[Cite as *State ex rel. Cedeno v. Indus. Comm.*, 2009-Ohio-4211.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Edelmiro Cedeno,	:	
Relator,	:	
v.	:	No. 08AP-912
Industrial Commission of Ohio and HMC Corporation,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on August 20, 2009

Plevin & Gallucci, Frank Gallucci, III and *Bradley E. Elzeer, II*; *Paul W. Flowers Co., L.P.A.,* and *Paul W. Flowers*, for relator.

Richard Cordray, Attorney General, and *Colleen C. Erdman*, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

KLATT, J.

{¶1} Relator, Edelmiro Cedeno, commenced this original action in mandamus seeking an order compelling respondent, Industrial Commission of Ohio ("commission"), to vacate its order denying him permanent total disability ("PTD") compensation, and to grant said compensation.

{¶2} Pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth District Court of Appeals, this matter was referred to a magistrate who issued a decision, including findings of fact and conclusions of law, which is appended hereto. The magistrate found that: (1) John Finnegan's vocational expert reports were some evidence supporting the commission's determination that relator's welding experience provided relator with skills transferable to the positions of ampoule sealer and solderer; and (2) the commission did not abuse its discretion in finding that the soldering position would "not entail extensive interpersonal contact." Based upon those findings, the magistrate has recommended that we deny relator's request for a writ of mandamus.

{¶3} Relator filed objections to the magistrate's decision arguing that the commission abused its discretion in relying on Finnegan's vocational reports because the reports predated the commission's allowance of relator's additional claims. Relator also argues that the commission could not act as its own vocational expert. We find neither argument persuasive.

{¶4} Finnegan's reports were based upon relator's ability to perform sedentary work. Thereafter, the commission allowed relator's additional claims but the medical evidence indicated that relator now was capable of remunerative employment at the light work level. Thus, when the commission denied relator's PTD request, relator's condition was better than it was when Finnegan issued his vocational reports. We also note that relator has not challenged the commission's determination of his residual functional capacity. Despite his additional claim allowances, there is no reason to conclude that relator's improved physical condition would undercut Finnegan's opinions. Therefore, the

commission did not abuse its discretion when it relied it on Finnegan's reports in its vocational analysis.

{¶5} Relator also argues that, except for Finnegan's reports, there was no basis for the commission to conclude that relator could engage in remunerative employment, given his physical and emotional restrictions. We disagree. The commission took into account the additionally-allowed conditions, as well as relator's surgery subsequent to Finnegan's reports, in concluding that relator's welding experience would transfer to an occupation that relator can medically perform. Moreover, contrary to relator's assertion, the commission is the expert on vocational issues, and it has the discretion to interpret and draw reasonable inferences from the vocational evidence before it. *State ex rel. Jackson v. Indus. Comm.* (1997), 79 Ohio St.3d 266, 270-71 (commission may credit offered vocational evidence, but expert opinion is not critical or even necessary, because the commission is the expert on this issue). Relator has not shown that the commission abused its discretion.

{¶6} Accordingly, we overrule relator's objections.

{¶7} 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 writ of mandamus.

Objections overruled;
writ of mandamus denied.

FRENCH, P.J., and BROWN, J., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Edelmiro Cedeno,	:	
Relator,	:	
v.	:	No. 08AP-912
Industrial Commission of Ohio and HMC Corporation,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on April 27, 2009

Plevin & Gallucci, Frank Gallucci, III and *Bradley E. Elzeer, II*; *Paul W. Flowers Co., L.P.A.,* and *Paul W. Flowers*, for relator.

Richard Cordray, Attorney General, and *Colleen C. Erdman*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶8} In this original action, relator, Edelmiro Cedeno, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order denying him permanent total disability ("PTD") compensation, and to enter an order granting said compensation.

Findings of Fact:

{¶9} 1. On October 17, 1979, relator sustained an industrial injury while employed as a welder. The industrial claim (No. 79-48101) was initially allowed for "foreign body, left eye; injury to low back."

{¶10} 2. On December 22, 1994, relator filed an application for PTD compensation. The application prompted the commission to request a so-called "Employability Assessment Report" from John Finnegan, a vocational expert.

