[Cite as *State ex rel. Randolph v. Indus. Comm.*, 2011-Ohio-4053.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Jonathan Randolph,	:	
Relator,	:	
v.	:	No. 10AP-572
Industrial Commission of Ohio and Omni Fireproofing Co., Inc.,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on August 16, 2011

Harris & Burgin, *L.P.A.*, and *Jeffrey W. Harris*, for relator.

Michael DeWine, Attorney General, and *Robert Eskridge, III*, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

BROWN, J.

{¶1} Relator, Jonathan Randolph, 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 denied his application for permanent total disability ("PTD") compensation and to enter a new order granting said compensation.

{¶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 which is appended to this decision, including findings of fact and conclusions of law, and recommended that this court grant relator's request for a writ of mandamus. Relator has filed objections to the magistrate's decision.

{¶3} We will address relator's objections together. Relator argues in his first objection that the magistrate erred when he found an inconsistency in Dr. James Lutz's report based solely on the level of impairment the magistrate perceived to be too low to be consistent with Dr. Lutz's finding that relator is physically incapable of working. In refusing to grant relator relief pursuant to *State ex rel. Gay v. Mihm*, 68 Ohio St.3d 315, 1994-Ohio-296, the magistrate found that Dr. Lutz's report was internally inconsistent because, notwithstanding Dr. Lutz's "relatively low estimate" of a 13 percent whole person impairment, he still concluded that relator was incapable of work.

{¶4} Relator argues in his second objection that the magistrate erred when, after finding neither Dr. Gary Ray's nor Dr. Lutz's reports could constitute some evidence, he ordered that the commission was free to obtain a new medical examination upon remand. Relator contends that, where evidence on the record is found to be non-probative, the commission must issue a new order based on the probative evidence existence on file. Because the magistrate did not address Dr. Bruce Siegel's report, and it is the only other probative evidence on record, relator asserts that this court should order that the commission base its new order on Dr. Siegel's report.

{¶5} After reviewing the magistrate's decision, this matter is returned to the commission for a redetermination of PTD based upon either Dr. Lutz's report, Dr. Siegel's report, any evidence already in the record or any new evidence obtained and submitted by the parties. Because neither Dr. Lutz's nor Dr. Siegel's reports were specifically cited

or relied upon by the commission, we do not determine whether these reports constitute some evidence. In finding that the commission may consider Dr. Lutz's report upon remand, we, by implication, sustain relator's first objection, although the commission may well arrive at the same conclusion as the magistrate with respect to Dr. Lutz's report.

{¶6} Relator cites *State ex rel. Taylor v. Indus. Comm.* (1995), 71 Ohio St.3d 582, for the proposition that, when evidence is rejected by a court, the result is not to order a new examination, but rather to issue a decision based upon the probative evidence that remains on the record. In *Taylor*, two doctors concluded the claimant was physically unable to work, and a vocational expert determined the claimant was not a viable candidate for rehabilitative services. Another doctor, Dr. Katz, found the claimant was capable of working at his former position of employment as a heavy laborer. The commission's decision denying relator's PTD compensation was premised exclusively on Dr. Katz's assessment. After rejecting Dr. Katz's reports as being internally inconsistent, the court found that "[g]ranted, the lack of 'some evidence' supporting denial of permanent total disability compensation does not automatically equate into 'some evidence' supporting an award. * * * However, here, the *remaining* medical evidence is overwhelming, and it unequivocally constitutes 'some evidence' supporting an award for permanent total disability compensation." Id. at 585. (Emphasis sic.) The court then granted the claimant relief consistent with *Gay*.

{¶7} However, in the present case, we do not find the remaining evidence in the record to be "overwhelming" and "unequivocally" "some evidence" to support PTD, as the court found in *Taylor*. Although upon remand the commission may, at its discretion, rely upon Dr. Lutz's and Dr. Siegel's reports, this evidence is not so overwhelming and

unequivocal that we believe the commission should be prohibited from considering additional evidence.

