[Cite as *State ex rel. Rittenhouse v. Indus. Comm.*, 2011-Ohio-6052.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. David C. Rittenhouse,	:	
Relator,	:	
v.	:	No. 10AP-1050
Industrial Commission of Ohio and Duke's Sanitary Service, Inc.,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on November 22, 2011

Heller, Maas, Moro & Magill Co., L.P.A., and *Robert J. Foley*, for relator.

Michael DeWine, Attorney General, and *Robert Eskridge*, *III*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

BROWN, J.

{¶1} Relator, David C. Rittenhouse, has filed an original action requesting that this court issue a writ of mandamus ordering respondent, Industrial Commission of Ohio, to vacate its order denying him permanent total disability compensation, and to enter an order granting said compensation.

{¶2} This matter was referred to a magistrate of this court pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate issued the appended decision, including findings of fact and conclusions of law, recommending that

this court deny relator's request for a writ of mandamus. No objections have been filed to that decision.

{¶3} Finding no error of law or other defect on the face of the magistrate's decision, this court adopts the magistrate's decision as our own, including the findings of fact and conclusions of law. In accordance with the magistrate's recommendation, relator's requested writ of mandamus is denied.

Writ of mandamus denied.

BRYANT, P.J., and TYACK, J., concur.

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[Cite as *State ex rel. Rittenhouse v. Indus. Comm.*, 2011-Ohio-6052.]

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. David C. Rittenhouse,	:	
Relator,	:	
v.	:	No. 10AP-1050
Industrial Commission of Ohio and Duke's Sanitary Service Inc.,	:	(REGULAR CALENDAR)
Respondents.	:	

M A G I S T R A T E ' S D E C I S I O N

Rendered on August 24, 2011

Heller, Maas, Moro & Magill Co., L.P.A., and *Robert J. Foley*, for relator.

Michael DeWine, Attorney General, and *Robert Eskridge*, III, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶4} In this original action, relator, David C. Rittenhouse, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order denying him permanent total disability ("PTD") compensation, and to enter an order granting the compensation.

Findings of Fact:

{¶5} 1. On June 14, 1990, relator sustained an industrial injury while employed with respondent Duke's Sanitary Service Inc., a state-fund employer. The industrial claim (No. 90-25723) is allowed for:

> Sprain of neck; sprain thoracic region; contusion of thigh, bilateral; sprain lumbar region; herniated disc L5-S1.

{¶6} 2. On September 15, 2005, relator filed an application for PTD compensation.

{¶7} 3. At the commission's request, relator was examined by a Dr. Bond whose report is not contained in the stipulation of evidence filed in this action.

{¶8} 4. Following an April 4, 2006 hearing, a staff hearing officer ("SHO") issued an order denying relator's PTD application. Relying exclusively upon the report of Dr. Bond, the SHO determined that the industrial injury medically permits relator to perform light work. The SHO addresses Dr. Bond's report:

> This order is based upon the report of Dr. Bond (State Specialist).
>
> Dr. Bond, who examined the Injured Worker on behalf of the Industrial Commission, indicated that the Injured Worker has reached maximum medical improvement, and that he cannot return to his former position of employment, but is capable of performing light activities which means exerting up to 20 pounds of force occasionally and/or up to 10 pounds of force constantly to move objects. He sums his opinion by indicating that the Injured Worker has a 10% permanent partial impairment with respect to the whole person as it relates to the Injured Worker's sole industrial injury from an orthopedic standpoint.
>
> Therefore, based upon the opinion of Dr. Bond, who has examined the Injured Worker on all of the allowed conditions for which the Injured Worker's sole industrial injury is recognized, the Staff Hearing Officer concludes that the

> Injured Worker is medically capable of performing some sustained remunerative employment. Therefore, the Staff Hearing Officer finds that a discussion of the Injured Worker's non-medical disability factors are now in order.

