2009 ACO # 10

STATE OF MICHIGAN
WORKERS' COMPENSATION APPELLATE COMMISSION

TIMOTHY SLAIS,
PLAINTIFF,

WORKERS' COMPENSATION AGENCY,
INTERVENING PLAINTIFF,

V DOCKET #07-0263

STATE OF MICHIGAN,
DEPARTMENT OF STATE POLICE,
SELF INSURED,
DEFENDANT.

APPEAL FROM MAGISTRATE AMBROSE.

DARYL C. ROYAL FOR PLAINTIFF,
SUSAN PRZEKOP-SHAW FOR INTERVENING PLAINTIFF,
GERALD M. MARCINKOSKI FOR DEFENDANT.

OPINION

WILL, COMMISSIONER

This claim came to the Workers' Compensation Agency pursuant to an application for mediation or hearing filed by plaintiff on or about August 29, 2006. Plaintiff is requesting the defendant pay his tuition, books, and related expenses for his attendance at Cooley Law School. Plaintiff is seeking this relief under the vocational rehabilitation provisions of the Worker's Disability Compensation Act.

By way of background, it is noted that plaintiff received a Bachelor of Arts degree from the University of Michigan in 1992. He has also had military experience and has acquired computer skills.

Plaintiff was employed as a Michigan State Trooper beginning in September, 1995. In June of 2003, he was injured in an event which arose out of and in the course of his employment when he was shot in the left arm. Plaintiff has been paid wage loss benefits on a voluntary basis from the date of injury to the present.

Plaintiff has received extensive medical care for his left arm. In March of 2006, plaintiff underwent surgical intervention to secure a permanent placement of a dorsal column stimulator to reduce his symptoms.

Before plaintiff filed the pending application for mediation or hearing, defendant began vocational rehabilitation under MCL 418.319. It was defendant's goal to return plaintiff to work consistent with plaintiff's existing qualifications and training. Plaintiff, on the other hand, wanted to attend law school, believing that such education would rehabilitate him and give him a greater wage earning capacity than he would secure by some other means.

Pursuant to the application for mediation or hearing, David R. Campbell, a vocational rehabilitation consultant for the State of Michigan, conducted a hearing on November 20, 2006.

Consultant Campbell's order was mailed on April 3, 2007. He summarized the positions of the parties as follows:

> The positions of the parties in this case are fairly clear. Plaintiff wishes to attend Cooley Law School as his course of rehabilitation, at the expense of the defendants. Plaintiff argues that this is a reasonable plan and will allow him to return to work in the future at a job commensurate with the wages he was earning prior to his injury. Defendants feel that plaintiff is employable at the present time with his current educational background, training, and qualifications and training. They do not feel that they should have to pay for additional schooling in order for plaintiff to find useful employment. Defendants are not claiming that plaintiff is uncooperative with vocational rehabilitation, and neither party is arguing that vocational rehabilitation is not a feasible option. The only remaining questions then are whether or not the course of rehabilitation chosen by the plaintiff is appropriate, and whether the employer can be held responsible for the tuition. [Consultant's order, p 3.]

The consultant completed his order with the following:

> IT IS SO ORDERED that the plaintiff's vocational plan of retraining at Cooley Law School is an appropriate course of rehabilitation. Plaintiff is granted 52 school weeks of retraining to begin at any time from the date of this order forward, including all reasonable associated costs such as tuition, books, supplies, etc. Plaintiff is to maintain a GPA of 2.0 or higher on a semester-by-semester basis. If this is not achieved, the rehabilitation plan can be revised. [*Id.*, p 4.]

On October 24, 2007, Magistrate Christopher P. Ambrose affirmed the order of Mr. Campbell. In affirming the order, the magistrate said:

> Defendant has argued in their appeal that an appropriate hearing was not held in this matter, inasmuch as no formal record or transcription was made of the hearing below. Clearly, the Appellate Commission has spoken on at least two occasions regarding this particular issue. *Lucido v. County of Macomb,* 2003

ACO #245; *Mazzara v. Cappucini Giuseppe Masonry,* 2000 ACO #386. In *Lucido*, the Appellate Commission is clear that "there is no statutory requirement that the proceedings before the Director or his designated representation be conducted with a record made of the proceedings." Furthermore, Chairperson Leslie, in that Opinion indicated that "the proceedings in this case were conducted in accordance with the procedures set forth in the statutory provision."

