

[Cite as *State ex rel. Findlay Industries v. Indus. Comm.*, 2009-Ohio-4384.]
IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Findlay Industries, :
Relator, :
v. : No. 09AP-52
Industrial Commission of Ohio et al., : (REGULAR CALENDAR)
Respondents. :

D E C I S I O N

Rendered on August 27, 2009

William W. Johnston, for relator.

Richard Cordray, Attorney General, and *Rema A. Ina*, for
respondent Industrial Commission of Ohio.

Larrimer and Larrimer, and *Thomas L. Reitz*, for respondent
Karen Fuson.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

FRENCH, P.J.

{¶1} Relator, Findlay Industries, Inc. ("employer"), filed an original action in mandamus requesting this court to issue a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order that granted

permanent total disability ("PTD") compensation to respondent Karen Fuson ("claimant"), and to enter an order denying that compensation.

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

{¶3} After the magistrate issued her decision, claimant moved to dismiss employer's action. Attached to claimant's motion is a Bureau of Workers' Compensation ("BWC") printout, which purportedly shows that employer is "BANKRUPT." Without citing any legal authority in support, claimant argues that, because of this bankruptcy, employer has no standing to pursue this action, and this court should dismiss employer's "complaint for lack of jurisdiction, lack of standing and/or that [employer] is no longer a real party in interest." We deny claimant's motion.

{¶4} First, the documents attached to claimant's motion do not comply with Civ.R. 56. See Loc.R. 1(C) (providing that the rules of civil procedure apply in original actions); Civ.R. 12(B) (requiring a trial court to consider matters outside the record in accordance with Civ.R. 56). Second, BWC printouts do not prove that employer is "bankrupt" or, even if bankrupt, without legal authority to pursue this action. Third, claimant has failed to provide any legal authority to support her motion. See Loc.R. 7(A) (requiring a memorandum in support of a motion to set "forth the reasons and authorities in support of the motion"). Fourth, while employer concedes in its response to claimant's motion that it has filed for bankruptcy, a bankruptcy filing does not provide a basis for automatic dismissal of employer's original action. See *Alaqua v. Mayfield*

(1987), 37 Ohio App.3d 140, 141 (reversing a trial court's dismissal of an employer's appeal based solely on the employer's filing for bankruptcy). Having denied claimant's motion, we turn to employer's objections to the magistrate's decision.

{¶5} In its objections, employer contends that the magistrate erred because (1) she did not exclude the report of Aaron LaTurner, Ph.D., as some evidence after excluding the report of Michael E. Miller, M.D., (2) she should have excluded Dr. LaTurner's report because it did not refer to the allowed condition correctly, and (3) she substituted her judgment regarding employer's job offer to claimant.

{¶6} Employer's arguments regarding Dr. LaTurner's report are the same as the arguments presented to the magistrate. We agree with her careful analysis and resolution of these arguments. We overrule employer's first two objections.

{¶7} As to its job offer to claimant, we agree with the commission that the written job offer employer purportedly made to claimant is not in the record, despite references to that purported offer in other documents. See, e.g., Stipulation of Evidence, at 72-74, 95, 100-04. In any event, while Ohio Adm.Code 4121-3-34(D)(1)(e) requires an adjudicator to deny PTD if a claimant has refused a bona fide offer of employment, the purported offer to claimant would not require denial of her application because the allowed psychological conditions precluded her from working at all. See *State ex rel. LTV Steel Co. v. Indus. Comm.*, 94 Ohio St.3d 467, 469-70, 2002-Ohio-1363 (stating that the employer had not offered the claimant a qualifying job for purposes of Ohio Adm.Code 4121-3-34(D)(1)(e) because his treating physician concluded that the claimant's allowed conditions precluded him from performing the job). Therefore, we overrule employer's third objection.

{¶8} Based on our independent review, and having overruled employer's objections to the magistrate's decision, we adopt the magistrate's decision, including the findings of fact and conclusions of law contained in it, as our own. We deny the requested writ.

