[Cite as *State ex rel. Kroger Co. v. Wedge*, 2012-Ohio-4073.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. The Kroger Company,	:	
Relator,	:	
		No. 11AP-631
v.	:	
		(REGULAR CALENDAR)
Carla Wedge and Industrial Commission of Ohio,	:	
	:	
Respondents.	:	

D E C I S I O N

Rendered on September 6, 2012

Bugbee & Conkle, LLP, and *Andrew J. Wilhelms*, for relator.

Gene Borgstahl and *Mark A. Skeldon*, for respondent Carla Wedge.

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

IN MANDAMUS

FRENCH, J.

{¶ 1} Relator, The Kroger Company, filed an original action, which asks this court to issue a writ of mandamus ordering respondent, the Industrial Commission of Ohio ("commission"), to vacate its order, which granted an award of permanent total disability ("PTD") compensation to claimant, Carla Wedge ("Wedge"), and ordering the commission to find that she is not entitled to that compensation.

{¶ 2} This matter was referred to a magistrate pursuant to Civ.R. 53(C) and Loc.R. 13(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 because relator has not demonstrated that the commission abused its discretion in awarding PTD compensation to Wedge. No objections to the magistrate's decision have been filed.

{¶ 3} Finding no error of law or other defect in the magistrate's decision, we adopt the 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.

Writ of mandamus denied.

KLATT and SADLER, JJ., concur.

A P P E N D I X

IN THE COURT OF APPEALS OF OHIO

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State of Ohio ex rel. The Kroger Company, :

Relator, :

No. 11AP-631

v. :

(REGULAR CALENDAR)

Carla Wedge and :
Industrial Commission of Ohio,

:

Respondents.

:

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

Rendered on May 30, 2012

Bugbee & Conkle, LLP, *Mark S. Barnes*, *Andrew J. Wilhelms*, and *Janelle M. Matuszak*, for relator.

Gene Borgstahl and *Mark A. Skeldon*, for respondent Carla Wedge.

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

IN MANDAMUS

{¶ 4} Relator, The Kroger Company, 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 which granted an award of permanent total disability ("PTD") compensation to claimant, Carla Wedge ("Wedge"), and ordering the commission to find that she is not entitled to that compensation.

Findings of Fact:

{¶ 5} 1. Wedge has three separate allowed claims incurred during her employment with relator and her workers' compensation claims have been allowed for the following conditions:

> CLAIM #05-828288: Sprain/strain lumbosacral; aggravation of pre-existing spinal stenosis at L4-5; major depressive disorder, single episode, severe, without psychotic features. Disallowed: Herniated lumbar disc at L3-4 and herniated lumbar disc at L4-5.
>
> CLAIM #00-817777: Bilateral carpal tunnel syndrome; left trigger thumb with flexor tenosynovitis.
>
> CLAIM #01-846841: Bilateral knee contusion.

{¶ 6} 2. Wedge has had two surgeries as a result of the injuries she sustained in the 2000 claim: right and left carpal tunnel release and trigger release of the left thumb.

{¶ 7} 3. Wedge's most serious injury occurred when she hurt her back in 2005. Wedge has undergone two back surgeries, the first a "lumbar decompression and a posterior lumbar transforaminal interbody fusion, with a BAK cage, at the L4-5 level, on 03/10/2006" and a "second surgery, consisting of a revision procedure for her previous fusion, * * * on 04/03/2007."

{¶ 8} 4. Wedge remained unable to perform any work, including light-duty or transitional work, one year following her second surgery.

{¶ 9} 5. Wedge was referred to Daniel J. Kuna, Ph.D., for an evaluation. In his July 22, 2008 report, Dr. Kuna opined as follows:

> Ms. Wedge has a history of a depressive reaction due to loss of her daughter pre [date of injury]. Zoloft was in place for a short while but a return to work helped her recover from the depression and function reasonably well. The industrial injury and consequent pain has produced a significant depression with a mild flow through from the loss of her daughter now that claimant is not working. Criteria are met for a Major Depressive Disorder, single episode, severe without psychotic features (296.23). This is clearly caused by the industrial injuries and her pain experience.

> Rehabilitation Psychology treatment is indicated as well as psychiatric consultations.

{¶ 10} 6. Wedge received temporary total disability ("TTD") compensation until January 8, 2010 when, following a hearing before a district hearing officer ("DHO"), Wedge's allowed psychological condition was found to have reached maximum medical improvement ("MMI").

