[Cite as *State ex rel. Ingersoll Rand Co. v. Indus. Comm.*, 2010-Ohio-5362.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Ingersoll Rand Company,	:	
Relator,	:	
v.	:	No. 10AP-254
Industrial Commission of Ohio and Bradley Taylor,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on November 4, 2010

Vorys, Sater, Seymour and Pease, LLP, and *Rosemary D. Welsh*, for relator.

Richard Cordray, Attorney General, and *Jeanna R. Volp*, for respondent Industrial Commission of Ohio.

Casper & Casper, and *Ronald M. Kabakoff*, for respondent Bradley Taylor.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

BROWN, J.

{¶1} Relator, Ingersoll Rand Company, 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 granted permanent total disability ("PTD") compensation to respondent, Bradley Taylor ("claimant"), and to enter a new order denying said compensation, or, in the alternative, ordering the commission to conduct a new hearing and issue a new decision.

{¶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 decision, and recommended that this court grant claimant's request for a writ of mandamus. Claimant and the commission have filed objections to the magistrate's decision.

{¶3} Claimant argues in his first objection that the magistrate erred when she found that Dr. Stephen Pledger's report was internally inconsistent. However, despite the wording of claimant's objection, the only contention claimant raises under this objection is that Dr. Pledger did not fail to clarify an ambiguous statement. In support, claimant quotes the portion of Dr. Pledger's report in which he found that claimant was unemployable due to pain and severe limitations in his neck and asserts that this conclusion is not ambiguous. However, the magistrate did not find that Dr. Pledger failed to clarify an ambiguous statement; rather, the magistrate found that Dr. Pledger's report contains internally contradictory opinions. The magistrate found that Dr. Pledger's statement that claimant was unemployable due to pain and severe neck limitations was in direct conflict with his earlier statement that claimant could perform sedentary work. Claimant does not address this conflict. We agree with the magistrate's finding that the

two statements were contradictory, thereby rendering the opinion internally inconsistent. Therefore, claimant's first objection is without merit.

{¶4} Although claimant's second objection and the commission's objection are moot given our determination that Dr. Pledger's report could not constitute some evidence due to an internal inconsistency, we will address them briefly. Claimant argues in his second objection that the magistrate erred in finding that Dr. Pledger inappropriately considered the non-medical factor of claimant's near illiteracy. Claimant asserts that Dr. Pledger noted his near illiteracy as merely background history. We disagree. Dr. Pledger discussed claimant's near illiteracy and then concluded that educating him to do anything other than manual type work would be wrought with difficulty. Thus, Dr. Pledger used claimant's illiteracy to render an opinion on claimant's employability and did not mention it merely as background history. Therefore, claimant's second objection is without merit.

{¶5} The commission argues in its objection that the magistrate erred when she found that claimant's inability to drive and dress himself are non-medical factors upon which a doctor cannot permissibly rely when formulating an opinion concerning PTD. The commission contends we should clarify that one's inability to drive and dress oneself are not "categorically" classified as non-medical factors. The commission asserts that these are non-medical factors when they are due to lack of education or intelligence, whereas they are medical factors when they are due to a medical condition. However, the magistrate did not say that these factors are "categorically" classified as non-medical factors; rather, the magistrate indicated that they are "generally" considered to be non-medical factors. The magistrate's determination does not set any "stern precedent," and no clarification is warranted. Therefore, the commission's objection is without merit.

{¶6} After an examination of the magistrate's decision, an independent review of the record pursuant to Civ.R. 53, and due consideration of claimant's and the commission's objections, we overrule the objections. Accordingly, we adopt the magistrate's decision as our own with regard to the findings of fact and conclusions of law, and we grant relator's request for a writ of mandamus. The commission is ordered to vacate its order and hold a new hearing to determine whether claimant is entitled to PTD compensation.

Objections overruled; writ of mandamus granted.

KLATT and CONNOR, JJ., concur.

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[Cite as *State ex rel. Ingersoll Rand Co. v. Indus. Comm.*, 2010-Ohio-5362.]