{¶11} 3. In his report dated October 13, 1996, Finnegan listed "employment options" based upon the medical report of orthopedist Jorge Bonilla Colon, M.D. Finnegan's report indicated that Dr. Colon had opined that the industrial injury permitted only sedentary work. Based upon Dr. Colon's opinion of residual functional capacity and Finnegan's analysis of the nonmedical disability factors, Finnegan listed employment options. Among the listed employment options that can be performed "immediately," was "ampoule sealer."

{¶12} 4. In his report, Finnegan also summarized relator's work history:

Job Title	* * *	Skill Level	Strength Level	Dates
Welder Arc	* * *	Skilled	Heavy	1979 to 1980
Furnace Tender	* * *	Semi-skilled	Heavy	1977 to 1978
Farm Worker, General I	* * *	Skilled	Heavy	1974 to 1974

{¶13} 5. Subsequent to issuance of Finnegan's October 13, 1996 report, relator was examined on May 11, 1998 by orthopedist Fernando Rojas, M.D., who opined that the industrial injury permitted sedentary work. Consequently, Finnegan was asked to prepare an addendum to his October 13, 1996 report.

{¶14} 6. In his addendum dated July 1, 1998, Finnegan listed "solderer" as an employment option "following appropriate academic remediation or brief skill training."

{¶15} 7. Following a July 29, 1998 hearing, a staff hearing officer ("SHO") issued an order denying relator's PTD application. In the order, the SHO stated reliance upon Finnegan's October 13, 1996 report and his addendum.

{¶16} 8. In 2006, the industrial claim was additionally allowed for "herniated disc at L5-S1; post laminectomy syndrome, lumbar; depressive psychosis, moderate."

{¶17} 9. In July 2006, relator underwent surgery described as "laminectomy L4 and L5, discectomy L4, L5, arthrodesis posterior interbody lumbar and application of intervertebral device."

{¶18} 10. On August 13, 2007, relator filed another PTD application which is the subject of this action.

{¶19} 11. On December 18, 2007, at the commission's request, relator was examined by psychologist Robert L. Byrnes, Ph.D. In his four-page narrative report, Dr. Byrnes opines:

> In my opinion this examinee's overall impairment is now mild to moderate and I assign a 20% to 25% whole person impairment for his allowed mental condition only.

{¶20} 12. On December 18, 2007, Dr. Byrnes completed a form captioned "Occupational Activity Assessment[,] Mental & Behavioral Examination." On the form, Dr. Byrnes indicated by checkmark that "[t]his injured worker is capable of work with the limitation(s) / modification(s) noted below."

Thereunder, Dr. Byrnes wrote in his own hand:

> This claimant's allowed mental condition, in and of itself would not prevent his return to work in low stress positions with limited interpersonal demands.

{¶21} 13. On January 2, 2008, at the commission's request, relator was examined by Kirby J. Flanagan, M.D., who is board certified in occupational medicine. In his three-page narrative report, Dr. Flanagan opines:

> In regard to the allowed condition of foreign body, left eye, it is my opinion that this allowed condition has resolved without residuals. He has no complaints regarding the left eye. My examination of the left eye was entirely unremarkable. Therefore, whole person impairment for this allowed condition is **0%.**
>
> In regard to the allowed conditions of injury to low back, herniated disk L5-S1, and postlaminectomy syndrome, lumbar, it is my opinion that impairment is best described by DRE Lumbar Category III as described in Table 15-3 on page 384 of the AMA Guides to the Evaluation of Permanent Impairment, 5th edition. This results in a **13%** whole person impairment for these allowed conditions.

(Emphases sic.)

{¶22} 14. On January 2, 2008, Dr. Flanagan completed a physical strength rating form on which he indicated by checkmark that relator is medically capable of performing "light work."

