[Cite as *State ex rel. Dillon v. Jsj Interiors, Inc.*, 2009-Ohio-5356.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

In Re State ex rel. Allen Dillon,	:	
Relator,	:	
v.	:	No. 08AP-947
Jsj Interiors, Inc. and The Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on October 8, 2009

Mondello & Levey, Scott I. Levey, and *Ronald R. Glassman*, for relator.

Richard Cordray, Attorney General, *Joseph C. Mastrangelo*, and *Rema Ina*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

BROWN, J.

{¶1} Relator, Allen Dillon, has filed an original action requesting that this court issue a writ of mandamus ordering respondent, Industrial Commission of Ohio, to vacate its order denying relator's request for permanent total disability compensation, and to enter an order granting said compensation.

{¶2} This matter was referred to a magistrate of this court pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. On June 19, 2009, the magistrate issued a decision, including findings of fact and conclusions of law, which is appended to this decision, recommending that this court deny relator's request for a writ of mandamus. No objections have been filed to that decision.

{¶3} Based upon an examination of the magistrate's decision and an independent review of the evidence, and finding no error of law or other defect on the face of the magistrate's decision, this court adopts the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein. In accordance with the magistrate's recommendation, relator's request for a writ of mandamus is hereby denied.

Writ denied.

SADLER and CONNOR, JJ., concur.

_____

[Cite as *State ex rel. Dillon v. Jsj Interiors, Inc.*, 2009-Ohio-5356.]

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

In Re State ex rel. Allen Dillon,	:	
Relator,	:	
v.	:	No. 08AP-947
Jsj Interiors, Inc. and The 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 on June 19, 2009

Mondello & Levey, Scott I. Levey and *Ronald R. Glassman*, for relator.

Richard Cordray, Attorney General, *Joseph C. Mastrangelo* and *Rema Ina*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶4} In this original action, relator, Allen Dillon, 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:

{¶5} 1. Relator has three industrial claims arising out of his employment as a carpenter with respondent Jsj Interiors, Inc., a state-fund employer.

{¶6} 2. Relator's October 21, 1998 injury (claim No. 98-553557) is allowed for "sprain knee & leg, left."

{¶7} 3. Relator's January 21, 1999 injury (claim No. 99-312272) is allowed for "contusion left wrist; sprain left wrist."

{¶8} 4. Relator's December 12, 2003 injury (claim No. 03-454563) is allowed for:

> Sprain or strain, left trapezius muscle; dislocation acromio-clavicular-closed, left; tendonitis, left rotator cuff; tear rotator cuff, left; sprain of neck; postconcussion syndrome; tear, left infraspinatus; superior glenoid labrum lesions (slap), left; tear, left labrum; C6-C7 disc herniation; stroke, dysphagia.

{¶9} 5. On February 19, 2008, relator filed an application for PTD compensation. In support, relator submitted a report dated January 3, 2008 from M.P. Patel, M.D., based upon a December 20, 2007 examination. In the report, Dr. Patel opines that relator "is permanently and totally disabled from engaging into any gainful employment."

{¶10} 6. In further support of the application, relator submitted a report dated January 13, 2008 from vocational expert Mark A. Anderson. In his five-page narrative report, Anderson opines:

> * * * [I]t is my opinion that Mr. Allen L. Dillon has no return to work potential. The medical reports and testing indicate that Mr. Dillon is capable of performing less than the full range of sedentary activities.
>
> The Vocational Diagnosis and Assessment of Residual Employability confirms that Mr. Dillon is not employable in the local, state or national economies. Based on his age, physical limitations, level of education and difficulties with

> reading and math comprehension, Mr. Dillon is not a candidate for vocational rehabilitation.

{¶11} 7. On April 14, 2008, at the commission's request, relator was examined by Jess G. Bond, M.D. In his four-page narrative report, Dr. Bond opines that the allowed conditions of the three industrial claims produce "a 33% whole person impairment rating."

