concluded that he is permanently and totally disabled.

This Court explained in *State ex rel. Gay v. Mihm*, 68 Ohio St.3d 315, 1994-Ohio-296:

> 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.** (Emphasis added.) *Id.* at 323.

This Court's holding in *Gay* applies here.

Conclusion

The Industrial Commission failed to consider the evidence of its own expert, which shows Metz is permanently and totally disabled. The lower court erred when it failed to sustain Metz's objection to the Magistrate's decision with respect to this issue. The lower court's judgment should be revered on Metz's cross-appeal.

Respectfully submitted,

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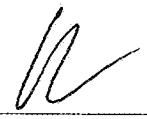

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