[Cite as *State ex rel. Gen. Motors, L.L.C. v. Indus. Comm.*, 2011-Ohio-4922.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. General Motors, LLC,	:	
Relator,	:	
v.	:	No. 10AP-855
Industrial Commission of Ohio and Johnsylon J. Luckie,	:	(REGULAR CALENDAR)
	:	
Respondents.	:	

D E C I S I O N

Rendered on September 27, 2011

Taft, Stettinius & Hollister LLP, and *Andrew R. Thaler,* for relator.

Michael DeWine, Attorney General, and *Allan K. Showalter*, for respondent Industrial Commission of Ohio.

E.S. Gallon & Associates, and *Corey L. Kleinhenz*, for respondent Johnsylon J. Luckie.

IN MANDAMUS
ON OBJECTIONS TO MAGISTRATE'S DECISION

TYACK, J.

{¶1} General Motors, LLC ("General Motors"), filed this action in mandamus, seeking a writ to compel the Industrial Commission of Ohio ("commission") to vacate its award of permanent total disability ("PTD") compensation to Johnsylon J. Luckie.

{¶2} In accord with Loc.R. 12, the case was referred to a magistrate to conduct appropriate proceedings. The parties stipulated the pertinent evidence and filed briefs. The magistrate then issued a magistrate's decision containing detailed findings of fact and conclusions of law, which is appended to this decision. The magistrate's decision includes a recommendation that we deny the request for a writ of mandamus.

{¶3} General Motors has filed objections to the magistrate's decision. Counsel for the commission has also filed its own objections and a separate memorandum in response to the objections of General Motors. Counsel for Ms. Luckie has filed a memorandum in response to the objections filed by General Motors. General Motors has filed a reply memorandum to support its objections. The case is now before the court for a full, independent review.

{¶4} Ms. Luckie has suffered three separate sets of injuries while employed by General Motors. The most recent set of injuries occurred in September 1994 and has been recognized for "contusion low back; contusion left thigh; sprain left knee; contusion left ankle; grade III chondral defect lateral femoral condyle; posterior horn middle one-third lateral meniscus; extensive synovitis medial and lateral compartments; traumatic arthritis femoral condyle-left knee."

{¶5} Her 1981 injuries were recognized for "bilateral carpal tunnel syndrome; flexor synovitis of the right index finger."

{¶6} Her 1990 injuries resulted in recognition for "multiple contusions; fracture proximal phalanx right great toe; contusion to the left clavicle, left middle ring finger, abdomen, right knee, and right ankle."

{¶7} Her award of PTD compensation was allocated 75 percent to the 1994 injuries and 25 percent to the 1981 injuries.

{¶8} The commission's objection to the magistrate's decision is "[t]he magistrate's finding of fact excludes the fact that Jennifer J. Stoeckel, Ph.D., was aware that Respondent, Johnsylon Luckie ("Luckie"), reported that she could read, write and perform basic math."

{¶9} Jennifer J. Stoeckel, Ph.D. provided a set of reports which concluded that Ms. Luckie was PTD. The reports especially focused on test findings that Ms. Luckie functioned at a level which bordered on MR in several important aspects. Dr. Stoeckel clearly was not bound to agree with Ms. Luckie's own belief that Ms. Luckie could read, write and perform basic math functions. Further, Ms. Luckie's belief in her own academic skills was not binding when the commission evaluated the so-called *Stephenson* factors.[1]

{¶10} The commission's objection suggests a fact which is true, but does not change the magistrate's consideration of the case.

{¶11} The commission's objection is overruled.

{¶12} General Motors has labeled its objection as "Assignment of Error." The objection reads:

---

[1] *State ex rel. Stephenson v. Indus. Comm.* (1987), 31 Ohio St.3d 167.

> The magistrate erred in finding no abuse of discretion in the award of PTD compensation as the commission failed to do a complete analysis of the claimant's educational abilities under OAC 4121-3-34.

