

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

The State of Ohio on Relation of Suresh Kirpekar,	:	
	:	
Relator,	:	
	:	
v.	:	No. 10AP-307
	:	
The Industrial Commission of Ohio and National City Bank,	:	(REGULAR CALENDAR)
	:	
Respondents.	:	

D E C I S I O N

Rendered on May 17, 2011

Ronald A. Apelt, for relator.

Michael DeWine, Attorney General, and *Derrick Knapp*, for
respondent Industrial Commission of Ohio.

Reminger Co., L.P.A., Lisa R. House and *Melvin J. Davis*, for
respondent National City Bank.

IN MANDAMUS
ON OBJECTION TO THE MAGISTRATE'S DECISION

DORRIAN, J.

{¶1} Relator, Suresh Kirpekar, commenced this original action requesting a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission"), to vacate its order denying relator's October 2, 2009 motion for temporary total disability ("TTD") compensation and entering an order granting the same.

{¶2} This court referred the matter to a magistrate of this court pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate issued a

decision, including findings of fact and conclusions of law, which is appended to this decision. In his decision, the magistrate recommended that this court deny relator's request for a writ of mandamus.

{¶3} No party has filed objections to the magistrate's findings of fact; however, the relator has timely filed this sole objection with respect to the magistrate's conclusions of law:

Relator Suresh Kirpekar objects to the Magistrate's conclusion that Relator submitted no evidence upon which the Industrial Commission could rely to support an award of temporary total disability compensation.

{¶4} Pursuant to Civ.R. 53(D)(4)(d), we undertake an independent review of the objected matter "to ascertain that the magistrate has properly determined the factual issues and appropriately applied the law."

{¶5} A relator seeking a writ of mandamus must establish: "'(1) a clear legal right to the relief prayed for, (2) a clear legal duty upon respondent to perform the act requested, and (3) that relator has no plain and adequate remedy in the ordinary course of the law.'" *Kinsey v. Bd. of Trustees of the Police & Firemen's Disability & Pension Fund of Ohio* (1990), 49 Ohio St.3d 224, 225, quoting *State ex rel. Consolidated Rail Corp. v. Gorman* (1982), 70 Ohio St.2d 274, 275. In a disability application proceeding, "[a] clear legal right exists where the board abuses its discretion by entering an order which is not supported by 'some evidence.'" *Id.*

{¶6} In his objection to the magistrate's decision, relator argues that the magistrate erred in recommending that this court deny relator's request for a writ of mandamus by finding that there was no evidence upon which the commission could rely to support an award of TTD compensation. In support of this argument, relator contends

that the C-84 dated April 7, 2009, along with the C-84 dated December 24, 2009, "revealed that [relator's] left thigh injury brought about his period of [TTD]," and that relator "should not be punished" because the C-84 lists, in addition to the allowed thigh injury, an improper diagnostic code and objective finding relating to a non-allowed left knee injury. (Feb. 7, 2011 Objection to Magistrate's Decision at 2.) Relator also contends that the commission's denial of TTD compensation "requires [relator] to prove that the non-allowed condition (Left Knee) was not the cause of his inability to work and the basis for his request for temporary total [disability] compensation." (Objection at 3.) We disagree.

{¶7} As the magistrate properly noted, the C-84 form instructs examining physicians to "'[l]ist ICD-9 Codes with narrative diagnosis(es) for allowed conditions being treated which prevent return to work.'" (Magistrate's Decision ¶19.) In addition, the C-84 form instructs examining physicians to "state the clinical findings supporting the disability certification," both objectively and subjectively. (Magistrate's Decision ¶20.)

{¶8} Here, relator's first C-84 form dated April 7, 2009, lists ICD-9 code "836.0" for a knee injury, "[left] knee & hamstring injury" for objective findings and "[left] knee & hamstring pain" for subjective findings. (Magistrate's Decision ¶20.) Further, relator's second C-84 form,¹ also dated April 7, 2009, lists ICD-9 code "843.9" for a sprain or strain to an unspecified site of the hip and thigh, "[left] knee & hamstring injury" for objective findings and "[left] knee & hamstring pain" for subjective findings. (Magistrate's Decision ¶25.) Finally, relator's third C-84 form, dated December 24, 2009, lists ICD-9 codes "836.0," "843.8," "840.9," and "843.9," for a knee injury, sprain or strain to specified and

¹ ¶25 of the Magistrate's Decision indicates the second form was dated December 24, 2009. The record reflects it was dated April 7, 2009, but faxed December 24, 2009.

unspecified sites of the hip and thigh, and sprain of an unspecified site of the shoulder and upper arm, with no written response regarding objective and subjective findings. (Magistrate's Decision ¶¶27, 29.) Each of relator's C-84 forms, presented as evidence of TTD, included consideration of nonallowed conditions and/or inconsistencies regarding the cause of disability.

