[Cite as *State ex rel. Qunicel v. Indus. Comm.*, 2012-Ohio-4369.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Gerald R. Quincel,	:	
Relator,	:	
v.	:	No. 11AP-594
Industrial Commission of Ohio and [E.I. DuPont De Nemours and Company] Circleville Plant,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on September 25, 2012

Philip J. Fulton Law Office, and *Chelsea J. Fulton*, for relator.

Michael DeWine, Attorney General, and *Stephen D. Plymale*, for respondent Industrial Commission of Ohio.

Vorys, Sater, Seymour and Pease LLP, and *Carl D. Smallwood*, for respondent E.I. DuPont De Nemours and Company, Circleville Plant.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

BRYANT, J.

{¶ 1} Relator, Gerald R. Quincel, commenced this original action requesting a writ of mandamus that orders respondent Industrial Commission of Ohio to vacate its order denying his October 15, 2009 motion for an R.C. 4123.57(D) change of occupation

award, and to enter an order awarding him the initial 30 weeks of compensation under the statute.

I. Facts and Procedural History

{¶ 2} Pursuant to Civ.R. 53 and Loc.R. 13(M), this matter was referred to a magistrate who issued the appended decision, including findings of fact and conclusions of law. Based on the language of R.C. 4123.57(D), the magistrate determined R.C. 4123.57(D) implicitly requires a claimant's change of occupation or discontinuance of employment "be causally related to the medical advisement that the employee change his occupation in order to decrease substantially further exposure to a toxic dust." (Mag. Dec., at ¶ 31.) The magistrate found that, contrary to the requirements of the statute, relator presented no evidence he discontinued his employment as a result of medical advice to change his occupation in order to decrease his exposure to toxic material.

II. Objections

{¶ 3} Relator filed three objections to the magistrate's conclusions of law:

> OBJECTION ONE
>
> THE MAGISTRATE IGNORED THE PLAIN LANGUAGE OF R.C. 4123.57(D).
>
> OBJECTION TWO
>
> THE MAGISTRATE REWEIGHED EVIDENCE TO DENY MR. QUINCEL'S CHANGE OF OCCUPATION AWARD.
>
> OBJECTION THREE
>
> THE MAGISTRATE ERRED AS A MATTER OF LAW BY DISTINGUISHING [*State ex rel. Liposchak v. Indus. Comm.*, 73 Ohio St.3d 194 (1995)] FROM THE INSTANT CASE.

A. *First Objection*

{¶ 4} Relator's first objection contends the magistrate ignored the plain language of R.C. 4123.57(D). According to the statute, if (1) an "administrator finds that the employee has contracted * * * asbestosis," (2) "a change of such employee's occupation is medically advisable in order to decrease substantially further exposure to * * * asbestos," and (3) "the employee, *after the finding*, has changed or shall change the employee's

occupation to an occupation which the exposure to * * * asbestos * * * is substantially decreased," then (4) "the administrator shall allow to the employee an amount equal to fifty per cent of the statewide average weekly wage per week for a period of thirty weeks, commencing as of the date of the discontinuance or change." (Emphasis added.)

{¶ 5} Quoting from *State ex rel. Sayre v. Indus. Comm.*, 17 Ohio St.2d 57, 62 (1969), relator contends the statute only "requires that where an employee discontinues all employment and there is a medical finding by the Industrial Commission that he has contracted silicosis and a change of occupation is advisable, such employee is entitled to the prescribed compensation ... for 30 weeks ..." (Relator's Objections, at 4-5.) *Sayre* is factually distinguishable. The claimant in *Sayre* discontinued his occupation because he contracted silicosis from exposure to silicosis dust. He ultimately changed employment and received change of occupation benefits. Here, by contrast, relator discontinued his employment in 1993 for reasons unrelated to his health, he was not diagnosed with asbestosis until 2001, and not until 2009 was he advised he should not engage in any employment where he would be exposed to asbestos.

