[Cite as *State ex rel. Metz v. GTC Inc.*, 2013-Ohio-461.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Joseph Metz,	:	
Relator,	:	
v.	:	No. 12AP-56
GTC Inc. and Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on February 12, 2013

Ronald E. Slipski, and *Shawn Scharf*, for relator.

Michael DeWine, Attorney General, and *Andrew Alatis*, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTION TO THE MAGISTRATE'S DECISION

TYACK, J.

{¶ 1} Joseph Metz filed this action in mandamus, seeking a writ to compel the Industrial Commission of Ohio ("commission") to grant him permanent total disability ("PTD") compensation.

{¶ 2} In accord with Loc.R. 13(M), the case was referred to a magistrate to conduct appropriate proceedings. The parties stipulated the pertinent evidence and filed briefs. The magistrate then issued a magistrate's decision, appended hereto, which contains detailed findings of fact and conclusions of law. The magistrate's decision includes a recommendation that we deny the request for a writ.

{¶ 3} Counsel for Metz has filed an objection to the magistrate's decision. The commission has filed a memorandum in response. The case is now before the court for a full, independent review.

{¶ 4} Metz was injured on May 13, 2005 while working as a truck driver. His workers' compensation claim has been recognized for:

> Sprain of neck; sprain thoracic region; sprain or strain left trapezius muscle; left C6-7 herniated disc protrusion; supraspinatus tendonopathy left shoulder; acromioclavicular joint hypertrophy left; impingement left shoulder; major depressive disorder recurrent.

{¶ 5} Metz has not worked since 2005. He filed his first application for PTD compensation two years after his injury. That application was denied in 2008.

{¶ 6} Metz filed his second application for PTD compensation in 2011. The application was supported by a report from his treating physician, who viewed Metz as being permanently and totally disabled physically. Metz also provided a report from a psychologist who indicated that Metz had a moderate impairment from a psychological point of view.

{¶ 7} The second application led to an independent medical examination by Karl V. Metz, M.D. Dr. Metz found Joseph Metz capable of sedentary employment, but placed restrictions on Joseph Metz's activity. Dr. Metz found:

> Mr. Metz is capable of returning to work in a sedentary capacity. He is unable to drive a truck, perform repetitive lifting, carrying, or bending activities.

{¶ 8} Sedentary work is defined in Ohio Adm.Code 4121-3-34(B)(2)(a) as follows:

> "Sedentary work" means exerting up to ten pounds of force occasionally (occasionally: activity or condition exists up to one-third of the time) and/or a negligible amount of force frequently (frequently: activity or condition exists from one-third to two-thirds of the time) to lift, carry, push, pull, or otherwise move objects. Sedentary work involves sitting most of the time, but may involve walking or standing for brief periods of time. Jobs are sedentary if walking and standing are required only occasionally and all other sedentary criteria are met.

{¶ 9} The staff hearing officer who reviewed Joseph Metz's second application for PTD compensation did not address the possible tension between Dr. Metz's finding regarding Joseph Metz's inability to perform repetitive lifting and the definition of sedentary work in the Ohio Administrative Code. Dr. Metz reported Joseph Metz medically unable to perform repetitive lifting. On its face, the restrictions could be construed to bar sedentary employment involving lifting up to ten pounds of force, either occasionally or frequently. That restriction means Dr. Metz has reported conflicting opinions.

{¶ 10} As a result of this difficulty, we sustain the objection to the magistrate's decision in part. We adopt the findings of fact in the magistrate's decision. We also adopt the portions of the conclusions of law which define sedentary employment and addresses the psychological issues. However, we vacate the denial of PTD compensation and return the case to the commission to cause Dr. Metz's restrictions and opinions to be clarified or to obtain additional medical evidence as to Joseph Metz's limitations and capacity for sedentary work.

Objection sustained in part;
limited writ granted.

DORRIAN, J., concurs.
SADLER, J., dissents.

SADLER, J., dissenting.