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Ingersoll Rand Company,	:	
Relator,	:	
v.	:	No. 10AP-254
Industrial Commission of Ohio and Bradley Taylor,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on August 13, 2010

Vorys, Sater, Seymour and Pease, LLP, and *Rosemary D. Welsh*, for relator.

Richard Cordray, Attorney General, and *Jeanna R. Volp*, for respondent Industrial Commission of Ohio.

Casper & Casper, and *Ronald M. Kabakoff*, for respondent Bradley Taylor.

IN MANDAMUS

{¶7} Relator, Ingersoll Rand Company, 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 permanent total disability ("PTD")

compensation to respondent Bradley Taylor ("claimant") and ordering the commission to find that he is not entitled to that compensation or, in the alternative, ordering the commission to conduct a new hearing and issue a new decision.

Findings of Fact:

{¶8} 1. Claimant sustained a work-related injury on January 27, 2003 and his workers' compensation claim has been allowed for the following conditions: "sprain of left shoulder; torn left rotator cuff; herniated disc at C-7; cervicalgia; cervical radiculitis; aggravation of pre-existing cervical spondylosis."

{¶9} 2. Claimant was able to resume his employment following his injury; however, claimant last worked in December 2007.

{¶10} 3. In July 2009, claimant filed his application for PTD compensation. In support, claimant submitted two reports from his treating physician, Stephen R. Pledger, M.D. In his April 30, 2009 report, Dr. Pledger stated:

> * * * Mr. Taylor has such severe neck pain and decreased range of motion, that it limits everything that he does. Using the Cervical Range of Motion Instrument made by Performance Attainment Associates, his ROM [range of motion] is 10 degrees in flexion, extension and right and left rotation. I have recommended sedentary type of work which limits him from lifting anything greater than 10 lbs. Because of the pain he can sit for 30 to 40 minutes at one time without having to get up for the pain. He can do simple grasping or fine manipulation with his hands but cannot lift even a gallon of milk. When trying to lift a gallon of milk, he has to use both hands and cradle it into his belly. Pulling and pushing causes severe pain in his neck.

Dr. Pledger also stated:

> Mr. Taylor is almost illiterate. His wife does all of his paper work since he can barely read or write. Educating him to do anything other than manual type work would be wrought with difficulty. * * *
>
> Because of the pain, he needs help with dressing, he has severe headaches, cannot concentrate, having severe difficulty with any type of work, cannot drive because he cannot turn his head to see and cannot participate in any recreational type of activities.
>
> It is my opinion with a reasonable degree of medical certainty that Mr. Taylor will be under either my care or some physicians care for his pain for the rest of his life. It is my opinion with a reasonable degree of medical certainty that Mr. Taylor is unemployable due to the pain and severe limitation in his neck. It is my opinion with a reasonable degree of medical certainty that Mr. Taylor's condition will not improve during the rest of his life, matter-of-fact, I would expect that his pain and disability will increase.

{¶11} 4. Dr. Pledger's second report is dated June 15, 2009. In that report, Dr. Pledger stated that claimant's allowed conditions had reached maximum medical improvement ("MMI") and concluded: "It is my opinion with a reasonable degree of medical certainty that Mr. Bradley Taylor is permanently and totally disabled from returning to any gainful employment."

{¶12} 5. Claimant also submitted the May 4, 2009 evaluation from NovaCare. The evaluator, Bill Gortner, M.S., concluded that claimant was unable to perform the full range of sedentary work due to limitations with lifting to waist and eye level, bilateral and unilateral carrying, pushing and pulling tasks. However, Gortner concluded that claimant had the sitting, standing, and walking ability to perform sedentary work, provided he be allowed to alternate among those tasks. If the materials handling and sitting tolerance could be accommodated, Gortner concluded that claimant would be able to perform at a

sedentary work level. Ultimately, Gortner concluded that retraining was not feasible and that claimant's options to return to gainful employment were severely limited as follows:

> Client's functional capacities are severely restricted. His work history (38 years with employer of record) has involved mostly heavy manual labor. His educational level is reported to be 8th grade, although literacy at this grade level is questioned. His cognition appears affected by diminished concentration and use of narcotic pain medication for symptom management. Given this information, as well as client's age, it appears that retraining is not a feasible option. Indeed, client's options for return to gainful employment in his current functional status are severely limited.

