

[Cite as *State ex rel. Johnston v. R.W. Sidley, Inc.* , 2011-Ohio-4516.]

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

State of Ohio ex rel. William L. Johnston, :  
Relator, :  
v. : No. 10AP-758  
R.W. Sidley, Inc. and The Industrial : (REGULAR CALENDAR)  
Commission of Ohio, :  
Respondents. :

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D E C I S I O N

Rendered on September 8, 2011

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*Dworken & Bernstein Co., L.P.A., Jonathan T. Stender and Jo A. Tatarko, for relator.*

*Buckingham, Doolittle & Burroughs, LLP, Gerald B. Chattman and Dale A. Nowak, for respondent R.W. Sidley, Inc.*

*Michael DeWine, Attorney General, and Colleen C. Erdman, for respondent Industrial Commission of Ohio.*

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IN MANDAMUS  
ON OBJECTIONS TO MAGISTRATE'S DECISION

TYACK, J.

{¶1} William L. Johnston filed this action in mandamus, seeking a writ to compel the Industrial Commission of Ohio ("commission") to grant him temporary total disability ("TTD") compensation for the period December 2, 2008 to June 16, 2009.

{¶2} In accord with Loc.R. 12, the case was referred to a magistrate to conduct appropriate proceedings. The parties stipulated the pertinent evidence and filed briefs. The magistrate then issued a magistrate's decision containing detailed findings of fact and conclusions of law, which is appended to this decision. The magistrate's decision contains a recommendation that we deny the request for a writ of mandamus.

{¶3} Counsel for Johnston has filed objections to the magistrate's decision. Counsel for the commission has filed a memorandum in response. The case is now before the court for a full, independent review.

{¶4} Johnston was injured on June 4, 2007. His workers' compensation claim was initially recognized for "[l]umbar compression fracture; mild scoliosis secondary to asymmetric compression fracture at L2-3, [and] substantial aggravation of pre-existing degenerative disc disease at L2-3."

{¶5} Johnston's claim was additionally allowed for "[p]ain disorder associated with both psychological factors and a general medical condition and generalized anxiety disorder." Johnston's former employer resisted recognition of the psychological conditions.

{¶6} Johnston did not immediately begin treatment for his psychological conditions, but started seeing a licensed social worker ("LISW") in April 2009. The social

worker was affiliated with the office of Donald Jay Weinstein, Ph.D., who diagnosed the psychological condition initially.

{¶7} On June 17, 2009, a clinical psychologist in the same office made a treatment note indicating that Johnston was TTD. Nine days earlier, Dr. Weinstein signed a C-84 which claimed Johnston had been TTD from October 28, 2008 until that date, but with an estimated return-to-work date of June 16, 2009.

{¶8} Ultimately, a staff hearing officer ("SHO") refused TTD compensation for any period prior to June 17, 2009 because no contemporaneous psychological report stated that Johnston was TTD. The report of Dr. Weinstein was back-dated almost six months, while the staff who actually saw Johnston did not claim Johnston was TTD at that time.

{¶9} Counsel for Johnston disagrees with the factual determinations of the SHO, as analyzed by the magistrate. Counsel sets forth five objections:

**FIRST OBJECTION:**

**RELATOR OBJECTS TO THE FOLLOWING ERRORS IN  
MAGISTRATE'S FINDINGS OF FACT**

1. In paragraph 2, Magistrate finds, "Because in his opinion the work was beyond his restrictions, Relator stopped working for respondent during fall 2008." This is incorrect. Dr. Chauhan completed a C-84 for physical conditions after Relator returned to work for the employer in a light duty position and was unable to perform the job. Relator was awarded a closed period of TT, ending 12/1/08. Magistrate errs.

2. In paragraph 15, Magistrate finds, "The first medical reference to relator's inability to return to work is included in the June 17, 2009 treatment note from Jamie Lichstein...." This is incorrect. Carrie Turbow's 4/28/08 treatment note plainly provides medical evidence of symptoms that support

an inability to work. However, even if same, in the opinion of the Magistrate, cannot constitute a "medical reference to relator's inability to return to work," certainly, Dr. Weinstein's C84, completed on 6/8/09, precedes the 6/17/09 note from Dr. Lichstein. Magistrate errs.

