

[Cite as *State ex rel. Nissin Brake Ohio, Inc. v. Indus. Comm.*, 2009-Ohio-2993.]
IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel.	:	
Nissin Brake Ohio, Inc.,	:	
	:	
Relator,	:	
	:	
v.	:	No. 08AP-909
	:	
Industrial Commission of Ohio et al.,	:	(REGULAR CALENDAR)
	:	
Respondents.	:	
	:	

D E C I S I O N

Rendered on June 23, 2009

Porter, Wright, Morris & Arthur, LLP, and Darin L. Van Vlerah, for relator.

Richard Cordray, Attorney General, and *Sandra E. Pinkerton*, for respondent Industrial Commission of Ohio.

Larrimer and Larrimer, and *Thomas L. Reitz*, for respondent Carolyn J. Stevens.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

FRENCH, P.J.

{¶1} Relator, Nissin Brake Ohio, Inc., filed an original action in mandamus requesting this court to issue a writ of mandamus ordering respondent Industrial

Commission of Ohio ("commission") to vacate its order, which granted respondent Carolyn J. Stevens ("claimant") permanent total disability ("PTD") compensation, and to enter an order denying that compensation.

{¶2} This court referred this matter to a magistrate pursuant to Civ.R. 53(C) and Loc.R. 12(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 grant a writ of mandamus. Specifically, the magistrate concluded that the staff hearing officer ("SHO") erred by relying on the report of David A. Ware, M.D., the Functional Capacity Evaluation ("FCE") of Angela L. Brinkman, and a letter from Cheryl Lentz, MRC, LSW, LICDC, with the Bureau of Vocational Rehabilitation ("BVR"). Concluding that this evidence alone does not support an award of PTD compensation, the magistrate recommended that this court issue a writ of mandamus ordering the commission to vacate its order granting claimant PTD compensation and to issue a new order after considering the non-medical disability factors.

{¶3} Claimant objected to the magistrate's decision, essentially arguing that the magistrate misinterpreted the evidence. We disagree.

{¶4} First, the SHO stated that the November 15, 2006 FCE report by Ms. Brinkman "showed that [claimant] was able to perform at a less than sedentary work load." The report states that claimant was capable of sedentary activity above the waist and less than sedentary activity below the waist. It also states that a comprehensive pain program might allow claimant to decrease her symptoms and increase her work

load levels. Ms. Brinkman's report does not state that claimant is incapable of all sedentary work.

{¶5} Nor does Dr. Ware's December 29, 2006 report indicate that claimant was incapable of sustained remunerative employment. Rather, Dr. Ware stated: "When asked of my opinion for the patient's ability to engage and sustain remunerative employment as a result of her allowed claims, I would say that at this point she is capable of only sedentary or less than sedentary duties." He identified numerous work restrictions. He also acknowledged Ms. Brinkman's suggestion that claimant might benefit from a comprehensive pain program, and he referred to claimant's candidacy for an epidural injection. He then said that he could further "assess her ability to work based on her response to this." While Dr. Ware acknowledged that claimant had not shown any period of sustained functional capacity that would have allowed regular employment during the past eight years, and that employment would require extensive restrictions, he did not state that claimant was incapable of employment at that time.

{¶6} Finally, Ms. Lentz's May 18, 2007 letter states that claimant's case was in an interrupted status based on claimant's medical doctor's advice. The letter states that Ms. Brinkman's FCE was no longer valid because claimant's health had declined and that claimant's "physician would best be able to describe her ability to return to work." While the letter states that BVR could not provide job placement assistance to claimant at that time, it does not indicate that claimant is permanently and totally disabled.

{¶7} In short, based on our independent review of the evidence relied on by the SHO, we agree with the magistrate's analysis of the evidence, and we overrule

claimant's objections. We also agree with the magistrate's conclusion that, without medical evidence showing that claimant is permanently and totally disabled, the commission must evaluate the non-medical factors. Accordingly, we adopt the magistrate's decision, including the findings of fact and conclusions of law contained in it. We grant a writ of mandamus ordering the commission to vacate its order granting claimant PTD compensation and to issue a new order after considering the non-medical disability factors.

*Objections overruled,
writ of mandamus granted.*

SADLER and McGRATH, JJ., concur.