{¶ 11} Because I believe that the staff hearing officer ("SHO") sufficiently considered the restrictions identified by Dr. Metz, and that those restrictions were not inherently inconsistent with Dr. Metz's conclusion that relator was capable of sedentary work, I respectfully dissent from the majority's decision to grant a writ of mandamus.

{¶ 12} The commission determined that relator was capable of performing sedentary work based on the reports issued by Dr. Metz and Dr. Van Auken. In Dr. Metz's report, he opined that relator was "capable of returning to work in a sedentary capacity" but was "unable to drive a truck, perform repetitive lifting, carrying, or bending activities." (Stip. 35.) The majority asserts that a "possible tension" existed between the restrictions identified by Dr. Metz and Dr. Metz's conclusion that relator was capable of sedentary

work, and that the SHO failed to consider Dr. Metz's restrictions in its order denying PTD compensation. (Majority Opinion, ¶ 9.) I disagree.

{¶ 13} The commission "is not required to list each piece of evidence that it considered in its order." *State ex rel. Rothkegel v. Westlake*, 88 Ohio St.3d 409, 411 (2000). "[T]he presumption of regularity that attaches to commission proceedings * * * gives rise to a second presumption—that the commission indeed considered all the evidence before it." *State ex rel. Lovell v. Indus. Comm.*, 74 Ohio St.3d 250, 252 (1996). "Where, as here, the commission lists only the evidence relied upon, omission does not raise the presumption that the evidence was overlooked." *Rothkegel* at 410.

{¶ 14} Contrary to the majority's view, the SHO in this case did consider the restrictions identified by Dr. Metz. In addition to the presumption that the SHO considered all of the evidence before it, the SHO explicitly stated that its conclusion was "based upon the *limited physical restrictions* indicated by Dr. Metz, M.D. and Dr. Van Auken, Ph.D. who indicate that [relator] can perform sedentary work in a non-stressful, non-demanding work environment." (Emphasis added.) (Stip. 54.) By characterizing the restrictions as "limited," the SHO not only considered the restrictions, but found them to be compatible with sedentary employment. I believe that relator failed to present any evidence to rebut the presumption that the commission considered the restrictions identified by Dr. Metz—especially when the commission specifically referenced those restrictions in its order.

{¶ 15} Additionally, I do not share the majority's view that Dr. Metz's restriction against *repetitive* lifting, carrying, and bending is inconsistent with Dr. Metz's conclusion that relator is capable of performing sedentary work, which is defined as "exerting up to ten pounds of force *occasionally* (occasionally: activity or condition exists up to one-third of the time) *and/or* a negligible amount of force *frequently* (frequently: activity or condition exists from one-third to two-thirds of the time) to lift, carry, push, pull, or otherwise move objects." (Emphasis added.) Ohio Adm.Code 4121-3-34(B)(2)(a). Instead, I agree with the magistrate's determination that these two findings are not inherently inconsistent, and, in the absence of evidence, I decline to presume otherwise. The burden of proving entitlement to mandamus relief "is a heavy one" that falls upon the relator, not the respondent. *State ex rel. Stevens v. Indus. Comm.*, 10th Dist. No. 10AP-

1147, 2012-Ohio-4408, ¶ 7. Moreover, federal courts have, in social security cases involving a similar definition of sedentary work, repeatedly declined to equate the term *repetitive* with the term *frequent*. As stated by the Ninth Circuit, " 'repetitively' * * * appears to refer to a *qualitative* characteristic—i.e., *how* one uses his hands, or *what type* of motion is required—whereas 'constantly' and 'frequently' seem to describe a *quantitative* characteristic—i.e., *how often* one uses his hands in a certain manner." (Emphasis sic.) *Gardner v. Astrue*, 257 Fed.Appx. 28, 30, fn. 5 (9th Cir.2007); *see also Gallegos v. Barnhart*, 99 Fed.Appx. 222, 224-25 (10th Cir.2004) ("frequent" and "repetitive" are not synonymous). Thus, in my view, Dr. Metz's restriction against *repetitive* actions does not equate to a restriction against performing certain activities *occasionally* or *frequently*.