*Motion to dismiss denied.
Objections overruled, writ of mandamus denied.*

BROWN and SADLER, JJ., concur.

A P P E N D I X

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Findlay Industries,	:	
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Relator,	:	
	:	
v.	:	No. 09AP-52
	:	
Industrial Commission of Ohio	:	(REGULAR CALENDAR)
and Karen Fuson,	:	
	:	
Respondents.	:	
	:	

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

Rendered on May 13, 2009

William J. Johnston, for relator.

Richard Cordray, Attorney General, and *Rema A. Ina*, for respondent Industrial Commission of Ohio.

Larrimer and Larrimer, and *Thomas L. Reitz*, for respondent Karen Fuson.

IN MANDAMUS

{¶9} Relator, Findlay Industries, has filed this original action requesting that this court issue a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order which granted permanent total disability ("PTD")

compensation to respondent Karen Fuson ("claimant") and ordering the commission to find that claimant is not entitled to that compensation.

Findings of Fact:

{¶10} 1. Claimant sustained a work-related injury on June 28, 1994 and her workers' compensation claim has been allowed for the following conditions: "Contusion right lower extremity; postraumatic sympathetic dystrophy; costochondritis; depressive disorder."

{¶11} 2. In January 2008, claimant filed an application for PTD compensation.

{¶12} 3. Claimant was examined by Michael E. Miller, M.D., who authored a report dated May 16, 2007. In his report, Dr. Miller indicated that claimant had seen psychotherapists over the years. Claimant began treating with a Dr. Turner in 1999 and, when Dr. Turner moved in 2001, claimant began treating with Dr. Thomas Miller. When Dr. Thomas Miller retired in 2005, claimant began treating with Aaron J. LaTurner, Ph.D. In his report, Dr. Miller identified certain medical reports which he reviewed including a January 2007 report from Dr. LaTurner. Dr. Miller summarized that report as follows:

Aaron LaTurner, Ph.D., treating psychologist, filed a report in January 2007. He stated that based on the psychological condition, the patient could not return to work[.] * * * Dr. LaTurner reported that the patient was suffering from depressive symptoms of sleep deprivation, irritable mood swings, depressed moods, anxiety, anger, poor appetite, severe headaches, withdrawn behavior, hopelessness feelings, and difficulties eating (accompanied by gagging behavior during most meals). "Mrs. Fuson reported and has demonstrates significant impairment in concentration and short-term memory." He felt that she was a risk to herself and co-workers because of her depressive symptoms, poor concentration, and lack of sleep.

{¶13} 4. Dr. Miller opined that continued psychotherapy at the current frequency was not medically necessary, although it was causally related to the allowed condition of depressive disorder. He recommended that claimant continue to be seen on a monthly basis for psychotherapy and that psychiatric care with medication management should be maintained on a quarterly basis. With regard to her ability to work, Dr. Miller made the following statements:

[Five] Objective evidence does support the fact that the patient is moderately depressed and unlikely to be able to sustain employment based on her somatic style, persistent pain, and fixation / over-identification with the sick role. My guess is that she will never be able to return to work based on the combination of pain and emotional distress.

[Six] The claimant is not capable of full-duty work. I do not think that she will be able to sustain any sort of employment based on her vacillating agitation, somatic style and focus, irritability, and sense of feeling disabled. I believe that her vacillating symptomatology supports the notion that she will remain permanently disabled.

[Seven] The claimant has reached maximum medical improvement for depression. She has been administered fairly intense doses of medications and a very intense combination of therapeutic modalities over seven to eight years. No further improvement is expected.

{¶14} 5. The record also contains the August 2, 2007 report of claimant's treating psychologist, Dr. LaTurner. In his report, Dr. LaTurner stated:

This psychologist agrees with Dr. Michael E. Miller's report dated 5-16-07 that Mrs. Fuson has reached her MMI. I also agree with Dr. Miller's statements that Mrs. Fuson "will never be able to return to work based on the combination of pain and emotional distress" and "that she will remain permanently disabled".