{¶9} In reaching his recommendation to deny relator's request for a writ of mandamus, the magistrate primarily relies upon *State ex rel. Waddle v. Indus. Comm.* (1993), 67 Ohio St.3d 452, and *State ex. rel. Bradley v. Indus. Comm.* (1997), 77 Ohio St.3d 239, 242. In *Waddle*, the Supreme Court of Ohio held that, although nonallowed conditions cannot be used to advance or defeat a cause, "the mere presence of nonallowed disabling conditions does not automatically foreclose a finding of permanent total disability." *Id.* at 458. However, in *Bradley*, the Supreme Court of Ohio subsequently stated that "a claimant must meet his burden of showing that an allowed condition independently caused the disability. The allowed condition cannot combine with a nonallowed medical condition to produce TTD." *Id.* at 242.

{¶10} In *State ex. rel. Washington-Bass v. Setla LLC*, 10th Dist. No. 09AP-343, 2010-Ohio-5151, this court faced a similar fact pattern, whereupon the relator claimed that she did not actually have the nonallowed conditions set forth in the C-84 form and that, in denying her claim, the burden of proof shifted requiring her "to prove that a condition she did not have did not contribute to her disability status." *Id.* at ¶4. In *Washington-Bass*, we held that because the examining physician identified a nonallowed condition as a disabling condition on all but one of the C-84's, the "nonallowed [condition] was used to advance the TTD claim, in violation of *Waddle*. *Id.* at ¶6. Further, we stated that "there is no indication on the C-84's that an allowed condition is independently

causing the TTD condition." Id. Based upon the record in *Washington-Bass*, we concluded that the "[r]elator has not proven that an allowed condition has caused her disability." Id. See also *State ex rel. Halleen Chevrolet, Inc. v. Jenkins*, 10th Dist. No. 06AP-1002, 2007-Ohio-3655, ¶4, wherein this court found that "because [the examining physician] considered both allowed and nonallowed medical conditions in opining that [the] claimant is temporarily and totally disabled, his opinion is not 'some evidence' supporting the commission's order."

{¶11} Further, we briefly note that, in support of his argument in favor of granting TTD compensation, relator relies largely upon *State ex. rel. Ignatious v. Indus. Comm.*, 99 Ohio St.3d 285, 2003-Ohio-3627. However, *Ignatious* differs greatly from the present appeal in that "[a]ll of the evidence in [*Ignatious*] attributes [the] claimant's inability to work to the allowed conditions only." Id. at ¶34. Therefore, in *Ignatious*, the claimant met the requisite burden of proof by showing that, in spite of mention of a nonallowed condition, an allowed condition independently caused his disability. Id. at ¶33.

{¶12} In contrast to *Ignatious*, the magistrate correctly found that, in the present matter, pursuant to *Waddle* and *Bradley*, relator's C-84's "cannot constitute some evidence upon which the commission can rely," in order to grant him TTD compensation because all three C-84's "fail to show that one or more allowed conditions of the claim are independently causing disability." (Magistrate's Decision ¶41, 45.) Thus, based upon the evidence in the record, relator failed to meet his burden of proof by providing no evidence of a direct causal relationship between an allowed condition and his disability. See *Waddle* at 454.

{¶13} Following an independent review pursuant to Civ.R. 53, we find the magistrate has properly determined the pertinent facts and applied the appropriate law.

Therefore, relator's objection to the magistrate's conclusions of law is overruled, and we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein. Therefore, we deny the requested writ of mandamus.

Objection overruled; writ denied.