{¶ 16} Because relator has failed to prove that Dr. Metz's statements were inherently inconsistent, I believe that Dr. Metz's report constituted "some evidence" upon which the commission could rely. *See State ex rel. Randolph v. Indus. Comm.*, 10th Dist. No. 10AP-572, 2011-Ohio-4053, ¶ 7. Accordingly, I would adopt the magistrate's recommendation for this court to deny the requested writ of mandamus. Because the majority does not, I respectfully dissent.

A P P E N D I X

IN THE COURT OF APPEALS OF OHIO

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Relator,	:	
v.	:	No. 12AP-56
GTC Inc. and Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on August 10, 2012

Ronald E. Slipski, and *Shawn Scharf*, for relator.

Michael DeWine, Attorney General, and *Andrew Alatis*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶ 17} Relator, Joseph Metz, 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:

{¶ 18} 1. Relator sustained a work-related injury on May 13, 2005 and his workers' compensation claim has been allowed for the following conditions:

> Sprain of neck; sprain thoracic region; sprain or strain left trapezius muscle; left C6-7 herniated disc protrusion; supraspinatus tendonopathy left shoulder; acromioclavicular joint hypertrophy left; impingement left shoulder; major depressive disorder recurrent.

{¶ 19} 2. At the time he was injured, relator was employed as a truck driver.

{¶ 20} 3. Relator has not returned to work since the date of injury.

{¶ 21} 4. Relator's first application for PTD compensation was filed August 1, 2007 and, following a hearing before a staff hearing officer ("SHO"), that application for PTD compensation was denied March 24, 2008.

{¶ 22} 5. Relator's second application for PTD compensation was filed February 15, 2011.

{¶ 23} 6. According to his application, relator was 45 years of age at the time he filed his second application and had been receiving Social Security disability benefits since 2005. Relator completed the 11th grade, did not obtain his GED, but did attend trade or vocational school. Relator indicated that he could read, write, and perform basic math, but not well.

{¶ 24} 7. In support of his application, relator submitted several letters from his treating physician Bradley A. Fell, M.D., who opined that relator had been permanently and totally disabled since January 18, 2007.

{¶ 25} 8. Relator also included the October 21, 2010 report of Marian Chatterjee, Ph.D., a psychologist. Following her evaluation, Dr. Chatterjee concluded that relator had a Class III, moderate impairment with regard to his activities of daily living, social functioning, concentration, persistence and pace, as well as adaptation to stressful circumstances. Ultimately, Dr. Chatterjee opined that relator had a 35 percent whole person impairment due to the allowed psychological conditions and that his allowed psychological condition rendered him permanently and totally disabled.

{¶ 26} 9. Relator also included documentation from Social Security Administration finding that he had been disabled since May 13, 2005.

{¶ 27} 10. An independent medical examination was performed by Karl V. Metz, M.D. In his April 13, 2011 report, Dr. Metz set out the allowed conditions in relator's claim, provided his physical findings upon examination, and concluded that relator's allowed physical conditions had reached maximum medical improvement ("MMI"). Dr. Metz opined that relator had a 37 percent whole person impairment and that he was capable of performing sedentary work. Specifically, Dr. Metz stated:

> Mr. Metz is capable of returning to work in a sedentary capacity. He is unable to drive a truck, perform repetitive lifting, carrying, or bending activities.