{¶23} 15. In support of his second PTD application, relator submitted a report dated March 3, 2008 from vocational expert Daniel L. Simone. In his report, Simone opines:

> The preponderance of information reviewed indicates that Mr. Cedeno is experiencing marked physical and psychological limitations as a direct result of his compensable injury. From a physical standpoint he would have difficulty performing more than a very narrow range of sedentary occupations. He is unable to remain in any one position for extended periods of time. He would be unable to

> meet the standing, walking, carrying or lifting requirements of light work. He would also be unable to meet the sitting or reaching requirements of most sedentary jobs. These limitations would significantly erode the occupational base of even sedentary work. However, the claimant also has significant psychological limitations which would prohibit Mr. Cedeno from performing more than simple, routine tasks in a low stress environment with reduced people contact and with limited production requirements. These additional limitations when taken in conjunction with the physical limitations would preclude the performance of sustained work activity. Mr. Cedeno's work history is compromised of very physically demanding positions. He is unable to return to his past work activities. He has not developed skills which would transfer into other occupations. In spite of his age he would not be considered a realistic candidate for additional education or vocational training given the extent of his limitations. Therefore as a result of these factors and the current labor market Mr. Cedeno has experienced a total inability to perform substantial gainful activity on a sustained basis.

{¶24} 16. Following an April 3, 2008 hearing, an SHO issued an order denying relator's second application for PTD compensation. The SHO's order explains:

> All medical and vocational evidence on file was reviewed and considered. This order is based on the reports of Dr. Kirby Flanagan, Dr. Robert Byrnes, and John Finnegan. Dr. Flanagan examined the injured worker at the request of the Industrial Commission with respect to the allowed physical conditions. He concluded that the injured worker retained the capacity to perform sustained remunerative employment in the light work classification. The injured worker's former position of employment was as an arc welder. In a vocational evaluation done in connection with a prior application for permanent total disability compensation, Mr. Finnegan stated that arc welding was heavy, skilled work. The Staff Hearing Officer, therefore, finds that, as a result of the physical injuries alone, the injured worker is unable to return to his former position of employment. Dr. Byrnes evaluated the injured worker with regard to the allowed depressive condition. Dr. Byrnes stated that the injured worker could engage in gainful work that was of a low stress nature and had limited interpersonal demands. The issue is whether there is alternate work which is available to the injured worker within these restrictions and consistent with his

> nonmedical disability factors. The injured worker is fifty-two years old. His age is a neutral vocational factor. He did not finish high school, but does have a GED. This, again, is a neutral factor. The injured worker's work history consists of positions as an arc welder, a furnace tender and a farm worker. These all fall within the heavy work classification and so the injured worker is unable to return to any of them. As noted above, however, arc welding is skilled work. Mr. Finnegan states that the injured worker would have skills that would transfer to other positions. Mr. Finnegan found that the injured worker could immediately work as an ampoule sealer. At that time, the medical evaluations restricted the injured worker to sedentary work. The injured worker has now undergone a lumbar fusion and Dr. Finnegan [sic] believes the injured worker could do light work. Many soldering positions fall within the light work classification. The Staff Hearing Officer believes that the injured worker's welding skills would transfer to a soldering position. A soldering position would also not entail extensive interpersonal contact as the injured worker would not be dealing with customers or large numbers of co-workers at any one time. For these reasons, the Staff Hearing Officer finds that the injured worker would have the ability to make a transition to work as an ampoule sealer or a solder. He, therefore, is not permanently and totally disabled. The application is denied.

{¶25} 17. On July 10, 2008, the three-member commission mailed an order denying relator's request for reconsideration of the SHO's order of April 3, 2008.

{¶26} 18. On August 28, 2008, the three-member commission mailed another order denying another request for reconsideration.

{¶27} 19. On October 16, 2008, relator, Edelmiro Cedeno, filed this mandamus action.

Conclusions of Law:

{¶28} For its determination of residual functional capacity, the commission, through its SHO, relied upon the medical reports of Drs. Flanagan and Byrnes. Based

upon reports from those two doctors, the commission determined that the industrial injury permits "light work" in "low stress positions with limited interpersonal demands."

{¶29} In this action, relator does not challenge the commission's determination of residual functional capacity, nor does relator challenge the reports of Drs. Flanagan and Byrnes upon which the commission relied.

{¶30} However, relator does challenge the commission's analysis of the nonmedical factors.

{¶31} Two issues are presented: (1) are the Finnegan reports some evidence upon which the commission can rely to support its determination that his welding employment provides relator with skills transferable to the positions of ampoule sealer and solderer, and (2) did the commission abuse its discretion in finding that the soldering position would "not entail extensive interpersonal contact."

