

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. American National Can Company,	:	
	:	
Relator,	:	No. 09AP-934
	:	
v.	:	(REGULAR CALENDAR)
	:	
Industrial Commission of Ohio and William A. Klemens,	:	
	:	
Respondents.	:	

D E C I S I O N

Rendered on September 28, 2010

Battle & Miller P.L.L., Sharon L. Miller and Arthur W. Brumett, II, for relator.

Richard Cordray, Attorney General, and *John R. Smart*, for respondent Industrial Commission of Ohio.

Kolick & Kondzer, Daniel J. Kolick and Michael T. Schroth, for respondent William A. Klemens.

IN MANDAMUS
ON OBJECTIONS TO MAGISTRATE'S DECISION

TYACK, P.J.

{¶1} American National Can Company filed this action in mandamus, seeking a writ to compel the Industrial Commission of Ohio ("commission") to vacate its order which

granted an increase in permanent partial disability ("PPD") compensation for William A. Klemens.

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

{¶3} American National Can Company has filed objections to the magistrate's decision. Counsel for William Klemens has filed a memorandum in response. Counsel for the commission has also filed a memorandum in response. The case is now before the court for a full, independent review.

{¶4} The objection filed on behalf of American National Can Company are six in number:

OBJECTION NO. 1: The Magistrate made a clear error of law in finding that Dr. Stearns' letter and records constituted "some evidence" of an increase in Respondent Klemens' percentage of permanent partial disability.

OBJECTION NO. 2: The Magistrate incorrectly applied the AMA Guidelines in an attempt to remedy the lack of objective examination findings in Dr. Stearns' letter.

OBJECTION NO. 3: The Magistrate improperly considered evidence outside the "four corners" of Respondent Commission's order contrary to the instruction of *Noll*.

OBJECTION NO. 4: The Magistrate improperly assumed evidence not contained within the Stipulated Record.

OBJECTION NO. 5: The Magistrate improperly distinguished this Court's decision in *Hoover*.

OBJECTION NO. 6: The Magistrate's finding that the letter and records for Dr. Stearns are sufficient evidence of an increase in permanent partial disability is contrary to long-established procedures for adjudicating permanent partial disability applications.

{¶5} The first objection questions whether the report of Kim L. Stearns, Klemens' treating physician, could constitute some evidence in support of the increase in PPD compensation granted by the commission. The majority of the panel concludes that it does. Dr. Stearns noted that since the issues involved in PPD were last addressed in 1999, Klemens had arthroscopy of his right knee, a partial knee replacement, another arthroscopy and finally a full knee replacement. Pain and swelling continued. Klemens still had to wear a Dynasplint. This medical history fully supports an increase in PPD.

{¶6} The first objection is overruled.

{¶7} We find that there was no lack of objective examination. Swelling is readily visible. Pain related behavior is also observable. The magistrate's mention of AMA guidelines does not undermine the validity of any factual findings, especially as to swelling and pain after the total knee replacement. The fact that Klemens had to wear a splint due to range of motion problems is an indication that Klemens had range of motion problems. We are not prepared to require that a physician push the limits of a patient's joints to the point of significant pain in order to find that a range of motion problem exists.

{¶8} The second objection is overruled.

{¶9} As to the third objection, we do not agree that the magistrate improperly considered other evidence in finding that the report of Dr. Stearns constituted "some evidence" in support of an increase of PPD compensation.

{¶10} The third objection is overruled.

{¶11} We see no basis for the assertion on behalf of American National Can Company that Dr. Stearns, as the treating physician for Klemens, did not examine Klemens at any relevant time and make findings based upon one or more examinations. Clearly Dr. Stearns saw Klemens in February 2006.

{¶12} The fourth objection is overruled.

{¶13} We agree with the magistrate's distinguishing of *State ex rel. Hoover Universal, Inc. v. Indus. Comm.* (1985), 26 Ohio App.3d 175, for the reasons stated in the magistrate's decision.

