

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel.	:	
Connie S. Wright,	:	
	:	
Relator,	:	
	:	
v.	:	No. 11AP-745
	:	
Industrial Commission of Ohio	:	(REGULAR CALENDAR)
and Adventure Kingdom, Inc.,	:	
	:	
Respondents.	:	

D E C I S I O N

Rendered on August 28, 2012

The Bainbridge Firm, LLC, Thomas H. Bainbridge, Andrew J. Bainbridge, Christopher J. Yeager, and Carol L. Herdman, for relator.

Michael DeWine, Attorney General, and Elise Porter, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

BRYANT, J.

{¶ 1} Relator, Connie S. Wright, commenced this original action requesting a writ of mandamus that orders respondent Industrial Commission of Ohio to vacate its order denying her temporary total disability compensation beginning November 23, 2010 and to enter an order granting the compensation.

I. Facts and Procedural History

{¶ 2} Pursuant to Civ.R. 53 and Loc.R. 13(M) of the Tenth Appellate District, this matter was referred to a magistrate who issued the appended decision, including findings

of fact and conclusions of law. The magistrate noted the issue to be "whether the reports of Drs. Hawkins and Burke provide some evidence that relator was medically able to return to her former position of employment as a party hostess." (Magistrate's decision, at ¶ 33.) The magistrate concluded neither report provides some evidence. As the magistrate explained, both reports speak only generally in terms of whether relator's injuries are "work prohibitive," a term that is ambiguous and fails to address whether relator's former position of employment is to be included among the work not prohibited. Accordingly, the magistrate determined a writ should issue.

II. Objections

{¶ 3} The commission filed two objections to the magistrate's decision:

The Magistrate erred in finding that a doctor's description of a claimant's psychiatric condition as "not work-prohibitive" is ambiguous, and that the Commission abused its discretion in considering that opinion when denying the claimant's application for temporary total compensation.

The Magistrate ignored the Commission's findings that the claimant had applied for social security benefits, removing her from the workplace and precluding temporary total compensation.

A. *First Objection - Work Prohibitive*

{¶ 4} Respondent's first objection largely reargues those matters adequately addressed in the magistrate's decision.

{¶ 5} Dr. Hawkins' report indicates relator's allowed condition "is a mild non-work prohibitive depressive condition that usually responds to antidepressant medication and psychotherapy. * * * The symptoms are mild and not necessarily work prohibitive." (Magistrate's decision, at ¶ 18.) Although Dr. Hawkins indicates Adventure Kingdom, Inc. employed relator, he does not identify the former position of party hostess or describe any of the duties of the position. Nor does Dr. Hawkins opine whether relator could return to her former position of employment, the question at issue in relator's application for temporary total disability compensation. Lastly, Dr. Hawkins qualified his statement by describing the symptoms as "not necessarily" work prohibitive.

{¶ 6} The magistrate correctly concluded the statement could mean either that no type of work is prohibited or that some, but not all, types of work are prohibited. Accordingly, the opinion is ambiguous as to whether relator's former position of employment is included among the work that is not prohibited and, in particular, whether relator could perform the duties of her position with Adventure Kingdom, Inc. Accordingly, the commission could not properly rely on it to deny relator's application for temporary total disability compensation.

{¶ 7} Dr. Burke similarly opined that relator's "adjustment disorder with depressed mood is mild and non-work prohibitive." (Magistrate's decision, at ¶ 25.) For the same reasons, the report of Dr. Burke, like that of Dr. Hawkins, is ambiguous, did not determine whether relator's former position of employment is included among the not prohibited work, and did not address relator's ability to return to her former position of employment. As a result, his opinion, like that of Dr. Hawkins, is not some evidence on which the commission could rely, absent clarification of the ambiguity. *See State ex rel. Chrysler Corp. v. Indus. Comm.*, 81 Ohio St.3d 158 (1998).

{¶ 8} The commission's first objection is overruled.

B. Second Objection - Social Security Benefits

{¶ 9} Respondent's second objection contends the magistrate failed to recognize, as the staff hearing officer's order pointed out, that relator applied for Social Security benefits, thereby removing herself from the workforce and precluding an award of temporary total disability compensation.

{¶ 10} Although respondent does not cite *State ex rel. Pierron v. Indus. Comm.*, 120 Ohio St.3d 40, 2008-Ohio-5245, its argument appears to be based on the theory articulated in that decision. *Pierron* concluded a claimant who has removed himself or herself from the workforce may not receive temporary total disability benefits, as those benefits are intended to compensate for wages lost while the industrial injury heals. The staff hearing officer's order, as it now stands, fails to support the application of *Pierron*.