{¶ 11} 7. In June 2010, Wedge filed her application for PTD compensation. At the time, Wedge was 49 years of age and had begun receiving Social Security Disability Benefits. According to her application, Wedge completed the 11th grade when she left in order to obtain a job and she could write well and she could read and perform basic math; however, not well. Wedge also indicated that she used a brace for her back and had participated in rehabilitation activities on several occasions.

{¶ 12} 8. The commission referred Wedge to Robert A. Muehleisen, Ph.D., for a psychological evaluation. In his October 7, 2010 report, Dr. Muehleisen discussed the medical evidence which he reviewed and discussed her mental status at the time of his examination. Concerning impairment, Dr. Muehleisen opined that Wedge had a "Class 2" impairment in her activities of daily living and her adaptation to workplace stress as well as a "Class 3" level impairment in terms of social functioning, concentration, persistence, and pace. Dr. Muehleisen opined further that her allowed psychological condition had reached MMI, assessed a 25 percent permanent whole person impairment, and concluded that she could perform work provided she be limited to simple and repetitive tasks which did not require a high level of interpersonal cooperation.

{¶ 13} 9. Relator had Wedge evaluated by Michael A. Murphy, Ph.D. In his July 28, 2010 report, Dr. Murphy identified and discussed the medical records which he reviewed and concluded that her impairment was mild. Dr. Murphy concluded that Wedge's allowed psychological condition had reached MMI and that she could return to her former position of employment as a clerk.

{¶ 14} 10. The commission had Wedge evaluated by Donato J. Borrillo, M.D., for her allowed physical conditions. In his September 5, 2010 report, Dr. Borrillo correctly

listed the allowed physical conditions, and identified the medical records which he reviewed. Thereafter, Dr. Borrillo provided his physical findings upon examination and concluded that her physical conditions had reached MMI. Concerning the percentage of impairment for the allowed conditions, Dr. Borrillo stated:

> The allowed bilateral knee contusions present with zero percent (0%) whole person impairment. The right knee has a varicose vein; however, this is not an allowed condition.
>
> The allowed bilateral carpal tunnel syndrome presents with five percent (5%) upper extremity impairment for the right upper extremity, or three percent (3%) whole person impairment, IAW table 16-3, page 439 and page 495, for residual median nerve impairment post surgical decompression. The left upper extremity similarly has five percent (5%) upper extremity impairment; however, the left thumb trigger release and tenosynovitis presents with 4% hand, 4% upper extremity, combined with the left CTS upper extremity total is nine percent (9%), or five percent (5%) whole person impairment, IAW 16-2, 16-3 page 439. This takes into account thumb function and range of motion. Claim 00-817777 presents with eight percent (8%) whole person impairment.
>
> Lastly, claim 05-828288 is allowed for lumbosacral sprain/strain and aggravation of pre-existing spinal stenosis L4-L5. This condition(s) was addressed surgically and meets the criteria for Lumbar DRE Category III impairment, thirteen percent (13%) whole person impairment, table 15-3 page 384.
>
> In my medical opinion, Ms. Wedge presents with a combined whole person impairment of twenty percent (20%) utilizing combined values chart on page 604.

Ultimately, Dr. Borrillo concluded that Wedge was incapable of returning to work as follows:

> In my medical opinion, the injured worker is incapable of returning to work. She is unable to perform bilateral upper extremity repetitive movements and she had a significant lower back injury requiring multiple surgeries. Ms. Wedge is not capable of performing sedentary duty and has persistent

> symptoms and limitations in range of motion (unable to bend, twist, climb, or squat safely).

{¶ 15} 11. Wedge's application for PTD compensation was heard before a staff hearing officer ("SHO") on January 10, 2011. The SHO did not find the report of Dr. Kuna to be persuasive. Instead, the SHO relied upon the October 7, 2010 report of Dr. Muehleisen who opined that she had a 25 percent whole person impairment due to her allowed depressive disorder and concluded that, due solely to her allowed psychological condition, Wedge was capable of work provided that she be limited to simple and repetitive tasks which did not require a high level of interpersonal cooperation. The SHO stated:

> [I]t is the finding of this Staff Hearing Officer that the Injured Worker's disability, relative to the impairment of her residual functional capacity resulting from impairment due to the allowed psychological condition in this claim, is not work prohibitive. However, that disability does create very significant barriers in regard to her ability to return to employment within her residual functional capacity, as there are very few jobs in the workforce that are simple repetitive tasks, not requiring a high level of interpersonal cooperation and also within her physical residuals.

