[Cite as *State ex rel. Keller v. Paragon Salons, Inc.*, 2011-Ohio-2742.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Kathleen Keller,	:	
Relator,	:	
v.	:	No. 10AP-455
Paragon Salons, Inc. and The Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on June 7, 2011

Mark R. Naegel, for relator.

Michael DeWine, Attorney General, and *Derrick L. Knapp*, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

FRENCH, J.

{¶1} Relator, Kathleen Keller, filed an original action asking this court to issue a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its order that denied relator permanent total disability ("PTD") compensation, and to enter an order granting that compensation.

{¶2} This court referred this matter to a magistrate pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate issued a decision, which includes findings of fact and conclusions of law and is appended to this decision, recommending that this court deny the request writ.

{¶3} No objections to the magistrate's findings of fact have been submitted, and we adopt those findings as our own. In brief, in 1998, relator was injured in a motor vehicle accident while employed as a receptionist for a hair salon, and claims were allowed for those injuries. In 2008, she applied for PTD compensation, contending that the injuries had rendered her permanently and totally disabled. The commission denied her application. On mandamus, the magistrate concluded that the commission had not abused its discretion by doing so.

{¶4} Relator has filed the following objections to the magistrate's decision: (1) the magistrate's decision did not address the issue of the commission's compliance with *State ex rel. Noll v. Indus. Comm.* (1991), 57 Ohio St.3d 203; and (2) the magistrate misunderstood the pain issue as a medical issue, rather than one of vocational adjustment. We address each issue, in turn.

{¶5} First, we agree with relator that the magistrate did not discuss her contentions within the context of *Noll*. Rather, the magistrate addressed the substance of relator's contention, i.e., that the commission abused its discretion by denying her claim. We agree with the magistrate's analysis and his conclusion that the commission had some evidence on which to determine that relator was capable of sustained remunerative employment. We decline relator's invitation to reweigh that evidence.

{¶6} We disagree, too, with relator's contention that the commission's order does not satisfy *Noll*. The order summarizes and relies on the report of Martin Fritzhand, M.D., which concluded that relator is capable of medium work. The order also analyzes, in detail, relator's vocational factors. Of primary importance is relator's complete lack of rehabilitation efforts. While relator disagrees with the commission's analysis, the analysis itself satisfies *Noll*. Therefore, we overrule relator's first objection.

{¶7} In her second objection, relator contends that the magistrate misunderstood the pain issue. We disagree. In her brief, relator argued that the commission's order failed to meet *Noll* by not discussing the impact of relator's pain on her ability to work and participate in rehabilitation. The magistrate concluded, however, that the commission need not always address pain as a factor; rather, the medical experts generally address pain within their medical reports.

{¶8} Here, while the commission did not specifically address relator's pain in its order, the commission did consider the medical report of Dr. Fritzhand and the vocational report of William T. Cody, M.S., both of which discussed the impact of relator's pain. The commission's order did not violate *Noll*, and relator has not demonstrated an abuse of discretion. Therefore, we overrule relator's second objection.

{¶9} Having overruled relator's objections, and based on our independent review, we adopt the magistrate's decision, including the findings of fact and conclusions of law contained in it, as our own. We deny the requested writ of mandamus.

Objections overruled;
writ of mandamus denied.

BROWN and TYACK, JJ., concur.

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Respondents.	:	

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

Rendered on February 28, 2011

Mark R. Naegel, for relator.

Michael DeWine, Attorney General, and *Derrick Knapp*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

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

Findings of Fact:

{¶11} 1. On September 30, 1998, relator was injured in a motor vehicle accident while employed as a receptionist for a hair salon operated by Paragon Salons, Inc., a state-fund employer. The industrial claim (No. 98-549643) is allowed for:

> Left supracondylar fracture femur-closed; fracture right calcaneus-closed; fracture left upper end tibia-closed; fat embolism; gluteus medius fibrosis; post-traumatic subralar right calcaneocuboid osteoarthritis of the right ankle; localized primary osteoarthritis left lower/leg.

{¶12} 2. On August 7, 2008, at relator's request, she was examined by Bruce F. Siegel, D.O., who then issued a five-page narrative report, concluding:

> * * * [I]t is my medical opinion that solely due to this injury date, she is unable to sustain remunerative employment and has been rendered permanently and totally disabled based solely on her medical findings.