**SECOND OBJECTION:**

**MAGISTRATE ERRS BY HOLDING AS A MATTER OF LAW THAT A LACK OF CONTEMPORANEOUS MEDICAL EVIDENCE BARS PAYMENT OF TEMPORARY TOTAL WHERE A PHYSICIAN RETROSPECTIVELY CERTIFIES TEMPORARY TOTAL DISABILITY**

**THIRD OBJECTION:**

**MAGISTRATE ERRS BY FINDING THAT THE COMMISSION SUFFICIENTLY CITED TO AND EXPLAINED THE REASONING BEHIND THE EVIDENCE UPON WHICH IT RELIED TO DENY TT.**

**FOURTH OBJECTION:**

**MAGISTRATE ERRS BY HOLDING AS A MATTER OF LAW THAT ALL TREATMENT NOTES MUST CONTAIN AN EXPLICIT REFERENCE TO TEMPORARY TOTAL DISABILITY IN ORDER TO SERVE AS SUFFICIENT MEDICAL EVIDENCE TO SUPPORT A C84.**

**FIFTH OBJECTION:**

**MAGISTRATE ERRS BY FINDING THAT DR. WEINSTEIN'S C84 AND LISW TURBOW'S TREATMENT NOTES CANNOT SUPPORT A RETROSPECTIVE PERIOD OF IT.**

{¶10} Addressing the individual objections, the problem asserted in subpart I has no impact on whether Johnston is or is not entitled to TTD compensation. We therefore overrule subpart No. 1.

{¶11} As to subpart No. 2, the objection regarding medical reference to inability to work is also not sustained in toto. Dr. Weinstein's C-84, dated June 8, 2009, is very

difficult to read and lists a return-to-work date of June 16, 2009. The C-84 lists a wide variety of conditions such as "anxious/depressed," "irritable," "restless," and "sleep problems," but provides no insight as to why these make Johnston TTD. The SHO was within her discretion to find that Dr. Weinstein's backdated period of disability as indicated in his June 8, 2009 C-84, was not sufficient to support an award of TTD compensation. However, Dr. Weinstein's report via C-84 does precede the June 17, 2009 office notes of Dr. Lichstein and the magistrate's findings of fact should be corrected to that extent.

{¶12} Counsel's second objection simply mistakes what the magistrate found. The issue is not backdating in and of itself. The issue is whether the SHO could fail to be persuaded by Dr. Weinstein's C-84. The SHO was within her discretion not to be persuaded for the reasons noted above.

{¶13} The second objection is overruled.

{¶14} The third objection misstates the issue once again. The SHO simply found that counsel and the claimant failed to prove that Johnston was TTD before June 17, 2009. The evidence submitted was discussed but opposing evidence does not have to be analyzed and discussed when the issue is a failure of proof.

{¶15} The third objection is overruled.

{¶16} The fourth objection also incorrectly states a portion of the magistrate's report. The issue is whether an SHO could find that the medical evidence present did not prove that Johnston was entitled to TTD compensation starting at a date earlier than that for which TTD compensation was awarded. The psychological evidence was found to be lacking and the SHO had the discretion to so find, given the minimal reference to disability before the date for which TTD compensation was actually awarded.

{¶17} The fourth objection is therefore overruled.

{¶18} The fifth objection suffers from the same infirmity. The SHO could have made a different finding, but was not compelled to do so. The SHO could have found the C-84 of Dr. Weinstein persuasive, but did not. The SHO could have found LISW Turbow's treatment had some evidentiary value, but did not. The evidence before the SHO did not compel a different result, however.

{¶19} The fifth objection is overruled.

{¶20} All five objections having been overruled, we adopt the findings of fact contained in the magistrate's decision except to correct the factual assertion that no psychological claim of disability preceded June 17, 2009.

{¶21} We adopt the conclusions of law contained in the magistrate's decision.

{¶22} As a result of the foregoing, we deny the request for a writ of mandamus.

*Objections overruled; writ of mandamus denied.*

KLATT and SADLER, JJ., concur.

