

[Cite as *State ex rel. Omni Manor, Inc. v. Indus. Comm.* , 2004-Ohio-6351.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio ex rel.	:	
Omni Manor, Inc.,	:	
	:	
Relator,	:	No. 03AP-1211
	:	
v.	:	(REGULAR CALENDAR)
	:	
Industrial Commission of Ohio	:	
and Kelly A. Russell,	:	
	:	
Respondents.	:	

D E C I S I O N

Rendered on November 30, 2004

Stefanski & Associates LLC, and *Janice T. O'Halloran*, for relator.

Jim Petro, Attorney General, and *Gerald H. Waterman*, for respondent Industrial Commission of Ohio.

Heller, Maas, Moro & Magill Co., L.P.A., and *Robert J. Foley, Jr.*, for respondent Kelly A. Russell.

IN MANDAMUS
ON OBJECTIONS TO MAGISTRATE'S DECISION

SADLER, J.

{¶1} Relator, Omni Manor, Inc., filed this original action in mandamus. Pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth District Court of Appeals, the matter was

referred to a magistrate of this court. On July 16, 2004, the magistrate rendered a decision, including findings of fact and conclusions of law, and therein recommended that this court deny the writ. (Attached as Appendix A.) Relator timely filed objections to the magistrate's decision, which are now before the court.

{¶2} Relator seeks the extraordinary writ of mandamus to compel the Bureau of Workers' Compensation ("the bureau") to exercise its continuing jurisdiction and to retroactively disallow the claimant's additional allowance for C4-5 herniated disc, based upon a myelogram conducted after the allowance, the results of which indicated that no herniation was present in the C4-5 disc.

{¶3} In its objections, relator argues that the magistrate erred in declining to view the results of the November 8, 2002 cervical myelogram as evidence that the claimant had never had a C4-5 herniated disc in the first place, and that therefore, the bureau had a clear legal duty to exercise its continuing jurisdiction and to vacate the additional allowance for C4-5 herniated disc.

{¶4} Rather, in the magistrate's view, the results of the myelogram could simply be evidence that the herniation had resolved itself during the passage of the nearly four months from the date that relator's expert concluded that the claimant did suffer from a C4-5 herniated disc. Therefore, the magistrate concluded, the bureau's order was supported by some evidence, and the bureau did not abuse its discretion in refusing to exercise its continuing jurisdiction.

{¶5} We agree with the magistrate's conclusions in this regard. The results of the myelogram provide evidence only as to the C4-5 disc's condition on November 8,

2002; the bureau is not required to presume that the myelogram results provide evidence as to the condition of that disc (e.g., not herniated at all) in July 2002, when relator's expert examined the claimant. As relator points out in its objections, the claimant was still complaining of pain up to the time the myelogram was performed, and the pain was acute enough that her treating physician ordered that test as part of an assessment of the need for surgical remediation of the herniation.

{¶6} Relator has not demonstrated a clear legal right to relief, nor has it demonstrated that the bureau has a clear legal duty to exercise its continuing jurisdiction for the purpose of retroactively disallowing the claim for C4-5 herniated disc.

{¶7} Relator also objects to the magistrate's conclusion that this "court can take judicial notice of the fact that not all herniated discs require surgical intervention and that they can heal on their own." We agree that this was an improper use of Evid.R. 201. That rule requires that a judicially noticed fact be "one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." The magistrate's use of judicial notice was both improper and unnecessary to our disposition of this matter. We, therefore, reject the foregoing conclusion of the magistrate.

{¶8} After an examination of the magistrate's decision, an independent review pursuant to Civ.R. 53, and due consideration of relator's objections, we sustain the objections with respect to the magistrate's conclusion that this court may take judicial notice of the potential for healing when a herniated disc is treated conservatively and

without surgical intervention, and we overrule the objections in all other respects. Accordingly, we adopt the magistrate's decision as our own, as modified, including the findings of fact and conclusions of law contained therein, but we reject the magistrate's conclusion that this court may take judicial notice of the fact that not all herniated discs require surgical intervention and that they can heal on their own. Therefore, we deny relator's request for a writ of mandamus.

Objections affirmed in part, overruled in part, and writ of mandamus denied.

LAZARUS, P.J., and FRENCH, J., concur.

(APPENDIX A)

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MAGISTRATE'S DECISION

Rendered on July 16, 2004

Stefanski & Associates LLC, and Janice T. O'Halloran, for relator.

Jim Petro, Attorney General, and Gerald H. Waterman, for respondent Industrial Commission of Ohio.

Heller, Maas, Moro & Magill Co., L.P.A., and Robert J. Foley, Jr., for respondent Kelly A. Russell.

IN MANDAMUS

{¶9} Relator, OMNI Manor, Inc., 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 refusing to exercise continuing jurisdiction and ordering the commission to exercise continuing jurisdiction and to grant relator's motion to disallow the claim of respondent Kelly A. Russell ("claimant") for herniated disc at C4-5.

