

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. AMG Resources, Inc.,	:	
fka G & W Leasing, Inc.,	:	
	:	
Relator,	:	No. 10AP-759
	:	
v.	:	(REGULAR CALENDAR)
	:	
Industrial Commission of Ohio and	:	
Michael S. Hegedus,	:	
	:	
Respondents.	:	

D E C I S I O N

Rendered on November 1, 2011

Ross, Brittain & Schonberg Co., L.P.A., Brian K. Brittain, Michael J. Reidy, Scott W. Gedeon and Meredith L. Ullman, for relator.

Michael DeWine, Attorney General, and John R. Smart, for respondent Industrial Commission of Ohio.

IN MANDAMUS

TYACK, J.

{¶1} AMG Resources, Inc. ("AMG"), filed this action in mandamus, seeking a writ to compel the Industrial Commission of Ohio ("commission") to grant AMG handicap reimbursement.

{¶2} In accord with Loc.R. 12, this 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 including detailed findings of fact and conclusions of law, which is appended to this decision. The magistrate's decision includes a recommendation that we deny the request for a writ.

{¶3} No party has filed objections to the magistrate's decision. The case is now before the court for review.

{¶4} No error of law or fact is present on the face of the magistrate's decision. We, therefore, 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.

Writ of mandamus denied.

BROWN and DORRIAN, JJ., concur.

A P P E N D I X

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 v. : No. 10AP-759
 Industrial Commission of Ohio and : (REGULAR CALENDAR)
 Michael S. Hegedus, :
 Respondents. :

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

Rendered on August 12, 2011

Ross, Brittain & Schonberg Co., L.P.A., Brian K. Brittain, Michael J. Reidy, Scott W. Gedeon and Meredith L. Ullman, for relator.

Michael DeWine, Attorney General, and John R. Smart, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶5} In this original action, relator, AMG Resources, Inc. ("AMG"), requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order denying its R.C. 4123.343 application for handicap reimbursement and to enter an order awarding handicap reimbursement.

Findings of Fact:

{¶6} 1. On February 8, 2007, respondent Michael S. Hegedus ("claimant") sustained an industrial injury while employed with relator, a state-fund employer. The industrial claim (No. 07-309640) is allowed for "sprain left shoulder/arm NOS; tear left rotator cuff."

{¶7} 2. By letter dated July 29, 2009, relator applied for handicap reimbursement with the Ohio Bureau of Workers' Compensation ("bureau"). The application was filed September 8, 2009.

{¶8} 3. In support of the application, relator submitted a three-page narrative report dated August 12, 2009 from Mark Berkowitz, M.D. The report states:

At your request I have done a medical record review on the above-named Claimant, Michael Hegedus in order to determine in percentage terms the extent of the Claimant's handicap due to pre-existing arthritic, diabetic, and cardiac conditions[.]

The Claimant was employed as a "burner" with the employer when he sustained an injury to his left shoulder on 2/8/07[.] On that date he was getting into position to use a torch to cut part of a "dome," he tripped over a piece of scrap, and fell to the ground on his left arm[.]

The Claimant subsequently filed a BWC claim which has been approved for the allowed conditions of tear of the left rotator cuff and a sprain of the left shoulder and arm[.]

* * *

I have reviewed the extensive medical records provided to me[.] I accept the clinical findings of the treating physicians but not necessarily their findings[.] I will now give my expert medical opinion based upon a reasonable degree of medical certainty to the following questions[:]

[One] Do you believe that the Claimant suffered from arthritis prior to his industrial injury of 2/8/07? Please fully explain your findings and conclusions[.]

Yes, I do believe that the Claimant suffered from arthritis prior to his industrial injury of 2/8/07[.] The MRI scan of 8/8/01 showed chronic degenerative changes[.]

[Two] Do you believe the Claimant suffered from diabetes prior to his industrial injury of 2/8/07? Please fully explain your findings and conclusions[.]

Yes, I do believe that the Claimant suffered from diabetes prior to his industrial injury of 2/8/07[.] The laboratory report from 4/13/07 revealed an elevated glucose level indicative of pre-existing diabetes[.]

[Three] Do you believe that the Claimant suffered from a cardiac condition, specifically a myocardial infarction, prior to his industrial injury of 2/8/07? Please fully explain your findings and conclusions[.]

Yes, I do believe that the Claimant suffered from a cardiac condition prior to his industrial injury of 2/8/07[.] The Myocardial perfusion scan performed on 4/13/07 showed the impression of abnormal study (Class V) demonstrating prior moderate inferior and inferoseptal myocardial infarction[.]

[Four] If so, do you believe that the Claimant's pre-existing conditions contributed to the length and difficulty of his recovery, hindered his recovery and/or exacerbated the allowed conditions of this claim?

Yes, I do believe that the Claimant's pre-existing conditions contributed to the length and difficulty of his recovery, hindered his recovery, and/or exacerbated the allowed conditions in this claim[.]