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**A P P E N D I X**

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. William L. Johnston, :  
 Relator, :  
 v. : No. 10AP-758  
 R.W. Sidley, Inc. and The Industrial : (REGULAR CALENDAR)  
 Commission of Ohio, :  
 Respondents. :

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M A G I S T R A T E ' S   D E C I S I O N

Rendered on May 17, 2011

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*Dworken & Bernstein Co., L.P.A., Jonathan T. Stender and Jo A. Tatarko, for relator.*

*Buckingham, Doolittle & Burroughs, LLP, Gerald B. Chattman and Dale A. Nowak, for respondent R.W. Sidley, Inc.*

*Michael DeWine, Attorney General, and Colleen C. Erdman, for respondent Industrial Commission of Ohio.*

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IN MANDAMUS

{¶23} Relator, William L. Johnston, 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 him temporary total disability ("TTD")

compensation "from 12/02/2008 – 06/16/2009" and ordering the commission to grant him that compensation.

Findings of Fact:

{¶24} 1. Relator sustained a work-related injury on June 4, 2007 and his workers' compensation claim was allowed for the following physical conditions: "Lumbar compression fracture; mild scoliosis secondary to asymmetric compression fracture at L2-3, substantial aggravation of pre-existing degenerative disc disease at L2-3."

{¶25} 2. Relator was able to return to light-duty work with certain restrictions. Because, in his opinion, the work was beyond his restrictions, relator stopped working for respondent R.W. Sidley, Inc. ("employer") during fall 2008.

{¶26} 3. As the stipulation of evidence indicates, after realizing that his physical conditions were not likely to improve, relator started to become anxious in October 2008.

{¶27} 4. Relator was examined by Donald Jay Weinstein, Ph.D. In his October 28, 2008 report, following his evaluation, Dr. Weinstein opined as follows:

\* \* \* Mr. Johnston meets the DSM-IV criteria for two diagnoses, both of which are a result of the industrial injury of 06/04/2007:

307.89-Pain Disorder Associated with Both Psychological Factors and a General Medical Condition  
300.02-Generalized Anxiety Disorder

{¶28} 5. Based on Dr. Weinstein's report, relator filed a motion seeking to have his claim additionally allowed for those psychological conditions.

{¶29} 6. Relator's motion was heard before a district hearing officer ("DHO") on May 18, 2009. Based upon the report of Dr. Weinstein, the DHO granted relator's

motion and his claim was additionally recognized for the following conditions: "Pain disorder associated with both psychological factors and a general medical condition and generalized anxiety disorder."

{¶30} 7. The employer appealed and that appeal was heard before a staff hearing officer ("SHO") on June 19, 2009. The SHO affirmed the prior DHO order allowing relator's claim for those psychological conditions.

{¶31} 8. The employer did not pursue further appeal of the allowance for the two psychological conditions.

{¶32} 9. Relator did not receive any treatment for the newly allowed psychological conditions until April 2009 when he began treating with Carrie Turbow, a Licensed Independent Social Worker affiliated with Dr Weinstein's office. The first date relator saw Turbow was April 28, 2009. Between April 28 and June 16, 2009, relator treated with Turbow on six occasions.

{¶33} 10. It is undisputed that, nowhere in those treatment notes did Turbow provide an opinion on whether or not relator was able to return to his former position of employment. Further, it is undisputed that Dr. Weinstein had not opined that relator was unable to return to his former position of employment following his initial evaluation of relator on October 28, 2008.

{¶34} 11. Near the same time relator began treating with Turbow, June 6, 2009, he was referred to Otto Kausch, M.D., who prescribed certain medications for his psychiatric condition. Relator reported to Dr. Kausch that he had been having problems with depression and anxiety for the preceding two years. Dr. Kausch did not provide an opinion concerning relator's ability to work.

{¶35} 12. In the interim, relator pursued vocational rehabilitation services; however, he did not want to use the services provided by his employer. Instead, relator wanted to use the services of a different vocational rehabilitation company.

{¶36} 13. During the December 11, 2008 hearing concerning his request to use different rehabilitation services, relator was asked whether or not, from a psychological standpoint, he was capable of looking for work, capable of working within his restrictions, and capable of participating in vocational rehabilitation. Relator responded in the affirmative that he believed he was psychologically capable of performing those tasks.

{¶37} 14. Relator's attempts to get approval to pursue vocational rehabilitation through an independent company were ultimately unsuccessful and his psychological condition continued to worsen.

{¶38} 15. The first medical reference to relator's inability to return to work is included in the June 17, 2009 treatment note from Jamie B. Lichstein, Psy.D, a clinical psychologist practicing with Dr. Weinstein: "Due the severity of the psychological symptoms Mr. Johnston is temporarily and totally disabled from work at this time."

