

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Ohio Presbyterian Retirement Services, Inc.,	:	
	:	
Relator,	:	
	:	
v.	:	No. 14AP-624
	:	
Industrial Commission of Ohio and Sherry L. Redwine,	:	(REGULAR CALENDAR)
	:	
Respondents.	:	

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D E C I S I O N

Rendered on June 2, 2015

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*Vorys, Sater, Seymour and Pease LLP*, and *Rosemary D. Welsh*, for relator.

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

*Robert A. Muehleisen*, for respondent Sherry L. Redwine.

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IN MANDAMUS  
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

TYACK, J.

{¶ 1} Ohio Presbyterian Retirement Services, Inc. ("OPRS"), has filed this action in mandamus, seeking a writ to compel the Industrial Commission of Ohio ("commission") to vacate its order granting permanent partial disability ("PPD") payment to Sherry L. Redwine.

{¶ 2} In accord with Loc.R. 13(M) of the Tenth Appellate District, 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, containing 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 OPRS has filed objections to the magistrate's decision. Counsel for the commission has filed a memorandum in response. Counsel for Sherry Redwine has also filed a memorandum in response. The case is now before the court for a full, independent review.

{¶ 4} Counsel for OPRS argues that an injured worker cannot receive both an award of PPD and compensation for permanent total disability ("PTD"). Counsel acknowledges that this court has expressly addressed this issue and ruled that an award of PTD compensation does not foreclose an award of PPD for other injuries an injured worker suffered. We follow today our prior ruling in *State ex rel. Mosley v. Indus. Comm.*, 10th Dist. No. 13AP-127, 2014-Ohio-1710.

{¶ 5} *Mosley* is particularly apt in the situation presented by Sherry Redwine's injuries. She has been found to be entitled to PTD compensation due to her recognized psychological conditions. The PPD award is for her physical injuries.

{¶ 6} We are bound by R.C. 4123.95 which mandates a liberal construction of the pertinent statutes in favor of injured workers.

{¶ 7} We have repeatedly noted that PPD is in the nature of an award for damages for injuries, while PTD is based upon the inability of an injured worker to engage in sustained remunerative employment.

{¶ 8} Our magistrate has correctly addressed these issues in more detail. We overrule the objections to the magistrate's decision. We adopt the findings of fact and conclusions of law contained in the magistrate's decision. As a result, we deny the request for a writ of mandamus.

*Objections overruled; writ denied.*

KLATT and HORTON, JJ., concur.

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**APPENDIX**  
**IN THE COURT OF APPEALS OF OHIO**  
**TENTH APPELLATE DISTRICT**

State ex rel. Ohio Presbyterian Retirement Services, Inc.,	:	
	:	
Relator,	:	
	:	
v.	:	No. 14AP-624
	:	
Industrial Commission of Ohio and Sherry L. Redwine,	:	(REGULAR CALENDAR)
	:	
Respondents.	:	

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**MAGISTRATE'S DECISION**

Rendered on February 4, 2015

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*Vorys, Sater, Seymour and Pease LLP, and Rosemary D. Welsh, for relator.*

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

*Robert A. Muehleisen, for respondent Sherry L. Redwine.*

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**IN MANDAMUS**

{¶ 9} In this original action, relator, Ohio Presbyterian Retirement Services, Inc., requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate the July 9, 2014 order of its staff hearing officer ("SHO") determining that the R.C. 4123.57(A) application for the determination of the percentage

of permanent partial disability ("PPD") filed by respondent Sherry L. Redwine ("claimant") is not barred by claimant's award of permanent total disability ("PTD") compensation, and to enter an order holding that the application is barred by the PTD award.

**Findings of Fact:**

{¶ 10} 1. On August 13, 2003, claimant injured her lower back while employed as a home health aide by relator. The injury occurred when claimant was assisting a patient into a wheelchair.

{¶ 11} 2. The industrial claim (No. 03-855480) is allowed for:

Lumbosacral strain; S1 radiculopathy right lower extremity; aggravation of pre-existing degenerative disc disease L4-5 and L5-S1; depression; ruptured disc at L4-5 with free disc fragment; L5-S1 transforaminal lumbar interbody fusion.

{¶ 12} 3. On October 1, 2010, claimant filed an application for PTD compensation.