BRYANT, P.J., and SADLER, J., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

The State of Ohio on Relation of Suresh Kirpekar,	:	
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Relator,	:	
v.	:	No. 10AP-307
	:	
The Industrial Commission of Ohio and National City Bank,	:	(REGULAR CALENDAR)
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Respondents.	:	

MAGISTRATE'S DECISION

Rendered on January 24, 2011

Ronald A. Apelt, for relator.

Michael DeWine, Attorney General, and *Derrick Knapp*, for respondent Industrial Commission of Ohio.

Reminger Co., L.P.A., Lisa R. House and *Melvin J. Davis*, for respondent National City Bank.

IN MANDAMUS

{¶14} In this original action, relator, Suresh Kirpekar, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order denying him temporary total disability ("TTD") compensation beginning January 2, 2009, and to enter an order granting said compensation.

Findings of Fact:

{¶15} 1. On January 2, 2009, relator sustained an industrial injury while employed as a customer service representative for respondent National City Bank ("National City") a self-insured employer under Ohio's workers' compensation laws. Relator describes the accident on his "First Report of an Injury, Occupational Disease or Death" as "[t]ripped over co-employee's chair while walking with customer to safety deposit box."

{¶16} 2. On January 29, 2009, National City's third-party administrator certified the industrial claim (No. 09-802334) for "left thigh, lower back sprain, [right] shoulder under blade pulled muscles."

{¶17} 3. On March 19, 2009, relator was examined by Zenos Vangelos, D.O. In a letter to Louis Keppler, M.D., of that date, Dr. Vangelos wrote:

I had the pleasure of seeing your patient, Suresh Kirpekar, on March 19, 2009, at which time, the patient gave a history of pain in the left buttock region which started around January 2, 2009, when he was at work and tripped over a chair and had pain. He says he has been seen in the past for his back and he had blocks which helped that, but this pain continues. The patient states he was sent for evaluation and treatment.

* * *

PHYSICAL EXAMINATION: Physical examination today, vital signs were within normal limits. Examination of the left hip region reveals tenderness over the proximal lateral hamstring. There is pain with activation of the hamstrings. He had a normal examination of the lumbar spine with good range of motion with pain again in the hamstring but very specific and not what I felt was radicular in nature. There was no divot felt in the area and no tenderness over the trochanteric bursa.

* * *

IMPRESSIONS:

[One] Probable tear of the lateral hamstring on the left.

RECOMMENDATIONS: The patient states he was sent for evaluation and treatment. There was an MRI done which we also reviewed of the thigh region. However, I don't feel that this was done in detail to give us information on this particular region, so I am going to suggest another MRI with a mark on the particular area of pain to better delineate pathology. * * *

{¶18} 4. On April 7, 2009, a C-84 was completed by Dr. Keppler. On the C-84, Dr. Keppler indicates that March 19, 2009 is the date of last examination and that June 19, 2009 is the estimated return-to-work date. Dr. Keppler certifies that starting January 2, 2009, relator is unable to return to his position of employment.

{¶19} 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 to the query, Dr. Keppler wrote "836.0" which is an ICD-9 code for a knee injury.

{¶20} The C-84 form also asks the physician to state the clinical findings supporting the disability certification. In response, under "objective" Dr. Keppler wrote "[left] knee & hamstring injury." Under "subjective" Dr. Keppler wrote "[left] knee & hamstring pain."

{¶21} 5. On October 2, 2009, relator moved for TTD compensation beginning January 2, 2009. In support of the motion, relator submitted the April 7, 2009 C-84 from Dr. Keppler.

{¶22} 6. Following a December 7, 2009 hearing, a district hearing officer ("DHO") issued an order denying relator's October 2, 2009 motion:

The Hearing Officer finds that the C-84 submitted in support of the request for Temporary Total Disability is denied as the C-84 does not reflect the allowed conditions of this claim.

{¶23} 7. Relator administratively appealed the DHO's order of December 7, 2009.

{¶24} 8. On December 24, 2009, a so-called "revised" C-84 was prepared by Dr. Keppler's office. The information provided in the revised C-84 is identical to that provided in the earlier C-84 dated April 7, 2009, with the exception of the C-84 date and the ICD-9 code provided in response to the pre-printed query. On the revised C-84, "843.9" is written in response to the pre-printed query "[list ICD-9 Codes with narrative diagnosis(es) for allowed conditions being treated which prevent return to work." It can be noted that ICD-9 code 843.9 describes a sprain or strain to an unspecified site of the hip and thigh.

