

[Cite as *State ex rel. Rohr v. Indus. Comm.*, 2009-Ohio-6416.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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|---------------------------------------------------------------------|---|--------------------|
| State of Ohio ex rel. Jeff Rohr, | : | |
| Relator, | : | |
| v. | : | No. 09AP-94 |
| The Industrial Commission of Ohio and The Gerstenslager Company, | : | (REGULAR CALENDAR) |
| Respondents. | : | |

D E C I S I O N

Rendered on December 8, 2009

M. Blake Stone, L.P.A., Inc., and M. Blake Stone, for relator.

Richard Cordray, Attorney General, and *Colleen C. Erdman*,
for respondent Industrial Commission of Ohio.

Critchfield, Critchfield & Johnston, Ltd., and Susan E. Baker,
for respondent The Gerstenslager Company.

IN MANDAMUS
ON OBJECTION TO THE MAGISTRATE'S DECISION

KLATT, J.

{¶1} Relator, Jeff Rohr, commenced this original action in mandamus seeking an order compelling respondent, Industrial Commission of Ohio ("commission"), to vacate its orders exercising its continuing jurisdiction and ordering relator to attend an examination for the allowed psychological conditions by a doctor selected by respondent, The Gerstenslager Company ("employer"). Relator is also seeking an

order compelling respondent to find that the employer's evidence was insufficient to invoke the commission's continuing jurisdiction to order relator to submit to a psychological examination.

{¶2} Pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth District Court of Appeals, this matter was referred to a magistrate who issued a decision, including findings of fact and conclusions of law, which is appended hereto. The magistrate found that there was some evidence of new and changed circumstances supporting the commission's exercise of continuing jurisdiction. The magistrate specifically noted that there was evidence that relator's current ability to communicate was significantly different from his ability to communicate at the time the commission granted permanent total disability ("PTD") compensation. Therefore, the magistrate concluded that the commission did not abuse its discretion when it exercised its continuing jurisdiction and ordered relator to attend an examination relating to his psychological conditions. Accordingly, the magistrate has recommended that we deny relator's request for a writ of mandamus.

{¶3} Relator has filed an objection to the magistrate's decision arguing that the evidence of new and changed circumstances was insufficient for the commission to exercise continuing jurisdiction. We disagree.

{¶4} Relator simply disagrees with the commission's conclusion that new evidence of relator's ability to communicate was sufficient to establish new and changed circumstances. Essentially, relator asks this court to reweigh the evidence. However, 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. Where the record contains some evidence to support the

commission's findings, there is no abuse of discretion and mandamus is not appropriate. *State ex rel. Lewis v. Diamond Foundry Co.* (1987), 29 Ohio St.3d 56.

{¶5} Here, there was evidence before the commission that relator's demeanor and ability to communicate, concentrate, and remember events was significantly different than his ability in these areas at the time the commission granted PTD compensation. Because there is some evidence of new and changed circumstances supporting the commission's decision, the commission did not abuse its discretion when it exercised its continuing jurisdiction and ordered relator to attend an examination. Therefore, we overrule relator's objection.

{¶6} Following an independent review of this matter, we find that the magistrate has properly determined the facts and applied the appropriate law. Therefore, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein. In accordance with the magistrate's decision, we deny relator's request for a writ of mandamus.

*Objections overruled;
writ of mandamus denied.*

McGRATH and CONNOR, JJ., concur.

A P P E N D I X

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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| Relator, | : | |
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| v. | : | No. 09AP-94 |
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| The Industrial Commission of Ohio | : | (REGULAR CALENDAR) |
| and The Gerstenslager Company, | : | |
| | : | |
| Respondents. | : | |
| | : | |

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

Rendered on June 22, 2009

M. Blake Stone, L.P.A., Inc., and M. Blake Stone, for relator.

Richard Cordray, Attorney General, and Colleen C. Erdman, for respondent Industrial Commission of Ohio.

Critchfield, Critchfield & Johnston, Ltd., and Susan E. Baker, for respondent The Gerstenslager Company.

IN MANDAMUS

{¶7} Relator, Jeff Rohr, 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 wherein the commission exercised its continuing jurisdiction and ordered relator to attend an examination for the allowed psychological conditions by a doctor selected by respondent The Gerstenslager Company

("employer") and ordering the commission to find that the employer's evidence was not sufficient to invoke the commission's continuing jurisdiction to order relator to submit to a psychological examination.

