

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Thomas R. Schmidt, :
Relator, :
v. : No. 10AP-688
The Industrial Commission of Ohio : (REGULAR CALENDAR)
and Watkins & Shepard Trucking, Inc., :
Respondents. :
:

D E C I S I O N

Rendered on August 23, 2011

Robert E. Tablack, for relator.

Michael DeWine, Attorney General, and *Charissa D. Payer*,
for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO MAGISTRATE'S DECISION

BRYANT, P.J.

{¶1} Relator, Thomas R. Schmidt, commenced this original action requesting a writ of mandamus that orders respondent Industrial Commission of Ohio to vacate its order granting a period of temporary total disability compensation, but denying another portion of temporary total disability compensation, and instead to award him temporary total disability compensation for the entire period of time requested.

I. Facts and Procedural History

{¶2} Pursuant to Civ.R. 53 and Section (M), Loc.R. 12 of the Tenth Appellate District, this matter was referred to a magistrate who issued a decision, including findings of fact and conclusions of law, appended to this decision. In the decision, the magistrate concluded the commission did not abuse its discretion in denying relator temporary total disability compensation: (1) for the time period from December 1, 2007 through February 9, 2008, because the December 31, 2007 and October 2, 2008 C-84s of Dr. Ferrara, submitted to support the requested compensation, were contradictory, and (2) for the time period April 29 through June 16, 2008, because only the October 2, 2008 C-84 was submitted to support the requested period of temporary total disability compensation, and although it correctly listed the allowed conditions, it was discredited due to its conflict with his December 31, 2007 C-84. Accordingly, the magistrate determined the requested writ should be denied.

II. Objections

{¶3} Relator filed objections to the magistrate's decision. Although relator fails to designate any specific objection, he contends the magistrate's decision "perpetuates a great injustice" and "permits unfair hearing officers to deprive claimants of compensation justly due them by relying on immaterial errors of physicians."

{¶4} The magistrate properly resolved the issues raised in relator's complaint. In doing so, she correctly noted "[t]he burden of proof was on relator to demonstrate that all periods of disability were related exclusively to the allowed conditions in the claim." (Mag. Dec., ¶51.) Contrary to that obligation, relator, to support the first period at issue, initially submitted the December 31, 2007 C-84 of Dr. Ferrara, which listed conditions that were

not allowed in relator's claim. Although Dr. Ferrara submitted an October 2, 2008 C-84 for essentially the same time period that listed only the allowed conditions, it contradicted the December 31, 2007 C-84 and thus failed to provide support for the requested period of temporary total disability compensation. For the second period of compensation at issue, relator submitted Dr. Ferrara's October 2, 2008 C-84. Because that C-84 was discredited as a result of its conflict with the doctor's December 31, 2007 C-84, the second period of requested temporary total disability compensation likewise was unsupported.

{¶5} In the end, relator failed to carry his burden to demonstrate that all periods of disability were related exclusively to the allowed conditions in the claim. The magistrate properly determined the commission did not abuse its discretion in denying temporary total disability compensation for the two time periods. Relator's objections are overruled.

III. Disposition

{¶6} Following independent review pursuant to Civ.R. 53, we find the magistrate has properly determined the pertinent facts and applied the salient law to them, with one exception. In ¶46, the magistrate refers to Dr. Ferrara's second C-84 as being dated December 2, 2008. October 2, 2008 is the correct date and is substituted in ¶46 of the magistrate's decision. With that modification, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained in it. In accordance with the magistrate's decision, we deny the requested writ of mandamus.

*Objections overruled;
writ denied.*

FRENCH, J., concurs.
TYACK, J., dissents.

TYACK, J., dissenting.

{¶7} I respectfully dissent.

{¶8} This case highlights some of the problems inherent in the workers' compensation system. Thomas Schmidt was seriously injured on November 30, 2007. He had been working for Watkins and Shepherd Trucking Company for over ten years, transporting carpeting and off-loading heavy rolls of carpet. He was 55 years old.

{¶9} On January 30, 2008, Schmidt experienced a so-called independent medical examination at the hands of Richard N. Kepple, M.D., and at the request of V & A Risk Services on behalf of the employer. Dr. Kepple examined Schmidt's neck, lower back and right shoulder. Dr. Kepple concluded that no compensable work-related injury occurred on November 30, 2007. Dr. Kepple claimed that Schmidt's right shoulder was essentially in the same condition as Schmidt's left shoulder.

