

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

The State of Ohio on Relation of Kevin Sims,	:	
	:	
Relator,	:	
	:	
v.	:	No. 04AP-398
	:	
American National Can and The Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
	:	
Respondents.	:	

DECISION

Rendered on August 2, 2005

*Shapiro, Marnecheck & Riemer, Philip A. Marnecheck and
Matthew A. Palnik*, for relator.

Battle & Miller P.L.L., Sharon L. Miller and James W. Ellis, for
respondent American National Can.

Jim Petro, Attorney General, and *Kevin J. Reis*, for
respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO MAGISTRATE'S DECISION

McGRATH, J.

{¶1} Relator, Kevin Sims, has requested a writ of mandamus ordering
respondent Industrial Commission of Ohio ("commission"), to vacate its order denying him

temporary total disability ("TTD") compensation beginning May 5, 2002, and to enter an order granting said compensation.

{¶2} Pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals, this case was referred to a magistrate who issued a decision, including findings of fact and conclusions of law. (Attached as Appendix A.) In his decision, the magistrate found that the staff hearing officer's ("SHO") explanation of why she was rejecting Dr. Chatterjee's certification was flawed and constituted an abuse of discretion. Specifically, the magistrate found that the SHO erroneously believed that Dr. Chatterjee was not legally competent to certify TTD until January 7, 2003, and that the SHO incorrectly suggested that Dr. Chatterjee's statement in the August 8, 2003 office note is a valid reason to reject Dr. Chatterjee's TTD certification, which clearly it is not. Therefore, the magistrate recommended that this court issue a writ of mandamus ordering the commission to vacate its order denying TTD compensation, and in a manner consistent with the magistrate's decision, enter a new order that adjudicates the request for TTD compensation.

{¶3} Respondent, American National Can Company ("National Can"), objects to the magistrate's decision as follows:

A. A WRIT OF MANDAMUS IS INAPPROPRIATE IN THIS MATTER BECAUSE THE COMMISSION'S DECISION IS SUPPORTED BY THE MEDICAL REPORT OF DOCTOR ROBERT KAPLAN.

B. THE MAGISTRATE'S DECISION, FINDING THAT THE COURT SHOULD ISSUE A WRIT OF MANDAMUS, IS CONTRARY TO OHIO LAW AND USURPS THE INDUSTRIAL COMMISSION'S SOLE AUTHORITY TO WEIGH THE EVIDENCE BEFORE IT.

{¶4} The objections filed by National Can essentially re-argue the same points addressed in the magistrate's decision. For the reasons set forth in the magistrate's decision, we do not find National Can's position to be well-taken. Accordingly, the objections are overruled.

{¶5} Following an independent review of the matter, we find that the magistrate has properly determined the facts and applied the appropriate law. Therefore, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein. In accordance with the magistrate's decision, we issue a writ of mandamus ordering respondent Industrial Commission of Ohio to vacate its order denying TTD compensation, and enter a new order that adjudicates the request for TTD compensation in accordance with this decision.

Objections overruled; writ of mandamus granted.

FRENCH and CHRISTLEY, JJ., concur.

CHRISTLEY, J., retired of the Eleventh Appellate District,
assigned to active duty under authority of Section 6(C), Article
IV, Ohio Constitution.

APPENDIX A

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

The State of Ohio on Relation	:	
of Kevin Sims,	:	
	:	
Relator,	:	
	:	
v.	:	No. 04AP-398
	:	
American National Can and	:	(REGULAR CALENDAR)
The Industrial Commission of Ohio,	:	
	:	
Respondents.	:	

MAGISTRATE'S DECISION

Rendered on March 31, 2005

Shapiro, Marnecheck & Riemer, Philip A. Marnecheck and Matthew A. Palnik, for relator.

Battle & Miller P.L.L., Sharon L. Miller and James W. Ellis, for respondent American National Can.

Jim Petro, Attorney General, and Kevin J. Reis, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶6} In this original action, relator, Kevin Sims, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order

denying him temporary total disability ("TTD") compensation beginning May 15, 2002, and to enter an order granting said compensation.

Findings of Fact:

{¶7} 1. On November 22, 1998, relator sustained an industrial injury while employed as a machine operator attendant for respondent American National Can ("employer"), a self-insured employer under Ohio's workers' compensation laws. The industrial claim was initially allowed for "cervical strain, aggravation of pseudoarthrosis at C5-6 with symthes plate fracture, C3-4 and C4-5 disc herniation," and was assigned claim number 98-620506.

{¶8} 2. Relator began receiving TTD compensation. On December 20, 2001, the employer moved to terminate TTD compensation on grounds that the industrial injury had reached maximum medical improvement ("MMI").

{¶9} 3. Following a May 15, 2002 hearing, a district hearing officer ("DHO") issued an order terminating TTD compensation on grounds that the industrial injury had reached MMI. Apparently, the DHO's order of May 15, 2002 was not administratively appealed.

{¶10} 4. Earlier, on January 15, 2002, relator was examined, at his counsel's request, by psychologist Marian Chatterjee, Ph.D. Dr. Chatterjee wrote: "Mr. Sims meets diagnostic criteria for depressive disorder, not otherwise specified, (DSM-IV: 311), a disorder that results directly and proximately from his injury on 11-22-98."

{¶11} 5. On May 14, 2002, relator moved for an additional claim allowance based upon the January 15, 2002 report of Dr. Chatterjee.

{¶12} 6. On August 12, 2002, relator was examined by psychologist Robert G.