{¶12} 8. On April 14, 2008, Dr. Bond completed a physical strength rating form. On the form, Dr. Bond indicated by his mark that relator is capable of "light work." Dr. Bond indicated a further limitation of "no reaching with left arm above chest level."

{¶13} 9. On May 23, 2008, Anderson wrote: "I have reviewed the Report submitted by Jess G. Bond, M.D. dated April 14, 2008. After reviewing this report, it remains my opinion that Allen Dillon has no return to work potential."

{¶14} 10. Following a September 10, 2008 hearing, a staff hearing officer ("SHO") issued an order denying relator's PTD application. The SHO's order explains:

> * * * This decision is based on the 4/14/08 report of Dr. Bond and consideration of the injured worker's non-medical disability factors.
>
> The injured worker was evaluated by Dr. Bond regarding the allowed conditions of all three of the injured worker's claims. Dr. Bond found all the allowed conditions had reached maximum medical improvement, totaled 33% whole person impairment, and restricted the injured worker to light work with the additional limitation of no reaching above chest level with the left arm.
>
> ["]Light work" means exerting up to twenty pounds of force occasionally, and/or up to ten pounds of force frequently, and/or negligible amount of force constantly (constantly: activity or condition exists two-thirds or more of the time) to move objects. Physical demand may be only a negligible amount, a job should be rated light work: (1) when it requires walking or standing to a significant degree; or (2) when it requires sitting most of the time but entails pushing and/or

pulling or arm or leg controls; and/or (3) when the job requires working at a production rate pace entailing the constant pushing and/or pulling of materials even though the weight of those materials is negligible.

The report of Dr. Bond is found persuasive. As the medical evidence is not dispositive of the permanent total disability issue, a discussion of the injured worker's non-medical disability factors is necessary. State, ex rel. Stephenson v. Industrial Commission (1987), 31 Ohio St. 3d 167.

The injured worker was born on 2/26/43 and is currently 65 years of age. This is classified as a "person closely approaching advanced age" and is found to be a negative vocational factor. Generally, this chronological age affects one's ability to adapt to new work situations and to do work in competition with others.

The injured worker's age and the impediment it presents to the injured worker's return to work are noted. However, age is not to be evaluated in isolation and must be considered with the injured worker's other vocational factors. Permanent total disability benefits were never intended to compensate an injured worker for growing old. State, ex rel. Moss v. Industrial Commission (1996), 75 Ohio St. 3d 414.

The injured worker completed the eighth grade in school and testified at hearing that he left school to work. As a result of leaving school the injured worker indicated he cannot read or write well. His ability to do basic math was not affected by his abbreviated education.

The injured worker's education is classified as "limited." This is considered to be a positive vocational factor. Generally, a limited education means reasoning, arithmetic, and language skills to do the less complicated job duties needed in semi-skilled and skilled work.

The injured worker's work history is consistent with his educational level. The injured worker has worked as a construction carpenter (skilled, heavy) since 1965. The injured worker's former position of employment was that of construction carpenter/supervisor which involved "all forms of construction in commercial buildings" per the IC2. The injured worker indicated he was a working supervisor (foreman) in charge of three to twelve people.

> This is found to be a positive vocational factor as it demonstrates the injured worker's ability to learn a skilled trade, despite any alleged reading or writing limitations, and perform this skilled work for approximately 38 years. The injured worker's supervisory experience demonstrates he was capable of handling the responsibilities for directing, controlling and planning work and has the temperament of supervising crews of various numbers.
>
> The residual functional capacity for light work as found by Dr. Bond would preclude the injured worker's return to work at the jobs he previously held. Therefore, the injured worker's effort to be vocationally retrained for less exertional work is a factor to be considered in this permanent total disability determination.
>
> The evidence in file and that adduced at hearing indicates the injured worker has not participated in any type of vocational rehabilitation. The injured worker indicated in the IC2 application that vocational rehabilitation was never offered to him. However, no evidence was presented that the injured worker requested a referral to vocational rehabilitation or explored any type of retraining options.
>
> The injured worker received temporary total compensation until 12/17/07. The IC2 application indicates the injured worker began receiving Social Security Disability in January of 2005. The injured worker testified at hearing that these benefits were converted to Social Security Retirement on his 65th birthday. The IC2 application was filed approximately two months after temporary total compensation terminated.
>
> Permanent total disability is a compensation "of last resort, to be awarded only when all reasonable avenues of accomplishing a return to sustained remunerative employment have failed." State, ex rel. Wilson v. Industrial Commission (1997), 80 Ohio St. 3d 250, 253. The injured worker's residual functional capacity for nearly a full range of light and sedentary work, ability to learn and perform skilled work, and long, skilled work experience make him a candidate for rehabilitation and re-entry into the workforce. The failure to explore or participate in vocational rehabilitation is a significant factor in denying this benefit of last resort.

