

[Cite as *State ex rel. Tope v. Manheim Auctions, Inc.*, 2010-Ohio-5152.]  
IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Christopher Tope, :  
Relator, :  
v. : No. 09AP-481  
Manheim Auctions, Inc., and : (REGULAR CALENDAR)  
Industrial Commission of Ohio, :  
Respondents. :  
:

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D E C I S I O N

Rendered on October 21, 2010

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*Kennedy & Colasurd, and Michael D. Colasurd, for relator.*

*Richard Cordray, Attorney General, and Joseph C. Mastrangelo, for respondent Industrial Commission of Ohio.*

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IN MANDAMUS

FRENCH, J.

{¶1} Relator, Christopher Tope, has filed an original action in mandamus requesting this court to issue a writ of mandamus ordering respondent, Industrial Commission of Ohio, to vacate its order finding that his start date for permanent total disability compensation is January 24, 2008, and to order the commission to find that

the start date is September 26, 2007, the day after his temporary total disability compensation was terminated.

{¶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 deny the requested writ. No objections to the magistrate's decision have been filed.

{¶3} Discerning no error on the face of the magistrate's decision, we adopt the decision, including the findings of fact and conclusions of law contained in it, as our own. Accordingly, the requested writ of mandamus is denied.

*Writ of mandamus denied.*

McGRATH and CONNOR, JJ., concur.

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**A P P E N D I X**

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Relator,	:	
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v.	:	No. 09AP-481
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Manheim Auctions, Inc. and	:	(REGULAR CALENDAR)
Industrial Commission of Ohio,	:	
	:	
Respondents.	:	
	:	

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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 October 19, 2009

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*Kennedy & Colasurd, and Michael D. Colasurd, for relator.*

*Richard Cordray, Attorney General, and Joseph C. Mastrangelo, for respondent Industrial Commission of Ohio.*

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IN MANDAMUS

{¶4} Relator, Christopher Tope, has filed this original action requesting that this court issue a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its orders finding that the start date for his permanent total disability ("PTD") compensation should be January 24, 2008, and ordering the

commission to find that his PTD compensation should begin September 26, 2007, the day after his temporary total disability ("TTD") compensation was terminated.

Findings of Fact:

{¶5} 1. Relator sustained a work-related injury on June 2, 1998, and his claim has been allowed for "acute lumbosacral strain; radiculopathy left S-1; spinal stenosis at L4-5 and L5-S1; spinal instability at L3-4."

{¶6} 2. In August 2007, the Ohio Bureau of Workers' Compensation ("BWC") filed a motion to terminate relator's TTD compensation. That motion was based on the August 1, 2007 report of Stephen J. Eichert, D.O., who concluded:

He has plateaued and is therefore at maximal medical improvement[.] I can say with reasonable medical probability that further rehabilitation or invasive medical procedures are not going to provide any benefit to this patient[.]

Currently[,] as a result of his multiple medications required to control his symptoms at the present level, he cannot safely return to physical employment[.]

He is a candidate for vocational rehabilitation[.]

{¶7} 3. Relator's TTD compensation was terminated effective September 26, 2007.

{¶8} 4. A functional capacity evaluation ("FCE") was performed in January 2008, and a report was completed January 24, 2008. The evaluator performing the FCE concluded that relator's overall performance fell below the sedentary category of work activity.

{¶9} 5. On February 8, 2008, relator's treating physician, W. David Leak, M.D., completed a Medco-14 indicating that relator was totally disabled beginning in June 1998.

{¶10} 6. Relator was referred for a vocational assessment in February 2008. The vocational assessment noted that relator's physician of record had imposed work restrictions of total disability through February 1, 2009, and that the January 22, 2008 FCE indicated that relator was not able to perform work at the sedentary strength level. It was indicated that the goal of the work conditioning program would be to increase relator's overall tolerance for sitting, standing, and strength factors so that he could participate in work at the sedentary level. However, a final conclusion was deferred until the evaluator could contact Dr. Leak with regards to his February 2008 Medco-14 indicating that relator was totally disabled.

{¶11} 7. Relator was examined by Richard M. Ward, M.D., on October 7, 2008. Following his examination, Dr. Ward opined that relator had a 29 percent whole person impairment, could stand and/or walk less than one hour in an eight-hour day, could sit for up to four hours in an eight-hour day, and could occasionally lift ten pounds.

{¶12} 8. In November 2008, relator filed his application for PTD compensation.

{¶13} 9. Relator was also examined by William Reynolds, M.D., who authored a report dated January 5, 2009. After providing his physical findings upon examination, Dr. Reynolds opined that relator had a 28 percent whole person impairment and was incapable of any work activity.

{¶14} 10. Relator's application for PTD compensation was heard before a staff hearing officer ("SHO") on March 11, 2009 and was granted. The SHO relied on the January 5, 2009 medical report of Dr. Reynolds for the conclusion that relator was unable to perform any sustained remunerative employment based solely upon the medical impairment caused by the allowed conditions. Further, the SHO determined that the start date for the award was January 24, 2008, the date of the FCE finding that relator was capable of performing less than sedentary work. At the hearing, relator argued that the start date should be September 26, 2007. The SHO rejected that argument as follows:

The Injured Worker argued that the start date for permanent and total disability should be 09/26/2007, which is the day after the Injured Worker was found to have been at maximum medical improvement, and his temporary total disability compensation was terminated. The Staff Hearing Officer denies this request, based on inadequate medical evidence prior to 01/24/2008 that the Injured Worker was permanently and totally disabled.