{¶32} The magistrate finds: (1) Finnegan's reports are some evidence to support the commission's determination that his welding employment provides relator with skills transferable to the positions of ampoule sealer and solderer, and (2) the commission did not abuse its discretion in finding that the soldering position would "not entail extensive interpersonal contact."

{¶33} Accordingly, it is the magistrate's decision that this court deny relator's request for a writ of mandamus, as more fully explained below.

{¶34} Turning to the first issue, Ohio Adm.Code 4121-3-34 sets forth the commission's rules applicable to the adjudication of PTD applications.

{¶35} Ohio Adm.Code 4121-3-34(B)(3)(c) is captioned "Work experience." Thereunder are the following provisions:

> (iii) "Skilled work" is work which requires qualifications in which a person uses judgment or involves dealing with people, factors or figures or substantial ideas at a high level of complexity. Skilled work may require qualifications in which a person uses judgment to determine the machine and manual operations to be performed in order to obtain the proper form, quality, or quantity to be produced. Skilled work may require laying out work, estimating quality, determine the suitability and needed quantities of materials, making precise measurements, reading blue prints or other specifications, or making necessary computations or mechanical adjustments or control or regulate the work.
>
> (iv) "Transferability of skills" are skills which can be used in other work activities. Transferability will depend upon the similarity of occupational work activities that have been performed by the injured worker. Skills which an individual has obtained through working at past relevant work may qualify individuals for some other type of employment.
>
> (v) "Previous work experience" is to include the injured worker's usual occupation, other past occupations, and the skills and abilities acquired through past employment which demonstrate the type of work the injured worker may be able to perform. Evidence may show that an injured worker has the training or past work experience which enables the injured worker to engage in sustained remunerative employment in another occupation. The relevance and transferability of previous work skills are to be addressed by the adjudicator.

{¶36} In *State ex rel. Jackson v. Indus. Comm.* (1997), 79 Ohio St.3d 266, 270-271, the court states, in relevant part:

> [T]he commission's charge is to review the evidence of the claimant's age, education, work history, and other relevant nonmedical characteristics and to decide for itself from that evidence whether the claimant is realistically foreclosed from sustained remunerative employment. The commission may credit offered vocational evidence, but expert opinion is not critical or even necessary, because the commission *is* the expert on this issue.

(Emphasis sic.)

{¶37} In *State ex rel. Ewart v. Indus. Comm.* (1996), 76 Ohio St.3d 139, 141-142, the court states, in pertinent part:

> The freedom to independently evaluate nonmedical factors is important because nonmedical factors are often subject to different interpretation.
>
> * * *
>
> Claimant worked for Refiners Transport and Terminal as a trucker for twenty-two years. Claimant's long tenure can be viewed negatively because it prevented the acquisition of a broader range of skills that more varied employment might have provided. It also, however, suggests a stable, loyal and dependable employee worth making an investment in. This is an asset and is an interpretation as valid as the first.

{¶38} In *State ex rel. Mobley v. Indus. Comm.* (1997), 78 Ohio St.3d 579, 583-584, the court was faced with the commission's reliance upon work experience that was remote in time. In reversing this court's judgment, the Supreme Court of Ohio explained:

> The commission concluded from Mobley's sales experience that he had acquired interpersonal communication skills, and it considered this skill an employment asset. The commission also noted that Mobley's physical restrictions were consistent with a sales position, which it did not consider physically demanding. The court of appeals discarded this assessment, finding that (1) the only description of Mobley's sales experience—"sales in [a] locomotive firm"—was too vague to evaluate; and (2) in any event, the experience was too long ago to be of value in the current job market.
>
> This ruling, as the commission argues, would divest the commission of its power to interpret evidence and draw reasonable inferences. *State ex rel. West v. Indus. Comm.* (1996), 74 Ohio St.3d 354, 356, 658 N.E.2d 780, 782. The phrase "sales in a locomotive firm" is cryptic, but it at least conveys Mobley's undisputed experience in sales, an occupation that is as available today as it was in the 1960s, when Mobley, then in his late thirties, apparently worked for the "locomotive firm." Moreover, the inference that Mobley developed some communicative ability follows naturally from

