

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State ex rel. William E. Thirion,	:	
Relator,	:	
v.	:	No. 10AP-282
Industrial Commission of Ohio and	:	(REGULAR CALENDAR)
Trumbull County,	:	
Respondents.	:	

D E C I S I O N

Rendered on December 15, 2011

Urban Co., L.P.A., and Anthony P. Christine, for relator.

*Michael DeWine, Attorney General, and Kevin J. Reis, for
respondent Industrial Commission of Ohio.*

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

CONNOR, J.

{¶1} Relator, William E. Thirion, filed this original action seeking a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its order, which denied his request for an adjustment of the start date for his award of permanent total disability ("PTD") compensation, and to enter an order changing the start date to November 30, 2006.

{¶2} This court referred the matter to a magistrate pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The parties stipulated the pertinent evidence and filed briefs. The magistrate rendered a decision which is appended hereto. In the appended decision, the magistrate issued findings of fact and conclusions of law before ultimately recommending that this court deny relator's request for a writ of mandamus. In support, the magistrate cited two legal consequences resulting from relator's failure to file objections to the tentative order issued by the commission on October 27, 2009. First, because relator failed to file objections, the tentative order became final and could only be reopened by the commission's exercise of continuing jurisdiction. Because relator failed to allege any of the bases permitting the commission to exercise continuing jurisdiction, the magistrate found no abuse of discretion on the part of the commission in denying the relief sought. Second, the magistrate noted that relator's failure to object constituted a failure to exhaust his administrative remedies. Because relator failed to exhaust administrative remedies, one of the required elements of his mandamus action was lacking because he had an adequate remedy at law.

{¶3} Upon our independent review, we find no merit to relator's objections. First, relator's objections offer not a single citation to a legal authority of any kind. Rather, relator's counsel recites his personal experience before the commission and simply states that objections to the tentative order were not required, and the exercise of continuing jurisdiction was not necessary. Relator also cites a policy guideline allegedly utilized by the commission in adjusting start dates. He asserts that the policy guideline never mentions the need to exercise continuing jurisdiction. We note the difficulty in reconciling these positions with relator's merit brief, in which he argued that the commission should

have exercised continuing jurisdiction. Nevertheless, as the commission aptly notes, in no way does this policy guideline alter the statutes, rules, regulations, and case law establishing the rights and obligations of parties before the commission. The same can be said of counsel's personal experience before the commission.

{¶4} As a result, after an examination of the magistrate's decision, as well as an independent review of the record and relevant law, we conclude that the magistrate has sufficiently discussed and determined the issues raised by relator. We therefore overrule relator's objections to the magistrate's decision and adopt the appended decision as our own. As a result, we deny relator's request for a writ of mandamus.

*Objections overruled;
writ denied.*

SADLER and DORRIAN, JJ., concur.

A P P E N D I X

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Trumbull County,	:	
	:	
Respondents.	:	
	:	

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

Rendered on April 29, 2011

Urban Co., L.P.A., and Anthony P. Christine, for relator.

*Michael DeWine, Attorney General, and Kevin J. Reis, for
respondent Industrial Commission of Ohio.*

I N M A N D A M U S

{¶5} In this original action, relator, William E. Thirion, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order denying his December 1, 2009 motion for an adjustment of the start date for his award of permanent total disability ("PTD") compensation, and to enter an order changing the start date to November 30, 2006.

Findings of Fact:

{¶6} 1. Relator has three industrial claims. Industrial claim number 03-459956 is allowed for "right shoulder sprain; aggravation of degenerative disc disease L5-S1." Industrial claim number 00-409153 is allowed for "sprain thoracic region." Industrial claim number 02-386561 is allowed for "olecranon bursitis, left."

{¶7} 2. On July 24, 2009, at relator's request, he was examined by E. B. Marsolais, M.D., Ph.D., who issued a three-page narrative report in which he opined:

Mr. Thirion remains totally and permanently disabled for any consistent reasonably remunerative activity as a direct and proximate result of the allowed injury. There is a small chance that further surgery could help him, but there is also a chance it could make him worse. * * *

{¶8} 3. The record also contains an office note from Dr. Marsolais dated July 30, 2006. The office note states in part:

Return to workdate Return to work capacity
never

(Emphasis sic.)

{¶9} 4. On August 21, 2009, relator filed an application for PTD compensation. In support, relator submitted the July 24, 2009 report from Dr. Marsolais.

{¶10} 5. On October 1, 2009, at the commission's request, relator was examined by John L. Dunne, D.O., who issued a narrative report. On October 1, 2009, Dr. Dunne also completed a physical strength rating form. On the form, Dr. Dunne indicated by his mark "[t]his Injured Worker is incapable of work."

{¶11} 6. On October 23, 2009, citing Ohio Adm.Code 4121-3-34(C)(6)(a), relator moved the commission for the issuance of a tentative order. In support of his motion,

relator submitted a memorandum in which he requested that the tentative order provide for a compensation start date of November 30, 2006 based upon Dr. Marsolais' November 30, 2006 office note.

{¶12} 7. On October 27, 2009, a staff hearing officer ("SHO") mailed a tentative order awarding PTD compensation starting July 24, 2009. The tentative order states:

After full consideration of the issue, it is the order of the Staff Hearing Officer that the Application for Permanent and Total Disability filed on 8/21/2009 is GRANTED. This order is based specifically upon the 10/1/2009 Industrial Commission Specialist examination of Dr. John Dunne, D.O., who found that the Injured [W]orker would not be able to perform sustained remunerative employment activities based upon the allowed conditions in claim # 03-459956. Permanent Total Disability benefits are to be paid from 7/24/2009, the earliest medical evidence of permanent total disability – specifically, the 7/24/2009 report of Dr. E. Byron Marsolais, M.D.