(Emphasis sic.) Concerning the allowed physical conditions, the SHO found Dr. Borrillo's report persuasive and determined that Wedge was incapable of performing some sustained remunerative employment as follows:

> [T]his adjudicator finds that the medical impairment, resulting from the allowed conditions in Claim #05-828288 and Claim #00-817777, prohibits the Injured Worker's return to her former position of employment, as well as prohibits the Injured Worker from performing any sustained remunerative employment. Therefore, the Injured Worker shall be, and hereby is, found to be permanently and totally disabled, without reference to the vocational factors listed in paragraph (B) (3) of Industrial Commission Rule 4121-3-34, pursuant to Industrial Commission Rule 4121-3-34(D) (2) (a).

{¶ 16} 12. Relator's request for reconsideration was denied by order of the commission mailed March 16, 2011.

{¶ 17} 13. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶ 18} Relator contends that the commission abused its discretion by finding that Wedge was permanently and totally disabled. Specifically, relator argues that the report of Dr. Borrillo is inconsistent and that he relied on non-allowed conditions. Further, relator contends that the commission abused its discretion by adopting Dr. Borrillo's findings as its own, failed to enunciate specifically what physical factors precluded her ability to return to sustained remunerative employment, and failed to explain the causal connection between the allowed conditions and Wedge's inability to return to work. Relator's final argument is that there is not some evidence in the record upon which the commission could properly rely to find that Wedge was permanently and totally disabled.

{¶ 19} For the reasons that follow, the magistrate finds that Dr. Borrillo's report is not inconsistent and he did not rely on non-allowed conditions. Further, there is some evidence upon which the commission could and did rely, and the commission's explanation is sufficient. It is the magistrate's decision that this court should deny relator's request for a writ of mandamus.

{¶ 20} In order for this court to issue a writ of mandamus as a remedy from a determination of the commission, relator must show a clear legal right to the relief sought and that the commission has a clear legal duty to provide such relief. *State ex rel. Pressley v. Indus. Comm.*, 11 Ohio St.2d 141 (1967). A clear legal right to a writ of mandamus exists where the relator shows that the commission abused its discretion by entering an order which is not supported by any evidence in the record. *State ex rel. Elliott v. Indus. Comm.*, 26 Ohio St.3d 76 (1986). On the other hand, where the record contains some evidence to support the commission's findings, there has been no abuse of discretion and mandamus is not appropriate. *State ex rel. Lewis v. Diamond Foundry Co.*, 29 Ohio St.3d 56 (1987). Furthermore, questions of credibility and the weight to be given evidence are clearly within the discretion of the commission as fact finder. *State ex rel. Teece v. Indus. Comm.*, 68 Ohio St.2d 165 (1981).

{¶ 21} The relevant inquiry in a determination of permanent total disability is claimant's ability to do any sustained remunerative employment. *State ex rel. Domjancic v. Indus. Comm.*, 69 Ohio St.3d 693 (1994). Generally, in making this determination, the commission must consider not only medical impairments but also the claimant's age, education, work record and other relevant non-medical factors. *State ex rel. Stephenson v. Indus. Comm.*, 31 Ohio St.3d 167 (1987). Thus, a claimant's medical capacity to work is not dispositive if the claimant's non-medical factors foreclose employability. *State ex rel. Gay v. Mihm*, 68 Ohio St.3d 315 (1994). The commission must also specify in its order what evidence has been relied upon and briefly explain the reasoning for its decision. *State ex rel. Noll v. Indus. Comm.*, 57 Ohio St.3d 203 (1991).

{¶ 22} Relator's first argument is that the report of Dr. Borrillo cannot constitute some evidence upon which the commission could rely because it is internally inconsistent. Specifically, relator contends that Dr. Borrillo's low impairment of 20 percent is inconsistent with his conclusion that Wedge is incapable of returning to even sedentary work.

{¶ 23} It is undisputed that equivocal or internally inconsistent medical reports do not constitute "some evidence" upon which the commission can rely. *State ex rel. Eberhardt v. Flxible Corp.*, 70 Ohio St.3d 649 (1994); *State ex rel. Lopez v. Indus. Comm.*, 69 Ohio St.3d 445 (1994); *State ex rel. Paragon v. Indus. Comm.*, 5 Ohio St.3d 72 (1983). The Supreme Court of Ohio summarized the distinction between ambiguous, equivocal, and repudiated reports as follows:

> [E]quivocal medical opinions are not evidence. See, also, *State ex rel. Woodard v. Frigidaire Div., Gen. Motors Corp.* (1985), 18 Ohio St.3d 110, 113, 18 OBR 143, 145, 480 N.E.2d 403, 406; [*State ex rel. Kokocinski v. Indus.Comm.* 11 Ohio St.3d 186] at 188-189, 11 OBR at 501, 464 N.E.2d at 566. Such opinions are of no probative value. Further, equivocation occurs when a doctor repudiates an earlier opinion, renders contradictory or uncertain opinions, or fails to clarify an ambiguous statement. Ambiguous statements, however, are considered equivocal only while they are unclarified. *Paragon, supra.* Thus, once clarified, such statements fall outside the boundaries of [*State ex rel.*

> *Jennings v. Indus.Comm.* (1982), 1 Ohio St.3d 101], and its progeny.