{¶ 11} The order states relator "has not worked since the date of injury in 2005 and has applied to receive social security benefits indicating that she is removed from all employment considerations." (Magistrate's decision, at ¶ 28.) Initially, the order does not state whether relator applied for Social Security disability benefits or Social Security

retirement benefits. While the former may preclude employment, the latter does not. Nor does the staff hearing officer's order specify whether relator received the benefits; a denied application for disability benefits may encourage future employment. Lastly, the staff hearing officer cites no authority for the proposition that relator's circumstances removed her from the workforce. As a result, the order fails to comply with *State ex rel. Noll v. Indus. Comm.*, 57 Ohio St.3d 203 (1991).

{¶ 12} Respondent's second objection is overruled.

III. Disposition

{¶ 13} Following independent review pursuant to Civ.R. 53, we find the magistrate has properly determined the pertinent facts and applied salient law to them. Accordingly, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law in it. In accordance with the magistrate's decision, we grant a writ of mandamus that orders the commission to vacate its staff hearing officer's order of March 29, 2011 and, in manner consistent with the magistrate's decision adopted here, enter a new order that complies with *Noll* and is supported by some evidence.

*Objections overruled;
writ granted.*

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

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel.	:	
Connie S. Wright,	:	
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Relator,	:	
	:	
v.	:	No. 11AP-745
	:	
Industrial Commission of Ohio	:	(REGULAR CALENDAR)
and Adventure Kingdom, Inc.,	:	
	:	
Respondents.	:	

MAGISTRATE'S DECISION

Rendered on February 27, 2012

The Bainbridge Firm, LLC, Thomas H. Bainbridge, Andrew J. Bainbridge, Christopher J. Yeager, and Carol L. Herdman, for relator.

Michael DeWine, Attorney General, and Elise Porter, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶ 14} In this original action, relator, Connie S. Wright, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission"), to

vacate its order denying her temporary total disability ("TTD") compensation beginning November 23, 2010, and to enter an order granting the compensation.

Findings of Fact:

{¶ 15} 1. On March 23, 2005, relator injured her right leg, lower back, and right knee while employed as "party hostess" for respondent Adventure Kingdom, Inc., a state-fund employer.

{¶ 16} 2. The industrial claim (No. 05-327894) was initially allowed for:

Contusion of right lower leg; lumbar sprain; medial meniscus tear of the right knee; lumbar radiculopathy at L4-5; lumbosacral spondylosis; osteoarthritis right knee.

{¶ 17} 3. On March 30, 2010, at her counsel's request, relator was examined by psychologist Ralph Skillings, Ph.D. In his three-page narrative report, Dr. Skillings wrote:

DIAGNOSTIC IMPRESSION:

Axis I: 309.0 Adjustment Disorder with Depressed Mood
 Axis II: V71.09 No diagnosis
 Axis III: Physical: R medial meniscus
 Lumbar radiculopathy
 Lumbosacral spondylosis
 Osteoarthritis of R knee
 Axis IV: Stress: Psychosocial work problems
 Axis V: Current GAF: 63

OPINION:

In light of her complaints of upset following her significant work injury and range of motion due to pain it is reasonable to conclude that she has developed a reactive depression condition. It is further my opinion this condition is a direct and proximate result of the industrial injury and its sequellae, notably chronic pain. She would be expected to benefit from a trial of outpatient psychological counseling to address these emotions as well as psychotropic medication.

{¶ 18} 4. On June 3, 2010, at the request of the Ohio Bureau of Workers' Compensation ("bureau"), relator was examined by James R. Hawkins, M.D. In his nine-page narrative report dated June 17, 2010, Dr. Hawkins opined:

Medical evidence and examination findings do support the presence of an Adjustment Disorder. This is a mild non-work prohibitive depressive condition that usually responds to

antidepressant medication and psychotherapy. [She] agrees that she has a mild as opposed to a severe depression.

* * *

An Adjustment Disorder with Depressed Mood is a response to a stressor that is time limited. The symptoms are mild and not necessarily work prohibitive. There is an identified stressor, in this case her knee and back injury, and the psychological symptoms are not severe. In my opinion, my findings support a diagnosis of Adjustment Disorder with Depressed Mood. * * *

{¶ 19} 5. On May 13, 2010, relator moved for the allowance of additional conditions in the claim.

{¶ 20} 6. Following a July 19, 2010 hearing, a district hearing officer ("DHO") issued an order additionally allowing the claim for "Adjustment Disorder" based upon the reports of Drs. Skillings and Hawkins.

{¶ 21} 7. Apparently, the DHO's order was not administratively appealed.

