

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

State of Ohio ex rel. Gerda Hemingway, :  
Relator, :  
v. : No. 09AP-728  
The Industrial Commission of Ohio : (REGULAR CALENDAR)  
and Rexam Consumer Plastic Inc., :  
Respondents. :  
:

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D E C I S I O N

Rendered on June 30, 2010

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*Daniel L. Shapiro and Leah P. VanderKaay*, for relator.

*Richard Cordray*, Attorney General, and *Joseph C. Mastrangelo*, for respondent Industrial Commission of Ohio.

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IN MANDAMUS  
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

KLATT, J.

{¶1} Relator, Gerda Hemingway, commenced this original action in mandamus seeking an order compelling respondent, Industrial Commission of Ohio ("commission"), to vacate its order denying her permanent total disability ("PTD") compensation, and to grant said compensation.

{¶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 the reports of Drs. Trinidad and Fritz were some evidence upon which the commission could rely in denying relator PTD compensation. Therefore, the magistrate concluded that the commission did not abuse its discretion. Accordingly, the magistrate has recommended that we deny relator's request for a writ of mandamus.

{¶3} Relator has filed objections to the magistrate's decision. Relator advances two arguments. We find neither argument persuasive.

{¶4} To address relator's arguments, it is necessary to summarize the magistrate's key factual findings. In 2001, relator sustained an industrial injury while employed as a "floor worker" for respondent, Rexam Consumer Plastic, Inc., a state-funded employer. Relator's claim was allowed for "sprain lumbar region; spasm of muscle; recurrent depression psychotic-severe." Relator began receiving temporary total disability ("TTD") compensation. In February 2008, relator was examined by clinical psychologist Lisa C. Goulden, Ph.D. at the request of the Ohio Bureau of Workers' Compensation to determine if relator had reached maximum medical improvement ("MMI") with respect to her psychological claim. Dr. Goulden opined that relator had reached MMI on this claim. However, Dr. Goulden's opinion also contained a statement that relator was not employable due to her psychological condition. The commission relied upon Dr. Goulden's opinion in finding that relator was at MMI. Based upon that finding, the commission terminated relator's TTD compensation. Shortly thereafter, relator filed an application for PTD compensation supported by Dr. Goulden's opinion that relator was not employable due to her psychological claim.

{¶5} Upon receiving relator's application, the commission ordered a physical and psychological examination of relator. After a number of delays due to relator's physical condition, relator was ultimately examined by Drs. Trinidad and Fritz. Relying upon their respective reports, the commission denied relator PTD compensation.

{¶6} In her first objection, relator argues that because the commission relied upon Dr. Goulden's opinion in determining that relator's psychological claim had reached MMI, the commission was required to accept Dr. Goulden's opinion that relator was unemployable for purposes of relator's PTD application. Relator cites no statutory or case authority in support of this argument, and we reject it.

{¶7} As the magistrate points out, the commission was required to schedule relator for an examination by commission doctors to process relator's PTD application. Ohio Adm.Code 4121-3-34(C)(5)(a)(iii). Drs. Trinidad and Fritz examined relator in connection with her PTD application. Neither doctor found that relator was unemployable. Although Dr. Goulden stated that relator was unemployable, she did not examine relator for purposes of PTD compensation. Nor did the commission rely on that portion of Dr. Goulden's opinion when it determined that relator's psychological claim had reached MMI. The commission was not required to accept Dr. Goulden's gratuitous opinion regarding relator's employability. The commission did not abuse its discretion when it relied upon the opinions of Drs. Trinidad and Fritz in denying relator PTD compensation. Therefore, we overrule relator's first objection.

{¶8} In her second objection, relator argues that the commission should have issued a tentative order granting relator PTD compensation based upon a file review, in

lieu of an examination. According to relator, the magistrate erred when he found that this issue was moot. We disagree.

{¶9} As previously noted, Dr. Goulden did not examine relator for purposes of PTD compensation. Dr. Goulden's examination of relator and subsequent opinion was for the purpose of determining whether relator's psychological claim was at MMI. Although the commission accepted Dr. Goulden's opinion for purposes of determining MMI, the commission was not required to accept it for purposes of relator's PTD application. Therefore, even if the commission had conducted a file review, it would not have been required to issue a tentative order granting PTD. Moreover, we agree with the magistrate that the commission did not abuse its discretion when it relied upon the opinions of Drs. Trinidad and Fritz in denying relator PTD compensation. For these reasons, we overrule relator's second objection.

{¶10} 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.*

BRYANT and FRENCH, JJ., concur.

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**APPENDIX**

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

State of Ohio ex rel. Gerda Hemingway,	:	
	:	
Relator,	:	
	:	
v.	:	No. 09AP-728
	:	
The Industrial Commission of Ohio	:	(REGULAR CALENDAR)
and Rexam Consumer Plastic Inc.,	:	
	:	
Respondents.	:	
	:	

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

Rendered on February 23, 2010

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*Daniel L. Shapiro and Leah P. VanderKaay*, for relator.