{¶10} A few month's later, an MRI showed that Schmidt had suffered a full thickness tear of the rotator cuff and mild impingement with respect to his right shoulder. This led to Schmidt being seen by an orthopedic surgeon, Curtis R. Noel, M.D. Dr. Noel performed surgery on the shoulder on June 23, 2008.

{¶11} Schmidt's employer had been using Dr. Kepple's report to resist recognition of any workers' compensation conditions. A district hearing officer ("DHO") initially agreed. A staff hearing officer ("SHO"), however, overturned the DHO's order, but not until August 5, 2008, after surgery.

{¶12} After the SHO found that Schmidt's torn rotator cuff and shoulder impingement syndrome should be recognized conditions for purposes of workers' compensation, application was made for temporary total disability ("TTD") compensation.

No one seriously asserts that the rotator cuff was not injured on November 30, 2007, except perhaps Dr. Kepple. No one seriously asserts that Schmidt could continue unloading heavy rolls of carpet from semi-trailers while in pain from a torn rotator cuff. The granting of TTD compensation should have been virtually a no-brainer.

{¶13} The Bureau of Workers' Compensation ("BWC") granted TTD, effective December 1, 2007, the day after the injury. Nevertheless, Schmidt's entitlement to TTD compensation was resisted in part because Jerimiah Ferrara, D.C., who had been giving Schmidt routine chiropractic adjustments for years, did not know and could not list as a recognized condition, the torn rotator cuff or impingement syndrome. Instead, Dr. Ferrara listed problems readily observable involving the right shoulder.

{¶14} A critical problem is presented by this fact scenario. What if a treating physician or chiropractor guesses wrong as to the extent of the underlying medical problems or the identity of some of the problems in part because treatment is delayed while an employer or a risk management company fights the recognition of any claim whatsoever or fights the recognition of some of the medical conditions. If the physician misses the correct diagnosis, even if the underlying harm to the injured worker is clear, should the commission refuse to grant TTD?

{¶15} Here, the medical picture is clear. Schmidt seriously injured his shoulder and could not do his job until well after surgery to repair his torn rotator cuff. I see no basis for legitimately refusing him TTD compensation for any of that time period, especially where the medical records of the surgeon who repaired his shoulder are so compelling.

{¶16} I would grant the requested writ of mandamus. Because the majority does not, I respectfully dissent.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Thomas R. Schmidt,	:	
	:	
Relator,	:	No. 10AP-688
	:	
v.	:	(REGULAR CALENDAR)
	:	
The Industrial Commission of Ohio	:	
and Watkins & Shepard Trucking, Inc.,	:	
	:	
Respondents.	:	
	:	

MAGISTRATE'S DECISION

Rendered on March 22, 2011

Robert E. Tablack, for relator.

Michael DeWine, Attorney General, and *Charissa D. Payer*,
for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶17} Relator, Thomas R. Schmidt, 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 granting a period of temporary total disability ("TTD") compensation but denying another portion of TTD compensation and ordering the commission to award him TTD compensation for the entire period of time requested.

Findings of Fact:

{¶18} 1. On December 6, 2007, relator's physician, Jerimiah Ferrara, D.C., signed a FROI-1 form stating that relator sustained a work-related injury on November 30, 2007, when he was unrolling rolls of carpet from a platform in his semi-trailer, and a ladder slipped, causing him to fall face down on the floor. Dr. Ferrara listed the following injuries: "acromioclavicular joint dislocation; acromioclavicular joint strain/sprain; rotator strain/sprain; cervical thoracic and lumbar strain/sprain; and strain/sprain of ribs."

{¶19} 2. Dr. Ferrara signed a C-84 requesting TTD compensation on December 3, 2007. Dr. Ferrara certified that relator was disabled from November 30, 2007 to an estimated return-to-work day of February 11, 2008. Dr. Ferrara listed the following diagnoses for allowed conditions being treated which prevented relator from returning to work: 831.04 (dislocation of shoulder), 840.0 (acromioclavicular joint/ligament), 840.4 (rotator cuff). Dr. Ferrara listed the following additional allowed conditions being treated: 847.0 (neck), 847.1 (thoracic), 847.2 (lumbar), 848.3 (ribs).