{¶ 6} Not only is relator's case factually distinguishable from *Sayre*, but his contention that abstractly meeting the three prongs of the *Sayre* syllabus warrants an award of change of occupation compensation is unpersuasive. This court in *State ex rel. Early v. Indus. Comm.*, 103 Ohio App.3d 199 (10th Dist.1995), addressed a claimant's similar contention that R.C. 4123.57(D) only requires (1) the employee discontinue all employment, (2) the employee has contracted the specified occupational disease, and (3) a change of occupation is advisable. Noting the language of R.C. 4123.57(D), this court listed the three requirements under the statute: (1) the claimant has contracted the specified occupational disease, (2) a change of occupation is advisable to decrease further exposure, and (3) the claimant changed or shall change to an occupation where exposure is substantially decreased. Citing *State ex rel. Lewis v. Diamond Foundry Co.*, 29 Ohio St.3d 56 (1987), the court stated that new employment, or a reasonable attempt to obtain such employment, is required under the statute. Concluding the claimant in *Early* presented no evidence that he either changed his occupation or was in the process of changing occupations when he filed for the benefits under R.C. 4123.57(D), this court

found no abuse of discretion in denying him benefits. Relator, too, fails to meet the third prong.

{¶ 7} For the same reason, the magistrate did not ignore the plain language of the statute. According to R.C. 4123.57(D), if, in accordance with the terms of the statute, a change of an employee's occupation is medically advisable to decrease further exposure to asbestos and "if the employee, after the finding, has changed or shall change the employee's occupation to an occupation" to one in which exposure to asbestos is substantially decreased, then change of occupation benefits may be available. Here, after finding he had contracted asbestosis and a change of occupation was medically advisable, relator neither changed occupations nor attempted to do so. Accordingly, relator does not meet the statute's terms.

{¶ 8} Whether the language of R.C. 4123.57(D) implicitly suggests a causal connection or simply delineates a chronology of events, we need not decide. Rather, given the language of the statute, the magistrate properly concluded that relator does not qualify for change of occupation benefits under the terms of the statute. Relator's first objection is overruled.

B. *Second and Third Objections*

{¶ 9} Relator's second objection suggests the magistrate never addressed the key issue in the staff hearing officer's order, that being whether voluntary abandonment defeats a change of occupation application. Relator contends the magistrate instead decided the requested writ on a wholly different basis than the staff hearing officer's order. In a related argument, relator contends the magistrate erred as a matter of law in distinguishing *State ex rel. Liposchak v. Indus. Comm.*, 73 Ohio St.3d 194 (1995), from the present case.

{¶ 10} Initially, relator's contention that the staff hearing officer premised his decision on voluntary abandonment is not persuasive. The staff hearing officer stated that the requested benefits were denied because relator "retired in 1993 after having almost 30 years of service." (Mag. Dec., at ¶ 26.) The staff hearing officer, however, continued by noting relator's retirement "had nothing to do with his exposure to asbestos," he "did not re-enter the work force after retirement," and relator was not diagnosed with asbestosis until 2001. (Mag. Dec., at ¶ 26.) In the next paragraph of the decision, the staff hearing

officer cited three cases, all related to change of occupation benefits. Taken as a whole, the order denies benefits because relator fails to comply with the statutory requisites as explained in those cases cited.

{¶ 11} Relator's third objection contends the magistrate improperly applied *Liposchak*. The magistrate adequately addresses the argument in his decision. For the reasons set forth in the decision, relator's contentions are unpersuasive.

{¶ 12} Accordingly, relator's second and third objections are overruled.

III. Disposition

{¶ 13} Following independent review pursuant to Civ.R. 53, we find the magistrate has properly determined the pertinent facts and applied the salient law to them. Accordingly, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained in it. In accordance with the magistrate's decision, we deny the requested writ of mandamus.

Objections overruled;
writ denied.

