[Cite as *State ex rel. Roeller v. Indus. Comm.*, 2013-Ohio-1056.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Thomas F. Roeller,	:	
Relator,	:	
v.	:	No. 11AP-1002
Industrial Commission of Ohio and Toyota of Cincinnati Co.,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on March 21, 2013

Charles Zamora Co., L.P.A., and *Karen D. Turano*, for relator.

Michael DeWine, Attorney General, and *Corinna V. Efkeman*, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

CONNOR, J.

{¶ 1} Relator, Thomas F. Roeller ("relator"), 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 denying her application for permanent total disability ("PTD") compensation and to issue a new order awarding PTD compensation.

{¶ 2} The court referred this matter 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,

including findings of fact and conclusions of law, which is appended to this decision. Therein, the magistrate concluded the report of Albert Wolkoff, M.D., F.A.P.A. ("Dr. Wolkoff"), was not equivocal, contradictory, or internally inconsistent and relator failed to demonstrate it should be removed from evidentiary consideration. Consequently, the magistrate found it constituted some evidence upon which the commission could rely. The magistrate further found the commission did not abuse its discretion by finding relator's age and work history were assets to his ability to become re-employed. Specifically, the magistrate noted that the commission actually found relator's age to be a neutral factor. In addition, the magistrate found the commission's analysis of the nonmedical disability factors was sufficient, particularly noting relator's long work history, which demonstrated a strong desire to work and the ability to learn new tasks on the job. As a result, the magistrate denied relator's request for a writ of mandamus.

{¶ 3} Relator filed objections to the magistrate's decision. The commission filed a memorandum opposing the objections. This cause is now before the court for a full review regarding relator's objections. Although relator's objections involve essentially the same arguments which were presented to and considered by the magistrate, we shall briefly address them.

{¶ 4} Relator raises the following three objections:

> [I.] The Magistrate Erred By Concluding The Industrial Commission Did Not Abuse Its Discretion By Relying On Dr. Wolkoff's Report Which Set Such a Significant Restriction Upon Employment That Employment With This Limitation Was Not Attainable.
>
> [II.] The Magistrate Erred By Concluding The Industrial Commission Did Not Abuse Its Discretion By Finding The Vocational Factor Of Age Would Be A Neutral Factor For Employment.
>
> [III.] The Magistrate Erred By Concluding The Industrial Commission Did Not Abuse Its Discretion By Finding The Vocational Factor Of Work History Would Be A "Distinct Asset" for Employment.

{¶ 5} In his first objection, relator argues the magistrate erred in finding the commission did not abuse its discretion by relying on Dr. Wolkoff's report. By restricting relator from engaging in employment involving direct contact with the public, which is the

very type of employment with which relator has experience, relator submits Dr. Wolkoff's report imposes such a significant limitation that it, in effect, renders it impossible for him to sustain remunerative employment. Relator contends the magistrate should have removed Dr. Wolkoff's report from evidentiary consideration. While relator acknowledges the magistrate is correct in finding that the inability to have direct contact with the public does not *automatically* render relator PTD, relator claims that the magistrate ignores the reality of the situation. We disagree with relator's contentions.

{¶ 6} Relator appears to argue, in essence, that he can only work as a salesman and since he is now limited to jobs where he has no contact with the public, he cannot find employment. However, Dr. Wolkoff's report does not preclude relator from working. It only restricts him from working in a job that requires him to have direct contact with the public. We are aware of no authority which indicates that an injured worker must be awarded PTD if he is unable to perform the very same job duties he was performing at the time of the industrial injury. In addition, the commission is not required to enumerate the jobs it believes claimant to be capable of performing. *State ex rel. Mann v. Indus. Comm.*, 80 Ohio St.3d 656, 659 (1998). Furthermore, as noted by the magistrate, issues of credibility and the weight to be given evidence are within the discretion of the commission. Thus, Dr. Wolkoff's report is some evidence upon which the commission can rely. Relator's first objection is overruled.