*Richard Cordray*, Attorney General, and *Joseph C. Mastrangelo*, for respondent Industrial Commission of Ohio.

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IN MANDAMUS

{¶11} In this original action, relator, Gerda Hemingway, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order denying her application for permanent total disability ("PTD") compensation, and to enter an order granting the application.

Findings of Fact:

{¶12} 1. On June 22, 2001, relator sustained an industrial injury while employed as a "floor worker" for respondent Rexam Consumer Plastic Inc., a state-fund employer.

On that date, while moving a finished product off the production line, relator injured her lower back. The industrial claim (No. 01-398616) is allowed for "sprain lumbar region; spasm of muscle; recurrent depression psychotic-severe."

{¶13} 2. Apparently, relator began receiving temporary total disability ("TTD") compensation from the Ohio Bureau of Workers' Compensation ("bureau").

{¶14} 3. On February 21, 2008, at the bureau's request, relator was examined by clinical psychologist Lisa C. Goulden, Ph.D., who practices at Tulsa, Oklahoma. In her six-page report, Dr. Goulden answered some queries:

Has the injured worker reached a treatment plateau that is static or well stabilized at which you can expect no fundamental, functional, or psychological change within reasonable medical probability in spite of continuing medical or rehabilitation procedures (maximum medical improvement)?

Yes. Mrs[.] Hemingway has reached a treatment plateau and is therefore at MMI with respect to the allowed psychological condition. \* \* \*

\* \* \*

Please provide a summary of any functional limitations solely due to the psychological condition(s) in this claim(s). In other words, please indicate the type of work the injured worker can perform and the supportive rationale for your opinion.

It is this evaluator's opinion that she is not employable. Due to her psychological condition, she has significant difficulties with interpersonal functioning and stress tolerance. She would not likely be able to respond appropriately to supervisor or co-worker feedback and demands.

{¶15} 4. On March 13, 2008, citing Dr. Goulden's report, the bureau moved for termination of TTD compensation.

{¶16} 5. Following an April 4, 2008 hearing, a district hearing officer ("DHO") issued an order terminating TTD compensation effective the hearing date. The order explains:

District Hearing Officer finds claimant has reached maximum medical improvement for the allowed psychological condition based upon the 02/22/2008 examination of Dr. Goulden and medical opinions contained therein.

{¶17} 6. Apparently, the DHO's order of April 4, 2008 was not administratively appealed.

{¶18} 7. On April 10, 2008, relator filed an application for PTD compensation. In support of the application, relator submitted the report of Dr. Goulden.

{¶19} 8. In May 2008, the commission issued two notices of examination scheduling relator for an examination on June 9, 2008, with Kenneth R. Trinidad, D.O., and on June 10, 2008, with clinical psychologist Jeri Fritz, Ph.D. Both doctors practice in the Tulsa, Oklahoma area where relator resides.

{¶20} 9. On May 27, 2008, relator, through counsel, faxed to the commission the following objection:

Claimant \* \* \* objects to the setting of a new examination in this matter. Claimant has been examined by the Bureau of Workers' Compensation and was found to be at maximum medical improvement and permanently and totally disabled. This opinion was adopted by the Industrial Commission on 4/4/08. Claimant respectfully requests that a tentative order order [sic] of permanent and total disability be entered accordingly. The appearance at another examination on 6/9/08 would be unduly burdensome on claimant and completely unnecessary.

{¶21} 10. Thereafter, the commission issued two more notices of examination. One scheduled an examination with Dr. Trinidad on June 30, 2008, and the other scheduled an examination with Dr. Fritz on July 8, 2008.

{¶22} 11. On June 25, 2008, the bureau moved for suspension of the PTD application.

{¶23} 12. On June 25, 2008, relator, through counsel, faxed to the commission the following message:

Claimant by and through counsel hereby objects to suspension of claim. Claimant requests that either an evidentiary hearing be scheduled in this matter on an emergency basis or that the Industrial Commission be ordered to conduct a file review in place of a medical examination. \* \* \*

{¶24} 13. On June 26, 2008, relator moved that the commission enter a PTD award based upon the report of Dr. Goulden. The motion argued:

Now comes claimant by and through undersigned counsel and hereby requests that Industrial Commission place order in claim granting permanent and total disability based on report of Dr. Goulden. Claimant is unable to attend an examination due to a medical condition beyond claimant's control. Claimant was already found to be permanently and totally disabled prior to onset of current medical issue. Placing claim in suspension status due to medical inability to attend exam will irreparably harm claimant. Please set hearing on evidentiary matter on emergency basis should order of permanent and total disability not be placed.

