

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

| | | |
|--------------------------------|---|--------------------|
| State of Ohio ex rel. | : | |
| Donald Ransom, | : | |
| | : | No. 11AP-206 |
| Relator, | : | |
| | : | (REGULAR CALENDAR) |
| v. | : | |
| | : | |
| Industrial Commission of Ohio, | : | |
| | : | |
| Respondent. | : | |
| | : | |

D E C I S I O N

Rendered on August 2, 2012

Malek & Malek, and Douglas C. Malek, for relator.

Michael DeWine, Attorney General, and John R. Smart, for respondent.

IN MANDAMUS
ON OBJECTIONS TO MAGISTRATE'S DECISION

TYACK, J.

{¶ 1} Donald Ransom filed this action in mandamus seeking a writ to compel the Industrial Commission of Ohio ("commission") to vacate its order finding that he had been overpaid temporary total disability ("TTD") compensation and to further compel the commission to vacate its finding of fraud with respect to the TTD payments.

{¶ 2} In accord with Loc.R. 12, the case was referred to a magistrate to conduct appropriate proceedings. The parties stipulated the pertinent evidence and filed briefs. The magistrate then issued a magistrate's decision, attached hereto, which contains detailed findings of fact and conclusions of law. The magistrate's decision includes a

recommendation that we overturn part of the order for repayment of TTD compensation and overturn the commission's finding of fraud in its entirety.

{¶ 3} Counsel for the commission has filed objections to the magistrate's decision. The case is now before the court for a full, independent review.

{¶ 4} Ransom was injured on February 20, 2002. His claim has now been recognized for sprain left shoulder; aggravation of supraspinatus tendonitis left shoulder; aggravation of impingement syndrome left shoulder; and aggravation of pre-existing depressive disorder. The psychological condition was not recognized until November 6, 2007.

{¶ 5} Ransom had surgery on his injured shoulder in May 2007 and applied for TTD compensation based upon his physical injuries. The request was denied following a hearing held on June 26, 2007. The staff hearing officer ("SHO") who issued that order based the denial of TTD compensation upon a finding that Ransom had not been working prior to the surgery.

{¶ 6} Three and one-half months later the aggravation of pre-existing depressive disorder condition was recognized and a second application was made for TTD. This application asked for TTD compensation back-dated to April 12, 2006 and continuing until April 12, 2008. Apparently known only to Ransom, he had begun working again on July 15, 2007, about two and one-half weeks after the hearing on TTD compensation for physical conditions.

{¶ 7} A hearing was not held on Ransom's second application for TTD compensation based upon his depressive disorder until February 22, 2008. By then, he was no longer working.

{¶ 8} The SHO who conducted the February 22, 2008 hearing awarded payments retroactive to April 2006. The SHO obviously did not know that Ransom worked from July 15, until December 9, 2007, so accidentally awarded TTD compensation for a period during which Ransom was employed. The commission later exercised its continuing jurisdiction to recoup the payments for that period of time.

{¶ 9} The magistrate found that the overpayment could only be computed from November 27, 2007. We respectfully disagree. Ransom should not have been allowed to collect TTD compensation and earn almost \$5,000 from a private employer at the same

time. To that extent, we sustain the objections filed on behalf of the commission and affirm the overpayment for the period July 15 to December 9, 2007.

{¶ 10} However, we do not find fraud with respect to the TTD order based upon the psychological condition. As repeatedly noted in our magistrate's decision, and as mentioned above, Ransom's psychological condition was not recognized until November 6, 2007. Ransom had to eat and have a place to live while the worker's compensation system processed his paperwork, including recognition of his psychological condition and its impact upon his ability to be employed. He did not receive his first TTD check until months after he stopped working and by then there was no current employment to report. We overrule the commission's objections with reference to the fraud findings.

{¶ 11} As a result of the above, we adopt the findings of fact set forth in the magistrate's decision. We adopt the conclusions of law with respect to the issue of fraud. We do not adopt the conclusions of law with respect to the declaring an overpayment for the period July 15 to December 9, 2007.

