

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

State ex rel. James E. Simms,	:	
Relator,	:	
v.	:	No. 09AP-165
Ford Motor Company and Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
Respondents.	:	

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D E C I S I O N

Rendered on February 25, 2010

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*Clements, Mahin & Cohen, L.P.A. Co.*, and *William E. Clements*, for relator.

*Taft Stettinius & Hollister LLP*, and *Cynthia C. Felson*, for respondent Ford Motor Company.

*Richard Cordray*, Attorney General, and *Derrick Knapp*, for respondent Industrial Commission of Ohio.

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IN MANDAMUS  
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

SADLER, J.

{¶1} Relator, James E. Simms ("relator"), 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 denying relator temporary total disability ("TTD") compensation for the periods September 6, 2002 to March 12, 2003, and from March 19 to July 20, 2003, and to enter a new order that adjudicates his request for TTD compensation without the alleged commission view that delay in obtaining C-84 certifications is an automatic disqualifier.

{¶2} Pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth Appellate District, this matter was referred to a magistrate who issued a decision including findings of fact and conclusions of law, which is appended to this decision. Therein, the magistrate concluded that the commission did not abuse its discretion with respect to the period from September 6, 2002 to March 12, 2003, but that it did abuse its discretion with respect to the period March 19 to July 20, 2003, and that we should grant the requested writ in part. Both relator and respondent, Ford Motor Company ("Ford"), filed objections to the magistrate's decision. This cause is now before the court for a full review.

{¶3} We begin with relator's objection. Therein, relator maintains that the magistrate erred in determining that the commission correctly rejected Dr. Weadick's C-84s because the C-84s are equivocal. Initially, relator argues that the magistrate was prohibited from examining the C-84s for equivocation because the commission did not cite equivocation as the reason for its rejection thereof. We reject this argument.

{¶4} First, we have adopted the decision of a magistrate that found medical evidence to be equivocal, even though neither the commission nor the relator had

advocated its rejection for that reason. See *State ex rel. Shelton-Collins v. United States Playing Card Co.*, 10th Dist. No. 03AP-1049, 2004-Ohio-6600. Second, review of the commission's orders in mandamus is governed by the "some evidence" standard. *State ex rel. Rouch v. Eagle Tool & Machine Co.* (1986), 26 Ohio St.3d 197. If a medical report is equivocal, it is not "some evidence." *State ex rel. Meridia Health Sys. v. Indus. Comm.*, 10th Dist. No. 07AP-826, 2008-Ohio-6222, ¶33, citing *State ex rel. Eberhardt v. Flexible Corp.* (1994), 70 Ohio St.3d 649, 657. Thus, the magistrate acted well within the scope of this court's review when he determined that Dr. Weadick's C-84s were equivocal and, therefore, not "some evidence."

{¶5} Relator also argues that the magistrate erred substantively in finding equivocation. Relator argues that the C-84s are consistent with Dr. Weadick's office notes and are therefore not equivocal. Relator misapprehends what the magistrate stated. The magistrate determined that the April 29, 2008 C-84 is equivocal because: (1) it partly covers a time period with respect to which Dr. Weadick stated in his December 12, 2007 C-84 relator *would not* be disabled from his former position due to his allowed conditions; and (2) it partly covers a different time period (September 6, 2002 to January 12, 2003) with respect to which Dr. Weadick provided no explanation as to why the newly allowed cervical conditions are not totally disabling as of January 2003. We find no error in the magistrate's equivocation analysis.

{¶6} For the foregoing reasons, we overrule relator's objection.

{¶7} We now turn to Ford's objection, in which it argues that the magistrate erred in determining that the SHO's order is ambiguous and must be clarified pursuant to *State ex rel. Noll v. Indus. Comm.* (1991), 57 Ohio St.3d 203. "*Noll* require[s] that in any order

granting or denying benefits, the commission specifically state what evidence it has relied on, and briefly explain the reasoning or basis for its decision. The purpose for requiring such evidentiary identification and explanation is so that 'meaningful review can be accomplished.' " *State ex rel. Buttolph v. Gen. Motors Corp.* (1997), 79 Ohio St.3d 73, 75, quoting *Noll* at 206. An order that is ambiguous should be returned to the commission for clarification because it prevents this court from conducting a meaningful review. *State ex rel. Good v. Indus. Comm.*, 162 Ohio App.3d 773, 2005-Ohio-4060, ¶37.

{¶8} In the order denying the requested compensation, the SHO stated, "The Hearing Officer finds that the C-84 form[ ] subsequently submitted by \* \* \* Dr. Stern \* \* \* [is] not supported by the medical evidence contemporaneous with the time periods." This statement could be interpreted to mean that the medical evidence does not show that relator was suffering from the allowed conditions during the time period covered by Dr. Stern's C-84 or it could be interpreted to mean that the medical evidence does not show that the allowed conditions were temporarily and totally disabling during the period covered by Dr. Stern's C-84. As such, the magistrate correctly determined that the order is ambiguous and should be returned for clarification to enable proper review. For this reason, Ford's objection is overruled.

{¶9} Having undertaken an independent review of the record, we find that the magistrate has properly determined the facts and the applicable law. Accordingly, we overrule the parties' objections, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein, and we grant a writ of mandamus ordering the commission to vacate its June 25, 2008 order to the extent that the order denies TTD compensation for the period March 19 to July 20, 2003, and to

enter an amended order that adjudicates relator's claimed entitlement to TTD compensation for that period in a manner consistent with law and with this decision.

