

{¶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} Counsel for Sigler has filed objections to the magistrate's decision. Counsel for the commission has filed a memorandum in response. Counsel for Lubrizol Corporation ("Lubrizol"), Sigler's former employer, has also filed a memorandum in response. The case is now before the court for a full, independent review.

{¶4} Sigler was injured in 2001. In 2006, he filed an application for PTD compensation. A staff hearing officer ("SHO") granted PTD compensation and the commission did not grant reconsideration.

{¶5} Lubrizol filed a mandamus action in this court which resulted in a writ of mandamus vacating the award of PTD compensation and returning the case to the commission for further review.

{¶6} An SHO again granted Sigler PTD compensation. Lubrizol again sought reconsideration from the full commission. On July 28, 2009, two of the three members of the commission conducted an evidentiary hearing. The hearing was not recorded, so the third commissioner could not review a recording of the proceedings. The third commissioner also could not review a transcript of the testimony and arguments presented at the hearing. The third commissioner, nevertheless, voted to overturn the SHO's award of PTD compensation.

{¶7} Sigler testified at the hearing held before the two other commissioners. He testified about his physical condition. He testified about his attempts at vocational rehabilitation. He also testified about future medical procedures which were contemplated, including a second surgery to his injured back.

{¶8} The order signed by two of the commissioners is critical of Sigler's efforts at rehabilitation. Evaluating Sigler's past efforts at rehabilitation and his ability to benefit from future rehabilitation efforts seems to be key to the finding that Sigler is or is not entitled to PTD compensation. The third commissioner should have been in a position to evaluate Sigler's credibility on these issues, not rely on the impressions and notes of a commission employee and that employee's summaries of what occurred.

{¶9} We are bound by the rulings of the Supreme Court of Ohio in *State ex rel. Ormet Corp. v. Indus. Comm.* (1990), 54 Ohio St.3d 102. In the *Ormet* case, the Supreme Court of Ohio found, in a per curiam opinion, that Due Process of Law was violated when a nonattending member of the commission voted on an application for PTD without reviewing a transcript of the proceedings. In *Ormet*, the employer was claiming a violation of Due Process.

{¶10} In a subsequent case, *State ex rel. Ohio Bell Tel. Co. v. Indus. Comm.*, 68 Ohio St.3d 329, 1994-Ohio-533 ,the Supreme Court of Ohio found no violation of Due Process. However, in the *Ohio Bell* case, the nonattending commissioner had access to an audiotape of the hearing before the commission.

{¶11} Credibility, especially the credibility of a claimant, can be key to reaching a just decision in important workers' compensation cases. As long as the commission and the courts are willing to consider failure to fully pursue rehabilitation efforts as a negative

factor in deciding PTD cases, the injured worker should be able to explain how he or she has done all he or she can do in pursuing rehabilitation.

{¶12} As long as there are disputes among medical professionals about a claimant's physical abilities, the claimant should be able to tell, in lay terms, what he or she can do. The claimant's credibility may help determine which medical reports the commission finds persuasive.

{¶13} With today's technological capabilities, there is no reason the commission cannot have a complete record, even a video record, of the testimony before it. An absent commissioner could then make the appropriate decision without risking a violation of Due Process of Law.

{¶14} We sustain the objections to the magistrate's decision. We adopt the findings of fact in the magistrate's decision, but not the conclusions of law. We grant a writ of mandamus compelling the commission to vacate its order overturning the granting of PTD compensation by the SHO. The commission shall conduct an additional hearing on Sigler's application for PTD compensation with all three commissioners present and participating or conduct an additional hearing with sufficient record of the proceedings such that the necessary credibility determinations can be made by all the commissioners.

*Objections sustained; writ
of mandamus granted.*

CONNOR, J., concurs.
SADLER, J., dissents.

SADLER, J., dissenting.

{¶15} While I agree with the majority that the best practice is for a voting commissioner to attend the PTD hearing or to review a transcript or other verbatim

recording of the proceeding, I cannot agree with the majority that such a practice is required by law. Because I believe that the majority has failed to follow the standard in *State ex rel. Ormet Corp. v. Indus. Comm.* (1990), 54 Ohio St.3d 102, I respectfully dissent.

{¶16} It is well-settled that "a commissioner need not attend the permanent total disability hearing in order to participate in the decision." *State ex rel. Dayton Walther Corp. v. Indus. Comm.*, 71 Ohio St.3d 105, 107, 1994-Ohio-468, citing *Ormet* at 107. Moreover, "transcript review is not the exclusive method by which an absentee commissioner can satisfy a party's due process rights." *State ex rel. Youghiogheny & Ohio Coal Co. v. Indus. Comm.* (1992), 65 Ohio St.3d 351, 353, citing *Ormet* at 107. Due process demands only that the absent commissioner consider the evidence obtained at the hearing "in some meaningful manner." *Ormet* at 107 (emphasis sic).