{¶ 12} We therefore issue a writ of mandamus compelling the commission to vacate its order finding fraud and compelling the commission to vacate its order of overpayment, except for the period July 15 to December 9, 2007.

*Objections sustained in part
and overruled in part; writ granted.*

KLATT and CONNOR, JJ., concur.

A P P E N D I X
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| Industrial Commission of Ohio, | : | |
| | : | |
| Respondent. | : | |
| | : | |

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

Rendered on April 24, 2012

Malek & Malek, and Douglas C. Malek, for relator.

Michael DeWine, Attorney General, and John R. Smart, for respondent.

IN MANDAMUS

{¶ 13} Relator, Donald Ransom, 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 finding that relator had been overpaid temporary total disability ("TTD") compensation, and ordering the repayment of that compensation pursuant to the fraud provisions.

Findings of Fact:

{¶ 14} 1. Relator sustained a work-related injury on February 20, 2002, and his workers' compensation claim was ultimately allowed for the following conditions: sprain left shoulder, aggravation of supraspinatus tendonitis left shoulder; aggravation of impingement syndrome left shoulder; aggravation of pre-existing depressive disorder.¹

{¶ 15} 2. It appears from the record that relator continued working for his employer until he was laid off in 2003. Thereafter, the record indicates that relator performed various odd jobs through January 2006.

{¶ 16} 3. On April 12, 2006, a comprehensive psychological examination was performed by Lee Howard, Ph.D., who opined that, as a result of the work-related injury, relator had suffered an aggravation from a pre-existing depressive disorder. Dr. Howard did not address whether or not relator was capable of working at that time.

{¶ 17} 4. An independent medical evaluation was conducted by Martin T. Ryan, M.D. In his July 30, 2007 report, Dr. Ryan identified the medical records which he reviewed, conducted an interview and examination of relator, and opined that relator had suffered an aggravation of a pre-existing depressive disorder and that relator needed continuing therapy.

{¶ 18} 5. Following a hearing on November 6, 2007, a staff hearing officer ("SHO") relied on the report of Dr. Ryan and additionally allowed relator's claim for "aggravation of pre-existing depressive disorder, not otherwise specified."

{¶ 19} 6. In the interim, relator underwent surgery on his shoulder and, in May 2007, he filed a motion requesting the payment of TTD compensation following surgery for the following closed period: "03/26/2007 through 05/21/2007."

{¶ 20} 7. Following a hearing held on June 26, 2007, relator's request for TTD compensation for that closed period was denied. At that time, relator "presented evidence that he had been employed at St. Stevens Community House from 06/25/2005 through 01/22/2006." Finding that relator "had not been employed for fourteen months prior to the surgery" the SHO determined that "it was not the claimant's allowed injury which prevented him from working from January 2006 to March of 2007." As such, the request

¹ The psychological condition was not allowed until November 6, 2007.

for TTD compensation based on relator's allowed physical conditions following surgery was denied.

{¶ 21} 8. Dr. Howard completed a C-84 dated November 27, 2007, and certified that relator was temporarily and totally disabled due to the allowed psychological condition from April 12, 2006 through an estimated return-to-work date of April 12, 2008.

{¶ 22} 9. Following a hearing on February 22, 2008, an SHO would grant relator's request for the payment of TTD compensation beginning April 12, 2006 through the date of the hearing and continuing. The SHO's determination was based upon "Dr. Ryan's report of 07/30/2007, Dr. Howard's reports of 04/12/2006 and 02/07/2008, and the C-84 signed by Dr. Howard on 11/27/2007."

{¶ 23} 10. Dr. Howard continued certifying that relator was temporarily and totally disabled through an estimated return-to-work date of October 13, 2010.

{¶ 24} 11. The Ohio Bureau of Workers' Compensation's Special Investigation Unit began investigating relator and found:

On 9/16/08, a cross match was conducted by the SIU with the Ohio Department of Job and Family Services (ODJFS) revealing that RANSOM received TT[D] compensation while employed at St. Industrial Maintenance (Skilled Trades) during the 3rd and 4th quarters of 2007.

The investigation conducted by SIU revealed RANSOM knowingly worked as an electrician for Skilled Trades from 7/15/07 to 12/09/07, a period for which he was retroactively paid TT[D] benefits.

