

[Cite as *State ex rel. Santiago v. Indus. Comm.*, 2010-Ohio-1020.]  
IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel.	:	
Johnathon R. Santiago,	:	
	:	
Relator,	:	
	:	
v.	:	No. 09AP-419
	:	
The Industrial Commission of Ohio	:	(REGULAR CALENDAR)
et al.,	:	
	:	
Respondents.	:	

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D E C I S I O N

Rendered on March 16, 2010

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*Shapiro, Marnecheck, Reimer & Palnik, Philip A. Marnecheck, and Matthew Palnik*, for relator.

*Richard Cordray*, Attorney General, and *LaTawnda N. Moore*, for respondent Industrial Commission of Ohio.

*Andrews & Wyatt, LLC, Thomas R. Wyatt, and Jerry P. Cline*, for respondent Sunnyside Automotive Incorporated.

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IN MANDAMUS  
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

FRENCH, J.

{¶1} Relator, Johnathon R. Santiago, filed an original action requesting this court to issue a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its order that denied relator's request for temporary total disability ("TTD") compensation, and to enter an order granting that compensation.

{¶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. Relator filed objections to the magistrate's decision. In these objections, relator contends that the magistrate erred in finding that (1) respondent's, Sunnyside Automotive Incorporated ("Sunnyside"), offer of light-duty work comported with applicable law, (2) relator voluntarily abandoned his employment, and (3) the commission did not abuse its discretion when it denied TTD based on the progress note of Cyril E. Marshall, M.D. We disagree.

{¶3} First, the commission's decision did not rest on whether relator refused an offer of light-duty work that did not comport with his restrictions. The record reflects that Sunnyside offered light-duty work, and relator worked within his restrictions for several weeks. Ohio Adm.Code 4121-3-32(A)(6) requires an employer to put an offer of light-duty work in writing if an injured worker refuses an oral job offer and the employer intends to initiate proceedings to terminate TTD. Here, however, the commission concluded that relator simply quit his job because of a scheduling conflict. The requirement of a written offer was never triggered.

{¶4} Second, while relator contends that he did not abandon his employment voluntarily, Sunnyside presented evidence to the contrary. Therefore, the record contains some evidence supporting the commission's decision, and we will not reweigh that evidence.

{¶5} Finally, we agree with the magistrate's determination that the commission did not abuse its discretion by relying on Dr. Marshall's progress note. The note, which indicates that relator's injury was completely healed as of November 24, 2008, was some evidence on which to determine that TTD should be denied.

{¶6} For all these reasons, we overrule relator's objections. Having conducted an independent review of the record, we adopt the magistrate's decision, including the findings of fact and conclusions of law contained in it. Accordingly, we deny the requested writ of mandamus.

*Objections overruled,  
writ of mandamus denied.*

KLATT and CONNOR, JJ., concur.

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

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Johnathon R. Santiago,	:	
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Relator,	:	
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v.	:	No. 09AP-419
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The Industrial Commission of Ohio, and	:	(REGULAR CALENDAR)
Sunnyside Automotive Incorporated,	:	
	:	
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 September 30, 2009

*Shapiro, Marnecheck, Reimer & Palnik, Philip A. Marnecheck and Matthew Palnik, for relator.*

*Richard Cordray, Attorney General, and Rema A. Ina, for respondent Industrial Commission of Ohio.*

*Andrews & Wyatt, LLC, Thomas R. Wyatt and Jerry P. Cline, for respondent Sunnyside Automotive Incorporated.*

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IN MANDAMUS

{¶7} Relator, Johnathon R. Santiago, 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 his request for temporary total

disability ("TTD") compensation on grounds that he had voluntarily abandoned his employment with respondent Sunnyside Automotive Incorporated ("Sunnyside") and finding that he is entitled to that compensation.

Findings of Fact:

{¶8} 1. Relator sustained a work-related injury on August 13, 2008, and his claim has been allowed for "open wound right 3rd finger."

{¶9} 2. Relator originally was treated by David A. Novotny, M.D., who performed surgery to repair relator's extensor tendon.

{¶10} 3. Dr. Novotny completed a Medco-14 certifying that relator was totally disabled from August 13 through August 26, 2008.

{¶11} 4. In Dr. Novotny's office note from August 26, 2008, it was noted that relator demonstrated some very general flexion and extension at the interphalangeal joints, he was to continue with early active range of motion exercises, and continue wearing his splint. At that time, Dr. Novotny released relator to return to light-duty work. Dr. Novotny completed a Medco-14 form certifying that relator could return to light-duty work provided he perform no manual labor with his right hand, beginning August 27 to approximately September 9, 2008.

{¶12} 5. Relator did in fact return to work at Sunnyside. According to the time card reports contained in the stipulation of evidence, relator worked August 27, 28 and 29, 2008. Thereafter, relator did not work for the majority of September 2008, but did return to work on September 26, 2008, and it appears that he worked consistently through October 17, 2008.

{¶13} 6. At some point in time, relator began treating with Cyril E. Marshall, M.D., who completed a C-84 dated September 25, 2008 certifying a period of disability from September 8, 2008 through an actual return-to-work date of September 25, 2008 with restrictions.

