

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

[State ex rel.] William Groves,	:	
Relator,	:	
v.	:	No. 04AP-284
Sysco Corporation, and	:	(REGULAR CALENDAR)
Industrial Commission of Ohio,	:	
Respondents.	:	

D E C I S I O N

Rendered on January 20, 2005

Michael J. Muldoon, for relator.

Lindhorst & Dreidame, and *James C. Frooman*, for
respondent Sysco Corporation.

Jim Petro, Attorney General, and *Dennis H. Behm*, for
respondent Industrial Commission of Ohio.

ON OBJECTIONS TO THE MAGISTRATE'S DECISION
IN MANDAMUS

FRENCH, J.

{¶1} Relator, William Groves, has filed an original action in mandamus requesting this court to issue a writ of mandamus to order respondent, Industrial

Commission of Ohio ("commission"), to vacate its decision that suspended relator's industrial claim.

{¶2} This court referred the matter to a magistrate, pursuant to Civ.R. 53(C) and Section (M), Loc.R. 12 of the Tenth District Court of Appeals, who rendered a decision including findings of fact and conclusions of law. (Attached as Appendix A.) The magistrate held that the commission properly suspended relator's industrial claim. Therefore, the magistrate decided that the requested writ of mandamus should be denied. Relator has filed objections to the magistrate's decision and asserts that the commission abused its discretion by suspending the industrial claim. We disagree.

{¶3} As indicated in the magistrate's findings of fact, relator sustained an industrial injury in September 2002, while employed by respondent-employer, Sysco Corporation ("Sysco"). On June 6, 2003, relator sought temporary total disability compensation. In response, Sysco requested that relator submit to a medical examination on July 10, 2003, at 12:15 p.m. with Dr. Middaugh in Cincinnati, Ohio. Relator refused the medical examination, contending that he lives in Columbus, Ohio, cannot "afford to miss work" from his new employment, and has child-care responsibilities. Subsequently, Sysco asked the commission to suspend relator's industrial claim for refusing the medical examination.

{¶4} A hearing administrator for the commission suspended relator's claim on August 2, 2003. Thus, Sysco rescheduled relator's medical examination for August 28, 2003, at 10:00 a.m. with Dr. Middaugh in Cincinnati. Relator refused the rescheduled examination and filed objections to the hearing administrator's suspension. A district hearing officer affirmed the suspension, concluding that no "hardship, inconvenience,

monetary loss or jeopardy to injured worker's 'new' job has been convincingly established." On appeal, a staff hearing officer affirmed the suspension after a December 8, 2003 hearing. Two other staff hearing officers affirmed the suspension on December 31, 2003. The commission denied relator's request for reconsideration, and relator pursued this mandamus action.

{¶5} To be entitled to a writ of mandamus, the relator must demonstrate that: (1) there is a clear legal right to the relief requested; (2) the respondent is under a clear legal duty to perform the requested act; and (3) there is no adequate remedy in the ordinary course of law. *State ex rel. Stafford v. Indus. Comm.* (1989), 47 Ohio St.3d 76, 77-78; *State ex rel. Ohio Civ. Serv. Employees Assn. v. State Employment Relations Bd.*, 104 Ohio St.3d 122, 2004-Ohio-6363, at ¶9. A clear legal right exists when the relator establishes that the commission abused its discretion by entering an order not supported by any evidence in the record. *State ex rel. Elliott v. Indus. Comm.* (1986), 26 Ohio St.3d 76, 78-79.

{¶6} Here, Sysco asked relator to submit to a medical examination pursuant to R.C. 4123.651(A), which states:

(A) The employer of a claimant who is injured or disabled in the course of his employment may require, without the approval of the administrator or the industrial commission, that the claimant be examined by a physician of the employer's choice one time * * *.

The commission may suspend the claim of an employee who refuses, without good cause, the requested medical examination. R.C. 4123.651(C).

{¶7} Relator argues that an employer must schedule the medical examination "at a place reasonably convenient to the employee." In support, relator cites R.C. 4123.53(A), which provides:

* * * [The commission] may require any employee claiming the right to receive compensation to submit to a medical examination * * * at any time * * * at a place reasonably convenient for the employee * * *.

Although R.C. 4123.53(A) governs commission requested medical examinations, relator asserts that the clause "at a place reasonably convenient for the employee" should be applied to employer requested medical examinations in R.C. 4123.651(A). We disagree.