* * *

An objection may be filed with the Industrial Commission within fourteen (14) days of the receipt of this order. If a timely objection is filed, the IC-2 Application for Permanent Total Disability will be scheduled for hearing.

(Emphasis sic.)

{¶13} 8. Relator did not file an objection to the tentative order.

{¶14} 9. Rather, on December 1, 2009, relator moved for an adjustment of the PTD start date to coincide with the November 30, 2006 office note of Dr. Marsolais.

{¶15} 10. Following a January 14, 2010 hearing, an SHO issued an order denying relator's December 1, 2009 motion. The SHO's order explains:

It is the order of the Staff Hearing Officer that the Injured Worker's C-86 motion filed 12/01/2009 is denied.

The Staff Hearing Officer notes that there was no timely appeal filed to the Staff Hearing Officer order issued 10/27/2009, which granted the Injured Worker's application for permanent total disability compensation. Thus, the Injured Worker did not exhaust all administrative remedies, and the Staff Hearing Officer order issued 10/27/2009 is a final Commission order. This order can only be reopened only [sic] through the Commission's exercise of continuing jurisdiction.

The Staff Hearing Officer finds that the Injured Worker has failed to present evidence under R.C. 4123.52 to warrant invocation of continuing jurisdiction. The Staff Hearing Officer notes that there has been no allegation of new and changed circumstances, fraud, clear mistake of fact, clear mistake of law, or an error by an inferior tribunal.

From a substantive perspective, the Staff Hearing Officer finds that the Injured Worker has submitted the 11/30/2006 office note and 11/30/2006 C-84 report from Earnest B. Marsolais, M.D., indicated that the Injured Worker would "never" return to work. However, the Staff Hearing Officer finds that the office note fails to specify the work to which the Injured Worker would never return, and the C-84 report refers to the Injured Worker never returning to his former position of employment. Thus, the Staff Hearing Officer finds that the Injured Worker has failed to establish that Dr. Marsolais' 11/30/2006 opinion as to the Injured Worker's "return to work – never" status references sustained remunerative employment.

This order is being placed pursuant to State ex. rel. Middleton v. Indus. Comm. (2007), Ohio App. (10th App. Dist.), 06AP-551.

Thus, the Injured Worker's request to adjust the start date of Permanent Total Disability compensation is denied.

{¶16} 11. On March 29, 2010, relator, William E. Thirion, filed this mandamus action.

Conclusions of Law:

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

{¶18} Ohio Adm.Code 4121-3-34(C) sets forth the commission's rules for the processing of PTD applications.

Thereunder, Ohio Adm.Code 4121-3-34(C)(6) provides:

(a) After the reports of the commission medical examinations have been received, the hearing administrator may refer the claim to an adjudicator to consider the issuance of a tentative order, without a hearing.

(i) Within fourteen days of the receipt of the tentative order adjudicating the merits of an application for compensation for permanent and total disability, a party may file a written objection to the order. Unless the party notifies the commission in writing of the objection to the tentative order within fourteen days after the date of receipt of notice of the findings of the tentative order, the tentative order shall become final.

(ii) In the event a party makes written notification to the industrial commission of an objection within fourteen days of the date of the receipt of the notice of findings of the tentative order, the application for compensation for permanent and total disability shall be set for hearing and adjudicated on its merits.

{¶19} Pursuant to Ohio Adm.Code 4121-3-34(C)(6), the tentative order mailed October 27, 2009 became final upon the failure of relator to object to the tentative order.

{¶20} Once the tentative order became final, it could be reopened only through the commission's exercise of continuing jurisdiction. That, in turn, could occur only if one of five prerequisites have been met: (1) new and changed circumstances; (2) fraud; (3) clear mistake of fact; (4) clear mistake of law; or (5) error by an inferior tribunal. *State ex rel. Poneris v. Indus. Comm.*, 111 Ohio St.3d 264, 2006-Ohio-5702.

{¶21} The SHO's order of January 14, 2010 correctly notes that the SHO's order of October 27, 2009 (tentative order) became a final order that can only be reopened through the commission's exercise of continuing jurisdiction.

{¶22} The SHO's order of January 14, 2010 correctly notes that relator failed to allege any of the five prerequisites for the exercise of continuing jurisdiction.

{¶23} Under such circumstances, the SHO had no basis to reopen the final order of October 27, 2009.

{¶24} The SHO's order of January 14, 2010 also notes that relator failed to exhaust his administrative remedies. In fact, relator did fail to file an objection to the SHO's order of October 27, 2009 as to the start date of the PTD award.

{¶25} Relator's failure to exhaust his administrative remedies by failing to object to the October 27, 2009 order has adverse consequences as to maintaining this mandamus action.

{¶26} A writ of mandamus will not issue where relator has a plain and adequate remedy in the ordinary course of law. *State ex rel. Berger v. McMonagle* (1983), 6 Ohio St.3d 28. It is well-settled that an adequate administrative remedy precludes relief in mandamus. *State ex rel. Harshaw Chem. Co. v. Zimpher* (1985), 18 Ohio St.3d 166; *State ex rel. Stafford v. Indus. Comm.* (1989), 47 Ohio St.3d 76; and *State ex rel. Reeves v. Indus. Comm.* (1990), 53 Ohio St.3d 212.

{¶27} 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).