{¶13} 6. Steven S. Wunder, M.D., examined claimant on behalf of relator. In his August 24, 2009 report, Dr. Wunder provided a history, identified the medical records which he reviewed, and provided his physical findings upon examination. Thereafter, Dr. Wunder concluded:

> * * * Accepting the allowed conditions in the claim, the sprain left shoulder, torn left shoulder rotator cuff, herniated disc C6-7, aggravation of pre-existing spondylosis, cervicalgia and cervical radiculitis, I do believe Mr. Taylor is capable of sustained remunerative employment. There is no specific neurologic deficit. He self reports capacities in sedentary ranges.
>
> * * * Mr. Taylor does have functional limitations as a result of the allowed conditions. He would be capable of full range of sedentary work which would include lifting up to 10 pounds occasionally and lesser amounts of weight more frequently.

{¶14} 7. Further, in an addendum prepared September 8, 2009, Dr. Wunder opined that claimant was physically capable of undergoing vocational rehabilitation.

{¶15} 8. Andrew Freeman, M.D., examined claimant on behalf of the commission. In his September 23, 2009 report, Dr. Freeman provided a history, identified the medical records which he reviewed, provided his physical findings upon examination,

concluded that claimant's allowed conditions had reached MMI, assessed a 20 percent whole person impairment, and concluded that claimant was capable of performing sedentary work provided there is "no reaching above chest height and driving only to and from work in his private vehicle, not driving on the job."

{¶16} 9. The record also contains two vocational reports. The first report, dated November 17, 2009, was prepared by Janet Chapman, MA, a certified rehabilitation counselor. After noting that none of the medical reports reviewed suggested that claimant could function above the sedentary exertional level, Chapman ultimately concluded that it was unlikely that claimant would be able to successfully re-enter the workforce. Specifically, Chapman noted:

> - Mr. Taylor's current age, while not alone work prohibitive, is nonetheless a significant barrier to return to work efforts particularly when one is limited to a restricted range of sedentary work at best. As one ages, it becomes increasingly difficult to adjust to work unlike that previously performed.
>
> - It is unclear whether Mr. Taylor has the literacy levels required for performance of many sedentary jobs. While limited educational levels may not be issues in performance of manual labor, such considerations become more limiting as one contemplates return to sedentary work. In any case, lack of a high school diploma alone may be problematic in some work settings.
>
> - Use of narcotic medication for pain relief may make concentration on even simple work tasks difficult. The FCE noted diminished concentration during that evaluation.
>
> * * * Although Mr. Taylor was quite committed to working as evidenced by his long employment history, an injury producing significant physical limitations is particularly devastating to an older, marginally literate individual.

> Because of these and the other factors noted above, I would not anticipate that return to work efforts would likely be successful in this case. Please contact me if I may provide further information.

{¶17} 10. Relator arranged for a second vocational assessment which was conducted by Shari Deogracias, MA, a certified rehabilitation counselor. Although claimant originally agreed to meet with Deogracias, claimant did not. Deogracias then offered an opinion based on evidence which was available to her. Claimant's last supervisor, Mr. Pangallo, described claimant to Deogracias as a "man of average intelligence, * * * able to read blueprints, use calipers, perform quality control checks, multitask, and perform any job within the facility without difficulty." Ultimately, Deogracias concluded that claimant's skills, along with his ability to use a variety of tools, would be transferable to alternative skilled and semi-skilled employment. Considering the medical reports indicating that claimant could engage in sedentary employment provided he have the ability to alternate his positioning, Deogracias identified certain employment opportunities (surveillance system monitor, gate guard, production and electronic assembly worker, and retail greeter) as being within claimant's abilities.