*Objections overruled,  
writ of mandamus granted.*

TYACK, P.J., and FRENCH, J., concur.

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**APPENDIX**

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. James E. Simms,	:	
	:	
Relator,	:	
v.	:	No. 09AP-165
Ford Motor Company and Industrial	:	(REGULAR CALENDAR)
Commission of Ohio,	:	
	:	
Respondents.	:	
	:	

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MAGISTRATE'S DECISION

Rendered on November 5, 2009

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*Clements, Mahin & Cohen, L.P.A. Co., and William E. Clements, for relator.*

*Taft Stettinius & Hollister LLP, and Cynthia C. Felson, for respondent Ford Motor Company.*

*Richard Cordray, Attorney General, and Derrick Knapp, for respondent Industrial Commission of Ohio.*

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IN MANDAMUS

{¶10} In this original action, relator, James E. Simms, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order denying him temporary total disability ("TTD") compensation for the

periods September 6, 2002 to March 12, 2003 and from March 19 to July 20, 2003, and to enter a new order that adjudicates his request for TTD compensation absent the alleged commission view that the delay of C-84 certifications is an automatic disqualifier.

Findings of Fact:

{¶11} 1. On September 5, 2002, relator sustained an industrial injury when he drove a HiLo forklift vehicle into a steel I-beam. On the date of injury, relator was employed by respondent Ford Motor Company ("Ford") at its Sharonville Transmission Plant.

{¶12} 2. Initially, the self-insured employer certified the industrial claim (No. 02-854874) for "mild cervical sprain; right lower leg contusion; abrasion to top of head."

{¶13} 3. On September 6, 2002, relator sought treatment from his family physician, Art Gendelman, M.D., who wrote that relator needs to be "off work" for two weeks.

{¶14} 4. Also on September 6, 2002, relator sought treatment from chiropractor Patrick Weadick, D.C. In his typed office note, at the initial visit, Dr. Weadick wrote:

Acute, severe cervical sprain/strain. Acute, severe thoracic sprain/strain. Acute, moderate lumbosacral sprain/strain – rule out possible disc herniation cervical spine.

Examination, general mobilization, massage, therapeutic activities. The patient tolerated treatment poorly. \* \* \*

{¶15} 5. Relator returned to Dr. Weadick on September 9, 2002. In his typed office note, Dr. Weadick wrote:

Patient continues with dizziness and difficult mental concentration. Some slight blurred vision at times. Severe

headache. Severe neck pain. Severe pain in upper back in the dominant right side shoulder region. Continues with some radicular-like symptomatology into the right arm, forearm, and wrist, and 3 digits on the right hand.

Bilateral severe cervical paraspinal muscular spasm. Pressure here is poorly tolerated. Severe spasm right shoulder girdle region including the levator scapula and rhomboid musculature bilaterally. Pressure here is poorly tolerated. Patient has difficult time laying supine and prone on the examination tables today. Very protective of his head motions.

\* \* \*

Dr. Gentleman [sic], M.D. has recommended a CT scan and two weeks off work with a reevaluation at that time. Continue with CT scan to rule out concussion and likely chance of possible intracranial bleeding. The abrasion/laceration on the top of the scalp appears to be healing without infection at this time. X-ray reports obtained show no sign of acute fracture of the cervical spine. There is indication in the prevertebral soft tissues that there is information in this region indicating spinal injury, common in whiplash-type injury to the cervical spine. \* \* \*

{¶16} 6. On or about September 9, 2002, on a Ford form, Dr. Weadick certified that relator is prevented by the injury from working from September 6, 2002 through an estimated September 23, 2002. Dr. Weadick also certified on the form that it will be necessary for relator to work "intermittently or to work less than a full schedule upon returning to work," and that the duration of this status was estimated at four to six weeks.

{¶17} 7. Relator visited Dr. Weadick for treatment nine days during September 2002. On September 20, 2002, Dr. Weadick wrote: "Radicular symptomatology of the C6 nerve root into the right arm continues." "Radicular symptomatology" into the right arm is mentioned in the office notes dated September 25 and 27, 2002.

{¶18} 8. On September 19, 2002, relator underwent an MRI of the cervical spine. The radiologist, John A. Botsford, M.D., reported a "minor right posterolateral disc bulge C5-6 without evidence of neural element compression or displacement."

{¶19} 9. Relator visited Dr. Weadick for treatment seven days during October 2002. In his October 2, 2002 office note, Dr. Weadick wrote: "Patient continues to be temporarily totally disabled from work due to these injuries."

{¶20} 10. Relator visited Dr. Weadick for treatment nine days during November 2002.

{¶21} 11. In his November 1, 2002 office note, Dr. Weadick wrote:

\* \* \* I am going to contact his family physician and see if we can repeat the MRI. I reviewed the films again and I am not happy with the quality of the films or the interpretation by the radiologist. I do believe there is quite a bit more going on with this gentleman's condition due to the severity of his symptomatology. I do not think the radiologist has identified what appears to me to be disc problems in other areas of his spine, and of a great degree of severity than mentioned in the report. \* \* \*

{¶22} 12. In his November 5, 2002 office note, Dr. Weadick wrote:

Patient has severe headache today and severe spasm in the neck. He was having arm pain all last night. He continues to have some pain to the front of his sternum from the [left] side, mainly in the clavical region. This is also a common finding with disc herniations of the cervical spine. I am concerned that these herniations were missed on the prior MRI read. We are still awaiting word from Dr. Gentleman [sic] about approving the MRI. The patient appears to be in quite a bit of discomfort and distress.

