[Cite as *State ex rel. Bradley v. Jack A. Bradley Constr. Co.*, 2009-Ohio-2454.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Jack Bradley,	:	
Relator,	:	
v.	:	No. 08AP-778
Jack A. Bradley Construction Co., Maxwell Brothers Construction, Dawson Evans Construction and Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
Respondents.	:	

O P I N I O N

Rendered on May 26, 2009

Michael J. Muldoon, for relator.

Richard Cordray, Attorney General, and *John R. Smart*, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

BROWN, J.

{¶1} Relator, Jack Bradley, 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 that denied relator's permanent total disability ("PTD")

application, and ordering the commission to process his application for PTD compensation.

{¶2} This matter was referred to a court-appointed magistrate pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate issued a decision, including findings of fact and conclusions of law which is appended to this opinion, and recommended that this court deny relator's writ of mandamus. Relator has filed objections to the magistrate's decision.

{¶3} Relator presents no new arguments in his objections and does not specifically indicate how the magistrate erred in her analysis. Nonetheless, relator first argues that the commission erred when it found relator could return to his former position of employment, as the evidence in the record demonstrates this would not be possible. Relator asserts that none of the physicians indicate that he could return to his former position of employment. Relator's most recent position of employment was as a salesperson for Lowe's from 2001 through 2006. However, the staff hearing officer ("SHO") did not find that relator could return to his former position as a salesperson at Lowe's, but, rather, he could return to his earlier employment as a home improvement salesperson, a position he held from 1996 through 2000. Relator indicated in his PTD application the home improvement salesperson job required lifting up to ten pounds, one hour of walking, two hours of standing, and five hours of sitting. Dr. Boyd Bowden found relator was capable of sedentary employment. "Sedentary work" was defined in the physical strength rating form as exerting up to ten pounds of force occasionally and/or a negligible amount of force frequently to carry, push, pull or otherwise move objects, as well as involving sitting most of the time, and walking or standing for brief periods. The

commission found the home improvement salesperson requirements fit within the definition of sedentary employment, and we have no reason to question the commission's determination. Therefore, relator's objection in this respect is overruled.

{¶4} Relator also argues that the SHO erred when he listed jobs he claimed relator could perform. Relator contends he was limited to sedentary work, and the listed jobs do not fit within these restrictions. However, relator fails to explain why he believes none of these jobs are appropriate for his physical restrictions, and we have no reason to question the commission's determination in this respect. The long list of sample jobs cited by the SHO all appear to fit appropriately within the sedentary unskilled classification and several, as noted by the SHO, appear to offer a sit/stand option if necessary.

{¶5} Relator also claims he does not possess the skills to perform the job of a receptionist, which the SHO indicated was a job consistent with his work history. Notwithstanding that this was only one of several job examples listed by the SHO, relator does not explain why he could not perform as a receptionist. The SHO detailed relator's long work history, his considerable sales experience, and his customer service experience as skills that would be transferable to a receptionist position. In the same discussion, the SHO also cites relator's experience using computers and handling orders. Even if performing as a receptionist would require some additional training, the SHO indicated that relator has the ability to read literature, which would be helpful in reading training materials. Therefore, we cannot find error in the commission's determination, and relator's objection is overruled in this respect, as well.

{¶6} After an examination of the magistrate's decision, an independent review of the evidence, pursuant to Civ.R. 53, and due consideration of relator's objections, we

overrule relator's objections. Accordingly, we adopt the magistrate's decision as our own with regard to the findings of fact and conclusions of law, and we deny relator's request for a writ of mandamus.

Objections overruled; writ of mandamus denied.

KLATT and McGRATH, JJ., concur.

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APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Jack Bradley,	:	
Relator,	:	
v.	:	No. 08AP-778
Jack A. Bradley Construction Co., Maxwell Brothers Construction, Dawson Evans Construction and Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered February 19, 2009

Michael J. Muldoon, for relator.

Richard Cordray, Attorney General, and *John R. Smart*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶7} Relator, Jack Bradley, 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 denied his application for permanent total

disability ("PTD") compensation and ordering the commission to find that he is entitled to that compensation.

Findings of Fact:

{¶8} 1. Relator has sustained work-related injuries and his claims have been allowed for the following conditions:

> DEEP RIGHT EAR LACERATION, LEFT HAND ABRASION.
>
> * * * CONTUSION LEFT FOOT WITH FRACTURE 3RD AND 4TH METATARSAL BONES.
>
> * * * SEVERE SPRAIN, RIGHT ANKLE; ANXIETY NEUROSIS WITH DEPRESSION; POST TRAUMATIC ARTHRITIS, RIGHT ANKLE.

{¶9} 2. In October 2000, relator submitted an application for PTD compensation supported by the October 9, 2000 report of James E. Lundeen, Sr., M.D., who opined that he was permanently and totally disabled. Dr. Lundeen concluded that relator had physical limitations related to standing, walking, balancing, stairs, and limited grip strength in his left hand.