First, the Injured Worker requests reliance upon the report of Dr. Eichert, dated 08/01/2007. The Staff Hearing Officer rejects that report because it supports only that the Injured Worker can not safely return to physical employment at that time, and that he is a candidate for vocational rehabilitation. The Staff Hearing Officer also rejects the report of Dr. Kakde, dated 10/03/2006, as not supporting an inability to perform sustained remunerative employment because Dr. Kakde opines that the Injured Worker can not return to his former position of employment as the work is very labor intensive, but also opines that the Injured Worker at that time could do some sedentary work.

{¶15} 11. Thereafter, relator filed a request for reconsideration again requesting that his PTD compensation start date be changed to September 26, 2007.

{¶16} 12. The matter was heard before an SHO on April 22, 2009 and was denied. First, the SHO reiterated the prior reasons listed for determining that January 24, 2008 was the proper start date for relator's PTD compensation. Thereafter, the SHO addressed relator's argument that Dr. Eichert's August 1, 2007 report constituted some evidence as to the proper start date of his PTD compensation. The SHO addressed that issue and rejected it as follows:

The Staff Hearing Officer finds that in pertinent part, Dr. Eichert's 08/01/2007 report states as follows: "Currently as a result of his multiple medications required to control his symptoms at the present level, {the injured worker} cannot safely return to physical employment." While there is no dispute that Dr. Eichert concluded that the allowed conditions were at maximum medical improvement, the Staff Hearing Officer finds that the cited language from Dr. Eichert's report does not adequately support a finding that the Injured Worker is permanently removed from sustained remunerative employment. By its express terms, the report ties the Injured Worker's inability to work to the medications that he was taking at the time, and with the use of the word "currently," the report appears to indicate that the opinion regarding the Injured Worker's incapacity for work could be subject to change. The Staff Hearing Officer finds that such an interpretation is entirely consistent with Dr. Eichert's further indication that the Injured Worker "is candidate for vocational rehabilitation."

The Staff Hearing Officer further rejects the Injured Worker's contention that Dr. Eichert's statement regarding the Injured Worker being a candidate for vocational rehabilitation is not a medical statement; the Staff Hearing Officer finds that Dr. Eichert's report is fairly read as indicating that the Injured Worker was medically capable of being evaluated for participation in a rehabilitation program.

Finally, the Staff Hearing Officer rejects the Injured Worker's contention that a consideration of Dr. Eichert's report and the 01/24/2008 functional capacities evaluation, in light of the Injured Worker's non-medical disability factors, supports the

request for an earlier start date of the permanent total award. The Staff Hearing Officer finds that in her order issued 03/14/2009, the Staff Hearing Officer granted permanent total disability based only on medical impairment grounds, with no consideration given to disability factors. The Staff Hearing Officer further finds that by its express terms, Hearing Officer Manual Policy G3 provides that the merits of the original determination as to permanent total disability compensation are not to be considered by the Staff Hearing Officer conducting a start date hearing held pursuant to that policy. As such, the Staff Hearing Officer finds Policy G3 precludes consideration of disability factors at today's hearing.

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

Conclusions of Law:

{¶18} 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.

{¶19} The relevant inquiry in a determination of permanent total disability is 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.

{¶20} For the reasons that follow, it is this magistrate's decision that this court should deny relator's request for a writ of mandamus.

{¶21} Relator had the burden of establishing entitlement to PTD compensation. Relying on medical evidence in the record, the commission granted PTD compensation based solely on the allowed physical conditions. The commission relied upon the January 5, 2009 report of Dr. Reynolds who opined that relator was incapable of working and the January 24, 2008 FCE finding that relator was capable of performing below the sedentary level of exertion. Clearly, the record contains some evidence to support the commission's determination that PTD compensation should be granted and that January 24, 2008 is an appropriate start date.

{¶22} Relator contends that the commission had an obligation to consider whether or not he was entitled to PTD compensation beginning the day after his TTD

compensation was terminated. In order for the commission to have made this determination, relator was required to submit medical evidence of his physical abilities contemporaneous with the requested time period. In that regard, the only medical evidence in support is the August 1, 2007 report of Dr. Eichert. However, as the commission found, Dr. Eichert does not indicate what level of physical exertion or what physical limitations applied to relator. The fact that Dr. Eichert stated that relator "cannot safely return to physical employment" does not provide Dr. Eichert's opinion as to relator's physical abilities. Unfortunately, Dr. Eichert did not provide any restrictions or limitations so the commission would not have been able to consider his physical abilities in conjunction with nonmedical factors and make a determination any earlier than when the commission had evidence of his physical abilities. Further, as Dr. Eichert noted, he concluded that relator was a candidate for vocational rehabilitation. As such, it appears that Dr. Eichert believed relator could perform activity at some unspecified level of exertion.

{¶23} As the commission stated, there is no medical evidence of relator's physical abilities at the time his TTD compensation was terminated in September 2007. The first medical evidence of relator's physical abilities after September 26, 2007 is the January 24, 2008 FCE wherein the evaluator concluded that relator was capable of performing less than sedentary work. The record supports the commission's determination as to the start date and as to relator's failure to present evidence to support an earlier start date.

{¶24} Based on the foregoing, it is this magistrate's conclusion that relator has not demonstrated that the commission abused its discretion by beginning his PTD compensation as of January 24, 2008 and refusing to begin that compensation earlier, and relator's request for a writ of mandamus should be denied.

/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).