

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio ex rel.	:	
Norman G. Campbell,	:	
	:	
Relator,	:	No. 12AP-914
v.	:	(REGULAR CALENDAR)
Industrial Commission of Ohio	:	
and Bill Wilbur & Sons Plumbing Co.,	:	
	:	
Respondents.	:	

D E C I S I O N

Rendered on September 19, 2013

Philip J. Fulton Law Office, and Chelsea J. Fulton, for relator.

Michael DeWine, Attorney General, and Sandra E. Pinkerton, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

SADLER, J.

{¶ 1} In this original action, relator, Norman G. Campbell, requests a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its order that denied him an increase in his percentage of permanent partial disability ("PPD") compensation and to enter an order finding that he is entitled to such an increase.

{¶ 2} Pursuant to Civ.R. 53 and Loc.R. 13(M) of the Tenth District Court of Appeals, this matter was referred to a magistrate who issued a decision, including findings

of fact and conclusions of law, which is appended hereto. The magistrate concluded the commission did not abuse its discretion in denying relator's application for an increase in his percentage of PPD. Accordingly, the magistrate recommended that this court deny the requested writ of mandamus.

I. RELATOR'S OBJECTIONS

{¶ 3} Relator has filed the following four objections to the magistrate's decision:

[I.] The magistrate erred by determining that newly allowed conditions do not constitute new and changed circumstances if located within the same body part as other conditions already allowed.

[II.] The magistrate erred by reweighing the evidence.

[III.] The magistrate's decision failed to address relator's arguments regarding *State ex rel. Mitchell v. Robbins & Meyers, Inc.*, 6 Ohio St.3d 481, 483-484, 453 N.E.2d 721 (1983).

[IV.] The magistrate erred by analyzing the AMA5 guides incorrectly.

II. DISCUSSION

{¶ 4} No objections have been filed to the magistrate's findings of fact. After an independent review of the same, we adopt those findings of fact as our own.

A. First Objection

{¶ 5} In his first objection, relator contends the magistrate erred in concluding newly allowed conditions do not constitute new and changed circumstances if located within the same body part as other conditions already allowed. A review of the magistrate's decision reveals the magistrate did not render such a broad conclusion. Rather, the magistrate concluded that, because relator's new conditions involved the same body part, the commission, in its discretion, could determine there had been no change in relator's percentage of PPD. In doing so, the magistrate was distinguishing the facts presented herein from those at issue in *State ex rel. Grim v. Indus. Comm.*, 10th Dist No. 07AP-761, 2008-Ohio-1800, the case relied upon by relator.

{¶ 6} Accordingly, we overrule relator's first objection to the magistrate's decision.

B. Second Objection

{¶ 7} In his second objection, relator contends the magistrate erred by reweighing the evidence as an independent factfinder. Contrary to relator's position, the magistrate did not reweigh the evidence but, instead, provided an explanation of how the commission could have reached the conclusions it did based on the evidence presented. What relator submits is a reweighing of the evidence, we find to be an explanation of why relator's position lacks merit.

{¶ 8} Accordingly, we overrule relator's second objection to the magistrate's decision.

C. Third Objection

{¶ 9} In his third objection, relator contends the magistrate failed to address his arguments based on *State ex rel. Mitchell v. Robbins & Myers, Inc.*, 6 Ohio St.3d 481 (1983), which requires the commission to state the evidence upon which it relied to reach its conclusions. Though not specifically citing *Mitchell*, the magistrate's decision sufficiently explains why the commission's decision satisfactorily complies with *Mitchell* and the line of cases requiring the commission to state the evidence upon which it relied.

{¶ 10} Accordingly, we overrule relator's third objection to the magistrate's decision.