{¶10} 3. On January 2, 2002, relator withdrew his application for PTD compensation because he had returned to work.

{¶11} 4. Relator filed his second application for PTD compensation on August 21, 2007. In support, relator submitted the February 15, 2007 report of Dr. Lundeen who indicated that relator could lift six pounds for approximately three hours a day, and three pounds for approximately six hours a day; stand and walk between one and two hours a day, and walk without interruption for five minutes; sit for a total of three to four hours a day and, without interruption for 30 to 45 minutes. Relator could occasionally climb,

balance, stoop, crouch, kneel, and crawl; and relator should avoid heights, moving machinery, cold temperatures, high humidity with cold, and vibrating floor surfaces. Dr. Lundeen again concluded that relator was permanently and totally disabled.

{¶12} 5. Relator was examined by commission specialist Boyd Bowden, D.O. In his January 18, 2008 report, Dr. Bowden identified the allowed conditions and provided his physical findings upon examination. Dr. Bowden opined that relator's allowed physical conditions had reached maximum medical improvement ("MMI") and assessed an 11 percent whole person impairment for all the allowed conditions. Dr. Bowden concluded that relator could perform at a sedentary work level.

{¶13} 6. Relator was also examined by Lee Howard, Ph.D., for his allowed psychological conditions. In his January 15, 2008 report, Dr. Howard noted his findings, the results of certain testing performed, concluded that relator's allowed psychological conditions had reached MMI, assessed a five percent permanent partial impairment, and concluded that relator had no work limitations.

{¶14} 7. Relator's application was heard before a staff hearing officer ("SHO") on July 17, 2008 and was denied. The SHO relied upon the medical reports of Drs. Bowden and Howard and concluded that relator could perform at a sedentary work level. Thereafter, the SHO noted that relator was 74 years old, had a high school education, and indicated that he could read, write, and perform basic math. First, the SHO concluded that relator was capable of returning to one of his prior jobs as a home improvement salesman. The SHO relied upon relator's PTD application wherein he indicated that this job required only ten pounds of lifting, one hour of walking, two hours of standing, and five hours of sitting. The SHO concluded that this particular job fit within

the definition of sedentary work. In the alternative, the SHO further concluded that relator could return to other sedentary employment. The SHO indicated as follows:

> The injured worker has a high school education and can read, write, and do basic math. There has been no objective evidence or testing submitted to indicate that his intellect and literacy skills are anything less than consistent with the level of education. To the contrary, his ability to learn carpentry, operate his own business and become a supervisor indicate good intelligence, which is consistent with Dr. Howard's finding of normal intelligence. With his education and intelligence the injured worker was able to learn and perform work that is considered skilled per the Dictionary of Occupational Titles (DOT). This shows that the injured worker has the intellect and academic skills to learn and perform entry level jobs of all skill levels. (Lewis v. I.C. (1997), 10th Ct. App., No. 96APD04-438). The injured worker's education and intelligence are found to be assets to retraining/re-employment. (Wood v. I.C. (1997), 78 O.S.3d 414).
>
> While the injured worker is of advanced age, age alone is not a basis for granting permanent totals [sic] disability. The injured worker demonstrated this himself when he dismissed his 2000 request for permanent total disability because he returned to work. At that time he was already approximately 66 years old. At that time he was able to utilize his prior knowledge and experience to find further employment. For these reasons the injured worker's age is not found to prevent a return to sustained gainful employment.
>
> The injured worker has a long work history, something looked upon favorably by prospective employers. He has sales and customer service experience that would be transferable to sedentary work such as receptionist or sedentary cashier positions. The IC-2 application indicates he has experience using computers and handling orders, skills that would be transferable to sedentary clerical type work. His ability to read literature as part of the job would be transferable to sedentary work and helpful in reading training materials. To this extent his prior work experience is found to be an asset to retraining and/or re-employment.

> Further, according to Ewart v. I.C. (1996), 76 O.S.3d 139, the nonexistence of transferable skills is not critical when the issue is whether the injured worker can be trained. To the extent there may be a lack of transferable skills, it is found the injured worker is capable of unskilled work within the physical restrictions noted above, even at his current age of 74. This finding is based on the fact that unskilled work, by its very definition, does not require transferable skills. Further, according to the DOT, unskilled work only requires up to 30 days of training, often on the job. Even at age 74 the injured work[er] is capable of completing 30 days of training. Finally, as noted above, the injured worker has demonstrated the intellect and academic skills needed to learn and perform up to skilled work. There are a number of sedentary unskilled jobs that require no more education than that possessed by the injured worker. Some examples include: lens inserter optica; jewelry preparer; telephone quotation clerk; order clerk food and beverage; paramutual ticket checker; surveillance system monitor; charge account clerk; and parking garage cashier. Some of these jobs, such as surveillance system monitor, parking garage cashier, paramutual ticket checker, and telephone quotation clerk, would appear to offer a sit/stand option if required. This list is exemplary and not exhaustive.