{¶23} 13. In his November 11, 2002 office note, Dr. Weadick wrote:

MRI results received from Open MRI. This film quality is much better. The radiologist reports findings of multiple disc herniations in the cervical spine. \* \* \* I believe the total is

four disc herniations in the cervical spine. This would be consistent with the accident that Mr. Simms suffered at work in September.

Cervical fixation, thoracic fixation. Bilateral cervical spinal musculature spasms. Spasm into the right rhomboid and deltoid area. Intermittent numbness and tingling noted into the C6 nerve root distribution.

{¶24} 14. Relator visited Dr. Weadick for treatment seven days during December 2002.

{¶25} 15. On December 2, 2002, Dr. Weadick wrote:

Patient continues with neck and upper back and arm pain. He continues with ongoing symptomatology around the left clavicle. He reports when his neck pain is severe and headaches are severe, he has pain across the clavicle and upper chest region on the left side. I do believe this is a radicular symptomatology from his disc herniation at the C3-4 level most likely.

{¶26} 16. On December 11, 2002, Dr. Weadick wrote:

\* \* \* Patient continues to be temporarily totally disabled. I am planning at this time to release the patient back to light duty at the beginning of next month if things continue to proceed as they are now. \* \* \*

{¶27} 17. Relator visited Dr. Weadick for treatment nine days during January 2003.

{¶28} 18. On January 6, 2003, Dr. Weadick wrote: "I am going to release him to work with great caution. I will put him on restrictions. I am not sure he should be working."

{¶29} 19. On January 9, 2003, Dr. Weadick wrote:

Patient presents with increased neck pain and increased upper back pain. He is unable to perform work duties. They worsen his condition substantially. He has severe headache.

Severe marked bilateral paraspinal musculature spasms. Cervical fixation, thoracic fixation. Decreased range of motion of the cervical spine from last examination. Patient is very stressed.

\* \* \*

Chiropractic adjustment, various physical modalities. I am concerned about this patient's mental stability at this point. He is extremely stressed about this whole situation. He is unable to work without restrictions at Ford, and they will not take him back with any restrictions at this point. \* \* \*

{¶30} 20. Relator visited Dr. Weadick for treatment six days during February 2003.

{¶31} 21. On February 24, 2003, Dr. Weadick wrote:

Chiropractic adjustment, various physical modalities. He has improved approximately 60% maximum medical improvement from the date of injury. To release him to work we would have to do some sort of restriction of work, although at this time Ford is not allowing that to happen. \* \* \*

{¶32} 22. Relator visited Dr. Weadick for treatment three days during March 2003. The last visit occurred March 10, 2003.

{¶33} 23. Earlier, on October 7, 2002, Dr. Weadick completed a C-84 on which he certified TTD from September 6, 2002 to an estimated return-to-work date of November 1, 2002. The C-84 form asks the physician to "[l]ist ICD-9 Codes with narrative diagnosis(es) for allowed conditions being treated which prevent return to work." In response, Dr. Weadick wrote: "847.0 Cervical neck pain sp[rain]/st[rain]," "847.1 Thoracic mid back sp[rain]/st[rain]," and "846.0 [L]umbosac[ral] sp[rain]/st[rain]."

{¶34} 24. On November 8, 2002, Dr. Weadick completed another C-84 on which he certified TTD from November 1, 2002 to an estimated return-to-work date of December 1, 2002. On the form, Dr. Weadick listed the same conditions that he listed

on his October 7, 2002 C-84—as the allowed conditions being treated which prevent return to work.

{¶35} 25. On November 8, 2002, citing a C-84 from Dr. Weadick, relator moved for TTD compensation.

{¶36} 26. On December 2, 2002, Dr. Weadick completed yet another C-84. This one certified TTD from December 2, 2002 to an estimated return-to-work date of January 2, 2003. On this C-84, Dr. Weadick listed the same conditions that he listed on his October 7, 2002 C-84—as the allowed conditions being treated which prevent return to work.

{¶37} 27. Following an April 10, 2003 hearing, a district hearing officer ("DHO") issued an order denying relator's motion for TTD compensation. The DHO's order explains:

The Injured Worker's request for Temporary Total Disability Compensation from 09/06/2002 to 11/01/2002 and to continue is denied. The District Hearing Officer finds that the Injured Worker's disability during this period is not causally related to the recognized conditions. The Injured Worker's chiropractor indicates on the C-84 forms and in the office notes that non-allowed conditions are causing the Injured Worker's disability.

{¶38} 28. Relator administratively appealed the April 10, 2003 DHO's order.

{¶39} 29. Following a June 5, 2003 hearing, a staff hearing officer ("SHO") issued an order affirming the DHO's order of April 10, 2003.

{¶40} 30. On July 17, 2003, another SHO mailed an order refusing relator's administrative appeal from the SHO's order of June 5, 2003.