D. Fourth Objection

{¶ 11} In his fourth objection, relator argues the magistrate erred by incorrectly analyzing the American Medical Association ("AMA") Guidelines. According to relator, when his percentage of PPD was increased to 21 percent in 1994, the increase was based upon the report of Dr. Cantor who utilized the Range of Motion ("ROM") method in accordance with the AMA Guidelines, Fourth Edition. Relator explains the Fifth Edition of the AMA Guidelines states that, while the Diagnosis Related Model ("DRE") would be the primary method for evaluating injury, "[i]f the ROM method has been used previously, it must be used again." (Relator's Objections, 17.) Nonetheless, when relator was evaluated in 2011, Dr. Rohner utilized the DRE to assess an eight percent PPD award. Because Dr. Rohner utilized the DRE rather than the ROM, relator contends Dr. Rohner's report cannot constitute "some evidence" upon which the commission can rely.

{¶ 12} Initially, we note that, with respect to disability claims, the commission is not bound to use the AMA Guidelines, as they are only to be used as a reference by physicians. *State ex rel. Piqua Technologies, Inc. v. Indus. Comm.*, 10th Dist. No. 03AP-186, 2004-Ohio-552, ¶ 4. To the extent relator challenges Dr. Rohner's utilization of the AMA Guidelines, Fifth Edition, by way of Dr. Rohner's use of the DRE, rather than the ROM method, to evaluate relator, such challenge goes to the weight and credibility of Dr. Rohner's report but does not render Dr. Rohner's report not "some evidence" upon which the commission can rely. *State ex rel. Litz v. Std. Slag Co.*, 10th Dist. No. 91AP-1159 (Oct. 22, 1992) (relator is free to discredit doctors' reports due to their use of the AMA Guidelines just as respondents are free to argue the guidelines are valid tools with which to evaluate injury). Questions of credibility and the weight to be given evidence are clearly within the discretion of the commission as factfinder. *State ex rel. Stitzel v. Roadway Express*, 10th Dist. No. 11AP-925, 2012-Ohio-4905, ¶ 3, citing *State ex rel. Teece v. Indus. Comm.*, 68 Ohio St.2d 165 (1981).

{¶ 13} Accordingly, we overrule relator's fourth objection to the magistrate's decision.

III. CONCLUSION

{¶ 14} Upon review of the magistrate's decision, an independent review of the record, and due consideration of relator's objections, we find the magistrate has properly determined the pertinent facts and applied the appropriate law. We, therefore, overrule relator's objections to the magistrate's decision and adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein. Accordingly, the requested writ of mandamus is hereby denied.

*Objections overruled;
writ of mandamus denied.*

TYACK and DORRIAN, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel.	:	
Norman G. Campbell,	:	
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Relator,	:	No. 12AP-914
	:	
v.	:	(REGULAR CALENDAR)
	:	
Industrial Commission of Ohio	:	
and Bill Wilbur & Sons Plumbing Co.,	:	
	:	
Respondents.	:	

MAGISTRATE'S DECISION

Rendered on April 10, 2013

*Philip J. Fulton Law Office, Norman G. Campbell and
Chelsea J. Fulton, for relator.*

*Michael DeWine, Attorney General, and Sandra E.
Pinkerton, for respondent Industrial Commission of Ohio.*

IN MANDAMUS

{¶ 15} Relator, Norman G. Campbell, 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 him an increase in his percentage of permanent partial disability ("PPD") and ordering the commission to find that he is entitled to an increase in his award.

Findings of Fact:

{¶ 16} 1. Relator sustained a work-related injury on November 17, 1986 and his workers' compensation claim was originally allowed for lumbar sprain/strain.

{¶ 17} 2. In an order mailed August 1, 1994, the administrator of the Ohio Bureau of Workers' Compensation ("BWC") issued a tentative order finding that relator was entitled to an award of 21 percent PPD, which represented an increase of 7 percent. This determination was based on two reports: an independent medical examination conducted by the BWC's medical section (which is not contained in the record) and the July 3, 1994 report of Ronald E. Cantor, M.D.

{¶ 18} 3. In his report, Dr. Cantor noted the following physical findings: flexion 40 degrees; extension 10 degrees; right and left lateral bending 10 degrees.

{¶ 19} 4. On May 17, 2010, relator filed a motion asking that his workers' compensation claim be allowed for additional conditions. His motion was supported by an MRI, an x-ray, and two reports from Robin A. Hunter, D.C. Dr. Hunter's February 7, 2011 report provided the following physical findings: 30 degrees forward bending; 10 degrees extension; right and left lateral bending 20 degrees respectively. Dr. Hunter also indicated that relator's PPD was now at 50 percent due to the additionally allowed conditions, his examination findings, and the impairments relator was experiencing in his activities of daily living.