{¶8} We construe statutes of equivalent subjects together only to resolve ambiguity. See *State ex rel. Burrows v. Indus. Comm.* (1997), 78 Ohio St.3d 78, 81. Otherwise, we apply unambiguous statutes "according to the plain meaning of the words used." *Id.*; see, also, *State v. Hairston*, 101 Ohio St.3d 308, 2004-Ohio-969, at ¶12 (noting that the legislature "should be held to mean what it has plainly expressed").

{¶9} Here, R.C. 4123.651(A) is not ambiguous, and unequivocally details an employer's right to request an independent medical examination. The statute makes no mention of scheduling the examination "at a place reasonably convenient for the employee." Indeed, R.C. 4123.651(A) makes no reference to any provisions in R.C. 4123.53(A). Rather, the statutory provision outlining an employer's request is separate from the commission's request. Likewise, the employer is not required to seek the commission's approval when requesting the medical examination. Accordingly, we do not apply the R.C. 4123.53(A) provision for a medical examination "at a place

reasonably convenient for the employee" to a medical examination requested by an employer under R.C. 4123.651(A).

{¶10} Next, relator contends that the burden of taking time off from his new employment establishes good cause to refuse the medical examination. Again, we disagree. Relator provides no evidence that his new employer would penalize him for taking time off for the examination. Rather, relator states that he "cannot afford to miss work." Sysco's obligation to reimburse relator for any lost wages stemming from the medical examination refutes such a concern. See Ohio Adm.Code 4121-3-09(A)(5)(a).

{¶11} Moreover, we reject relator's claim that the out-of-town examination interferes with his single parent responsibilities. Sysco alleviated any such interference by scheduling the examination at 12:15 p.m. and 10:00 a.m., which are during normal working hours.

{¶12} Relator further maintains that he has good cause to refuse the medical examination because Sysco unreasonably scheduled the examination in Cincinnati. Similarly, relator claims that the out-of-town examination is tantamount to harassment. In support, relator relies on *Howell v. Dayton Power & Light Co.* (1995), 102 Ohio App.3d 6. In *Howell*, the Fourth District Court of Appeals reviewed a trial court's Civ.R. 26(C) protective order forbidding an employer from requiring a claimant to travel to Oregon and Minnesota for medical examinations. *Id.* at 15-16. The court affirmed the protective order, noting that the trial court was "simply [protecting] the claimant from the expense and inconvenience of flying out-of-state for medical examinations." *Id.* at 16.

{¶13} *Howell* is inapposite. Sysco scheduled the medical examination in Ohio, not distant states. Furthermore, unlike *Howell*, Sysco must compensate for any

expense or inconvenience to relator by paying for lost wages and travel expenses. See Ohio Adm.Code 4121-3-09(A)(5)(a).

{¶14} Relator also challenges the validity of the out-of-town examination by asserting that Dr. Middaugh previously performed an examination in Columbus. Relator references a letter from an unrelated case notifying an employee of an examination with Dr. Middaugh in Columbus. Relator has not properly proffered the letter because he neither introduced the letter with the stipulated evidence pursuant to Loc.R. 12(G), nor sought introduction of the letter with his objections pursuant to Civ.R. 53(E)(4)(b). Nonetheless, relator fails to establish how the other examination, involving neither Sysco nor relator, relates to this case.

{¶15} In the final analysis, R.C. 4123.651(A) allows an employer to request a medical examination with "a physician of the employer's choice." Here, Sysco requested that relator submit to an examination with Dr. Middaugh in Cincinnati. As the magistrate recognized, Dr. Middaugh previously examined relator and is familiar with the medical records. Sysco agreed to assume relator's expenses and offered to transport relator to the examination. Accordingly, Sysco's request is valid under R.C. 4123.651(A), and relator's contention otherwise does not rise to the level of good cause as required by R.C. 4123.651(C).

{¶16} Thus, we hold that the commission did not abuse its discretion by suspending relator's claim, and that relator has not established a clear legal duty to a writ of mandamus. See *Elliott* at 78-79. Therefore, following a review of the magistrate's decision and an independent review of the evidence, we find that the magistrate has properly determined the pertinent facts and applied the relevant law, and

we adopt the magistrate's decision as our own. Accordingly, relator's objections to the magistrate's decision are overruled, and the requested writ of mandamus is denied.

*Objections overruled,
writ of mandamus denied.*

PETREE and McCORMAC, JJ., concur.

McCORMAC, J., retired of the Tenth Appellate District,
assigned to active duty under authority of Section 6(C),
Article IV, Ohio Constitution.