In *Mazzara*, Commissioner Kent addressed the issue as to whether a full evidentiary hearing needed to be held by the Magistrate as opposed to an off the record review of the Vocational Rehabilitation Order. In the *Mazzara* case, Commissioner Kent indication [sic] that "clearly, given the facts that the Defendant was heard in this matter, a Rehabilitation Order was issued, and the Magistrate acted to review the Order *de novo*, there is no convincing case law requiring us to order a remand to hold a full evidentiary hearing. In fact, if the Defendant was given another attempt to litigate this case, it would completely sidestep the statutory authority of the deputy director to administer the vocational rehabilitation program and review relevant evidence."

Given the Appellate Commission's pronouncements in both *Lucido* and *Mazzara*, it is clear that a proper hearing was held before Vocational Rehabilitation Consultant David Campbell, serving as a designee of the Director pursuant to statute. Therefore, I find that no error was committed regarding a transcription of that initial hearing not being made. Additionally, Defendant does not rebut in its brief the Plaintiff's assertion that Defendant failed to raise an objection at the time of the initial hearing. Notwithstanding Defendant's failure to object, case law is clear that the transcription of a hearing before the Director or his designee pursuant to Section 319 is unnecessary. Likewise, I find that a full evidentiary hearing at the Bureau level is unnecessary, especially given the Appellate Commission's opinion in *Mazzara*. The undersigned did allow the filing of briefs in this matter, and has carefully reviewed both of them. With respect to the issue of additional evidentiary information, none is needed to make an appropriate *de novo* review of this matter. No additional testimony or evidence is needed at this level, nor is it necessary to remand this matter back to Mr. Campbell.

In fact, this Court has reviewed all the information which was looked at by David Campbell in coming to his determination regarding this matter. It is clear that Plaintiff suffered a significant injury as a result of being shot in the line of duty with the State Police. It is abundantly clear from the medical testimony submitted that Plaintiff is unable to engage in his prior occupation as a police officer, and he is essentially confined to doing one-handed work in a warm environment given the rather fragile nature of his affected extremity as a result of being shot. I, like Vocational Rehabilitation consultant Campbell, am persuaded that the Order requiring Defendant pay for up to 104 weeks of legal education at Cooley Law School is reasonable pursuant to Section 319. [Magistrate's decision, pp 1-3.]

On November 14, 2007, defendant filed a claim for review. On April 9, 2008, defendant filed its brief on appeal, raising four issues. On May 13, 2008, plaintiff filed a brief in response to the brief of defendant-appellant.

On August 11, 2008, the Director of the Workers' Compensation Agency filed a motion for leave to file an amicus curiae brief. The brief was accepted by the Commission.

On August 13, 2008, oral argument was held in this matter. At that time, the parties voiced no objection to the amicus curiae brief. However, both parties asked for the opportunity to file a response to the amicus curiae brief. The Commission granted the request of both parties. On August 27, 2008, defendant filed its responsive brief and on September 10, 2008, plaintiff filed his responsive brief.

Turning to defendant's appeal, we note that defendant raised four issues in its brief on appeal. Having carefully reviewed the briefs of the parties, including the brief of the Director and the responsive briefs of defendant and plaintiff, we believe that our resolution of this matter requires the Commission to address the first two issues raised by defendant and remand this matter to the Board of Magistrates for further action.

The first two issues raised by defendant are set forth below:

> I. Constitutional safeguards of due process of law apply to workers' compensation proceedings. Defendant was deprived of due process of law at the vocational rehabilitation hearing level where no transcription of the hearing occurred.
>
> II. If a transcript of evidence is not to be made at the vocational rehabilitation hearing level, then due process requires it be made at the Board of Magistrates level. The Magistrate's decision in this case to not allow such evidence is a deprivation of due process of law.

Plaintiff testified in front of Mr. Campbell. Mr. Riley, a vocational consultant, also offered testimony by telephone. No transcript was made of this testimony.

