[Cite as *State ex rel. YRC, Inc. v. Hood*, 2010-Ohio-2190.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. YRC, Inc., formerly known as Yellow Transportation, Inc.,	:	
Relator,	:	No. 09AP-529
v.	:	(REGULAR CALENDAR)
George D. Hood and Industrial Commission of Ohio,	:	
Respondents.	:	

D E C I S I O N

Rendered on May 18, 2010

Thomas & Company, L.P.A., and *William R. Thomas*, for relator.

Marchese & Monast, and *James P. Monast*, for respondent George D. Hood.

Richard Cordray, Attorney General, and *Kevin J. Reis*, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

SADLER, J.

{¶1} Relator, YRC, Inc. ("relator"), filed this action seeking a writ of mandamus directing respondent, Industrial Commission of Ohio ("commission"), to amend its order denying an application for permanent total disability ("PTD") compensation filed by respondent, George D. Hood ("claimant"), to reflect an additional basis for denying the application: specifically, that claimant voluntarily removed himself from the workforce.

{¶2} We referred this case to a magistrate of this court pursuant to Loc.R. 12(M) and Civ.R. 53. On January 12, 2010, the magistrate issued a decision, a copy of which is attached to this decision, denying the writ of mandamus. Relator filed objections to the magistrate's decision, and the commission and claimant each filed memoranda in response to the objections. For the reasons that follow, we overrule relator's objections, and adopt the magistrate's decision.

{¶3} Claimant began working for relator in 1987 as a truck driver. Claimant has three industrial claims arising from that employment. On November 28, 2005, claimant signed a form indicating that he was voluntarily resigning from his employment. On August 9, 2007, claimant filed an application seeking PTD compensation.

{¶4} After a hearing on November 19, 2008, a staff hearing officer ("SHO") denied claimant's PTD application. The SHO concluded that claimant retains the ability to engage in sedentary employment. The SHO's order also concluded that claimant did not voluntarily remove himself from the workforce when he retired from his employment with relator. Relator requested reconsideration on the issue of whether claimant voluntarily removed himself from the workforce, which was denied by the commission. Relator then filed this action.

{¶5} The magistrate concluded that the writ should be denied because the issue of whether claimant voluntarily removed himself from the workforce is not ripe for review. The magistrate relied on *State ex rel. Elyria Foundry Co. v. Indus. Comm.*, 82 Ohio St.3d 88, 1998-Ohio-366, in which the Supreme Court of Ohio concluded that denial of a writ of mandamus was appropriate on the grounds of ripeness. In that case, there was a dispute regarding whether the employee's workers' compensation claim should be allowed, and what conditions should be allowed. The employer sought a writ of mandamus on the issue of whether the claimant was entitled to temporary total disability ("TTD") compensation in the event that the claim was allowed. The court concluded that this was an inappropriate issue for review because the writ sought by the employer would have required the court to consider issues that, at that point, were purely abstract and hypothetical. Id.

{¶6} Relator argues that *Elyria Foundry* is distinguishable from this case, because in *Elyria Foundry* the dispute regarding whether the employee's claim would be allowed was the subject of an action in common pleas court under R.C. 4123.512 that was pending at the time the mandamus action was brought in that case. Relator argues that the Supreme Court in *Elyria Foundry* recognized that the claim regarding TTD that it found was not ripe could become ripe based on the result of the action in common pleas court. Relator claims that in this case there is no way for its argument that claimant voluntarily withdrew from the workforce to become ripe for review in a future proceeding, because the commission has already decided that claimant did not voluntarily withdraw from the workforce, and that decision will have res judicata effect in any future proceedings on the issue.

