

**THE STATE EX REL. BINEGAR, APPELLEE, v. INDUSTRIAL COMMISSION OF OHIO
ET AL., APPELLANTS.**

[Cite as *State ex rel. Binegar v. Indus. Comm.*, 1997-Ohio-63.]

Workers' compensation—Denial of permanent total disability compensation by Industrial Commission not an abuse of discretion, when—Industrial Commission did not abuse its discretion in finding that claimant's vocational and rehabilitation potential permitted him to secure alternate employment, when.

(No. 95-1525—Submitted December 3, 1997—Decided December 31, 1997.)

APPEAL from the Court of Appeals for Franklin County, No. 94APD06-794.

{¶ 1} Appellee-claimant, Chester Binegar, was injured on October 4, 1984 when overcome by fumes during the course of and arising from his employment with Cuyahoga Exploration and Development. He was twenty-four years old at the time. Appellant Industrial Commission of Ohio allowed his workers' compensation claim for "natural gas exposure, seizure disorder, post-traumatic stress disorder, amnestic disorder."

{¶ 2} Claimant apparently never worked after September 1986, although the reason for his departure from the work force is not clear. In 1991, claimant moved for permanent total disability compensation. Drs. Pliny A. Price and George W. Paulson stated that because claimant continued to experience unpredictable seizures, sometimes as frequently as three times a month, he was incapable of sustained remunerative employment. Vocational consultant Dr. Anthony C. Riccio, Ph.D. also opined that claimant was permanently and totally disabled.

{¶ 3} Dr. Lee Howard examined claimant on behalf of the commission. With regard to claimant's allowed psychological conditions, Dr. Howard concluded:

"The claimant is experiencing a 20% permanent partial impairment of a psychological/psychiatric nature directly related to the industrial accident. He is permanently prohibited from performing his previous type of work activity as 'service rig handler' but is really not prohibited from any other type of sustained remunerative employment from a psychological/psychiatric standpoint. He is also not prohibited from participation in rehabilitation services, although motivation for change appears to be quite questionable."

{¶ 4} Dr. John T. Kissel evaluated claimant's neurological condition. Dr. Kissel wrote:

"On the basis of the findings today, I think the following conclusions are valid: 1) the claimant is not capable of returning to his prior job. Because of the seizure disorder, he will never be able to return to his prior job, 2) the claimant's seizure disorder appears to be the most significant work prohibitive factor. He is presently undergoing further evaluation of treatment which should result in better seizure control. From this perspective, therefore[,] he appears capable of many types of sedentary, light or even medium activity. The usual procedures [and] precautions (not work[ing] around heights, dangerous machinery, open water, etc.) would apply, 3) his percentage of residual neurologic[al] impairment, on the basis of the findings today, would be approximately 30%. This would include the 22% allowance for his seizure disorder and 5% allowance for the headache. Combined with Dr. Howard's 20% impairment, this would yield a combined effects impairment of 44%, 4) a vocational rehabilitation program would not appear appropriate for new job training. Rehabilitation per say [*sic*] would not appear to be cost effective since his principal problem is seizures."

{¶ 5} Dr. Walter A. Holbrook performed a combined-effects review. He assessed a fifty-five-percent combined permanent partial impairment that precluded claimant's return to his former position of employment. He did not, however, find that claimant was removed from all gainful employment. Dr. Holbrook stated:

"[I]t is not within reasonable medical probability and certainty to conclude that the combined effects of the allowed conditions would preclude claimant from performing some other sustained and gainful employment. Claimant is not permanently totally impaired from the combined effects of the allowed conditions of the industrial accident.

"It is within reasonable medical probability and certainty to conclude after reviewing the medical proof in the [file] that claimant does not have any exertional limitations[,] but he does have seizure restrictions where he should not be involved in any hazardous occupations of working in high altitudes, scaffolds, climbing ladders or in dangerous places or operation of dangerous or hazardous equipment. He should be involved in occupations not requiring deadlines or strict quotas.

"The claimant could possibly benefit from [some] type of rehabilitation."

{¶ 6} Claimant's application for permanent total disability compensation was heard on December 15, 1992 by a deputy of the commission, who issued the following interlocutory order:

"FINDINGS OF FACT AND ORDER OF THE COMMISSION

"INTERLOCUTORY ORDER

"* * *

"It is the finding of the Commission that the claimant is permanently and totally disabled; that the compensation for such disability be awarded from 12/16/92 TO 3/28/93; further payment of compensation to be considered at the next scheduled hearing on the issue of continuation of permanent and total disability; that the Application be granted to the extent of this order * * *.

“Claim files to be referred to Claims Management-Special Projects, then to the Attorney Unit for preparation of a statement of facts to be completed within 43 days from the date of publication of this order and then set for hearing before the members of the Industrial Commission on the issue of continuation of the award of permanent and total disability compensation.