After extensive discussion of the nonmedical factors, including the work history, the SHO concluded:

> * * * [T]he Injured Worker can at least be re-trained to perform other occupations based upon his prior work history or at least have the ability to access other unskilled work in the economy.

{¶9} 5. On January 19, 2010, relator filed another PTD application which is the one at issue here.

{¶10} 6. The PTD application form asks the applicant to provide information regarding his work history. Among the information requested, the applicant is asked to list the job titles he has held, the type of business or industry where the job title was held, and the dates worked under the job title.

{¶11} Relator indicated that he was a "tile setter" in the "flooring" business from 1996 to 2000; he was a "welder" in the "Fab-shop" business from 1991 to 1994; he was a "[f]oreman" in the "cleaning" business from 1989 to 1990. It can be noted that relator was injured on June 14, 1990.

{¶12} 7. The PTD application also asks the applicant to describe the basic duties of each job title held. For the "foreman" job title, which relator identified as pertaining to "Dukes," relator described his job duties as follows:

> Industrial cleaning, high pressure water, vac, pump out oil and grease pits[.]

This job also involved "[d]riving and operating equipment."

{¶13} 8. On March 4, 2009, at the commission's request, relator was examined by Karl V. Metz, M.D. In his five-page narrative report, Dr. Metz concludes:

> It is my opinion, based on my experience as an orthopaedic surgeon, that Mr. Rittenhouse is capable of functioning at a light work demand capability. Within that scope, the [injured worker] should do no repetitive bending, lifting or carrying. He would have a weight restriction of no more than 20 – 25 lbs. – lifting and carrying, occasionally. No climbing of ladders. He is capable of working 4-6 hours/day, at least 3 days/week. This recommended schedule could be amended based upon the outcome of an [functional capacity evaluation].

{¶14} 9. On March 4, 2009, Dr. Metz also completed a physical strength rating form on which he indicated by his mark that relator is capable of "light work." In the space provided, in his own hand, Dr. Metz listed further limitations:

> No repetitive bending, lifting or carrying. Occasional lifting and carrying of no more then 20-25 lbs. No climbing of ladders. Can work 4-6 hrs/day, at least 3 days/week.

{¶15} 10. Following a May 19, 2010 hearing, an SHO issued an order denying the PTD application filed January 19, 2010 at issue here. The SHO's order of May 19, 2010 explains:

> In issuing this order, the Staff Hearing Officer relies upon the 03/04/2009 medical narrative report of Industrial Commission Specialist, Dr. Karl Metz, M.D. The Staff Hearing Officer further relies upon the 06/02/2009 Functional Capacity Evaluation of Devin Witt, P.T.; the Injured Worker's IC-2 application; and the Injured Worker's testimony at hearing as further described in the body of this order. When considering all of this evidence in totality, the Staff Hearing Officer is persuaded that the Injured Worker is capable of engaging in sustained remunerative employment.
>
> Dr. Metz evaluated the Injured Worker on behalf of the Industrial Commission. In his report of 03/04/2009, Dr. Metz opines that the allowed conditions have reached maximum medical improvement. He reports that the Injured Worker walks with a normal gait and station; that he can balance

satisfactorily from the right to the left foot; and that he can perform heel and toe walking without difficulty. Dr. Metz further notes no atrophy of the lower extremities on circumferential measurements; manual muscle testing graded at 5/5 for the quadriceps and hamstrings; the absence of muscle spasm in the lumbar, thoracic and cervical regions; and the absence of sensory deficits in the cervical region. Dr. Metz concludes by stating that the Injured Worker retains the physical functional capacity to perform in the light work category.

Light work is defined under Ohio Administrative Code Section 4121-3-32 (B) (2) (b)

Light work means exerting up to twenty pounds of force occasionally, and/or up to ten pounds of force frequently, and/or a negligible amount of force constantly (constantly: activity or condition exists two-thirds or more of the time) to move objects. Physical demand may be only a negligible amount, a job should be rated light work: (1) when it requires walking or standing to a significant degree; or (2) when it requires sitting most of the time but entails pushing and/or pulling or arm or leg controls; and/or (3) when the job requires working at a production rate pace entailing the constant pushing and/or pulling of materials even though the weight of those materials is negligible.