{¶7} In his decision, the magistrate, citing *State ex rel. Park Poultry, Inc. v. Indus. Comm.*, 10th Dist. No. 03AP-1122, 2004-Ohio-6831, rejected relator's argument that unless the commission's decision regarding whether claimant voluntarily withdrew from the workforce is overturned by way of a writ of mandamus now, that decision will have res judicata effect that will prevent relator from asserting that argument in the future. *Park Poultry* involved a case in which a claimant had been denied PTD on the grounds that the commission concluded that the claimant was capable of sustained remunerative employment. The employer brought a writ of mandamus action seeking to vacate the commission's conclusion that the claimant had not abandoned his employment by rejecting a bona fide job offer.

{¶8} In *Park Poultry*, we adopted the magistrate's decision that concluded that the employer's claim for a writ of mandamus was not ripe for review. Id. at ¶4. The magistrate's decision on ripeness was based on the idea that the commission, having already determined that the employee's application for PTD should be denied based on the employee's ability to engage in sustained remunerative employment, was not required to enter any alternative grounds for denial. Id. at ¶21. In adopting the magistrate's decision, we emphasized that "a denial of relator's request for a writ of mandamus on the basis that the controversy is not ripe for review is not a decision on the merits of the action." Id. at ¶4.

{¶9} In this case, like in *Park Poultry*, the commission was only required to assert one ground for denying claimant's application for PTD compensation. Therefore, we agree with the magistrate's conclusion in this case that relator's argument that claimant voluntarily removed himself from the workforce is not ripe for review. We also agree with

the magistrate's conclusion that, although the commission rejected relator's argument that claimant voluntarily removed himself from the workforce, relator will not be precluded from arguing that claimant voluntarily removed himself from the workforce in any future proceedings.

{¶10} Consequently, we overrule relator's objections to the magistrate's decision. Further, having independently reviewed the record, we find that the magistrate has properly discerned the facts and has applied the relevant law to those facts. Therefore, we adopt the magistrate's decision as our own. In accordance with the magistrate's decision, we hereby deny the requested writ of mandamus.

Objections overruled;
writ of mandamus denied.

FRENCH and CONNOR, JJ., concur.

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A P P E N D I X

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

Rendered on January 12, 2010

Thomas & Company, L.P.A., and *William R. Thomas*, for relator.

Marchese & Monast and *James P. Monast*, for respondent George D. Hood.

Richard Cordray, Attorney General, and *Kevin J. Reis*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶11} In this original action, relator, YRC, Inc. ("YRC" or "relator"), requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to

amend its order denying the application for permanent total disability ("PTD") compensation filed by respondent George D. Hood ("claimant") so that the order determines an additional ground for denial of the application, to wit: that claimant voluntarily removed himself from the workforce.

Findings of Fact:

{¶12} 1. Claimant has three industrial claims arising out of his employment with relator, a self-insured employer under Ohio's workers' compensation laws.

{¶13} 2. Claimant began working for YRC in October 1987 as a truck driver. On November 28, 2005, claimant signed a company form indicating that he was voluntarily resigning from his employment.

{¶14} 3. On August 9, 2007, claimant filed an application for PTD compensation.

{¶15} 4. Following a November 19, 2008 hearing, a staff hearing officer ("SHO") mailed an order denying the application. The SHO's order explains:

> It is the finding of the Staff Hearing Officer that the Injured Worker retains the residual physical and intellectual capacities to engage in sustained remunerative employment. In finding that the Injured Worker is not permanently and totally disabled, the Staff Hearing Officer relied upon the medical report of Dr. Rutherford, dated 01/03/2008, Dr. Stanko, and dated 01/03/2008.
>
> The Injured Worker is a 61 year old male who graduated from high school and has the ability to read[,] write and perform basic math problems. The record reviews [sic] that the Injured Worker has acquired the skill of a truck driver. He has a current CDL [commercial driver's license]. The record reveals that the Injured Worker had been employed as a truck driver/yard person from 1973 to 2005. His duties were

over the road truck driver. The Injured Worker retired in 2005 at the age of 59 from his place of employment due to physical reasons. (The Staff Hearing Officer will address whether the Injured Worker voluntarily removed himself [from] the work force.)

