[Cite as *State ex rel. Price v. Indus. Comm.*, 2010-Ohio-2976.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Eleanor Price,	:	
Relator,	:	
v.	:	No. 09AP-952
The Industrial Commission of Ohio and Malachi DDLS,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on June 29, 2010

Shapiro, Shapiro & Shapiro Co., LPA, Daniel L. Shapiro, and *Leah P. VanderKaay*, for relator.

Richard Cordray, Attorney General, and *Stephen D. Plymale*, for respondent Industrial Commission of Ohio.

Taft Stettinius & Hollister LLP, Timothy L. Zix, and *Judson D. Stelter*, for respondent Malachi DDLS.

IN MANDAMUS

TYACK, P.J.

{¶1} Eleanor Price filed this action in mandamus, seeking a writ to compel the Industrial Commission of Ohio ("commission") to vacate its orders denying her temporary total disability ("TTD") compensation and to compel the commission to grant TTD compensation from April 8, 2009 onward.

{¶2} In accord with Loc.R. 12, the case was referred to a magistrate to conduct appropriate proceedings. The parties stipulated the pertinent evidence and filed briefs. The magistrate then issued a magistrate's decision containing detailed findings of fact and conclusions of law which is appended to this decision. The magistrate's decision includes a recommendation that we grant a limited writ of mandamus ordering the commission to vacate its orders denying Price TTD compensation and issue a new order after determining whether or not Price was provided a written job offer which specifically identified her new job duties.

{¶3} No party has filed objections to the magistrate's decision. The case is now before the court for review.

{¶4} No error of law or fact is present on the face of the magistrate's decision. We, therefore, adopt the findings of fact and conclusions of law present in the magistrate's decision. As a result, we grant a writ of mandamus compelling the commission to vacate its prior orders denying TTD compensation for Price and compelling the commission to enter a new order after determining whether or not Price was provided a written job offer which specifically identified her new job duties.

Writ of mandamus granted.

BROWN and CONNOR, JJ., concur.

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APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Eleanor Price,	:	
Relator,	:	
v.	:	No. 09AP-952
The Industrial Commission of Ohio and Malachi DDLS,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on March 15, 2010

Shapiro, Shapiro & Shapiro Co., LPA, Daniel L. Shapiro, and *Leah P. VanderKaay*, for relator.

Richard Cordray, Attorney General, and *Stephen D. Plymale*, for respondent Industrial Commission of Ohio.

Taft Stettinius & Hollister LLP, Timothy L. Zix, and *Judson D. Stelter*, for respondent Malachi DDLS.

IN MANDAMUS

{¶5} Relator, Eleanor Price, has filed this original action in mandamus requesting that this court issue a writ of mandamus ordering respondent, Industrial

Commission of Ohio ("commission"), to vacate its order which denied her request for temporary total disability ("TTD") compensation from April 8, 2009 and continuing, and ordering the commission to grant her that compensation.

Findings of Fact:

{¶6} 1. Relator sustained a work-related injury on February 18, 2009, and her workers' compensation claim has been allowed for the following condition: "SPRAIN LUMBAR REGION, SPRAIN/STRAIN LEFT HIP, LEFT THIGH; SCIATICA."

{¶7} 2. In a letter dated March 2, 2009, relator's treating physician, Nathan R. Beachy, M.D., released relator to return to work on March 9, 2009, with a weight restriction of lifting no more than ten pounds, at least through March 13th.

{¶8} 3. Richard J. Ostendorf, M.D., completed a C-84 certifying that relator was temporarily totally disabled from March 4 through an estimated return-to-work date of March 17, 2009.

{¶9} 4. On March 23, 2009, relator's treating physician, J. Britten Shroyer, M.D., released relator to return to work at a desk job only as of March 23, 2009. When asked to explain further, Dr. Shroyer completed a MEDCO-14, noting relator's restrictions, and specifically noting that she not be required to lift, bend, twist/turn, push/pull, squat/kneel or lift above her shoulders.

{¶10} 5. In a letter dated April 2, 2009, relator's employer, Malachi DDLS, Inc., made an offer of employment to relator indicating as follows:

> This letter is to verify that a light duty position has been offered to you pursuant to the restrictions set forth by your physician, Dr. J. Britten Shroyer and in conjunction with your agreement to return to work, an individualized vocational rehabilitation plan has been established and will begin on

> Monday, April 6, 2009. As agreed upon, your work schedule will be Monday through Friday 10 am to 6:30 pm.
>
> Your restrictions are as follows:
> No lifting; bending, twisting, pushing, pulling, squatting, kneeling or lifting above the shoulders
> Continuous sitting
> Occasional standing/walking
>
> Pursuant to your acceptance we look forward to seeing you on Monday, April 6, 2009.