{¶ 20} 5. Relator's motion was heard before a district hearing officer ("DHO") on July 16, 2010. The DHO relied on the medical report of Dr. Hunter as well as the MRI and determined that relator's claim should be allowed for the following additional conditions: "[l]umbar degenerative joint disease; lumbar degenerative disc disease; lumbar retrolisthesis of L4 on L5."

{¶ 21} 6. On March 28, 2011, relator filed an application for the determination of an increase in his percentage of PPD based on the newly allowed conditions.

{¶ 22} 7. Relator was examined by Ralph G. Rohner, Jr., M.D. In his August 29, 2011 report, Dr. Rohner noted the following physical findings: flexion is 50 degrees; extension 20 degrees; right lateral bending 20 degrees; and left lateral bending 30 degrees. Dr. Rohner opined that relator currently had an 8 percent whole person

impairment and that, as such, there was no increase in his percentage of permanent partial impairment.

{¶ 23} 8. In an order mailed September 12, 2011, the administrator of the BWC relied on the report of Dr. Rohner and concluded that relator was not entitled to an increase in the percentage of his PPD.

{¶ 24} 9. Relator appealed and the matter was heard before a DHO on October 31, 2011. The DHO relied on the report of Dr. Rohner and concluded that relator was not entitled to an increase in his percentage of PPD.

{¶ 25} 10. Relator appealed, arguing the following:

Mr. Campbell's last percentage of permanent partial disability award was in 1994 when he was awarded a 21% permanent partial disability for the condition of lumbar sprain/strain. This award was based upon the Bureau doctor using the range of motion model * * * of the AMA Guides.

On July 16, 2010, his claim was allowed for the conditions of lumbar degenerative joint disease, lumbar degenerative disc disease, and lumbar retrolisthesis of the L4 on L5. His treating physician, Dr. Robin Hunter, opines that his percentage of disability based upon these additional conditions is now at 50%. The Bureau had Mr. Campbell examined by Dr. Rohner who does not provide any opinion as to the percentage for the new conditions but indicates that based upon Table 15-3 of the AMA 5, or the DRE method, his percentage is 8%. Since Dr. Rohner neither provided a percentage for the new allowed diagnoses, which was his instructions by the Bureau, and improperly used the DRE, his opinion should be totally discounted. However, according to the AMA 5, if the range of motion method was previously used, it should be used again. This request is obviously based upon issues of fairness and *res judicata* because it is legally impossible to use the DRE method to compare when previously the range of motion method was used.

{¶ 26} 11. Relator's appeal was heard before a staff hearing officer ("SHO") on December 23, 2011. The SHO relied on the reports of both Drs. Hunter and Rohner and concluded that relator's PPD was "no greater than that previously determined" and denied his request for an increase.

{¶ 27} 12. Relator's request for reconsideration was denied by order of the commission mailed February 15, 2012.

{¶ 28} 13. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶ 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} The Supreme Court of Ohio has set forth three requirements which must be met in establishing a right to a writ of mandamus: (1) that relator has a clear legal right to the relief prayed for; (2) that respondent is under a clear legal duty to perform the act requested; and (3) that relator has no plain and adequate remedy in the ordinary course of the law. *State ex rel. Berger v. McMonagle*, 6 Ohio St.3d 28 (1983).

{¶ 31} 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).

{¶ 32} Pursuant to R.C. 4123.57(A), a determination of the percentage of an employee's permanent disability must be based on medical or clinical findings which are reasonably demonstrable. R.C. 4123.57(A) further requires that an application for an increase in PPD must be supported by substantial evidence of new and changed circumstances which have developed since the time of the hearing on the original or last determination.

{¶ 33} It is undisputed that when the relied-upon medical reports present a range of percentages, the commission does not abuse its discretion by choosing a percentage

within the range of those percentages, and there is no requirement, in those situations, that the commission explain why it has selected the percentage chosen. *State ex rel. Yellow Freight Sys., Inc. v. Indus. Comm.*, 97 Ohio St.3d 179, 2002-Ohio-5811 ¶ 9.