Findings of Fact:

{¶10} 1. Claimant sustained a work-related injury on January 15, 2002, while moving a resident out of bed. Claimant filed a workers' compensation claim with relator, a self-insured employer under Ohio's workers' compensation laws.

{¶11} 2. Relator originally certified claimant's claim for: "cervical sprain and strain and thoracic sprain and strain."

{¶12} 3. Relator began paying temporary total disability ("TTD") compensation to claimant.

{¶13} 4. On July 18, 2002, claimant filed a motion requesting that her claim be amended to include the following conditions: "C4-5 herniated disc and C6-7 bulging disc." Claimant's motion was supported by the office notes of her treating physician, Patrick A. Lalama, D.C., and the June 18, 2000 report of Tracy L. Neuendorf, D.O.

{¶14} 5. Relator referred claimant to E.A. DeChellis, D.O., who examined claimant on July 16, 2002. Dr. DeChellis reviewed the office notes of Dr. Lalama, the initial evaluation report from the Health South Physical Therapy as well as an MRI report dated May 22, 2002, and the consultation report of Dr. Neuendorf. In discussing the results of the MRI, Dr. DeChellis noted the following:

* * * The report notes there is protrusion of disc material which extends beyond the confines of vertebral body extending to the left lateral recess compatible with a left paracentral disc herniation at C4-5. Also noted was disc bulging confined by the posterior annulus with no evidence of frank disc herniation seen at C6-7. There were degenerative changes with small posterior osteophytes noted from C2 through C7 causing effacement of the ventral epidural fat. The impression states, "left paracentral disc herniation C4-5; degenerative changes with disc bulging at C6-7, and no fractures are identified".

{¶15} 6. Based upon his examination of claimant and his review of the medical documentation, Dr. DeChellis opined that claimant had sustained a herniated cervical disc at C4-5 as a direct and proximate result of the industrial injury. He noted that the mechanism of injury was consistent with a herniation of the C4-5 disc and that the May 22, 2002 MRI substantiated that the disc at C4-5 is herniated to the left. However, in his medical opinion, Dr. DeChellis opined that the disc bulge at C6-7 was not a direct and proximate result of the industrial injury. Instead, he concluded that it was due to degenerative changes.

{¶16} 7. Based upon Dr. DeChellis' report, relator additionally allowed claimant's claim for C4-5 herniated disc, but rejected the request to allow her claim for C6-7 bulging disc.

{¶17} 8. Claimant's motion to additionally allow her claim was heard before a district hearing officer ("DHO") on August 23, 2003. The DHO noted as follows in the order:

The employer herein agrees to pay temporary total compensation from the date of last payment through

August 24, 2002 in accordance with Dr. Lalama's C-84 report of July 15, 2002.

The employer also agrees to accept this claim for herniated disc C-4, C-5. The employer rejects the additional allowance for bulging disc at C-6, C-7.

The claimant herein withdraws the request for additional allowance of bulging disc C-6, C-7 at this time.

{¶18} 9. On October 8, 2002, claimant submitted a C-9 form requesting a cervical myelogram which relator approved solely for diagnostic purposes.

{¶19} 10. Based upon the myelogram, the radiologist concluded that "[n]o definite disk herniation or protrusion is seen at any level."

{¶20} 11. Claimant was again seen by Dr. DeChellis on December 12, 2002. Based upon his examination of her as well as the results of the recent myelogram conducted, Dr. DeChellis opined that claimant had reached maximum medical improvement ("MMI"), that surgery was not indicated, that the cervical myelogram had been warranted and appropriate, and that claimant would be able to perform her former job duties and tasks as a nurse's aid without restrictions.

{¶21} 12. Thereafter, relator filed a motion requesting that the commission accept continuing jurisdiction and specifically requested that the commission disallow claimant's claim for herniated disc at C4-5 based upon the results of the cervical myelogram and the report of Dr. DeChellis.

{¶22} 13. The matter was heard before a DHO on March 24, 2003, and was granted.

{¶23} 14. Because the DHO had failed to address the issue of MMI, relator appealed and the matter was heard before a staff hearing officer ("SHO") on May 5, 2003.

The SHO vacated the prior DHO order as follows:

It is the finding of the Staff Hearing Officer that the Employer has failed to submit evidence of mistake of fact or new and changed circumstances to warrant invocation of Ohio Revised Code 4123.52 and continuing jurisdiction. Accordingly, the Staff Hearing Officer finds that the claim remains allowed for herniated disc C4-C5.

It is further the finding of the Staff Hearing Officer that the claimant's allowed conditions have reached maximum medical improvement based on Dr. DeChellis' 2/3/03 report. However, there is no issue regarding temporary total compensation termination because the claimant returned to work 3/4/03 based on claimant's indication at hearing.

{¶24} 15. Further appeal was refused by order of the commission mailed May 31, 2003.