{¶ 22} 8. On November 30, 2010, relator was initially examined by psychologist Keli A. Yee, Psy.D., for treatment. On that date, Dr. Yee wrote:

Treatment Plan: Increase mental health functioning and appropriate adjustment; decrease depressive and anxious symptoms related to injury; increase support.

Summary of Symptoms: poor motivation, reduced concentration, reduced enjoyment in activities, is easily frustrated, and crying spells.

Narrative: Connie was on time for her appointment and presents as depressed. She has already seen Drs. Skillings, Hawkins, Blankenship, and Dr. Weinstein with a 21% PPI. She was allowed her Brief Depressive Reaction 8-11-10. She reported an increase in irritability, poor sleep, increase in racing thoughts, and feeling overall achy. She may have a dx of Reynolds or Fibro. She stated she has changed from a size 4 to a size 16, and is struggle [sic] with poor self esteem, and poor self concept. She noted very little patience with others, and would not be nice to other people. She feels sad all the time. She has problems paying attention to tasks, which affect her ability to finish things, or complete them in a timely manner. She is easily frustrated. Introduced her to basic

breathing technique and the concept of calming the body so she is able to think better. Encouraged her to work on treatment goals and where she sees herself in the future.

{¶ 23} 9. On November 23, 2010, Dr. Yee completed a C-84 on which she certified temporary total disability beginning November 23, 2010 to an estimated return-to-work date of May 23, 2011. Apparently, the C-84 was not filed until December 15, 2010.

{¶ 24} The C-84 form asks the attending physician to state objective and subjective "clinical findings [that] are the basis of [the] recommendations." For objective findings, Dr. Yee wrote "Depression." For subjective findings, Dr. Yee wrote "sadness, irritability, withdrawal."

{¶ 25} 10. Apparently, the November 23, 2010 C-84 from Dr. Yee prompted the bureau to seek a medical or psychiatric records review from psychiatrist Charles S. Burke, M.D. In his three-page narrative report dated December 21, 2010, Dr. Burke opined:

In summary, there is substantial support for the diagnosis of adjustment disorder with depressed mood 309.0 according to DSM-IV standards regarding [relator's] history. It is noted that she does have the Ohio Bureau of Workers' Compensation allowed condition of brief depressive reaction (309.0 adjustment disorder with depressed mood). Her responses to psychotherapy and medication are not noted in the records reviewed. There is prominent information that the above-noted adjustment disorder with depressed mood is mild and non-work prohibitive.

Therefore, in response to the question specifically being asked on this evaluation, it is my opinion that the records reviewed do not support to a reasonable degree of medical probability that the allowed condition of brief depressive reaction renders [relator] disabled from 11-23-10 to continue, as it is related to a 3-23-05 industrial injury.

{¶ 26} 11. Following a February 10, 2011 hearing, a DHO issued an order denying the C-84 request for TTD compensation beginning November 23, 2010. The DHO's order explains:

It is the order of the District Hearing Officer that the C-84 Request for Temporary Total Compensation, filed by Injured Worker on 12/15/2010, is denied.

The District Hearing Officer finds that there is not sufficient medical evidence to support a finding that the Injured Worker is temporarily and totally disabled as the direct result of the allowed condition of adjustment disorder. The claim was amended to include the adjustment disorder following evaluations with Drs. Skillings and Hawkins. Dr. Skillings noted the Injured Worker's depression to be mild and Dr. Hawkins opined that the condition was not work prohibitive.

The Injured Worker requests the payment of temporary total disability compensation beginning 11/23/2010, her first evaluation with Dr. Yee. As there are no treatment records on file, it is unclear why Dr. Yee finds the adjustment disorder to be work prohibitive. Therefore, the District Hearing Officer orders that temporary total disability compensation from 11/23/2010 to 02/10/2011 be denied. This order is based on the reports from Drs. Skillings and Hawkins and the review of Dr. Burke.

{¶ 27} 12. Relator administratively appealed the DHO's order of February 10, 2011.

{¶ 28} 13. Following a March 29, 2011 hearing, a staff hearing officer ("SHO") issued an order affirming the DHO's order of February 10, 2011. The SHO's order explains:

It is the order of the Staff Hearing Officer that the Injured Worker's C-84, filed 12/15/2010, is denied.

The Staff Hearing Officer agrees with the reasoning and decision of the District Hearing Officer in denying the request for temporary total disability compensation beginning 11/23/2010 through 03/29/2011 due to the allowed psychological condition based on the 06/30/2010 report of Dr. Hawkins and the 12/21/2010 report of Dr. Burke who both indicate that the allowed psychological condition is mild in severity and not work-prohibitive, which would by necessity include the former position of employment. Additionally, the Injured Worker indicated that she has not worked since the date of injury in 2005 and has applied to receive social security benefits indicating that she is removed from all employment considerations. As there appear no wages to replace, temporary total disability compensation is not found to be properly payable in this situation.