{¶15} 8. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶16} 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.

{¶17} Relator contends that the commission abused its discretion when it concluded that he could perform some sustained remunerative employment. Relator argues that the commission did not obtain any vocational evidence and that there was no basis to support the commission's conclusion that he could perform any of the jobs identified in the commission's order. Relator cites the decisions in *State ex rel. Bruner v. Indus. Comm.* (1997), 77 Ohio St.3d 243, *State ex rel. Pierce v. Indus. Comm.* (1997), 77 Ohio St.3d 275, and *State ex rel. Mann v. Indus. Comm.* (1998), 80 Ohio St.3d 656, in support of his argument that the commission manufactured transferable skills where there are none and failed to adequately explain its conclusion that relator was capable of performing any sedentary work. For the reasons that follow, this magistrate disagrees with relator's arguments.

{¶18} First, regarding relator's argument that the commission had no vocational evidence upon which it could rely, it must be remembered that the commission is the ultimate evaluator of the disability factors pursuant to *State ex rel. Stephenson v. Indus. Comm.* (1987), 31 Ohio St.3d 167. As such, the commission was not required to obtain, nor required to rely on, any specific vocational evidence. See, also, *State ex rel. Singleton v. Indus. Comm.* (1994), 71 Ohio St.3d 117, and *State ex rel. Jackson v. Indus. Comm.* (1997), 79 Ohio St.3d 266.

{¶19} Second, contrary to relator's assertions, the commission did not manufacture transferable skills. Instead, the commission specifically noted that relator was self-employed, held a position in sales for Sears, was a supervisor, and indicated on his application that he had experience using computers and handling orders. The commission found that these jobs (self-employment, sales and supervisor) would have provided him with skills that would have transferred to sedentary work. With regards to these three jobs, the magistrate finds that it was not necessary for the commission to specifically identify those transferable skills. It is commonly understood that people who are self-employed must be able to keep track of orders and finances, and that people involved in sales and as supervisors develop the ability to interact with the public, answer questions, work out solutions, and direct others in the performance of their responsibilities. Further, the commission noted that relator himself specifically indicated that he was able to utilize computers and handle orders. These skills do transfer to sedentary work.

{¶20} Furthermore, the commission concluded that relator's education, work experience, training, and various jobs indicate that he is capable of learning new tasks and that he could perform unskilled work. Upon review of the jobs listed by the commission, it is apparent that telephone quotation clerk, food and beverage clerk, ticket checker, surveillance system monitor, and parking garage cashier would clearly be within relator's physical (all can be performed while sitting), as well as intellectual abilities, and would require a minimal amount of training.

{¶21} Contrary to relator's assertions, the situation presented here is not the same as the situation criticized by the court in *Bruner*. In the *Bruner* case, the claimant had

worked as a window washer and maintenance worker for the City of Cleveland. The commission determined that the claimant had sufficient vocational skills to obtain or be retrained for sedentary or light employment because he obtained a GED and because unskilled sedentary and light level positions are available in the labor market. The court found that the commission's explanation was inadequate given the commission's determination that the claimant had certain unidentified transferable skills which he derived from traditionally unskilled jobs.

{¶22} In the present case, the jobs relator has performed in the past are not unskilled jobs. As noted previously, relator had been self-employed, has worked in sales, and has supervised other people.

{¶23} Further, the situation here is different from the situation presented in the *Pierce* case. In *Pierce*, the claimant had a tenth grade education and had worked as a foreman iron worker and a journeyman iron worker. The commission determined that the claimant possessed skills which would transfer to similar or lighter-duty employment and that he should be able to obtain following participation in a reconditioning or work hardening program. Upon review, the court criticized the commission's failure to identify those alleged transferable skills. However, in *Pierce*, the court did state that, depending on the claimant's background, the identity of the transferable skills can be self-evident. That is the situation presented here.

{¶24} Likewise, relator's case differs significantly from the situation of the claimant in the *Mann* case. The claimant in *Mann* was 59 years old, had an 11th grade education, had obtained a GED, and had work experience as a packer, ceramic factory worker, restaurant worker, factory and assembly worker, cook, cashier, and cleaner. In denying

her PTD compensation, the commission specifically relied upon her work experience as a cook, cashier and restaurant worker to find that she has some skills in the food service industry that may transfer or apply to sedentary low stress positions in the food service industry. Upon review, the court concluded that the commission's reference to "sedentary low stress positions in the food service industry" merited further explanation. Especially in light of the fact that work in that industry is traditionally considered neither low stress, nor sedentary.

{¶25} As stated previously, relator was self-employed, worked in sales, and worked in a supervisory capacity. Relator's prior work history and experience differs significantly from the prior work history and experience of the claimants in the above-cited cases, making them inapplicable here.

{¶26} Based on the foregoing, it is this magistrate's conclusion that relator has not demonstrated that the commission abused its discretion when it denied his application for PTD compensation 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).