{¶41} 31. Earlier, in a January 28, 2003 letter to relator's counsel, Dr. Weadick

wrote:

It would be appropriate at this time to amend the diagnosis of Mr. James E. Simms to correctly reflect injuries he suffered in an industrial accident on September 5, 2002.

History: As is well documented, Mr. Simms injured himself in an industrial accident at the Ford Plant in Sharonville while driving a HiLo. He was making a left turn in the HiLo with his head turned to the left when he struck a structural support I-beam in from [sic] of him. The I-beam received substantial damage, as did the HiLo machine Mr. Simms was driving. The force of this impact ejected Mr. Simms from his seat and caused him to forcefully impact his head and upper body into the metal restraining cage around him. He was traveling at approximately 5 mph at the time of this impact and was totally unprepared for the impact, and was not able to brace himself. He has suffered severe headaches and radicular symptoms into his right arm and radicular symptoms into his left upper chest and clavicle region since the accident.

An MRI was performed by Open Sided MRI in Norwood. Mr. Simms brought a copy of the films to my office, which I reviewed. The quality of the image was quite poor and there was motion artifact. What could be made out and read on this MRI revealed to me what appeared to be multiple disc displacements and herniations. However, the MRI report from Open Sided at this time remarked only upon a disc protrusion at the C5-6 spinal levels. As our treatment progressed, it [sic] was disappointed in the lack of his progress. I contacted his family physician, Dr. Gentleman [sic], and requested that perhaps we should order a new MRI at a different facility. We had an MRI obtained again an [sic] Open MRI Eastgate approximately one and a half months after the initial MRI. As I was expecting, multiple disc protrusions and herniations were found throughout Mr. Simms' spine. This would certainly explain his slower progress than expected. Had he experienced only severe cervical sprain/strain, we would expect him to be able to work with maybe some restriction within 8-12 weeks. His disability has run a bit longer. His recovery has been slow. Any time Mr. Simms attempts to increase his work activity, it causes a concurrent increase in muscular spasms in his

spine and radicular arm pain into his right arm and around to his right clavicle. He also continues to suffer, depending on his activity level and stress, from severe headaches of a muscular tension type of variety.

Due to the forceful nature of the cervical compression, which would be experienced in an injury such as this, it would be wise at this time to add cervical disc herniations at the following levels for Mr. Simms' Worker's [sic] Compensation claim:

1. Disc protrusion 722.10 – C2-3 spinal level.
2. C3-4 – broad leftward disc protrusion with decreased left foramen space.
3. 722.10 – C4-5 disc displacement.
4. C5-6 disc herniation with narrowing of the right foramen due to disc protrusion.

Mr. Simms' current symptomatology and concurrent findings on MRI examination on 11/8/02 are congruent with his present findings and injury mechanism. His claim should be allowed to be amended to add on these diagnoses.

{¶42} 32. On April 10, 2003, relator moved that additional conditions be allowed in the claim. In support, relator cited "medical documents from Dr. Weadick" and "MRI findings."

{¶43} 33. Following a September 26, 2003 hearing, a DHO issued an order denying relator's April 10, 2003 motion for the allowance of additional conditions. Relator administratively appealed the DHO's order.

{¶44} 34. Following a January 13, 2004 hearing, an SHO issued an order affirming the DHO's order of September 26, 2003, and denying relator's motion.

{¶45} 35. On February 14, 2004, another SHO mailed an order refusing relator's administrative appeal from the SHO's order of January 13, 2004.

{¶46} 36. Relator appealed to the Hamilton County Court of Common Pleas the commission's denial of his claimed right to participate for additional conditions.

{¶47} 37. On July 17, 2007, the common pleas court entered judgment in favor of relator following a court trial. The court's judgment entry provides:

That Plaintiff is entitled to participate in the Ohio Workers' Compensation system under Claim No. 02-854874 for the conditions of disc protrusion at spinal level C2-3, disc protrusion at C3-4, disc displacement at C4-5, and disc displacement at C5-6, as being the direct and proximate result of his allowed injury of September 5, 2002.

{¶48} 38. Earlier, on March 19, 2004, relator initially sought treatment from orthopedic surgeon, Errol J. Stern, M.D. At that office visit, Dr. Stern wrote:

The patient was in an unusual accident that he was involved in when he was driving a forklift on September 5, 2002. He had an accident at work. He hit a 60 foot I-beam that cost \$125,000.00 to replacement [sic] the bent I-beam. He hit his head and also the cage on the I-beam. His head hit the top of the cage.

He states he has been having severe neck pain with radiation into his head since that time.

He has been under the care of Dr. Patrick Weadich [sic] in Amelia. He has been getting traction and manipulation two to three times a week since the accident.

He had an MRI done on November 7th. The MRI is reviewed in detail. The MRI shows that he has a minimal spondylitic protrusion, non-compressive C2-3 protrusion and also there is a mixed C3-4 protrusion and a C5-6 protrusion. He brings in the MRI scan for us to review. They do show the disc protrusions on his MRI scan, which are definitive and they do cause a mild cord compression.

\* \* \*

He describes no previous neck problem before this accident happened. He describes himself as being in pretty good health.

Review of systems [sic] indicates recurrent headaches, dizziness, neck pain and stiffness, previous head injury, nervousness and depression.

He describes his pain in his neck at eight over ten and the pain in his upper back at four over ten. He has not worked.

On physical examination, he is well-developed, well-nourished, 34 year old, 6'0" tall, 240 pound gentleman.

