

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State ex rel. Robert L. Grogan, :
Relator, :
v. : No. 03AP-142
Industrial Commission of Ohio and Cassens : (REGULAR CALENDAR)
Transport Co., :
Respondents. :
:

D E C I S I O N

Rendered on February 3, 2004

Urban Co., L.P.A., and Anthony P. Christine, for relator.

Jim Petro, Attorney General, and *Dennis H. Behm*, for
respondent Industrial Commission of Ohio.

Schottenstein Zox & Dunn L.P.A., Corey V. Crognale and
Aaron L. Granger, for respondent Cassens Transport Co.

IN MANDAMUS
ON OBJECTIONS TO MAGISTRATE'S DECISION

LAZARUS, P.J.

{¶1} Relator, Robert L. Grogan, has filed this original action in mandamus requesting this court to issue a writ of mandamus ordering respondent Industrial Commission of Ohio to vacate its order to the extent that temporary total disability

compensation is denied beginning November 21, 2001, and to enter a new order granting said compensation beginning November 21, 2001.

{¶2} This court referred the matter to a magistrate, pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals, who issued a decision, including findings of fact and conclusions of law. (Attached as Appendix A.) The magistrate concluded that relator had failed to establish that the commission had abused its discretion and that this court should deny the requested writ.

{¶3} Relator filed objections to the decision of the magistrate essentially reiterating the arguments made to the magistrate. For the reasons stated in the decision of the magistrate, the objections are overruled.

{¶4} Following independent review, pursuant to Civ.R. 53, we find that the magistrate has properly determined the pertinent facts and applied the salient law to them. Accordingly, we adopt the decision of the magistrate as our own, including the findings of fact and conclusions of law contained in it. In accordance with the decision of the magistrate, the requested writ is denied.

Objections overruled;

writ denied.

BOWMAN and SADLER, JJ., concur.

APPENDIX A

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Robert L. Grogan,	:	
	:	
Relator,	:	
	:	
v.	:	No. 03AP-142
	:	
Industrial Commission of Ohio	:	(REGULAR CALENDAR)
and Cassens Transport Co.,	:	
	:	
Respondents.	:	
	:	

MAGISTRATE'S DECISION

Rendered on August 27, 2003

*Urban Co., L.P.A., and Anthony P. Christine, for relator.**Jim Petro, Attorney General, and Dennis H. Behm, for
respondent Industrial Commission of Ohio.**Schottenstein Zox & Dunn L.P.A., Corey V. Crognale and
Aaron L. Granger, for respondent Cassens Transport
Company.*

IN MANDAMUS

{¶5} In this original action, relator, Robert L. Grogan, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate

its order to the extent that temporary total disability ("TTD") compensation is denied beginning November 21, 2001, and to enter an order granting TTD compensation beginning November 21, 2001.

Findings of Fact

{¶6} 1. On May 31, 2001, relator sustained an industrial injury while employed as a driver for respondent Cassens Transport Company ("employer"), a self-insured employer under Ohio's workers' compensation laws. The industrial claim was initially allowed for: "left shoulder sprain; strain left AC joint; strain left trapezius muscle," and assigned claim number 01-825645.

{¶7} 2. Shortly after the injury, relator began treating with Ronald S. Paloski, D.O., for his shoulder injury. Dr. Paloski certified TTD and the employer began paying TTD compensation.

{¶8} 3. On July 20, 2001, relator underwent a left shoulder MRI. Dr. Paloski then referred relator to orthopedic surgeon K. Brian Williams, D.O., for a consult. Based upon his review of the MRI and his examination of relator, Dr. Williams wrote to Dr. Paloski on August 8, 2001:

{¶9} **IMPRESSION:** Impingement left shoulder with AC degeneration. This represents pre-existent problem with new onset of symptoms related to his incident of record.

{¶10} **RECOMMENDATION:** Conservative treatment. Options are anti-inflammatories, home exercise, injection and physical therapy. If these fail to offer him adequate relief, he may go on to require subacromial decompression and acromioclavicular joint resection. * * *

{¶11} (Emphasis sic.)

{¶12} 4. On September 5, 2001, relator was examined at the employer's request by Paul C. Martin, M.D. Dr. Martin also reviewed the MRI and Dr. Williams' report of August 8, 2001. Dr. Martin opined that relator has reached maximum medical improvement ("MMI").

{¶13} 5. On October 4, 2001, the employer moved to terminate TTD compensation based upon Dr. Martin's report.