{¶ 25} 12. Relator admits that he worked during that period of time (7/15/07 – 12/9/07) and documents obtained by the Bureau of Workers' Compensation ("BWC") revealed that relator earned \$4,969.25 while working for skilled trade. At the same time, relator acknowledges that, on July 30, 2007 when Dr. Ryan examined him, he did not tell Dr. Ryan that he had resumed work activities two weeks earlier. While relator does contend that he reported his work activities to Grandview Family Practice, including the fact that he had to stop that work because it was too painful, relator fails to identify the

documents in the record to corroborate that statement.² In his affidavit, relator stated that his duties with Skilled Trade included the following: "shoveling gravel and digging holes, in addition to setting footers into place in preparation for building structures." While this could arguably correspond with his indicating he had difficulty with "raking, lifting and carrying and with weight bearing activities," there is no mention in the office notes that relator was working. Further, other evidence in the record indicates that relator was working as an electrician during that time period.

{¶ 26} 13. The BWC filed a motion in March 2010 requesting that the commission exercise its continuing jurisdiction, terminate relator's TTD compensation, find that relator was overpaid TTD compensation beginning July 15, 2007, and further make a finding of fraud.

{¶ 27} 14. A hearing was held before a district hearing officer ("DHO") on April 13, 2010. At the hearing, relator admitted that he had worked between July 15 and December 9, 2007, but argued that the work he was performing was not outside his restrictions. Further, relator conceded that it was proper to find an overpayment of TTD compensation for the period he was working, July 15 through December 9, 2007. With regard to fraud, relator argued that the evidence presented did not establish fraud.

{¶ 28} 15. In making the finding of fraud, the DHO provided the following rationale:

[T]he Injured Worker was present and represented by counsel at the time of the 02/22/2008 Industrial Commission hearing that awarded the payment of compensation over the period of time relevant to today's hearing. The Injured Worker had more than ample opportunity at that time to inform the Industrial Commission of his period of employment, and even if the District Hearing Officer were to accept the argument that, at the time of the Industrial Commission hearing, the Injured Worker was unaware that he was unable to receive compensation over the same period when he worked, the Injured Worker would certainly have been aware of that prohibition once compensation began being paid. He reported nothing. Additionally, based on the 11/27/2007 treatment note from Dr. Howard's office in file the Injured

² In an office note dated August 8, 2007, relator informed personnel at Grandview Family Practice that he had "difficulty with raking, lifting and carrying and with weight bearing activities."

Worker reported at that time that he had "attempted to work without success," even though he was actually working at that time. The Special Investigations Unit questionnaire completed by Dr. Howard on 05/18/2009 indicates the Injured Worker was informed by Dr. Howard's office that he was not permitted to work while receiving compensation, yet the Injured [W]orker clearly reported no employment to Dr. Howard. Based on all of the above the District Hearing Officer is persuaded the Injured [W]orker showed the requisite intent to commit fraud in this claim.

Based on the Injured Worker's concealment of employment from his treating doctor, the Bureau of Workers' Compensation, and the Industrial Commission the District Hearing Officer is persuaded the Bureau justifiably relied on the C-84 forms submitted on behalf of the Injured Worker to pay temporary total disability compensation. This reliance proximately resulted in an injury as the Injured Worker would not have been paid compensation from the state insurance fund had his employment been revealed. Therefore, based on all of the above the District Hearing Officer finds the Bureau of Workers' Compensation has satisfied its burden of demonstrating the six elements necessary for a finding of fraud.