> Based on the above-listed physical capacities and non-medical disability factors, the Staff Hearing Officer finds the injured worker's disability is not total, and that the injured worker is capable of engaging in sustained remunerative employment, or being retrained to engage in sustained remunerative employment. Therefore, the injured worker's request for an award of permanent disability benefits is denied.

{¶15} 11. On October 27, 2008, relator, Allen Dillon, filed this mandamus action.

Conclusions of Law:

{¶16} Relator contends that the commission abused its discretion by (1) failing to reference the Anderson reports in its order, and (2) failing to review all the medical records in the industrial claims.

{¶17} These contentions are easily answered. Clearly, the absence of any reference to the Anderson reports in the commission's order does not indicate a failure of the commission to consider those reports. Also, the commission's exclusive reliance upon Dr. Bond's reports for the determination of residual functional capacity does not indicate that the commission failed to review other relevant medical evidence of record.

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

{¶19} In *State ex rel. Lovell v. Indus. Comm.*, 74 Ohio St.3d 250, 252, 1996-Ohio-321, the court states:

> *State ex rel. Mitchell v. Robbins & Myers, Inc.* (1983), 6 Ohio St.3d 481, 6 OBR 531, 453 N.E.2d 721, directed the commission to cite in its orders the evidence on which it *relied* to reach its decision. Reiterating the concept of reliance, *State ex rel. DeMint v. Indus. Comm.* (1990), 49 Ohio St.3d 19, 20, 550 N.E.2d 174, 176, held:

> "*Mitchell* mandates citation of only that evidence *relied* on. It does not require enumeration of all evidence *considered*." (Emphasis original.)
>
> Therefore, because the commission does not have to list the evidence considered, the presumption of regularity that attaches to commission proceedings (*State ex rel. Brady v. Indus. Comm.* [1989], 28 Ohio St.3d 241, 28 OBR 322, 503 N.E.2d 173) gives rise to a second presumption—that the commission indeed considered all the evidence before it. * * *

{¶20} The commission may credit offered vocational evidence, but expert opinion is not critical or even necessary, because the commission is the expert on the nonmedical factors. *State ex rel. Jackson v. Indus. Comm.* (1997), 79 Ohio St.3d 266, 271.

{¶21} Contrary to relator's contention, the absence of any reference to the Anderson reports in the SHO's order does not show that the commission abused its discretion by failing to consider relevant vocational evidence.

{¶22} The SHO's order indicates that an analysis of the nonmedical factors was performed by the hearing officer who placed no reliance upon Anderson's vocational opinions. Under *Lovell*, the presumption is that Anderson's reports were reviewed but were simply found to be unpersuasive. Thus, the commission did not abuse its discretion in its determination of the nonmedical factors or in its failure to reference Anderson's reports in its order.

{¶23} As earlier noted, relator argues that the commission failed to review all the relevant medical evidence. This contention also lacks merit.

{¶24} The SHO's order indicates that the commission placed exclusive reliance upon the reports of Dr. Bond for its determination of residual functional capacity. The commission was not required to list the evidence it considered. An absence of any

reference to other medical evidence in the record does not prove that the commission failed to consider relevant medical evidence.

{¶25} 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).