BROWN, P.J., and DORRIAN, J., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

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State of Ohio ex rel. Gerald R. Quincel,	:	
Relator,	:	
v.	:	No. 11AP-594
Industrial Commission of Ohio and [E.I. DuPont De Nemours and Company] Circleville Plant,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on April 27, 2012

Philip J. Fulton Law Office, and *Ross R. Fulton*, for relator.

Michael DeWine, Attorney General, and *Stephen D. Plymale*, for respondent Industrial Commission of Ohio.

Vorys, Sater, Seymour and Pease LLP, and *Carl D. Smallwood*, for respondent E.I. DuPont De Nemours and Company, Circleville Plant.

IN MANDAMUS

{¶ 14} In this original action, relator, Gerald R. Quincel, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order denying his October 15, 2009 motion for an R.C. 4123.57(D) change of

occupation award, and to enter an order awarding him the initial 30 weeks of compensation under the statute.

Findings of Fact:

{¶ 15} 1. In 1993, relator retired from his almost 30 years of employment with respondent E.I. DuPont De Nemours and Company, Circleville Plant ("DuPont"), a self-insured employer under Ohio's workers' compensation laws.

{¶ 16} 2. During his employment with DuPont, relator worked with asbestos as an insulator.

{¶ 17} 3. On May 10, 2001, relator was examined by William M. Chinn, M.D., who specializes in pulmonary diseases. In his report dated May 20, 2001, Dr. Chinn opined:

> Mr. Quincel has had what appears to be some progression on CXR of interstitial change consistent with asbestos related disease and certainly on physical exam he has new findings of bilateral crepitant rales very consistent with the development of a pneumoconiosis asbestosis. It would now appear that he has both asbestosis as well as asbestos related pleural thickening.

{¶ 18} 4. On February 5, 2009, relator filed an application for workers' compensation benefits. DuPont refused to certify the industrial claim (No. 08-858079).

{¶ 19} 5. Following an April 14, 2009 hearing, a staff hearing officer ("SHO") allowed the claim for asbestosis based in part on the May 10, 2001 report of Dr. Chinn. The commission officially recognizes May 10, 2001 as the date of diagnosis in this occupational disease claim.

{¶ 20} 6. On November 12, 2008, relator filed an application for permanent total disability ("PTD") compensation.

{¶ 21} 7. Following a September 4, 2009 hearing, an SHO issued an order denying PTD compensation. The SHO's order states in part:

> The Injured Worker is currently at the age of 71. His date last worked was in December of 1993. The Injured Worker simply retired at that time with a normal retirement.
>
> * * *
>
> [T]he last day of work for the Injured Worker was in December of 1993. This was well over 15 years ago. At that

> time, the Injured Worker was 55 years of age. * * * It would seem that the Injured Worker had little intent to continue employment after 1993.

{¶ 22} 8. Earlier, On January 20, 2009, at DuPont's request, relator was examined by Herbert A. Grodner, M.D. In his seven-page narrative report, dated February 6, 2009, Dr. Grodner opines:

> Considering only the condition of pulmonary asbestosis and the pleural changes that are secondary to asbestos exposure, it is my opinion that this gentleman could engage in some type of sustained remunerative employment. He, obviously, should not engage in any employment where he would have exposure to asbestos. In addition, employment that would require significant physical exertion also would not be prudent, since he does have pulmonary function changes, as well as symptoms of shortness of breath and dyspnea. I do feel that he could perform some type of employment that would be considered sedentary or that would require only mild physical exertion.

{¶ 23} 9. On October 15, 2009, relator moved for a change of occupation award under R.C. 4123.57(D).

{¶ 24} 10. Following a March 7, 2011 hearing, a district hearing officer ("DHO") issued an order denying relator's October 15, 2009 motion.

{¶ 25} 11. Relator administratively appealed the DHO's order of March 7, 2011.