Mrs. Fuson continues to suffer from depressive symptoms of sleep deprivation, irritable mood swings, depressed moods, anxiety, anger, poor appetite, severe headaches, withdrawn behavior, hopelessness and helplessness feelings. Mrs. Fuson has continued to report and has demonstrated significant impairment in concentration and short-term memory. Her main precipitator of depressive symptoms continues to be the chronic pain state and lack of sleep that is a result of her reflex sympathetic dystrophy condition.

The patient's depressive symptoms, poor concentration, and lack of sleep (1-2 hours per night) make her a risk to herself and/or coworkers. She often experiences decompensation under ordinary/daily stressors. Continued psychological treatment will provide her with a healthier psychological lifestyle and prevent further psychological decomposition requiring a higher level of care.

It is my professional opinion based on extensive psychological treatment with Mrs. Fuson and other independent medical evaluations, Mrs. Fuson is permanently and totally disabled and therefore, unable to engage in sustained remunerative employment as a result of her psychological condition.

{¶15} 6. Claimant was examined by Donald J. Tosi, Ph.D., on behalf of the commission. In his April 23, 2008 report, Dr. Tosi concluded that claimant was mildly impaired with regard to daily activities, social interaction, adaptation, attention, concentration and pace. Dr. Tosi administered certain psychological tests and ultimately concluded that claimant's allowed psychological condition had reached maximum medical improvement ("MMI"), assessed a 15 percent impairment and opined that claimant was capable of working with no limitations.

{¶16} 7. The record also contains the March 10, 2008 report of Lee Howard, Ph.D., who conducted an independent medical examination as to claimant's extent of disability. In his report, Dr. Howard ultimately concluded that claimant's depressive disorder was in remission and noted that she self-reported a 95 percent reduction in the

frequency of her depressive symptoms. Dr. Howard administered certain tests and indicated that the results were positive for malingering. Dr. Howard also concluded that claimant's current psychotherapy and psychiatric management were excessive and concluded that claimant was not permanently and totally disabled as a result of her allowed psychological condition.

{¶17} 8. With regard to claimant's allowed physical conditions, the record contains the April 21, 2008 report of James B. Hoover, M.D., who opined that claimant's allowed physical conditions had reached MMI, assessed a zero percent impairment, and concluded that claimant was capable of performing at a sedentary work level.

{¶18} 9. Claimant's application was heard before a staff hearing officer ("SHO") on July 23, 2008. The SHO granted claimant's application based solely upon the allowed medical evidence and without consideration of the nonmedical disability factors. Specifically, the SHO relied on the May 16, 2007 report of Dr. Miller and the August 2, 2007 report of Dr. LaTurner as follows:

Related to the allowed psychological condition the employer had the injured worker evaluated by Dr. Miller in 2007. At that time, Dr. Miller opined that the injured worker would not be able to sustain any sort of employment based upon her vacillating symptoms. He opined she would remain permanently disabled. The treating psychologist, Dr. LaTurner, offered a report of 8-02-07 that the injured worker was at maximum medical improvement for her allowed psychological conditions. He went onto agree that the injured worker was permanently and totally disabled based upon the psychological conditions.

This Staff Hearing Officer finds the reports of Drs. Miller and LaTurner to be persuasive that the injured worker is at maximum medical improvement for the allowed psychological conditions and that she is permanently and

totally disabled based upon the allowed psychological conditions.

{¶19} 10. Relator filed a request for reconsideration arguing that neither the report of Dr. Miller nor the report of Dr. LaTurner constituted some evidence upon which the commission could rely in awarding claimant PTD compensation. With regard to the report of Dr. Miller, relator argued that his medical opinion was not rendered within a reasonable degree of medical certainty or probability as required. Further, relator argued that Dr. Miller based his opinion in part on the nonallowed medical conditions of pain, emotional distress, vacillating agitation, somatic style and focus, irritability, and sense of feeling disabled. Relator criticizes the report of Dr. LaTurner because he cites and relies on the report of Dr. Miller. Because, in relator's opinion, the report of Dr. Miller cannot constitute some evidence upon which the commission could rely, relator contends that the report of Dr. LaTurner likewise cannot constitute some evidence upon which the commission could rely because he based his opinion on the report of Dr. Miller. Further, relator argued that the SHO did not address the fact that relator had made a job offer to claimant.