[Five] If you do find any indication of a pre-existing arthritic condition, please indicate the degree (in percentage terms) to which the pre-existing arthritic condition exacerbated the Claimant's industrial injury and/or delayed his recovery process[.]

I do believe that the Claimant's pre-existing arthritic condition exacerbated the Claimant's industrial injury by 80%.

[Six] If you do find any indication of a pre-existing diabetic condition, please indicate the degree (in percentage terms) to which the pre-existing diabetic condition exacerbated the Claimant's industrial injury and/or delayed his recovery process[.]

I do believe that the pre-existing diabetic condition exacerbated the Claimant's industrial injury and/or exacerbated or delayed his recovery process by 5%.

[Seven] If you do find any indication of a pre-existing cardiac condition, please indicate the degree (in percentage terms) to which the pre-existing cardiac condition exacerbated the Claimant's industrial injury and/or delayed his recovery process[.]

I do believe that the pre-existing cardiac condition exacerbated the claimant's industrial injury and/or delayed his recovery process by 15%.

{¶9} 4. In addition to the three-page narrative report quoted above, Dr. Berkowitz also indicated by his mark his agreement with pre-printed statements contained on three documents provided by relator's counsel. Each document is dated August 12, 2009. The first of the three documents states:

 x I have either treated, examined or reviewed medical records regarding the Claimant in connection with the above-referenced claim

 x The Claimant's handicappable condition of arthritis did pre-exist the date of injury for this claim

 x The pre-existing condition of arthritis has contributed, in my medical opinion, **80 percent** of the delay and difficulty Claimant has incurred in his recovery from the injury for this claim

(Emphasis sic.) The second of the three documents states:

x I have either treated, examined or reviewed medical records regarding the Claimant in connection with the above-referenced claim

 x The Claimant's handicapable condition of diabetes did pre-exist the date of injury for this claim

 x The pre-existing condition of diabetes has contributed, in my medical opinion, to **5 percent** of the delay and difficulty Claimant has incurred in his recovery from the injury for this claim.

(Emphasis sic.) The third of the three documents states:

 x I have either treated, examined or reviewed medical records regarding the Claimant in connection with the above-referenced claim

 x The Claimant's handicapable cardiac condition did pre-exist the date of injury for this claim

 x The pre-existing cardiac condition has contributed, in my medical opinion, to **15 percent** of the delay and difficulty Claimant has incurred in his recovery from the injury for this claim

(Emphasis sic.)

{¶10} 5. On December 2, 2009, the application proceeded to an informal conference with a representative of the administrator. Following the conference, the representative issued an order awarding to relator a 50-percent handicap reimbursement award based on 45 percent for arthritis, 5 percent for cardiac disease, and 0 percent for diabetes. The order was mailed January 8, 2010.

{¶11} 6. Relator administratively appealed the January 8, 2010 order of the administrator's representative.

{¶12} 7. Following a February 24, 2010 hearing, a district hearing officer ("DHO") issued an order awarding to relator a 50-percent handicap reimbursement award based on 45 percent for arthritis and 5 percent for cardiac disease.

{¶13} 8. Relator administratively appealed the February 24, 2010 DHO's order.

{¶14} 9. Following an April 9, 2010 hearing, a staff hearing officer ("SHO") issued an order that vacates the DHO's order. The SHO's order states:

The order of the District Hearing Officer, issued 03/02/2010, is vacated. The appeal filed by the Employer on 03/17/2010 is granted. Therefore, the Employer's CHP-4 Application filed 09/08/2009, is adjudicated as follows.

The Staff Hearing Officer finds that the Employer's said application is supported by the opinion of Mark S. Berkowitz, M.D., dated 08/12/2009. By way of clarification, Dr. Berkowitz has submitted a medical narrative dated 08/12/2009 as well as three "check the box response"-type letters, also dated 08/12/2009, pertaining to the Employer's application. Hereafter, all four reports will be referenced together as one and referred to as Dr. Berkowitz' 08/12/2009 report.

The Staff Hearing Officer finds that Dr. Berkowitz' report is the only report specifically addressing the issue of handicap reimbursement in terms of percentage. No other physician has offered an opinion in terms of percentages, that has been submitted to the record.

However, the Staff Hearing Officer does not find the 08/12/2009 report of Dr. Berkowitz' to be persuasive evidence in this matter and more specifically, does not find it to be some evidence upon which the Industrial Commission may rely.

As such, the Staff Hearing Officer concludes that the Employer has failed to meet its burden of proof in this matter.

The Staff Hearing Officer finds upon a review of the 08/12/2009 report of Dr. Berkowitz that he did not provide any rationale to explain how each alleged handicap condition, (arthritis, myocardial infarction, and diabetes), either

exacerbated the Injured Worker's industrial injury and/or delayed the Injured Worker's recovery process; nor did said physician provide any rationale to explain how he arrived at/or determined the alleged percentage amounts these alleged handicap conditions exacerbated the Injured Worker's industrial injury and/or delayed his recovery process.