{¶13} Ohio Adm.Code 4121-3-34 reads in part:

> (g) The Adjudicator is to review all relevant factors in the record that may affect the injured worker's ability to work.
>
> (h) The Adjudicator shall prepare orders on a case-by-case basis which are fact specific and which contain the reasons explaining the decision. The orders must specifically state what evidence has been relied upon in reaching the conclusion and explain the basis for the decision. In orders that are issued under paragraphs (D)(2)(b) and (D)(2)(c) of this rule, the Adjudicator is to specifically list the non-medical disability factors within the order and state how such factors interact with the medical impairment resulting from the allowed injuries in the claim in reaching the decision.

{¶14} We see no basis for asserting that the commission, through its staff hearing officers, failed to review all relevant factors. The fact that Ms. Luckie felt she could read, write and do basic math is not a separate fact which required separate discussion in this case. The more complete information was presented in the context of the reports of Dr. Stoeckel. We note in addition that the application filed by Ms. Luckie has numerous grammatical errors and contains misspelling of simple words like "doctor" and "metal," which are consistent with Dr. Stoeckel's findings.

{¶15} The medical and psychological reports before the commission constituted some evidence to support the commission's finding that Ms. Luckie is entitled to PTD compensation. The staff hearing officer ("SHO") who made the award generated a four-page order which carefully discussed both Ms. Luckie's medical picture and the various

Stephenson or disability factors. There is no basis for asserting that the SHO failed to consider all the relevant factors.

{¶16} The objections to the magistrate's decision are overruled. We adopt the findings of fact and the conclusions of law contained in the magistrate's decision. As a result, we refuse to grant the writ of mandamus requested by General Motors.

Objections overruled; writ denied.

BROWN and DORRIAN, 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. General Motors, LLC,	:	
Relator,	:	
v.	:	No. 10AP-855
Industrial Commission of Ohio and Johnsylon J. Luckie,	:	(REGULAR CALENDAR)
	:	
Respondents.	:	

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

Rendered on May 25, 2011

Taft, Stettinius & Hollister LLP, and Andrew R. Thaler, for relator.

Michael DeWine, Attorney General, and *Allan K. Showalter*, for respondent Industrial Commission of Ohio.

E.S. Gallon & Associates, and *Corey L. Kleinhenz*, for respondent Johnsylon J. Luckie.

IN MANDAMUS

{¶17} Relator, General Motors, LLC, 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 awarded permanent total disability ("PTD")

compensation to respondent Johnsylon J. Luckie ("claimant") and ordering the commission to find that claimant is not entitled to that compensation.

Findings of Fact:

{¶18} 1. Claimant has sustained three separate work-related injuries during the course of her employment with relator and her claims have been allowed as follows (1) claim No. 823108-22 (October 20, 1981) is allowed for: "bilateral carpal tunnel syndrome; flexor synovitis of the right index finger"; (2) claim No. L44141-22 (March 22, 1990) is allowed for: "multiple contusions; fracture proximal phalanx right great toe; contusion to the left clavicle, left middle ring finger, abdomen, right knee, and right ankle"; and (3) claim No. 94-509282 (September 21, 1994) is allowed for: "contusion low back; contusion left thigh; sprain left knee; contusion left ankle; grade III chondral defect lateral femoral condyle; posterior horn middle one-third lateral meniscus; extensive synovitis medial and lateral compartments; traumatic arthritis femoral condyle-left knee."

{¶19} 2. On June 9, 2009, claimant filed her application for PTD compensation. In support of her application, claimant submitted the August 20, 2008 report of her treating physician, Jonathan J. Paley, M.D. In that report, and considering only claimant's injury resulting from the 1994 work-related injury, Dr. Paley opined that claimant was an "excellent candidate for permanent total disability * * * [and that he did] not think that she will be capable of sustained remunerative employment."

