

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Lockheed Martin	:	
Energy Systems, Inc.,	:	
	:	
Relator,	:	
	:	
v.	:	No. 10AP-823
	:	
Industrial Commission of Ohio and	:	(REGULAR CALENDAR)
William J. Bryant,	:	
	:	
Respondents.	:	

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D E C I S I O N

Rendered on September 30, 2011

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*Vorys, Sater, Seymour & Pease LLP*, and *Robert E. Tait*, for relator.

*Michael DeWine*, Attorney General, and *Rachel L. Lawless*, for respondent Industrial Commission of Ohio.

*Livorno & Arnett Co., LPA*, and *John F. Livorno*, for respondent William J. Bryant.

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IN MANDAMUS  
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

KLATT, J.

{¶1} Relator, Lockheed Martin Energy Systems, Inc., commenced this original action in mandamus seeking an order compelling respondent, Industrial Commission of Ohio ("commission"), to vacate its order awarding permanent total disability ("PTD")

compensation to respondent, William J. Bryant ("claimant"), and to enter an order denying said compensation.

{¶2} Pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth District Court of Appeals, we referred this matter to a magistrate who issued a decision, including findings of fact and conclusions of law, which is appended hereto. The magistrate found that the commission did not abuse its discretion when it granted the claimant PTD compensation because Dr. North's report constituted some evidence upon which the commission could rely to support the PTD award. Therefore, 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 argues that Dr. North's report cannot constitute some evidence supporting the commission's decision because Dr. North considered nonallowed conditions in rendering his opinion. We disagree.

{¶4} Although Dr. North does make a reference to the claimant's right knee injury in his report, he does so only to point out that this nonallowed condition limited his ability to conduct the examination. Dr. North correctly identifies the allowed conditions in the claim and, after conducting a physical examination (limited to areas of the body associated with the allowed claims), concludes that the claimant is permanently and totally disabled. We agree with the magistrate that the commission did not abuse its discretion when it relied on Dr. North's report.

{¶5} As noted by the magistrate, the mere presence of debilitating nonallowed conditions does not preclude PTD compensation so long as the allowed conditions independently prevent sustained remunerative employment. *State ex rel. Waddle v.*

*Indus. Comm.* (1993), 67 Ohio St.3d 452. Here, we agree with the magistrate that Dr. North's report was evidence upon which the commission could rely in the exercise of its discretion. Therefore, we overrule relator's objections.

{¶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.*

FRENCH and CONNOR, JJ., concur.

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compensation to respondent William J. Bryant ("claimant") and to enter an order denying the compensation.

Findings of Fact:

{¶8} 1. Claimant has two industrial claims arising from his employment as an instrument technician with relator.

{¶9} 2. Arising from a March 2, 1993 injury, claim number L231970-22 is allowed for:

Lumbar strain; cervical and thoracic sprain; herniated nucleus pulposus C4-5, C5-6, C6-7 and C7-T1; L5-S1 disc herniation.

{¶10} 3. Arising from a February 1, 1996 injury, claim number 96-427352 is allowed for:

Lumbosacral strain; aggravation of pre-existing depression.

{¶11} 4. On May 7, 2009, at claimant's request, he was examined by his treating physician, Philip North, M.D. In a letter or report to claimant's counsel dated May 29, 2009, Dr. North states:

I performed a Permanent Total Disability Examination on 05/07/09 to determine the question of permanent total disability in the above referenced claim. The claim is currently allowed for conditions of 722.0 HNP C4-C5, C5-C6, C6-C7, C7-T1, 722.10 Herniated Disc L5-S1, 847.0 Sprain of Neck, 847.1 Sprain Thoracic Region, and 847.2 Sprain Lumbar Region.

History

As you are aware of the full history, I will only reiterate the pertinent points. Mr. Bryant was employed by Lockheed Martin Energy System when a back injury occurred on 03/02/93. Mr. Bryant injured his back when he pushed a heavy cart into a control room to solder a valve into a small heated cabinet. He was bent over with his upper torso in the heated cabinet for approximately 45 minutes, when he

backed out he could not straighten his back. The patient continues to have constant back pain, which is aggravated by movement, sitting, standing up and walking. William finds relief from medication to be modest. When asked about severity, he ranks it currently as 6/10. The symptoms occur all the time. Since the last visit patient has a long history of back pain. He has had 3 neck surgeries. He has marked decreased cervical range of motion and cannot look over his shoulders.