{¶ 34} In the present case, relator had been granted a 21 percent PPD award. After his claim was additionally allowed for lumbar degenerative joint disease, lumbar degenerative disc disease, and lumbar retrolisthesis of L4 on L5, relator sought an increase in his PPD award. Relator submitted the February 7, 2011 report of Dr. Hunter who opined that relator then had a 50 PPD. The record also contains the August 29, 2011 report of Dr. Rohner who opined that relator currently had an 8 percent permanent partial disability. Dr. Hunter's opinion, if accepted, would have represented a 29 percent increase, while Dr. Rohner's report, if relied upon, would not support an increase in the award.

{¶ 35} Relator contends that it was an abuse of discretion for the commission to rely on Dr. Rohner's report because Dr. Rohner did not even acknowledge that relator had a 21 percent impairment as had previously been found. Relator contends that the medical evidence he submitted clearly demonstrates new and changed circumstances and that the commission abused its discretion by not awarding him an increase in his award.

{¶ 36} The record contains three medical reports which address the issue of relator's percentage of partial disability, the July 3, 1994 report of Dr. Cantor, the February 7, 2011 report of Dr. Hunter, and the August 29, 2011 report of Dr. Rohner. In the following chart, the magistrate sets forth the objective findings of those physicians:

	Flexion	Extension	Right Lateral Bending	Left Lateral Bending
Dr. Cantor Jul. 3, 1994	40 degrees	10 degrees	10 degrees	10 degrees
Dr. Hunter Feb. 7, 2011	30 degrees	10 degrees	20 degrees	20 degrees
Dr. Rohner Aug. 29, 2011	50 degrees	20 degrees	20 degrees	30 degrees

{¶ 37} A comparison of the three reports reveals the following: Drs. Hunter and Rohner both observed improvement in relator's right and left lateral bending in 2011 compared to the findings observed by Dr. Cantor in 1994; while Dr. Rohner observed improvement in relator's extension, Dr. Hunter observed that relator's extension was the same in 2011 as it was in 1994; and while Dr. Hunter observed a decrease in relator's flexion compared to Dr. Cantor's 1994 observation, Dr. Rohner observed an improvement in relator's flexion. Considering the demonstrable evidence before the commission, while relator's claim had indeed been allowed for significant new conditions, there was conflicting medical evidence concerning whether or not his impairment had objectively worsened and, if so, by how much.

{¶ 38} Finding that relator's percentage of PPD was "no greater than that previously determined," the commission did select a percentage of impairment between 8 percent and 50 percent—specifically 21 percent. There is no case law supporting relator's assertion that the commission was required to grant an increase between 0 percent (since Dr. Rohner opined that his impairment had not increased) and 29 percent (since Dr. Hunter opined that his impairment had increased by 29 percent from 21 percent to 50 percent). Physicians are not asked whether a claimant has an increase in the percentage of impairment. Physicians are asked to determine what percentage of impairment the claimant has currently. There was conflicting medical evidence in the record and the magistrate finds that the commission's determination that relator had not demonstrated an increase in his percentage of PPD did not constitute an abuse of discretion.

{¶ 39} Relator also contends that Dr. Rohner clearly utilized the wrong table when he made his determination of relator's percentage of impairment. Although relator acknowledges that neither the Ohio Revised Code nor the Ohio Administrative Code required that Dr. Rohner use the same chart used by Dr. Cantor, relator asserts that the commission's own policy requires such a result.

{¶ 40} Relator correctly notes that examining physicians are required to use the AMA Guidelines to determine the percentage of impairment and that those guidelines provide that, for purposes of re-evaluation, if the ROM (Range of Motion) method is used initially, the ROM method (and not the DRE method - Diagnosis Related Estimate)

must be used again. Here, Dr. Cantor specifically indicated that he was using the ROM method and relator contends that the commission was required to rely on a medical report that also utilized the ROM method.