{¶18} 11. Claimant's application for PTD compensation was heard before a staff hearing officer ("SHO") on December 15, 2009. The SHO granted claimant's application for PTD compensation based solely upon the allowed medical conditions and relied solely upon Dr. Pledger's April 30, 2009 report. Specifically, the SHO stated:

> After full consideration of the issue it is the order of the Staff Hearing Officer that the Injured Worker's IC-2 Application for Permanent Total Disability Compensation is granted. Permanent total disability compensation is awarded from 04/30/2009 based upon the medical report of Dr. Stephen Pledger, Injured Worker's physician of record, who opines

> the Injured Worker to be permanently and totally disabled as a result of the allowed physical conditions in this claim. The cost of this award is apportioned as 100% in claim number 03-812256, the sole claim at issue. Based upon the medical reports of Dr. Stephen Pledger dated 04/30/2009, it is found that the Injured Worker is unable to perform any sustained remunerative employment solely as a result of the medical impairment caused by the allowed physical conditions in this claim. The Staff Hearing Officer finds that Dr. Pledger opines the Injured Worker's allowed physical conditions to be permanent having reached maximum medical improvement. He states that the Injured Worker has a severe cervical spine condition with severe neck pain and decreased range of motion that limits everything the Injured Worker does. He states that the Injured Worker's cervical range of motion is ten degrees in flexion, extension and right left rotation. He states that because of the pain the Injured Worker can sit for 30 to 40 minutes at one time and can do simple grasping or fine manipulation but cannot lift even a gallon of milk. He also states that pulling and pushing causes the Injured Worker severe pain in his neck. He further states that the Injured Worker needs help with dressing, has severe headaches, cannot concentrate and has severe difficulty with any type of work. He and the Injured Worker both state that the Injured Worker cannot drive because of his limited flexion and cannot participate in any form of recreation type activities. Dr. Pledger does state that the Injured Worker as a result of the allowed condition in this claim is unable to engage in sustained remunerative employment. It is the finding and order of the Staff Hearing Officer based upon the medical report of Dr. Stephen Pledger dated 04/30/2009 that the permanent total disability application filed 07/06/2009, is granted. The Staff Hearing Officer finds that the Injured Worker's allowed conditions are permanent having reached maximum medical improvement and that those same allowed conditions prevent the Injured Worker from engaging in any form of sustained remunerative employment. This order is based upon [the] medical [report] of Dr. Stephen Pledger dated 04/30/2009.

{¶19} 12. Relator filed an application for reconsideration arguing that the SHO's failure to address claimant's refusal to participate in rehabilitation was a clear mistake of

law and that the report of Dr. Pledger was internally inconsistent and could not constitute some evidence upon which to award PTD compensation.

{¶20} 13. In an order mailed February 20, 2010, the commission denied relator's request for reconsideration.

{¶21} 14. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶22} In this mandamus action, relator raises two arguments: (1) Dr. Pledger's April 30, 2009 report is internally inconsistent and does not constitute some evidence upon which the commission could rely, and (2) the commission abused its discretion when it denied relator's request for reconsideration.

{¶23} After a thorough review of the record, it is this magistrate's conclusion that: (1) Dr. Pledger's April 30, 2009 report is internally inconsistent and does not constitute some evidence upon which the commission could rely, and (2) while the resolution of relator's second argument is unnecessary, regardless of whether or not this court grants a writ of mandamus, it cannot be said that the commission abused its discretion by denying relator's request for reconsideration. As such, it is this magistrate's decision that this court should issue a writ of mandamus ordering the commission to rehear the matter of claimant's entitlement to PTD compensation and to thereafter issue an order either granting or denying the request for compensation.

{¶24} It is undisputed that contradictory or equivocal statements made by the same physician cannot, as a matter of law, support an award of compensation. See *State ex rel. Eberhardt v. Flxible Corp.* (1994), 70 Ohio St.3d 649, and *State ex rel. Paragon v. Indus. Comm.* (1983), 5 Ohio St.3d 72. A medical report is equivocal where a

doctor repudiates an earlier opinion, renders contradictory or uncertain opinions, or fails to clarify an ambiguous statement. *Eberhardt*, at 655.