#### Physical Examination

The physical examination is essentially noncontributory except for the pertinent musculoskeletal examination, which reveals WHS of the neck. Cervical range of motion, L rotation 15 degrees, R rotation 20 degrees. Flexion 10 degrees, extension 10 degrees. Lumbar range of motion, flexion 15 degrees, ext 5 degrees, L side bending 15 degrees, R side bending 12 degrees, L rotation 15 degrees, R rotation 15 degrees.

#### Conclusion

Functional capacity evaluation is limited due to severe right knee injury. He is however unable to carry a gallon of milk 30 feet. He has bilateral arm and hand pain with numbness and tingling and loss of fine manipulation skill L>R. He is right handed. He does have some radicular pain on the left leg.

#### Opinion

Based on the above findings I believe him to be permanently and totally disabled.

{¶12} 5. On June 2, 2009, claimant filed an application for PTD compensation. In support, claimant submitted the May 29, 2009 report from Dr. North.

{¶13} 6. On September 14, 2009, at the commission's request, claimant was examined by Ron M. Koppenhoefer, M.D. In his five-page narrative report, Dr. Koppenhoefer opined:

**Discussion:** Based on my examination and taking into effect the allowed conditions of these claims, Mr. Bryant has reached maximum medical improvement.

When using the AMA Guides Fifth Edition, Mr. Bryant would have the following degree of impairment related to these allowed conditions:

1. 96-427352 lumbosacral sprain – 0% impairment.
2. L231970-22 lumbar strain; cervical thoracic sprain – 0% impairment.
  - a. Herniated nucleus pulposus C4-5, C5-6, C6-7 and C7-T1 would equal to a DRE Category 4 degree of impairment or a 28% impairment to the body as a whole.
  - b. L5-S1 disc herniation would equal to a DRE Category 2 degree of impairment or an 8% impairment to the body as a whole.

The combined values chart would equal to a 34% impairment to the body as a whole.

It is noted that Mr. Bryant has inconsistencies on his physical exam and shows evidence of having additional musculoskeletal problems primarily involving his right leg secondary to a past automobile accident. However, when one takes into effect the allowed conditions particularly related to the cervical spine and result in surgery, I believe he would have a difficult time doing any type of work at this time. Therefore, it is my medical opinion that he is incapable of work on a 40 hour a week basis at this time.

{¶14} 7. On September 14, 2009, Dr. Koppenhoefer also completed a physical strength rating form. By his mark, Dr. Koppenhoefer indicates that he agrees with the preprinted statement "This Injured Worker is incapable of work."

{¶15} 8. Following a December 10, 2009 hearing, a staff hearing officer ("SHO") issued an order granting the PTD application.

{¶16} 9. On January 8, 2010, relator moved for reconsideration of the SHO's order of December 10, 2009.

{¶17} 10. On March 18, 2010, the three-member commission mailed an interlocutory order indicating that relator's request for reconsideration would be set for hearing to determine whether grounds exist for the exercise of continuing jurisdiction, and if grounds are found to exist, to redetermine the merits of the PTD application.

{¶18} 11. Following a June 22, 2010 hearing, the three-member commission issued an order finding that grounds exist for the exercise of continuing jurisdiction. The commission also redetermined the merits of the PTD application:

Permanent total disability compensation is awarded from 05/29/2009 as that is the date of the report of Philip North, D.C. [sic], which is the earliest report that supports permanent total disability.

\* \* \*

Based upon the reports of Dr. North and Dr. Koppenhoefer, the Commission finds that the Injured Worker is unable to perform any sustained remunerative employment solely as a result of the allowed physical conditions in his two industrial claims. Therefore, pursuant to State ex rel. Speelman v. Indus. Comm. (1992), 73 Ohio App.3d 757, it is not necessary to discuss or analyze the Injured Worker's non-medical disability factors.

Therefore, based on the reports of Dr. North and Dr. Koppenhoefer, who both found the Injured Worker incapable of performing sustained remunerative employment and is permanently and totally disabled, the IC-2 Application for Compensation for Permanent Total Disability is granted.

12. On August 31, 2010, relator, Lockheed Martin Energy Systems, Inc., filed this mandamus action.

#### Conclusions of Law:

{¶19} The main issue is whether the report of Dr. North constitutes some evidence upon which the commission can rely to support its PTD award. Finding that Dr.