{¶ 41} As relator acknowledges, the law does not require this. In fact, this court has specifically found that the AMA Guidelines are merely a reference point to be used by physicians:

[T]he commission has never adopted Guidelines as a rule, regulation or guideline to be used by hearing officers and the AMA Guidelines are only to be used as a reference by doctors. *State ex rel. Nabisco, Inc. v. Indus. Comm.* (Feb. 21, 2002), Franklin App. No. 01AP-464.

State ex rel. Piqua Technologies, Inc. v. Indus. Comm., 10th Dist. No. 03AP-186, 2004-Ohio-552, ¶ 4.

{¶ 42} Further, since Dr. Rohner found that relator's range of motion in all categories was improved over Dr. Cantor's findings, Dr. Rohner's percentage based on range of motion would have been less than the 21 percent found by Dr. Cantor. Also, to the extent that relator argues that he is now entitled to a 50 percent PPD award, the magistrate disagrees. While Dr. Hunter did provide his range of motion findings, only flexion was less than what Dr. Cantor found and, more importantly, Dr. Hunter did not identify the method he used to assess a 50 percent impairment. It cannot be determined if he used the DRE method, the ROM method or some other unidentified method. So, if neither report truly constitutes some evidence, there is no evidence upon which the commission could have relied to increase relator's award. As such, the magistrate finds that the commission did not abuse its discretion.

{¶ 43} Relator cites this court's decision in *State ex rel. Grimm v. Indus. Comm.*, 10th Dist. No. 07AP-761, 2008-Ohio-1800, and contends that this court determined that the commission abused its discretion when it failed to grant an increase in a claimant's PPD award based on newly allowed right knee conditions, when the medical evidence submitted attributed impairment to those newly allowed conditions. For the reasons that follow, the magistrate finds that this court's decision in *Grimm* does not apply here.

{¶ 44} Nicole L. Grimm sustained a work-related injury and her claim was originally allowed for cervical and lumbar sprain. Grimm filed an application for the

determination of the percentage of PPD resulting from her cervical and lumbar sprain and she was awarded a 5 percent PPD award.

{¶ 45} Thereafter, Grimm's claim was additionally allowed for right knee sprain and aggravation of pre-existing arthritis of the right knee. Grimm filed an application seeking an increase in her percentage of PPD based solely upon her newly allowed right knee conditions.

{¶ 46} The commission had two medical reports to consider: one doctor opined that Grimm's right knee conditions caused her to have a 2 percent whole person impairment while another physician opined that Grimm had a 10 percent whole person impairment due to the right knee conditions. The commission denied Grimm's application in its entirety.

{¶ 47} Grimm filed a mandamus action in this court and one of the issues raised was whether the commission abused its discretion by failing to find that she had any increase in her percentage of PPD. This court concluded that the commission did abuse its discretion when it did not make some award, between 2 and 10 percent, given that all the medical evidence in the record attributed any increase in Grimm's percentage of PPD to newly allowed conditions.

{¶ 48} In the present case, relator is correct to assert that she has new conditions allowed in her claim. However, relator's newly allowed conditions are confined to the same body parts for which her claim was originally allowed, namely her lumbar spine. By comparison, Grimm's claim was originally allowed for cervical and lumbar sprain and was later allowed for conditions in her right knee. Clearly, any objective medical findings related to Grimm's right knee would not have been made and included when the commission originally determined her percentage of PPD based on her cervical and lumbar conditions.

{¶ 49} In the present case, there was conflicting medical evidence in the record as to relator's objective findings. Although relator did have newly allowed conditions, those conditions were allowed for the same body part and, the evidence was inconclusive as to whether or not those objective findings had improved or worsened since the original application and, if so, by how much. Because there was conflicting evidence in the record, the magistrate finds that the commission did not abuse its

discretion in finding that relator had not demonstrated entitlement to an increase in his percentage of PPD and has not demonstrated the commission abused its discretion.

{¶ 50} Based on the forgoing, it is this magistrate's decision that relator has not demonstrated that the commission abused its discretion in denying his application for an increase in his percentage of PPD, and this court should deny his request for a writ of mandamus.

/S/ MAGISTRATE
STEPHANIE BISCA BROOKS

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).