Absent this reasoning, Dr. Berkowitz' opinion cannot be found to be persuasive as the rationale that provides the basis for his final opinion is unknown.

There being no other medical opinion from the physician specifically addressing these issues, the Staff Hearing Officer concludes that the Injured Worker has not met his burden of proof in this matter.

Accordingly, the Employer's CHP-4 Application is denied in its entirety.

All evidence contained within the record was reviewed and considered in rendering this decision. However, only that evidence specifically cited above was found to be persuasive and relied upon.

{¶15} 10. On August 10, 2010, relator AMG filed this mandamus action.

Conclusions of Law:

{¶16} It is the magistrate's decision that this court deny relator's request for a writ of mandamus, as more fully explained below.

{¶17} R.C. 4123.343 provides for handicap reimbursement. It states in part:

This section shall be construed liberally to the end that employers shall be encouraged to employ and retain in their employment handicapped employees as defined in this section.

(A) As used in this section, "handicapped employee" means an employee who is afflicted with or subject to any physical or mental impairment, or both, whether congenital or due to an injury or disease of such character that the impairment constitutes a handicap in obtaining employment or would constitute a handicap in obtaining reemployment if the

employee should become unemployed and whose handicap is due to any of the following diseases or conditions:

* * *

(2) Diabetes;

(3) Cardiac disease;

(4) Arthritis;

* * *

(C) Any employer who has in its employ a handicapped employee is entitled, in the event the person is injured, to a determination under this section.

An employer shall file an application under this section for a determination with the bureau or commission in the same manner as other claims. An application only may be made in cases where a handicapped employee or a handicapped employee's dependents claim or is receiving an award of compensation as a result of an injury or occupational disease occurring or contracted on or after the date on which division (A) of this section first included the handicap of such employee.

(D) The circumstances under and the manner in which an apportionment under this section shall be made are:

(1) Whenever a handicapped employee is injured or disabled or dies as the result of an injury or occupational disease sustained in the course of and arising out of a handicapped employee's employment in this state and the administrator awards compensation therefore and when it appears to the satisfaction of the administrator that the injury or occupational disease or the death resulting therefrom would not have occurred but for the pre-existing physical or mental impairment of the handicapped employee, all compensation and benefits payable on account of the disability or death shall be paid from the surplus fund.

(2) Whenever a handicapped employee is injured or disabled or dies as a result of an injury or occupational disease and the administrator finds that the injury or occupational disease

would have been sustained or suffered without regard to the employee's pre-existing impairment but that the resulting disability or death was caused at least in part through aggravation of the employee's pre-existing disability, the administrator shall determine in a manner that is equitable and reasonable and based upon medical evidence the amount of disability or proportion of the cost of the death award that is attributable to the employee's pre-existing disability and the amount found shall be charged to the statutory surplus fund.

{¶18} Here, the commission, through its SHO, denied relator's request for handicap reimbursement in its entirety, stating that the reports of Dr. Berkowitz are not persuasive because he failed to explain how each alleged handicap condition either exacerbated the industrial injury and/or delayed medical recovery. Also, the SHO states that Dr. Berkowitz failed to explain how he arrived at the percentage amounts.

{¶19} As a point of observation, clearly the SHO did not cite to or rely upon any medical opinion or evidence that challenges Dr. Berkowitz's opinions. Rather, the SHO found Dr. Berkowitz's reports to be flawed and, on that basis alone, denied the request for handicap reimbursement.

{¶20} According to relator, it was an abuse of discretion for the commission to deny the request based entirely upon findings that Dr. Berkowitz's reports were flawed. The magistrate disagrees with relator's argument.

{¶21} Relator does not disagree with the SHO's observation that Dr. Berkowitz fails to explain how each alleged handicap condition either exacerbated the industrial injury and/or delayed medical recovery. Relator does not disagree that Dr. Berkowitz failed to explain how he arrived at the percentage amounts.

{¶22} The commission is exclusively responsible for weighing and interpreting medical reports. *State ex rel. Burley v. Coil Packing, Inc.* (1987), 31 Ohio St.3d 18.

{¶23} Though ordinarily the commission cites affirmative evidence to support its order, it may deny a claim based upon a lack of probative or credible evidence in the record because relator has the burden of proof. *State ex rel. Thomas v. Indus. Comm.* (1989), 42 Ohio St.3d 31.

{¶24} Where a key question is left unanswered, the commission is entitled to conclude that a medical report's persuasiveness is either diminished or rejected. *State ex rel. Pavis v. Gen. Motors Corp., B.O.C. Group.*, 65 Ohio St.3d 30, 1992-Ohio-114.

{¶25} 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/Kenneth W. Macke
KENNETH W. MACKE
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).