



## 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 her decision, the magistrate noted relator's contention that the commission abused its discretion when it relied upon the report of Dr. Mannava, since his report was not based on all the allowed conditions due to the limited nature of his physical examination of relator. In response to that issue, the magistrate concluded the commission did not abuse its discretion in relying on the report of Dr. Mannava who specifically indicated in his report that he not only accepted the objective findings contained in the medical reports he reviewed, but conducted a physical examination of relator, albeit limited. Accordingly, the magistrate determined the requested writ should be denied.

## II. Objection

{¶3} Relator filed an objection to the magistrate's conclusions of law:

The Magistrate erred in denying Relator's requested writ of mandamus since the disputed Commission order was not based on "some evidence."

{¶4} In her decision, the magistrate described the core issue as "whether or not Dr. Mannava's admittedly limited examination was sufficient for him to render an opinion." Because relator indicated during Dr. Mannava's physical examination of him that the doctor's attempt to check his ankle reflex caused him pain, Dr. Mannava terminated the examination. In light of the abbreviated examination, relator contends the doctor's opinion is not some evidence on which the commission properly could rely to conclude relator

reached maximum medical improvement and thus is not entitled to an award of temporary total disability compensation.

{¶5} Relator's objection, in essence, questions the nature of a physical examination that would support a doctor's opinion and permit the commission to rely on that opinion. Although the two extremes of conducting either no examination or a complete physical examination may be easily resolved, the commission has some discretion in determining whether an examination which falls between either extreme is sufficient to constitute the required physical examination. For several reasons, we cannot say the commission abused that discretion.

{¶6} Initially, Dr. Mannava reviewed all of the medical records provided to him, including an MRI of relator's lumbar region. Secondly, Dr. Mannava properly listed the allowed conditions, including the lumbar region, which was newly allowed. Thirdly, and contrary to relator's contentions, Dr. Mannava's report listed his objective reasons for concluding relator reached maximum medical improvement when he provided "his observations of relator's ability to ambulate, sit, and transfer on and off the exam table" as well as relator's ability to climb a half flight of stairs at a rapid pace without difficulty. (Mag. Dec., ¶36; Dr. Mannava's Report, 3.) Given what he observed, Dr. Mannava found no objective evidence to support further "fundamental, functional, or physiological changes." (Dr. Mannava's Report, 4.)

{¶7} Relator's reliance on *State ex rel. Shaffer v. Indus. Comm.*, 10th Dist. No. 03AP-486, 2004-Ohio-3838 is misplaced. In *Shaffer*, the examining doctor declined to make an assessment of one of the claimant's significant medical complaints, instead suggesting the claimant be referred to a specialist; no report from a specialist was

obtained. Because the doctor did not examine in any fashion one of claimant's medical complaints, this court found the doctor's examination to be incomplete without a complementary report addressing the other condition. By contrast, Dr. Mannava examined relator and evaluated relator's newly allowed lumbar condition, though not as extensively as he may have wished due to relator's complaint of pain in an ankle reflex test.

{¶8} Here, based on his review of the accepted medical findings, his observations of relator and relator's ability to navigate about the office, and no indication of any new treatment plan, Dr. Mannava concluded relator's conditions reached maximum medical improvement. Because Dr. Mannava's opinion included his impressions from both his physical examination, though limited, and his observation of relator, the commission did not abuse its discretion in relying on Dr. Mannava's opinion. Accordingly, relator's single objection is overruled.

### **III. Disposition**

{¶9} 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. Accordingly, 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.

*Objection overruled;  
writ denied.*

FRENCH and TYACK, JJ., concur.

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# APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Benjamin Coleman,	:	
	:	
Relator,	:	
	:	
v.	:	No. 10AP-714
	:	
Harvey Schwartz, Big Four Window	:	(REGULAR CALENDAR)
Cleaning Company and The Industrial	:	
Commission of Ohio,	:	
	:	
Respondents.	:	

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## MAGISTRATE'S DECISION

Rendered on March 28, 2011

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*Clements, Mahin & Cohen, L.P.A., Co., Edward Cohen and Paul A. Lewandowski, for relator.*

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

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### IN MANDAMUS

{¶10} Relator, Benjamin Coleman, has filed this original action requesting that this court issue a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order which denied his request for temporary total disability ("TTD") compensation and ordering the commission to find that he is entitled to that compensation.

