

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

The State of Ohio ex rel.	:	
Piqua Technologies, Inc.,	:	
	:	
Relator,	:	
v.	:	No. 03AP-186
Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
and	:	
Tammy Feters,	:	
	:	
Respondents.	:	

D E C I S I O N

Rendered on February 5, 2004

Sebaly Shillito + Dyer, Karl R. Ulrich and Patricia L. Hendrixson, for relator.

Jim Petro, Attorney General, and *Dennis H. Behm*, for respondent Industrial Commission of Ohio.

Gloria P. Castrodale, for respondent Tammy Feters.

ON OBJECTIONS TO THE MAGISTRATE'S DECISION
IN MANDAMUS

BOWMAN, J.

{¶1} Relator, Piqua Technologies, Inc., has filed an original action in mandamus requesting this court to issue a writ of mandamus to order respondent, Industrial Commission of Ohio, to vacate its order that granted an award of 18 percent permanent partial disability compensation to respondent-claimant, Tammy Feters. Relator also requests this court issue a writ of mandamus to order the commission to vacate its order that granted claimant's application for temporary total disability compensation.

{¶2} This court referred the matter to a magistrate, pursuant to Civ.R. 53(C) and Section (M), Loc.R. 12 of the Tenth District Court of Appeals, who rendered a decision including findings of fact and conclusions of law. (Attached as Appendix A.) The magistrate decided that Dr. Charles L. Walters and Dr. Arthur L. Hughes miscalculated claimant's percentage of permanent partial disability compensation according to the AMA Guidelines and that the commission should be ordered to recalculate that amount. The magistrate also decided the commission did not abuse its discretion in awarding claimant's claim for temporary total disability compensation. Respondents have filed objections to the magistrate's decision as it relates to the percentage of permanent partial disability to be awarded to the claimant. No objections have been filed to that portion of the magistrate's decision as it relates to the award of temporary total disability compensation.

{¶3} In their objections as to the percentage of permanent partial disability compensation awarded, respondents argue that the magistrate engaged in a de novo review of a medical determination and failed to follow this court's decision in *State ex rel. Puckett v. Indus. Comm.* (Nov. 9, 2000), Franklin App. No. 00AP-82.

{¶4} Claimant has suffered two work-related injuries. In claim No. 00-483434, she filed an application for a determination of a percentage of permanent partial disability and a staff hearing officer determined she should receive 18 percent based on the reports of Drs. Walters, Hughes and Imbrogno. The magistrate examined the AMA Guidelines and determined the doctors erred in their calculations and that the percentage should have been less. In doing so, the magistrate erred in two regards. First, the commission has never adopted the AMA Guidelines as a rule, regulation or guideline to be used by hearing officers and the AMA Guidelines are only to be used as a reference by doctors. *State ex rel. Nabisco, Inc. v. Indus. Comm.* (Feb. 21, 2002), Franklin App. No. 01AP-464. Second, In *Puckett*, this court stated:

* * * [C]ourts may not second-guess a physician's assessment of the numerical percentage, and must leave the matter of the value of the doctor's opinion to the commission's evaluation as the finder of fact, unless the doctor has relied on non-allowed conditions or his percentage was blatantly inconsistent with other findings.
* * *

{¶5} There is no evidence here the doctors relied on non-allowed conditions in determining the claimant had an 18 percent permanent partial disability or that the award is blatantly inconsistent with other findings. Thus, we find respondents' objections to be well-taken.

{¶6} In claim No. 01-477035, the magistrate correctly found Dr. John P. Moore's report provided some evidence that claimant was temporarily totally disabled based on the allowed conditions of that claim.

{¶7} Upon a review of the magistrate's decision and an independent review of the record, this court adopts the magistrate's findings of fact and conclusions of law as it

relates to the commission's award of temporary total disability compensation in claim No. 01-477035. This court adopts the magistrate's findings of fact, but not the conclusions of law, as the magistrate's decision relates to an 18 percent award of permanent partial disability compensation in claim No. 00-483434. Respondents' objections to the magistrate's decision are sustained, and the requested writ of mandamus is denied.

Objections sustained,
writ of mandamus denied.

BRYANT and PETREE, JJ., concur.

A P P E N D I X A

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Piqua Technologies, Inc.,	:	
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Relator,	:	
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v.	:	No. 03AP-186
	:	
Industrial Commission of Ohio	:	(REGULAR CALENDAR)
and Tammy Feters,	:	
	:	
Respondents.	:	

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

Rendered on July 23, 2003

Sebaly Shillito + Dyer, Karl R. Ulrich and Patricia L. Hendrixson, for relator.

Jim Petro, Attorney General, and Dennis H. Behm, for respondent Industrial Commission of Ohio.

