[Cite as *State ex rel. Daniels v. CHS Greystone, Inc.*, 2012-Ohio-2268.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Launa K. Daniels,	:	
Relator,	:	
v.	:	No. 11AP-394
CHS Greystone, Inc. and The Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on May 22, 2012

Clements, Mahin & Cohen, L.P.A., Co., Paul Lewandowski, and *Catharin R. Taylor,* for relator.

Michael DeWine, Attorney General, and *Sandra E. Pinkerton,* for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTION TO THE MAGISTRATE'S DECISION

FRENCH, J.

{¶ 1} Relator, Launa K. Daniels ("relator"), filed an original action, which asks this court to issue a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its interlocutory order finding the reports of Edward Lim, M.D., to be internally inconsistent and ordering another medical examination to be

performed, and to enter an order that adjudicates relator's application for permanent total disability ("PTD") compensation based on the current record.

{¶ 2} This matter was referred 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 requested writ. No objections have been filed to the magistrate's findings of fact, and we adopt them as our own.

I. BACKGROUND

{¶ 3} In brief, relator suffered a work-related injury in 1999. She applied for PTD compensation in 2010. At the commission's request, Dr. Lim examined relator. In his report, Dr. Lim concluded that relator suffered a permanent impairment of 7 percent. He concluded that relator's morbid obesity contributed to her mobility issues and that she "is unable to do any kind of sustained employment due to her physical problems at this time and the fact that she is also on very strong narcotic medication." When asked to clarify his medical opinion, Dr. Lim confirmed that, in his opinion, relator is permanently and totally disabled apart from her obesity.

{¶ 4} Following a hearing, a staff hearing officer ("SHO") issued an interlocutory order finding Dr. Lim's report to be internally inconsistent because he found only a 7-percent impairment, but also found permanent and total disability. The SHO ordered that a new examination be conducted. Relator has refused to attend an additional examination and, through this mandamus action, asks us to order the commission to adjudicate her application based on the evidence currently in the record. The magistrate recommended that we deny the requested writ because relator's action is premature.

II. RELATOR'S OBJECTION

{¶ 5} In her objection, relator contends that the magistrate erred by concluding that she sought a writ of mandamus prematurely. In support, relator relies primarily on this court's opinion in *State ex rel. Giel v. Indus. Comm.*, 88 Ohio App.3d 96 (10th Dist.1993), in which we issued a writ of mandamus requiring the commission to vacate its order requiring a second medical examination of the claimant and to adjudicate the

claimant's application for PTD compensation based on the evidence in the record or explain its decision not to do so.

{¶ 6} This court, however, has described *Giel* as "[o]ne of the exceedingly rare instances where mandamus has been utilized to review an interlocutory order." *State ex rel. Groff v. Indus. Comm.*, 10th Dist. No. 08AP-697, 2009-Ohio-2048, ¶ 4. In *Giel*, we found that the commission's order had failed to explain why an additional medical examination was necessary or helpful. In fact, the writ issued in *Giel* gave the commission the option of entering "a true order which sets forth in detail the reasons why another medical examination is necessary or even helpful before the [commission] can determine whether Giel is entitled to [PTD] compensation." *Giel* at 99. The commission has already done so here, where the SHO explained why an additional examination is necessary and would be helpful to the commission's review. Therefore, we overrule relator's objection.

III. CONCLUSION

{¶ 7} Having conducted an independent review of this matter, and having overruled relator's only objection, we adopt the magistrate's decision, including the findings of fact and conclusions of law contained in it, as our own. Accordingly, we deny the requested writ.

Objection overruled;
writ of mandamus denied.

SADLER and DORRIAN, JJ., concur.

A P P E N D I X

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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 January 11, 2012

Clements, Mahin & Cohen, L.P.A., Co., Paul Lewandowski, and *Catharin R. Taylor*, for relator.

Michael DeWine, Attorney General, and *Sandra E. Pinkerton*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶ 8} In this original action, relator, Launa K. Daniels, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate the February 22, 2011 interlocutory order of its staff hearing officer ("SHO") that finds the reports of Edward Lim, M.D., to be internally inconsistent and orders another

medical examination to be performed by a commission physician, and to enter an order that adjudicates relator's application for permanent total disability ("PTD") compensation absent another commission medical examination.