Clinical examination of his neck indicates tenderness at the base of his neck and some paraspinal spasms throughout the entire neck area with restricted motion, especially hyperextension is markedly restricted. Forward flexion is present. We can estimate the restricted motions at less than 50% of normal. There are no neurological deficits of the upper extremities. There are no neurological deficits of the lower extremities.

The MRI scan is reviewed. It does show a slightly bulging disc at cervical vertebra 2-3 and 3-4. There is also a bulging at 5-6 and there is minimal degenerative nature to these disc herniations.

Based upon the clinical findings, I believe that the disc herniations that he has are directly related to the accident. It is a stove pipe injury to his neck and it could have easily resulted in a[n] impaction injury.

{¶49} 39. On April 9, 2003, Dr. Stern wrote:

DIAGNOSIS: Impaction injury cervical spine

DISPOSITION: He is improving. He needs to be treated with conservative care. I would like to get him epidural steroid injections. We will continue physical therapy modalities.

James [is] in for difficulties related to a cervical neck problem. He is about 50% better with physical therapy modalities and Vioxx 25 mg a day. He stopped the chiropractic treatment.

He continues to have neck pain and spasms. He continues to have pain in the neck. He continues to be somewhat dizzy. I told him dizziness is a combination of taking Xanax

and Flexeril. He needs to cut that back and take one or the other, but not both.

Clinically, he has paracervical spasms. He has no dorsiflexion of his neck. He has forward flexion. He has marked paracervical spasms. There is no neurological deficit of the upper or lower extremities that I can detect. There is marked loss of range of motion of the cervical spine. There is no doubt he had an impaction injury of his neck resulting in compression of the C2-3 and from there on down of the cervical spine resulting in problems after he hit his head into a metal I-beam.

{¶50} 40. On May 7, 2003, Dr. Stern wrote:

DIAGNOSIS:           1. 722.71 Cervical disorder  
                          2. 847.0 Sprain neck

DISPOSITION: We will continue physical therapy since he is improving. We will see him back for continuing care and evaluation in one month. He will call for difficulties. He is off work until June 2nd while he rehabs himself. He is looking for work at this point.

(See previous dictation) He is progressively improving with physical therapy modalities, strengthening of the neck and range of motion exercises is improving his condition.

He still has some moderate paracervical spasms and tenderness in the neck area, which still bothers him on both sides. He still has some mild spasms. He does not have any specific neurological deficit.

Range of motion is at least 80% of normal.

{¶51} 41. On June 4, 2003, Dr. Stern wrote:

DIAGNOSIS: Neck pain

DISPOSITION: I renewed Vioxx 25 mg #30 samples. We will see him back for continuing care and evaluation per required need. We will get him to finish his *therapy and get him back to some light work-related activities.*

James is in today for difficulties related to his neck. It is actually progressively improving in therapy.

He has much more range of motion. He has no radicular symptomatology that I can detect down his right arm on today's visit. However, he said he gets it intermittently when he does strenuous exercises that are aggravating him in physical therapy.

He said he feels he is improving. He said the Vioxx does help.

(Emphasis sic.)

{¶52} 42. On July 16, 2003, Dr. Stern wrote:

DIAGNOSIS: Cervical pain

DISPOSITION: I don't want him to do any heavy lifting yet. He is going back to light work-related activities on Monday the 21st.

Mr. Simms is in today for difficulties with his neck. He is showing progressive improvement.

He still has a lot of stiffness on hyperextension and rotation, but he has made a major improvement since I last saw him.

{¶53} 43. Relator also visited Dr. Stern on November 9, 2003, January 5 and May 21, 2004.

{¶54} 44. On November 6, 2007, less than four months after the July 17, 2007 judgment of the common pleas court additionally allowing the claim for the cervical spine conditions, relator moved for "temporary total disability benefits from September 8, 2002 through December 15, 2002 and thereafter, provided ongoing C-84 forms or medical are filed." (The time period of compensation requested by the November 6, 2007 motion had previously been denied by a final commission order rendered by an SHO following a June 5, 2003 hearing, as earlier noted.) For reasons unknown, the November 6, 2007 motion cited to Dr. Weadick's C-84s dated October 7,

2002, November 8 and December 2, 2002—medical evidence previously rejected by the commission.

{¶55} 45. On November 26, 2007, Dr. Stern completed a C-84 certifying TTD beginning March 19, 2003, which is the date of relator's first visit to Dr. Stern. The C-84 certified disability to an actual return-to-work date of July 20, 2003. The C-84 form asks the examining physician to "[l]ist ICD-9 Codes with narrative diagnosis(es) for allowed conditions being treated which prevent return to work." In response, Dr. Stern wrote: "847[.]0 Neck sprain," "722[.]2 C2-3 C3-4 Cervical disc protrusion," and "722[.]0 C4-5 C5-6 Cervical disc displacement."

{¶56} 46. On December 10, 2007, Dr. Weadick completed a C-84 certifying TTD from January 12, 2003 to an estimated return-to-work date of March 12, 2003. The C-84 form asks the physician to "[l]ist ICD 9 Codes with narrative diagnosis(es) for allowed conditions being treated which prevent return to work." In response, Dr. Weadick wrote: "847.0 Cervical sp[rain]/st[rain]," "847.1 Thoracic sp[rain]/st[rain]," and "846.0 Lumbosacral sp[rain]/st[rain]."