{¶13} 3. On October 30, 2008, relator filed an application for PTD compensation. In support, relator submitted the August 7, 2008 report of Dr. Siegel.

{¶14} 4. On December 18, 2008, at the commission's request, relator was examined by Martin Fritzhand, M.D. Dr. Fritzhand examined for all allowed conditions of the industrial claim. Thereafter, Dr. Fritzhand issued a four-page narrative report stating:

> CURRENT SYMPTOMS: At present, the patient has intermittent ("some of the time") dull pain primarily surrounding the left knee "here in the (distal) femur where the break was and below the (left) knee. When the weather changes I can predict it." In addition, she continues to have intermittent ("some of the time") dull pain localized to the right. Prolonged ambulation, standing or weight-bearing exacerbates the pain. The patient notes weakness involving the left leg as well as numbness localized to the left knee. The patient notes occasional instability, but has never fallen.

> The patient is currently being followed by Dr. Goldfarb and takes "pain pills." The patient does not use a heating pad.
>
> * * *
>
> DISCUSSION: In summary, this is a middle-aged woman who sustained injuries to the left knee and right foot during a motor vehicle accident in September 1998. She required multiple procedures at the time of her initial hospitalization, and has subsequently required additional operations. Unfortunately, musculoskeletal distress has persisted since the accident, and she has remained refractory to both surgery and aggressive medical care over the years. On physical examination, the patient ambulates with a somewhat stiff nonlimping gait. Range of motion of the right ankle is diminished. Synovial thickening is also present. There is some sensory loss involving the left leg. The patient was a receptionist, but has been unable to perform work duties due to ongoing pain and discomfort. The injured worker reached maximum medical improvement on all allowed conditions by July 2008. Her subjective symptoms are certainly corroborated by the objective findings described above. The AMA Guides to the Evaluation of Permanent Impairment Fifth Edition has been consulted in arriving at the cited level of impairment. Table 17-12 indicates an impairment to the whole body of 2.5% + 1%. Table 17-33 indicates an impairment of 2% to the whole body for an undisplaced supracondylar fracture as well as an impairment of 2% for a plateau fracture, undisplaced. I used Table 16-10 for an impairment due to sensory loss of 3/5 (50%). Figure 17-8 indicates an impairment to the common peroneal nerve. Table 17-37 indicates an impairment to the whole body of 50% x 2% = 1%. I also used the guidelines for estimating impairment of pain in Chapter 18 with use of Figure 18-1 indicating an impairment of 3%. There were no sequelae secondary to the allowed condition "fat embolism," and no award was given. Thus, by using the Combined Value Chart, it is my medical opinion that the patient has sustained a permanent partial impairment to the whole body of 11%. * * *

{¶15} 5. On a physical strength rating form dated December 18, 2008, Dr. Fritzhand indicated by his mark that relator is capable of "medium work."

{¶16} 6. By letter dated January 19, 2009, relator's counsel wrote to the hearing administrator of the Cincinnati Service Office of the Ohio Bureau of Workers' Compensation ("bureau"). In the letter, relator requested an additional medical examination "for the reason that the report of Dr. Fritzhand dated December 18, 2008 is internally inconsistent and is significantly disparate from existing information in the claim."

{¶17} 7. Apparently, the bureau's hearing examiner did not grant relator's request for an additional medical examination.

{¶18} 8. On February 26, 2009, at relator's request, vocational expert William T. Cody interviewed relator by telephone and conducted a vocational assessment. Thereafter, Cody issued a four-page narrative report stating:

> Vocational Potential Analysis
>
> Dr. Fritzhand (2008), in his specialist report, states that Ms. Keller can perform medium level work in spite of the limitations stemming from [the] work injury. If this is the situation, Ms. Keller can return to either of her former positions of employment. These jobs were performed at the light level of physical demand. There is no evidence that she could perform medium level work prior to her work injury so it seems inappropriate for an evaluating physician to assume she can perform work at this level after a work injury. Dr. Fritzhand's opinion that she is capable of medium level work is inconsistent with his own report. He says that her "**subjective symptoms are certainly corroborated by the objective finding**" (emphasis added). That is, it is believable when she reported to him, "**Prolonged ambulation, standing or weight-bearing exacerbates the pain**" (emphasis added). Medium and even light level work requires that one be on their feet for the majority of the workday. The narrative of Dr. Fritzhand's report suggest[s] that one could work at no more than the sedentary level of physical demand.