{¶14} The fifth objection is overruled.

{¶15} As to the sixth objection, we do not see a finding that a claimant who endures four surgical procedures, including a total knee replacement, has suffered an increase in PPD as being unreasonable or in any way jeopardizing the routine adjudication of PPD cases.

{¶16} The sixth objection is overruled.

{¶17} Having overruled all the objections, we adopt the findings of fact and conclusions of law in the magistrate's decision. As a result, we deny the request for a writ of mandamus.

Objections overruled; writ denied.

CONNOR, J., concurs.
FRENCH, J., dissents.

FRENCH, J., dissenting.

{¶18} I respectfully dissent.

{¶19} R.C. 4123.57(A) allows a hearing officer to determine the percentage of an employee's permanent disability, based on the employee's condition resulting from the injury "and causing permanent impairment evidenced by medical or clinical findings reasonably demonstrable." A former award may not be increased "unless it is found from medical or clinical findings that the condition of the claimant resulting from the injury has so progressed as to have increased the percentage of permanent partial disability." *Id.* "In this context, 'permanent' means the permanent physical or mental diminution of the whole person caused by the industrial injury." *State ex rel. Advantage Tank Lines v. Indus. Comm.*, 107 Ohio St.3d 16, 18, 2005-Ohio-5829, ¶9.

{¶20} Here, relator suggests that the commission relied solely on the July 2, 2008 letter of Dr. Stearns. The Staff Hearing Officer's order, however, indicates consideration of "the reports of Dr. Stearns," not just the July 2, 2008 letter. Those other reports include office notes beginning in August 2002, when respondent began seeing Dr. Stearns, and ending in February 2006. The "reports of Dr. Stearns" also include the operative and post-operative reports of the October 2003 arthroscopy and the March 2005 total knee replacement, both of which were performed by Dr. Stearns. Having reviewed all of these reports, however, I agree with relator that they do not support the commission's order.

{¶21} First, Dr. Stearns' July 2, 2008 letter contains no clinical findings supporting permanent injury. Dr. Stearns observes that respondent "has had" surgeries and

diagnostic tests, and he also had to wear a Dynasplint because of motion problems. Dr. Stearns cites to no current or "permanent" impairments, however.

{¶22} Second, Dr. Stearns' office notes contained in the record suggest that any additional impairment was not permanent. The February 24, 2006 office note, for example, states that respondent is "doing extremely well." He had motion of 0-100 degrees, the X-rays were "excellent," and respondent was "doing very well" overall. The record contains no evidence of more recent examinations.

{¶23} As noted, R.C. 4123.57(A) requires the commission to base an award on "permanent impairment evidenced by medical or clinical findings reasonably demonstrable." And R.C. 4123.57(A) forbids the commission from modifying a prior award without finding that the condition "has so progressed as to have increased the percentage" of PPD. Here, in my view, the record contains no findings demonstrating an increase in *permanent* impairment. Therefore, I would sustain relator's first objection; the remaining objections would be rendered moot. Because the majority has determined otherwise, I dissent.

A P P E N D I X

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. American	:	
National Can Company,	:	
	:	
Relator,	:	No. 09AP-934
	:	
v.	:	(REGULAR CALENDAR)
	:	
Industrial Commission of Ohio and	:	
William A. Klemens,	:	
	:	
Respondents.	:	

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

Rendered on April 16, 2010

Battle & Miller P.L.L., Sharon L. Miller, and Arthur W. Brumett, II, for relator.

Richard Cordray, Attorney General, and John R. Smart, for respondent Industrial Commission of Ohio.

Kolick & Kondzer, Daniel J. Kolick, and Michael T. Schroth, for respondent William A. Klemens.

IN MANDAMUS

{¶24} Relator, American National Can Company, 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 granted respondent, William A. Klemens ("claimant"), an increase in his permanent partial disability ("PPD")

award and ordering the commission to find that claimant did not meet his burden of proving that he was entitled to an increase.