> his sales experience, which typically requires interaction with customers in a physically unchallenging environment. Thus, the commission did not abuse its discretion in finding this occupational experience an asset to reemployment. Cf. *State ex rel. Miller v. Indus. Comm.* (1996), 76 Ohio St.3d 590, 592, 669 N.E.2d 844, 846 (fifty-two-year-old claimant's teenage experience of delivering telegrams by bicycle was of "negligible re-employment value" because it was "vocationally and chronologically" remote).
>
> Reviewing courts must not micromanage the commission as it carries out the business of compensating for industrial/occupational injuries and illness. The commission is the exclusive evaluator of evidentiary weight and disability. *State ex rel. Ellis v. McGraw Edison Co.* (1993), 66 Ohio St.3d 92, 94, 609 N.E.2d 164, 165. Moreover, review of a commission order in mandamus is not *de novo,* and courts must defer to the commission's expertise in evaluating disability, not substitute their judgment for the commission's. * * *

{¶39} Here, the commission relied upon relator's work experience as a skilled welder to conclude that relator has skills transferable to other occupations. According to relator's PTD application, relator last worked as a welder in 1979, almost 30 years prior to the PTD hearing at issue. Thus, it can be said that the welding experience is indeed remote in time to the commission's determination at issue.

{¶40} However, as the *Mobley* court tells us, a determination of the relevancy of the work experience based on the remoteness question is a determination within the sound discretion of the commission. That the skilled work experience occurred almost 30 years ago does not compel the conclusion, as a matter of law, that the experience is automatically irrelevant to relator's current ability to perform sustained remunerative employment.

{¶41} Here, relator does not actually argue that the welding experience is too remote to be viewed by the commission as relevant to its determination. What relator

argues is that Finnegan's "decade old" reports are "plainly outdated" and "of no probative value." (Relator's brief, at 9; reply brief, at 3.)

{¶42} Relator contends that Finnegan's reports are outdated and of no probative value because the industrial claim was additionally allowed for serious physical and psychological conditions after issuance of the reports, and Finnegan was never asked to consider the medical reports of those doctors who have examined relator for all the allowed conditions of the claim. Relator's argument lacks merit.

{¶43} Underpinning relator's argument is the suggestion that the commission, without additional analysis, merely accepted Finnegan's opinion that ampoule sealer and solderer were viable employment options. This suggestion is without foundation.

{¶44} The commission, through its SHO, analyzed the welding experience in light of the current medical reports from Drs. Flanagan and Byrnes. In fact, the SHO noted in her order that Dr. Flanagan found that relator can now perform light work and that many soldering positions fall within the classification of light work. Thus, the SHO took into account the additionally allowed conditions as well as relator's surgery subsequent to Finnegan's report in concluding that the welding experience would transfer to an occupation that relator can medically perform.

{¶45} Based upon the above analysis, the magistrate concludes that the commission did not abuse its discretion in relying upon portions of Finnegan's reports to support its determination that relator's welding employment provides him with transferable skills. Finnegan's reports clearly constitute some evidence upon which the commission can and did rely.

{¶46} The second issue, as previously noted, is whether the commission abused its discretion in finding that the soldering position would "not entail extensive interpersonal contact."

{¶47} According to relator, there is no evidence in the record to support the commission's determination that the soldering position would "not entail extensive interpersonal contact." Relator points out that Finnegan's reports do not address this finding. Moreover, relator posits, in pertinent part:

> It is simply illogical to assume that a solder's life is a monastic one, as such laborers frequently work in crowded and noisy factories in close contact with co-workers supplying them with what they need and supervisors telling them what to do.

(Relator's brief, at 10; emphasis sic.)

{¶48} Again, as the *Jackson* court instructs, the commission and its hearing officers are the experts on the vocational issues in a PTD determination. Clearly, under *Jackson*, it was within the SHO's expertise to conclude that the soldering position would "not entail extensive interpersonal contact." Moreover, there is no need to find support from a vocational report.

{¶49} Accordingly, it is the magistrate's decision that this court deny relator's request for a writ of mandamus.

s/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).