{¶57} The C-84 form also asks the physician to "[l]ist ICD 9 Codes with narrative diagnosis(es) for other allowed conditions being treated." In response, Dr. Weadick wrote: "722[.]0 Disc displacement C4-5," "722.0 [Disc displacement] C5-6," "722.2 Disc protrusion C2-3," and "722.2 [Disc protrusion] C3-4."

{¶58} 47. On April 29, 2008, Dr. Weadick completed a C-84 certifying TTD from September 6, 2002 to an estimated return-to-work date of March 12, 2003. On the form, Dr. Weadick listed the following as the conditions being treated which prevent

return to work: "847.0 sprain of neck," "722.0 disc C4-C5, C5-C6," and "722.2 protruding disc C2-C3, C3-C4."

{¶59} 48. Following an April 29, 2008 hearing, a DHO issued an order denying relator's November 6, 2007 motion. The DHO's order explains:

The injured worker's motion requesting temporary total disability compensation for the periods of 09/06/2002 to 03/12/2003 and 03/19/2003 to 07/20/2003 is denied.

The District Hearing Officer finds that the injured worker is requesting temporary total disability compensation for these periods based on the allowed conditions of disc protrusion at spinal level C2-3, disc protrusion at C3-4, disc displacement at C4-5 and disc displacement at C5-6.

The District Hearing Officer finds that the medical evidence on file does not substantiate that these specific conditions rendered the injured worker temporarily totally disabled for the requested periods.

Specifically, the injured worker relies upon the C-84's of Dr. Weadick dated 04/29/2008 and 12/10/2007 and the C-84 of Dr. Stern dated 11/26/2007.

The District Hearing Officer finds no medical evidence from Dr. Stern indicating that these conditions rendered the injured worker temporarily totally disabled for the period of 03/19/2003 to 07/20/2003 contemporaneous to when this period of disability was incurred. The first time Dr. Stern certifies temporary total disability compensation for the condition disc protrusion at spinal level C2-3, disc protrusion at C3-4, disc displacement at C4-5 and disc displacement at C5-6 is the C-84 dated 11/26/2007.

Further, the District Hearing Officer finds that Dr. Weadick submitted C-84's dated 10/07/2002, 11/08/2002 and 12/02/2002 on which Dr. Weadick indicated that the injured worker was temporarily totally disabled for the period of 09/06/2002 to 03/12/2003 as a result of the conditions cervical sprain/strain, thoracic sprain/strain and lumbar sprain/strain. At no time contemporaneous to the requested period of disability did Dr. Weadick indicate that the conditions disc protrusion at spinal level C2-3, disc

protrusion at C3-4, disc displacement at C4-5 and disc displacement at C5-6 rendered the injured worker temporarily totally disabled for the requested period.

Accordingly, the District Hearing Officer finds that the C-84 of Dr. Stern dated 11/26/2007 and the C-84's of Dr. Weadick dated 12/10/2007 and 04/29/2008 are not supported by the medical evidence contemporaneous to the requested periods of disability and therefore do not substantiate the requested period of disability.

Therefore, the injured worker's motion requesting temporary total disability compensation for the periods of 09/06/2002 to 03/12/2003 and 03/19/2003 to 07/20/2003 is denied.

\* \* \*

This order is based on the office records of Dr. Stern on file, the office records of Dr. Weadick on file and the C-84's of Dr. Weadick dated 10/07/2002, 11/08/2002 and 12/02/2002.

{¶60} 49. Relator administratively appealed the DHO's order of April 29, 2008.

{¶61} 50. Following a June 25, 2008 hearing, an SHO issued an order affirming

the DHO's order of April 29, 2008. The SHO's order explains:

It is the order of the Hearing Officer that the C-86 motion filed on 11/06/2007 is denied.

The injured worker requested the payment of temporary total disability compensation from 09/08/2002 through 12/15/2002 and continuing. In support of the motion, the injured worker submitted C-84 forms certifying temporary total disability compensation for the periods from 09/06/2002 to 03/12/2003 and from 03/19/2003 to 07/20/2003.

The Hearing Officer finds that the weight of the medical evidence in file does not support that the injured worker was temporarily and totally disabled as a result of the newly recognized cervical disc conditions during these time periods. A review of the contemporaneous medical records from both Dr. Stern and Dr. Weadick does not contain evidence indicating that the injured worker was temporarily and totally disabled as a result of these conditions during these time periods. The Hearing Officer finds that the C-84

forms subsequently submitted by both Dr. Stern and Dr. Weadick are not supported by the medical evidence contemporaneous with the time periods.

Therefore, the Hearing Officer orders that the request for the payment of temporary total disability compensation for the time periods from 09/06/2002 to 03/12/2003 and from 03/19/2003 to 07/20/2003 is denied.

This order is based upon the office notes in file from Dr. Stern and Dr. Weadick.

{¶62} 51. On July 11, 2008, another SHO mailed an order refusing relator's administrative appeal from the SHO's order of June 25, 2008.

{¶63} 52. On February 18, 2009, relator, James E. Simms, filed this mandamus action.

#### Conclusions of Law:

{¶64} The commission, through its SHO, denied TTD compensation from September 6, 2002 to March 12, 2003, a period certified by Dr. Weadick through two of his C-84s.