A review of the record indicates that the Injured Worker had several industrial injuries with the employer which resulted in the conditions noted in this order. With respect to the medical treatment that the Injured Worker received with respect to the allowed conditions in the claim[,] the Injured Worker['s] treatment had been moderate. The Injured Worker had several surgeries to repair his right knee and lumbar surgery to repair a herniated disc. The record reflects that the Injured Worker has non-allowed conditions that affect him physically, he has pre-existing left knee injuries, COPD, Parkinson's disease, left knee arthritis, left shoulder rotator cuff tear, asthma, and sleep apnea.

Dr. Rutherford examined the Injured Worker on behalf of the Industrial Commission to determine whether the Injured Worker retains the residual physical capacity to engage in sustained remunerative employment. He opined that the Injured Worker had reached maximum medical improvement with respect to the allowed conditions in the claim, [and] that the Injured Worker had 27 percent whole person impairment. He further opined that the Injured Worker retains the residual physical capacity to engage in sedentary type employment. He noted that the Injured Worker could not climb ladders, or drive heavy equipment.

Dr. Stanko examined the Injured Worker on behalf of the Industrial Commission to determine what restrictions the Injured Worker had if any from the post-traumatic concussive syndrome. Dr. Stanko opined that the Injured Worker could engage in sustained remunerative employment, however, the Injured Worker cannot perform jobs that require working around unprotected heights. He opined that the Injured Worker had 6 percent whole person impairment.

It is the finding of the Staff Hearing Officer that the Injured Worker is not permanently and totally disabled and retains the ability to engage in sedentary employment. The application is denied based upon the reasons set forth in this order.

> The Injured Worker is a 61 year old male who graduated from high school and has the ability to read, write and perform basic math. The Injured Worker has demonstrated that he has interpersonal skills that would allow him to maintain employment. The Injured Worker had been employed for over 28 years with this Employer. The Injured Worker has the ability to learn new tasks as over the years the trucking industry changed with driver keeping more detailed logs, records as required by the employer and governmental departments. The Injured Worker has the reading, math and writing skills to obtain entry level sedentary employment. The Staff Hearing Officer finds that the Injured Worker could seek employment as a sit down cashier for [a] parking garage, a[n] airport van driver, and video clerk, security guard positions that do not require walking great distances, telemarketer, and surveillance monitor.
>
> The Staff Hearing Officer also finds that the Injured Worker could make him more marketable by availing himself of the services that are available to people to find employment. The Injured Worker is a veteran of the Armed Services; he could contact veteran affairs for jobs counseling and job referrals. The Injured Worker could also contact employment services for the State of Ohio. The court has stated that permanent and total disability compensation is the last resort not the first.
>
> The Staff Hearing Officer further finds that the Injured Worker did not remove himself from the work force when he retired from Yellow Freight. The Injured Worker testified that he left Yellow Freight because of his physical problems[,] that he was in pain, [and] that he could no longer perform the over the road driving. The Injured Worker stated that he did not file for disability retirement because the amount of money he would receive would have been at least $1,000.00 a month less. The Staff Hearing Officer finds that it is not unreasonable to assume that a person would apply for benefits that provide the maximum amount [of] monies as oppose[d] to taking less benefits.

{¶16} 5. On January 23, 2009, the three-member commission mailed an order denying relator's request for reconsideration of the SHO's order of November 19, 2008.

{¶17} 6. On May 29, 2009, relator, YRC, Inc., filed this mandamus action.

Conclusions of Law:

{¶18} Because the issue relator presents for review in this action is not ripe for review, it is the magistrate's decision that this court deny relator's request for a writ of mandamus, as more fully explained below.