{¶8} Furthermore, we also do not grant relator relief pursuant to *Gay*, as the court did in *Taylor*. "*Gay* relief was intended as a *narrow* exception to the general rule of returning *Noll* [*v. Indus. Comm.* (1991), 57 Ohio St.3d 203]-deficient orders to the commission." *State ex rel. Pass v. C.S.T. Extraction Co.* (1996), 74 Ohio St.3d 373, 376. (Emphasis sic.) *Gay* relief is to be issued only in "extraordinary circumstances." Id. *Gay* relief is not warranted in this case, as the evidence does not present the one-sidedness necessary to warrant such extraordinary relief. See *State ex rel. Corona v. Indus. Comm.* (1998), 81 Ohio St.3d 587. For these reasons, we overrule relator's second objection.

{¶9} After an examination of the magistrate's decision, an independent review of the record pursuant to Civ.R. 53, and due consideration of relator's objections, we sustain relator's first objection and overrule his second objection. Accordingly, we do not adopt that portion of the magistrate's decision that found Dr. Lutz's report internally inconsistent, but adopt the findings of fact and conclusions of law in all other respects. We grant relator's request for a writ of mandamus and remand this matter to the commission to adjudicate the application for PTD compensation and make a determination based upon either the existing record, except for Dr. Ray's report, or any new evidence obtained by both parties, at the commission's discretion.

Objections sustained in part and overruled in part;
writ of mandamus granted and cause remanded.

BRYANT, P.J., and KLATT, J., concur.

_____

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APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Jonathan Randolph,	:	
Relator,	:	
v.	:	No. 10AP-572
Industrial Commission of Ohio and Omni Fireproofing Co., Inc.,	:	(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 23, 2011

Harris & Burgin, L.P.A., and *Jeffrey W. Harris*, for relator.

Michael DeWine, Attorney General, and *Robert Eskridge, III*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶10} In this original action, relator, Jonathan Randolph, 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:

{¶11} 1. On October 24, 2006, relator injured his lower back while employed as a truck driver with respondent Omni Fireproofing Co., Inc., a state-fund employer. The industrial claim (No. 06-872615) is allowed for:

> Sprain lumbar region; focal right disc protrusion L5-S1; post surgical changes with peri-neural granulation tissue at L5-S1; radiculopathy; sciatica of the right lower extremity; disc bulge at L4-5.

{¶12} 2. Apparently, relator began receiving temporary total disability ("TTD") compensation.

{¶13} 3. On March 26, 2009, at the request of the Ohio Bureau of Workers' Compensation ("bureau"), relator was examined by Gary L. Ray, M.D. Dr. Ray issued a three-page narrative report stating:

> IMPRESSION: John Randolph is being evaluated today for a work-related injury with the allowed conditions as listed previously. With a reasonable degree of medical certainty he has reached maximum medical improvement. I would not expect a fundamental, functional or physiological change to occur with continued medical or rehabilitation treatment. The injury occurred more than 2 years ago. He has undergone extensive treatment for the condition including medications, physical therapy, exercises, epidural steroid injections, and surgery.
>
> He is not able to return to his former position of employment which is a heavy job. In regards to his functional limitations please see the DEP Physician's Report of Work Ability form.
>
> The current treatment is necessary and appropriate for the allowed condition[s] of this claim. Although, it would be helpful to cut back on his narcotic medications so he does not feel so tired.
>
> My recommendations for treatment at this time include medications but at a lower dose to take the edge off of the pain but to allow him to function better. It is also recommended that he continue on his home exercise

> program to try to increase his strengthening exercises and walking to improve his functional abilities so he can return to work at a sedentary to light level of functioning. I would expect that he would need the treatment for a number of years.

{¶14} 4. Also on March 26, 2009, Dr. Ray completed a bureau form captioned "DEP Physician's Report of Work Ability." The form asks the examining physician to opine as to the claimant's physical capabilities during an eight-hour workday by appropriately marking boxes on the form. Dr. Ray indicated that relator cannot lift or carry 21 pounds or over. However, he can lift or carry 11 to 20 pounds "occasionally." He can lift or carry up to 10 pounds "continuously."

{¶15} On the form, Dr. Ray further indicated that relator can bend "occasionally," and squat/kneel "occasionally." He can stand/walk "occasionally."