{¶14} 6. On October 19, 2001, relator moved for the recognition of an additional claim allowance citing an October 16, 2001 report from Dr. Paloski in which he opined that the claim should be amended to include "aggravation of left shoulder AC joint degeneration causing impingement syndrome."

{¶15} 7. The employer's October 4, 2001 motion to terminate TTD compensation was heard by a district hearing officer ("DHO") on November 20, 2001. Following the hearing, the DHO issued an order terminating TTD compensation effective November 20, 2001, based upon Dr. Martin's September 5, 2001 report. The DHO's order of November 20, 2001 was not administratively appealed.

{¶16} 8. On February 4, 2002, relator renewed his October 19, 2001 motion for the recognition of an additional claim allowance, and also added a request for reinstatement of TTD compensation beginning November 20, 2001.

{¶17} 9. In support of his TTD compensation request, relator submitted a C-84 from Dr. Paloski dated January 21, 2002. The C-84 form asks the attending physician to list "the allowed conditions being treated which prevent return to work." In response, Dr. Paloski listed the allowed strain and sprain conditions of the left shoulder. The C-84 form

also asks the attending physician to list "other allowed conditions being treated." In response, Dr. Paloski wrote "Agg of left shoulder, AC joint degeneration causing impingement syndrome." The C-84 form also asks the attending physician to report the objective and subjective clinical findings supporting his recommendation as to TTD. Dr. Paloski failed to respond to this query on the C-84 report dated January 21, 2002.

{¶18} 10. Following a March 21, 2002 hearing, a DHO issued an order additionally allowing the claim for "aggravation of left shoulder AC joint degeneration causing impingement." The DHO also denied TTD compensation beginning November 21, 2002.

{¶19} 11. Relator administratively appealed the DHO's order of March 21, 2002.

{¶20} 12. On April 5, 2002, Dr. Paloski signed a C-9 requesting approval for left shoulder surgery to be performed by Dr. Williams.

{¶21} 13. Following a May 22, 2002 hearing, a staff hearing officer ("SHO") issued an order affirming the DHO's order of March 21, 2002. On the question of TTD compensation, the SHO's order explains:

{¶22} It is the finding of the Staff Hearing Officer that the portion of claimant's motion requesting temporary total compensation is adjudicated as follows.

{¶23} For purposes of clarification, the Staff Hearing Officer finds that the claimant's request for temporary total compensation is being alleged due to the requested further allowance and is being requested from 11/21/01 through present and to continue.

{¶24} It is the order of the Staff Hearing Officer that temporary total compensation is denied from 11/21/01 through 5/22/02, inclusive. The Staff Hearing Officer finds that the additional allowance granted herein, in and of itself, is not sufficient to warrant

reinstatement of temporary total compensation or evidence that claimant's condition has changed to once again render claimant temporarily and totally disabled. In addition, the Staff Hearing Officer finds that the 1/21/02 C-84 from Dr. Paloski submitted in support of claimant's request for temporary total compensation fails to document any objective or subjective findings to substantiate the requested period of disability.

{¶25} The Staff Hearing Officer notes that claimant was previously found to have reached maximum medical improvement effective 11/20/01 by prior District Hearing Officer order. Further, the Staff Hearing Officer finds that the claimant has failed to establish by a preponderance of the evidence that claimant was temporarily and totally disabled based upon the newly allowed condition herein. This decision is based on a review of Dr. Paloski's 1/21/02 C-84 report.

{¶26} 14. On June 15, 2002, another SHO mailed an order refusing relator's administrative appeal from the SHO's order of May 22, 2002.

{¶27} 15. On July 18, 2002, the employer approved relator's request for left shoulder surgery.

{¶28} 16. On July 23, 2002, relator underwent left shoulder surgery performed by Dr. Williams.

{¶29} 17. On February 19, 2003, relator, Robert L. Grogan, filed this mandamus action.

Conclusions of Law

{¶30} The issue is whether the commission abused its discretion by denying TTD compensation beginning November 21, 2001. Finding no abuse of discretion, it is the

magistrate's decision that this court deny relator's request for a writ of mandamus, as more fully explained below.

{¶31} Effective August 22, 1986, R.C. 4123.56(A) provides that TTD compensation "shall not be made for the period * * * when the employee has reached the maximum medical improvement." It further provides:

{¶32} * * * The termination of temporary total disability, whether by order or otherwise, does not preclude the commencement of temporary total disability at another point in time if the employee again becomes temporarily totally disabled.