{¶39} 16. That same day, Dr. Lichstein completed a C-84 certifying that relator was temporarily unable to return to his former position of employment from June 17, 2009 through an estimated return-to-work date of September 17, 2009.

{¶40} 17. On June 8, 2009, Dr. Weinstein completed a C-84 certifying that relator had been temporarily unable to return to his former position of employment from October 28, 2008 to the present. Relator submitted this C-84 to his employer for approval.

{¶41} 18. The employer denied relator's request for TTD compensation and requested a hearing.

{¶42} 19. Prior to the hearing, the employer had relator examined by Graham Young, Ph.D. In his first report, dated August 22, 2009, Dr. Young administered the Minnesota Multiphasic Personality Inventory-2 test and noted that relator became agitated due to the length of the test. Dr. Young noted relator's chief complaints as well as his treatment history, identified the medical records which he reviewed and ultimately concluded that relator did not meet the criteria for either generalized anxiety disorder or for pain disorder associated with both psychological factors and a general medical condition. Further, he opined that relator did not have any restrictions or limitations as a result of the psychological conditions.

{¶43} 20. In his second report, dated September 14, 2009, Dr. Young acknowledged the additional information which he received and specifically indicated that he accepted the allowed conditions in relator's claim; however, he noted that, at the time of the evaluation, relator was not manifesting symptoms of either general anxiety disorder or pain disorder associated with both psychological factors in a general medical condition. He ultimately concluded that relator's allowed psychological conditions did not prevent him from returning to his former position of employment

{¶44} 21. On November 12, 2009, a DHO held a hearing to consider both relator's motion for TTD compensation as well as a motion he filed asking that the employer be ordered to pay for treatment and medications.

{¶45} 22. The DHO approved relator's request for payment and reimbursement for medications prescribed to him by Dr. Kausch. The DHO also concluded that relator was entitled to an award of TTD compensation beginning December 2, 2008 as follows:

The District Hearing Officer awards temporary total disability compensation from 12/02/2008 through today 11/12/2009, and to continue with proof, per proof of disability from Dr. Weinstein (10/28/2008, 04/28/2009, 06/08/2009, 06/17/2009, 06/25/2009) and Dr. Lichstein (06/17/2009, 09/16/2009, 10/06/2009, 11/08/2009).

{¶46} 23. The employer appealed and the matter was heard before an SHO on January 13, 2010. The SHO modified the prior DHO order. Specifically, the SHO authorized payment for relator's office visits with Dr. Kausch and authorized payment for relator's medications. However, with regard to TTD compensation, the SHO determined that relator was not entitled to TTD compensation from December 2, 2008 through June 16, 2009 due to a lack of contemporaneous psychological reports supporting that period of time. Specifically, the SHO stated:

The Staff Hearing Officer denies temporary total disability compensation, from 12/02/2008 – 06/16/2009, with regard to the allowed psychological conditions, as not being supported by contemporaneous psychological records in support of same. This denial is made based on the lack of treatment records from 12/02/2008 – 04/27/2009, and the office visit records from 04/28/2009 – 06/16/2009, from Carrie Turbow, LISW, the treating social worker, that are devoid of any indication that, the Injured Worker was temporarily and totally disabled, throughout that time.

The SHO did grant TTD compensation beginning June 17, 2009 as follows:

Temporary total disability compensation is granted from 06/17/2009 to date, with regard to the allowed psychological conditions, based on the C-84, dated 12/02/2009, from Jamie Lichstein, PHD[.] Further temporary total disability

compensation is to be considered upon submission of supporting, persuasive, medical proof[.]

{¶47} 24. Relator's appeal was refused by order of the commission mailed February 6, 2010.

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

Conclusions of Law:

{¶49} Relator argues that the commission abused its discretion by denying his request for TTD compensation beginning December 2, 2008 because:

The law is clear that a psychologist may certify TT retroactively by reviewing the evidence and accepting the findings therein. State ex rel. Gray v. Hurosky (2006), 2006 Ohio 4985 at \*P36, relying on State ex rel Bowie v. Greater Regional Transit Auth. (1996), 75 Ohio St.3d 458. TT is payable even if an examining physician does not certify TT at the time of exam, but another psychologist in the same practice later determines that the injured worker is TT from the initial date of exam. Gray, 2006 Ohio 4985. Moreover, a hearing office[r] must accept that "there are circumstances under which an examining doctor is indeed competent to render an opinion as to disability retrospective of his initial evaluation." Id.