It is noted that Dr. Metz further adds the proviso in his light work determination that the Injured Worker should not engage in "repetitive bending, lifting, or carrying…the Injured Worker can perform occasional lifting and carrying at no more than 20-25 pounds…no climbing of ladders…and can work 4 – 6 hours per day at least three days per week".

Dr. Metz's conclusion of this Injured Worker's retained functional capacity finds support in the most recent Functional Capacity Evaluation of Devin Witt, P.T. In his report of 06/02/2009, Mr. Witt describes the retained functional capacity of the Injured Worker. Mr. Witt determined that the Functional Capacity Evaluation demonstrated that this Injured Worker has the ability to function at the "light" physical demand level. Mr. Witt's evaluation was performed at the request of the Injured Worker's physician of record, Dr. N. Stychno, D.C.

Given the above evidence, the Staff Hearing Officer is persuaded that the Injured Worker has the retained functional capacity to perform work within the light work classification. Notably, the Injured Worker's IC-2 application describes the Injured Worker's past employment as consisting of a title setter, a welder, and high water pressure cleaner. In the description of the basic job duties for each of these positions, the Injured Worker states that none of these jobs required lifting greater than twenty pounds. The Injured Worker provided no response on the IC-2 application to the question of whether his past jobs required frequent lifting or carrying. A summary of these descriptions is provided by this Staff Hearing Officer as follows:

Tile Setter -- this job involved "layout, bidding, setting grout, and clean up". The Injured Worker writes that he used a wet saw and power tools to perform his work functions. He reports that the job of tile setter required technical knowledge of "measuring and layout". Heaviest weight lifted was reported to be 20 pounds. He further writes on the IC-2 application that he was responsible for writing contracts, and at times supervised two to three individuals.

Welder -- the Injured Worker reported his basic duties as "layout, prints, and weld". He used a welder, a grinder, a crane, and a forklift to perform his job duties. When questioned at hearing, the Injured Worker testified that most lifting in this position was done with the use of a crane. Heaviest weight lifted was reported to be 20 pounds. This job required reading of blue-prints.

High Water Pressure Cleaner -- In his position of high water pressure cleaner, the Injured Worker reported that he used a high pressure washer, pumps, vacuums, and trucks to clean out grease pits. Heaviest weight lifted was reported to be 20 pounds. He writes in the IC-2 application that the exact operation he performed in this position consisted of "running equipment".

When the Injured Worker was questioned at hearing as to the accuracy of the above job descriptions he provided on the IC-2 application, the Injured Worker affirmed that such descriptions were correct. The Staff Hearing Officer accepts the above descriptions as being accurate, and relies upon the IC-2 Application, and the Injured Worker's testimony at hearing, as noted above, in the issuance of this order.

> From a review of the above evidence concerning the Injured Worker's prior employment, the Staff Hearing Officer concludes that the Injured Worker retains the functional capacity to perform his former positions of employment as a tile setter, welder, and high water pressure cleaner. This work is found to be within the light work classification. This finding is also based upon the report of Dr. K. Metz, M.D., of 03/04/2009; the Functional Capacity Evaluation study performed by physical therapist Devin Witt, P.T., dated 06/02/2009; as well as the description of the Injured Worker's prior employment as set forth on the Injured Worker's IC-2 application.
>
> Notably, Ohio Administrative Code Section 4121-3-34(D) (1) (c) provides that: "If, after hearing, the adjudicator finds that the injured worker is medically able to return to the former position of employment, the injured worker shall be found not to be permanently and totally disabled." Given the above conclusion that this Injured Worker retains the functional capacity to perform in his former positions of employment, the Staff Hearing Officer finds that the Injured Worker is not eligible for permanent total disability compensation pursuant to the provisions of Ohio Administrative Code Section 4121-3-34 (D) (1) (c). For these reasons, the Injured Worker's application for Permanent Total Disability Compensation is denied.