Eberhardt at 657. The court went on to state:

> Repudiated, contradictory or uncertain statements reveal that the doctor is not sure what he means and, therefore, they are inherently unreliable. Such statements relate to the doctor's position on a critical issue. *Id.*

{¶ 24} In support of its argument, relator cites from a recent decision of the Supreme Court of Ohio dealing with percentage of impairment and loss of use. *State ex rel. Kroger Co. v. Johnson*, 128 Ohio St.3d 243, 2011-Ohio-530. In *Kroger*, the issue before the commission was whether or not Dan C. Johnson had sustained a total loss of use of his right hand. Dr. Renneker assessed a 27 percent hand impairment and then concluded that Johnson had sustained a total loss of use of his hand. The court stated:

> Because percentage figures alone do not always tell the whole story, a doctor's opinion as to whether "for all practical purposes" the claimant has lost all use of the affected member is critically important. When a medical report contains both a narrative opinion and a percentage figure—as is frequently the case—the two must be reconcilable, because an internally inconsistent medical report is not evidence on which the commission can rely. *State ex rel. Lopez v. Indus. Comm.* (1994), 69 Ohio St.3d 445, 449, 633 N.E.2d 528.
>
> In the instant case, the court of appeals found that Dr. Renneker's assessment of a 27 percent hand impairment could not be reconciled with her conclusion that Johnson had lost the total use of that member. We agree. "Impairment" is defined as the "amount of a claimant's anatomical and/or mental loss of function." *State ex rel. Stephenson v. Indus. Comm.* (1987), 31 Ohio St.3d 167, 171, 31 OBR 369, 509 N.E.2d 946. Johnson's 27 percent loss of function meant that he retained 73 percent of his hand's use, which does not equate to a total loss.

Kroger at ¶ 17-18.

{¶ 25} In making this argument here, relator contends that "[a]s a practical matter, a 20% whole person impairment, the impairment found by Dr. Borrillo, is

relatively low because this finding means respondent retains 80% functionality." (Relator's brief at 8.) Relator suggests that this court should treat PTD cases in the same manner as loss of use cases; however, the two are not synonymous.

{¶ 26} This court has discussed this same issue recently in a PTD case. *State ex rel. Randolph v. Indus. Comm.*, 10th Dist. No. 10AP-572, 2011-Ohio-4053. In *Randolph*, Dr. Lutz had opined that the injured worker, Jonathan Randolph, had a 13 percent whole person impairment. Thereafter, Dr. Lutz stated that he was incapable of work. The magistrate found his report to be internally inconsistent and that it could not be some evidence upon which the commission could rely. However, after noting that the commission had not relied on Dr. Lutz's report, this court rejected the magistrate's determination that the low percentage of impairment (13 percent) was necessarily inconsistent with a finding that *Randolph* was incapable of working and found that, on remand, the commission could rely on that report.

{¶ 27} In the present case, after concluding that Wedge had a 20 percent whole person impairment, Dr. Borrillo stated:

> In my medical opinion, the injured worker is incapable of returning to work. She is unable to perform bilateral upper extremity repetitive movements and she had a significant lower back injury requiring multiple surgeries. Ms. Wedge is not capable of performing sedentary duty and has persistent symptoms and limitations in range of motion (unable to bend, twist, climb, or squat safely).

{¶ 28} Dr. Borrillo explained why, in his opinion, Wedge was incapable of returning to work. He first noted that she was unable to perform bilateral upper extremity repetitive movements. Next, Dr. Borrillo noted that Wedge's lower back injury was significant and that she was not capable of performing at a sedentary level. And last, Dr. Borrillo noted that Wedge has persistent symptoms and limitations in her range of motion (unable to bend, twist, climb or squat safely). Dr. Borrillo provided an explanation for why, in his opinion, Wedge was incapable of returning to work in spite of a 20 percent impairment. The magistrate finds that the report did constitute some evidence upon which the commission could rely.

{¶ 29} Relator also contends that Dr. Borrillo considered the non-allowed condition of tenosynovitis. The magistrate finds relator's argument contradicts the facts.