{¶20} 11. In an order mailed September 5, 2008, the commission denied relator's request for reconsideration.

{¶21} 12. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶22} In order for this court to issue a writ of mandamus as a remedy from a determination of the commission, relator must show a clear legal right to the relief sought and that the commission has a clear legal duty to provide such relief. *State ex*

rel. Pressley v. Indus. Comm. (1967), 11 Ohio St.2d 141. A clear legal right to a writ of mandamus exists where the relator shows that the commission abused its discretion by entering an order which is not supported by any evidence in the record. *State ex rel. Elliott v. Indus. Comm.* (1986), 26 Ohio St.3d 76. On the other hand, where the record contains some evidence to support the commission's findings, there has been no abuse of discretion and mandamus is not appropriate. *State ex rel. Lewis v. Diamond Foundry Co.* (1987), 29 Ohio St.3d 56. Furthermore, questions of credibility and the weight to be given evidence are clearly within the discretion of the commission as fact finder. *State ex rel. Teece v. Indus. Comm.* (1981), 68 Ohio St.2d 165.

{¶23} The relevant inquiry in a determination of permanent total disability is claimant's ability to do any sustained remunerative employment. *State ex rel. Domjancic v. Indus. Comm.* (1994), 69 Ohio St.3d 693. Generally, in making this determination, the commission must consider not only medical impairments but also the claimant's age, education, work record and other relevant nonmedical factors. *State ex rel. Stephenson v. Indus. Comm.* (1987), 31 Ohio St.3d 167. Thus, a claimant's medical capacity to work is not dispositive if the claimant's nonmedical factors foreclose employability. *State ex rel. Gay v. Mihm* (1994), 68 Ohio St.3d 315. The commission must also specify in its order what evidence has been relied upon and briefly explain the reasoning for its decision. *State ex rel. Noll v. Indus. Comm.* (1991), 57 Ohio St.3d 203.

{¶24} For the reasons that follow, it is this magistrate's decision that this court should deny relator's request for a writ of mandamus.

{¶25} In this mandamus action, relator challenges the medical evidence relied upon by the commission in granting claimant PTD compensation. Relator contends that

the cited evidence does not constitute some evidence upon which the commission could properly rely.

{¶26} First, turning to the report of Dr. Miller, the magistrate notes that relator is correct in pointing out that some of the statements in his report are not given within a reasonable degree of medical certainty or probability. The following statements are problematic: (1) "the patient is * * * unlikely to be able to sustain employment based on her somatic style, persistent pain, and fixation / over-identification with the sick role"; (2) "[m]y guess is that she will never be able to return to work based on the combination of pain and emotional distress"; (3) "I do not think that she will be able to sustain any sort of employment based on her vacillating agitation, somatic style and focus, irritability, and sense of feeling disabled"; and (4) "I believe that her vacillating symptomatology supports the notion that she will remain permanently disabled."

{¶27} The above four sentences are problematic because they are prefaced with words such as "unlikely," "my guess," "I do not think," and "I believe." The use of those words does not demonstrate any certainty or probability and, for those reasons, Dr. Miller's report is compromised. Dr. Miller also stated that "[t]he claimant is not capable of full-duty work"; however, nowhere in Dr. Miller's report did he address the psychological limitations resulting from claimant's allowed psychological condition. As such, Dr. Miller's report does not comply with the requirements of Ohio Adm.Code 4121-3-34(C)(1) which provides, in pertinent part:

Each application for permanent total disability shall be accompanied by medical evidence from a physician, or a psychologist or a psychiatric specialist in a claim that has been allowed for a psychiatric or psychological condition, that supports an application for permanent and total disability

compensation. * * * The medical evidence used to support an application for permanent total disability compensation is to provide an opinion that addresses the injured worker's physical and/or mental limitations resulting from the allowed conditions in the claim(s).