{¶11} 6. The employer faxed a description of the job being offered relator to Dr. Shroyer. The job was described as follows:

> - Assist with classroom preparation (sitting in chair at table while cutting letters, shapes, etc…)
> - Assist children with table activities (sitting in chair at table assisting with: puzzles, blocks, arts and crafts, music, coloring etc..)
> - Sanitizing small toys (sitting in chair at table while sanitizing)
> - Reading stories to children (sitting in chair while reading stories)
> - Answering telephones at front desk and taking messages as needed
>
> Restrict Activity (*In effect until further recommendation from physician*):
> - No lifting; bending, twisting, pushing, pulling, squatting, kneeling or lifting above the shoulders
> - Continuous sitting
> - Occasional standing/walking
>
> *To accommodate[ ] employee's physical restrictions, employee will be permitted to stand and or sit as needed during the above activities. Employee will not be left alone in classroom, Lead Teacher will be present at all times during classroom activities.*

(Emphasis sic.)

{¶12} Apparently, Dr. Shroyer did not respond. As such, he never indicated whether or not the job was within her restrictions.

{¶13} Relator did not report for work on April 6, 2009.

{¶14} On April 8, 2009, the employer mailed a letter to relator indicating the following:

> Pursuant to our prior agreement as documented in the letter dated April 2, 2009, you did not report to work as scheduled. You did not call or report to work as scheduled on Monday, April 6, 2009. A message was left for you by Margo at Advocare, regarding your not reporting as scheduled. I also telephoned you on Monday, April 06, 2009 at 10:30 a.m. to inquire where you were, but no one answered and no answering system was available for me to leave a message. On Tuesday, April 7, 2009, you did not call or report to work as scheduled. Today Wednesday, April 8, 2009 once again, you failed to call or report to work as scheduled.
>
> We expected you to honor your agreement to return to work at the light duty position which you accepted and your physician approved. Your absence without notice is deemed a voluntary termination of employment.

{¶15} 10. A hearing was held before a district hearing officer ("DHO") on June 30, 2009. The DHO allowed relator's claim and found that TTD compensation was payable from March 3 through April 8, 2009, per Dr. Ostendorf's C-84. However, the DHO determined that TTD compensation was not payable beyond April 8, 2009, because relator failed to return to a light-duty job offer, which had been made by the employer.

{¶16} 11. Relator appealed and the matter was heard before a staff hearing officer ("SHO") on August 10, 2009. The SHO affirmed the prior DHO order, allowed relator's claim and the payment of TTD compensation from March 3 through April 7,

2009. However, the SHO determined that TTD compensation was not payable from April 8, 2009 on, as follows:

> Temporary total [d]isability is terminated as of 04/08/2009 based upon the employer's written job offer of light duty work and the Injured Worker's failure to accept this job offer within the restrictions of a "desk job only" as outlined by Dr. Shroyer. The Injured Worker's allegation that she did not receive the 04/02/2009 letter is not found persuasive as the address is the same for other mail Injured Worker did not receive and the letter was not returned by the post office. The Injured Worker testified that she did receive the 04/08/2009 termination letter which was sent to the same address.

{¶17} 12. Relator's further appeal was refused by order of the commission mailed August 29, 2009.

{¶18} 13. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶19} 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.

{¶20} In this mandamus action, relator makes three arguments. First, relator contends that she did not receive the April 2, 2009 letter sent to her verifying the light-duty position that had been offered to her pursuant to Dr. Shroyer's restrictions. Second, relator argues that the April 2, 2009 letter does not constitute a good-faith written job offer because the job is not specifically identified. Third, relator argues that her treating physician never actually approved the job offered by the employer as evidenced by the fact that there was no signature from Dr. Shroyer specifically stating that the job offered was within her restrictions.

{¶21} For the reasons that follow, it is this magistrate's decision that this court should grant relator's request for a writ of mandamus.