Findings of Fact:

{¶25} 1. Claimant sustained a work-related injury on July 1, 1994 and his workers' compensation claim was originally allowed for: possible torn meniscus right knee. In 1997, relator certified claimant's claim for the following additional conditions: torn medial meniscus right knee medial femoral condyle contusion. In 1998, relator certified claimant's claim for the following allowed condition: traumatic arthritis right knee.

{¶26} 2. In 1999, claimant's PPD award was increased an additional six percent resulting in a total PPD award of nine percent.

{¶27} 3. Between 1999 and 2006, claimant underwent several surgical procedures for his knee. In 2000, claimant underwent diagnostic arthroscopy on his right knee, and in 2001, claimant had a partial knee replacement. In October 2003, Kim L. Stearns, M.D., claimant's treating physician, performed the following operation:

Right knee Examination under anesthesia, arthroscopy, debridement of the medial compartment, abrasion chondroplasty of grade III and IV chondrosis on the weight-bearing surface of the lateral tibial plateau.

Lastly, in March 2005, claimant had a full knee replacement.

{¶28} 4. In 2008, claimant filed an application seeking an increase in his PPD award. Claimant attached the July 2, 2008 report of Dr. Stearns who stated that claimant had multiple surgeries on his right knee, including a total knee arthroplasty in 2005. Further, Dr. Stearns indicated that claimant had persistent pain and continued swelling

and that he needed to wear a Dynasplint because of range of motion problems. Dr.

Stearns concluded:

Citing the AMA Guide to the Evaluation of Permanent Impairment, 5th Ed., table 17-33 on page 546, his permanent partial impairment is at 20% of the whole person. Using that table for total knee replacements, Mr. Klemens has a fair result with a knee score in the 70 to 75 range. This would put him at a fair result with a total permanent impairment of 20%.

{¶29} 5. The Bureau of Workers' Compensation referred the issue to Loyola J. Mascarenhas who conducted a file review. Because the report sent to Dr. Mascarenhas did not have any range of motion findings, Dr. Mascarenhas opined that claimant had a zero percent permanent partial impairment.

{¶30} 6. The matter was referred to the commission and a hearing was held before a district hearing officer ("DHO") on May 22, 2009, at which time the DHO found that claimant's disability had increased to 20 percent "based upon the report(s) of Dr(s). Kim Stearns."

{¶31} 7. Relator appealed and the matter was heard before a staff hearing officer ("SHO") on July 28, 2009. The SHO affirmed the prior DHO order based upon the reports of Dr. Stearns.

{¶32} 8. Relator's request for reconsideration was denied by order of the commission mailed August 26, 2009.

{¶33} 9. On October 2, 2009, relator filed the instant mandamus action in this court.

{¶34}

Conclusions of Law:

{¶35} 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.

{¶36} In this mandamus action, relator challenges the commission's order granting claimant an increase in his PPD award on grounds that the evidence cited by the commission is insufficient to support the award because Dr. Stearns's July 2, 2008 letter does not contain any objective examination findings.

{¶37} R.C. 4123.57(A) provides in pertinent part:

The district hearing officer, upon the application, shall determine the percentage of the employee's permanent disability, except as is subject to division (B) of this section, based upon that condition of the employee resulting from the injury or occupational disease and causing permanent impairment evidenced by medical or clinical findings reasonably demonstrable. * * * [I]n no instance shall the former award be modified unless it is found from medical or

clinical findings that the condition of the claimant resulting from the injury has so progressed as to have increased the percentage of permanent partial disability.

{¶38} In *State ex rel. Hoover Universal, Inc. v. Indus. Comm.* (1985), 26 Ohio App.3d 175, this court stated:

The term "demonstrable" means capable of being demonstrated. Thus, a medical or clinical finding which is reasonably demonstrable is essentially "objective" rather than "subjective." Webster's Third New International Dictionary (1961) defines "objective" concerning a symptom of disease as "perceptible to persons other than an affected individual." Webster's also defines "subjective" as "arising out of or identified by means of an individual's attention to or awareness of his own states and processes."