{¶ 28} 11. Relator was examined by Steven B. Van Auken, Ph.D. In his April 18, 2011 report, Dr. Van Auken identified and discussed the medical records which he reviewed, concluded that relator's allowed psychological condition had reached MMI, determined that relator had a Class II, moderate impairment concerning his activities of daily living, social functioning, concentration, persistence and pace, as well as adaptation to changing life circumstances. Ultimately, Dr. Van Auken concluded that relator had a 16 percent impairment and that he was capable of working. Specifically, Dr. Van Auken stated:

> In and of themselves, Mr. Metz's work-injury-related depressive symptoms -- including diminishments in concentration, energy level, stress tolerance, and social tolerance -- would limit him to work environments that offered no more than moderate demands in terms of deadline pressures, productivity requirements, the need for frequent decision-making and frequency of contact with the general public.

{¶ 29} 12. Relator submitted a vocational report prepared by John Ruth, M.S., C.D.M.S. In that report, dated June 2, 2011, Mr. Ruth concluded that relator did not have any transferrable skills and that he would not benefit from either rehabilitation services or technical training. Mr. Ruth concluded that relator would be unable to successfully seek or perform sustained remunerative employment now or in the future.

{¶ 30} 13. Relator's second application for PTD compensation was heard before an SHO on August 3, 2011 and was denied. The SHO relied on the medical reports of Drs. Metz and Van Auken and concluded that relator could perform sedentary work as follows:

> Therefore, based upon the opinion of Dr. Metz, D.O. and Dr. Van Auken, Ph.D., who combined have examined the Injured Worker on all of the allowed conditions for which the Injured Worker's sole industrial injury is recognized, the Staff Hearing Officer concludes on a whole that the Injured Worker is medically capable of performing some sustained remunerative employment, i.e. sedentary work in a non-stressful, non-demanding work environment. Therefore, the Staff Hearing Officer finds that a discussion of the Injured Worker's non-medical disability factors are now in order.

{¶ 31} 14. The SHO considered the non-medical disability factors and determined that relator's age and education were positive factors and that his work history was a neutral factor. Concerning his age and education, the SHO stated:

> As indicated before, the Staff Hearing Officer finds that the Injured Worker's age is definitely a positive factor, as the Injured Worker's age of 45 leaves approximately 20 years of working life ahead of him.
>
> The Staff Hearing Officer finds that the Injured Worker's education is also a positive factor. The Staff Hearing Officer finds that the Injured Worker's 11th grade education in and of itself does not indicate a lack of intellectual ability to be retrained. The Staff Hearing Officer finds that the Injured Worker's 11th grade education noting that he was able to obtain a CDL license may not necessarily provide the Injured Worker with present time skills, but is evidence of the Injured Worker's ability to learn new skills conductive to at least sedentary work in an entry level position.

{¶ 32} 15. With regard to his work history, the SHO noted that it did not provide him with immediate transferable skills to a sedentary work environment; however, the SHO also concluded that relator's work history would not preclude his ability to access other unskilled to semi-skilled work which was sedentary in nature.

{¶ 33} 16. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶ 34} In this mandamus action, relator contends that the commission abused its discretion by not acknowledging the complete restrictions Drs. Metz and Van Auken placed on him. Specifically, while the commission noted that Dr. Metz concluded that he

could perform at a sedentary work level, relator argues that the commission failed to consider this additional restriction placed on him by Dr. Metz:

> Mr. Metz is capable of returning to work in a sedentary capacity. He is unable to drive a truck, perform repetitive lifting, carrying, or bending activities.

Further, while the SHO noted that relator could perform sedentary work in a "non-stressful, non-demanding work environment," relator contends that the SHO failed to consider all Dr. Van Auken's restrictions, namely the following:

> In and of themselves, Mr. Metz's work-injury-related depressive symptoms -- including diminishments in concentration, energy level, stress tolerance, and social tolerance -- would limit him to work environments that offered no more than moderate demands in terms of deadline pressures, productivity requirements, the need for frequent decision-making and frequency of contact with the general public.