{¶ 7} In his second objection, relator argues the magistrate erred in determining the commission did not abuse its discretion by finding relator's age of 56 was a neutral factor in assessing his ability to become re-employed. Relator argues the magistrate has ignored the reality of the current job market in which older workers, such as relator, who do not have a college education and who have been out of work for several years, are at a distinct disadvantage. In addition, relator notes his physical and psychological limitations. Relator further submits pursuit of employment-enhancing activities is not realistic, as they would involve additional education and take months or years to complete, and recouping the costs involved would require relator to work well past age 65. Thus, relator contends it is infeasible that he has the ability to learn new skills.

{¶ 8} Pursuant to *State ex rel. Stephenson v. Indus. Comm.*, 31 Ohio St.3d 167 (1987), the commission must consider the nonmedical factors of age, education, and work

history, in addition to other factors, such as physical, psychological, and sociological factors, in its PTD analysis. Thorough consideration of the *Stephenson* factors is essential to the determination of PTD where a claimant's medical capacity to do work is not dispositive and the nonmedical factors indicate that the claimant cannot realistically return to the job market.

{¶ 9} While we acknowledge that the current job market does present certain challenges, there was some evidence before the commission to support its determination that relator is not PTD. Here, the commission determined relator's age was a neutral factor. Specifically, the staff hearing officer ("SHO") stated relator's age "is neither a barrier nor an asset to employment." The SHO found relator had time to pursue employment or employment enhancing activities, particularly given that the traditional retirement age is 65 and the workforce includes older individuals. The commission is the expert on nonmedical factors. *State ex rel. Jackson v. Indus. Comm.*, 79 Ohio St.3d 266 (1997). The commission weighed the facts and reports in evidence in determining the nonmedical disability factors. The commission was within its discretion to determine that relator was not PTD. Accordingly, relator's second objection is overruled.

{¶ 10} Finally, in his third objection, relator argues the magistrate erred in concluding the commission did not abuse its discretion by finding relator's work history was a "distinct asset" for employment. Relator argues the magistrate ignored his actual work history, including the fact that he had held numerous sales jobs within a nine-year period and was terminated from all of those jobs due to his allowed psychological conditions. Relator contends his lengthy work history and ability to learn on the job are not skills that would translate to a new job because his success was based on his ability to interact with people, something he is now restricted from doing. Relator argues this dismal work history is actually a hindrance to finding sustained remunerative employment. Relator further submits his work ethic and work history can no longer be described as a positive factor and argues his history of terminations is actually indicative of an inability to learn new tasks, rather than an ability to learn new tasks.

{¶ 11} We disagree with relator's characterization of his work history. Admittedly, relator has been terminated from numerous jobs since his industrial injury. However, all of the jobs from which relator was terminated were sales jobs which involved interaction

with the public. Contrary to relator's assertions, those terminations are not necessarily indicative of an inability to learn new tasks, but rather of an inability to interact with the public following his accident. His terminations do not necessarily speak to whether or not relator is able to learn new tasks in a different setting. His prior work history, which involved exposure to new technology, suggests that he is.

{¶ 12} Furthermore, we do not believe the SHO's characterization of relator's work history as an asset is an abuse of discretion. The SHO and the magistrate were not referring to relator's multiple terminations as an asset, but rather to relator's overall work history. We agree that relator's 26-year work history, overall, does imply a strong work ethic and note that there is evidence that relator is capable of doing sedentary work and light-duty work that does not involve direct contact with the public. The ability to perform light-duty jobs expands the opportunities available to him for finding work that does not involve direct contact with the public beyond those that would be available if he were limited to simply sedentary jobs.

{¶ 13} We further note that, contrary to relator's contention, the SHO did not find his work history to be a "distinct asset," but simply an asset. (The SHO did find relator's *education* to be a "distinct asset" to re-employment.) It was not an abuse of discretion to find the vocational factor of work history to be an asset for re-employment. Accordingly, relator's third objection is overruled.

{¶ 14} In conclusion, after an independent review, pursuant to Civ.R. 53, we find the magistrate has properly determined the pertinent facts and applied the appropriate law. Therefore, relator's objections to the magistrate's decision are overruled, and we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein. In accordance with the magistrate's decision, we deny the requested writ of mandamus.