{¶19} *State ex rel. Elyria Foundry Co. v. Indus. Comm.* (1998), 82 Ohio St.3d 88, 89, is instructive. In that case, the Supreme Court of Ohio applied the ripeness doctrine in a mandamus action brought by an employer who challenged the claimant's entitlement to workers' compensation. The *Elyria* court denied the requested writ on grounds that the question presented was not ripe for review. The *Elyria* court states:

> * * * The ripeness doctrine is motivated in part by the desire "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies * * *." *Abbott Laboratories v. Gardner* (1967), 387 U.S. 136, 148, 87 S.Ct. 1507, 1515, 18 L.Ed.2d 681, 691. As one writer has observed:
>
> "The basic principle of ripeness may be derived from the conclusion that 'judicial machinery should be conserved for problems which are real or present and imminent, not squandered on problems which are abstract or hypothetical or remote.' * * * [T]he prerequisite of ripeness is a limitation on jurisdiction that is nevertheless basically optimistic as regards the prospects of a day in court: the time for judicial relief is simply not yet arrived, even though the alleged action of the defendant foretells legal injury to the plaintiff." Comment, Mootness and Ripeness: The Postman Always Rings Twice (1965), 65 Colum.L.Rev. 867, 876.

{¶20} Ohio Adm.Code 4121-3-34 sets forth the commission's rules applicable to the adjudication of PTD applications. Ohio Adm.Code 4121-3-34(D) sets forth the

commission's guidelines for the adjudication of PTD applications. Thereunder, Ohio Adm.Code 4121-3-34(D)(1)(d) provides:

> If, after hearing, the adjudicator finds that the injured worker voluntarily removed himself from the work force, the injured worker shall be found not to be permanently and totally disabled. If evidence of voluntary removal or retirement is brought into issue, the adjudicator shall consider evidence that is submitted of the injured worker's medical condition at or near the time of removal/retirement.

{¶21} Also, Ohio Adm.Code 4121-3-34(D)(2)(b) provides:

> If, after hearing, the adjudicator finds that the injured worker, based on the medical impairment resulting from the allowed conditions is unable to return to the former position of employment but may be able to engage in sustained remunerative employment, the non-medical factors shall be considered by the adjudicator.
>
> The non-medical factors that are to be reviewed are the injured worker's age, education, work record, and all other factors, such as physical, psychological, and sociological, that are contained within the record that might be important to the determination as to whether the injured worker may return to the job market by using past employment skills or those skills which may be reasonably developed. * * *

{¶22} Following the November 19, 2008 hearing, the SHO issued an order denying the PTD application under Ohio Adm.Code 4121-3-34(D)(2)(b) based upon a determination that claimant is able to engage in sustained remunerative employment. Also, the SHO's order renders a determination under Ohio Adm.Code 4121-3-34(D)(1)(d) when the SHO finds that the claimant "did not remove himself from the work force when he retired from Yellow Freight."

{¶23} Obviously, there is no challenge by relator to the commission's determination that claimant is able to perform sustained remunerative employment.

However, relator does challenge the SHO's determination that claimant did not (voluntarily) remove himself from the workforce.

{¶24} That it may be successfully argued that the commission erred in determining that claimant did not (voluntarily) remove himself from the workforce, cannot alter the commission's ultimate determination that the application be denied. Thus, relator's challenge here to the commission's determination under Ohio Adm.Code 4121-3-34(D)(1)(d) is, in effect, an invitation that this court address the abstract and the hypothetical.

{¶25} That claimant may file another PTD application at some future time does not render the issue of claimant's removal from the workforce any less abstract or hypothetical in this action. If, upon the filing of another application, claimant were to successfully persuade the commission that he is unable to perform sustained remunerative employment, and the commission were to hold that it is bound by its prior determination that claimant did not remove himself from the workforce, relator can challenge the determination in the SHO's order of November 19, 2008 in a future mandamus action that challenges an award of PTD compensation. See *State ex rel. Park Poultry, Inc. v. Indus. Comm.*, 10th Dist. No. 03AP-1122, 2004-Ohio-6831.

{¶26} 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).