{¶17} In *Ormet*, the Supreme Court of Ohio found a due process violation, not because the absent commissioner merely failed to review a transcript of the hearing, but because it was "undisputed" that the absent commissioner "did not *in any manner* consider any evidence presented at the hearing." *Ormet* at 107 (emphasis sic). The parties in *Ormet* stipulated that (1) the commissioner did not attend the claimant's PTD hearing, (2) no transcript of the hearing was taken, (3) no summary or report of the hearing was prepared, and (4) no other hearing or meeting occurred between the absent commissioner and the other commissioners concerning the claimant's application. *Id.* at 107. Based on this stipulation, the court concluded that it could not apply the presumption of regularity that ordinarily attaches to commission proceedings because the

presumption "is destroyed where the decision-maker admits that he did not consider any evidence from the hearing." *Id.*

{¶18} Following *Ormet*, the court, in *State ex rel. Ohio Bell Tel. Co. v. Indus. Comm.*, 68 Ohio St.3d 329, 1994-Ohio-533, upheld the voting participation of an absent commissioner because "unlike *Ormet*, there [was] no stipulation that [the absent commissioner] did not review the evidence before rendering his decision." *Id.* at 333. Instead, the evidence established that there was (1) an audiotape of the hearing, (2) a posthearing case summary by the commission's legal advisor, and (3) an apparent additional discussion with all the commissioners regarding claimant's permanent total disability application. *Id.* Although the absent commissioner cast the deciding vote, the *Ohio Bell* court applied the presumption of regularity and held that the relator "failed to sustain its burden of establishing a lack of meaningful review sufficient to support a due process violation." *Id.* According to the court, "[t]he commission does not have the burden of establishing compliance with *Ormet*; rather, [the relator] must prove noncompliance." *Id.*

{¶19} Notwithstanding this precedent, the majority did not determine whether Commissioner Abrams considered the evidence from the hearing "in some meaningful manner" as required under *Ormet*. The pertinent facts in this case, not noted by the majority, are that Commissioner Abrams did not cast his vote until after he was presented with a summary of the July 28, 2009 hearing by Robert Cromley, a commission employee. Above his signature on the commission's order, Commissioner Abrams indicated that Cromley "summarized the testimony, evidence and arguments presented at [the] hearing" at a meeting held on August 12, 2009. Cromley, an employee with over 20

years of experience as a staff hearing officer and member of the commission's legal services department, attended the hearing and prepared written notes of the hearing as part of his duties to assist the commission. By way of affidavit, Cromley averred that he used those notes, "[f]ollowing standard procedure," to summarize the evidence, testimony, and arguments from the hearing to Commissioner Abrams.

{¶20} The Supreme Court of Ohio has long-recognized that an absent commissioner can satisfy *Ormet* by reviewing a subordinate's summary of the hearing. "*Ormet* discussed, extensively and approvingly, the use of subordinates in the administrative process." *State ex rel. Hart v. Beverage Transp.*, 73 Ohio St.3d 353, 355, 1995-Ohio-116; see also *State ex rel. Cangemi v. Indus. Comm.*, 72 Ohio St.3d 453, 455-56, 1995-Ohio-229. The *Ormet* court observed that because due process requires only that the decision-maker "consider and appraise" evidence from the hearing, such evidence "may be sifted and analyzed by competent subordinates." *Ormet* at 104, quoting *Morgan v. United States* (1936), 298 U.S. 468, 481-82, 56 S.Ct. 906. This principle was further recognized in *Ohio Bell* where the court found that a "posthearing case summary" prepared by the commission's legal advisor served as evidence of meaningful review. *Ohio Bell* at 333.