Findings of Fact:

{¶ 9} 1. On May 11, 1999, relator sustained an industrial injury while employed as a licensed practical nurse at a nursing home operated by a state-fund employer. The industrial claim (No. 99-410057) is allowed for "sprain of neck, bilateral; sprain thoracic region, bilateral; herniated disc L4-L5 and L5-S1; chronic pain syndrome."

{¶ 10} 2. On June 21, 2010, relator filed an application for PTD compensation. In support of her application, relator submitted a report from chiropractor John E. Ruch, D.C. That report is not contained in the stipulation of evidence before this court.

{¶ 11} 3. On November 12, 2010, at the commission's request, relator was examined by orthopedic surgeon Edward V. A. Lim, M.D. Dr. Lim issued a four-page narrative report. Under a portion of his report captioned "HISTORY AS DESCRIBED BY MS. DANIELS," Dr. Lim wrote:

> * * * She currently is under the care of Dr. Martinez, who primarily treats her medically. She is on multiple medications including Klonopin, Opana (which is oxymorphone) 40 mg twice a day. She said that two years ago she was on OxyContin and it was changed to Opana. She also is on Percocet and Lyrica for her chronic pain problems.

{¶ 12} Under a portion of his report captioned "DISCUSSION AND OPINIONS," Dr. Lim wrote:

> [One] In my opinion, this injured worker has reached her maximum medical improvement with regards to all of her claims.

> [Two] Using the AMA Guides to the Evaluation of Permanent Impairment, 5th Edition, for her sprain neck bilateral and sprain thoracic region bilateral, she is noted to have 0% impairment. For her herniated disc L4-L5 and L5-S1, she is noted to have a 5% impairment using the AMA Guides to the Evaluation of Permanent Impairment, 5th Edition, DRE Lumbar Category II. For chronic pain syndrome, she is noted to have a 2% impairment again using the AMA Guides to the Evaluation of Permanent Impairment, 5th Edition. Using the Combined Values Chart, Ms. Daniels is noted to have a 7% impairment due to the allowed conditions in her claim. It should be noted that Ms. Daniels has a condition of morbid obesity that also contributes to her difficulty in terms of mobilization. She has also been on multiple narcotic medication for an extended and long period of time.
>
> [Three] In my opinion, Ms. Daniels is unable to do any kind of sustained employment due to her physical problems at this time and the fact that she is also on very strong narcotic medication.

{¶ 13} 4. On a physical strength rating form dated November 12, 2010, Dr. Lim indicated by his mark: "This Injured Worker is incapable of work."

{¶ 14} 5. By letter dated December 17, 2010, a commission claims examiner posed to Dr. Lim the following query:

> You have indicated the [injured worker] has only 7% permanent partial disability resulting from the allowed conditions. Is it your opinion that based only on the allowed conditions the [injured worker] is [permanently and totally disabled], apart from her obesity[?]

{¶ 15} In response to the above query, Dr. Lim wrote "Yes" in his own hand and he entered his signature on December 20, 2010. (Emphasis sic.)

{¶ 16} 6. Relator's PTD application was scheduled for a hearing before an SHO on February 22, 2011. Following the February 22, 2011 hearing, the SHO issued an interlocutory order stating:

> The Staff Hearing Officer considers the Injured Worker's Application for Permanent Total Disability Compensation filed by the Injured Worker on 06/21/2010. This Staff Hearing Officer finds that the Injured Worker was examined by Dr. Lim on behalf of the Industrial Commission on 11/12/2010.
>
> The Staff Hearing Officer finds that the Industrial Commission specialist report of Dr. Lim, Orthopedist, is internally inconsistent. Dr. Lim, opines in his report dated 11/12/2010 that the Injured Worker is incapable of work based on the allowed conditions of in [sic] the claim.
>
> Dr. Lim, also opines in the same report that the Injured Worker has a 7% permanent impairment due to the allowed conditions in the claim. The Staff Hearing Officer finds that 7% is an extremely low impairment. The Staff Hearing Officer finds that these findings, both contained in Dr. Lim's report, cannot be reconciled.
>
> The Staff Hearing Officer refers the file back for a new medical examination on the issue of permanent total disability. The Staff Hearing Officer finds upon receipt of the new medical examination report, the matter is to be reset for hearing on the Injured Worker's application for permanent total disability filed 06/21/2010.