A P P E N D I X A
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Relator,	:	
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v.	:	No. 04AP-284
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Sysco Corporation and	:	(REGULAR CALENDAR)
Industrial Commission of Ohio,	:	
	:	
Respondents.	:	
	:	

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

Rendered on September 30, 2004

Michael J. Muldoon, for relator.

Lindhorst & Dreidame, and *James C. Frooman*, for respondent Sysco Corporation.

Jim Petro, Attorney General, and *Stephen D. Plymale*, for respondent Industrial Commission of Ohio.

I N M A N D A M U S

{¶17} In this original action, relator, William Groves, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order suspending relator's industrial claim pursuant to R.C. 4123.651.

Findings of Fact:

{¶18} 1. On September 12, 2002, relator sustained an industrial injury while employed with Sysco Corporation ("Sysco"), a self-insured employer under Ohio's workers' compensation laws.

{¶19} 2. On June 6, 2003, relator moved for temporary total disability ("TTD") compensation.

{¶20} 3. By letter dated June 25, 2003, citing an eviction notice, relator's counsel asked the commission's hearing administrator to schedule an emergency hearing.

{¶21} 4. By letter dated June 30, 2003, Sysco notified relator that he was scheduled for a medical examination to be performed by Ann Middaugh, M.D., at her office in Cincinnati, Ohio, on July 10, 2003 at 2:15 p.m.¹ A travel expense reimbursement form accompanied the letter. Sysco also offered relator transportation to the examination if needed.

{¶22} 5. Pursuant to Ohio Adm.Code 4121-3-30, a hearing was scheduled for July 2, 2003 before a district hearing officer ("DHO") on an expedited basis. Following the emergency hearing, the DHO issued an order denying relator's request for TTD compensation for the closed period May 16, 2003 through June 13, 2003. The order stated reliance in part on a January 30, 2003 report from Dr. Middaugh indicating that the industrial injury was at maximum medical improvement and that relator was able to return to his former position of employment.

{¶23} 6. The DHO's order of July 2, 2003 was mailed July 2, 2003.

{¶24} 7. On July 7, 2003, relator's counsel faxed to Sysco's counsel the following letter:

* * * I have advised Mr. Groves that he is required to attend the examination with Dr. Middaugh on 7/10/03. However, considering we are now dealing with a closed period of temporary total disability of only four weeks, I am wondering whether or not this IME is necessary. As you know, Mr. Groves has begun a new job and is still in the probationary period. Unless it is absolutely necessary, he would rather not attend the examination with Dr. Middaugh. He has advised me that he definitely will attend this examination pursuant to Industrial Commission rules, however I am wondering if we can avoid this.

Considering the claimant has already returned to work I am not sure that Dr. Middaugh's opinion will even be relevant if an SHO hearing is necessary. * * *

{¶25} 8. On July 8, 2003, Sysco faxed a response stating that Sysco would still like Mr. Gross to keep his appointment with Dr. Middaugh.

{¶26} 9. On July 9, 2003, another attorney representing relator from the same law office faxed to Sysco's counsel the following letter:

We received your notice scheduling Mr. Groves for an examination in Cincinnati with Dr. Middaugh on July 10, 2003 at 12:15 p.m. Please be advised that Mr. Groves will not be able to attend this examination.

Mr. Groves lives in Columbus, Ohio. We certainly feel that it is unreasonable to require him to travel to Cincinnati, Ohio for an examination. Please reschedule in Columbus and we will have Mr. Groves appear for the examination. I am sure that since you were able to have your hand picked physical therapist travel from Cincinnati to Columbus to evaluate Mr. Groves, I am certainly sure that you will be able to have your hand picked physician, Dr. Middaugh, also travel to Columbus to evaluate him.

¹ Sysco's letter indicated incorrectly that the examination was scheduled for July 10, 2002. However, this typographical error is not an issue.

{¶27} 10. Relator did not appear for the examination scheduled with Dr. Middaugh for July 10, 2003.

{¶28} 11. By letter dated July 15, 2003, Sysco's counsel asked relator's counsel to agree to a rescheduled examination for relator. Sysco again offered to provide transportation to the examination.

{¶29} 12. On July 24, 2003, believing that it had received an inadequate response to its July 15, 2003 letter, Sysco moved for the suspension of relator's industrial claim for relator's refusal to attend the medical examination that had been scheduled for July 10, 2003.