{¶20} 3. The commission had relator examined by James T. Lutz, M.D. In his October 6, 2009 report, Dr. Lutz set forth all of claimant's claims as well as the conditions allowed, noted her complaints, identified the medical records which he reviewed, and

provided his physical findings upon examination as well as his breakdown of the percentage of whole person impairment for each and every allowed condition. Ultimately, Dr. Lutz opined that claimant had a 49 percent whole person impairment due to all the allowed conditions. Dr. Lutz concluded that claimant was "capable of sedentary work with repetitive use of both upper extremities limited to one-third of the time."

{¶21} 4. There are two vocational reports which were submitted to the commission. First, relator submitted the November 18, 2009 vocational report prepared by Howard L. Caston, Ph.D. Dr. Caston concluded that claimant had transferable skills as a result of previous work experience as a receptionist in a physician's office from 1969 until 1972. Dr. Caston opined that the "vocational significance of this work activity is that Ms. Luckie obtained basic office clerical skills, typing, receptionist, and customer service activities." Ultimately, Dr. Caston concluded that claimant could perform jobs including the following: receptionist, scheduler, medical records clerk, unit ward clerk, data entry clerk, telephone operator, and customer service clerk.

{¶22} 5. Claimant submitted the November 21, 2009 vocational assessment prepared by Jennifer J. Stoeckel, Ph.D. Dr. Stoeckel administered various tests. Specifically, Dr. Stoeckel administer the WAIS-IV which demonstrated that claimant showed strength for working memory at the low average range and the remainder of her test scores were in the borderline MR range of ability. The testing revealed that claimant was particularly weak in the areas of verbal reasoning, verbal understanding, and general fund of knowledge, but that she showed some strength of short-term recall and mental arithmetic. Dr. Stoeckel noted that people with these scores are typically employed at

unskilled labor. Dr. Stoeckel also administered the Wide Range Achievement Test-IV which demonstrated that claimant had elementary level academic skills and, based upon those test scores, claimant would not be able to compete effectively in entry level clerical type positions. Dr. Stoeckel also administered the Career Ability Placement Survey and noted that claimant's scores were not consistent with an ability to perform sedentary employment. Ultimately, Dr. Stoeckel opined that claimant was not able to perform sustained remunerative employment as follows:

> Ms. Luckie is of advanced age of 72. Her age alone would interfere with her ability to acquire new work skills as well as her ability to compete with younger workers for entry level positions. Furthermore, Ms. Luckie has a limited educational history. She completed the tenth grade and has never earned a GED. She would not have any transferable skills. Her most substantial position was in assembly. In the remote past she worked as a receptionist and telemarketer, but this was well over 35 years ago. This would no longer make her competitive in those markets. Furthermore, results of vocational testing identify below average intellectual academic and vocational functions. She does not have academic abilities or clerical skills consistent with sedentary employment.
>
> Summarily, within reasonable vocational certainty, Ms. Luckie presents as permanently and totally disabled given the combination of her allowed conditions, residual impairment, advanced age, lack of transferable work skills, and below average intellectual, academic, and vocational ability. Thank you for referring Ms. Luckie for examination. Should you have any further questions or concerns, please do not hesitate to contact me.

{¶23} 6. Relator had claimant examined by Stephen S. Wunder, M.D. In his August 18, 2009 report, Dr. Wunder noted the history of claimant's injuries, identified her specific complaints, provided his physical findings upon examination, identified the

medical records which he reviewed, and ultimately concluded that claimant was capable of performing remunerative employment in the sedentary to light ranges. Dr. Wunder assessed a 6 percent whole person impairment for the 1981 claim and a 20 percent whole person impairment for the 1994 claim. Ultimately, this resulted in a 25 percent whole person impairment for both claims.

{¶24} 7. Dr. Wunder completed an addendum, dated January 18, 2010, after being asked to consider the 1990 claim's impact on claimant's application for PTD compensation. Dr. Wunder concluded that there was no additional medical impairment from the 1990 injury and claimant was still capable of performing in the sedentary to light ranges.