{¶65} The commission, through its SHO, also denied TTD compensation from March 19 to July 20, 2003, a period certified by Dr. Stern on his C-84.

{¶66} In denying TTD compensation, the commission endeavored to explain why it rejected the C-84s from both doctors.

{¶67} Two issues are presented: (1) whether the commission abused its discretion in denying TTD compensation from March 19 to July 20, 2003 based upon its explanation for rejecting the C-84 of Dr. Stern, and (2) whether the commission abused its discretion in denying TTD compensation from September 6, 2002 to March 12, 2003 based upon its rejection of Dr. Weadick's C-84s.

{¶68} The magistrate finds: (1) the commission did abuse its discretion in denying TTD compensation from March 19 to July 20, 2003 as certified by Dr. Stern, and (2) the commission did not abuse its discretion in denying TTD compensation from September 6, 2002 to March 12, 2003 as certified by Dr. Weadick.

{¶69} Accordingly, as more fully explained below, it is the magistrate's decision that this court issue a writ of mandamus.

{¶70} Turning to the first issue, clearly, it can be said that Dr. Stern did not certify TTD contemporaneously with the period that he certified. That is, Dr. Stern certified the period March 19 to July 20, 2003, more than four years after the fact, i.e., on November 26, 2007. During the certified period, Dr. Stern saw relator five times. He recorded office notes on March 19, April 9, May 7, June 4, and July 16, 2003. Three other office notes were recorded after the July 20, 2003 return-to-work date.

{¶71} Dr. Stern's delay in certifying TTD compensation based upon the newly allowed conditions regarding the cervical spine is easily justified. On April 10, 2003, approximately one month after his initial office visit with Dr. Stern, relator moved for the allowance of the cervical spine conditions. Prior to that motion, relator's request for TTD compensation based on the conditions initially certified by Ford had been denied. Relator was not successful in obtaining the additional claim allowances until July 17, 2007, when the common pleas court entered judgment in his favor. Dr. Stern certified TTD based upon the newly allowed cervical spine conditions on November 26, 2007, some four months after the judgment entry.

{¶72} Clearly, had Dr. Stern contemporaneously certified TTD based upon the cervical spine conditions that had not been allowed, the commission would have

rejected such certification, and appropriately so, as being premised upon nonallowed conditions.

{¶73} In *State ex rel. Airborne Freight Corp. v. Indus. Comm.*, 117 Ohio St.3d 369, 2008-Ohio-1116, the court noted how "pointless" it would be to seek compensation based upon conditions that had not yet been allowed. Accordingly, it was not unreasonable that attending physician Dr. Hernandez retroactively certified a period of TTD after new conditions had been allowed in the claim. *Id.*

{¶74} The commission cannot reject Dr. Stern's C-84 solely on grounds that Dr. Stern delayed his certification until after the conditions premising his certification had been allowed. *Id.*; but see *State ex rel. Gibson v. Indus. Comm.*, 123 Ohio St.3d 92, 2009-Ohio-4148. It appears that the DHO's order of April 29, 2008 does just that. Again, the DHO's order states:

The District Hearing Officer finds no medical evidence from Dr. Stern indicating that these conditions rendered the injured worker temporarily totally disabled for the period of 03/19/2003 to 07/20/2003 contemporaneous to when this period of disability was incurred. The first time Dr. Stern certifies temporary total disability compensation for the condition disc protrusion at spinal level C2-3, disc protrusion at C3-4, disc displacement at C4-5 and disc displacement at C5-6 is the C-84 dated 11/26/2007.

{¶75} Apparently, the DHO's use of the term "medical evidence" is a more specific reference to a disability opinion rather than a broader reference to all the clinical findings of the doctor. (There is no dispute that Dr. Stern's office notes were made contemporaneously with the office visits they record.)

{¶76} The DHO's order endeavors to make a point that the certification did not occur until November 26, 2007.

{¶77} It is indeed clear that the DHO rejected Dr. Stern's C-84 solely because the certification was delayed until long after the period being certified. Clearly, the DHO's rationale for rejecting Dr. Stern's C-84 is an abuse of discretion. *Airborne Freight*.

{¶78} On administrative appeal, the SHO's order affirms the order of the DHO. The SHO's order does not indicate that the SHO rejected the DHO's rationale in any way. However, the SHO did craft her own explanation for affirming the order. Again, the SHO's order states in part:

The Hearing Officer finds that the weight of the medical evidence in file does not support that the injured worker was temporarily and totally disabled as a result of the newly recognized cervical disc conditions during these time periods. A review of the contemporaneous medical records from both Dr. Stern and Dr. Weadick does not contain evidence indicating that the injured worker was temporarily and totally disabled as a result of these conditions during these time periods. The Hearing Officer finds that the C-84 forms subsequently submitted by both Dr. Stern and Dr. Weadick are not supported by the medical evidence contemporaneous with the time periods.

\* \* \*

This order is based upon the office notes in file from Dr. Stern and Dr. Weadick.

{¶79} Unlike the DHO's order, the SHO's order does not directly make a point that Dr. Stern waited until November 26, 2007 to certify disability.

{¶80} However, it appears that the SHO is indirectly pointing to Dr. Stern's certification delay when the SHO uses the word "contemporaneous" in reference to the "medical records" and then concludes that those medical records do not contain "evidence" of TTD. Arguably, when the SHO states that the "contemporaneous medical

records" do not contain "evidence" of TTD, the word "evidence" is used to mean disability opinion evidence.