{¶ 30} It is undisputed that allowed and non-allowed conditions may not be combined to support a finding of permanent and total disability. *State ex rel. LTV Steel, Co. v. Indus. Comm.*, 65 Ohio St.3d 22 (1992). Compensation cannot be awarded based either in whole or in part on non-allowed conditions. *State ex rel. Waddle v. Indus. Comm.*, 67 Ohio St.3d 452 (1993).

{¶ 31} Frankly, the magistrate does not understand relator's argument specifically because Wedge's claim is allowed for left trigger thumb with flexor tenosynovitis. In his report, Dr. Borrillo correctly identified the allowed conditions in claim #00-817777: "Bilateral carpal tunnel syndrome; left trigger thumb with flexor tenosynovitis." Further, when Dr. Borrillo set out his percentages of impairment, he again correctly identified the allowed conditions of left thumb trigger release and tenosynovitis and indicated that it presented a four percent hand and a four percent upper extremity impairment. The magistrate finds that there is nothing in Dr. Borrillo's report that would indicate that he considered non-allowed conditions in rendering his opinion.

{¶ 32} Relator next contends that the commission improperly adopted Dr. Borrillo's findings. Specifically, relator states as follows in its brief:

> While it is permissible for the Commission to rely on medical reports in support of its decisions, it is <u>not permissible</u> for the Commission to adopt the findings of a medical report, without questioning such, and adopting the medical report as its own. *Stephenson* 31 Ohio St.3d at 171; *State ex rel. Hayes v. Indus. Comm.* (1997), 78 Ohio St.3d 572, 679 N.E.2d 295. As the Supreme Court has held, "to do so would be tantamount to allowing a physician to determine disability rather than the commission." *Stephenson* 31 Ohio St.3d at 171.

(Emphasis sic.) (Relator's brief at 11.)

{¶ 33} Relator's quote from *Stephenson* is incomplete. The Supreme Court of Ohio never made the statement that relator indicates. Instead, and without quoting the entire decision, the court stated as follows:

> [T]he commission relies upon the doctors' reports. These usually include the examination of the claimant and a medical analysis of the physical condition highlighting the allowed injury. The doctors' determination of the severity of the physical condition generally presents a conclusion as to the examinee's percentage of physical impairment of function. Doctors' reports regularly use the words "disability" and "impairment" interchangeably, which use is not in accordance with the Medical Examination Manual issued by the Industrial Commission. However, in the context of the medical report, it may be concluded that reference to the claimant's physical impairment is generally intended. * * *
>
> Additionally, doctors' reports quite regularly indicate their opinion as to whether a claimant would be able to perform his prior employment functions, or any employment functions. These types of conclusions arguably go beyond the question of impairment and transcend into the job market-disability issue. The fact that a doctor's report offers an opinion as to the ultimate fact to be determined by the commission does not necessarily detract from the reliability of the report. The utilization of the term "disability" by doctors in their reports has been tacitly recognized over the years by this court in our opinions and syllabus law. Yet it remains the ultimate authority and duty of the commission to determine the totality and permanency of the allowed injury. The commission is not required to accept the factual findings stated in a medical report at face value and, without questioning such, adopt the conclusions as those of the commission. This court, in *State, ex rel. Teece, v. Indus. Comm.* (1981), 68 Ohio St.2d 165, 22 O.O.3d 400, 429 N.E.2d 433, stated that to do so would be tantamount to allowing a physician to determine disability rather than the commission. Questions of credibility and the weight to be given evidence are clearly within the commission's discretionary powers. See, generally, *State, ex rel. Ohio Bell Telephone Co., v. Krise* (1975), 42 Ohio St.2d 247, 71 O.O.2d 226, 327 N.E.2d 756.

Stephenson at 171.

{¶ 34} As can be seen, nowhere did the *Stephenson* court say that it was not permissible for the commission to adopt the findings of a medical report; instead, the court stated that the commission is not required to accept the factual findings stated in a medical report at face value and, without questioning such, adopt the conclusions as those of the commission. While the commission is not required to accept the factual findings, nothing in *Stephenson* forbids it.

{¶ 35} Relator's final argument is that there is not some evidence in the record to support the commission's conclusion that Wedge is permanently and totally disabled. Relator's argument relies on the finding that Dr. Borrillo's report is internally inconsistent and based on a non-allowed condition and, thus, cannot constitute some evidence upon which the commission could have relied. However, as noted previously, the magistrate finds that Dr. Borrillo's report is not internally inconsistent and he did not base his opinion in part on any non-allowed condition. As such, Dr. Borrillo's report constitutes some evidence.

{¶ 36} Based on the foregoing, it is this magistrate's decision that relator has not demonstrated that the commission abused its discretion in awarding PTD compensation to Carla Wedge and this court should deny relator's request for a writ of mandamus.

/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).