{¶25} 8. Dr. Lutz authored an addendum dated May 18, 2010. Apparently, the parties were not aware that the 1990 claim was to be considered relative to claimant's application for PTD compensation. After reviewing his previous report and considering the report and addendum from Dr. Wunder, Dr. Lutz opined that his opinion that claimant had a 49 percent whole person impairment and was capable of performing sedentary work with restrictions remained unchanged.

{¶26} 9. After being provided a copy of Dr. Caston's vocational report, Dr. Stoeckel prepared an addendum dated November 23, 2009. With regard to Dr. Caston's opinion that claimant had transferable skills, Dr. Stoeckel responded as follows:

> It should be noted that while Ms. Luckie performed clerical capacities in the past, this was nearly 40 years ago and certainly would not make her competitive in today's labor market, particularly in light of the economy that Dr. Caston mentions. The jobs he identifies, particularly typing, filing, scheduling, and computer work are also inconsistent with the

> Industrial Commission's physician's restrictions of limited use of the upper extremities. It is further noteworthy that most of the jobs he identified require skills in Microsoft, word, excel, and other computer programs for which Ms. Luckie does not possess, nor would she be considered retrainable at the age of 72. Furthermore, results of vocational assessment identified limited clerical capacities at this time, below average academic skills, and predominantly below average cognitive functioning.

{¶27} 10. Relator's application was heard before a staff hearing officer ("SHO") on June 21, 2010 and was granted. The SHO relied on the medical reports of Dr. Lutz and concluded that claimant was capable of performing sedentary work activities within the restrictions identified by Dr. Lutz. Thereafter, the SHO addressed the non-medical disability factors. The SHO determined that claimant's age of 73 years was a significant barrier to her ability to return to sedentary employment or to undertake any vocational rehabilitation or further her education to permit a return to restricted sedentary employment as identified by Dr. Lutz. Further, the SHO determined claimant's 11th grade education and no GED were a barrier to her ability to return to limited sedentary work within the restrictions set forth by Dr. Lutz. The SHO specifically noted the vocational testing conducted by Dr. Stoeckel demonstrating that claimant's abilities were particularly weak for verbal reasoning, verbal understanding, and her general fund of knowledge, that it would be difficult for her to compete without the benefit of special education, that she possessed elementary level academic skills and did not demonstrate any measurable vocational aptitude skills. The SHO also considered claimant's past employment and determined that her 28 years working as an assembler/microprocessor for relator did not provide her with any transferable skills necessary to perform sedentary work within the

restrictions set forth by Dr. Lutz. Further, the SHO concluded that claimant's remote work history did not provide her with transferable skills which would permit her to perform limited and restricted sedentary work. Thereafter, the SHO allocated the PTD award as follows:

> * * * 75% of this award is to be paid in claim 94-509282 and 25% of the award is to be paid in claim 823108-22. This allocation is based upon the respective amount of benefits paid in the two claims, as well as upon the physical restrictions arising independently in both claims.

{¶28} 11. Relator's appeal was denied by order of the commission mailed August 10, 2010.

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

Conclusions of Law:

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

{¶31} In this mandamus action, relator argues that the commission abused its discretion by relying on the results of the testing performed by Dr. Stoeckel to find that claimant had a diminished intellectual capacity since this evidence was contrary to claimant's own statement on her PTD application that she could read, write, and perform basic math. Relator points out that claimant indicated on her application that her hobbies including reading and that her self-reported history included 28 years of reading and writing while checking microprocessor screens for relator. Relator also contends that the commission abused its discretion by allocating 25 percent of the award to claim No. 823108-22 on grounds that claimant did not submit any medical evidence indicating that

the 1981 claim contributed to her inability to perform some sustained remunerative employment. Citing Ohio Adm.Code 4121-3-34, relator contends that claimant was required to provide medical evidence addressing the limitations suffered from the allowed conditions in that claim and without such medical evidence, the 1981 claim should not have even been considered. Because claimant only submitted evidence regarding the 1994 claim, relator argues that it was an abuse of discretion to allocate 25 percent of the award to the 1981 claim.