North's report is indeed some evidence, it is the magistrate's decision that this court deny relator's request for a writ of mandamus, as more fully explained below.

{¶20} PTD compensation cannot be based, wholly or partially, on non-allowed medical conditions. *State ex rel. Erico Prods., Inc. v. Indus. Comm.*, 70 Ohio St.3d 661, 663, 1994-Ohio-155. The presence of debilitating non-allowed conditions, however, does not preclude PTD compensation so long as the allowed conditions independently prevent sustained remunerative employment. *State ex rel. Waddle v. Indus. Comm* (1993), 67 Ohio St.3d 452.

{¶21} In the first sentence of the paragraph of his report captioned "Conclusion," Dr. North states "Functional capacity evaluation is limited due to severe right knee injury." Pointing out that the industrial claim is not allowed for any sort of knee injury, relator asserts that the reference to a right knee injury is an indication that Dr. North considered a non-allowed condition in rendering his opinion that claimant is "permanently and totally disabled." If relator is correct in asserting that Dr. North relied in part upon a right knee injury in rendering his disability opinion, the report cannot be some evidence upon which the commission can rely. *Erico*.

{¶22} However, upon further examination of Dr. North's report, it is clear that the commission was not required to view Dr. North's disability opinion as being based, even in part, upon a non-allowed knee injury.

{¶23} Significantly, in the paragraph of the report captioned "Physical Examination," Dr. North indicates he performed a musculoskeletal examination of the "cervical" and "lumbar" areas. There is no indication that he examined for a knee injury.

{¶24} It is also significant that, in the paragraph of the report captioned "History," the knee injury is not mentioned at all. Rather, there is discussion of the "back" injury and related "back pain," and there is mention of neck surgeries and related decreased cervical range of motion.

{¶25} In short, Dr. North did not examine for the knee injury, nor did he report the knee injury in the history. Reference to a knee injury only occurs in the initial sentence of the paragraph captioned "Conclusion."

{¶26} Reading carefully the sentence referring to the knee injury, we find that Dr. North was simply commenting that the knee injury limited his ability to perform the examination, i.e., the "functional capacity evaluation." There is nothing inappropriate about Dr. North's comment about the knee injury.

{¶27} The evaluation of the weight and credibility of the medical 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.

{¶28} Clearly, it was within the commission's fact finding discretion to conclude that Dr. North's disability opinion is not based, even partially, upon a non-allowed condition. *Id.*

{¶29} Relator further asserts that Dr. North's findings are insufficient to support the opinion that claimant is permanently and totally disabled. The magistrate disagrees.

{¶30} To begin, relator inaccurately states that "Dr. North's physical exam reports only a limitation in the range of motion in Bryant's cervical and lumbar areas." (Relator's brief, 8.) Relator's statement ignores Dr. North's statement that claimant "has bilateral

arm and hand pain with numbness and tingling and loss of fine manipulation skill." It also ignores that Dr. North reported "radicular pain on the left leg."

{¶31} Bilateral loss of fine manipulation skill, along with leg left radicular pain, can be viewed as permanently and totally disabling. In this case, there is no cause for this court to second guess Dr. North's medical expertise. See *State ex rel. Young v. Indus. Comm.*, 79 Ohio St.3d 484, 1997-Ohio-162.

{¶32} "In general, the court does not 'second guess' medical opinions from medical experts and will remove a medical opinion from evidentiary consideration as having no value only when the report is patently illogical or contradictory \* \* \*." *State ex rel. Certified Oil Corp. v. Mabe*, 10th Dist. No. 06AP-835, 2007-Ohio-3877, ¶4, quoting *State ex rel. Tharp v. Consol. Metal Prods.*, 10th Dist. No. 03AP-124, 2003-Ohio-6355, ¶67.

{¶33} While Dr. North's report is brief, it clearly and succinctly sets forth clinical findings that support the opinion that claimant is permanently and totally disabled. See *State ex rel. Frigidaire, Inc. v. Indus. Comm.*, 70 Ohio St.3d 166, 1994-Ohio-377 (although "skimpy," Dr. Reed's report contained findings to support the PTD opinion).

{¶34} Relator also challenges the commission's reliance upon the reports of Dr. Koppenhoefer. However, because Dr. North's report is some evidence supporting the entire PTD award starting May 29, 2009, there is no need for this court to address relator's challenge to Dr. Koppenhoefer's reports.

{¶35} Accordingly, 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).