{¶16} Thereunder, Dr. Ray indicated by his mark that the restrictions are "permanent."

{¶17} 5. Apparently, TTD compensation was terminated effective July 21, 2009 based upon Dr. Ray's report, presumably, on grounds that the industrial injury has reached maximum medical improvement ("MMI").[1]

{¶18} 6. On September 18, 2009, at relator's own request, he was examined by Bruce F. Siegel, D.O. In his three-page narrative report, Dr. Siegel concludes:

> This gentleman continues to suffer with chronic pain and limited ability to function. He has had these limitations at home and with activities of daily living despite the benefits in utilizing various medications and having gone through surgery and having physical therapy and epidural injections. Consequently, he is unable to maintain the level of function

[1]See the commission's "Statement of Facts" at page 15 of the "Stipulation as to the Record" filed herein on August 19, 2010. At oral argument, counsel for relator and counsel for respondent commission agreed that TTD compensation was terminated on MMI grounds based upon Dr. Ray's report.

> and control the pain in performing activities out of the house, such as remunerative activities. Therefore, it is my opinion, with a reasonable degree of medical certainty, that this gentleman is permanently and totally disabled.

{¶19} 7. On October 21, 2009, relator filed an application for PTD compensation. In support, relator submitted the report of Dr. Siegel.

{¶20} 8. Pursuant to the commission's rules regarding the processing of PTD applications, relator was examined at the commission's request on November 23, 2009 by James T. Lutz, M.D. In his two-page narrative report, Dr. Lutz states:

> ANSWERS TO SPECIFIC QUESTIONS:
>
> [One] In my medical opinion, this claimant has reached maximum medical improvement with regard to each specified allowed condition of the injury of record. In my opinion, no fundamental, functional or physiologic change can be expected despite continued treatment and/or rehabilitation.
>
> [Two] Reference is made to the Fifth Edition of the AMA Guides Revised in arriving at the following impairment assessment. As all claim allowances refer to the lumbosacral spine, with evidence of radiculopathy: Utilizing table 15-3, Mr. Randolph warrants a DRE category III, which equals a 13% whole person impairment.
>
> [Three] Please see the enclosed physical strength rating. In my opinion, as the direct result of the injury of record and its allowed conditions, Mr. Randolph is incapable of work.

{¶21} 9. Also on November 23, 2009, Dr. Lutz completed a physical strength rating form. On the form, Dr. Lutz indicated by his mark that "[t]his Injured Worker is incapable of work."

{¶22} 10. Following a February 2, 2010 hearing, a staff hearing officer ("SHO") issued an order denying the PTD application based upon Dr. Ray's report. The SHO's order does not address the reports of Drs. Siegel and Lutz. The order states in part:

> After full consideration of the issue, it is the order of the Staff Hearing Officer that the application for permanent total disability compensation filed 10/21/2009 is denied.
>
> The Staff Hearing Officer finds that the Injured Worker's condition has become permanent and that he is unable to return * * * to his former position of employment as a truck driver due to the allowed conditions in the claim.
>
> Dr. Gary Ray examined the Injured Worker at the request of the Bureau of Workers' Compensation on 03/26/2009. Dr. Ray opined that the Injured Worker has permanent restrictions as a result of the industrial injury. Dr. Ray opined that the Injured Worker can lift/carry up to 10 pounds continuously and 11-20 pounds occasionally. Dr. Ray further opined that the Injured Worker can bend occasionally and squat/kneel occasionally. Dr. Ray further opined that the Injured Worker can stand/walk and sit frequently. Dr. Ray opined that these restrictions are permanent and that the Injured Worker is able to work 8 hours per day 5 days per week with these restrictions.
>
> Dr. Ray opined that his recommendations for treatment of the Injured Worker include medications but at a lower dose to take the edge off the pain but to allow him to function better. Dr. Ray opined that the Injured Worker should continue on his home exercise program to try to increase his strengthening exercises and walking to improve functional abilities so he can return to work at a sedentary to light level of functioning.
>
> The Staff Hearing Officer finds from the permanent restrictions given by Dr. Ray that the Injured Worker is capable of engaging in sedentary employment.
>
> The Staff Hearing Officer finds that the Injured Worker would be able to engage in sedentary work activity based on the report of Dr. Ray.