{¶ 35} Upon review, the magistrate finds that relator is correct to assert that the commission did not mention Dr. Metz's additional restrictions that he refrain from repetitive lifting, carrying, or bending activities; however, relator is incorrect to assert that the commission did not consider all the restrictions placed on him by Dr. Van Auken. Specifically, when discussing the report of Dr. Van Auken, the commission noted that he placed the following restrictions on relator:

> [H]e can not return to his former position of employment, but would be able to return to some sustained remunerative employment that would offer him no more than moderate demands in terms of deadline pressure, and productivity requirements due to his diminished concentration, energy, and stress tolerance.
>
> * * *
>
> Therefore, based upon the opinion of Dr. Metz, D.O. and Dr. Van Auken, Ph.D., who combined have examined the Injured Worker on all of the allowed conditions for which the Injured Worker's sole industrial injury is recognized, the Staff Hearing Officer concludes on a whole that the Injured Worker is medically capable of performing some sustained remunerative employment, i.e. sedentary work in a non-stressful, non-demanding work environment. Therefore, the

> Staff Hearing Officer finds that a discussion of the Injured Worker's non-medical disability factors are now in order.

{¶ 36} The question here is whether or not the report of Dr. Metz can be relied on to find that relator is capable of performing sedentary work or whether the additional restrictions Dr. Metz imposed (no repetitive lifting, carrying, or bending activities) precludes an ability to perform some sustained remunerative employment at a sedentary work level.

{¶ 37} Sedentary work is defined in Ohio Adm.Code 4121-3-34(B)(2)(a):

> "Sedentary work" means exerting up to ten pounds of force occasionally (occasionally: activity or condition exists up to one-third of the time) and/or a negligible amount of force frequently (frequently: activity or condition exists from one-third to two-thirds of the time) to lift, carry, push, pull, or otherwise move objects. Sedentary work involves sitting most of the time, but may involve walking or standing for brief periods of time. Jobs are sedentary if walking and standing are required only occasionally and all other sedentary criteria are met.

{¶ 38} It is well-settled that a medical report that identifies the worker's exertional category as defined in the Ohio Adm.Code and does not include additional opinions regarding specific restrictions on sitting, lifting, standing, and so forth is still sufficient to constitute some evidence. *See State ex rel. Ace v. Toyota of Cincinnati Co.*, 10th Dist No. 03AP-517, 2004-Ohio-3971, ¶ 30. On the other hand, the commission cannot simply rely on a physician's "bottom line" identification of an exertional category without examining the specific restrictions imposed by the physician in the body of the report. *See State ex rel. Owens Corning Fiberglass v. Indus. Comm.*, 10th Dist. No. 03AP-684, 2004-Ohio-3841. *State ex rel. Howard v. Millennium Inorganic Chems.*, 10th Dist. No. 03AP-637, 2004-Ohio-6603.

{¶ 39} In both *Owens Corning* and *Howard*, the doctors indicated that the injured workers could perform at a certain strength level, and yet, the rest of the report indicated great restrictions on the injured workers that would actually render them incapable of performing the strength level work that the doctor had indicated he could perform. This court held in *Owens Corning* and *Howard* that the commission cannot simply rely upon a determination that an injured worker can perform at a certain strength level; rather, the

commission must review the doctor's report and actually make certain that any physical restrictions the doctor listed correspond with an ability to actually perform at the exertional level indicated by the doctor.

{¶ 40} In the present case, relator contends that Dr. Metz's opinion that he refrain from repetitive lifting, carrying, or bending activities, limits him to less than sedentary work. Here, the magistrate finds that Dr. Metz's additional restrictions do not preclude sedentary work nor are those restrictions so limiting that only brief periods of work activity would be possible. Since sedentary work is defined as involving sitting most of the time, neither repetitive lifting, carrying, nor bending would ordinarily fall within the definition of sedentary work. The magistrate finds that Dr. Metz's additional restrictions are compatible with sedentary employment and do not rise to the level which would require the commission to provide additional analysis.

{¶ 41} Based on the forgoing, it is this magistrate's decision that relator has not demonstrated that the commission abused its discretion by relying on the reports of Drs. Metz and Van Auken and finding that he was not entitled to an award of PTD compensation 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).