(Relator's brief, at 10.)

{¶50} Further, while acknowledging that, as a licensed independent social worker, Turbow was not able to legally certify a period of TTD, relator asserts that her treatment notes as well as Dr. Weinstein's later C-84 clearly support an award of TTD compensation beginning December 2, 2008. To the extent that argument fails, relator argues that the commission abused its discretion by refusing to award TTD compensation from the date of his initial visit with Turbow (April 28, 2009) because Dr. Lichstein's C-84 reiterated the same findings from Turbow's notes. Further, since the

commission relied on Dr. Lichstein's C-84 to grant TTD compensation beginning June 17, 2009, relator argues that the commission had no basis upon which to deny TTD compensation beginning April 28, 2009.

{¶51} It is this magistrate's decision that the commission did not abuse its discretion in this case. Specifically, while *State ex rel. Gray v. Hurosky*, 10th Dist. No. 05AP-1163, 2006-Ohio-4985 and *State ex rel. Bowie v. Greater Cleveland Regional Transit Auth.*, 75 Ohio St.3d 458, 1996-Ohio-142, do provide that a psychologist *may* certify a period of TTD retroactively and the commission *may* rely on that retroactive certification to grant TTD compensation, the law does not require that the commission do so. Further, to the extent that Dr. Lichstein certified TTD compensation beginning June 17, 2009, the commission did not abuse its discretion by beginning TTD compensation as of that date.

{¶52} 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.

{¶53} In denying relator's request for TTD compensation from December 2, 2008 through June 16, 2009, the commission did so based upon a finding that the requested

period was not supported by contemporaneous psychological records. Specifically, the commission noted that there was no evidence that relator received treatment from December 2, 2008 until April 27, 2009 when he began treating with Turbow. Further, the commission noted that in Turbow's office notes from April 28 through June 16, 2009, there was no indication that relator was temporarily and totally disabled during that time period.

{¶54} It is not an abuse of discretion for the commission to find a lack of contemporaneous medical evidence of treatment for disability to be relevant. *State ex rel. Bercaw v. Sunnybreeze Health Care Corp.*, 119 Ohio St.3d 284, 2008-Ohio-3922; and *State ex rel. Gibson v. Indus. Comm.*, 123 Ohio St.3d 92, 2009-Ohio-4148. In the present case, it is undisputed that, following his initial evaluation by Dr. Weinstein on October 28, 2008, relator did not begin treating for his psychological conditions until April 28, 2009 when he first saw Turbow. While relator does argue that he was unable to seek treatment until his claim was actually allowed for those additional conditions, the record is also clear that his claim was additionally allowed for those conditions in a DHO order dated May 18, 2009. Because it was not until May 2009 that his claim was actually allowed for those additional conditions, the fact that relator sought treatment in April 2009, before his claim was actually allowed for additional conditions, contradicts the argument that he makes here. Further, it is undisputed that, in his October 28, 2008 report, Dr. Weinstein did not offer an opinion as to whether or not relator's psychological conditions prevented him from returning to his former position of employment. It is also undisputed that the first time it was actually opined in medical records that relator was unable to

return to his former position of employment, was in the June 17, 2009 office note and C-84 of Dr. Lichstein.

{¶55} In support of his argument here, relator argues that, because Dr. Weinstein retroactively certified this period of TTD compensation, the commission was required to rely on that evidence or, at the very least, discuss it and explain why that evidence was not relied upon. In support of his argument, relator points to the following cases: *Gray*, *Bowie*, and *State ex rel. Wagner v. Vi-Cas Mfg. Co.*, 10th Dist. No. 06AP-405, 2007-Ohio-2383.

{¶56} In *Gray*, the claimant, June Y. Gray, was evaluated by Dr. Weinstein on December 29, 2003. At that time, Dr. Weinstein opined that Gray suffered from anxiety disorder. However, Gray's claim was not officially allowed for that condition until September 3, 2004. Thereafter, Dr. Weinstein completed a C-84 certifying TTD compensation beginning December 29, 2003, the date of his initial exam, and Gray began ongoing psychotherapy with Dr. Raymond D. Richetta, another doctor in Dr. Weinstein's office, who also completed a C-84.