{¶20} 3. Richard Kepple, M.D., examined relator on January 28, 2008 for the purpose of determining whether certain conditions should be allowed, whether the requested treatment was reasonable, and the extent of relator's disability. In his report, Dr. Kepple noted the history of relator's injury as well as his current status and provided his physical findings upon examination. Ultimately Dr. Kepple concluded that it was "medically reasonable to conclude that a compensable work-related injury did not occur on November 30, 2007." In explaining his decision, Dr. Kepple noted that, upon physical examination, relator's cervical, thoracic and lumbar spines were functionally normal, and there was no evidence of radiculopathy. He also noted that the condition of relator's

allegedly injured right shoulder was essentially the same as his uninjured left shoulder and that diagnostic studies did not demonstrate an acromioclavicular joint dislocation or separation in the right shoulder. He noted further that relator had been receiving chiropractic treatment for his neck, shoulders, back, and hips for the last 12 years. Dr. Kepple also noted that a November 30, 2007 office note from Dr. Ferrara did not reference a new work-related injury. Dr. Kepple indicated further that relator's subjective complaints could not be corroborated by objective clinical findings and that TTD compensation could not be medically justified.

{¶21} 4. A hearing was held before a district hearing officer ("DHO") on February 11, 2008, and relator's claim was denied in its entirety. The DHO concluded that relator did not meet his burden of proving that he sustained a work-related injury on November 30, 2007. Specifically, the DHO noted that the office notes from the treating chiropractor failed to mention the occurrence of the alleged work-related injury, the radiology reports did not mention any work-related injury in the history portion, and the January 28, 2008 report of Dr. Kepple was found to be persuasive.

{¶22} 5. An MRI of relator's right shoulder was performed on April 3, 2008. The MRI revealed the following: "Full thickness tear of the rotator cuff tendon with retraction to 12 o'clock. There is mild impingement as well."

{¶23} 6. Dr. Ferrara signed a C-9 form requesting a consultation with an orthopedist on April 25, 2008.

{¶24} 7. Relator was examined by Curtis R. Noel, M.D., on May 7, 2008. Following his physical examination, Dr. Noel provided the following assessment: "Right rotator cuff tear, status post fall."

{¶25} 8. Dr. Noel completed a C-9 form on May 28, 2007. Dr. Noel indicated that he was currently treating relator for the following conditions: 831.04 (dislocation of shoulder), 840.4 (rotator cuff), 847.1 (thoracic), and 847.2 (lumbar). Dr. Noel requested that relator's claim be allowed for the following additional conditions: "840.4 ROTATOR CUFF TEAR."

{¶26} 9. Dr. Noel performed surgery on relator on June 17, 2008. His pre-operative diagnosis was "right rotator cuff tear, medium" and his post-operative diagnosis was (1) rotator cuff tear, (2) glenohumeral fraying chondromalacia, and (3) impingement.

{¶27} 10. Dr. Noel saw relator in his office on June 23, 2008 and noted that he was one week post-surgery and he was doing well. Dr. Noel saw relator again on July 14, 2008 when he was one month post-surgery and noted that relator was doing well and could continue therapy.

{¶28} 11. On August 5, 2008, a staff hearing officer ("SHO") heard relator's appeal from the February 11, 2008 DHO order denying relator's claim. The SHO determined that relator's claim should be allowed for the following conditions: "right rotator cuff tear; right shoulder impingement syndrome." The SHO determined further that relator's claim should be disallowed for the following conditions: "right ac joint dislocation; right ac joint sprain/strain; cervical sprain/strain; thoracic sprain/strain; lumbar sprain/strain; right ribs sprain/strain." The SHO relied on the April 25, 2008 C-9 from Dr. Ferrara requesting an orthopedic consult, the May 28, 2008 C-9 from Dr. Noel asking that relator's claim be allowed for rotator cuff tear, and the April 3, 2008 MRI which revealed a full thickness tear of the rotator cuff.

{¶29} 12. On August 14, 2008, Dr. Ferrara completed a C-84 requesting the payment of TTD compensation from February 10, 2008 to an estimated return-to-work date of April 24, 2008. Dr. Ferrara listed the following conditions as preventing relator from working: 726.2 (impingement syndrome), and 840.6 (rotator cuff).

{¶30} 13. In an order mailed August 19, 2008, the Bureau of Workers' Compensation ("BWC") awarded relator TTD compensation beginning December 1, 2007 and continuing based upon the following evidence: "SHO order 8/15/08 – and file documentation."

{¶31} 14. Dr. Noel completed a C-84 dated September 18, 2008 attributing the period of disability in part to 840.4 (acromioclavicular joint/ligament) certifying that relator was temporarily and totally disabled from June 17, 2008 to present, and provided an estimated return-to-work date of November 16, 2008.

{¶32} 15. Relator's employer had appealed the August 19, 2008 order of the BWC awarding relator TTD compensation beginning December 1, 2007.