Objections overruled;
writ of mandamus denied

BROWN and SADLER, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Thomas F. Roeller,	:	
Relator,	:	
v.	:	No. 11AP-1002
Industrial Commission of Ohio and Toyota of Cincinnati Co.,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on June 27, 2012

Charles Zamora Co., L.P.A., and *Karen D. Turano*, for relator.

Michael DeWine, Attorney General, and *Corinna V. Efkeman*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶ 15} Relator, Thomas F. Roeller, 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 denied relator's application for permanent total disability ("PTD") compensation and ordering the commission to find that he is entitled to that compensation.

Findings of Fact:

{¶ 16} 1. Relator sustained a work-related injury on September 16, 1996 and his workers' compensation claim would ultimately be allowed for the following conditions:

> SPRAIN OF NECK; SPRAIN LUMBAR REGION; LUMBAR DISC DISPLACEMENT AT L5-S1; ADJUSTMENT DISORDER WITH ANXIETY MILD; PERSONALITY CHANGE, LABILE TYPE; DEPRESSIVE DISORDER; POST LAMINECTOMY SYNDROME.

{¶ 17} 2. Relator originally received conservative care for his back pain; however, after failing conservative treatment and due to severe ongoing pain, relator underwent a partial hemilaminectomy and diskectomy at L5-S1 on February 24, 1998.

{¶ 18} 3. Shortly after surgery, claimant sought treatment for psychological problems which had developed following his injury.

{¶ 19} 4. Relator had been a car salesman at the time he was injured and was able to return to the workforce in that capacity following surgery.

{¶ 20} 5. Over the next several years, relator obtained other work in sales; however, due to increasing problems caused by his allowed psychological conditions, relator was not able to keep these jobs. Relator states that his psychological conditions caused him to be terminated from these jobs.

{¶ 21} 6. Relator filed his application for PTD compensation on March 2, 2011. According to his application, relator was 55 years of age, was receiving social security disability compensation, had graduated in high school in 1973, received special training in the form of selling seminars, was able to read, write, and perform basic math and he had participated in rehabilitation services consisting of physical therapy and pain management.

{¶ 22} 7. In support of his application, relator attached the July 14, 2010 report of Jill Krilov, M.D., who opined that relator was permanently and totally disabled due to his allowed psychological conditions. Specifically, Dr. Krilov stated:

> In answer to your letter of July 8, I do believe Mr. Roeller to be permanently and totally disabled from sustained remunerative employment. As you know, in addition to his spinal problems, the accident left Mr. Roeller with impaired short-term memory, labile mood shifts, and poor frustration tolerance, as has been documented in Workers[']

> Compensation documents. I do not believe Mr. Roeller to be capable of any sustained remunerative employment, nor do I believe he will be so in the future.

{¶ 23} 8. Relator also submitted the July 26, 2010 report of Richard H. Normile, Ph.D., who also opined that he was permanently and totally disabled due to his allowed psychological conditions.

{¶ 24} 9. Allen Friedman, M.D., examined relator at the request of the commission. In his June 20, 2011 report, Dr. Friedman identified the medical records which he reviewed, provided his physical findings upon examination, concluded that relator's allowed physical conditions had reached maximum medical improvement ("MMI"), assessed a 15 percent whole person impairment for the allowed physical conditions and opined that relator was capable of performing light work as follows:

> In my opinion, the claimant is capable of light work. Light work means exerting up to twenty pounds of force occasionally, and/or up to ten pounds of force frequently, and/or a negligible amount of force constantly. He is capable of performing sedentary type work.

{¶ 25} 10. Albert Wolkoff, M.D., examined relator for his allowed psychological conditions. In his June 1, 2011 report, Dr. Wolkoff identified the medical records which he reviewed. Dr. Wolkoff opined that relator had a mild ten percent impairment due to his allowed psychological condition, opined that relator's psychological conditions had reached MMI, and opined that relator could return to work with the following restriction:

> He can work, but should not have direct contact with the public.