{¶32} It is this magistrate's determination that the commission did not abuse its discretion by relying on the vocational testing conducted by Dr. Stoeckel and allocating 25 percent of the award to the 1981 claim.

{¶33} 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.*, 69 Ohio St.3d 693, 1994-Ohio-95. 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.

{¶34} Relator first argues that the commission should have accepted claimant's own self-reporting of her intellectual abilities and that it was an abuse of discretion for

the commission to rely on the results of the testing conducted by Dr. Stoeckel. In support of its argument, relator cites several cases from this court upholding determinations of the commission denying PTD compensation to claimants based upon their self-reported ability to read, write, and perform basic math.

{¶35} Relator first points to this court's decision in *State ex rel. Solley v. Indus. Comm.*, 10th Dist. No. 05AP-713, 2007-Ohio-231. In that case, the commission had denied PTD compensation to the claimant, Roberta J. Solley, after finding that she was physically and psychologically capable of performing light-duty work and following the commission's analysis of a non-medical disability factor. One of Solley's arguments in her mandamus action before this court was that commission abused its discretion by apparently relying on her own self-reporting on the PTD application indicating that she could read, write, and perform basic math. Solley had argued that the vocational report prepared by Mark A. Anderson, which Solley submitted in support of her application, demonstrated that "her 'intellectual abilities' and her 'actual skills' fall below the appropriate skill level for a high school graduate * * * [and argued that the commission abused its discretion by] failing to discount her high school education based upon the Anderson report or simply failed to consider the Anderson report." Id. at ¶59. After citing *State ex rel. Jackson v. Indus. Comm.*, 79 Ohio St.3d 266, 1997-Ohio-152, for the proposition that the commission is the expert on the non-medical disability factors, this court's magistrate disagreed with Solley's argument, stating:

> While the commission was required to consider the Anderson report, there is no evidence that it failed to consider it. The absence of any mention of the report in the SHO's order is not, by itself, an indication that the

> commission failed to consider it. *State ex rel. Lovell v. Indus. Comm.* (1996), 74 Ohio St.3d 250. (There is a presumption of regularity that attaches to commission proceedings.) Here, the presumption is that the commission did not find the Anderson report credible. The commission thus determined that relator has a high school education.

Id. at ¶60.

{¶36} Similarly, relator cites this court's decision in *State ex rel. Alley-Yazell v. Trim Sys., Inc.*, 10th Dist. No. 05AP-1107, 2006-Ohio-5775. In that case, the claimant, Christina L. Alley-Yazell, also argued that the commission abused its discretion by relying, in part, on her self-reported ability that she could read, write, and perform basic math. This court rejected that argument stating:

> Relator contends she is illiterate, rendering her education a negative factor. The evidence, however, reflects that relator graduated from high school and received average grades. She further attended additional educational classes through her involvement with vocational rehabilitation programs. Evaluators determined relator had strengths in visual sequential memory; later tests indicated she read at the level of a first grader in the seventh month of school. Without question, relator's ability to function is not commensurate with the level of her schooling. The magistrate nonetheless appropriately concluded relator does not fit the definition of illiteracy as provided in Ohio Adm.Code 4121-3-34(B)(3)(b)(i), especially in view of her application for permanent total disability compensation that indicated she could read, write and perform basic math, though not well. While relator apparently indicated at the hearing before the commission's staff hearing officer that she was illiterate and could not read, write or perform basic math, the commission ultimately determined the evidence was conflicting and that her education is a neutral factor. Given the evidence presented, we cannot conclude the commission abused its discretion. Relator's objection is overruled.

Id. at ¶5.