{¶25} 14. Following a July 9, 2008 hearing, a staff hearing officer ("SHO") issued an order suspending relator's PTD application. The SHO's order explains:

Claimant's counsel, at hearing, stated that due to an unrelated heart condition, claimant is unable to attend the examinations, but, outside of this bare allegation, no documentation regarding this, medical or otherwise, is presented. The Staff Hearing Officer concludes that evidence weight is

inadequate to forego the necessity for medical examination on the PTD issue. As required under Ohio Administrative Code section 4121-3-34(C)(5)(a), the PTD application is suspended until the requisite examinations take place.

{¶26} 15. On October 27, 2008, relator, through counsel, faxed to the commission relator's October 21, 2008 handwritten note indicating that she is able to attend the examinations.

{¶27} 16. Thereafter, the commission issued notices of examinations to be performed by Drs. Trinidad and Fritz.

{¶28} 17. On November 18, 2008, relator was examined by Dr. Fritz. In a four-page narrative report, Dr. Fritz opined:

Conclusions: Ms. Hemingway has an allowance on her claim for Recurrent Depressive Psychosis, Severe. There were some discrepancies between information presented at this evaluation and symptoms she has presented to other examiners or providers. For example[,] she denied a history of hallucinations yet has apparently reported to her psychiatrist and [sic] she has heard voices. She has also indicated to other examiners that she had no leisure activities since her injury in 2001 although she reported to this examiner that prior to May of this year she regularly played bingo and attended movies. Ms. Hemingway has received consistent treatment for her depression for several years and, by her report, her depressive symptoms at this time are entirely due to the health problems which developed in May of this year. She no longer has any psychotic symptoms and her current test scores suggested only moderate levels of depression. Although Ms. Hemingway had reported profound levels of depression in the past due to her back pain and inability to work, since her recent hospitalization and colon surgery, she appears to have adjusted her perception of her past depression and implied that she was functioning relatively well until this spring. While Ms. Hemingway may benefit from continued supportive therapy from her psychiatrist, her psychological condition appears chronic and stable with little chance of significant improvement. Based solely on the allowed condition of Recurrent Depressive Psychosis, Severe and in accordance

with the AMA Guide to Permanent Disability -5th Edition, it is the opinion of this examiner that Ms. Hemingway has reached maximal medical improvement and her condition produced a 35% level of functional impairment.

{¶29} 18. On December 1, 2008, Dr. Fritz completed a form captioned "Occupational Activity Assessment, Mental & Behavioral Examination." On the form, Dr. Fritz indicated by checkmark: "This injured worker has no work limitations." In her own hand, Dr. Fritz wrote: "Ms. Hemingway's current level of depression would not hinder her from performing the type of duties she had while employed in her last job."

{¶30} 19. Earlier, on November 24, 2008, relator was examined by Dr. Trinidad. In his four-page narrative report, Dr. Trinidad opined:

With her current physical impairment she is unable to return to work in her formal capacity. Based on the lumbar spine injury alone, it is my opinion that she could work in a light-duty capacity. She has had intervening medical conditions and injuries which preclude her from performing any work activities, and are unrelated to her industrial injury of June 22, 2001.

It is my opinion, within a reasonable degree of medical certainty, that the above findings represent objective evidence of permanent anatomic abnormalities which diminishes the claimant's ability to earn wages at the same level as before the injury.

In my opinion, the major cause of her injuries, need for treatment and permanent impairment is the June 22, 2001 work-related trauma.

{¶31} 20. Following a February 26, 2009 hearing, an SHO issued an order denying relator's PTD application. In the order, the SHO states reliance upon the reports of Drs. Trinidad and Fritz and then evaluates the nonmedical disability factors.

{¶32} 21. On July 28, 2009, relator, Gerda Hemingway, filed this mandamus action.

Conclusions of Law:

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

{¶34} Analysis begins with the DHO's order of April 4, 2008, determining that relator has reached maximum medical improvement ("MMI") based upon Dr. Goulden's report. Contrary to relator's assertions in the May 27, 2008 fax, the DHO did not find that relator is permanently and totally disabled, nor did the DHO even have authority to enter a determination regarding PTD. While Dr. Goulden does opine in her report that relator "is not employable," that opinion was not adopted by the DHO nor was adoption of that opinion necessary to the ultimate determination that relator is at MMI. It is incorrect for relator to assert, as was done in the May 27, 2008 fax, that relator "was found to be at maximum medical improvement and permanently and totally disabled." Again, the DHO determined that relator was at MMI. The DHO did not determine that relator was "unemployable" or that relator is PTD. Thus, that Dr. Goulden's report contains an opinion that relator is unemployable does not create a binding effect upon the commission's subsequent adjudication of the PTD application.