{¶ 26} 11. Relator's application was heard before a staff hearing officer ("SHO") on September 1, 2011. The SHO relied on the medical report of Dr. Friedman and concluded that relator was capable of performing light-duty work. The commission also relied on the report of Dr. Wolkoff and concluded that relator retained the residual mental/psychological ability to return to the workforce within the stated restriction that he should have no direct contact with the public. Thereafter, the SHO considered the nonmedical factors and opined that relator's age of 56 was a neutral factor, and that his education and work history were both positive factors. Specifically, the SHO stated:

> From a vocational standpoint the Staff Hearing Officer finds that Injured Worker's age is neither a barrier nor an asset to employment in that although Injured Worker is an older individual, he still has time to pursue employment or employment enhancing activities if so motivated to re-enter the work force. This is particularly true when considering that the traditional retirement age is 65 and the work force today is replete with older individuals in non-traditional work settings.
>
> Injured Worker's education is viewed to be a distinct asset to re-employment in that it is adequate for most entry-level sedentary and light positions of employment. Injured Worker can read, write and do basic math per his IC-2 application.
>
> Injured Worker's work history is also viewed as an asset in that it is indicative of an individual with a strong work ethic, a trait that is sought after by potential employer's [sic]. Furthermore, Injured Worker ostensibly learned the duties of his previous jobs via on-the-job training. This demonstrated ability to acquire new job skills in this manner is yet another asset to re-employment in that the Injured Worker at the very least, would be able to learn new skills in this manner should that be necessary. Furthermore, when considering this together with his retained physical ability to engage in up to light level employment, Injured Worker has an even greater opportunity to find work that would comport with his psychological restriction (ie. work that does not involve direct contact with the public)since the universe of potential jobs for him is greater than it would have been had he been limited to only sedentary work.

{¶ 27} 12. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶ 28} Relator contends that the commission abused its discretion by finding that he was not entitled to PTD compensation. Specifically, relator contends that the report of Dr. Wolkoff does not constitute some evidence upon which the commission could rely and that the commission abused its discretion by finding that his age and work history were assets to his ability to be re-employed.

{¶ 29} For the reasons that follow, it is this magistrate's decision that this court should deny relator's request for a writ of mandamus.

{¶ 30} 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).

{¶ 31} 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).

{¶ 32} Relator first contends the report of Dr. Wolkoff is inherently equivocal, contradictory, and ambiguous. Specifically, relator contends that Dr. Wolkoff's one-time evaluation ignores the "voluminous amount of treatment records and opinions" of Drs. Krilov and Normile and ignores relator's 26-year occupational history as a salesman wherein he had significant contact with the public. Further, relator argues that the restriction—no direct contact with the public—precludes him from performing any work.

{¶ 33} In *State ex rel. Eberhardt v. Flxible Corp.*, 70 Ohio St.3d 649, 657 (1994), the Supreme Court of Ohio summarized the distinction between the 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 * * *. 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. [*State ex rel. Paragon v. Indus. Comm.*, 5 Ohio St.3d 72 (1983).] Thus, once clarified, such statements fall outside the boundaries of [*State ex rel. Jennings v. Indus. Comm.*, 1 Ohio St.3d 101 (1982)], and its progeny.
>
> Moreover, ambiguous statements are inherently different from those that are repudiated, contradictory or uncertain. 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. Ambiguous statements, however, merely reveal that the doctor did not effectively convey what he meant and, therefore, they are not inherently unreliable. Such statements do not relate to the doctor's position, but to his communication skills. If we were to hold that clarified statements, because previously ambiguous, are subject to *Jennings* or to commission rejection, we would effectively allow the commission to put words into a doctor's mouth or, worse, discount a truly probative opinion. Under such a view, any doctor's opinion could be disregarded merely because he failed on a single occasion to employ precise terminology. In a word, once an ambiguity, always an ambiguity. This court cannot countenance such an exclusion of probative evidence.

{¶ 34} It appears that relator is arguing that Dr. Wolkoff's report is equivocal and contradictory because Dr. Wolkoff opined that relator had a mild impairment and could work provided he had no direct contact with the public. Dr. Wolkoff made this statement despite having reviewed the reports from other doctors who opined that his allowed psychological conditions were so severe that he was incapable of working. Relator also appears to be arguing that Dr. Wolkoff's report is internally inconsistent because clearly, given his 26-year history as a salesman, a job with significant direct contact with the public, relator is unable to perform other work where he would not have direct contact with the public.