A P P E N D I X

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel.	:	
Nissin Brake Ohio, Inc.,	:	
	:	
Relator,	:	
	:	
v.	:	No. 08AP-909
	:	
Industrial Commission of Ohio	:	(REGULAR CALENDAR)
and Carolyn J. Stevens,	:	
	:	
Respondents.	:	

MAGISTRATE'S DECISION

Rendered on March 26, 2009

Porter Wright Morris & Arthur, LLP, and Darin L. Van Vlerah,
for relator.

Richard Cordray, Attorney General, and Sandra E.
Pinkerton, for respondent Industrial Commission of Ohio.

Larrimer & Larrimer, LLC, and Thomas L. Reitz, for
respondent Carolyn J. Stevens.

IN MANDAMUS

{¶8} Relator, Nissin Brake Ohio, Inc., 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 awarded permanent total disability ("PTD") compensation to respondent Carolyn J. Stevens ("claimant") and ordering the commission to find that claimant is not entitled to an award of PTD compensation.

Findings of Fact:

{¶9} 1. Claimant sustained a work-related injury on September 1, 1998, and her claim has been allowed for the following conditions:

Lumbosacral sprain/strain; left elbow sprain; left ankle sprain; right lateral disc herniation L4-5; aggravation of pre-existing spinal stenosis at L2-3, L3-4, with associated spondylolisthesis; dysthymic disorder, late onset.

{¶10} 2. Claimant returned to work with restrictions until she was laid off by relator in 2004.

{¶11} 3. Claimant received temporary total disability compensation for her newly allowed psychological condition until August 2006.

{¶12} 4. In July 2007, claimant filed an application for PTD compensation.

{¶13} 5. Claimant's treating physician, David A. Ware, M.D., placed permanent work restrictions on claimant as of November 22, 2004. Dr. Ware opined that claimant could sit up to eight hours per day and stand and walk up to four hours per day. Dr. Ware opined further that claimant could never bend, squat, crawl, climb or reach. Dr. Ware opined that claimant could lift and carry up to five pounds continuously, between six to ten pounds frequently, between 11 and 20 pounds occasionally, and that claimant could never lift above 20 pounds. Further, Dr. Ware opined that claimant could perform simple grasping, pushing and pulling arm controls and fine manipulation with both her

right and left hands. Dr. Ware also indicated that it was unlikely claimant would be a candidate for sustained employment.

{¶14} 6. Dr. Ware referred claimant for a functional capacity evaluation ("FCE") which was performed by Angela L. Brinkman in 2006. Ms. Brinkman ultimately concluded:

* * * The results indicate that this client gave reliable efforts that were not diminished or biased by disability behaviors or active choice to portray efforts that are less than true. Based on this presentation, the efforts identified this date can be safely used to consider return to work possibilities.

Based on this workers efforts as they were demonstrated this date she is able to work at the Sedentary physical demand Level for activity above the waist and the less than Sedentary physical demand level for activity below the waist.

{¶15} Ms. Brinkman did note that in July 2006 claimant reported she had been short of breath for the past four months and had bilateral lower extremity edema for one month. Claimant indicated in November 2006 that she had symptoms in her low back and posterior left leg and recently noticed that the right posterior leg and foot had begun to have symptoms as well. Ms. Brinkman opined that claimant may have the ability to decrease her symptoms and increase her workload levels through a comprehensive chronic pain program.

{¶16} 7. Following the FCE, Dr. Ware authored a report dated December 29, 2006. Dr. Ware stated as follows:

* * * When asked of my opinion for the patient's ability to engage and sustain remunerative employment as a result of her allowed claims, I would say that at this point she is capable of only sedentary or less than sedentary duties. This

would include no lifting of more than 10 lbs or any repetitive lifting at all. She should not do any bending, squatting or twisting. She should be allowed to sit and stand at will throughout her work day. It is of note that the therapist who performed her Functional Capacity Exam did believe that she could receive some benefit from a comprehensive pain program. She is currently seeing Dr. Bakos and was felt to be a candidate for an epidural injection. We can further assess her ability to work based on her response to this. * * *

In summary, while her symptoms have fluxuated somewhat recently and are certainly influenced by comorbid medical conditions, it appears unlikely that she would be a candidate for sustained employment. Her history over the past eight years has not demonstrated any periods of sustained functional capacity which would allow regular employment. If any employment were attempted, it would be with the extensive restrictions outlined above.

{¶17} 8. Cheryl Lentz, MRC, LSW, LICDC, with the Bureau of Vocational Rehabilitation ("BVR"), commented on the status of claimant's vocational rehabilitation.