{¶35} In the May 27, 2008 fax, relator's counsel asks the commission to enter a tentative order finding that relator is PTD. That request invited the commission to violate its own rules pertaining to the adjudication of PTD applications.

{¶36} Ohio Adm.Code 4121-3-34 sets forth the commission's rules regarding the adjudication of PTD applications. Ohio Adm.Code 4121-3-34(C) sets forth the commission's rules regarding the processing of PTD applications. Thereunder, the rules provide:

(C) Processing of applications for permanent total disability

\* \* \*

(1) 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). \* \* \*

\* \* \*

(3) A claims examiner shall initially review the application for permanent and total disability.

(a) If it is determined there is a written agreement to award permanent total disability compensation entered into between the injured worker, the employer, and the administrator in claims involving state fund employers, the application shall be adjudicated, and an order issued, without a hearing.

\* \* \*

[5](a) Following the date of filing of the permanent and total disability application, the claims examiner shall perform the following activities:

\* \* \*

(iii) Schedule appropriate medical examination(s) by physician(s) to be selected by the commission[.] \* \* \*

\* \* \*

[6](a) After the reports of the commission medical examinations have been received, the hearing administrator may refer the claim to an adjudicator to consider the issuance of a tentative order, without a hearing.

\* \* \*

(ii) In the event a party makes written notification to the industrial commission of an objection within fourteen days of the date of the receipt of the notice of findings of the tentative order, the application for compensation for permanent and total disability shall be set for hearing and adjudicated on its merits.

{¶37} The May 27, 2008 fax objected to the commission's scheduling of medical examinations yet requested that a tentative order be issued based upon Dr. Goulden's report. But the commission's rules explicitly state that a tentative order may issue *after* the reports of the commission medical examinations have been received. Thus, the May 27, 2008 fax requested that a tentative order issue in violation of the commission's rules.

{¶38} Relator's June 26, 2008 motion also invited the commission to violate its rules. Again, the June 26, 2008 motion states:

Now comes claimant by and through undersigned counsel and hereby requests that Industrial Commission place order in claim granting permanent and total disability based on report of Dr. Goulden. Claimant is unable to attend an examination due to a medical condition beyond claimant's control. Claimant was already found to be permanently and totally disabled prior to onset of current medical issue. Placing claim in suspension status due to medical inability to attend exam will irreparably harm claimant. \* \* \*

{¶39} On June 26, 2008, when the motion was filed, relator had not been examined by a commission-appointed physician. Like the May 27, 2008 fax, the June 26, 2008 motion, in effect, asks the commission to enter a tentative order before commission medical examinations have been performed. Like the May 27, 2008 fax, the June 26, 2008 motion incorrectly asserts that relator "was already found to be permanently and totally disabled prior to onset of current medical issue."

{¶40} Here, relator asserts, without citation to any authority, that the commission "should not be entitled to obtain it's [sic] own medical opinion when the BWC has already obtained a medical opinion on the same issue of fact." (Relator's brief, at 6.) Relator's assertion lacks merit.

{¶41} Ohio Adm.Code 4121-3-34(C)(5)(a)(iii) provides that the claims examiner shall schedule appropriate medical examinations by physicians to be selected by the commission. That procedure cannot be bypassed under the rules unless, under Ohio Adm.Code 4121-3-34(C)(3)(a), a written agreement to award PTD has been entered into by the injured worker, the employer, and the administrator.

{¶42} No such agreement occurred in this case. Thus, the commission was required to schedule relator for examinations to be performed by commission doctors notwithstanding that the bureau doctor had declared relator to be unemployable. Relator's assertion that the commission should not be allowed to obtain its own medical reports simply ignores the commission's promulgated rules.

{¶43} Here, relator also asserts that the commission abused its discretion when it suspended relator's PTD application for her failure to attend the scheduled examinations rather than ordering a physician file review in lieu of actual examinations. This assertion or issue is moot.

{¶44} As the record undisputedly shows, relator indicated on October 21, 2008, that she was able to attend the examinations and, thereafter, the examinations were conducted. Given that the examinations were conducted, there was no need for a file review.

{¶45} Here, relator also asserts that the commission abused its discretion by relying upon the reports of Drs. Trinidad and Fritz when, in relator's view, Dr. Goulden's opinion is more accurate. Relator's assertion lacks merit and is easily answered.

{¶46} The evaluation of the weight and credibility of the evidence before it rests exclusively with the commission. *State ex rel. Thomas v. Indus. Comm.* (1989), 42 Ohio St.3d 31, 33, citing *State ex rel. Burley v. Coil Packing, Inc.* (1987), 31 Ohio St.3d 18.

{¶47} Thus, the commission's reliance upon the reports of Drs. Trinidad and Fritz and its apparent rejection of Dr. Goulden's opinion that relator was unemployable was within the commission's sound discretion.

{¶48} 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

### **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).