{¶ 29} 14. On April 21, 2011, another SHO mailed an order refusing relator's administrative appeal from the SHO's order of March 29, 2011.

{¶ 30} 15. On July 2, 2011, the three-member commission, on a 2 to 1 vote, mailed an order denying relator's request for reconsideration.

{¶ 31} 16. On August 30, 2011, relator, Connie S. Wright, filed this mandamus action.

Conclusions of Law:

{¶ 32} In denying relator's request for TTD compensation, the commission, through its SHO, relied upon the June 30, 2010 report of Dr. Hawkins and the December 21, 2010 report of Dr. Burke.

{¶ 33} The issue here is whether the reports of Drs. Hawkins and Burke provide some evidence that relator was medically able to return to her former position of employment as a party hostess.

{¶ 34} Finding that neither report provides some evidence of an ability to return to the former position of employment, it is the magistrate's decision that this court issue a writ of mandamus, as more fully explained below.

{¶ 35} It is well-settled that temporary total disability under R.C. 4123.56 is the inability to return to the former position of employment due to the industrial injury. *State ex rel. Ramirez v. Indus. Comm.*, 69 Ohio St.2d 630 (1982).

{¶ 36} Equivocal medical opinions are not evidence. *State ex rel. Eberhardt v. Flxible Corp.*, 70 Ohio St.3d 649, 657 (1994). Equivocation occurs when a doctor repudiates an earlier opinion, renders contradictory or uncertain opinions or fails to clarify an ambiguous statement. *Id.*

{¶ 37} In his June 30, 2010 report, Dr. Hawkins opines:

Medical evidence and examination findings do support the presence of an Adjustment Disorder. This is a mild non-work prohibitive depressive condition that usually responds to antidepressant medication and psychotherapy. * * *

* * *

An Adjustment Disorder with Depressed Mood is a response to a stressor that is time limited. The symptoms are mild and not necessarily work prohibitive. * * *

{¶ 38} Significantly, the bureau did not ask Dr. Hawkins whether, in his opinion, relator could return to her former position of employment. In his report, Dr. Hawkins answers six questions that the bureau posed. Whether or not relator could return to her former position of employment was not among the six questions posed. Moreover, while indicating that relator "was employed by Adventure Kingdom," Dr. Hawkins never identifies the former position of party hostess nor does he describe any of the duties of that position. *See State ex rel. Braswell v. Indus. Comm.*, 25 Ohio St.3d 61 (1986) (physician must be sufficiently apprised of the duties of the former position of employment).

{¶ 39} Significantly, speaking in general regarding the nature of an adjustment disorder, Dr. Hawkins states that "[t]he symptoms are mild and not necessarily work prohibitive." (Emphasis added.)

{¶ 40} The magistrate agrees with relator that the term "work prohibitive" becomes ambiguous when the term is used to state that a condition is not work prohibitive. In that situation, the statement could mean that no type of work is prohibited or it could mean that some, but not all, types of work are prohibited. When it is said that a condition is not work prohibitive, it is not clear whether the former position of employment is to be included among the work that is not prohibited.

{¶ 41} Given the above analysis, the magistrate concludes that Dr. Hawkins' report fails to provide some evidence that the psychological condition permits relator to return to her former position of employment.

{¶ 42} In his December 21, 2010 report, Dr. Burke opines:

There is prominent information that the above-noted adjustment disorder with depressed mood is mild and non-work prohibitive.

{¶ 43} Significantly, the bureau did not ask Dr. Burke to opine as to whether the adjustment disorder prohibits relator from returning to her former position of employment.

{¶ 44} Dr. Burke's statement that the adjustment disorder is "non-work prohibitive" is ambiguous. The statement could mean that no type of work is prohibited or it could mean that some, but not all, types of work are prohibited. When Dr. Burke states that the adjustment disorder is "non-work prohibitive," it is not clear whether the former position of employment is to be included among the work that is not prohibited.

{¶ 45} Given the above analysis, the magistrate concludes that the SHO's order of March 29, 2011 is not supported by the evidence upon which the SHO relied.

{¶ 46} Accordingly, it is the magistrate's decision that this court issue a writ of mandamus ordering the commission to vacate its SHO's order of March 29, 2011 and, in a manner consistent with this magistrate's decision, enter a new order supported by some evidence.

/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).