{¶ 13} 4. Following a June 7, 2011 hearing, an SHO awarded PTD compensation starting July 12, 2010, based solely upon the allowed psychological condition of the claim.

{¶ 14} 5. On August 12, 2013, claimant filed an application for the determination of the percentage of PPD on a form provided by the Ohio Bureau of Workers' Compensation ("bureau"). The form is designated as the C-92. Claimant requested that she be examined only for the allowed physical conditions of the claim.

{¶ 15} 6. On December 20, 2013, at the bureau's request, claimant was examined by David Garcia, D.O., who issued a report dated December 26, 2013. Dr. Garcia examined only for the allowed physical conditions of the claim. In his report, Dr. Garcia opined that the allowed physical conditions cause a 31 percent whole person impairment.

{¶ 16} 7. On February 20, 2014, the bureau mailed a tentative ordering finding that claimant has a 31 percent PPD based upon Dr. Garcia's report.

{¶ 17} 8. Relator timely objected to the bureau's February 20, 2014 tentative order.

{¶ 18} 9. On March 31, 2014, at relator's request, claimant was examined by Alan R. Kohlhaas, M.D. Dr. Kohlhaas examined only for the allowed physical conditions

of the claim. In his report dated April 25, 2014, Dr. Kohlhaas opined that the allowed physical conditions of the claim cause a 20 percent whole person impairment.

{¶ 19} 10. On May 1, 2014, at her own request, claimant was examined by Daniel Buchanan, D.C. Dr. Buchanan examined only for the allowed physical conditions of the claim. In his report, Dr. Buchanan opined that the allowed physical conditions of the claim cause a 39 percent whole person impairment.

{¶ 20} 11. Following a May 6, 2014 hearing, a DHO held that the application for the determination of percentage of PPD was barred by the PTD award. Citing *State ex rel. Murray v. Indus. Comm.*, 63 Ohio St.3d 473 (1992), for the proposition that PPD and PTD compensation cannot be concurrently paid for the same injury, the DHO's order explains:

In this claim, all of the medical conditions in this claim, both physical and psychological, were ultimately the result of the industrial injury of 08/13/2013 [sic]. As the Injured Worker is currently receiving permanent total disability benefits as a result of this injury and the sequela therefrom, the District Hearing Officer finds the Injured Worker is precluded from receiving a permanent partial disability award under Ohio Revised Code 4123.57(A) for this same injury.

{¶ 21} 12. Claimant moved for reconsideration pursuant to R.C. 4123.57(A).

{¶ 22} 13. Following a July 9, 2014 hearing, an SHO issued an order that vacates the DHO's order of May 6, 2014 and orders that the application be scheduled for hearing on the merits on the next available C-92 docket. Disagreeing with the DHO's holding that the PTD award bars the C-92 application, the SHO's order explains:

The award of permanent total disability compensation was based solely on the impairments the Injured Worker experiences as a result of the previously allowed psychological condition in this claim. The Permanent Total Disability Award was not based upon or considered any of the previously allowed physical conditions. \* \* \*

[A]n Injured Worker is not barred from receiving an award of Permanent Partial Disability Compensation for a condition or conditions in a claim which were not a basis for a prior finding of permanent total disability in the same claim.

{¶ 23} 14. Following an August 29, 2014 hearing, a DHO issued an order that vacates the February 20, 2014 tentative order of the bureau. The DHO granted the PPD application and awarded 33 percent PPD based upon the reports of Drs. Garcia, Buchanan, and Kohlhaas.

{¶ 24} 15. Relator applied for reconsideration pursuant to R.C. 4123.57(A).

{¶ 25} 16. Following a November 12, 2014 hearing, an SHO issued an order that affirms the DHO's order of August 29, 2014. The SHO's order of November 12, 2014 grants the PPD application and awards 33 percent PPD based upon the reports of Drs. Garcia, Buchanan, and Kohlhaas.

{¶ 26} 17. On August 12, 2014, relator, Ohio Presbyterian Retirement Services, Inc., filed this mandamus action.

#### Conclusions of Law:

{¶ 27} It is the magistrate's decision that this court deny relator's request for a writ of mandamus.