{¶ 35} The magistrate finds that Dr. Wolkoff's report is neither equivocal, contradictory, nor internally inconsistent. Relator's criticism of Dr. Wolkoff's report is that it is contradictory with the other psychological evidence contained within the stipulation of evidence. The fact that his report is at odds with other medical reports does not render his report equivocal, contradictory, or internally inconsistent. Further, contrary to relator's argument, an inability to have direct contact with people does not automatically render relator permanently and totally disabled. Dr. Wolkoff's restriction is not incompatible with his opinion that relator can perform some sustained remunerative employment.

{¶ 36} The magistrate finds that relator has not demonstrated that Dr. Wolkoff's report should be removed from evidentiary consideration. Instead, the magistrate finds that it is some evidence upon which the commission could rely. It must be remembered that questions of credibility and the weight to be given evidence are clearly within the discretion of the commission as fact finder. *Teece*. Further, it is immaterial whether other evidence even if greater in quality and/or quantity supports a decision contrary to the commission's. *State ex rel. Pass v. C.S.T. Extraction Co.*, 74 Ohio St.3d 373 (1996). For the above reasons, the magistrate finds that relator's first argument lacks merit.

{¶ 37} Relator's second argument is that the commission abused its discretion by finding that his age and work history were assets to his ability to become re-employed. For the reasons that follow, the magistrate disagrees.

{¶ 38} First, a review of the commission's order indicates that the commission actually found that relator's age of 56 was a neutral factor in terms of his ability to become re-employed, neither a barrier nor an asset. While noting that relator was an older individual, the SHO also noted that he had time to pursue employment or employment-enhancing activities especially considering that the traditional retirement age is 65 and there are numerous individuals in the workforce who are relator's age and older who are currently working. Relator's contention that the commission found that his age was an asset is incorrect.

{¶ 39} Relator also contends that the commission abused its discretion by finding that his work history was an asset to his ability to become re-employed. Specifically, relator argues that the SHO completely ignored the fact that he had obtained numerous

sales jobs within a nine-year period and that he was unable to remain employed at those jobs because of his allowed psychological conditions. Further, relator contends that he did not learn anything on the job; instead, his success was derived solely by his ability to interact with people. Given that he is now limited to having no direct contact with the public, relator contends that his lengthy work history and demonstrated ability to learn on the job are not skills which would translate to a new job.

{¶ 40} Relator graduated from high school and indicated on his PTD application that he is able to read, write, and perform basic math. Relator does have a long work history which can be viewed as indicating that he has a strong work ethic and that trait is a positive one. Further, relator has not demonstrated that the SHO's statement that relator's work history demonstrated an ability to learn on the job is incorrect. Yes, relator's job involved contact with the public; however, having worked in sales for 26 years, relator was exposed to new technologies and innovations, including the use of computers, which would have been learned. Relator has not demonstrated that these statements are incorrect; instead, he appears to argue that he can only work as a salesman and because he is now limited to jobs where he has no contact with the public, clearly he cannot find any employment. The magistrate disagrees.

{¶ 41} As noted by the commission, the fact that relator was capable of performing light-duty work placed him at an advantage compared to a claimant who is limited to sedentary work. It is not an abuse of discretion for the commission to conclude that there are more light-duty jobs which would not require direct contact with the public than if relator was limited to sedentary work.

{¶ 42} In the present case, the commission relied on medical evidence that relator was capable of performing light-duty work and that he could work provided he had no direct contact with the public. The commission noted that relator was 56 years of age, had a high school education, could read, write, and perform basic math, and had a long history which demonstrated a strong desire to work and an ability to learn new tasks on the job. The magistrate finds that the medical reports of Drs. Friedman and Wolkoff do constitute some evidence upon which the commission could rely and that the commission's analysis of the nonmedical disability factors was sufficient.

{¶ 43} Based on the foregoing, it is this magistrate's decision that relator has not demonstrated that the commission abused its discretion in denying his application for PTD disability compensation and this court should deny his request for a writ of mandamus.

/s/ *Stephanie Bisca Brook*
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).