The statutory language providing for rehabilitation hearings is found at MCL 418.319, which provides:

> (1) An employee who has suffered an injury covered by this act shall be entitled to prompt medical rehabilitation services. When as a result of the injury he or she is unable to perform work for which he or she has previous training or experience, the employee shall be entitled to such vocational rehabilitation services, including retraining and job placement, as may be reasonably necessary to restore him or her to useful employment. If such services are not voluntarily offered and accepted, the director on his or her own motion or upon application of the employee, carrier, or employer, after affording the parties an opportunity to be heard, may refer the employee to a bureau-approved facility for evaluation of the need for, and kind of service, treatment, or training necessary

> and appropriate to render the employee fit for a remunerative occupation. Upon receipt of such report, the director may order that the training, services, or treatment recommended in the report be provided at the expense of the employer. The director may order that any employee participating in vocational rehabilitation shall receive additional payments for transportation or any extra and necessary expenses during the period and arising out of his or her program of vocational rehabilitation. Vocational rehabilitation training, treatment, or service shall not extend for a period of more than 52 weeks except in cases when, by special order of the director after review, the period may be extended for an additional 52 weeks or portion thereof. If there is an unjustifiable refusal to accept rehabilitation pursuant to a decision of the director, the director shall order a loss or reduction of compensation in an amount determined by the director for each week of the period of refusal, except for specific compensation payable under section 361(1) and (2).
>
> (2) If a dispute arises between the parties concerning application of any of the provisions of subsection (1), any of the parties may apply for a hearing before a hearing referee or worker's compensation magistrate, as applicable.

Clearly, this statutory language provides for a hearing at the agency level presided over by an agent of the Director. Further, in the event of a dispute, a party may apply for a hearing before a magistrate.

The statute is silent pertaining to the necessity of providing for a transcript or stenographic notes of hearings before the Director or his authorized agent, although transcripts are provided of redemption reviews conducted by the Director, pursuant to MCL 418.837(2) as part of the record where further appeal is sought at the Workers' Compensation Appellate Commission.

Due process requires a recorded hearing before the magistrate, and today we abandon our interpretation of MCL 418.319(2) found in *Mazzara v Cappucini Giuseppe Masonry*, 2000 ACO #386 as it pertains to the applicable review by the Board of Magistrates.

The first issue to be determined was whether a full, formal, evidentiary hearing is required, before the director or his representative (in this case, consultant Campbell) is able to issue a Vocational Rehabilitation Order. Defendant argues that the formal evidentiary hearing is required. Plaintiff argues that it is not. For the reasons stated by Professor Welch in his treatise, we agree that no formal evidentiary hearing is required at this level:

> When disputes arise concerning the proper course of vocational rehabilitation, they must be submitted first to the director of the bureau. *Frammolino v Richmond Products*, 79 Mich App 18, 260 NW2d 908 (1977); *Steinhebel v Koppers Co*, 1977 WCABO 320. The director, in turn, will refer the dispute to a deputy or mediator, who will schedule a "hearing." It is important to understand that this is not a hearing in the sense that the term is understood by attorneys. The formal rules of evidence and procedure are not followed. The hearing officer may rely on records and reports that are not introduced into evidence or incorporated into the record in any formal way. The hearings are, to a large extent, attempts at

> mediation. The hearing officers do everything within their power to bring the parties to an agreement about the best course of rehabilitation for the worker. If no agreement is reached, the mediator will enter an order.
>
> If there has been no evaluation, the first order entered will ordinarily be for an evaluation. If an evaluation has been done, the mediator may order the carrier to provide specified rehabilitation services and the worker to cooperate with the rehabilitation plan. If the worker fails to cooperate with the plan, the carrier may request another hearing. These hearings are usually held by a deputy director or a senior mediator who has the authority to order that benefits be terminated for lack of cooperation.
>
> Any of these orders may be appealed to a magistrate and then to the appellate commission. [Welch, *Worker's Compensation in Michigan: Law & Practice*, Section 17:4.]