{¶30} 13. On August 2, 2003, the commission's Columbus hearing administrator mailed a compliance letter pursuant to R.C. 4121.36(H)(2)(c)(i). The compliance letter reads:

The employer has made application to be afforded relief under Ohio Revised Code Section 4123.651(C) for the reason that the injured worker has refused without good cause to submit to an examination scheduled under Ohio Revised Code 4123.651(A).

Following review of the claim file and relevant evidence, it is the finding of the Hearing Administrator that the employer has demonstrated good cause for the relief requested. IT IS THEREFORE, THE FINDING OF THE HEARING ADMINISTRATOR THAT ALL ACTIVITY IN THE CLAIM IS SUSPENDED.

In order to remove this suspension, the injured worker must notify the employer, in writing, that the injured worker is willing to appear for an examination as scheduled by the employer. The employer then must reschedule and complete that examination within 45 days of receiving the injured worker's notice of intent to appear.

After the injured worker has attended the rescheduled examination, the parties shall immediately notify the Hearing

Administrator, in writing, of the injured worker's attendance. THE ATTENDANCE BY THE INJURED WORKER SHALL AUTOMATICALLY REVOKE THE SUSPENSION AND NO OTHER COMPLIANCE LETTER WILL BE ISSUED.

(Emphasis sic.)

{¶31} 14. Relator objected to the August 2, 2003 compliance letter.

{¶32} 15. By letter dated August 13, 2003, Sysco notified relator that he was scheduled for an examination to be performed by Dr. Middaugh in Cincinnati, Ohio, on August 28, 2003 at 10 a.m. The letter again offered relator transportation to the examination.

{¶33} 16. By letter dated August 19, 2003, relator's counsel advised Sysco that relator would not appear for the examination scheduled for August 28, 2003.

{¶34} 17. On September 29, 2003, a DHO heard Sysco's July 24, 2003 motion to suspend the claim. Relator was represented by counsel at hearing, but relator himself did not appear. Counsel submitted relator's affidavit, executed September 19, 2003, stating:

I am a resident of Columbus, Ohio. I was employed by Sysco Foods in Columbus Ohio at their facility at 5051 Kreiger Court, Columbus, Ohio. Because of my injury it was necessary for me to obtain employment with another employer for which the work was not as heavy. I am currently available for further medical examinations however I would request that the examination take place in Columbus. I cannot afford to miss work for the six hours it would require to travel to Cincinnati, Ohio to be examined and then return to Columbus. I also am a single parent and have the responsibility of taking care of my child which would further cause inconvenience.

{¶35} 18. Following the September 29, 2003 hearing, the DHO issued an order granting Sysco's motion to suspend the claim. The September 29, 2003 order states:

The Columbus Hearing Administrator's finding of 08/02/2003 in her "compliance letter" is affirmed. The named employer is found to be in compliance with the Relevant Rule and Statute; and, the injured worker's refusal to attend the employer's ".651" examination is not shown to be based on "good cause". No hardship, inconvenience, monetary loss or jeopardy to injured worker's "new" job has been convincingly established.

The finding of the Columbus Hearing Administrator per ORC 4123.651 is therefore affirmed.

(Emphasis sic.)

{¶36} 19. Relator administratively appealed the DHO's order of September 29, 2003.

{¶37} 20. Following a December 8, 2003 hearing, a staff hearing officer ("SHO") issued an order affirming the DHO's order. The SHO's order of December 8, 2003 states:

The Staff Hearing Officer affirms the finding that action in this claim remains suspended, as originally indicated in the Columbus Hearing Administrator's Compliance Letter dated 08/02/2003. Claimant has not demonstrated good cause under Ohio Revised Code 4123.651(C) to refuse to attend the examinations scheduled with D[r]. Middaugh on 07/10/2003 and 08/28/2003, and the Staff Hearing Officer finds that the employer is entitled to an examination of the claimant by a physician of its choosing. The means by which the suspension may be lifted remain as stated in the 08/02/2003 Compliance Letter.

All evidence, including the claimant's 09/18/2003 affidavit on file, was reviewed and evaluated.

{¶38} 21. On January 6, 2004, another SHO mailed an order refusing relator's administrative appeal from the SHO's order of December 8, 2003.

{¶39} 22. Relator moved for reconsideration of the SHO's January 6, 2004 refusal order.

{¶40} 23. On January 29, 2004, the commission denied reconsideration.

{¶41} 24. On March 16, 2004, relator, William Groves, filed this mandamus action.