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

Conclusions of Law:

{¶26} In order for this court to issue a writ of mandamus as a remedy from a determination of the commission, relator must show that she has a clear legal right to the relief sought and that the commission has a clear legal duty to provide such relief. *State ex rel. Pressley v. Indus. Comm.* (1967), 11 Ohio St.2d 141. A clear legal right to a writ of mandamus exists where the relator shows that the commission abused its discretion by entering an order which is not supported by any evidence in the record. *State ex rel. Elliott v. Indus. Comm.* (1986), 26 Ohio St.3d 76. On the other hand, where the record contains some evidence to support the commission's findings, there has been no abuse

of discretion and mandamus is not appropriate. *State ex rel. Lewis v. Diamond Foundry Co.* (1987), 29 Ohio St.3d 56. Furthermore, questions of credibility and the weight to be given evidence are clearly within the discretion of the commission as fact finder. *State ex rel. Teece v. Indus. Comm.* (1981), 68 Ohio St.2d 165.

{¶27} Pursuant to R.C. 4123.52, "[t]he jurisdiction of the industrial commission and the authority of the administrator of workers' compensation over each case is continuing, and the commission may make such modification or change with respect to former findings or orders with respect thereto, as, in its opinion is justified." In *State ex rel. B & C Machine Co. v. Indus. Comm.* (1992), 65 Ohio St.3d 538, 541-542, the court examined the judicially-carved circumstances under which continuing jurisdiction may be exercised, and stated as follows:

R.C. 4123.52 contains a broad grant of authority. However, we are aware that the commission's continuing jurisdiction is not unlimited. See, e.g., *State ex rel. Gatlin v. Yellow Freight System, Inc.* (1985), 18 Ohio St.3d 246 * * * (commission has inherent power to reconsider its order for a reasonable period of time absent statutory or administrative restrictions); *State ex rel. Cuyahoga Hts. Bd. of Edn. v. Johnston* (1979), 58 Ohio St.2d 132 * * * (just cause for modification of a prior order includes new and changed conditions); *State ex rel. Weimer v. Indus. Comm.* (1980), 62 Ohio St.2d 159 * * * (continuing jurisdiction exists when prior order is clearly a mistake of fact); *State ex rel. Kilgore v. Indus. Comm.* (1930), 123 Ohio St. 164 * * * (commission has continuing jurisdiction in cases involving fraud); *State ex rel. Manns v. Indus. Comm.* (1988), 39 Ohio St.3d 188 * * * (an error by an inferior tribunal is a sufficient reason to invoke continuing jurisdiction); and *State ex rel. Saunders v. Metal Container Corp.* (1990), 52 Ohio St.3d 85 * * * (mistake must be "sufficient to invoke the continuing jurisdiction provisions of R.C. 4123.52"). Today, we expand the list set forth above and hold that the Industrial

Commission has the authority pursuant to R.C. 4123.52 to modify a prior order that is clearly a mistake of law. * * *

{¶28} In the present case, the issue of whether claimant's claim should be additionally allowed for the condition of "C4-5 herniated disc" was never argued before the commission. Instead, based upon the medical reports of Drs. Lalama, Neuendorf, and DeChellis and the results of the May 22, 2002 MRI, relator herein, a self-insured employer, certified the claim for that condition. Based upon the report of Dr. DeChellis, relator refused to certify claimant's claim for "C6-7 bulging disc" and that issue came on for hearing before the commission's DHO on August 23, 2002. At that time, claimant voluntarily withdrew her request that her claim be additionally allowed for "bulging disc C6-7," and relator indicated that it had already accepted the claim for "herniated disc C4-5" and agreed to pay TTD compensation through August 24, 2002.

{¶29} Inasmuch as the record shows that relator certified the claim in the first instance, based upon the fact that all the medical evidence substantiated the claim, the commission never addressed the issue. Now, when there is medical evidence showing that the herniated disc at C4-5 no longer exists, relator is requesting that the commission exercise its continuing jurisdiction and wants the claim disallowed for this condition.

{¶30} This magistrate concludes that the commission's order refusing to exercise continuing jurisdiction does not constitute an abuse of discretion. Inasmuch as R.C. 4123.52 provides that the commission can exercise continuing jurisdiction as, in its opinion, is justified, this magistrate concludes that the exercise of continuing jurisdiction was not justified in the present case. Relator is not contending that claimant committed

fraud by submitting false doctors' reports or an MRI. Instead, based upon all the medical evidence, including an MRI, relator allowed claimant's claim for herniated disc at C4-5. Months later, when a cervical myelogram was taken, the herniated disc at C4-5 no longer appeared. It is conceivable that the condition resolved itself, without surgical intervention, based upon the conservative treatment which claimant had already received. This court can take judicial notice of the fact that not all herniated discs require surgical intervention and that they can heal on their own. When a claim is allowed for a broken leg, the break in the leg will eventually heal. Once it is healed, the claim is not thereafter disallowed for the condition of the broken leg. In the present case, relator did not present any evidence which would have required the commission to go back and disallow claimant's claim.

{¶31} Based on the foregoing, it is this magistrate's decision that relator has not demonstrated that the commission abused its discretion by refusing to exercise its continuing jurisdiction in the instant matter, and relator's request for a writ of mandamus should be denied.

/s/ Stephanie Bisca Brooks
STEPHANIE BISCA BROOKS
MAGISTRATE