{¶ 29} 16. Relator's appeal was heard before an SHO on May 19, 2010. The SHO explained the rationale for the finding of fraud as follows:

The Staff Hearing Officer also finds that the Injured Worker's misrepresentation was material to the transaction at hand. The Staff Hearing Officer notes that the Injured Worker would not have been entitled to temporary total compensation if the Bureau of Workers' Compensation had knowledge of the Injured Worker's employment. In addition, the Staff Hearing Officer finds the Injured Worker received wages and temporary total disability compensation at the same time despite specific written warnings provided by the BWC to the Injured Worker on several occasions. Despite, being given several warnings, the Injured Worker failed to report his employment to the Bureau of Workers' Compensation or his physician of record or to a number of examining physicians. The Injured Worker falsified his employment status with his physician of record and with physicians who examined the Injured Worker on behalf of the Industrial Commission and the Bureau of Workers' Compensation. The Staff Hearing Officer relies upon the fact that Dr. Howard indicates in a 05/27/2009 report that the

Injured Worker did not tell him that he was employed and had he known the Injured Worker was employed, he would not have certified temporary total compensation. In addition, Dr. Ryan examined the Injured Worker in July of 2007; at that time, the Injured Worker had told Dr. Ryan that he had last worked in August of 2005. In addition, Dr. Lowe examined the Injured Worker on 02/04/2008; the Injured Worker informed Dr. Ryan that he had not worked in over two years. In addition, Dr. Tosi had examined the Injured Worker on 06/23/2008; the Injured Worker informed him that he had not worked since 2005. In addition, Dr. Clary had examined the Injured Worker on 09/25/2007, the same time in which the Injured Worker was receiving temporary total compensation and was working for Skilled Trades, the Injured Worker reported to Dr. Clary that he last worked in 2005. The Staff Hearing Officer finds that these misrepresentations to a number of physicians, including Dr. Howard, do represent a "material" misrepresentation. In addition, the Staff Hearing Officer finds that the Injured Worker intended to mislead these physicians by failing to inform them that he had been working in 2007 for Skilled Trades.

In addition, the Staff Hearing Officer finds the Injured Worker intentionally misled them by informing them that he had not worked for two years or since approximately 2005.

The Staff Hearing Officer further finds that the Bureau of Workers' Compensation was misled by the Injured Worker's misrepresentations and had justifiably relied on these representations. These representations resulted in an injury to the Bureau of Workers' Compensation as the Bureau of Workers' Compensation paid compensation and benefits to the Injured Worker for which he had not been entitled to receive.

The Staff Hearing Officer relies upon the Special Investigations Unit Report from the Bureau of Workers' Compensation, filed 03/03/2010, Lori Effinger's letter, wage documentation for the period of 07/15/2007 through 12/09/2007, Dr. Howard's response to the Bureau of Workers' Compensation questionnaire, Dr. Ryan's 07/30/2007 exam and report, Dr. Lowe's 02/04/2008 exam and report, Dr. Tosi's 06/23/2008 exam and report, and Dr. Clary's 09/25/2007 exam and report.

The Staff Hearing Officer therefore finds that a material misrepresentation had been portrayed by the Injured Worker when he told numerous physicians that he had not worked for several years and failed to honestly indicate that he had been working at the time of their examinations, specifically Dr. Howard's examination, Dr. Clary's examination and Dr. Ryan's examination. The Staff Hearing Officer therefore distinguishes this case from the [State ex rel. Goodwin v. Indus. Comm., 124 Ohio St.3d 334 (2010)] case.

{¶ 30} 17. Relator's appeal was refused by order of the commission mailed June 11, 2010.

{¶ 31} 18. Relator's request for reconsideration was denied in an order mailed July 30, 2010.

{¶ 32} 19. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶ 33} As will be explained hereinafter, it is this magistrate's decision that the commission did not abuse its discretion by finding an overpayment of TTD compensation from November 27, 2007 and continuing because relator was working as an electrician on November 27, 2007, the day Dr. Howard signed the C-84 certifying disability retroactive to April 12, 2006, the day Dr. Howard first examined him. However, the magistrate finds that the commission did abuse its discretion by finding an overpayment of TTD compensation from July 15, 2007 (the day relator first worked) through November 26, 2007 because relator's claim was not even allowed for a psychological condition until November 6, 2007, and the C-84 was not signed until November 27, 2007. Further, it is this magistrate's decision that the commission did abuse its discretion by finding fraud because: (1) relator's claim was not allowed for a psychological condition until November 6, 2007; (2) relator was not actually working at the same time that he was actually receiving TTD compensation (stopped working December 9, 2007 and TTD compensation was not granted until February 22, 2008); (3) relator did not sign any warrants containing the warning that he could not work while he was actually working during the time period; and (4) relator signed only one C-84 (the first one November 27, 2007) while he was working.