I N M A N D A M U S

{¶8} Relator, Piqua Technologies, Inc., 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 granted an award of 18 percent permanent partial disability ("PPD") compensation to respondent Tammy Feters ("claimant"). Relator also requests this court vacate the commission's order granting claimant temporary total disability ("TTD") compensation.

Findings of Fact

{¶9} 1. Claimant has sustained two work-related injuries. On August 10, 2000, claimant sustained a work-related injury and her claim has been allowed for: "sprain right shoulder." This claim was assigned claim number 00-483434.¹ Claimant sustained a second work-related injury November 7, 2001, and this claim has been allowed for: "contusion right hand; contusion right wrist; fracture right metacarpal." The claim number assigned to this injury is 01-477035.²

{¶10} 2. On March 8, 2002, claimant filed an application for determination of percentage of permanent partial disability or increase of permanent partial disability with the Ohio Bureau of Workers' Compensation ("BWC") regarding her claim in 00-483434. Claimant attached the April 17, 2002 report of Arthur L. Hughes, M.D., who found that claimant had a 25 percent impairment of the right upper extremity. Dr. Hughes concluded that, based on the allowed conditions, claimant had a 15 percent permanent partial impairment of the whole person. Dr. Hughes made the following findings: active abduction – 90 degrees; active flexion – 94 degrees; active extension – 20 degrees; active – adduction – zero degrees; external rotation – 18 degrees; and internal rotation - 22 degrees.

{¶11} 3. Based upon Dr. Hughes' report, the BWC issued a tentative order granting claimant a 15 percent PPD award.

{¶12} 4. Claimant filed an objection to the BWC order.

{¶13} 5. On June 3, 2002, Dean Imbrogno, M.D., examined claimant and issued a report concerning her permanent partial impairment. Dr. Imbrogno measured her range of motion as follows: abduction – 90 degrees; adduction – 50 degrees; flexion – 130 degrees; extension – 20 degrees; internal rotation – 85 degrees; and external rotation – 65 degrees. Based upon these findings, Dr. Imbrogno concluded that claimant had a five percent impairment of the upper extremity which is equivalent to a three percent impairment of the whole person.

¹ This allowed condition is the subject of relator's argument that the commission abused its discretion in determining claimant's percentage of PPD compensation.

² The injury involved in this claim is the subject of relator's action asserting that the commission abused its discretion in granting claimant TTD compensation.

{¶14} 6. Claimant was examined by Charles L. Walters, M.D., on June 15, 2002. Dr. Walters issued a report dated June 16, 2002, wherein he noted his findings as follows: loss of flexion - 90 degrees; loss of extension - 30 degrees; loss of abduction - 90 degrees; loss of adduction - 50 degrees; loss of internal rotation - 70 degrees; and loss of external rotation - 70 degrees. Dr. Walters assessed a 25 percent impairment based upon claimant's decreased range of motion which is equivalent to a 15 percent whole person impairment. Dr. Walters also found an eight percent impairment of the upper extremity due to pain which was equivalent to a five percent whole person impairment. Dr. Walters also examined claimant's dominant right hand and found that she had a 90 percent loss of strength. As such, he found a 30 percent impairment of the upper extremity based upon her loss of strength in her dominant right hand which was equivalent to an 18 percent impairment of the whole person. Ultimately, Dr. Walters concluded that claimant had a 34 percent whole person impairment.

{¶15} 7. Claimant's motion was heard before a district hearing officer ("DHO") on June 19, 2002, and resulted in an order finding that claimant had an 18 percent permanent partial disability. This conclusion was based upon the reports of Drs. Walters, Imbrogno, and Hughes.

{¶16} 8. Relator filed a motion for reconsideration and included the September 4, 2002 report of Dr. Imbrogno who gave his opinion as to why Dr. Walters' finding of a 34 percent impairment was improper. Specifically, Dr. Imbrogno accepted Dr. Walters' objective findings and then explained how, instead of yielding a 25 percent impairment for the upper extremity those numbers, pursuant to the AMA Guidelines, only yielded a 19 percent impairment, which would be equivalent to an 11 percent whole person impairment. Dr. Imbrogno then concluded that Dr. Walters should not have added any additional impairment for loss of strength as such is not accepted practice for impairment evaluators. Lastly, Dr. Imbrogno explained that Dr. Walters erred in assigning an additional impairment due to claimant's upper extremity pain. Dr. Imbrogno concluded by stating that the only issue in question for claimant's impairment rating is the actual rating of her loss of range of motion. As such, he concluded that Dr. Walters' report could not be read to assign anything greater than an 11 percent whole person impairment.

{¶17} 9. The appeal was heard before a staff hearing officer ("SHO") on September 6, 2002, and resulted in an order affirming the prior DHO order in all respects and relying upon the reports of Drs. Walters, Imbrogno, and Hughes.