{¶25} The magistrate finds that, in his April 30, 2009 report, Dr. Pledger did make contradictory statements. First, Dr. Pledger opined that claimant was capable of performing sedentary type of work as follows:

> * * * Mr. Taylor has such severe neck pain and decreased range of motion, that it limits everything that he does. Using the Cervical Range of Motion Instrument made by Performance Attainment Associates, his ROM [range of motion] is 10 degrees in flexion, extension and right and left rotation. I have recommended sedentary type of work which limits him from lifting anything greater than 10 lbs. Because of the pain he can sit for 30 to 40 minutes at one time without having to get up for the pain. He can do simple grasping or fine manipulation with his hands but cannot lift even a gallon of milk. When trying to lift a gallon of milk, he has to use both hands and cradle it into his belly. Pulling and pushing causes severe pain in his neck.
>
> Sedentary work is defined in Ohio Adm.Code 4121-3-34(B)(2)(a):
>
> "Sedentary work" means exerting up to ten pounds of force occasionally (occasionally: activity or condition exists up to one-third of the time) and/or a negligible amount of force frequently (frequently: activity or condition exists from one-third to two-thirds of the time) to lift, carry, push, pull, or otherwise move objects. Sedentary work involves sitting most of the time, but may involve walking or standing for brief periods of time. Jobs are sedentary if walking and standing are required only occasionally and all other sedentary criteria are met.

{¶26} Dr. Pledger's limitations on claimant's abilities fall squarely under the definition of sedentary work.

{¶27} After opining that claimant could perform sedentary type work, Dr. Pledger also opined that claimant would have "severe difficulty with any type of work" and was

"unemployable due to the pain and severe limitation in his neck." Specifically, in this regard, Dr. Pledger stated:

> Mr. Taylor is almost illiterate. His wife does all of his paper work since he can barely read or write. Educating him to do anything other than manual type work would be wrought with difficulty. * * *
>
> Because of the pain, he needs help with dressing, he has severe headaches, cannot concentrate, having severe difficulty with any type of work, cannot drive because he cannot turn his head to see and cannot participate in any recreational type of activities.
>
> It is my opinion with a reasonable degree of medical certainty that Mr. Taylor will be under either my care or some physicians care for his pain for the rest of his life. It is my opinion with a reasonable degree of medical certainty that Mr. Taylor is unemployable due to the pain and severe limitation in his neck. It is my opinion with a reasonable degree of medical certainty that Mr. Taylor's condition will not improve during the rest of his life, matter-of-fact, I would expect that his pain and disability will increase.

{¶28} As can be seen by reviewing the above paragraphs, Dr. Pledger recommended sedentary type work and then opined that claimant was unemployable due to the pain and severe limitation in his neck. While the commission argues that Dr. Pledger actually opined that he had recommended sedentary work in the past but now opined that claimant could not perform such work, this magistrate disagrees. Although Dr. Pledger did write: "I have recommended sedentary type of work," he also listed claimant's limitations in the present tense indicating that claimant "can sit * * * can do simple grasping." As such, this magistrate does not accept the commission's argument that any reference to sedentary work refers solely to claimant's past abilities. Instead, the magistrate finds that Dr. Pledger's report contains contradictory opinions and, as such, Dr.

Pledger's April 30, 2009 report, standing on its own, does not constitute some evidence upon which the commission could properly rely to grant claimant PTD compensation. Further, the argument that Dr. Pledger's June 15, 2009 report clears up any ambiguity fails because the commission did not rely on the June 15, 2009 report wherein Dr. Pledger did opine that claimant was permanently and totally disabled from returning to any gainful employment. Given the ambiguity in the only piece of evidence cited and relied upon by the commission, the magistrate finds that Dr. Pledger's April 30, 2009 report does not constitute some evidence upon which the commission could properly rely and that the court should grant a writ of mandamus for that reason.