{¶57} Gray filed a motion seeking TTD compensation; however, her request was denied. Specifically, the commission found that Dr. Richetta could not evaluate Gray's disability prior to the date he first treated her. Further, the commission found that Dr. Weinstein's reports could not be relied on because he did not evaluate her ability to return to her former position of employment.

{¶58} Gray filed a mandamus action which this court granted. This court's magistrate set out the issue as follows:

The main issue is whether the commission ignored or misapplied the holding in *State ex rel. Bowie v. Greater Regional Transit Auth.* (1996), 75 Ohio St.3d 458, in denying relator TTD compensation for the period prior to Dr. Richetta's initial examination of relator on October 8, 2004.

Id. at ¶29. In adopting the decision of the magistrate, this court stated:

In *Bowie*, the commission denied the claimant's request for TTD compensation based in part on a report from Dr. Katz who examined the claimant on July 12, 1990, almost seven months after the industrial injury. In his report, Dr. Katz opined that the claimant "should [not] have been out of work at any time after" the date of injury. Id. at 459. Dr. Katz's retrospective opinion was based upon emergency room records on the date of injury and his examination of the claimant.

Concerned that Dr. Katz had not reviewed the reports of the claimant's treating chiropractor, Dr. McFadden, the *Bowie* court wrote:

\* \* \* In this instance, the conspicuous reference to the emergency room reports coupled with the equally conspicuous lack of reference to Dr. McFadden's reports suggests to us that Dr. Katz may have overlooked the latter.

Id. at 460.

The *Bowie* court issued a writ of mandamus returning the cause to the commission for its further consideration of the compensation request after removal of Dr. Katz's report from further evidentiary consideration. The *Bowie* court explains the law that underpins its decision:

There are parallels between an examining doctor who offers a retroactive opinion and a doctor who renders an opinion as to a claimant's current status without examination. The evidentiary acceptability of the latter is long-settled, having been equated to an expert's response to a hypothetical question. *State ex rel. Wallace v. Indus. Comm.* (1979), 57 Ohio St.2d 55 \* \* \*; *State ex rel. Hughes v. Goodyear Tire & Rubber Co.* (1986), 26 Ohio St.3d 71 \* \* \*; *State ex rel. Lampkins v. Dayton Malleable, Inc.* (1989), 45 Ohio St.3d 14[.] \* \* \*

As in the case of a non-examining physician, however, certain safeguards must apply when dealing with a report that is not based on an examination done contemporaneously with the claimed period of disability. We find it imperative, for example, that the doctor review all of the relevant medical evidence generated prior to that time. \* \* \*

Id. at 460.

It should be further noted that under the so-called Wallace rule, *State ex rel. Wallace v. Indus. Comm.* (1979), 57 Ohio St.2d 55, the nonexamining physician is required to accept the findings of the examining physician but not the opinion drawn therefrom. *State ex rel. Consolidation Coal Co. v. Indus. Comm.* (1997), 78 Ohio St.3d 176, 179.

Id. at ¶31-34.

{¶59} In granting a writ of mandamus ordering the commission to award Gray TTD compensation beginning December 29, 2003, this court found that the safeguards noted in *Bowie* were present. Specifically, in adopting the magistrate's decision, this court agreed that, since Drs. Richetta and Weinstein practiced together, Dr. Richetta was aware of Dr. Weinstein's earlier report and the commission found Dr. Richetta's certification of TTD for the period prospective of his examination to be credible.

{¶60} Similarly, in *Wagner*, this court found that the commission's denial of TTD compensation for a specific period of time was premised upon a mistake of law and issued a writ of mandamus. In that case, the commission denied TTD compensation to the claimant, Robert Wagner, because Dr. Kimberly A. Wells, who originally saw Wagner on December 17, 2002, did not see him again until April 29, 2003. The commission found that Dr. Wells was not able to certify TTD compensation for the time period between December 17, 2002 and April 29, 2003.

{¶61} Wagner filed a mandamus action and this court, through its magistrate, determined that the commission's denial of TTD compensation for the requested period was premised upon a mistake of law and issued a writ of mandamus. Although the commission cited no authority to support the conclusion that Dr. Wells was not able to certify the requested period of TTD compensation, the magistrate determined that the decision strongly suggested a misapplication and misunderstanding of the legal principles set forth in *Bowie*. In adopting the report of its magistrate, this court stated:

Here, unlike the situation with Dr. Katz in *Bowie*, Dr. Wells examined relator both before and after the period at issue, i.e., January 15 through April 28, 2003. Clearly, the commission cannot arbitrarily declare under *Bowie* that the period at issue is retrospective of the April 29, 2003 examination and ignore that the period at issue is also prospective of the series of examinations ending December 17, 2002.