Conclusions of Law:

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

{¶43} R.C. 4123.651 states:

(A) The employer of a claimant who is injured or disabled in the course of his employment may require, without the approval of the administrator or the industrial commission, that the claimant be examined by a physician of the employer's choice one time upon any issue asserted by the employee or a physician of the employee's choice or which is to be considered by the commission. * * * The employer shall pay the cost of any examinations initiated by the employer.

* * *

(C) If, without good cause, an employee refuses to submit to any examination scheduled under this section * * * his right to have his claim for compensation or benefits considered, if his claim is pending before the administrator, commission, or a district or staff hearing officer, or to receive any payment for compensation or benefits previously granted, is suspended during the period of refusal.

{¶44} Supplementing the statute, Ohio Adm.Code 4121-3-09(A)(5)(a) states:

* * * The cost of any examination initiated by employer shall be paid by the employer including any fee required by the physician, and the payment of all of the claimant's traveling and meal expenses, in a manner and at the rates as established by the administrator from time to time. If employed, the claimant will also be compensated for any loss of wages arising from the scheduling of an examination. All reasonable expenses shall be paid by the employer immediately upon receipt of the billing, and the employer shall provide the claimant with a proper form to be

completed by the claimant for reimbursement of such expenses. The employer shall reimburse the claimant for lost wages within thirty days of the submission of proof of lost wages.

{¶45} R.C. 4123.53 states in part:

(A) The administrator of workers' compensation or the industrial commission may require any employee claiming the right to receive compensation to submit to a medical examination * * * at any time, and from time to time, *at a place reasonably convenient for the employee*, and as provided by the rules of the commission or the administrator of workers' compensation. A claimant required by the commission or administrator to submit to a medical examination * * * at a point outside of the place of permanent or temporary residence of the claimant, as provided in this section, is entitled to have paid to the claimant by the bureau of workers' compensation the necessary and actual expenses on account of the attendance for the medical examination[.] * * *

* * *

(C) If an employee refuses to submit to any medical examination * * * scheduled pursuant to this section or obstructs the same * * * the employee's right to have his or her claim for compensation considered, if the claim is pending before the bureau or commission, or to receive any payment for compensation theretofore granted, is suspended during the period of the refusal or obstruction. * * *

(Emphasis added.)

{¶46} R.C. 4123.53(A) provides for commission medical examinations "at a place reasonably convenient for the employee." That language, or language to that effect, does not appear at R.C. 4123.651. According to relator, R.C. 4123.53(A) and particularly the above-noted language, is applicable to employer examinations conducted pursuant to R.C. 4123.651. The magistrate disagrees that R.C. 4123.53 is applicable to the employer examination involved in the instant case.

{¶47} Relator's argument that R.C. 4123.53 is applicable to employer scheduled examinations is based on his belief that "the self-insured employer stands at no better position than the Bureau of Workers' Compensation or Industrial Commission." (Relator's brief at 8.) However, that is not the standard by which R.C. 4123.651 can be interpreted. In effect, relator is asking this court to engraft new language onto R.C. 4123.651.

{¶48} Unambiguous statutes are to be applied according to the plain meaning of the words used, and the courts are not free to delete or insert other words. *State ex rel. Burrows v. Indus. Comm.* (1997), 78 Ohio St.3d 78, 81. Relator does not argue that R.C. 4123.651 is ambiguous, nor does this magistrate find it to be ambiguous as applied to this case.

{¶49} Relator seems to suggest that R.C. 4123.53 must be read in para materia with R.C. 4123.651 so that the language "at a place reasonably convenient for the employee" found in R.C. 4123.53 would be read into R.C. 4123.651. Relator's suggestion lacks merit.

{¶50} The in para materia rule of construction may be used in interpreting a statute but first some doubt or ambiguity must exist. *Id.* Relator has presented no cause for use of this rule of construction in this case.

{¶51} The Ohio legislature has seen fit to enact separate statutes applicable to employer medical examinations and commission medical examinations. The legislature's determination in that regard must be accepted. Accordingly, R.C. 4123.651 is applicable to this case. R.C. 4123.53 is clearly not applicable given the plain meaning of the statute.

{¶52} As indicated by relator's affidavit, his objection to submitting to Sysco's scheduled medical examinations in Cincinnati, Ohio, divides into three contentions which this magistrate shall enumerate: (1) it is allegedly unreasonable for Sysco to schedule a medical examination in Cincinnati when relator is a resident of Columbus and was employed by Sysco in Columbus; (2) relator "cannot afford to miss work" due to the examination; and (3) the examination would "further cause inconvenience" because relator is a single parent with responsibility for the care of his child. As more fully explained below, the commission did not abuse its discretion with respect to any of the enumerated contentions.