{¶18} 10. Thereafter, relator filed the instant mandamus action in this court regarding the commission's determination of claimant's percentage of PPD compensation.

{¶19} 11. On May 3, 2002, John P. Moore, III, M.D., completed a C-84 stating that claimant was disabled due to the allowed conditions in claim number 01-477035 involving her right hand and wrist. He opined that she was disabled from April 18, 2002 to present, and estimated that she could return to work on July 18, 2002. In his objective findings, Dr. Moore noted that claimant had tenderness on palpation at the dorsal lateral distal wrist and decreased range of motion of her wrist.

{¶20} 12. The record also includes the May 7, 2002 report of Dr. Moore wherein he detailed his plan of care for claimant. In that report, he noted that claimant had returned to full duty work on April 17, 2002, but suffered severe swelling of her hand and was again taken off work. Due to her complaints, Dr. Moore outlined additional diagnostic testing as well as a new treatment plan.

{¶21} 13. Vocational rehabilitation case manager Jeffrey R. Berman issued a report dated May 14, 2002, wherein he noted that when claimant returned to work on April 18, 2002, she complained of increased upper extremity symptoms and was only able to work for approximately two hours.

{¶22} 14. The record also includes the April 17, 2002 report of Martti E. Kahkonen, M.D., who opined that claimant appeared to have full range of motion of her hand at the wrist and that she was released to return to work without restrictions as she has reached maximum medical improvement ("MMI").

{¶23} 15. The record also includes the April 18, 2002 report of Stephen Huffman, M.D., who also opined that claimant had reached MMI. He stated that she could return to light duty work and that he would recheck her in a few days for further evaluation and further recommendations. He indicated that he believed she was at MMI and that she will need to be on permanent restrictions if she cannot do her job for more than one-half hour.

{¶24} 16. The matter was heard before a DHO on June 21, 2002, and resulted in an order denying claimant's request for TTD compensation on the basis that both Drs. Huffman and Kahkonen had found that she had reached MMI.

{¶25} 17. On appeal, the matter was heard before an SHO on July 26, 2002, and resulted in an order granting her TTD compensation based upon the reports of Drs. Moore, Mr. Berman, and claimant's own testimony at hearing.

{¶26} 18. Thereafter, relator filed the instant mandamus action alleging that the commission abused its discretion in granting claimant TTD compensation.

Conclusions of Law

{¶27} In order for this court to issue a writ of mandamus as a remedy from a determination of the commission, relator must show a clear legal right to the relief sought and that the commission has a clear legal duty to provide such relief. *State ex rel. Pressley v. Indus. Comm.* (1967), 11 Ohio St.2d 141. A clear legal right to a writ of mandamus exists where the relator shows that the commission abused its discretion by entering an order which is not supported by any evidence in the record. *State ex rel. Elliott v. Indus. Comm.* (1986), 26 Ohio St.3d 76. On the other hand, where the record contains some evidence to support the commission's findings, there has been no abuse of discretion and mandamus is not appropriate. *State ex rel. Lewis v. Diamond Foundry Co.* (1987), 29 Ohio St.3d 56. Furthermore, questions of credibility and the weight to be given evidence are clearly within the discretion of the commission as fact finder. *State ex rel. Teece v. Indus. Comm.* (1981), 68 Ohio St.2d 165.

{¶28} This magistrate will first discuss relator's argument that the commission abused its discretion in awarding claimant an 18 percent PPD award. For the reasons that follow, this magistrate concludes that relator has raised a valid complaint and has shown that the commission abused its discretion.

{¶29} R.C. 4123.57 permits an employee to apply for an award of permanent partial disability arising from a work-related injury. The commission is to determine the percentage of the employee's permanent disability based upon that condition of the employee resulting from the injury and causing permanent impairment as evidenced by medical or clinical findings reasonably demonstrable.

{¶30} In the present case, Drs. Hughes, Walters, and Imbrogno, listed their objective findings and specifically referred to the AMA Guidelines to explain how they arrived at the percentage of permanent partial disability. This magistrate has specifically examined the tables (Figures 16-40, 16-43, and 16-46; Tables 16-2, 16-3, 16-10, 16-13, 16-32, and 16-34) relative to claimant's injury and made the calculations necessary to determine the percentage of impairment to claimant's right upper extremity as well as the corresponding whole person impairment. Based upon the objective findings noted by Dr. Hughes, this magistrate finds that, instead of assessing a 25 percent impairment for the right upper extremity, Dr. Hughes should have assessed a 19 percent upper extremity impairment. Likewise, after reviewing Dr. Walters' report, this magistrate finds that, instead of assessing a 25 percent upper extremity impairment, Dr. Walters should have assessed an 18 percent extremity impairment. As noted in the tables, a finding of either 18 or 19 percent upper extremity impairment converts to an 11 percent whole person impairment. As such, relator is correct to argue that both Drs. Hughes and Walters assessed too high of an impairment for claimant's right upper extremity based upon their range of motion findings alone.