In short, *Bowie* renders Dr. Wells "able" to certify TTD compensation from January 15 through "April 28, 2003, contrary to the holding of the SHO.

Moreover, the record undisputedly shows that Dr. Wells was informed of relator's treatment during the period at issue because Dr. Wells was actually coordinating the treatment. Thus, even though *Bowie* does not prohibit Dr. Wells' disability certification, there are additional safeguards present beyond what is normally required for prospective disability opinions.

Here, the commission accepted Dr. Wells C-84 certification as of April 29, 2003, but refused to accept it for the period prior to April 29, 2003, because of the commission's misunderstanding of the legal principles set forth in *Bowie*. Thus, the commission, through its SHO, has already weighed the credibility of Dr. Wells' certification and the SHO's order offers no credibility concerns relating to the C-84.

Given that the commission cannot reject Dr. Wells' certification as a matter of law under *Bowie*, and that the commission has already determined the credibility of the C-84, this court should issue a full writ of mandamus ordering the commission to award TTD compensation for the period January 15 through April 28, 2003. See *State ex rel. Pleban v. Indus. Comm.* (1997), 78 Ohio St.3d 406, 678 N.E.2d 562.

Id. at ¶44-48.

{¶62} As the above case law indicates, a retroactive certification of a period of TTD compensation can be considered some evidence to support a period of TTD compensation provided the doctor certifying the period of TTD compensation is aware of the treatment the claimant received and if the commission had already found the doctor's opinion to be credible. Here, Dr. Weinstein did evaluate relator on October 28, 2008; however, in retroactively certifying TTD compensation, he never indicated that he reviewed the treatment records of Turbow. Under *State ex rel. Wallace v. Indus. Comm.* (1979), 57 Ohio St.2d 55, a non-examining physician is required to accept the findings of examining physicians before rendering their opinion. Considering for the moment that Dr. Weinstein did review those records, the commission could have relied on his certification, especially since the commission had relied on his earlier report to grant the allowance for the psychological conditions. However, the commission was not required to. Further, as the employer argues in its brief, if we assume that Dr. Weinstein had access to and considered Turbow's treatment notes, we could also assume that Dr. Lichstein had access to and considered Turbow's treatment notes when he examined relator and completed his C-84. However, Dr. Lichstein specifically indicated that relator's disability began on June 17, 2009 and not April 28, 2009. Drs. Weinstein, Lichstein and Turbow all practice in the same office. Two doctors with

access to the same medical records certified periods of disability beginning on two different days. Dr. Weinstein opined that the disability began October 28, 2008 while Dr. Lichstein opined that the disability began June 17, 2009. The commission relied on Dr. Lichstein's C-84 and the magistrate finds that this does not constitute an abuse of discretion.

{¶63} There is nothing in the commission's order that would indicate that the commission misapplied the law as set out in *Bowie and Gray*. Further, although relator argues that the commission should have discussed Dr. Weinstein's report and explained why it was not relied upon, the commission is not required to do so. The commission is only required to list the evidence upon which it relied and provide its reasoning. *State ex rel. Noll v. Indus. Comm.* (1991), 57 Ohio St.3d 203.

{¶64} The reason the commission provided for denying TTD compensation from October 28, 2008 through April 27, 2009 was the fact that relator had sought no treatment for his psychological conditions during this time period. The lack of contemporaneous medical evidence of treatment does constitute some evidence upon which the commission could rely in denying the requested period of TTD compensation. Further, Dr. Lichstein first indicated that relator's psychological condition had worsened and prevented him from returning to work as of June 17, 2009.

{¶65} The commission cited the evidence upon which it relied: it denied a period of TTD compensation due to relator's lack of contemporaneous medical evidence that he was receiving treatment, and granted TTD compensation based on medical evidence certifying that his psychological conditions prevented him from returning to his former position of employment as of June 17, 2009. Given that there is no indication in the

stipulation of evidence that the commission misapplied the law, the magistrate finds that relator has not demonstrated that the commission abused its discretion 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).