In her May 18, 2007 letter, Ms. Lentz stated:

I have been working with Carolyn Stevens since April 26, 2006; her case with BVR is currently open, but in an "Interrupted Status". She was placed in this status following advice of her medical doctor.

Carolyn was made eligible for BVR services on 8/18/06. She completed a Functional Capacities Evaluation on November 15, 2006, however since that time, her physical health has declined. A copy of the Functional Capacities Evaluation is attached- however, the results are now invalid as she has experienced additional medical problems. Her physician would best be able to describe her ability to return to work.

Carolyn has not worked since November 2004. She reports on-going medical problems that prevent her from obtaining employment; therefore, given this information, we are unable to provide job placement assistance.

{¶18} 9. Claimant was examined by Jose Luiz Chavez, M.D., in August 2007. In his August 29, 2007 report, Dr. Chavez provided his physical findings upon examination and identified certain medical records which he reviewed. Thereafter, Dr. Chavez opined that claimant's allowed physical conditions had reached maximum medical improvement ("MMI"), assessed a 20 percent whole person impairment, stated that claimant was permanently unable to return to her former job, but that she was not permanently totally disabled. Dr. Chavez opined that claimant was capable of employment in a sedentary to light level of physical capacity in a situation where she could sit or stand as necessary provided that she not lift more than 15 pounds overhead and only occasionally climb stairs.

{¶19} 10. Claimant was examined by Lee Howard, Ph.D., for her allowed psychological condition. In his August 8, 2007 report, Dr. Howard opined that claimant's dysthymic disorder was currently in remission and not work-prohibitive. He stated further that claimant should remain on a maintenance dosage of Lexapro and should consider possible referral to BVR.

{¶20} 11. An independent medical examination was performed by John W. Cunningham, M.D. In his January 23, 2008 report, Dr. Cunningham opined that claimant's allowed physical conditions had reached MMI, assessed a 24 percent whole person impairment, and opined that claimant was capable of sedentary physical work activity. In a note at the conclusion of his report, Dr. Cunningham stated:

During the course of the physical examination, this individual stated repeatedly that her left lower extremity swelling, pain

beginning in the ankle, also involving the calf and lower leg was only a recent onset over the last month or so. It was my verbal recommendation to her that she follow up with her primary care physician to determine whether she has a deep vein thrombophlebitis or some other significant health condition involving her left lower extremity since her swelling is significant, and she does have diffuse tenderness of the calf, although I could not detect any specific physical examination findings of active ongoing deep vein thrombophlebitis at this time.

In my medical opinion, this individual's recent onset of swelling of the left calf and ankle with pain and discomfort is probably not related to this claim. I hope this information is helpful to you.

{¶21} 12. An independent medical examination was performed by Donald L. Brown, M.D. In his January 24, 2008 report, Dr. Brown opined that claimant's allowed psychiatric condition had reached MMI, assessed a 20 percent whole person impairment, and indicated that there were no work limitations as a result.

{¶22} 13. Claimant's application for PTD compensation was heard before a staff hearing officer ("SHO") on June 24, 2008 and was granted based solely upon the medical evidence. As such, there was no consideration of the nonmedical disability factors. Specifically, the SHO relied upon the medical report of Dr. Ware, the FCE completed by Ms. Brinkman, and the letter from Ms. Lentz explaining claimant's attempts at rehabilitation. Specifically, the SHO stated:

Ms. Stevens' treating psychologist, Dr. Hustak, opined that she was at maximum medical improvement for the allowed psychological conditions on 8/30/2006.

Dr. Ware, her treating physician for the medical conditions, opined that her condition was permanent with permanent restrictions on a C-140, dated 11/19/2004.

Based on those findings, this Staff Hearing Officer finds that Ms. Stevens is at maximum medical improvement for all of the allowed conditions within this claim.

Ms. Stevens had a Functional Capacity Evaluation (FCE) performed on 11/15/2006. This FCE showed that she was able to perform at a less than sedentary work load. Her treating physician, Dr. Ware, has opined that she is unable to return to sustained remunerative employment based upon an inability to function at a sedentary work level.

The Bureau of Vocational Rehabilitation has indicated that she is not a feasible vocational rehabilitation candidate based upon her FCE.

This Staff Hearing Officer finds the Functional Capacity Evaluation and report of Dr. Ware to be persuasive that Ms. Stevens is only able to function at a less than sedentary work load level.

As such, she is found to be permanently and totally disabled based upon the physical conditions allowed within this claim.