{¶ 26} 12. Following an April 28, 2011 hearing, an SHO issued an order that affirms the DHO's order of March 7, 2011 and denies relator's motion. The SHO's order explains:

> It is the order of the Staff Hearing Officer that the Injured Worker's C-86 filed 10/15/2009 is denied.
>
> The Injured Worker is requesting only the first 30 weeks of Change of Occupation benefits under R.C. 4123.57(D), which provides in relevant part:
>
> > If an employee of the state fund employer makes application for a finding and the Administrator finds that the employee has contracted asbestosis as defined in Division (AA) of Section 4123.68 of the Revised Code, and that a change of such employee's

> occupation is medically advisable in order to decrease substantially further exposure to asbestosis, and if the employee, after the finding, has changed or shall change the employee's occupation to an occupation which the exposure to asbestos is substantially decreased, the Administrator shall allow to the employee an amount equal to 50% of the statewide average weekly wage per week for a period of 30 weeks, commencing as of the date of the discontinuance or change.
>
> The Staff Hearing Officer affirms the District Hearing Officer's finding denying the Injured Worker's request for the first 30 weeks of change of occupation benefits for a [sic] reason that the Injured Worker retired in 1993 after having almost 30 years of service. His retirement at the time was [a] typical retirement and had nothing to do with his exposure to asbestos. The Injured Worker did not re-enter the work force after retirement. The Injured Worker was not diagnosed with asbestosis until 2001. For these reasons, the Injured Worker's request for the first 30 weeks of change of occupation benefits is denied.
>
> This finding is consistent with the holdings in [*State ex rel. Regal Ware, Inc. v. Indus. Comm.*, 105 Ohio St.3d 1, 2004-Ohio-6893] and State ex rel. Sayre v. Indus. Comm. (1969), 17 Ohio St. 2d 57, 245 N.E. 2d 827 and State ex rel. Early v. Indus. Comm. (1995), 103 Ohio App. 3d 199, 658 N.E. 2d 1131.
>
> The Staff Hearing Officer did not find the case argued by the Injured Worker, State ex rel. Liposchak v. Indus. Comm. (1995), 73 Ohio St. 3d 194, 652 N.E. 2d 753 to be applicable in that it pertains to the issue of entitlement to permanent and total disability and not change of occupation.

{¶ 27} 13. On May 28, 2011, another SHO mailed an order refusing relator's administrative appeal from the SHO's order of April 28, 2011.

{¶ 28} 14. On July 8, 2011, relator, Gerald R. Quincel, filed this mandamus action.

Conclusions of Law:

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

{¶ 30} R.C. 4123.57(D) provides:

> If an employee of a state fund employer makes application for a finding and the administrator finds that the employee has contracted * * * asbestosis as defined in division (AA) of section 4123.68 of the Revised Code, and that a change of such employee's occupation is medically advisable in order to decrease substantially further exposure to silica dust, asbestos, or coal dust and if the employee, after the finding, has changed or shall change the employee's occupation to an occupation in which the exposure to silica dust, asbestos, or coal dust is substantially decreased, the administrator shall allow to the employee an amount equal to fifty per cent of the statewide average weekly wage per week for a period of thirty weeks, commencing as of the date of the discontinuance or change, and for a period of one hundred weeks immediately following the expiration of the period of thirty weeks, the employee shall receive sixty-six and two-thirds per cent of the loss of wages resulting directly and solely from the change of occupation but not to exceed a maximum of an amount equal to fifty per cent of the statewide average weekly wage per week.

{¶ 31} Implicit in the language of R.C. 4123.57(D) is that the change of occupation or discontinuance of employment must be causally related to the medical advisement that the employee change his occupation in order to decrease substantially further exposure to a toxic dust.

{¶ 32} Here, there is no claim that relator's discontinuance of his employment in 1993 was causally related to any medical advisement that relator change his occupation in order to decrease substantially further exposure to toxic dust.

{¶ 33} The SHO who issued her order following the April 28, 2011 hearing seems to have understood the above analysis of the statute when she wrote that relator's 1993 retirement "had nothing to do with his exposure to asbestos."

{¶ 34} In short, the SHO's statement is right on point.