{¶ 17} 7. On March 8, 2011, relator moved for reconsideration of the SHO's order of February 22, 2011.

{¶ 18} 8. Apparently, relator received notice from the commission that she was to be examined by Steven Wunder, M.D.

{¶ 19} 9. On March 8, 2011, relator moved as follows:

> [Relator] requests that the scheduled medical examination with Steven Wunder, M.D., scheduled for March 15 [sic], 2011, be cancelled pending the resolution of [relator's] Motion for Reconsideration of Staff Hearing [O]fficer Ordered [sic], dated 2/22/11.

{¶ 20} 10. By letter dated March 7, 2011, relator's counsel informed the commission:

> We have filed a Motion with the Industrial Commission to cancel a permanent total disability medical examination pending the resolution of a Request for Reconsideration that we have also filed. I just wanted to make you aware of this, since the examination with Dr. Wunder, is scheduled for March 16 [sic], 2011.
>
> Because of the pending Request for Reconsideration, the Injured Worker is not planning on attending the medical examination.

{¶ 21} 11. On March 25, 2011, the three-member commission, on a two-to-one vote, mailed an order denying relator's March 8, 2011 motion for reconsideration.

{¶ 22} 12. On April 25, 2011, relator, Launa K. Daniels, filed this mandamus action.

{¶ 23} 13. By letter dated June 16, 2011, the Cincinnati Hearing Administrator informed the parties as follows:

> The Injured [W]orker's IC-2 Application for Permanent Total Disability Compensation, filed 06/21/2010, is held in abeyance until such time as the Injured Worker advises in writing that she is willing and able to attend a medical examination scheduled by the Industrial Commission.
>
> Per letter from the Injured Worker's representative dated 05/25/2011, the Injured Worker refuses to attend such examination pending the outcome of a complaint in Mandamus filed 04/25/2011 (Case number 11APD 04-394).
>
> It is the Injured Worker's responsibility to notify the Industrial Commission when she is willing to attend the Industrial Commission examination. Until such time, this claim is referred to the Bureau of Workers' Compensation for housing.

Conclusions of Law:

{¶ 24} In this action, relator challenges the February 22, 2011 interlocutory order of the SHO that orders relator to submit to another commission medical examination. Relator argues that the SHO's stated explanation for ordering another examination is invalid as a matter of law. That is, relator argues that Dr. Lim's reports are not internally inconsistent as the SHO found. However, this court need not determine whether the SHO correctly held that Dr. Lim's reports are internally inconsistent.

{¶ 25} Because this action is at best premature given that the commission has not yet issued a final order determining relator's PTD application, it is the magistrate's decision that this court deny relator's request for a writ of mandamus, as more fully explained below.

{¶ 26} R.C. 4123.53(A) provides:

> The administrator of workers' compensation or the industrial commission may require any employee claiming the right to receive compensation to submit to a medical examination * * * at any time, and from time to time, at a place reasonably convenient for the employee, and as provided by the rules of the commission or the administrator of workers' compensation. * * *

{¶ 27} R.C. 4123.53(C) provides:

> If an employee refuses to submit to any medical examination * * * scheduled pursuant to this section * * * the employee's right to have his or her claim for compensation considered, if the claim is pending before the bureau or commission, or to receive any payment for compensation theretofore granted, is suspended during the period of the refusal[.] * * * Notwithstanding this section, an employee's failure to submit to a medical examination * * * shall not result in the dismissal of the employee's claim.

{¶ 28} Supplementing the statute, Ohio Adm.Code 4121-3-12 provides:

> When the bureau or the commission orders an injured or disabled employee to submit to medical examination and such employee refuses to be examined or in any way obstructs the examination, the employee's claim for compensation shall be suspended during the period of his refusal or obstruction.

{¶ 29} Mandamus does not ordinarily lie from an interlocutory order of the commission. *State ex rel. Kmart Corp. v. Frantom* (1999), 86 Ohio St.3d 430 (interlocutory discovery order); see *State ex rel. Lantz v. Indus. Comm.* (1993), 66 Ohio St.3d 29 (a reconsideration order).