{¶16} 11. On November 4, 2010, relator, David C. Rittenhouse, filed this mandamus action.

Conclusions of Law:

{¶17} It is the magistrate's decision that this court deny relator's request for a writ of mandamus, as more fully explained below.

{¶18} Ohio Adm.Code 4121-3-34 sets forth the commission's rules applicable to the adjudication of PTD applications.

{¶19} Ohio Adm.Code 4121-3-34(D) sets forth the commission's guidelines for the adjudication of PTD applications.

{¶20} Thereunder, Ohio Adm.Code 4121-3-34(D)(1)(c) provides:

> If, after hearing, the adjudicator finds that the injured worker is medically able to return to the former position of employment, the injured worker shall be found not to be permanently and totally disabled.

{¶21} Also, Ohio Adm.Code 4121-3-34(D)(2)(b) provides:

> If, after hearing, the adjudicator finds that the injured worker, based on the medical impairment resulting from the allowed conditions is unable to return to the former position of employment but may be able to engage in sustained remunerative employment, the non-medical factors shall be considered by the adjudicator.

{¶22} It can be noted that Ohio Adm.Code 4121-3-34 does not define the term "former position of employment." Presumably, the term refers to the position of employment held by the claimant at the time of his industrial injury, and does not include positions of employment held at other times during the claimant's work history. See *State ex rel. Speelman v. Indus. Comm.* (1992), 73 Ohio App.3d 757, 762.

{¶23} A derivative of res judicata, collateral estoppel bars the relitigation of a point of law or fact that was at issue in a former action between the same parties and was passed upon by a court of competent jurisdiction. *State ex rel. Kincaid v. Allen Refractories Co.*, 114 Ohio St.3d 129, 2007-Ohio-3758, ¶8. It requires an identity of parties and issues in the proceedings and applies equally to administrative hearings. Id.

{¶24} Following its determination that relator's residual functional capacity is at the "light work" level, the commission, through its SHO, analyzed the duties of three of relator's former positions of employment and found that relator's industrially related medical restrictions do not prevent a return to any of those former positions of employment. That is, the commission determined that the industrial injury does not prevent a return to the positions of tile setter, welder, and high water pressure cleaner.

{¶25} Previously, in adjudicating relator's first PTD application, the commission, through its SHO, had stated reliance upon the report of Dr. Bond in which it was opined that relator cannot return to his former position of employment. Presumably, the former position of employment that Dr. Bond felt that relator was unable to return to is the same job referred to in the SHO's order of May 19, 2010 as "high water pressure cleaner."

{¶26} Invoking the doctrine of res judicata, relator argues here that the SHO's order of April 4, 2006 precludes the commission from subsequently finding that relator can return to the position described as "high water pressure cleaner."

{¶27} But even if it can be said that relator correctly invokes res judicata to eliminate the commission's finding that the industrial injury permits a return to the former position of employment described as "high water pressure cleaner," relator fails to challenge the commission's findings that the industrial injury permits a return to other positions of employment described in the order as "tile setter," and "welder."

{¶28} Clearly, if relator can return to either the "tile setter" position or the "welder" position, or both, he can indeed perform sustained remunerative employment. Given that analysis, relator's invocation of res judicata, even if accepted, cannot fatally flaw the commission's ultimate conclusion that relator is able to perform sustained remunerative employment, and thus, the PTD application must be denied.

{¶29} Accordingly, for all of the above reasons, it is the magistrate's decision that this court deny relator's request for a writ of mandamus.

/s/ Kenneth W. Macke
KENNETH W. MACKE
MAGISTRATE

NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides that 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 timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).