{¶81} On the other hand, the SHO's order states that the hearing officer finds that "the weight of the medical evidence in file does not support" TTD based upon the newly recognized cervical disc conditions. This suggests that the SHO may have actually weighed or analyzed the office notes and determined that somehow those notes do not support the C-84 disability certifications. However, the SHO does not explain how the office notes fail to support a disability certification.

{¶82} At best, it can be said that the SHO's order is ambiguous as to the rationale for affirming the DHO's order.

{¶83} An order that is ambiguous should be returned to the commission for clarification because it prevents this court from conducting a meaningful review. *State ex rel. Buttolph v. Gen. Motors Corp., Terex Div.* (1997), 79 Ohio St.3d 73, 75. The ambiguity in the order violates the requirements set forth in *State ex rel. Noll v. Indus. Comm.* (1991), 57 Ohio St.3d 203.

{¶84} Based upon the above analysis, the magistrate concludes that the commission abused its discretion in denying TTD compensation from March 19 to July 20, 2003 based upon its rejection of Dr. Stern's C-84.

{¶85} As earlier noted, the second issue is whether the commission abused its discretion in denying TTD compensation from September 6, 2002 to March 12, 2003 based upon rejection of Dr. Weadick's C-84s.

{¶86} Equivocal medical opinions are not evidence. *State ex rel. Eberhardt v. Flxible Corp.* (1994), 70 Ohio St.3d 649, 657. Equivocation occurs when a doctor

repudiates an earlier opinion, renders contradictory or uncertain opinions, or fails to clarify an ambiguous statement. *Id.*

{¶87} A physician's report can be so internally inconsistent that it cannot be some evidence supporting the commission's decision. *State ex rel. Lopez v. Indus. Comm.* (1994), 69 Ohio St.3d 445, 449; *State ex rel. Taylor v. Indus. Comm.* (1995), 71 Ohio St.3d 582, 585. The *Lopez* holding extends also to substantial inconsistencies between two reports generated by the same medical examination. *State ex rel. M. Weingold & Co. v. Indus. Comm.*, 97 Ohio St.3d 44, 2002-Ohio-5353; *State ex rel. Genuine Parts Co. v. Indus. Comm.*, 160 Ohio App.3d 99, 2005-Ohio-1447.

{¶88} A claimant must always show the existence of a direct and proximate causal relationship between his or her industrial injury and the claimed disability. *State ex rel. Waddle v. Indus. Comm.* (1993), 67 Ohio St.3d 452. Nonallowed medical conditions cannot be used to advance or defeat a claim for compensation. *Id.*

{¶89} The mere presence of a nonallowed condition in a claim for TTD compensation does not in itself destroy the compensability of the claim, but the claimant must meet his or her burden of showing that an allowed condition independently caused the disability. *State ex rel. Bradley v. Indus. Comm.* (1997), 77 Ohio St.3d 239, 242.

{¶90} Dr. Weadick's December 10, 2007 C-84 certifies TTD based upon a nonallowed thoracic sprain/strain and a nonallowed lumbosacral sprain/strain. Furthermore, it indicates that the newly allowed cervical spine conditions are being treated, but do not cause disability. Clearly, under *Waddle* and *Bradley*, Dr. Weadick's December 10, 2007 C-84, as a matter of law, cannot constitute some evidence upon which the commission can rely.

{¶91} Dr. Weadick's April 29, 2008 C-84 certifies TTD based upon the initially allowed neck sprain and the additional claim allowances. On its face at least, the C-84 appears to be in compliance with *Waddle* and *Bradley*. However, the April 29, 2008 C-84 cannot be viewed in a vacuum.

{¶92} The period being certified on the April 29, 2008 C-84, i.e., September 6, 2002 to March 12, 2003, overlaps part of the period being certified in the December 10, 2007 C-84, i.e., January 12 to March 12, 2003. Clearly, the period certified in the April 29, 2008 C-84 that overlaps the period certified in the December 10, 2007 C-84 produces equivocal medical evidence in that Dr. Weadick certifies that the newly allowed conditions both cause disability and do not cause disability.

{¶93} The period September 6, 2002 to January 12, 2003 is that portion of the period being certified in the April 29, 2008 C-84 that does not overlap the period being certified in the December 10, 2007 C-84. However, even that period is not properly certified as some evidence upon which the commission can rely because there is no explanation as to why the newly allowed cervical spine conditions suddenly are not temporarily and totally disabling as of January 12, 2003.

{¶94} Based upon the above analysis, it is also clear that the two C-84s from Dr. Weadick together are so internally inconsistent that neither C-84 can constitute some evidence upon which the commission can rely. *Lopez, Taylor*.

{¶95} Based upon the above analysis, the magistrate concludes that the commission did not abuse its discretion in denying TTD compensation from September 6, 2002 to March 12, 2003.

{¶96} Accordingly, for all the above reasons, it is the magistrate's decision that this court issue a writ of mandamus ordering the commission to vacate its SHO's order of June 25, 2008 to the extent that it denies TTD compensation for the period March 19 to July 20, 2003, and to enter an amended order that adjudicates relator's claimed entitlement to TTD compensation for that period in a manner consistent with this magistrate's decision.

*/s/ Kenneth W. Macke*

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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).