{¶31} Further, with regard to Dr. Walters' report, this magistrate notes that Dr. Walters opined that claimant had an additional eight percent impairment of the right upper extremity due to pain and that, pursuant to the conversion tables, this constituted a five percent whole person impairment. Taking the corrected 18 percent whole person impairment for the right upper extremity and combining it with the five percent whole person impairment for the pain, Dr. Walters should have concluded that claimant had a 23 percent whole person impairment. However, after reviewing Tables 16-13 and 16-10 and reading through the guidelines, it is apparent that an additional award based upon pain is to be made in the presence of some sensory deficits or pain resulting from peripheral nerve disorders. In his report, Dr. Walters noted that claimant's sensory examination was intact. As such, Dr. Walters should not have added a five percent whole person impairment to his conclusion. Furthermore, Dr. Walters had also added an additional 18 percent whole person impairment due to the loss of strength in claimant's right hand. Claim number 00-483434 is allowed for sprain right shoulder and is the subject of claimant's PPD award. Claim number 01-477035 is allowed for contusion

right hand; contusion right wrist; and fracture right metacarpal and is not the subject of claimant's PPD award. As such, it was improper for Dr. Walters to add an additional 18 percent whole person impairment since claimant's right wrist injury is the subject of another claim.

{¶32} After correcting the reports of Drs. Hughes and Walters, the commission had before it evidence from Dr. Walters that claimant had an 11 percent whole person impairment, from Dr. Hughes the claimant had an 11 percent whole person impairment, and from Dr. Imbrogno the claimant had a three percent whole person impairment. In ultimately assessing an 18 percent PPD award, the commission has abused its discretion. A writ of mandamus must issue in this case and the commission should either take additional medical evidence from the parties or redetermine claimant's permanent partial impairment based upon the corrections made to the reports of Drs. Hughes and Walters.

{¶33} TTD compensation awarded pursuant to R.C. 4123.56 has been defined as compensation for wages lost where a claimant's injury prevents a return to the former position of employment. *State ex rel. Ramirez v. Indus. Comm.* (1982), 69 Ohio St.2d 630. Upon that predicate, TTD compensation is payable to a claimant until the claimant has returned to work, claimant's treating physician has made a written statement that the claimant is capable of returning to their former position of employment, when work within claimant's physical capabilities is made available by the employer or by another employer, or when claimant has reached MMI.

{¶34} Relator appears to first argue that the commission should find the reports of Drs. Kahkonen and Huffman to be more credible; however, as stated previously, questions of credibility and the weight to be given evidence are for the commission to determine.

{¶35} Second, relator also contends that claimant should be denied TTD compensation because she refused to return to her former position of employment. However, upon review of the record, this magistrate notes that the commission relied upon the report of Mr. Berman who indicated that claimant did return to work but that, after working for approximately two hours, she was unable to perform the lightest duty work which relator could provide to her. As such, the commission had evidence before

it that, instead of refusing to return to work, as relator argues, claimant actually attempted to return to work but was unable to continue working due to pain.

{¶36} Relator also contends that claimant was being treated for non-allowed conditions during the period that Dr. Moore certified her as being temporarily totally disabled. However, it is clear from Dr. Moore's C-84, that the period of TTD compensation is based solely upon the allowed conditions and his objective findings of tenderness on palpation at the dorsal lateral distal wrist and decreased range of motion of the wrist. The fact that Dr. Moore believed that claimant's claim should be additionally allowed for other conditions is material only if Dr. Moore included those non-allowed conditions in reaching his determination that the claimant was temporarily and totally disabled. Upon review of the C-84 and the follow-up reports, this magistrate concludes that Dr. Moore's opinion was limited to the allowed conditions and the commission did not abuse its discretion in relying on his report.

{¶37} Based on the foregoing, it is this magistrate's decision that relator is correct in asserting that Drs. Walters and Hughes miscalculated her percentage of permanent partial impairment; however, this magistrate finds that relator has not demonstrated that the commission abused its discretion in granting claimant TTD compensation. Based on the foregoing, this court should grant a writ of mandamus as it pertains to claim number 00-483434 and the commission's determination of claimant's percentage of PPD compensation. The commission should be ordered to decide the matter after either obtaining new medical reports or after considering the medical evidence currently before it but as corrected by this decision.

/s/ Stephanie Bisca Brooks
STEPHANIE BISCA BROOKS
MAGISTRATE