{¶21} Indeed, this court has held that an absent commissioner can comply with *Ormet* by relying exclusively on a subordinate's summary of the hearing. *State ex rel. Medcorp, Inc. v. Ryan*, 10th Dist. No. 06AP-1223, 2008-Ohio-2835. We found this scenario to differ from that in *Ormet*, where it was "undisputed that [the commissioner] did not *in any manner* consider any evidence presented at the hearing." *Id.* at ¶20, quoting *Ormet* at 107 (emphasis in *Ormet*). We also noted that *Ormet* approved the use of

subordinates in commission proceedings: "[d]eciding officers may 'consider and appraise' the evidence by reading a summary or analysis prepared by subordinates." *Id.* at ¶21, quoting *Ormet* at 106, quoting Administrative Law (1 Ed.1958), Section 11.03. Given that the absent commissioner in *Medcorp* "was provided a summary of the evidence," we found that the commission "at least minimally complied with the requirements of *Ormet*." *Id.*

{¶22} In my view, resolution of this case requires a determination of whether Commissioner Abrams, through the post-hearing summary provided to him by Cromley, considered the evidence obtained at the hearing "in some meaningful manner" consistent with *Ormet*. The record indicates that Commissioner Abrams considered the "testimony, evidence and arguments" from the hearing through Cromley's post-hearing summary; however, the majority failed to explain how that summary did not constitute "meaningful" review under *Ormet*. Nor did the majority describe how Cromley's summary was less reliable than the summary approved by this court in *Medcorp* or the summary that the Supreme Court of Ohio recognized in *Ohio Bell*.

{¶23} Because relator has presented no evidence to contradict the statements of Commissioner Abrams and Cromley, I find that relator failed to sustain his burden of showing that the commission's voting procedure violated due process under the standard articulated in *Ormet*. See *Ohio Bell* at 333; see also *State ex rel. Ohio Bldg. Restoration, Inc. v. Indus. Comm.* (1992), 64 Ohio St.3d 188, 189 ("Given the presumption of regularity that attaches to commission proceedings * * *, the commission's statement that it complied with *Ormet*, absent evidence to the contrary, should be accepted.").

{¶24} Accordingly, I would adopt the magistrate's decision and deny the requested writ of mandamus. Therefore, I respectfully dissent.

A P P E N D I X

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Terry W. Sigler,	:	
	:	
Relator,	:	
	:	
v.	:	No. 10AP-255
	:	
The Lubrizol 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 March 30, 2011

Bentoff & Duber Co., L.P.A., and Glen S. Richardson, for relator.

Walter & Haverfield, LLP, and Michael J. Spisak, for respondent The Lubrizol Corporation.

Michael DeWine, Attorney General, and Colleen C. Erdman, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶25} In this original action, relator, Terry W. Sigler, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate an order denying his application for permanent total disability ("PTD") compensation that issued after a commission hearing at which one of the three

commission members was absent, and to rehear the application with all commission members present.

Findings of Fact:

{¶26} 1. On September 21, 2001, relator sustained an industrial injury while employed as a maintenance mechanic for respondent The Lubrizol Corporation ("Lubrizol"), a self-insured employer under Ohio's workers' compensation laws. The industrial claim (No. 01-852681) is allowed for "acute myofascial strain lumbar; bulging discs at L4-5, L5-S1 and radiculopathy."

{¶27} 2. On April 13, 2006, relator filed an application for PTD compensation.

{¶28} 3. Following a December 28, 2006 hearing, a staff hearing officer ("SHO") issued an order granting the PTD application. Thereafter, Lubrizol's request for reconsideration of the SHO's order was denied by the commission.

{¶29} 4. On March 12, 2007, Lubrizol filed in this court a mandamus action challenging the commission's award of PTD compensation.

{¶30} 5. In February 2008, this court issued a writ of mandamus ordering the commission to vacate its PTD award and to reconsider the PTD application in light of this court's written decision. *State ex rel. The Lubrizol Corp. v. Indus. Comm.*, 10th Dist. No. 07AP-204, 2008-Ohio-463.

{¶31} 6. Pursuant to this court's writ of mandamus, an SHO reheard the PTD application on November 6, 2008. Following the hearing, the SHO mailed an order on November 20, 2008 awarding PTD compensation.

{¶32} 7. On December 26, 2008, Lubrizol moved the three-member commission for reconsideration of the SHO's order of November 6, 2008.

{¶33} 8. Following a July 28, 2009 unrecorded hearing, at which one of the three members was absent, the commission issued an order that is divided into two parts.

{¶15} The first part of the order determines that the SHO's order of November 6, 2008 contains a clear mistake of law upon which the commission exercises continuing jurisdiction to vacate the SHO's order. The commissioners unanimously agreed to the first part of the order.

{¶16} The second part of the order denies the PTD application based upon a re-determination of the merits of the application. The commissioners voted two-to-one for denial of the application. Commissioner Kevin R. Abrams, the member who was not present at the July 28, 2009 hearing, joined Commissioner Jodie M. Taylor in denying the PTD application.