{¶33} 16. The matter was heard before a DHO on September 26, 2008. The DHO vacated the prior BWC order and denied the following periods of TTD compensation: December 1, 2007 to February 9, 2008, and April 29 through September 26, 2008 on grounds that those periods of disability "were not independently attributed to the conditions recognized in this claim." (Emphasis sic.) The DHO explained:

This portion of this decision is based upon a review of the 12/31/2007 and 4/25/2008 C-84 reports from J. Ferrara, D.C., as well as, the 7/1/2008 and 9/18/2008 C-84 reports from Dr. Noel which attribute the periods of alleged temporary total disability at issue, at least in part, to

conditions which have been disallowed in this claim. All evidence on file with regard to this matter was reviewed and considered.

The DHO did determine that TTD compensation should be paid from February 10 through April 28, 2008 based on the August 14, 2008 C-84 from Dr. Ferrara.

{¶34} 17. Dr. Ferrara completed a C-84 on October 2, 2008 certifying TTD compensation from November 30, 2007 through an estimated return-to-work date of January 2, 2009. Dr. Ferrara did list the correct allowed conditions here as he did in his August 14, 2008 C-84.

{¶35} 18. Relator's appeal from the DHO order was heard before an SHO on October 30, 2008. The SHO modified the DHO's order. The SHO denied the following periods of TTD compensation: December 1, 2007 through February 9, 2008 and April 29 through June 16, 2008. The SHO indicated that relator failed to establish by a preponderance of the evidence that the allowed conditions independently rendered him temporarily and totally disabled for those periods. The SHO granted TTD compensation for the following time periods: February 10 through April 28, 2008, and June 17 through October 30, 2008, and continuing. The SHO opined that relator's allowed conditions rendered him temporarily and totally disabled for these two time periods based on the August 14, 2008 C-84 from Dr. Ferrara as well as the September 18, 2008 C-84 from Dr. Noel.

{¶36} 19. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

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

{¶38} Relator argues that "[i]t is obvious that the relator was unable to perform his job as a truck driver from the date of the injury through surgery on June 17, 2008 and beyond because of the shoulder injury." In support of this argument, relator points to the May 7, 2008 report of Dr. Noel and the following statement Dr. Noel made in the history section of his report: "evidently there are some issues with Workers' Comp on this injury, he has had difficulty getting appropriate evaluation and treatment. Eventually he had an MRI which showed a full thickness rotator cuff tear." Based on this statement, relator argues that TTD compensation should have been awarded from the date of injury and continuing.

{¶39} The magistrate finds that the commission properly denied TTD compensation from December 1, 2007 through February 9, 2008 and from February 29 through June 16, 2008 because the medical evidence submitted attributed the periods of disability, in part, to non-allowed conditions.

{¶40} 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.

{¶41} The Supreme Court of Ohio has set forth three requirements which must be met in establishing a right to a writ of mandamus: (1) that relator has a clear legal right to the relief prayed for; (2) that respondent is under a clear legal duty to perform the act requested; and (3) that relator has no plain and adequate remedy in the ordinary course of the law. *State ex rel. Berger v. McMonagle* (1983), 6 Ohio St.3d 28.

{¶42} Relator had the burden of supplying medical evidence to support the requested periods of TTD compensation. *State ex rel. Jeep Corp. v. Indus. Comm.* (1991), 62 Ohio St.3d 64. Further, in order for TTD compensation to be paid, relator had to supply medical evidence demonstrating that the requested periods of disability were exclusively attributable to his allowed conditions. *State ex rel. Chrysler Corp. v. Indus. Comm.* (1998), 81 Ohio St.3d 158, 166.

{¶43} The following periods of disability were specifically disallowed: (1) December 1, 2007 through February 9, 2008, and (2) April 29 through June 16, 2008. A review of the record indicates that relator submitted the following evidence to establish that these requested periods of disability were indeed caused by the allowed conditions in his claim.

December 1, 2007 through February 9, 2008

{¶44} (1) The December 31, 2007 C-84 of Dr. Ferrara requesting TTD compensation from 11/30/2007 through an estimated return-to-work date of February 11, 2008. Dr. Ferrara listed the following conditions as causing relator's disability: 831.04 (dislocation of shoulder), 840.0 (acromioclavicular joint/ligament), and 840.4 (rotator cuff).

{¶45} (2) The October 2, 2008 C-84 from Dr. Ferrara seeking TTD compensation from November 30, 2007 through January 2, 2009. On the C-84, Dr. Ferrara correctly

listed the allowed conditions of right rotator cuff tear and right shoulder impingement syndrome.