However, when it comes to hearings at the Board of Magistrates, clearly the statute does address the necessity of stenographic notes and other costs of the hearing process. As a matter of fact, MCL 418.858(1) provides:

> The cost of a hearing, including the cost of taking stenographic notes of the testimony presented at the hearing, not exceeding the taxable costs allowed in actions at law in the circuit courts of this state, shall be fixed by the board of magistrates and paid by the state as other expenses of the state are paid.

Plaintiff has said that the above does not mandate stenographic notes to be made at rehabilitation hearings before a magistrate. If plaintiff is correct pertaining to rehabilitation hearings, then apparently it is plaintiff's position stenographic notes are not necessary for hearings on the merits in all other claims. Fortunately for the workers' compensation system in general, the provisions of MCL 418.841(7) state "A record of a hearing shall not be made in the small claims division." Thus it is clear that a record shall be made in all other hearings at the Board of Magistrates. To hold to the contrary would make § 841(7) unnecessary. Our holding is in keeping with *expressio unius est exclusio alterius*.

Again turning to the need for a stenographic record at the Director's level, here we have a different picture because of the absence of statutory language pertaining to stenographic notes as found in § 858 pertaining to hearings before a magistrate. Also militating against the need for stenographic notes is the fact that mediators and others who are not required to be lawyers preside at the hearing. Furthermore, in performing their duties in a style akin to mediation, these hearing officers do an excellent job in helping the parties resolve rehabilitation matters to the satisfaction of both sides.

Accordingly, when the system does not succeed at that level, the Board of Magistrates must provide an evidentiary hearing that will pass the constitutional test of providing the parties due process.

An issue arose at oral argument, as to a possible conflict between the statute at § 319(2) and the Agency Rules at R 408.45(3)(d). The rule incorrectly interprets this as an appeal of the director's order and not a separate action:

> Unless a request for review by a magistrate is filed by a party within 15 days, the order of the director or his or her authorized representative shall stand as the order of the bureau. For sufficient cause shown, the magistrate may grant additional time in which to claim such review. [R 408.45(3)(d).]

It has long been the standard in this State that respectful consideration be given to an agency interpretation. This is particularly true where the law is "doubtful or obscure." *In re Complaint of Rovas against SBC Michigan*, 482 Mich 90 (2008). However, the agency's interpretation cannot conflict with the Legislature's intent as expressed in the language of the statute at issue.

The parties have discussed *Dation v Ford Motor Co*, 314 Mich 152 (1946) in some detail in their briefs on appeal. Interestingly, *Dation* seems to pull this Commission in two separate directions. First of all, we note that as an administrative body, we are not required to determine constitutional issues. However, having said that, we are also mindful that the parties are entitled to a fair hearing if due process is to be afforded.

In looking at the practice of not recording hearings at the magistrate level, we are convinced that neither party is afforded a fair hearing. Such is true because without a transcript it becomes almost impossible for an appellant before this Commission to show error, no matter how blatant such error might be. In this case, the defendant is denied fundamental fairness. In the next case, the plaintiff could be subjected to a similar injustice.

In determining that the defendant has been denied due process for the failure to provide a transcript of the hearing before the magistrate, we note the following from *Dation*:

> At the request of the court the attorney general has filed a carefully prepared and helpful brief on the constitutional question. He agrees with the claim of plaintiff that the procedure with reference to the medical commission is not in accord with fundamental principles of 'due process of law.' In support of such view counsel for plaintiff, and the attorney general as well, call attention to the recent decision of the supreme court of Minnesota in *Hunter v. Zenith Dredge Co., Minn.*, 19 N.W.2d 795. There a provision of the Minnesota Workmen's Compensation Act, analogous to the section of the Michigan act involved in this controversy, was held unconstitutional. Said section (L.1943, c. 633, § 11) gave to the medical board, provided for by the act, the right to examine witnesses and required that it file its findings with the commission, including therein the names of doctors appearing and, also, medical reports and exhibits considered. *No provision was made, however, for filing a transcript of the evidence upon which the board based its determination*. The court in discussing the constitutional question said at pages 799, 800 of 19 N.W.2d 799:

> Due process requires that the evidence on which an agency, board, or commission bases its findings be ascertainable. This court must have the necessary data on which to determine the correctness thereof. A claimant for workmen's compensation, under § 176.61 (§ 4320), is guaranteed a right of review by the supreme court, which may examine findings of fact and determine whether they have a sufficient foundation in the evidence. *Since no transcript of the evidence is required to be filed by the medical board under L.1943, c. 633, § 11, it is apparent that claimant's right of appeal or review is effectively denied thereby.*

[314 Mich 162-163, emphasis supplied.]