{¶17} Immediately above Abrams' signature on the second part, the order states:

On 08/12/2009, I discussed this matter with Bob Cromley, who was present at the 07/28/2009 hearing. Mr. Cromley summarized the testimony, evidence and arguments presented at hearing. After this discussion and a review of all the evidence contained within the claim file, I vote to find jurisdiction and grant the Employer's request for reconsideration, filed 12/26/2008. I further vote to vacate the Staff Hearing Officer order issued 11/20/2008, and to deny the Injured Workers' IC-2 Application for Permanent Total Disability.

{¶18} 9. On March 22, 2010, relator, Terry W. Sigler, filed this mandamus action.

{¶19} 10. After this action was filed, the parties agreed to a stipulated record of evidence and, pursuant to the magistrate's order, filed their briefs.

{¶20} 11. On February 9, 2011, the magistrate held oral argument. At the oral argument, counsel for the parties agreed to file affidavits to clarify what occurred at the

July 28, 2009 commission hearing. The magistrate issued an order on February 10, 2011 that summarizes counsels' oral agreement as to the filing of affidavits.

{¶21} 12. On February 17, 2011, the commission filed the affidavit of Robert Cromley, aka Bob Cromley, executed February 16, 2011. The Cromley affidavit avers:

[One] I am employed by the Industrial Commission of Ohio as a Hearing Officer since May 20, 1985. I have been in the position of Staff Hearing Officer since 1988.

[Two] In the scope and course of my job responsibilities, I, at times, perform functions in the Legal Services Department of the Ohio Industrial Commission. In that capacity one of my job duties is to assist the Commissioners when they preside at hearings. I do not act as a Deputy or an adjudicator at those times.

[Three] I was in attendance at a hearing conducted by Commissioners J. Taylor and G. DiCeglio on July 28, 2009, at 2:30 PM in claim number 01-852681. Commissioner K. Abrams was not in attendance at the hearing. I took handwritten notes during the hearing and used those notes as reference when discussing the case with the Commissioner.

[Four] There was a split vote between Commissioners Taylor and DiCeglio following the hearing. Following standard procedure, on August 12, 2009, I met with Commissioner Abrams and summarized the testimony, evidence and arguments from the hearing. The testimony of Mr. Sigler from the hearing on July 28, 2009 was related to and discussed with Mr. Abrams.

[Five] Following discussion with Commissioner Abrams, he indicated his vote on the issues from the hearing.

{¶22} 13. On February 23, 2011, relator filed the affidavit of Glen S. Richardson executed February 18, 2011. The Richardson affidavit avers:

[One] I am an attorney licensed to practice law in the State of Ohio.

[Two] I represent the Relator, Terry Sigler in the case of State ex rel. Terry Sigler v. The Lubrizol Corp, et al.

[Three] I attended and represented Mr. Sigler in his hearings before the Industrial Commission of Ohio which took place on December 28, 2006, November 6, 2008 and July 28, 2009.

[Four] To the best of my knowledge and recollection, Mr. Sigler testified at his hearing before two Commissioners of the Industrial Commission on July 28, 2009. I recall that his testimony included a recitation of his complaints and symptoms, his efforts at attempting to go through vocational rehabilitation and his anticipated second surgical procedure on his back, related to this Workers' Compensation claim.

{¶23} 14. On February 17, 2011, Lubrizol filed the affidavit of Michael J. Spisak executed February 16, 2011. The Spisak affidavit avers:

[One] I am an attorney licensed to practice law in the State of Ohio.

[Two] I represent The Lubrizol Corporation relative to the workers' compensation claim filed by Terry Sigler.

[Three] I was present at the Industrial Commission hearings that took place on December 28, 2006, November 6, 2008, and July 28, 2009.

[Four] To the best of my recollection, the testimony offered by Mr. Sigler on July 28, 2009, was consistent with, and was substantially similar to, the testimony he offered on December 28, 2006, and November 6, 2008.

Conclusions of Law:

{¶24} The issue is whether Abrams' vote deprived relator of due process of law under *State ex rel. Ormet Corp. v. Indus. Comm.* (1990), 54 Ohio St.3d 102, and its progeny, notwithstanding Abrams' review of the claim file and his discussion with Cromley.

{¶25} In *Ormet*, Commissioner Smith voted on the claimant's PTD application even though he was absent from the hearing. Holding that Smith's vote violated due process, the *Ormet* court explained:

* * * [T]he decision-maker must, in some meaningful manner, consider evidence obtained at hearing. In the case before us, it is undisputed that, (1) Smith did not attend the hearing, (2) no transcript was taken, (3) no summary or report of the hearing was prepared, and (4) no other hearing or meeting occurred between Smith and the other commissioners concerning claimant's application. It is thus undisputed that Smith did not in any manner consider any evidence presented at the hearing.