{¶37} Relator also cites to *State ex rel. Ferguson v. Indus. Comm.*, 10th Dist. No. 08AP-902, 2009-Ohio-6913, *State ex rel. Kynard v. Indus. Comm.*, 10th Dist. No. 03AP-1071, 2004-Ohio-5153, *State ex rel. Scarborough v. Indus. Comm.*, 10th Dist. No. 09AP-1041, 2010-Ohio-4020, and *State ex rel. Gonzales v. Indus. Comm.*, 10th Dist. No. 09AP-752, 2010-Ohio-1959. In each of the above-cited cases, the commission concluded that, in spite of vocational testing which demonstrated certain intellectual inabilities, the commission could rely on a claimant's self-reporting concerning their abilities, including the ability to read, write, and perform basic math. However, just because this court upheld the commission's decision to accept a claimant's self-reporting of their intellectual abilities, these cases do not equate with the hard-and-fast rule that the commission is always required to accept a claimant's own self-reporting of their intellectual abilities. Relator argues that "[i]f the injured worker does believe she has diminished intellectual capacity, how could the Industrial Commission find otherwise?" (Relator's brief, at 12.)

{¶38} Relator's argument completely ignores the fact that the commission is the exclusive evaluator of the disability factors. *State ex rel. Singleton v. Indus. Comm.* (1994), 71 Ohio St.3d 117; *Jackson*. The commission may accept the findings in a vocational report, or some of the findings, or none of the findings. On any given day, the commission may give greater weight to either the results of vocational testing or to a claimant's self-reported abilities. Neither constitutes an abuse of discretion and the commission is not required to explain its rationale.

{¶39} Relator's argument also ignores the fact that it is not the province of this court to consider whether a decision of the commission is supported by the manifest

weight of the evidence. It is improper for this court to disturb a commission order where that order is supported by "some evidence" even if the record includes other evidence, greater in quantity and/or quality, that supports a decision contrary to that of the commission. See *State ex rel. Pass v. C.S.T. Extraction Co.*, 74 Ohio St.3d 373, 1996-Ohio-126. As such, this magistrate concludes that the commission did not abuse its discretion by relying on the testing conducted by Dr. Stoeckel in concluding that claimant's intellectual abilities would be a barrier to her ability to perform some sustained remunerative employment within the restrictions set forth by Dr. Lutz.

{¶40} Relator also argues that the commission abused its discretion by allocating 25 percent of the PTD award to the 1981 claim. Relator cites Ohio Adm.Code 4121-3-34 which provides, in pertinent part:

> (C) Processing of applications for permanent total disability
>
> * * *
>
> Each application for permanent total disability shall be accompanied by medical evidence from a physician * * * that supports an application for permanent and total disability compensation. * * * If the application for permanent total disability is filed without the required medical evidence, it shall be dismissed without hearing.

Because claimant only presented evidence indicating that it was a 1994 claim upon which she was relying in her PTD application, relator contends that the commission was required to allocate 100 percent of the award to the 1994 claim. For the following reasons, this magistrate disagrees.

{¶41} Relator correctly argues that the only evidence claimant submitted in support of her application was a report of Dr. Lutz opining that she was permanently

and totally disabled based upon the 1994 claim. However, Drs. Lutz and Wunder both considered the allowed conditions in all three claims in setting forth their opinions as to claimant's ability to perform some sustained remunerative employment. Further, the magistrate notes that both Drs. Lutz and Wunder were asked to prepare addendums because of their failure to fully address the 1990 claim and its impact on claimant's ability to perform some sustained remunerative employment. Given the language of those two reports, it appears that the parties had been under the assumptions that only the 1981 and 1994 claims were being considered when, in fact, all three claims were being considered. The stipulated evidence indicates that relator was well aware that claimant's PTD application would be considered based on the allowed conditions in all three claims and this magistrate finds it somewhat disingenuous that relator raised this argument both in its appeal from the SHO's order and in this mandamus action to this court. Further, the magistrate finds it is not an abuse of discretion for the commission to rely on medical reports of doctors other than a claimant's own physician. The magistrate finds that relator has not demonstrated that the commission abused its discretion in this regard.

{¶42} Based on the foregoing, it is this magistrate's decision that relator has not demonstrated that the commission abused its discretion in granting PTD compensation to claimant 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).