As indicated earlier in this opinion, we believe that even before considering constitutional issues, that the Worker's Disability Compensation Act requires that in rehabilitation hearings before a magistrate, stenographic notes or the use of recording equipment is mandatory. Further, to the extent that the Commission's opinion pertaining to constitutional issues is pertinent, we find that failure to grant such a hearing so recorded before a magistrate would deprive the appellant due process of law. The proceeding before the magistrate is a de novo hearing. Essentially the magistrate is starting over with the evidence. The parties are not limited to submitting the exhibits or "testimony" discussed or used at the informal hearing with the director's representative/mediator. Because there is no record of the informal hearing, practically there would be no way for the magistrate to discern what transpired at the informal hearing level.

Conclusion

This matter is remanded to the Board of Magistrates for a hearing on the merits of this claim. A record shall be made of such proceedings, utilizing stenographic notes or the equivalent thereof. We do not retain jurisdiction.

Commissioner Przybylo, Chairperson Gasparovich, and Commissioner Grit concur.

Rodger G. Will — Commissioner

Gregory A. Przybylo — Commissioner

Martha M. Gasparovich — Chairperson

Donna J. Grit — Commissioner

S T A T E   O F   M I C H I G A N
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RIES, COMMISSIONER, DISSENTING

I respectfully dissent. If, as here, the director has not entered an order which is enforceable because the statutory standard providing an opportunity to be heard was not met, the only possible remedy is to remand the matter to him to allow him to enter an order which is enforceable.

A prevailing party must be able to demonstrate that any order it will seek to enforce is supported by an adequate record as legally required and employs a proper standard of law. Plaintiff cannot do so without a record of proceedings before the director and the magistrate. Hence, a remand is necessary, but it should be to the director.

As a result, I agree with the lead opinion to the extent that it establishes that any hearing before the magistrate on appeal from the director's order entered pursuant to MCL 418.319(1) must be held on the record with stenographic notes taken or recording equipment utilized. However, because an employer can be ordered *by the director* to pay rehabilitation costs amounting to tens of thousands of dollars, and employee's wage loss benefits can be ordered lost or reduced *by the director* in amounts of tens of thousands of dollars, it is not correct to suggest that the director's MCL 418.319(1) hearing is an informal mediation-like process. Rather, the director must enter an enforceable order which may be reviewed by the magistrate as provided in MCL 418.319(2) if the appealing party seeks to demonstrate that there was an error in the director's application of MCL 418.319(1) or it is subject to collateral attack if constitutional requirements were not satisfied. *Abbott v Howard*, 182 Mich App 243; lv den, 439 Mich 874 (1990). To initiate the process that MCL 418.319(2) provides, the party seeking the hearing before the magistrate must demonstrate that there is a dispute between the parties concerning the

director's application of any of the provisions of subsection (1). The party seeking the hearing cannot do so without a record of the proceedings before the director, even if the hearing is de novo.

Granner S. Ries Commissioner

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This cause came before the Appellate Commission on a claim for review filed by defendant from Magistrate Christopher P. Ambrose's order, mailed October 24, 2007, affirming the order of Vocational Rehabilitation Counselor David Campbell, mailed April 13, 2007, granting plaintiff's vocational rehabilitation plan. The Commission has considered the record and counsel's briefs, and believes that the magistrate's order should be remanded for further proceedings. Therefore,

IT IS ORDERED that the magistrate's order is remanded for further proceedings according to the attached opinion. We do not retain jurisdiction.

Rodger G. Will	Commissioner
Gregory A. Przybylo	Commissioner
Martha M. Gasparovich	Chairperson
Donna J. Grit	Commissioner