The commission argues that Smith's failure to consider evidence obtained at the hearing is inconsequential, since he reviewed the claimant's claim file. The commission points to the presumption of regularity that attaches to commission proceedings. Within the context of the present discussion, however, we interpret "regularity" to require that an absent commissioner consider the evidence derived from a hearing in a meaningful way. This presumption is destroyed where the decision-maker admits that he did not consider any evidence from the hearing. The commission's contention that no meaningful evidence was submitted at the hearing is equally unpersuasive since without a record of the proceedings, we cannot tell what transpired.

Id. at 107. (Emphases sic.)

{¶26} In *State ex rel. Ohio Bell Telephone Co. v. Indus. Comm.* (1994), 68 Ohio St.3d 329, the employer, Ohio Bell, challenged the commission's award of PTD compensation on grounds that Commissioner Geltzer missed the hearing. Citing *Ormet*, Ohio Bell argued that Geltzer failed to meaningfully review the evidence. Rejecting Ohio Bell's claim, the *Ohio Bell* court explained:

The commission does not have the burden of establishing compliance with *Ormet*; rather, Bell must prove noncompliance. As *Ormet* observed, there is a "presumption of regularity that attaches to commission proceedings." Id. at

107, 561 N.E.2d at 925. In *Ormet*, that presumption was destroyed by undisputed evidence that (1) Commissioner Smith missed the permanent total disability hearing, (2) no hearing transcript was taken, (3) no summary or report of the hearing was prepared, and (4) no other hearing or meeting occurred between Smith and the other commissioners concerning claimant's application.

In contrast, in the present case, there was (1) an audio tape of the hearing, (2) a posthearing case summary by Robert Robbins, the commission's legal advisor, and (3) an apparent additional discussion with all the commissioners regarding claimant's permanent total disability application. Equally important, unlike *Ormet*, there is no stipulation that Geltzer did not review the evidence before rendering his decision. Bell has thus failed to sustain its burden of establishing a lack of meaningful review sufficient to support a due process violation.

Id. at 333.

{¶27} Here, there was no hearing transcript or record for Abrams to review. While he did review the claim file, that alone is insufficient where the claimant testified at the hearing, as happened here.

{¶28} According to his affidavit, Cromley took handwritten notes during the hearing and used those notes as reference when discussing the case with Abrams. In meeting with Abrams, according to the affidavit, Cromley summarized the testimony, evidence and arguments from the hearing. Claimant's testimony was discussed.

{¶29} By inference, while Cromley used his handwritten notes to brief Abrams on the hearing, it can be said that Cromley did not actually hand to Abrams a written summary for him to read. According to relator, Cromley's oral summary was insufficient to satisfy due process under *Ormet*. The magistrate disagrees with relator's position.

{¶30} Relator seemingly concedes, had Cromley handed to Abrams a written summary of the hearing to read, there would be no due process violation. Focusing on

Cromley's oral presentation to Abrams, relator contends this is insufficient to meet due process. According to relator, because of the lack of a written summary from Cromley, we do not know whether Cromley's presentation to Abrams was thorough. But, the same problem would exist with a written summary because, without a hearing transcript, there would be no sure way of determining whether a written or oral summary was thorough.

{¶31} Here, we do know that Cromley is a commission SHO with years of experience in workers' compensation matters. Moreover, one of his job duties is to assist the commission when they preside at hearings. Under those circumstances, there is no real reason to question the thoroughness of Cromley's discussion with Abrams because Cromley was well-qualified to provide the oral summary to Abrams.

{¶32} The magistrate notes that the *Ormet* case suggests that an absent commissioner's "meeting" with other commissioners who were present at the hearing would be relevant to the due process determination. *Ormet* at 107. Moreover, in *Ohio Bell*, the court found relevant, "an apparent additional discussion with all the commissioners." *Id.* at 333. Presumably, a meeting suggests an oral discussion among the commissioners.

{¶33} Moreover, there is no evidence here that relator's hearing testimony was extensive or complicated. According to the Richardson affidavit:

* * * I recall that his testimony included a recitation of his complaints and symptoms, his efforts at attempting to go through vocational rehabilitation and his anticipated second surgical procedure on his back, related to this Workers' Compensation claim.

{¶34} Clearly, under the circumstances here, relator has failed to prove a deprivation of due process where Abrams reviewed the claim file and was orally apprised of relator's hearing testimony by Cromley using handwritten notes as a reference.

{¶35} 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).