{¶ 34} TTD compensation awarded pursuant to R.C. 4123.56 has been defined as compensation for wages lost where a claimant's injury prevents a return to the former position of employment. Upon that predicate, TTD compensation shall be paid to a claimant until one of four things occurs: (1) claimant has returned to work; (2) claimant's treating physician has made a written statement that claimant is able to return to the former position of employment; (3) when work within the physical capabilities of claimant is made available by the employer or another employer; or (4) claimant has reached MMI. *See* R.C. 4123.56(A); *State ex rel. Ramirez v. Indus. Comm.*, 69 Ohio St.2d 630 (1982).

{¶ 35} As above indicated, TTD compensation is prohibited to one who has returned to work. Work is not defined for purposes of workers' compensation. The Supreme Court of Ohio has held, however, that any remunerative activity outside the former position of employment precludes the payment of TTD compensation. *State ex rel. Nye v. Indus. Comm.*, 22 Ohio St.3d 75 (1986). The court has also held that activities which are medically inconsistent with the alleged inability to return to the former position of employment bar the payment of TTD compensation, regardless of whether the claimant is paid. *State ex rel. Parma Community Gen. Hosp. v. Jankowski*, 95 Ohio St.3d 340, 2002-Ohio-2336. However, activities that are not medically inconsistent bar the payment of TTD compensation only when a claimant is remunerated for them. *Id.* Further, work does not have to be full-time or even regular part-time to forego the payment of TTD compensation as even sporadic employment can bar the payment of benefits. *State ex rel. Blabac v. Indus. Comm.*, 87 Ohio St.3d 113 (1999).

{¶ 36} In the present case, relator concedes that he was working from July 15 through December 9, 2007. On November 27, 2007, Dr. Howard certified that relator was unable to return to any form of employment as of April 12, 2006, the day he first examined relator. As such, whether one accepts relator's statement that he was shoveling gravel and digging ditches or the statements provided by other witnesses that he was actually working as an electrician (his former position of employment), it is clear that relator was working and that he was being paid for that work.

{¶ 37} In the present case, the commission found an overpayment of TTD compensation beginning July 15, 2007, the day relator first began to work. However,

because relator's claim was not even allowed for a psychological condition until November 6, 2007, and the C-84 certifying disability was not signed until November 27, 2007, the magistrate finds that it was an abuse of discretion for the commission to find an overpayment of compensation between July 15 and November 26, 2007. However, because relator was working and being remunerated for that work as of November 27, 2007, when Dr. Howard signed the C-84, the commission properly found an overpayment of compensation beginning on that date.

{¶ 38} Finding that the commission properly found an overpayment of TTD compensation beginning November 27, 2007, the magistrate must now address whether or not the commission abused its discretion when it determined that relator had committed fraud.

{¶ 39} The elements of fraud are: (1) a representation or, where there is a duty to disclose, concealment of a fact; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred; (4) with the intent of misleading another and to relying upon it; (5) justifiable reliance upon the representation or concealment; and (6) a result in injury proximately caused by the reliance. *Gaines v. Preterm-Cleveland, Inc.*, 33 Ohio St.3d 54 (1987).

{¶ 40} As above indicated, the first element that the BWC needed to establish was that relator made a representation or where there was a duty to disclose, he concealed a fact. The SHO found that the BWC established this in the following manner: (1) relator "had a duty to disclose that he was employed at the time (when he became employed) to the Bureau of Workers' compensation as he was receiving temporary total compensation at that time"; (2) relator received "an EBT confirmation letter from the BWC which is utilized for direct deposit of his temporary total compensation warrants/monies [which] specifically warned the Injured Worker that working while receiving temporary total compensation was not permitted"; (3) relator "had received check/warrants in the past from the BWC which specifically provides warning language which indicates that receipt of temporary total compensation at the same time an Injured Worker is working is not permitted"; and (4) relator received a "BWC entitlement letter * * * indicating that the

Injured Worker would not be entitled to receipt of temporary total compensation if he is working."