Findings of Fact:

{¶8} 1. Relator sustained a work-related injury on February 13, 1997, and his claim has been allowed for the following conditions: "lumbar sprain/strain; herniated nucleus pulposus L5-S1; seizure disorder; major depressive episode, recurrent, moderate severity; dysthymic disorder; pain disorder due to a combination of medical and psychological factors."

{¶9} 2. Relator last worked in May 1999.

{¶10} 3. In May 2004 relator filed an application for permanent total disability ("PTD") compensation.

{¶11} 4. Relator's motion was heard before a staff hearing officer ("SHO") on November 9, 2004 and resulted in an order granting relator PTD compensation based solely upon the allowed psychological conditions and without addressing the nonmedical disability factors. The SHO relied upon the reports of Gregg A. Martin, Ph.D., and Steven B. Van Auken, Ph.D.

{¶12} 5. In his September 27, 2002 report, Dr. Martin stated:

In my opinion, the evidence strongly indicates that Mr. Rohr's mood and coping problems including either the major depressive episode or dysthymia and the pain disorder are directly caused by his industrial injuries. Mr. Rohr survived a disastrous accident at a very young age to go on to complete high school and technical training, work fulltime consistently, and marry and raise a family after the motor vehicle accident at age 17. Thus, if this is merely a question of chronic personality and poor psychosocial adjustment, one likely would not have seen Mr. Rohr succeed so well from age 17 until the onset of his current medical problems in 1997.

Moreover, Mr. Rohr's other significant stressful life events that contribute to current mood problems are all related to his industrial injuries: loss of ability to work, financial stresses, and complications from treatments such as the onset of the seizures after trials on antidepressants. Thus, within a reasonable degree of psychological certainty, it is my opinion that the psychological conditions are due to the industrial injuries.

It also is important to note that Mr. Rohr's mild cognitive deficits as a result of the traumatic brain injury suffered at age 17 plays a part in Mr. Rohr's difficult situation. He is not a candidate for additional retraining such as college coursework for a professional career. Moreover, the worsening of the cognitive deficits following the onset of seizures makes what little chance Mr. Rohr had for a new career even less possible. Thus, while some contribution of the original mild traumatic brain injury can be linked to his poor outcome, the industrial injuries are the primary causes.

In my opinion, within a reasonable degree of psychological certainty, Mr. Rohr's mood and coping problems, his cognitive deficits, and the chronic low back pain leave him permanently disabled for any competitive employment. Mr. Rohr has been unable to work since the late 1990's and it is unlikely that any combination of treatments physical or psychological would change this prognosis.

(Emphases sic.)

{¶13} 6. In his September 14, 2004 report, Dr. Van Auken described relator's appearance as follows, in pertinent part:

He moved slowly and ponderously. His face bore little expression. His speech was clear, coherent and goal directed, and noticeably slowed in pace. His tonal quality suggested a mechanical, robotic mode of speech. * * * His affect was flattened. His mood was resigned, dispirited. His short-term memory appeared unreliable[.] * * * His long-term memory appeared questionable. * * * His concentration appeared quite negatively impacted; He was able to accurately perform one step of the Serial Seven Subtraction Exercise, and this took him a consideration amount of time.

He responded to the items of the SCL 90-R. He appeared perplexed by the task of reading the items and responding to

them. Therefore the items were read to him by his mother and he recorded his responses. In comparison to outpatient psychiatric male norms, he showed significant elevations on two of the nine subscales; Somatization and Obsessive-Compulsiveness. This suggests some symptom magnification.

{¶14} Dr. Van Auken concluded that relator was unable to return to any sustained remunerative employment:

In and of themselves, Mr. Rohr's psychological symptoms - - including diminished concentration and diminished intellectual and physical energy generally - - would prevent him from working in an effective manner in sustained remunerative employment.