Findings of Fact:

{¶11} 1. Relator sustained a work-related injury on July 9, 1984, and his workers' compensation claim was allowed for the following conditions:

Cervical, thoracic and lumbar strain; herniated cervical disc C6-7, left; cervical degenerative disc disease C4-C5, C5-C6; dysthymic disorder; cervical spondylosis; cervical degenerative disc disease C1-C2, C2-C3, C3-C4.

{¶12} 2. In a judgment entry dated January 30, 2009, Judge Melba D. Marsh, a judge in the Hamilton County Court of Common Pleas, determined that relator was entitled to participate in the Ohio Bureau of Workers' Compensation ("BWC") fund for the following condition: "Degenerative Disc Disease of the Lumbar Spine."

{¶13} 3. Although the documents are not contained in the stipulated record, it appears that relator received a period of TTD compensation.

{¶14} 4. In March 2009, relator filed a motion seeking TTD compensation as follows:

That the Claimant's temporary total disability compensation be reinstated, effective October 12, 2006 and payable to the present and to continue upon submission of medical proof, based upon the recent change of circumstance created by the amendment of the claim to include "degenerative disc disease of lumbar spine[.]"

{¶15} According to the C-86 form, relator indicates that he attached the following documents:

C84 of Claimant,  
C84 of Luis F Pagani, M D dated February 6, 2009,  
Industrial Commission "Court Unit 4123 512 Memo" and  
Court Entry,  
Office note, Riverhills Healthcare Inc dated July 25, 2006,  
and  
C230 of Claimant

(Only the commission memo and the court entry are contained in the stipulated record.)

{¶16} 5. The record does contain the May 5, 2009 C-84 completed by Luis Pagani, M.D., certifying that relator was disabled from October 12, 2006 to the present and continuing based on the condition of lumbar degenerative disc disease.

{¶17} 6. Relator's March 10, 2009 motion was heard before a district hearing officer ("DHO") on June 25, 2009 and was granted as follows:

\* \* \* [T]he District Hearing Officer hereby grants the Injured Worker temporary total disability compensation from 03/10/2007 to the date of this hearing, 06/25/2009, and continuing upon submission of appropriate medical documentation, less sickness and accident benefits paid for this time period.

The District Hearing Officer notes the Injured Worker was previously found to be at maximum medical improvement for the conditions then allowed in this claim. However, the District Hearing Officer finds this claim was amended by the Hamilton County Court of Common Pleas, by order dated 01/30/2009, to include the additional condition of "DEGENERATIVE DISC DISEASE OF THE LUMBAR SPINE." The District Hearing Officer finds this is a new and changed circumstance warranting a new period of temporary total disability compensation in this claim.

Finally, the District Hearing Officer finds that, pursuant to Revised Code 4123.52, the Injured Worker is only entitled to an award of temporary total disability compensation for the period up to two years prior to the date of the filing of the request for temporary total disability compensation. \* \* \*

The DHO cited the following evidence in support:

The District Hearing Officer relies on the medical letter from Dr. Pagani, dated 05/26/2009, the C-84s by Dr. Pagani, dated 02/06/2009 and 05/05/2009, the office notes of Dr. Pagani, dated 05/27/2008, 11/28/2007, 09/05/2007, 08/07/2007, 06/13/2007, and 03/14/2007, the Judgement Entry by Judge Marsh from the Hamilton County Court of

Common Pleas, dated 01/30/2009, and on Revised Code 4123.52.

(Only the May 5, 2009 C-84 and the January 30, 2009 judgment entry are contained in the stipulated record.)

{¶18} 7. Dr. Pagani signed another C-84 form on December 15, 2009 certifying that relator was temporarily and totally disabled from January 1, 2010 through an estimated return-to-work date of April 1, 2010 for the following conditions: "722.0[,] 847.2[,] 847.0 [and] 847.1." (722.0 C-6 to C-7 herniated disc; 847.2 sprain lumbar region; 847.0 sprain neck and 847.1 sprain thoracic region.)