{¶14} 7. Dr. Marshall completed a Medco-14 on October 16, 2008 certifying that relator was able to return to work as of September 23 through November 24, 2008 with the following restrictions: "Ok to drive – restrictions are – no buffing or use of vacuum cleaner in place until 11/17/08 exam."

{¶15} 8. On October 17, 2008, relator's employment with Sunnyside was terminated. According to relator, when he presented Dr. Marshall's latest Medco-14 to his supervisors at Sunnyside, they fired him. According to Sunnyside, relator was informed that he would be required to work some evening shifts; however, relator refused to work evening shifts because he had begun taking evening classes at the Polaris Career Center. According to Sunnyside, relator quit his job on October 17, 2008 so he would be able to attend classes. The foregoing evidence must have been testified to at the hearing before the staff hearing officer ("SHO") because there is no definitive proof in the record supporting either theory.

{¶16} 9. Relator points out that there is evidence from his treating physician, Dr. Marshall, supporting his argument. Specifically, relator points to the following: (a) a September 9, 2008 letter from Dr. Marshall indicating: "He did return to work with use of only one hand. He worked 8-27-08, 8-28-08 and 8-29-08, but the company sent him

home. He works as a detailer at an automobile dealership"; (b) an October 28, 2008 letter providing:

I did return him to work, with restrictions on 9-25-08. His employer did honor the restrictions. I examined him on 10-16-08, and he still has "a lot of pain" on the dorsum of the right hand (in the surgery area)[.] I issued a MEDCO-14 on that date, which I have attached for your reference[.] He works as a detailer. His regular job calls for using buffing machines and vacuum cleaners. He was not able to perform those activities, as most recent exam confirmed residual swelling on the dorsum of the hand and tenderness. He was cleared for work, but restricted from using buffers or vacuum cleaners. Again, the employer had been meeting that requirement since his initial return to work in September; however, they no longer can accommodate the specified restrictions[;]

and (c) the October 21, 2008 C-84 wherein Dr. Marshall noted: "Was working with restrictions up until 10-17-08 – employer was unable to continue him on light duty."

{¶17} 10. Sunnyside submitted an affidavit from Tony Venditti, the detail manager at Sunnyside. In that affidavit, Mr. Venditti indicated: (a) relator returned to work on restricted duty from August 27 through August 29, 2008; (b) after August 29, 2008, relator was found to be completely disabled until September 25, 2008 when Dr. Marshall released him to restricted duty; (c) relator returned to restricted duty work on September 26, 2008; (d) prior to his injury, relator primarily worked evenings; (e) on October 6, 2008, Venditti informed relator that he would be scheduled to work evenings on Mondays and Thursdays; (f) on Monday, October 13, 2008, relator worked his evening shift as scheduled; (g) on October 16, 2008, relator changed his schedule without approval and worked in the afternoon instead of the evening; (h) on October 17, 2008, relator informed Venditti that he was not able to work the evening shifts because he was

going to school; (i) Venditti told relator he would need to speak with Katie Vaughn in human resources; (j) relator indicated that he would just leave; (k) relator walked out of Sunnyside, and never returned to work; and (l) Venditti indicated that he did not fire relator.

{¶18} 11. Relator's request for TTD compensation was heard before a district hearing officer ("DHO") on February 13, 2009 and was granted.

{¶19} 12. Sunnyside appealed and the matter was heard before an SHO on March 26, 2009. The SHO vacated the prior DHO's order and denied TTD compensation as follows:

Staff Hearing Officer denies the request for temporary total disability compensation from 10/18/2008 through 12/18/2008 as not being causally related to the allowed condition herein. The Injured Worker was provided commingling light duty work through 10/17/2008. Two weeks before 10/18/20[0]8, the Injured Worker had been informed by his Employer that he would be returned to his former shift, working with restrictions. The Injured Worker indicated that he was not able to do that as he had resumed taking evening classes at the Polaris Career Center. He then did not return to work as scheduled. Staff Hearing Officer finds that, the Injured Worker voluntarily abandoned his employment by refusing the commingling light duty job offer due to his scheduling conflicts. Further, Staff Hearing Officer notes that, the progress note of 11/24/2008, from the physician of record, Dr. Cyril Marshall notes, "hand has completely recovered...full range of motion. No tenderness." Based on the above, temporary total disability compensation is denied.

{¶20} 13. Relator's further appeal was refused by order of the commission mailed April 17, 2009.

{¶21} 14. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶22} 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.

{¶23} In this mandamus action, relator first asserts that the commission abused its discretion by finding that he had voluntarily abandoned his employment. Specifically, relator points out that there is no written job offer in the record; therefore, the commission never could have determined that he had refused a comportsing job offer. Relator argues further that, even if the job was within his restrictions, Sunnyside purposely changed his hours to a time they knew he could not work and then fired him. Secondly, relator contends that it was an abuse of discretion to rely on the November 24, 2008 progress note of Dr. Marshall when he provided that relator's hand

had completely recovered, had full range of motion and no tenderness. Relator contends that this progress note is not relevant.