{¶15} 7. At the time the SHO awarded relator PTD compensation there was additional psychological evidence in the record, specifically, the August 17, 2004 report of Thomas E. Sullivan, Ph.D. In his report, Dr. Sullivan identified the medical records which he reviewed and took into account information provided by relator's mother. Dr. Sullivan administered certain tests to relator and specifically noted, in pertinent part:

Mr. Rohr walked quite slowly down the hallway. He provided verbal and written responses in a very slow fashion. For example, Mr. Rohr took approximately thirty seconds to sign his name. Rohr frequently provided a minimal response to test items. He showed extremely poor persistence, and gave up prematurely on many testing items. He very frequently stated that he was unable to provide a response to items, even when they were quite simple in nature. He frequently complained of being incapable of processing very simple information. For example, when asked whether he wanted a salad or sandwich for lunch, he said that he was cognitively incapable of making this decision. He asked that the decision be made for him.

* * *

It is my opinion that Mr. Rohr did not provide his best effort during this evaluation. This issue will be addressed further in the next section of this report.

* * *

When Mr. Rohr's performance on the TOMM is compared to the performances of depressed and head-injured subjects, the likelihood that he provided his best effort on this test is less than one in one million.

Mr. Rohr was also administered the Word Memory Test (WMT), which is a malingering test[.] * * * Mr. Rohr's performance on the immediate recall portion of this test fell at chance levels, which means that he performed no better than a person who had never heard the initial presentation of the words.

{¶16} Dr. Sullivan concluded that relator's complaints regarding his cognitive and emotional functioning were due to malingering or to a combination of depression and pain disorder. However, because relator's current neuropsychological testing results could not be validly interpreted, Dr. Sullivan was unable to give an impairment rating or determine whether relator was capable of sustained remunerative activity based solely on the allowed conditions in the claim.

{¶17} 8. With regards to relator's allowed physical conditions, there are two reports. In his July 30, 2004 report, Jack Jones, M.D., described relator's presentation:

* * * He ambulated with a slow forward-leaning gait.

The patient displayed a moderate amount of chronic pain behavior with frequent moaning, grimacing, hyperventilation and verbal complaints of pain.

{¶18} Dr. Jones noted that the Lasegue sign was negative (in lumbar disc disease, the sign is positive if pain radiates into the leg). He also noted that the Hoover test was positive indicating suboptimal muscular effort during the examination. Dr. Jones concluded that relator's allowed physical conditions had reached maximum medical improvement ("MMI"), assessed a 28 percent whole person impairment, and

opined that, based solely upon the allowed physical conditions, relator was capable of performing sedentary work with the following restrictions:

* * * Sitting twenty minutes, standing five minutes, walking ten minutes, lifting or carrying up to ten pounds, bending or twisting three times per hour, no kneeling or crawling activities, no ladder-climbing activities, no restriction on use of the upper extremities. * * *

{¶19} 9. Perry S. Williams, M.D., also examined relator with regards to his allowed physical findings. In his September 8, 2004 report, Dr. Williams noted that relator sometimes seems to have trouble being able to think clearly during the interview. Thereafter, he provided his physical findings upon examination, identified the medical records he reviewed, opined that relator's allowed conditions had reached MMI, assessed a 25 percent whole person impairment, and concluded that relator could perform sedentary work provided he avoid driving company vehicles, working with hazardous machinery or working at heights greater than six feet.

{¶20} 10. In June 2007, the employer hired a private investigator to conduct surveillance of relator. As part of the surveillance report, the investigator obtained video and audio recordings of relator which are contained in the record. In the video, relator appears to walk without any difficulty such as the slow forward-leaning gait observed by Dr. Jones or the slow ponderous movement noted by Dr. Van Auken. From a verbal standpoint, relator carried on a conversation with the investigator and his speech was considerably different than what had been described by the examiners. For example, Dr. Van Auken had noted that relator's speech was noticeably slowed in pace and his tonal qualities suggested a mechanical, robotic mode of speech. He noted further that relator's short-term memory appeared unreliable and that his long-term memory

appeared questionable. Instead, his conversation with the investigator was lively and informative.

{¶21} 11. The employer then requested that relator appear for two examinations, one psychological and one physical. Relator, through counsel, refused.

{¶22} 12. Thereafter, the employer filed a motion with the commission asking the commission to exercise its continuing jurisdiction and order relator to appear for the examinations.