{¶ 30} Moreover, it is well-settled that failure to pursue an adequate administrative remedy precludes mandamus relief. *State ex rel. Harshaw Chemical Co. v. Zimpher* (1985), 18 Ohio St.3d 166; *State ex rel. Stafford v. Indus. Comm.* (1989), 47 Ohio St.3d 76; *State ex rel. Reeves v. Indus. Comm.* (1990), 53 Ohio St.3d 212.

{¶ 31} Here, relator has an adequate administrative remedy. She can submit to the additional medical examination and then argue the merits of her PTD application based upon the evidence before the commission. If relator should prevail before the commission, she will have obtained the ultimate relief that she seeks to obtain through this mandamus action.

{¶ 32} Notwithstanding R.C. 4123.53(A)'s provision that the commission may require an employee claiming the right to receive compensation to submit to a medical examination "at any time, and from time to time," the courts have recognized that the discretion granted the commission in scheduling medical examinations is not unlimited.

{¶ 33} In arguing for a writ of mandamus, relator relies primarily upon two mandamus decisions, one from this court and the other from the Supreme Court of Ohio. That is, relator relies upon *State ex rel. Giel v. Indus. Comm.* (1993), 88 Ohio App.3d 96, and *State ex rel. Clark v. Indus. Comm.*, 78 Ohio St.3d 509, 1997-Ohio-189. In *Giel*, this court issued a writ of mandamus where the commission's order under challenge was interlocutory. However, in *Clark* the Supreme Court of Ohio issued a full writ of mandamus when the commission's order under challenge was a final order with respect to the PTD application. The *Giel* and *Clark* cases are worthy of an extended presentation here.

{¶ 34} In *Giel*, this court issued a writ of mandamus ordering the commission to vacate its order for another medical examination and directing the commission to either consider the PTD application based upon the evidence already in the file, or to enter a true order which sets forth in detail the reasons why another medical examination is necessary or even helpful before the commission can determine whether Giel is entitled to PTD compensation.

{¶ 35} On March 19, 1990, Giel filed a PTD application. On May 18, 1990, an SHO dismissed the application allegedly because the medical evidence submitted did not demonstrate that Giel was PTD. Almost 11 months later, a different SHO vacated the order and entered a new order that the application be processed. As a result, Giel was referred to commission specialist Dr. Kaffen for an examination.

{¶ 36} Dr. Kaffen opined that Giel was "permanently and totally impaired from engaging in any sustained remunerative employment." Dr. Kaffen also opined that Giel

had a 90 percent whole body impairment. In March 1992, a tentative order granting PTD was circulated. One member of the commission voted for the order and two members voted against the order. Two other members of the then five-member commission never indicated their vote on the matter.

{¶ 37} In May 1992, an attorney with the commission's legal section prepared a statement of facts and recommendation that PTD be awarded. The application was scheduled for hearing before the commission on June 2, 1992.

{¶ 38} On June 2, 1992, the commission took no formal action. On June 8, 1992, a memorandum from the commission's claims management section to the Cleveland Medical Section stated that the commission was holding the PTD application in abeyance and that the medical section was instructed to arrange for an additional examination.

{¶ 39} In *Giel*, this court stated:

> The record clearly shows that Giel is unemployed and the medical proof presently in the claim file indicates that he cannot be employed. His application for permanent total disability compensation has been processed for over three years without resolution. An individual would be hard-pressed to aggregate impairments greater than the ninety-percent total impairment suffered by Giel, as found by Dr. Kaffen. Yet, the Industrial Commission, instead of granting the permanent total disability compensation, recommended by its specialist and by its legal staff, has chosen to ask to have Giel examined by a second commission specialist, for reasons not revealed on the record. The circulation of the tentative order granting permanent total disability compensation stopped, for reasons not revealed.
>
> Under the circumstances, it is easy to understand why Giel and his counsel would infer that the Industrial Commission is so reticent to grant permanent total disability compensation

> that it will go to great lengths to delay or avoid such an award. We also fully understand why Giel and counsel would file an action demanding that the Industrial Commission do its duty. They are within their rights to ask the courts of this state to exercise oversight in such situations.
>
> Perhaps some valid reason for having another medical examination in Giel's case exists. However, the record before us does not reveal the reason and the "order" of the Industrial Commission for the examination is completely silent as to the rationale behind it. The silence, coupled with the highly irregular course of the proceedings demonstrated by the handling of his particular claim, makes it possible or even probable that the claimant will perceive devious or dishonorable motives as the reason for the delays and reexamination.