{¶ 28} This action is controlled by this court's decision in *State ex rel. Mosley v. Indus. Comm.*, 10th Dist. No. 13AP-127, 2014-Ohio-1710. Accordingly, a review of the *Mosley* decision is in order.

{¶ 29} On September 23, 2002, Kelly R. Mosley, sustained an industrial injury. Her claim was allowed for multiple physical and psychological conditions. There are 23 allowed conditions in her claim.

{¶ 30} On November 13, 2009, Mosley applied for PTD compensation. The commission, through its SHO, awarded PTD compensation starting October 1, 2010 based solely on the allowed psychological condition described as "organic personality syndrome."

{¶ 31} On September 7, 2012, Mosley applied for a determination of her percentage of PPD. However, the bureau did not schedule Mosley for a medical examination and did not issue a tentative order determining the percentage of PPD. On September 10, 2010, the bureau issued an order dismissing Mosley's application. The bureau order explained that PPD compensation was barred by the PTD award. Mosley timely objected to the bureau's order.

{¶ 32} Following a November 1, 2012 hearing, a DHO issued an order that affirmed the bureau's order. The DHO agreed with the bureau that Mosley was ineligible for PPD compensation because she was currently receiving PTD compensation. The DHO further noted that Mosley had requested that she receive a PPD award to run after the PTD award.

{¶ 33} Following a December 18, 2012 hearing, an SHO affirmed the DHO's order of November 1, 2012 and dismissed the PPD application. The three-member commission denied reconsideration. Mosley then filed a mandamus action in this court.

{¶ 34} In *Mosley*, the magistrate recommended that this court issue a writ of mandamus. The magistrate observed that the PTD award was premised solely upon a psychological condition of the claim and that Mosley had listed all of her allowed conditions as the basis for her PPD application. Nevertheless, the magistrate held that Mosley was eligible for a PPD award based upon the physical conditions of the claim and that the bureau had a duty to have Mosley examined for at least the allowed physical conditions of the claim.

{¶ 35} In *Mosley*, the magistrate's decision sets forth pertinent law and explains:

In *State ex rel. Murray v. Indus. Comm.*, 63 Ohio St.3d 473 (1992), the court held that PPD and PTD compensation cannot be concurrently paid for the same conditions. *State ex rel. Hoskins v. Indus. Comm.*, 87 Ohio St.3d 560 (2000).

Here, relator and the commission acknowledged the point of law set forth in *Murray* and reaffirmed in *Hoskins*. However, the parties fail to acknowledge the corollary to the *Murray* point of law as set forth in *State ex rel. Missik v. Youngstown*, 65 Ohio St.3d 189 (1992). Significantly, the *Missik* decision issued shortly after the *Murray* decision.

In *Missik*, the claimant, George Missik, suffered three industrial injuries while working for the City of Youngstown: (1) claim number PE626746—"Bilateral sacroiliac injury," (2) claim number PEL4593—"Neck and shoulder," and (3) claim number PEL3212—"Injured back and left side." *Missik* at 190.

In 1986, Missik filed for PTD compensation, listing only PEL3212 and PEL4593 on his application. On the commission's behalf, Missik was examined by Dr. William G.

Kraus who opined that Missik is permanently and totally disabled based upon the allowed conditions in claim numbers PEL4593 and PEL3212. The commission's PTD award specified "that the cost of this award be allocated 100% to claim number PEL-3212." *Id.*

Eventually, Missik sought PPD compensation in claim number PE626746 and PEL4593. A DHO dismissed both applications based on the PTD award. Reconsideration was denied in both claims.

Issuing a writ, the *Missik* court explained:

Pursuant to our decision in *State ex rel. Litten v. Indus. Comm.* (1992), 65 Ohio St.3d 178, 602 N.E.2d 624, we find that the commission's permanent total disability finding, by attributing the award's costs exclusively to PEL3212, did not encompass PEL4593 and PE626746. We thus find that the commission abused its discretion in dismissing claimant's permanent partial disability application in PEL4593. However, because PEL3212 and PE626746 both involve back injuries, the commission did not err in dismissing claimant's permanent partial disability application in the latter claim. *State ex rel. Consolidation Coal Co. v. Indus. Comm.* (1980), 62 Ohio St.2d 147, 16 O.O.3d 166, 404 N.E.2d 141.

*Id.* at 191.