{¶25} The revised C-84 dated December 24, 2009 continues to list "[left] knee & hamstring injury" for the objective clinical findings. It also continues to list "[left] knee & hamstring pain" for the subjective clinical findings.

{¶26} 9. Another C-84 was prepared by Dr. Keppler's office and also dated December 24, 2009. This third C-84 lists December 15, 2009 as the last examination date and certifies disability from June 19, 2009 to an estimated return-to-work date of December 18, 2009.

{¶27} As earlier noted, the C-84 form asks the physician to "[list ICD-9 Codes with narrative diagnosis(es) for allowed conditions being treated which prevent return to work." In response, four ICD-9 codes are listed on the third C-84:

836.0
843.8
840.9
843.9

{¶28} It can be noted that ICD-9 code 843.8 describes a sprain to unspecified sites of the hip and thigh, and that ICD-9 code 840.9 describes a sprain of an unspecified site of the shoulder and upper arm.

{¶29} On the third C-84 (dated December 24, 2009), there is no written response to the pre-printed query regarding the objective and subjective clinical findings.

{¶30} 10. Following a January 28, 2010 hearing, a staff hearing officer ("SHO") issued an order stating:

The order of the District Hearing Officer, from the hearing dated 12/07/2009, is modified.

The Staff Hearing Officer denies the Injured Worker's request for payment of temporary total disability compensation for the period 01/03/2009 to an estimated return to work date of 12/18/2009. The C-84 forms relied upon (two from Dr. Keppler dated 04/07/2009 and one from Dr. Keppler dated 12/24/2009) fail to assert that the allowed conditions, alone, are responsible for the disability alleged.

The first C-84 dated 04/07/2009 cites a left knee condition (836.0) as the cause of the disability alleged. The claim is not recognized for a left knee condition.

The second C-84, also dated 04/07/2009, cites "843.9" (sprain hip/thigh) as the disabling condition, but then describes (under "Objective" clinical findings" [sic] a "left knee and hamstring injury"[]). Again, the claim is not allowed for a left knee injury.

The most recent C-84, also from Dr. Keppler and dated 12/24/2009, again cites "836.0" as one of the conditions causing the disability asserted.

There is no medical evidence found probative and persuasive to support the period of temporary total disability compensation requested (01/03/2009 forward).

{¶31} 11. On February 19, 2010, another SHO mailed an order refusing relator's administrative appeal from the SHO's order of January 28, 2010.

{¶32} 12. On April 6, 2010, relator, Suresh Kirpekar, filed this mandamus action.

Conclusions of Law:

{¶33} The commission, through its SHO, correctly held that relator submitted no evidence upon which the commission could rely to support TTD compensation. Accordingly, it is the magistrate's decision that this court deny relator's request for a writ of mandamus, as more fully explained below.

{¶34} In the seminal case of *State ex rel. Waddle v. Indus. Comm.* (1993), 67 Ohio St.3d 452, the court held that nonallowed medical conditions cannot be used to advance or defeat a claim for compensation. Later, in *State ex rel. Bradley v. Indus. Comm.* (1997), 77 Ohio St.3d 239, 242, citing its decision in *Waddle*, the court stated that the mere presence of a nonallowed condition in a claim does not 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.

{¶35} As the SHO's order of January 28, 2010 indicates, relator submitted three C-84s in support of his request for TTD compensation.

{¶36} The first C-84 is dated April 7, 2009 and it cites a left knee injury as the sole cause of TTD. That is, ICD-9 code 836.0 (which is a code for a knee injury) was solely listed in response to the query of what condition being treated prevents a return to work. Under *Waddle* and *Bradley*, the first C-84 dated April 7, 2009 provides no evidence of TTD.

{¶37} The second C-84 is the so-called revised C-84 and it is also dated April 7, 2009. As earlier noted, the revised C-84 lists ICD-9 code 843.9 as the allowed condition being treated that prevents a return to work. While ICD-9 code 843.9 arguably describes an allowed condition in the claim, neither Dr. Keppler nor his office staff revised the

handwritten responses to the C-84 form's request for the objective and subjective clinical findings supporting disability. That is, the revised C-84 continues to list "[left] knee & hamstring injury" as the objective clinical finding and it continues to list "[left] knee & hamstring pain" as the subjective clinical finding.