{¶29} Relator also argues that, in his April 30, 2009 report, Dr. Pledger inappropriately considered nonmedical disability factors when he states that claimant is "unemployable due to the pain and severe limitation in his neck." In making this argument, relator argues that this opinion was based on claimant's near illiteracy, his difficulties reading and writing, the fact that he needs help with dressing, and cannot drive. Relator contends that those are vocational factors and that it is inappropriate for Dr. Pledger to base his opinion, even in part, on them. This magistrate agrees.

{¶30} Dr. Pledger noted claimant's near illiteracy, his difficulty reading and writing, the fact that he needs help dressing, has difficulty concentrating and cannot drive. These factors are generally considered nonmedical factors. For example, in *State ex rel. Lake Hosp. Sys., Inc. v. Giffin*, 10th Dist. No. 09AP-217, 2009-Ohio-5713, the commission relied on the report of Dr. John G. Nemunaitis to conclude that the claimant, Linda Giffin, was capable of performing sedentary work. Thereafter, the commission analyzed the nonmedical disability factors which included Giffin's ninth grade education, her inability to

pass a GED test, her difficulties reading and performing basic math, as well as her inability to drive a car and concluded that Giffin was entitled to an award of PTD compensation.

{¶31} As the Supreme Court of Ohio stated in *State ex rel. Shields v. Indus. Comm.* (1996), 74 Ohio St.3d 264, the consideration of nonmedical factors by a physician in opining as to the critical issue of a claimant's medical impairment constitutes grounds for removing that report from evidentiary consideration. In the present case, it appears that Dr. Pledger did consider nonmedical disability factors when he stated that claimant was unemployable and the magistrate finds that this constitutes an additional reason to find that Dr. Pledger's report does not constitute some evidence upon which the commission could properly rely.

{¶32} Relator also argues that the commission abused its discretion by failing to address claimant's refusal to participate in rehabilitation. Ordinarily, the failure of a claimant who, despite time and medical ability to do so, never tries to further their education or learn new skills may be held against them (*State ex rel. Bowling v. Natl. Can Corp.*, 77 Ohio St.3d 148, 1996-Ohio-200; *State ex rel. Wilson v. Indus. Comm.* (1997), 80 Ohio St.3d 250; *State ex rel. Ewart v. Indus. Comm.*, 76 Ohio St.3d 139, 1996-Ohio-316). However, in the present case, there was no reason for the commission to consider this issue given that the commission relied on Dr. Pledger's report. Finding that claimant was physically incapable of performing any employment, it was not an abuse of discretion for the commission to not address claimant's rehabilitation efforts, or lack thereof.

{¶33} Lastly, relator argues that the commission abused its discretion by denying its request for reconsideration. In making this argument, relator relies strongly on the

commission's failure to consider claimant's failure to engage in educational or rehabilitative efforts to enhance his employability. However, as above noted, because the commission relied solely on medical evidence to conclude that claimant was unable to perform any sustained remunerative employment, it was not an abuse of discretion for the commission to not discuss this issue. Further, the magistrate notes that, although this argument is definitely raised in relator's request for reconsideration, the magistrate is unable to determine whether or not this argument was raised at the hearing. As such, it is difficult to fully review and consider that issue. However, the magistrate finds that the determination of this issue is not necessary here for the following reasons: (1) this matter should be returned to the commission for a new hearing on claimant's eligibility for PTD compensation, and (2) even if this court disagrees and finds that Dr. Pledger's report does constitute some evidence upon which the commission could rely, the fact that claimant last worked in December 2007, filed his application for PTD compensation one and one-half years later in July 2009, and the fact that there is evidence in the record indicating that retraining was not feasible, it cannot be said that the commission abused its discretion by denying relator's request for reconsideration.

{¶34} Based on the foregoing, it is this magistrate's decision that this court should issue a writ of mandamus ordering the commission to vacate its order which granted PTD compensation to claimant and the commission should be ordered to hold a new hearing and thereafter determine whether or not claimant is entitled to that compensation.

/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).