{¶19} 8. On December 31, 2009, relator was examined by V.P. Mannava, M.D. In his report, Dr. Mannava listed the allowed conditions as follows:

722.0 C6-C7 herniated disc, 847.2 sprain lumbar region, 847.0 sprain of neck, 847.1 sprain thoracic region, 722.4 DDD C4-C5 C5-C6 – cervical, 722.52 DDD L2-L3 L3-L4 L4-L5, 300.4 dysthymic disorder, 721.0 cervical spondylosis, 722.4 DDD C1-C2 C2-C3 C3-C4 – cervical[.]

{¶20} In his report, Dr. Mannava specifically indicated as follows: "I accept the allowed conditions, and the objective findings in the medical records. My opinions and conclusions at the end of this report are derived after complete review of the file including today's history and objective physical examination." Dr. Mannava listed the medical records which he reviewed:

#### REVIEW OF MEDICAL RECORDS

[One] Undated C84 from Luis Pagani, M.D. requested disability to 1-1-10 on estimated basis.

[Two] 5-26-09: Office visit Pagani, M.D. "Chief complaint upper and lower back pain. Pain is at least level 7. He is

wearing a low back brace". Disposition was appointment in six months with Dr. Pagani or before if needs.

[Three] 5-15-97: MRI report read by Pagani, M.D. "There is disc degeneration at L5-S1, L4-5, L3-4 and L2-3. There is diffuse disc bulge present at the last three level".

[Four] 5-8-97: MRI lumbar. Same report read by Rebecca Cornelius, M.D., radiologist.

[Five] 7-20-96: MRI lumbar spine. Mild degenerative disc disease from L3 to S1 levels.

[Six] 11-10-98: Lumbar MRI. Disc degeneration L2 through S1. Minor disc bulge at L4-5 and L5-S1. No evidence of HNP or extruded disc.

[Seven] 2-19-08: Impairment Evaluation by Glen Reinhart, M.D. He noted in the history that he was in a semi truck accident while working. He was initially treated at University Hospital. On 2-10-04 MRI of the cervical spine showed status post anterior cervical fusion at C6-7 and degenerative changes at C4-5 and C5-6 resulting in neural foraminal narrowing, worse on the right.

(None of those records are contained in the stipulated record.) Dr. Mannava provided a history of relator's claim and specifically noted the following: "[H]e does state that only recently he won his case for his lower back and that the lumbar area has been included in this claim." Thereafter, Dr. Mannava began his physical examination noting that: relator was able to sit erect on the edge of the table and in the chair without difficulty; had no problems in undressing and dressing his shirt; no problems walking with a normal gait; swinging his cane; no difficulty walking up and down the slopes; and no difficulty going up and down stairs. He noted further that relator was comfortable bearing weight on his left leg, transferring off and on the table, and walking without any significant limp. However, during the examination, relator complained of pain as follows:

In spite of this, while sitting comfortably dangling his feet at the edge of the table checking the ankle reflex apparently caused and is causing more pain and he says that he knows that further examination of his body parts will cause him more pain.

At this point I stopped and advised him that if my checking the ankle reflex caused him knee pain and if further examination is going to result in further pains I do not see any point of continuing the evaluation and causing him more problems or symptoms and that we will stop it there and he can basically go home.

**NOTE: There is absolutely nothing I did that should have caused any pain or discomfort, especially in the knee.**

He informed me repeatedly at that time that he just got his lower back included in the claim by winning the case in the court and he repeatedly asked me if I was going to make him [maximum medical improvement]. I basically advised him that that is one of the questions I am supposed to respond to and it is not up to me to decide whether he is MMI or not. It is between him, the treatment plan, his employer, lawyer and BWC, etc.

At this point I stopped further evaluations.

He departed pleasantly. He did not show any difficulties leaving our office actually climbed up one-half flight of stairs at a rapid pace without any difficulty.

(Emphasis sic.) Dr. Mannava's assessment included:

Mr. Coleman underwent one cervical surgery with partial improvement. He reports of ongoing difficulties, symptoms and limitations with cervical range of motion. No specific neurological deficits are noted in the upper extremities.