“The reports of Doctor(s) PAULSON, PIEES [*sic* PRICE], HOLBROOK, KISSEL & HOWARD were reviewed and evaluated. This order is based particularly upon the report(s) of Dr[s]. HOLBROOK, PAULSON. A consideration of the claimant’s age of 32, 12th grade education, a work history which included Laborer & [*sic*], the evidence in the file and the evidence adduced at the hearing. * * *

“CLOSED AWARD.”

{¶ 7} On April 6, 1993, the commission denied further permanent total disability compensation, writing:

“This order is based particularly upon the reports of Drs. Howard, Kissel & Holbrook, the evidence in the file and the evidence adduced at the hearing.

“* * *

“Claimant is 32 years old, has a high school education, and work experience as a laborer, machine operator, and oil field worker. Claimant was injured on 10-4-84 and last worked on 9-7-86 at which time claimant was 26 years old. Claimant’s treatment has been entirely conservative. The medical evidence found persuasive includes the reports of Drs. Howard, Kissel, and Holbrook. Dr. Howard, commission psychologist, examined claimant on 11-18-91. From the examination, Dr. Howard concluded that claimant demonstrated a 20% psychological impairment that precludes a return to claimant’s former position of employment but does not preclude any other sustained remunerative employment. Dr. Kissel, commission neurologist, examined claimant on 11-18-91. Dr. Kissel stated that the neurological condition represents a 30% impairment and does not preclude

sedentary, light or medium work activity. Dr. Holbrook, staff physician, rendered a claim file review on 12-29-91. From the review, Dr. Holbrook concluded that claimant demonstrates a total combined effects impairment of 55%. Further, Dr. Holbrook stated that claimant is not permanently and totally impaired from all sustained remunerative employment. Dr. Holbrook did state, however, that claimant cannot be involved in any hazardous occupation. Based upon the medical evidence, the commission finds that the allowed conditions do not render claimant permanently and totally disabled, but rather, allow claimant to perform sedentary, light or possibly medium work activity. As claimant is extremely young and does possess a high school education, the commission finds that claimant has [the] vocational and rehabilitation potential to obtain employment consistent with the allowed conditions recognized herein. Accordingly, claimant's application for permanent total disability is denied."

{¶ 8} Claimant filed a complaint in mandamus in the Court of Appeals for Franklin County, alleging that the commission abused its discretion in denying him further permanent total disability compensation. The court of appeals agreed, finding that the commission was bound by the earlier finding of permanent total disability.

{¶ 9} This cause is now before this court upon an appeal as of right.

Daniel D. Connor Co., L.P.A., and Daniel D. Connor, for appellee.

Betty D. Montgomery, Attorney General, and William A. Thorman III, Assistant Attorney General, for appellants.

Per Curiam.

{¶ 10} The court of appeals' decision preceded our decision in *State ex rel. Draganic v. Indus. Comm.* (1996), 75 Ohio St.3d 461, 663 N.E.2d 929, wherein we

held that the commission was not required to extend permanent total disability compensation beyond the date specified in an interlocutory order. The commission did not, therefore, in the case before us, abuse its discretion in refusing to continue permanent total disability compensation.

{¶ 11} The commission further argues that its order is supported by “some evidence.” We agree. Medically, all of the doctors on which the commission relied found claimant was able to do sustained remunerative work. The only restriction placed upon claimant by those doctors was that he avoid hazardous work machinery and environments. Dr. Kissel found that claimant could do up to medium-duty work, while Dr. Holbrook found no exertional limitations at all. Likewise, Dr. Howard opined that claimant’s allowed psychiatric condition did not prohibit him from any type of sustained remunerative employment outside of his former job.

{¶ 12} Claimant’s contention that the aforementioned conclusions were based on a misunderstanding of the severity of his allowed conditions is unpersuasive. It was the doctors’ awareness of continued seizures as well as their unpredictability that assuredly generated the recommendation that claimant not work in environments where his safety would be jeopardized by sudden seizure activity. We also reject claimant’s suggestion that the commission abused its discretion in accepting these reports over other available medical evidence. As we have repeatedly stated, the commission alone evaluates the weight and credibility of the evidence before it. *State ex rel. Burley v. Coil Packing, Inc.* (1987), 31 Ohio St.3d 18, 31 OBR 70, 508 N.E.2d 936.

{¶ 13} In evaluating claimant’s nonmedical disability factors, the commission stressed that claimant was only thirty-two years old, which it viewed as “extremely young” from an occupational perspective. The commission also noted that claimant had successfully completed high school. These two factors convinced the commission that claimant was amenable to retraining and reemployment into jobs consistent with his medical capabilities. The commission

did not, therefore, abuse its discretion in finding that claimant's vocational and rehabilitation potential permitted him to secure alternate employment.

{¶ 14} Accordingly, the judgment of the court of appeals is reversed.

Judgment reversed.

MOYER, C.J., RESNICK, F.E. SWEENEY, PFEIFER, COOK and LUNDBERG
STRATTON, JJ., concur.

DOUGLAS, J., dissents.