Id. at 98-99.

{¶ 40} Subsequent to this court's decision in *Giel*, the Supreme Court of Ohio decided *Clark*. In *Clark*, the court held that the commission abuses its discretion under R.C. 4123.53 where the record fails to disclose that additional medical examinations are necessary or of assistance in determining PTD.

{¶ 41} The *Clark* court held that the commission abused its discretion when it decided to schedule a third psychological examination followed by another combined-effects review. The court struck from evidentiary consideration the reports generated from the third psychological examination and the combined-effects review that followed. (The reports of Drs. Shaffer and Holbrook.) The *Clark* court observed that once the reports of Drs. Shaffer and Holbrook are stricken from evidentiary consideration, the only conclusion that can be reached is to grant relief consistent with *State ex rel. Gay v. Mihm* (1994), 68 Ohio St.3d 315. Thus, the *Clark* court issued a writ of mandamus ordering that the commission enter a PTD award.

{¶ 42} It is important to note that the *Clark* court was reviewing a final commission order denying PTD compensation. Also, the *Clark* case is instructive of this court's decision in *Giel*, because *Clark* provides the analysis of R.C. 4123.53.

{¶ 43} The *Giel* case is a unique example of this court's exercise of its mandamus power where the commission had ordered additional medical examinations and had not issued a final order as to PTD. This court in *Giel* ordered the commission to either consider the application based upon the evidence already in the file or to enter a true order which sets forth in detail the reasons why another medical examination is necessary or even helpful. This court, in *Giel*, did not order *Gay* relief as did the court in *Clark*, supra.

{¶ 44} While a review of *Giel* and *Clark* is helpful, clearly neither case supports relator's request for a writ of mandamus, and both are clearly distinguishable from the instant case.

{¶ 45} Relator's reliance on *Giel* is misplaced. As earlier noted, in *Giel* the record was silent as to why the commission's medical section was being instructed to arrange for an additional examination. By way of contrast here, the SHO's order provides an explanation for ordering another medical examination.

{¶ 46} The SHO's order of February 22, 2011 finds that Dr. Lim's estimate of a seven percent impairment cannot be reconciled with his opinion that relator is incapable of work. Thus, the SHO concludes that Dr. Lim's report is "internally inconsistent." While the SHO's order does not specifically say that Dr. Lim's report is being eliminated from any further evidentiary consideration, that is clearly the import of the order.

{¶ 47} In the magistrate's view, the SHO has articulated an explanation that, at least facially, indicates that an additional medical examination is necessary or of assistance in determining the PTD application. This court need not go beyond this analysis to determine whether, as a matter of law, Dr. Lim's report must be eliminated from further evidentiary consideration. After all, the commission is exclusively responsible for weighing and interpreting medical reports. *State ex rel. Burley v. Coil Packing, Inc.* (1987), 31 Ohio St.3d 18. Thus, relator is not entitled to a decision from this court as to whether Dr. Lim's report is internally inconsistent as a matter of law and therefore must be eliminated from further evidentiary consideration.

{¶ 48} *Giel* is readily distinguishable from the instant case in another respect. In *Giel*, this court found a "highly irregular course" of proceedings that made it "possible or even probable that the claimant will perceive devious or dishonorable motives." Id. at 99. That is clearly not the case here.

{¶ 49} Upon a thorough review of *Giel*, there is no basis in the record before this court to issue a writ of mandamus where the commission's order under challenge is interlocutory and there exists no final order adjudicating the PTD application.

{¶ 50} Relator's reliance upon *Clark* is even more misplaced. Again, *Clark* did not involve a challenge to an interlocutory order. Thus, *Clark* does not support relator's request for a writ of mandamus.

{¶ 51} Based upon the foregoing analysis, the magistrate concludes that this action is, at best, premature and, in fact, relator has an adequate administrative remedy.

{¶ 52} 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).