He continues to report of ongoing lower back pain with limited range of motion. Neurological evaluation of the lower extremities could not be done.

He is undergoing active treatment for unallowed/unrelated knee conditions including possible total knee replacement soon.

Basing on the current available active medical notes he is being followed only by Dr. Pagani on a maintenance basis every few months to replenish his medications.

Dr. Mannava ultimately concluded as follows:

[One] Although he has several conditions and ongoing symptoms in several body parts especially the neck and lumbar region, according to him his claim was only recently expanded. Basing on the available medical and limited evaluations today, there is no evidence of any specific change or indication for any new treatment plan. There is no objective evidence to support any further fundamental, functional or physiological changes within reasonable medical probability in his conditions despite ongoing current treatment including any pain management by Dr. Pagani, rehabilitation or other procedures.

Despite today's limited evaluation in my opinion basing on the above discussions and evidence he has reached maximum medical improvement.

[Two] However because of the significant conditions and limitations, at least subjectively, he is presenting, he is unable to return to his previous position of employment.

[Three] Because of limited evaluation today I am unable to completely specify his functional limitations.

[Four] Yes, he has reached maximum medical improvement. Please see # 1 above.

[Five] Yes, the current and ongoing treatment is on maintenance management physician visits every several months and medication refills.

[Six] No new recommendations at present.

{¶21} 9. Based on Dr. Mannava's report, the BWC referred the claim to the commission to consider terminating relator's TTD compensation.

{¶22} 10. The BWC's motion to terminate TTD compensation was heard before a DHO on February 19, 2010 and was granted. The DHO specifically relied on the December 31, 2009 report of Dr. Mannava.

{¶23} 11. Relator appealed and the matter was heard before a staff hearing officer ("SHO") on April 12, 2010. The SHO found that relator's allowed conditions had reached maximum medical improvement ("MMI") and agreed with the DHO's conclusion that TTD compensation should be terminated based on the December 31, 2009 report of Dr. Mannava.

{¶24} 12. Relator's further appeal was refused by order of the commission mailed May 7, 2010.

{¶25} 13. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶26} In this mandamus action, relator contends that the commission abused its discretion by relying upon the report of Dr. Mannava because his report was not based on all the allowed conditions. Specifically, relator notes that the examination was terminated when he complained of pain and that Dr. Mannava never examined his lumbar region. Because his claim had recently been allowed for degenerative disc disease of the lumbar region, relator contends that Dr. Mannava's report was insufficient.

{¶27} The magistrate finds that the commission did not abuse its discretion by relying on the report of Dr. Mannava, who specifically indicated in his report that he accepted the objective findings contained in the medical records which he reviewed.

{¶28} 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 MMI. See R.C. 4123.56(A); *State ex rel. Ramirez v. Indus. Comm.* (1982), 69 Ohio St.2d 630.

{¶29} The commission has continuing jurisdiction to reinstate TTD compensation after an MMI determination if new and changed circumstances warrant. *State ex rel. Bing v. Indus. Comm.* (1991), 61 Ohio St.3d 424, and *State ex rel. Moore v. Internatl. Truck & Engine*, 116 Ohio St.3d 272, 2007-Ohio-6055. Further, the allowance of new conditions can constitute a new and changed circumstance warranting the payment of TTD compensation. See *State ex rel. Basye v. Indus. Comm.*, 64 Ohio St.3d 68, 1992-Ohio-102. Here, relator's claim was additionally allowed for degenerative disc disease of the lumber spine, and the DHO found that relator established new and changed circumstances and awarded him TTD compensation beginning March 10, 2007 through the date of the hearing (June 25, 2009) and continuing.

{¶30} On December 31, 2009, Dr. Mannava examined relator to determine the extent of disability. At the outset of his report, Dr. Mannava listed all the allowed conditions, including the recently allowed condition of degenerative disc disease of the lumbar spine. Further, Dr. Mannava identified the medical records which he reviewed and expressly accepted the objective findings contained within those reports. Included within that list are MRIs from 1996, 1997 and 1998. Although none of the reports generated from those MRIs are contained in the record, Dr. Mannava apparently had

them, and those reports would have contained objective findings. Further, Dr. Mannava indicated that he had the May 26, 2009 office note of Dr. Pagani noting that relator's low back pain was a seven out of ten and that his next appointment was scheduled for six months.