{¶ 41} For the following reasons, the magistrate finds that none of the above cited evidence establishes the first element of fraud. The commission first says that relator had a duty to disclose that he began working on July 15, 2007. In reality, relator had no reason to inform the BWC that he began working on July 15, 2007 because he was not receiving TTD compensation in July 2007. Further, relator's request for TTD compensation beginning March 26, 2007 following his shoulder surgery had specifically been denied in an SHO order dated June 26, 2007 on grounds that relator had not worked for the prior 14 months. There was no reason for relator to tell the BWC that he began working in July 2007 so this cannot establish the first element.

{¶ 42} The SHO also stated that the EBT confirmation letter relator received for direct deposit warned him that he could not work while receiving TTD compensation. However, that letter was not mailed to relator until March 4, 2008 which was several months after he stopped working. As such, this did not put relator on notice that he had any duty to tell the BWC that he was working in July 2007.

{¶ 43} The SHO also determined that the past warrants relator had received put him on notice that he could not work while receiving TTD compensation. However, it appears that relator had last been paid TTD compensation sometime in 2005. As above indicated, relator's most recent request for TTD compensation was denied on June 26, 2007 because he had not been working for 14 months previously. Further, in July 2007, relator's claim had not yet been allowed for any psychological condition and there was no request or indication that such a condition would be allowed or that he would receive TTD compensation because of an allowed psychological condition. The magistrate finds that signing warrants approximately two years earlier did not put relator on notice that he should have notified the BWC that he began working in July 2007.

{¶ 44} Lastly, the SHO referenced the BWC entitlement letter warning relator that he could not work while receiving TTD compensation. However, that letter was not mailed until February 28, 2008, months after he had stopped working.

{¶ 45} None of the evidence cited by the commission established that relator made a representation or concealed a fact when he had a duty to disclose it. Again, relator had

no reason to tell the commission or the BWC that he began working in July 2007 when he was not receiving TTD compensation, when his claim was not yet allowed for a psychological condition, when he had recently been denied for TTD compensation based on his allowed physical condition, and when there were no pending requests for TTD compensation before the commission. Having failed to establish this first element, the magistrate finds that the commission did not cite to any evidence which would support this element of fraud.

{¶ 46} Finding that the commission abused its discretion by failing to cite any evidence which would support the first element of fraud, there is no reason to consider the other elements. However, even if the court did consider whether or not any statement or lack of statement was material or was done falsely or with such other disregard and recklessness that knowledge may be inferred, the magistrate again points out the following facts: (1) relator last received TTD compensation in 2005; (2) relator's request for TTD compensation following shoulder surgery had been denied in June 2007 solely because relator had not worked the preceding 14 months prior to surgery; (3) relator's claim had neither been allowed for a psychological condition nor did relator have any expectation that it would be allowed for a psychological condition or that he would receive TTD compensation based on his allowed psychological condition when he began working on July 15, 2007; and (4) relator signed only one C-84 while he was still working, and that was the first one. None of the cases cited by the parties are factually comparable to the situation here and this case must be considered on its own unique facts.

{¶ 47} Based on the foregoing, it is this magistrate's decision that the commission did not abuse its discretion in finding that relator worked during the time his doctor certified that he was unable to work. However, the magistrate finds that the commission did abuse its discretion by finding an overpayment beginning July 15, 2007, the first day relator worked, when his claim had not yet been allowed for a psychological condition and when he had not applied for TTD compensation based on that psychological condition. Instead, the magistrate finds that the proper date to determine the beginning of any overpayment is November 27, 2007, the date that relator and his doctor actually signed the C-84. Further, the magistrate finds that the commission did abuse its discretion in making the finding of fraud here where the commission failed to cite any evidence to

support the first element of fraud and where none of the evidence the commission did cite supports its conclusion. As such, it is this magistrate's decision that this court should issue a writ of mandamus ordering respondent, the Industrial Commission of Ohio, to vacate its order and to issue an order which finds an overpayment of TTD compensation beginning November 27, 2007, and which does not make a finding of fraud.

/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).