{¶38} Thus, the revised C-84 is internally inconsistent when it lists the code number for an allowed condition as the sole basis for disability, but then indicates clinical findings related to a nonallowed knee injury. *State ex rel. Lopez v. Indus. Comm.* (1994), 69 Ohio St.3d 445; *State ex rel. Taylor v. Indus. Comm.* (1995), 71 Ohio St.3d 582.

{¶39} Because the revised C-84 is internally inconsistent, it cannot be some evidence upon which the commission can rely. *Id.*

{¶40} The third C-84 submitted by relator is dated December 24, 2009. As the SHO correctly points out, this C-84 improperly lists ICD-9 code 836.0 as among the four codes that are said to describe allowed conditions being treated which prevent a return to work.

{¶41} Arguably, the remaining ICD-9 codes listed on the C-84 (843.8, 840.9 and 843.9) describe allowed conditions in the claim. Even so, the listing of ICD-9 code 836.0 which describes a nonallowed condition as a contributing cause of disability fatally flaws the C-84 unless there can be found a certification that the three remaining codes describe conditions that independently cause disability. On the C-84, however, there is no indication that one or more allowed conditions of the claim independently cause disability. Accordingly, the third C-84 cannot constitute some evidence upon which the commission can rely under *Waddle* and *Bradley*. See *State ex rel. Washington-Bass v. Setla LLC*, 10th Dist. No. 09AP-343, 2010-Ohio-5151.

{¶42} Here, relator concedes that listing ICD-9 code 836.0 among the four codes listed on the C-84 "is a mistake made solely by Dr. Keppler's office." (Relator's brief, at 7.) Because the record before this court allegedly fails to indicate that relator ever received medical treatment for his knee, relator suggests that the commission or this court can, in effect, delete ICD-9 code 836.0 from the C-84 so that only codes for allowed conditions remain—thus saving the C-84 as evidence upon which the commission can rely. However, neither the commission nor this court has the authority to rewrite the C-84 or to correct what may seem to be an error on the part of Dr. Keppler or his office staff.

{¶43} Relator's reliance upon *State ex rel. Ignatious v. Indus. Comm.*, 99 Ohio St.3d 285, 2003-Ohio-3627, is misplaced. In *Ignatious*, the court states:

* * * Without question, the commission is entitled to draw inferences from the evidence before it. What it is not empowered to do, however, is alter the burden of proof.

No one disputes claimant's responsibility to establish a causal relationship between his allowed conditions and the claimed disability. He is *not*, however, required to disprove a negative. Having supplied evidence of a direct causal relationship between his allowed neck conditions and his disability, he is not required to further show that his carpal tunnel syndrome is not causing his inability to work. Yet upon review, this is what the commission indeed appears to have done. In response to the bureau's request for clarification, Dr. Ruch supplied a January 9, 2001 C-84 and a May 18, 2001 letter. The former listed "neck pain" as the sole cause of disability and the latter expressly to the allowed conditions of "sprain of neck and herniated disc C4-5 and C5-6." That the commission order continued even after these clarifications to rely on the presence of carpal tunnel syndrome to disqualify this evidence implies but one thing: that the evidence was deemed insufficient because it did not affirmatively state that carpal tunnel syndrome was not influencing claimant's inability to work. In tacitly requiring this, the commission overstepped its bounds.

Id. at ¶32-33. (Emphasis sic.)

{¶44} According to relator, by rejecting the three C-84s, the commission is in effect requiring him to prove that his knee is not the cause of his inability to work. The magistrate disagrees.

{¶45} All three C-84s fail to show that one or more allowed conditions of the claim are independently causing disability. Thus, relator has failed to supply evidence of a direct causal relationship between an allowed condition and his disability. Relator has failed to do what the *Ignatious* court requires. Having failed to meet his burden under *Waddle*, *Bradley* or *Ignatious*, he cannot successfully argue that the commission has improperly required him to prove that the knee is not causing disability.

{¶46} Accordingly, for all the above reasons, it is the magistrate's decision that this court deny relator's request for a writ of mandamus.

/s/ Kenneth W. Macke
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).