{¶33} Supplementing the statute, Ohio Adm.Code 4121-3-32(A)(1) provides:

{¶34} "Maximum medical improvement" is a treatment plateau (static or well-stabilized) at which no fundamental functional or physiological change can be expected within reasonable medical probability in spite of continuing medical or rehabilitative procedures. A claimant may need supportive treatment to maintain this level of function.

{¶35} The syllabus of *State ex rel. Bing v. Indus. Comm.* (1991), 61 Ohio St.3d 424, states:

{¶36} Even where temporary total disability compensation payments have been previously terminated, R.C. 4123.52 grants the Industrial Commission continuing jurisdiction to award temporary total disability compensation where the claimant has again become temporarily totally disabled. (R.C. 4123.52, construed and applied * * *.)

{¶37} The *Bing* court dealt with the pre-August 22, 1986 version of R.C. 4123.56. In *Bing*, the claimant applied for further TTD compensation after the commission had previously terminated TTD compensation on grounds that she had reached the point of MMI and was able to return to work. The commission denied further TTD on grounds that

the issue was res judicata. As the syllabus of *Bing* indicates, the *Bing* court held that the commission retained continuing jurisdiction under R.C. 4125.52 to make later awards of TTD compensation where circumstances warrant. The *Bing* court rejected the commission's argument that the claimant was not entitled to further TTD because she allegedly experienced merely a temporary "flare-up" of her condition rather than any change in the overall severity of her injury. The *Bing* court explained:

{¶38} * * * A claimant who is temporarily totally disabled by a "flare-up" of an existing injury is no less unable to work—or less deserving of temporary total compensation—than a claimant who is temporarily totally disabled by a worsening of an existing injury. Accordingly, we reject the Industrial Commission's argument.

{¶39} (Id. at 427.)

{¶40} The *Bing* court did not use the term "new and changed circumstances." However, in *State ex rel. Chrysler Corp. v. Indus. Comm.* (1998), 81 Ohio St.3d 158, 169, the court made it clear that a new and changed circumstance (the need for surgery) could justify the reopening of a TTD award that had previously been terminated on MMI grounds. See, also, *State ex rel. Navistar Internatl. Transp. Corp. v. Indus. Comm.* (1993), 66 Ohio St.3d 267, 270.

{¶41} The commission's granting of an additional claim allowance after a finding of MMI may be cause for resuming TTD compensation if the new claim allowance is not at MMI and other requirements for TTD compensation are met. See *State ex rel. Basye v. Indus. Comm.* (1992), 64 Ohio St.3d 68; *State ex rel. Richardson v. Quarto Mining Co.* (1995), 73 Ohio St.3d 358. However, the granting of an additional claim allowance, after

a finding of MMI, does not automatically resume TTD compensation. *State ex rel. Vance v. Marikis* (1999), 86 Ohio St.3d 305.

{¶42} Here, the commission terminated TTD compensation on MMI grounds effective November 20, 2001. Thereafter, relator sought recognition of an additional claim allowance and reinstatement of TTD compensation. The claim was additionally allowed, but the commission denied reinstatement of TTD compensation on grounds that the C-84 from Dr. Paloski dated January 21, 2002, was being rejected because it failed to document any objective or subjective findings to support TTD.

{¶43} The SHO's order of May 22, 2002, denying TTD compensation beginning November 21, 2001, is supported by some evidence and the reasoning provided in the order. The some evidence is the flawed C-84 report from Dr. Paloski which clearly cannot support TTD compensation.

{¶44} Dr. Paloski's January 21, 2002 C-84 lists only the initially allowed strain and sprain conditions as those conditions being treated which prevent a return to work. However, those initially allowed conditions were found to be at MMI. The newly allowed condition is listed only as a condition being treated, not as a condition that prevents a return to work. Dr. Paloski failed to certify that the newly allowed condition caused a disability. Thus, on its face, Dr. Paloski's C-84 fails to provide some evidence of TTD based upon the newly allowed condition.

{¶45} The commission rejected Dr. Paloski's C-84 report on grounds that he failed to present any objective or subjective clinical findings to support TTD. Clearly, it was within the commissions fact-finding discretion to reject the C-84 report on those grounds.

{¶46} Here, relator seems to suggest, incorrectly, that reinstatement of TTD compensation is automatic when the commission recognizes an additional claim allowance and where surgery due to that newly allowed condition is anticipated. Moreover, contrary to relator's suggestion, *State ex rel. Value City Dept. Stores v. Indus. Comm.*, 97 Ohio St.3d 187, 2002-Ohio-5810, does not support relator's position. It remains the claimant's burden to prove that he is medically unable to return to his former position of employment for any period for which TTD compensation is requested.

{¶47} 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