In the magistrate's view, based upon the undisputed facts of record, the *Missik* decision compels the issuance of a writ of mandamus in this action.

The magistrate acknowledges that, unlike *Missik*, this action does not involve multiple industrial claims, but only the one industrial claim. Here, the PTD award is premised upon only 1 of the 23 allowed conditions of the claim. Therefore, by his application for the determination of the percentage of PPD in his sole industrial claim, relator was not seeking PPD compensation for the same conditions (or condition) that support his PTD award. Both the bureau and the commission failed to recognize this distinction in their orders, and, as a result, relator was denied a statutory right under R.C. 4123.57.

Clearly, under R.C. 4123.57, upon the filing of the application, the bureau was required to schedule relator for a



medical examination by the bureau's medical section at least for the allowed physical conditions of the claim. Following the issuance of the medical report, the bureau was required to make a tentative order.

Because the bureau failed to schedule relator for a medical examination and to issue a tentative order, and the commission's hearing officers failed to order the bureau to do so, a writ of mandamus must issue.

*Id.* at ¶ 31-40.

{¶ 36} In *Mosley*, this court adopted the magistrate's findings of fact and conclusions of law. The instant case is nearly identical to *Mosley* as to the pertinent facts. In both cases, there is a PTD award based solely upon an allowed psychological condition and, thus, the question is whether the claimant is eligible for a PPD award based upon the allowed physical conditions of the claim. In both cases, the PTD award and PPD application relate to a single industrial claim.

{¶ 37} Here, relator only addresses *Mosley* in its reply brief:

Both Respondents cited *Mosley* \* \* \*, which relied on [*State ex rel. Hoskins v. Indus. Comm.*, 87 Ohio St.3d 560 (2000)] and [*State ex rel. Missik v. Youngstown*, 65 Ohio St.3d 189 (1992)]. But the *Mosley* decision cited the *Hoskins'* court's inaccurate rephrasing of *Murray*, "that PPD and PTD compensation cannot be concurrently paid for the same *condition*," when that was not the language used in *Murray* and was dicta in the *Hoskins* decision. *Id.* at ¶ 31 (citing [*Hoskins*]). Despite acknowledging that unlike George Missik, claimant Kelly [Mosley] did not have PPD awards in multiple claims, the *Mosley* court nonetheless concluded that *Missik* compelled the issuance of a writ and ordered the Commission to process Mosley's PPD application. *Id.* at ¶ 8, ¶ 38. But neither *Missik* nor *Hoskins* overruled *Murray*, and *Murray* remains controlling authority.

(Emphasis sic.) (Footnote omitted.) (Relator's reply brief, 9.)

{¶ 38} In *Murray*, the court seems to use the words "injury" and "condition" interchangeably. The *Murray* court states:

A claimant's ability or inability to concurrently receive PPD and PTD for the *same condition* does not involve claimant's

right to participate in the State Insurance Fund and is not appealable.

(Emphasis added.) *Id.* at 474.

{¶ 39} Earlier in the *Murray* decision, the issue to be addressed is presented "[c]an a claimant concurrently receive PPD and PTD for the same injury?" *Id.* Albeit, at other points in the decision, the *Murray* court uses the term "same injury."

{¶ 40} The *Murray* court never defined what it meant by "injury." Contrary to relator's suggestion here, the *Murray* court did not state that the word "injury" was being used as defined by R.C. 4123.01.

{¶ 41} In *Hoskins*, the Supreme Court of Ohio uses the word "conditions" throughout the decision. The *Hoskins* court summarized the *Murray* holding:

[W]e held that permanent partial and permanent total disability compensation could not be concurrently paid for the same conditions.

*Hoskins* at 560.

{¶ 42} Given the above analysis, it was appropriate for this court in *Mosley* to focus on the psychological *condition* that premised the PTD award and to conclude that the physical conditions of the claim can be the basis for a PPD award. Relator's unexplained assertion that "*Murray* remains controlling authority" is but an invitation for this court to overrule *Hoskins*. (Relator's reply brief, 9.) This court must decline the invitation.

{¶ 43} Accordingly, for all the above reasons, it is the magistrate's decision that this court deny relator's request for a writ of mandamus.

/S/ MAGISTRATE  
KENNETH W. MACKE

### 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).