{¶22} One of the grounds upon which TTD compensation can be terminated occurs when the employer makes a good-faith job offer to the injured worker, which is within the injured worker's restrictions. Ohio Adm.Code 4121-3-32(A)(6) defines "job offer" as follows:

> "Job offer" means a proposal, made in good faith, of suitable employment within a reasonable proximity of the injured worker's residence. If the injured worker refuses an oral job offer and the employer intends to initiate proceedings to terminate temporary total disability compensation, the employer must give the injured worker a written job offer at least forty-eight hours prior to initiating proceedings. If the employer files a motion with the industrial commission to terminate payment of compensation, a copy of the written offer must accompany the employer's initial filing.

{¶23} Relator cites *State ex rel. Coxson v. Dairy Mart Stores of Ohio, Inc.*, 90 Ohio St.3d 428, 2000-Ohio-188, wherein the Supreme Court of Ohio affirmed a decision from this court finding that the employer had not made a good-faith job offer to the claimant. The commission had specifically relied on two letters sent by the employer. The court found these letters problematic for two reasons. First, the letters did not identify the position offered, nor did the letters describe the duties. Second, the court found certain portions of the letters to be ambiguous.

{¶24} Relator also cites *State ex rel. Ganu v. Willow Brook Christian Communities,* 108 Ohio St.3d 296, 2006-Ohio-907, wherein the Supreme Court of Ohio again affirmed a decision from this court finding that the report of Dr. Holzaepfel could not properly form the basis of a good-faith job offer because he did not consider all the allowed conditions.

{¶25} While neither of the above cases mirrors the facts in this case, the magistrate finds that the commission's order constitutes an abuse of discretion.

{¶26} In terminating relator's TTD compensation, the commission relied on Dr. Shroyer's opinion that relator could perform a desk job. The commission also relied on the April 2, 2009 letter, which relator argued she did not receive. However, the magistrate finds that the April 2, 2009 letter the employer sent to relator does not constitute a good-faith job offer because it does not identify the job being offered, nor does it identify and set forth the specific job duties. As noted in the findings of fact, the April 2, 2009 letter provided:

> This letter is to verify that a light duty position has been offered to you pursuant to the restrictions set forth by your physician, Dr. J. Britten Shroyer and in conjunction with your

> agreement to return to work, an individualized vocational rehabilitation plan has been established and will begin on Monday, April 6, 2009. As agreed upon, your work schedule will be Monday through Friday 10 am to 6:30 pm.
>
> Your restrictions are as follows:
> - No lifting; bending, twisting, pushing, pulling, squatting, kneeling or lifting above the shoulders
> - Continuous sitting
> - Occasional standing/walking
>
> Pursuant to your acceptance we look forward to seeing you on Monday, April 6, 2009.

{¶27} Similar to the situation in *Coxson*, this letter neither identifies the job being offered nor does it explain relator's specific job duties. In its brief, the employer argues that a verbal job offer was first made to relator and that she apparently understood the parameters of that job. However, Ohio Adm.Code 4121-3-33(A)(6) specifically indicates that, if the injured worker refuses the oral job offer, the employer must give the injured worker a written job offer at least 48 hours prior to initiating proceedings. In the present case, it appears that the employer faxed Dr. Shroyer a copy of the specific job duties; however, there is no evidence that that description was provided to relator and, given that that description was faxed to Dr. Shroyer on April 3, 2009, there are no reports or other acknowledgements from Dr. Shroyer in the record indicating that he determined that relator could perform that job as described.

{¶28} Although the commission found relator's testimony not credible when she indicated that she had not received the April 2, 2009 letter, the magistrate finds that that letter did not constitute a good-faith written job offer because it did not identify the job or the specific duties that relator would be performing. Because it does not constitute a good-faith written job offer, it is immaterial whether relator actually received it or not. The

evidence cited by the commission simply does not support the finding that the employer made a good-faith written job offer.

{¶29} Based on the foregoing, it is this magistrate's decision that relator has demonstrated the commission abused its discretion in denying her TTD compensation based on her failure to accept a good-faith written job offer because the evidence cited by the commission is not some evidence that the job was ever identified to relator or that relator was ever provided with a description of the job, which the employer was offering. This court should issue a writ of mandamus ordering the Industrial Commission of Ohio to vacate its orders denying relator TTD compensation and ordering the commission to issue an order, either granting or denying the compensation, after determining whether or not relator was actually provided a written job offer, which specifically identified the job duties.

/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).