> Dr. Siegel (2008), in his letter, feels that the physical limitations emanating from her work injury prevent Ms. Keller from engaging in ongoing work activity of any kind.
>
> Ms. Keller has work experience in positions performed at the light level of physical demand. She has no experience in or skills that transfer to work performed at the sedentary level of physical demand. Therefore, only unskilled and, perhaps, semiskilled work performed at the sedentary level of physical demand can be considered for Ms. Keller, according to the narrative of Dr. Fritzhand's report.
>
> Ms. Keller, at the age of fifty-nine years, would not be able to adapt to a new kind of work activity. She has a significant level of pain, restricted unskilled work history, and physical limitations as reflected in the record reviewed. Under these circumstances she could not be expected to adequately adapt to the new tools, tasks, procedures, and rules involved in performing a new type of work activity, a type of work that she has not performed in the past. This holds true even for unskilled work. The Industrial Commission defines the age of fifty-nine years as middle age. Being of this age presents obstacles to ones' ability to adjust to a new kind of work activity. When a significant level of pain is combined with physical limitations and a restricted unskilled work history, they serve as contributing factors, along with age, to an inability to make vocational adjustments.
>
> Therefore, in the opinion of this vocational expert, Kathleen Keller is permanently and totally occupationally disabled. That is, there are no jobs in the local or national economies that she is able to perform. This conclusion was reached considering her age, education, work history, and the limitations that he has as a result of her allowed injury, claim number 98-549643. This appears to have been the situation since she last worked in 2006.
>
> Ms. Keller is not an appropriate candidate for a vocational rehabilitation program. This is because of her age, her physical limitations, and her restricted work history.

{¶19} 9. Relator submitted the Cody report to the commission in support of her PTD application.

{¶20} 10. Following a March 5, 2009 hearing, a staff hearing officer ("SHO") issued an order denying the PTD application. The SHO's order explains:

> Upon the request of the Industrial Commission of Ohio, the Injured Worker was examined by Dr. Fritzhand on 12/18/2008 with regard to the allowed conditions in the claim. Dr. Fritzhand opined that the allowed orthopedic conditions are permanent and have reached maximum medical improvement. Dr. Fritzhand also found that the Injured Worker had an 11% permanent partial impairment to her whole person as a result of the allowed orthopedic conditions. Further, Dr. Freeman opined that the Injured Worker could engage in medium work activity. Medium work means exerting 20 to 50 pounds of force occasionally, and/or 10 to 25 pounds of force frequently, and/or greater than negligible amounts of force up to 10 pounds constantly to move objects.
>
> It is the finding of the Staff Hearing Officer that the allowed conditions in this claim are permanent and have reached maximum medical improvement. The Hearing Officer also finds that the allowed orthopedic conditions do not prevent the Injured Worker from returning to the work force and performing employment activities up to and including medium work.
>
> The Staff Hearing Officer finds that the Injured Worker is 59 years old, has a 12th grade education and has been employed as a candy store sales clerk, a receptionist, a department store sales clerk and a factory seamstress.
>
> The Staff Hearing Officer finds that the Injured Worker's age of 59 years old would not be a barrier to the Injured Worker returning to entry-level sedentary employment. This age would not preclude the Injured Worker from adhering to new rules, processes and procedures in a new position, especially positions which the Injured Worker has not been employed in the past.
>
> The Staff Hearing Officer also finds that the Injured Worker has a 12th grade education. The Injured Worker has the ability to read, write and do basic math as noted by Mr. Cody in his report dated 02/26/2008 [sic] and her ability to read, write and do basic math would be assets with regard to her returning to entry-level sedentary employment activity. The