{¶23} 14. Relator's request for reconsideration was denied by order of the commission mailed August 8, 2008.

{¶24} 15. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶25} 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.* (1967), 11 Ohio St.2d 141. 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. (1986), 26 Ohio St.3d 76. 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.* (1987), 29 Ohio St.3d 56. 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.* (1981), 68 Ohio St.2d 165.

{¶26} The relevant inquiry in a determination of permanent total disability is the claimant's ability to do any sustained remunerative employment. *State ex rel. Domjancic v. Indus. Comm.* (1994), 69 Ohio St.3d 693. 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 nonmedical factors. *State ex rel. Stephenson v. Indus. Comm.* (1987), 31 Ohio St.3d 167. Thus, a claimant's medical capacity to work is not dispositive if the claimant's nonmedical factors foreclose employability. *State ex rel. Gay v. Mihm* (1994), 68 Ohio St.3d 315. 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.* (1991), 57 Ohio St.3d 203.

{¶27} For the reasons that follow, it is this magistrate's conclusion that this court should grant a writ of mandamus.

{¶28} It is undisputed that PTD compensation may be granted when there is some medical evidence that the claimant cannot perform any sustained remunerative employment. When the medical evidence establishes that a claimant is unable to perform any sustained remunerative employment, it is unnecessary for the commission

to consider the nonmedical disability factors. See *State ex rel. Speelman v. Indus. Comm.* (1992), 73 Ohio App.3d 757.

{¶29} In the present case, the magistrate finds that the medical evidence relied upon by the commission is not some evidence, standing alone, to support an award of PTD compensation without a discussion of the nonmedical disability factors. The commission relied upon the report of Dr. Ware, the FCE of Ms. Brinkman, and the letter from Ms. Lentz indicating that claimant is not a feasible vocational rehabilitation candidate.

{¶30} In his report, Dr. Ware never stated that claimant's allowed physical conditions rendered her unable to perform sustained remunerative employment. Instead, after evaluating the FCE results, he opined that claimant was capable of only sedentary or less than sedentary duties. His work restrictions included no lifting above ten pounds, no repetitive lifting, no bending, squatting, or twisting, and a sit/stand option throughout the workday. Sedentary work is defined as follows 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.

{¶31} The above restrictions provided by Dr. Ware fall within the sedentary category. The definition of sedentary work provides the upper limit of physical demand which can be required in a job and have the job still be considered sedentary. Jobs which require less than this maximum amount of effort are still considered sedentary. By opining that claimant can exert up to ten pounds of force, her ability falls within the definition of sedentary work. Work is sedentary if it means exerting up to ten pounds of force occasionally and occasionally is defined as an activity or condition exists up to one-third of the time. Dr. Ware did indicate that claimant could not perform any repetitive lifting; however, sedentary work is defined as requiring a negligible amount of force to be exerted frequently and frequently is defined as an activity or condition exists from one-third to two-thirds of the time. As Dr. Ware concluded, if claimant were to attempt any employment, it would be with the extensive restrictions outlined in his report. This opinion is not synonymous with the statement that claimant is permanently and totally disabled based solely on the allowed medical conditions.

{¶32} Likewise, Ms. Brinkman's report indicates that claimant can perform work at the sedentary physical demand level for activities above her waist and less than sedentary physical demand level for activities below her waist. Further, Ms. Brinkman opined that claimant may benefit from a comprehensive chronic pain program. Again, this report does not support the finding that claimant is permanently and totally disabled based solely upon the allowed conditions.

{¶33} Lastly, the commission relied upon the report of Ms. Lentz who indicated that claimant's vocational rehabilitation file is currently in an interrupted status following

the advice of her medical doctor. She opined further that the results of the FCE were now invalid because claimant has experienced additional medical problems. Lastly, she indicated that claimant's treating physician would be best able to describe her ability to return to work. This does not support the conclusion that claimant is permanently and totally disabled.

{¶34} The medical evidence in the record upon which the commission relied to grant PTD compensation based solely upon the allowed medical conditions does not constitute some evidence to support this conclusion. Instead, the evidence cited by the commission supports the conclusion that claimant is physically capable of performing work at a sedentary level. As such, the commission needs to address the nonmedical disability factors before reaching the conclusion on her application.

{¶35} Based on the foregoing, it is this magistrate's conclusion that this court should issue a writ of mandamus ordering the commission to vacate its order granting claimant PTD compensation and to issue a new order after considering the nonmedical disability factors.

/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).