{¶23} 13. On November 18, 2008, the employer's motion was heard before an SHO. The SHO granted the employer's motion, but only regarding the psychological examination. The SHO found that there was evidence of new and changed circumstances warranting a medical examination of relator for his allowed psychological conditions, but not for his allowed physical conditions. Specifically, the SHO invoked the commission's continuing jurisdiction:

The Hearing Officer finds that the employer has submitted through evidence new and changes circumstances which would warrant a re-evaluation of the claimant's permanent and total disability status. The Hearing Officer finds that Dr. Van Auken in a report dated 09/14/2004 which was used to determine that the claimant was permanently and totally disabled indicates in his report that "his mother drove him to the exam, he was cooperative and friendly, his eye contact was good, he moved slowly and ponderously. He face bore little expression. He speech was clear, coherent and goal oriented and noticeably slowed and paced. His total quality suggested a mechanical robotic mode of speech. No particular abnormality were noted in the contents of his speech and there was no evidence of hallucinations, delusions, paranoia, loosing of associations, obsessions or compulsions. His effect was flatter. His mood was resigned, dispirited. His short-term memory appeared unreliable, he was able to recall none of the three objects after five minutes. His long-term memory appeared questionable, he was an indifferent reporter of his personal history, he was

able to recall the names of only four presidents who have served during his lifetime."

The employer presented a CD of an investigation performed by a Mr. Walters who was at hearing and as part of said investigation, Mr. Walters engaged in a verbal conversation with the claimant in which the claimant was heard by this Hearing Officer and showed that the claimant's speech was clear, cogent and goal oriented.

The Hearing Officer further finds that in said conversation the claimant experienced remarkably well short-term and remarkably well long-term memory in speaking to the investigator concerning his neighbors, the length of time that the neighbors have owned certain property, what property was owned and by whom. The Hearing Officer further finds that the speech was normal in its flow and in no way "noticeably slowed and paced," as indicated by Dr. Van Auken in the report of 09/14/2004, and that the claimant showed a mode of speech that was hardly mechanical or robotic.

* * *

Therefore, the Hearing Officer grants the employer's request to have the claimant examined by a doctor of their choice for the allowed psychological conditions and the claimant is ordered to attend said examination.

The Staff Hearing Officer finds that the permanent total disability allowance order was based on the report of Dr. Van Auken examining for the allowed psychological conditions.

The Hearing Officer finds that this order to examine the claimant is only for the psychological condition.

The employer has not presented sufficient evidence to justify granting an exam for the allowed physical conditions, therefore, the employer's request for an examination for the allowed physical conditions is denied.

The Staff Hearing Officer finds that the voice on the CD was confirmed to be that of the claimant. The Staff Hearing Officer finds that the claimant's speech was engaging and friendly throughout the presentation.

(Emphasis sic; sic passim.)

{¶24} 14. Relator filed a request for reconsideration arguing that the SHO made no attempt to determine whether the 15-minute conversation between relator and the investigator occurred while relator was under the influence of his medications. Relator also argues that *State ex rel. Spohn v. Indus. Comm.*, 115 Ohio St.3d 329, 2007-Ohio-5027, applies to his situation.

{¶25} 15. In an order mailed January 20, 2009, the commission denied relator's request for reconsideration.

{¶26} 16. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

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

{¶28} 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.

{¶29} Pursuant to R.C. 4123.52, "[t]he jurisdiction of the industrial commission and the authority of the administrator of workers' compensation over each case is continuing, and the commission may make such modification or change with respect to former findings or orders with respect thereto, as, in its opinion is justified." In *State ex rel. B & C Machine Co. v. Indus. Comm.* (1992), 65 Ohio St.3d 538, 541-542, the court examined the judicially-carved circumstances under which continuing jurisdiction may be exercised, and stated as follows:

R.C. 4123.52 contains a broad grant of authority. However, we are aware that the commission's continuing jurisdiction is not unlimited. See, e.g., *State ex rel. Gatlin v. Yellow Freight System, Inc.* (1985), 18 Ohio St.3d 246, 18 OBR 302, 480 N.E.2d 487 (commission has inherent power to reconsider its order for a reasonable period of time absent statutory or administrative restrictions); *State ex rel. Cuyahoga Hts. Bd. of Edn. v. Johnston* (1979), 58 Ohio St.2d 132, 12 O.O.3d 128, 388 N.E.2d 1383 (just cause for modification of a prior order includes new and changed conditions); *State ex rel. Weimer v. Indus. Comm.* (1980), 62 Ohio St.2d 159, 16 O.O.3d 174, 404 N.E.2d 149 (continuing jurisdiction exists when prior order is clearly a mistake of fact); *State ex rel. Kilgore v. Indus. Comm.* (1930), 123 Ohio St. 164, 9 Ohio Law Abs. 62, 174 N.E. 345 (commission has continuing jurisdiction in cases involving fraud); *State ex rel. Manns v. Indus. Comm.* (1988), 39 Ohio St.3d 188, 529 N.E.2d 1379 (an error by an inferior tribunal is a sufficient reason to invoke continuing jurisdiction); and *State ex rel. Saunders v. Metal Container Corp.* (1990), 52 Ohio St.3d 85, 86, 556 N.E.2d 168, 170 (mistake must be "sufficient to invoke the continuing jurisdiction provisions of R.C. 4123.52"). Today, we expand the list set forth above and hold that the Industrial Commission has the authority pursuant to R.C. 4123.52 to modify a prior order that is clearly a mistake of law. * * *

{¶30} In the present case, the commission determined that the evidence submitted by the employer constituted new and changed circumstances sufficient to order relator to attend a medical examination. After reviewing that evidence, this magistrate cannot say that the commission abused its discretion in finding that relator's

ability to engage the investigator in conversation was sufficiently different from his ability to communicate with doctors and the commission at the time that PTD compensation was granted. While ordering relator to attend this examination does reopen the question of the extent of relator's disability, relator will have the opportunity to submit his own medical evidence in support of his contention that he is still entitled to that compensation.

{¶31} Throughout his brief, relator asserts that the *Spohn* case is dispositive and somehow warrants a finding that the commission abused its discretion. This magistrate disagrees.

{¶32} In *Spohn*, the claimant was awarded PTD compensation in 1991. In 1998, his employer hired investigators who discovered that he had played 95 rounds of golf at a local country club even though he had surgeries to his back and his claim was allowed for depression. The claimant had not worked since 1985. When the commission awarded PTD compensation in 1991, the commission determined that the claimant had a 70 percent permanent partial disability and was limited to sedentary work requiring lifting of no more than 10 to 15 pounds and that he should avoid bending, lifting, twisting or otherwise stressing his back. It was also found that the claimant was unable to perform employment demanding a great deal of concentration and attention. At the time PTD compensation was awarded, the claimant was 35 years old.

{¶33} In *Spohn*, the employer filed a motion with the commission requesting that the claimant submit to a medical examination. The motion was granted by a district hearing officer and the claimant did not appeal that order. The claimant appeared for the examination. Thereafter, the commission exercised its continuing jurisdiction, reviewed the employer's newly submitted medical evidence, noted that relator failed to

submit any updated medical evidence regarding his back condition, and failed to file any additional vocational evidence. The commission exercised its continuing jurisdiction and found that new and changed circumstances existed warranting the termination of the claimant's PTD compensation.

{¶34} In the present case, the commission filed a motion to compel relator to attend medical examinations. The commission exercised its continuing jurisdiction based on new and changed circumstances and ordered claimant to attend an examination regarding his psychological conditions. In this case, unlike *Spohn*, relator has appealed the commission's order requiring him to attend a medical examination. Therefore, the issue before this court is not whether the commission had some evidence of new and changed circumstances to warrant the termination of PTD compensation, but whether the commission had some evidence to support a finding of new and changed circumstances warranting relator's attendance at a psychological examination. As stated previously, the magistrate finds that relator has not demonstrated that the commission abused its discretion in this regard.

{¶35} Relator's further comparisons with the claimant in the *Spohn* case are premature. Relator attempts to distinguish his abilities to perform some sustained remunerative employment from the *Spohn* claimant's abilities to perform some sustained remunerative employment. The commission has yet to consider those factors. After relator submits to the psychological examination, if the commission finds that he is physically and psychologically able to perform some sustained remunerative employment, the commission will then be required to examine the nonmedical disability factors and decide whether or not relator's PTD compensation should be terminated on grounds that his condition has improved to the point where he is now capable of

performing some sustained remunerative employment. That decision has yet to be considered and decided.

{¶36} Based on the foregoing, it is this magistrate's conclusion that relator has not demonstrated that the commission abused its discretion by finding that the employer submitted some evidence supporting new and changed circumstances warranting an order requiring relator to submit to a psychological examination and relator's request for a writ of mandamus should be denied.

/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).