{¶ 35} Contrary to the above analysis of the statute and the SHO's order denying R.C. 4123.57(D) compensation, relator asserts incorrectly that the commission, through its SHO, denied compensation based upon a finding that relator had voluntarily removed himself from the labor market when he retired in 1993 and never attempted to re-enter the job market. Relator misconstrues the SHO's order.

{¶ 36} In *State ex rel. Baker Material Handling Corp. v. Indus. Comm.*, 69 Ohio St.3d 202 (1994), the court, at paragraph two of the syllabus, states:

> An employee who retires prior to becoming permanently and totally disabled is precluded from eligibility for permanent total disability compensation only if the retirement is voluntary and constitutes an abandonment of the entire job market.

{¶ 37} In *State ex rel. Liposchak v. Indus. Comm.*, 73 Ohio St.3d 194 (1995), Robert E. Liposchak had, in 1980, quit his job at Wheeling-Pittsburgh Steel after he was caught bringing a gun into the plant. Liposchak's activities after that were unclear. At best, he worked sporadic odd jobs and allegedly cared for an invalid couple until their deaths.

{¶ 38} In 1992, 12 years after he quit Wheeling-Pittsburgh, Liposchak was diagnosed with malignant mesothelioma and his industrial claim was allowed for that condition. His subsequent application for PTD compensation was denied by the commission on grounds that he had voluntarily abandoned the workforce prior to his claim that he was PTD.

{¶ 39} In *Liposchak*, the court recognized two factors. First, that mesothelioma, at a minimum, has a latency period of 25-to-30 years. Second, Liposchak did not have an allowed workers' compensation claim for his occupational disease at the time he left Wheeling-Pittsburgh. His mesothelioma did not arise for another 12 years.

{¶ 40} Based on those two factors, the *Liposchak* court concluded:

> Unquestionably, claimant committed an extremely serious offense by taking a gun to work, irrespective of the plant's location in what he perceived to be an unsafe area. Nevertheless, we cannot find that in so doing, the claimant tacitly surrendered a right that did not exist *and* could not be foreseen.

(Emphasis sic.) *Id*. at 196.

{¶ 41} Thus, the *Liposchak* court issued a writ of mandamus ordering the commission to enter a PTD award.

{¶ 42} Relying on *Liposchak*, relator argues that his abandonment of the workforce starting with his 1993 retirement cannot bar an R.C. 4123.57(D) change of occupation

award just as it cannot bar a PTD award. Relator claims that, in 1993, when he retired, he was unaware that he had asbestosis as a result of exposure to asbestos at DuPont and, thus, he cannot be found to have "tacitly surrendered a right that did not exist *and* could not be foreseen." (Emphasis sic.) *Id*.

{¶ 43} Relator's reliance on *Liposchak* is misplaced because his claim for an R.C. 4123.57(D) change of occupation award was not denied because of his workforce abandonment. Thus, even if it could be successfully argued that his workforce abandonment beginning in 1993 cannot bar R.C. 4123.57(D) compensation, he has, nonetheless, failed to show that his discontinuance of employment in 1993 was causally related to the medical advisement that he change his occupation in order to decrease substantially further exposure to a toxic dust.

{¶ 44} Relator also cites to *State ex rel. Regal Ware, Inc. v. Indus. Comm.*, 105 Ohio St.3d 1, 2004-Ohio-6893, for the proposition that a job search is not a prerequisite for an award of the initial 30 weeks of R.C. 4123.57(D) compensation where the claimant is unemployed during that period. In *Regal Ware*, the court deferred to the expertise of the commission which had held that a job search was not required to support the first 30 weeks of compensation to an unemployed claimant.

{¶ 45} Here, relator never claimed that he conducted a job search following the 1993 discontinuance of his employment at DuPont. So, under *Regal Ware*, relator's failure to conduct a job search during the initial 30-week period following his job continuance does not, by itself, bar compensation. But again, relator was not denied R.C. 4123.57(D) compensation for his failure to conduct a job search. Thus, relator's reliance on *Regal Ware* is also misplaced.

{¶ 46} 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).