{¶31} While it is true that Dr. Mannava terminated the examination when relator complained of pain, Dr. Mannava had medical evidence before him which he could review and from which he could render an opinion. Relator argues that the commission could not rely on Dr. Mannava's report because Dr. Mannava never physically examined his back. Relator essentially argues that Dr. Mannava could not render an opinion concerning his back condition. In support, relator directs the court's attention to R.C. 4123.56(A) and (B), *State ex rel. Richardson v. Quarto Mining Co.* (1995), 73 Ohio St.3d 358, and *State ex rel. Vance v. Marikis* (1999), 86 Ohio St.3d 305.

{¶32} Relator points to R.C. 4123.56(A) and (B) and asserts that a physical examination is required before TTD compensation can be terminated. Both sections provide that, after 200 weeks (R.C. 4123.56(A)) or 90 days (R.C. 4123.56(B)) of TTD compensation, the employee shall be scheduled for a medical examination to determine the employee's continued entitlement to receive TTD compensation. These provisions do call for a medical examination before TTD compensation is terminated. Therefore, the question here is whether or not Dr. Mannava's admittedly limited examination was sufficient for him to render an opinion. The magistrate concludes that it was.

{¶33} First, Dr. Mannava was aware that relator's claim had recently been allowed for degenerative disc disease of the lumbar spine. Dr. Mannava listed the newly allowed condition at the beginning of his report and, on several occasions, noted that relator

indicated the same during the examination. This fact, in and of itself, distinguishes relator's case from *Richardson*.

{¶34} In *Richardson*, the claimant, Jason Richardson, sustained a work-related injury, and his claim was originally allowed for lumbosacral strain. Richardson sought to have his claim additionally allowed for central disc herniation at L4-5 and L5-S1 and sought TTD compensation. Dr. M.A. Shahabi examined Richardson and opined that his lumbosacral strain had reached MMI. The commission allowed the disc herniation but denied TTD compensation based on Dr. Shahabi's report.

{¶35} This court granted a writ of mandamus finding that Dr. Shahabi's report did not constitute some evidence that the herniated disc problem had reached MMI since the ruptured discs were not shown to exist until an MRI taken subsequent to his examination.<sup>1</sup> By comparison, here, Dr. Mannava knew relator's claim had been additionally allowed for the degenerative disc disease condition, and he considered this condition.

{¶36} Second, Dr. Mannava did examine relator. Although he acknowledged that his examination was limited due to relator's complaints of pain, Dr. Mannava did provide his observations of relator's ability to ambulate, sit, and transfer on and off the exam table. These constitute objective observations. Further, Dr. Mannava never indicated that he was not able to render an opinion because of the limited examination. Instead, Dr. Mannava referenced the fact that relator's current treatment regimen was on a

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<sup>1</sup>The situation in *Vance* is inapposite to the situation in *Richardson*. In *Vance*, the doctor examined the claimant's entire back when the claim was allowed for chronic back pain syndrome but before the claim was additionally allowed for the more specific conditions of thoracic sprain and myofascial pain syndrome. The court found that the report constituted some evidence because, by examining the claimant for the more

maintenance basis and that there was no objective evidence to support further fundamental, functional or physiological changes. In the present case, Dr. Mannava accepted the objective findings, chronicled his observations of relator and his ability to move about the office, noted that there was no evidence of a specific change or an indication for a new treatment plan, and concluded that all of relator's allowed conditions had reached MMI.

{¶37} Finding that Dr. Mannava's report does constitute "some evidence" upon which the commission could rely, the magistrate finds that relator has not demonstrated that the commission abused its discretion.

{¶38} Based on the foregoing, it is this magistrate's decision that relator has not demonstrated that the commission abused its discretion in denying his request for reinstatement of TTD compensation, and this court should deny relator's request for a writ of mandamus.

/s/ Stephanie Bisca Brooks  
STEPHANIE BISCA BROOKS  
MAGISTRATE

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general back pain condition, the doctor's examination actually encompassed the additionally allowed conditions which were manifestations of the originally allowed condition.

**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).