{¶39} This court described the evidence upon which the commission had relied in *Hoover* as follows:

Dr. Penman's findings are included in the examination section of his report. They indicate, however, that appellant's reactions are normal. Thus, it follows that there is no evidence upon which the commission could properly and legally base an award of twenty-five percent permanent partial disability, because a person cannot suffer a permanent partial disability while being normal. There are indeed subjective findings in Dr. Penman's report which show that appellant has a disability. However, as the trial court wrote in its decision, "the only interpretation of Dr. Penman's report that would be warranted is that he relied upon the patient's subjective complaints."

Id. at 177-78.

{¶40} As noted above, relator argues that the July 2, 2008 letter from Dr. Stearns is devoid of any examination findings and does not constitute some evidence upon which the commission could have relied. For the following reasons, this magistrate disagrees.

{¶41} First, the commission specifically relied upon the "reports of Dr. Stearns" and not the "report" of Dr. Stearns as argued by relator. The stipulated record before this court contains office records from Dr. Stearns to which the commission might, in part, be referring. As such, it is clear that the commission relied on more than just Dr. Stearns's July 2, 2008 report. The stipulation includes the operative report from March 2005 and several office visits following that procedure. By all accounts, claimant did very well following his total knee replacement surgery. However, in his July 2, 2008 letter, Dr. Stearns specifically noted that claimant had continued swelling and that he wore a Dynasplint because of range of motion problems. Further, Dr. Stearns noted:

Citing the AMA Guide to the Evaluation of Permanent Impairment, 5th Ed., table 17-33 on page 546, his permanent partial impairment is at 20% of the whole person. Using that table for total knee replacements, Mr. Klemens has a fair result with a knee score in the 70 to 75 range. This would put him at a fair result with a total permanent impairment of 20%.

{¶42} The observation that claimant's knee had continued swelling and that he needed to wear a Dynasplint because of range of motion problems constitutes objective findings "perceptible to persons other than an affected individual." Unlike the facts in *Hoover*, Dr. Stearns did not rely solely on claimant's subjective complaints but on his own assessment as well. Further, in citing to the AMA Guide to the Evaluation of Permanent Impairment, Dr. Stearns rated the success of claimant's total knee replacement as having had a "fair result." The table to which Dr. Stearns referred has been made part of the record and a review of that table indicates that when a doctor opines that a patient has had a fair result from a total knee replacement, the

corresponding whole person impairment is to be 20 percent. Although Dr. Stearns did not provide the rationale for the determination that claimant's result was fair, Dr. Stearns obviously followed accepted AMA guidelines in making that assessment.

{¶43} When all of Dr. Stearns's office notes are considered as well as the report noting claimant's continued swelling and need to wear a Dynasplint because of range of motion problems and the medical assessment that claimant had achieved a "fair result" with the total knee replacement constitutes objective evidence which the magistrate finds to be sufficient. Dr. Stearns's comments concern symptoms "perceptible to persons other than an affected individual" and are, therefore, objective in spite of the fact that Dr. Stearns did not give specific range of motion findings. As such, the magistrate finds that Dr. Stearns's report and records constitute some evidence upon which the commission could properly rely and determine that claimant now had a 20 percent whole person impairment and in granting him an increase in his PPD award.

{¶44} Lastly, to the extent relator argues that Dr. Mascarenhas found a zero percent impairment, it is clear that Dr. Stearns's July 2, 2008 report was the only evidence Dr. Mascarenhas had to review. Standing alone, it is plain to see that Dr. Mascarenhas did not have any range of motion findings or other objective evidence upon which to make a determination.

{¶45} Based on the foregoing, it is this magistrate's decision that relator has not demonstrated that the commission abused its discretion by awarding claimant an increase in his permanent partial disability award and this court should deny relator's request for a writ of mandamus.

/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).