{¶53} The commission found that relator had failed to show good cause under R.C. 4123.651(C) for refusing to attend the medical examinations scheduled with Dr. Middaugh in Cincinnati, Ohio. The DHO explained: "No hardship, inconvenience, monetary loss or jeopardy to injured worker's 'new' job has been convincingly established." (Emphasis sic.) The DHO's decision was administratively affirmed.

{¶54} Addressing relator's first contention regarding the reasonableness of a Cincinnati examination, R.C. 4123.651(A) provides that the employer may require the claimant to be examined by a physician of the employer's choice. It is at least implicit in this provision that the employer also chooses the location of the examination because a physician will ordinarily examine at the location of his or her office. The statute requires the employer to pay the cost of the examination. The claimant cannot refuse an examination without good cause.

{¶55} Ohio Adm.Code 4121-3-09(A)(5) specifies the types of examination costs that the employer is obligated to pay. The employer must pay the physician's fee for the

examination. The employer must also pay for the claimant's travel and meal expenses, as well as the claimant's loss of wages if employed.

{¶56} Although Sysco has expressed a preference for Dr. Middaugh because she has examined relator before and is familiar with the medical records, Sysco does not contend that it could not find a Columbus physician who has the equivalent medical expertise of Dr. Middaugh.

{¶57} However, nothing in R.C. 4123.651 nor in Ohio Adm.Code 4121-3-09 prohibits Sysco from scheduling relator for an examination to be performed in Cincinnati as opposed to Columbus, Ohio, even if it is assumed that another physician of Dr. Middaugh's qualifications is available for an examination in Columbus. Moreover, relator has pointed to no regulation or policy of the commission that prohibits Sysco from scheduling an examination in Cincinnati when relator is a resident of Columbus.

{¶58} While the employer's exercise of its right to require a medical examination under R.C. 4123.651 is not unlimited, this magistrate, nevertheless, finds that it is not inherently unreasonable for Sysco to schedule a medical examination with Dr. Middaugh in Cincinnati when relator resides in Columbus and was employed by relator in Columbus. In this regard, it should be noted that there is no evidence that Sysco has selected Dr. Middaugh to perform an examination in Cincinnati in order to harass relator. There is no evidence to contradict Sysco's claim that it simply preferred Dr. Middaugh because she has previously examined relator for Sysco and is familiar with the medical records.

{¶59} Accordingly, the magistrate concludes that the commission did not abuse its discretion with respect to relator's first contention regarding the reasonableness of a Cincinnati examination.

{¶60} Relator's second contention, as enumerated by the magistrate, is that relator "cannot afford to miss work for the six hours it would require to travel to Cincinnati, Ohio to be examined and then return to Columbus."

{¶61} When relator states that he cannot *afford* to miss work, he suggests that he is concerned that he will lose his wages when he is scheduled for the examination. If relator was actually concerned that missing work would cause him a problem with his current employer, he did not specifically say so in his affidavit. The commission's hearing officer was not required to read something into the affidavit that relator himself seemed unwilling to say. Given that Ohio Adm.Code 4121-3-09(A)(5)(a) requires Sysco to reimburse relator for any lost wages resulting from the examination, it was well within the commission's fact-finding discretion to conclude that relator did not have a legitimate concern that he could not *afford* to miss work for the examination. Accordingly, the DHO could properly find that "jeopardy" to relator's new job had not been convincingly established.

{¶62} Accordingly, the commission did not abuse its discretion with respect to relator's second contention.

{¶63} Relator's third contention, as enumerated by the magistrate, is that the examination would "further cause inconvenience" because relator is a single parent with responsibility for the care of his child.

{¶64} As Sysco points out in this action, relator was scheduled for an examination with Dr. Middaugh on July 10, 2003 at 12:15 p.m., during normal working hours. Relator was later scheduled for an examination on August 28, 2003 at 10 a.m., during normal working hours. Sysco states that the times were chosen so that relator would be traveling to and from Cincinnati during his normal working hours so as not to interfere with his parental obligations. Relator does not deny Sysco's contention that the travel to and from Cincinnati would correspond to his normal working hours.

{¶65} Given that relator would normally be working during the time needed to travel to and from Cincinnati and that relator would be reimbursed by Sysco for his lost wages, it was clearly within the commission's fact-finding discretion to conclude that no hardship with respect to relator's parental responsibilities was convincingly established.

{¶66} Accordingly, for all 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