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

{¶25} TTD compensation awarded pursuant to R.C. 4123.56 has been defined as compensation for wages lost where a claimant's injury prevents a return to the former position of employment. Upon that predicate, TTD compensation shall be paid to a claimant until one of four things occurs: (1) claimant has returned to work; (2) claimant's treating physician has made a written statement that claimant is able to return to the former position of employment; (3) when work within the physical capabilities of claimant is made available by the employer or another employer; or (4) claimant has reached maximum medical improvement. See R.C. 4123.56(A); *State ex rel. Ramirez v. Indus. Comm.* (1982), 69 Ohio St.2d 630.

{¶26} In the present case, Sunnyside indicates that they provided relator with suitable employment within his physical capabilities. The evidence indicates that relator did return to work for several weeks.

{¶27} It is undisputed that relator was no longer working for Sunnyside as of October 17, 2008. Relator contends that the SHO abused his discretion by stating that relator abandoned his employment when he refused the commingled light-duty job offer due to his scheduling conflicts. Ohio Adm.Code 4121-3-32 provides rules for the payment of TTD compensation. Specifically, Ohio Adm.Code 4121-3-32(A)(6) provides:

"Job offer" means a proposal, made in good faith, of suitable employment within a reasonable proximity of the injured

worker's residence. If the injured worker refuses an oral job offer and the employer intends to initiate proceedings to terminate temporary total disability compensation, the employer must give the injured worker a written job offer at least forty-eight hours prior to initiating proceedings. If the employer files a motion with the industrial commission to terminate payment of compensation, a copy of the written offer must accompany the employer's initial filing.

(Emphasis added.)

{¶28} There is no written job offer contained in the stipulated record. However, it is undisputed that relator did return to work for Sunnyside for a number of weeks. As such, there must have been an oral job offer made by Sunnyside which relator accepted.

{¶29} The magistrate finds that whether or not there was a written job offer is not the issue in this case. The issue here concerns why relator ceased his employment with Sunnyside effective October 17, 2008. Relator contends that Sunnyside refused to continue to accommodate his restrictions and terminated him. In the alternative, relator contends that Sunnyside changed his hours to a time when Sunnyside knew he could not work and then fired him. Conversely, Sunnyside argues that relator was asked to work Monday and Thursday evenings; however, relator indicated that he was taking classes in the evening and would not work those evening shifts. According to Sunnyside, relator essentially walked out the door and never returned.

{¶30} Questions of credibility and the weight to be given evidence are clearly within the discretion of the commission as the fact finder. Teece. The magistrate finds that there is some evidence in the record supporting relator's argument: notations made in Dr. Marshall's progress notes. The magistrate further notes that there is some evidence in the record supporting Sunnyside's version of the facts: the affidavit of Mr.

Venditti. The SHO obviously made a credibility determination and decided that Sunnyside's evidence and version of the facts was more credible than relator's. Given that there is some evidence in the record supporting both versions, the magistrate cannot find that the commission abused its discretion by finding that relator voluntarily abandoned his employment with Sunnyside.

{¶31} Relator also contends that the November 24, 2008 progress note from Dr. Marshall is not relevant because it was written more than one month after Sunnyside terminated him. Relator argues that the commission could only rely on Dr. Marshall's October 16, 2008 Medco-14 wherein he released relator to light-duty work with the following restrictions: "Ok to drive – restrictions are – no buffing or use of vacuum cleaner in place until 11/17/08 exam."

{¶32} First, aside from relator stating that Sunnyside refused to accommodate the October 16, 2008 restrictions, there is no other evidence in the record indicating that Sunnyside told relator he was going to have to perform buffing duties and use the vacuum cleaner. As stated previously, this was one of relator's versions of the facts. Relator also argues that Sunnyside purposely changed his schedule to a time when Sunnyside knew he could not work and then terminated him. In the event relator made both these arguments before the SHO, it might explain why the SHO did not find him to be credible.

{¶33} As to the relevance of the November 24, 2008 progress note, the magistrate specifically notes that November 24, 2008 falls right in the middle of relator's request for TTD compensation. As such, even if the SHO would have accepted relator's

version of the facts, it appears that TTD compensation may have only been payable from October 17 through November 24, 2008. Since Dr. Marshall indicated that relator's hand was completely healed and that he had full range of motion and no tenderness, it appears that Dr. Marshall opined that relator was capable of returning to his former position of employment as of November 24, 2008. As such, TTD compensation would not have been payable thereafter. Relator also points to Dr. Marshall's later notes wherein he indicates that relator continued to have a lot of pain over the second and third knuckles of his right hand. This may be evidence of an exacerbation of relator's condition and, if he had returned to some work after he abandoned his employment with Sunnyside, he could have been entitled to a new period of TTD compensation. However, that question is not before the court at this time.

{¶34} The commission had conflicting evidence before it concerning the reasons why relator was no longer working for Sunnyside. Because there is some evidence in the record supporting the commission's order, relator cannot demonstrate an abuse of discretion.

{¶35} Based on the foregoing, it is this magistrate's conclusion that relator has not demonstrated that the commission abused its discretion in denying his requested period of TTD compensation 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).