> The Staff Hearing Officer finds that the capabilities listed by Dr. Ray are the capabilities the Injured Worker has as a result of the recognized conditions in the claim.

The SHO's order then addresses the nonmedical factors.

{¶23} 11. Relator moved the three-member commission for reconsideration of the SHO's order.

{¶24} 12. On March 27, 2010, the commission, on a two-to-one vote, denied reconsideration.

{¶25} 13. On June 17, 2010, relator, Jonathan Randolph, filed this mandamus action.

Conclusions of Law:

{¶26} The main issue is whether the report of Dr. Ray is some evidence supporting the commission's determination of relator's current residual functional capacity—that he is currently capable of sedentary employment.

{¶27} Finding that Dr. Ray's report provides no evidence to support a current residual functional capacity for sedentary employment, it is the magistrate's decision that this court issue a writ of mandamus, as more fully explained below.

{¶28} 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. Thereunder, Ohio Adm.Code 4121-3-34(B)(4) provides:

> "Residual functional capacity" means the maximum degree to which the injured worker has the capacity for sustained performance of the physical-mental requirements of jobs as these relate to the allowed conditions in the claim(s).

At issue here is the following portion of Dr. Ray's narrative report:

> * * * It is also recommended that he continue on his home exercise program to try to increase his strengthening exercises and walking to improve his functional abilities so he can return to work at a sedentary to light level of functioning. * * *

{¶29} Dr. Ray's report is not some evidence that relator has the current residual functional capacity for any sustained remunerative employment, even "sedentary to light" work. Dr. Ray's focus on *improvement* of functional abilities through the home exercise program so there can be a return to work strongly suggests that *improvement* is needed to achieve a return to work, and thus relator is not currently able to do so.

{¶30} Simply put, a medical opinion that relator is expected to return to work at some unspecified point in the future should he meet a recommendation such as a home exercise program is not an opinion that supports the commission's duty to determine residual functional capacity. See *State ex rel. Malinowski v. Horids Bros., Inc.* (1997), 79 Ohio St.3d 342 (Dr. Matrka's report was not some evidence of a capacity for sustained remunerative employment absent evidence that the PTD applicant met the conditions precedent set forth in the medical report).

{¶31} Given that the commission abused its discretion by exclusive reliance upon Dr. Ray's report for its determination of residual functional capacity, a writ of mandamus must issue.

{¶32} Citing *State ex rel. Gay v. Mihm* (1994), 68 Ohio St.3d 315, relator argues for a full writ of mandamus because the remaining medical reports, i.e., from Drs. Siegel and Lutz, contain opinions supporting PTD. The magistrate disagrees that a full writ is appropriate here.

{¶33} A medical report can be so internally inconsistent that it cannot be some evidence upon which the commission can rely. *State ex rel. Lopez v. Indus. Comm.* (1994), 69 Ohio St.3d 445; *State ex rel. Taylor v. Indus. Comm.* (1995), 71 Ohio St.3d 582.

{¶34} Dr. Lutz's report is internally inconsistent on the question of relator's capacity for sustained remunerative employment. In his narrative report, Dr. Lutz estimates a 13 percent whole person impairment which this court can note to be a relatively low percentage. Notwithstanding this relatively low estimate of whole person impairment, Dr. Lutz indicates on the physical strength rating form that relator "is incapable of work." Given the internal inconsistency, Dr. Lutz's statement that relator "is incapable of work" must be removed from evidentiary consideration.

{¶35} Given that Dr. Lutz's report contains no evidence upon which the commission can rely on a remand from this court, the commission is free to obtain a new medical examination under its rules for the processing of PTD applications.

{¶36} Accordingly, it is the magistrate's decision that this court issue a writ of mandamus ordering the commission to vacate its order denying relator's application for PTD compensation, and, in a manner consistent with this magistrate's decision, enter a new order that adjudicates the PTD application.

/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).