{¶46} The December 31, 2007 C-84 attributed this requested period of disability in part to two conditions that were specifically disallowed in relator's claim: dislocation of shoulder and acromioclavicular joint/ligament. While Dr. Ferrara did complete a second C-84 on December 2, 2008, attributing that same period of disability beginning November 30, 2007 through January 2, 2009 specifically to the allowed conditions, he has rendered contradictory opinions.

{¶47} It is undisputed that an equivocal medical opinion does not constitute "some evidence" upon which the commission can rely. In *State ex rel. Eberhardt v. Flexible Corp.* (1994), 70 Ohio St.3d 649, 657, the Supreme Court of Ohio explained what constitutes equivocation by a medical expert:

[E]quivocation occurs when a doctor repudiates an earlier opinion, renders contradictory or uncertain opinions, or fails to clarify an ambiguous statement. Ambiguous statements, however, are considered equivocal only while they are unclarified. [*State ex rel. Paragon v. Indus. Comm.* (1983), 5 Ohio St.3d 72.] Thus, once clarified, such statements fall outside the boundaries of [*State ex rel. Jennings v. Indus. Comm.* (1982), 1 Ohio St.3d 101], and its progeny.

Moreover, ambiguous statements are inherently different from those that are repudiated, contradictory or uncertain. Repudiated, contradictory or uncertain statements reveal that the doctor is not sure what he means and, therefore, they are inherently unreliable. Such statements relate to the doctor's position on a critical issue. Ambiguous statements, however, merely reveal that the doctor did not effectively convey what he meant and, therefore, they are not inherently unreliable. Such statements do not relate to the doctor's position, but to his communication skills. If we were to hold that clarified statements, because previously ambiguous, are subject to *Jennings* or to commission rejection, we would

effectively allow the commission to put words into a doctor's mouth or, worse, discount a truly probative opinion. Under such a review, any doctor's opinion could be disregarded merely because he failed on a single occasion to employ precise terminology. In a word, once an ambiguity, always an ambiguity. This court cannot countenance such an exclusion of probative evidence.

{¶48} As above indicated, Dr. Ferrara clearly attributed this period of disability both to the allowed conditions in this claim as well as to two conditions which were specifically disallowed: (1) dislocation of shoulder, and (2) acromioclavicular joint/ligament. Because Dr. Ferrara attributed the same period of disability, in part, to non-allowed conditions, the magistrate cannot find that the commission abused its discretion by denying this period of compensation.

April 29 through June 16, 2008

{¶49} The only C-84 submitted in support of this requested period of TTD compensation is the October 2, 2008 C-84 from Dr. Ferrara certifying TTD compensation beginning November 30, 2007 through January 2, 2009. While this C-84 lists the correct allowed conditions, it was already discredited because it conflicted with the December 31, 2007 C-84. Having found that Dr. Ferrara had rendered inconsistent and contradictory opinions regarding a portion of this requested period of compensation, the magistrate finds the commission did not abuse its discretion by denying relator TTD compensation for these periods.

{¶50} The commission did grant TTD compensation for two specific periods of time: (1) February 10 through April 28, 2008, and (2) June 17 through the date of the hearing: October 30, 2008 and continuing. There is some evidence in the record to support these periods of disability. Specifically, the August 14, 2008 C-84 of Dr. Ferrara

certified a period of TTD compensation beginning February 10 through April 24, 2008 due solely to the allowed conditions. Further, the stipulated evidence contains a September 18, 2008 C-84 of Dr. Noel certifying disability beginning June 17, 2008 and continuing based solely upon the allowed conditions in the claim. The commission used those two pieces of evidence to grant compensation to relator.

{¶51} The burden of proof was on relator to demonstrate that all periods of disability were related exclusively to the allowed conditions in the claim. Although relator argues that, no matter what diagnosis was currently being considered, his disability was obviously related to the injury he sustained on November 30, 2007, the commission disagreed. The commission is the exclusive evaluator of disability and questions of credibility and the weight to be given evidence are clearly within the discretion of the Industrial Commission as fact finder. *State ex rel. Teece v. Indus. Comm.* (1981), 68 Ohio St.2d 165. Because the commission's determination is supported by some evidence in the record, and because the commission identified the evidence upon which both the denial of TTD compensation and the granting of TTD compensation was based, relator has not demonstrated the commission abused its discretion.

{¶52} Based on the foregoing, it is this magistrate's decision that relator has not demonstrated the commission abused its discretion in denying him the specific periods 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).