{¶28} For these reasons, Dr. Miller's report does not constitute some evidence upon which the commission could properly rely to support an award of PTD compensation.

{¶29} Relator also challenges the report of Dr. LaTurner. Relator argues that, inasmuch as Dr. LaTurner specifically referred to and agreed with the report of Dr. Miller and, given that the report of Dr. Miller is insufficient, relator contends that the report of Dr. LaTurner cannot constitute some evidence upon which the commission could rely. For the reasons that follow, this magistrate disagrees.

{¶30} Based upon a review of the evidence, claimant has been treated for her psychological conditions since 1999. Further, Dr. LaTurner is currently claimant's treating psychologist. As such, Dr. LaTurner had seen claimant on a regular basis for several months before he issued his report. Also, Dr. LaTurner became claimant's treating psychologist in 2005 after her prior psychologist moved. As such, Dr. LaTurner not only had access to claimant's prior medical records, he had also been treating claimant for a significant amount of time. Further, in his report, Dr. Miller specifically referenced a report authored by Dr. LaTurner in January 2007. According to Dr. Miller's report, Dr. LaTurner had opined, in January 2007, that claimant was not able to return to work based upon her depressive symptoms of sleep deprivation, irritable mood swings, depressed moods, anxiety, anger, poor appetite, severe headaches, withdrawn feelings, hopelessness feelings, and difficulties eating. At that time, Dr. LaTurner opined that

claimant was a risk to herself and to co-workers due to the depressive symptoms, her poor concentration and lack of sleep.

{¶31} In his August 2007 report, Dr. LaTurner reiterated several of those comments which he made in January 2007 and he specifically concluded that claimant was "unable to engage in sustained remunerative employment as a result of her psychological condition." In actuality, no reference to the report of Dr. Miller was necessary.

{¶32} Because Dr. LaTurner was claimant's treating psychologist and he opined in January 2007 and again in August 2007 that claimant was unable to engage in sustained remunerative employment as a result of her allowed psychological condition, the magistrate finds that the report of Dr. LaTurner does constitute some evidence upon which the commission could rely in granting claimant PTD compensation. With regard to the remainder of the medical evidence, relator's arguments go to weight and credibility and are clearly within the discretion of the commission as fact finder. Teece. Relator emphasizes that, in his March 10, 2008 report, Dr. Howard stated that claimant self reported a 95 percent reduction in the frequency of her depressive symptoms. Dr. Howard concluded that her depressive disorder was in remission, the current psychotherapy and psychiatric management was excessive, and that claimant was not permanently and totally disabled. Relator asserts that Dr. Howard's report should be given greater weight than the earlier reports of the other doctors. However, given that weight and credibility are within the discretion of the commission as fact finder, it is irrelevant that relator or this court might consider Dr. Howard's report to be more persuasive. Because the report of Dr. LaTurner does constitute some evidence upon

which the commission could rely in awarding relator PTD compensation, that finding should not be disturbed.

{¶33} Relator also contends that the commission abused its discretion by not addressing the fact that relator made an offer of employment to claimant. However, inasmuch as the commission relied on Dr. LaTurner's conclusion that claimant was not capable of performing some sustained remunerative employment due to her allowed psychological condition, there was no reason for the commission to consider relator's offer of employment given that Dr. LaTurner opined that she was not capable of any sustained remunerative employment.

{¶34} Based on the foregoing, it is this magistrate's conclusion that relator has not demonstrated that the commission abused its discretion in awarding claimant PTD compensation and this court should deny relator's request for a writ of mandamus.

/s/ Stephanie Bisca Brooks
STEPHANIE BISCA BROOKS
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).