> Staff Hearing Officer finds that the Injured Worker has sufficient intellectual ability to engage in entry-level sedentary employment activity or engage in re-training which may be necessary to return to the work force.
>
> The Injured Worker's past employment as a candy store sales clerk, department store sales clerk, receptionist and seamstress would be positive factors with regard to the Injured Worker returning to entry-level sedentary employment or engaging in re-training which may be necessary to return to the work force. The Injured Worker's past employment involved varied positions which show her adaptability to performing different types of employment activities.
>
> A review of the file indicates that the Injured Worker has not engaged in any type of rehabilitation efforts in the past seven years. The Hearing Officer finds the Injured Worker's lack of interest in participation in rehabilitation is a negative factor in regards to adjudicating her application for permanent total disability compensation.
>
> For the reasons stated above, the Staff Hearing Officer finds that the Injured Worker is able to engage in sustained remunerative work activity and is not permanently and totally disabled.

{¶21} 11. On May 13, 2010, relator, Kathleen Keller, filed this mandamus action.

Conclusions of Law:

{¶22} Two issues are presented: (1) whether the commission abused its discretion in determining that relator is vocationally qualified for sedentary employment when Dr. Fritzhand opined that the industrial injury permits "medium work," and (2) whether the commission abused its discretion by allegedly not addressing in its order the impact of relator's pain on her ability to perform sustained remunerative employment.

{¶23} The magistrate finds: (1) the commission did not abuse its discretion in determining that relator is vocationally qualified for sedentary employment when Dr. Fritzhand opined that the industrial injury permits "medium work," and (2) the commission did not abuse its discretion by allegedly failing to address in its order the impact of relator's pain on her ability to perform sustained remunerative employment.

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

{¶25} Turning to the first issue, Ohio Adm.Code 4121-3-34 sets forth the commission's rules for the adjudication of PTD applications. Ohio Adm.Code 4121-3-34(B) sets forth definitions. Ohio Adm.Code 4121-3-34(B)(2) is captioned "Classification of physical demands of work."

{¶26} Thereunder, the following definitions are provided:

> (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.
>
> (b) "Light work" means exerting up to twenty pounds of force occasionally, and/or up to ten pounds of force frequently, and/or a 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.
>
> (c) "Medium work" means exerting twenty to fifty pounds of force occasionally, and/or ten to twenty-five pounds of force frequently, and/or greater than negligible up to ten pounds of force constantly to move objects. Physical demand requirements are in excess of those for light work.

{¶27} The commission, through its SHO, relied upon the reports of Dr. Fritzhand in determining relator's residual functional capacity. Dr. Fritzhand opined that relator is capable of "medium work" on the physical strength rating form.

{¶28} While the relied-upon physician, Dr. Fritzhand, opined that relator is medically capable of performing "medium work," the commission's nonmedical analysis determined that relator was vocationally qualified for sedentary work.

{¶29} Given that an injured worker capable of medium work is, by definition, also capable of light work and sedentary work, it cannot be an abuse of discretion for the commission to determine that relator is vocationally capable of sedentary work, and on that basis deny the PTD application.

{¶30} Turning to the second issue, clearly, pain can be a factor under consideration in a PTD proceeding. *State ex rel. Unger v. Indus. Comm.* (1994), 70 Ohio St.3d 672, 676. However, contrary to relator's suggestion, pain is not a nonmedical or vocational factor that must be specifically addressed in the commission's order.

{¶31} Rather, if pain is a factor in an industrial injury, it should be addressed by the examining physicians in their reports. When the commission determines residual functional capacity by stating reliance upon one or more medical reports, pain will be

included to the extent that the relied upon doctor or doctors have included pain in their assessment of the claimant's medical capacity for work.

{¶32} Here, Dr. Fritzhand considered relator's pain associated with the allowed conditions of the claim.

{¶33} Under "current symptoms," Dr. Fritzhand records relator's reporting to him her pain complaints. Under "discussion," while not using the word "pain," Dr. Fritzhand refers to relator's "musculoskeletal distress" that has persisted since the accident. He also refers to her "subjective symptoms."

{¶34} In his evaluation of whole body impairment, Dr. Fritzhand estimates an impairment of three percent due to pain.

{¶35} Because Dr. Fritzhand factored pain into his medical evaluation, the commission necessarily included pain in its determination of residual functional capacity. There was no need for the commission to specifically mention pain in its order.

{¶36} 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).