Kaplan, Ph.D. Dr. Kaplan wrote:

Mr. Sims clearly connects his depression to his pain and disability and he has no history of depression prior to the date of the industrial injury. Therefore, it would be reasonable to conclude that the industrial injury caused him to develop this major depressive disorder. Fortunately, he currently has very little impairment due to his depression, primarily since he has been prescribed the Duragesic Patch which significantly reduces his pain. Most of his current impairment is due to pain, not depression. In fact, Mr. Sims, himself, is not sure if he needs counseling or if psychiatric antidepressant medications would be helpful to him at this point. He cries only twice a week now for a few minutes each time, goes out once a week with his family, thinks of himself as a good person, and has no decreased interest in activities that are typically rewarding, although he cannot do them due to pain. No feelings of worthlessness, helplessness, hopelessness, or guilt were elicited. No appetite disturbance was elicited. His sleep problems are solely due to pain, not depression. He no longer has any suicidal ideations. His cognitive functioning is, at most, mildly impaired. Thus, it would be reasonable to conclude that Mr. Sims' current impairment has little to do with depression, and mostly to do with pain. Therefore, it would also be reasonable to conclude that he is not totally disabled by depression or even partially disabled by it. Instead, he is disabled by physical pain, which is a physical condition, not a psychiatric one.

Opinion

With reasonable psychological certainty, it can be stated that:

1. Mr. Kevin Sims developed a Major Depressive Disorder, Single Episode, Mild Severity due to the industrial injury of 11/22/98.
2. Mr. Sims' Major Depressive Disorder, Single Episode, Moderate Severity, does not prevent him from engaging in any sustained remunerative employment and therefore, he is not temporarily and totally disabled due to the Major Depressive Disorder, Single Episode, Moderate Severity. This

opinion does not apply to any disability due to his physical injury and resulting pain.

{¶13} 7. Following a September 17, 2002 hearing, a DHO issued an order stating:

It is the order of the District Hearing Officer that the C-86 Motion filed by Injured Worker on 05/14/2002 is moot as the self-insured employer has certified this claim for "DEPRESSIVE DISORDER" based upon Dr. Kaplan's 09/12/2002 report.

(Emphasis sic.)

{¶14} 8. On a C-84 dated November 9, 2002, Dr. Chatterjee certified a period of TTD from January 15, 2002 to an estimated return-to-work date of February 9, 2003. Dr. Chatterjee listed "depressive disorder" as the allowed condition being treated that prevents a return to work. The C-84 also indicates that the last examination or treatment occurred on November 9, 2002. (Dr. Chatterjee also completed additional C-84 certifications extending TTD beyond February 9, 2003.)

{¶15} 9. On November 25, 2002, relator moved for TTD compensation beginning May 15, 2002, based upon Dr. Chatterjee's November 9, 2002 C-84.

{¶16} 10. On August 8, 2003, relator visited Dr. Chatterjee for treatment. Dr. Chatterjee wrote:

* * * Reassessed depression on the BDI-II. Scored an 8 on the BDI-II- within normal limits!! Last November he scored 25, Jan 2002 was 31. I need to see a sustained stable mood over the winter to consider Kevin "out of the woods." Kevin states his pain (and temper) are better in the summer.

{¶17} 11. Following a January 30, 2004 hearing, a DHO issued an order granting TTD compensation based upon the C-84s from Dr. Chatterjee.

{¶18} 12. The employer administratively appealed the DHO order of January 30, 2004.

{¶19} 13. Following a March 9, 2004 hearing, a staff hearing officer ("SHO") issued an order vacating the DHO order of January 30, 2004. The SHO's order states:

Temporary total disability compensation from 05/15/2002 to date is denied based on the 09/12/2002 report of Dr. Kaplan wherein he opines that, the claimant was not disabled as a result of his depression but, his inability to work is attributable to his physical pain. Staff Hearing Officer further notes that, Dr. Chatterjee does not begin to treat the claimant until 01/07/2003 and the depressive disorder, when tested on 08/08/2003 is found to be, by Dr. Chatterjee "within normal limits."

{¶20} 14. On April 6, 2004, another SHO mailed an order refusing relator's administrative appeal from the SHO order of March 9, 2004.

{¶21} 15. On April 14, 2004, relator, Kevin Sims, filed this mandamus action.

Conclusions of Law:

{¶22} It is the magistrate's decision that this court issue a writ of mandamus, as more fully explained below.

{¶23} The SHO who denied TTD compensation following the March 9, 2004 hearing had the duty to weigh the conflicting medical opinions regarding psychological disability. Dr. Chatterjee had certified TTD as of January 15, 2002, the date relator was first examined. Dr. Kaplan, who did not examine relator until August 12, 2002, almost three months after the date that TTD compensation was requested to begin, had opined that the psychological condition did not prevent work.

{¶24} The SHO accepted Dr. Kaplan's August 12, 2002 opinion and rejected Dr. Chatterjee's certification of TTD. In doing so, the SHO explained in her order why she

was rejecting Dr. Chatterjee's certification. The SHO's explanation for rejecting Dr. Chatterjee's certification is seriously flawed and constitutes an abuse of discretion.

{¶25} The SHO explains her rejection of Dr. Chatterjee's certification: "Dr. Chatterjee does not begin to treat the claimant until 01/07/2003 and the depressive disorder, when tested on 08/08/2003 is found to be, by Dr. Chatterjee 'within normal limits.' "

{¶26} As relator correctly points out in this action, Dr. Chatterjee first examined relator on January 15, 2002 and, thereafter, began treating relator on November 9, 2002. Thus, the SHO's statement that Dr. Chatterjee began treating relator on January 7, 2003 is incorrect. Moreover, the SHO fails to explain the significance of the date that she incorrectly believed Dr. Chatterjee first began treating relator. This failure creates ambiguity in the order strongly suggesting that the SHO erroneously believed that Dr. Chatterjee was not legally competent to certify TTD until January 7, 2003. Clearly, under well-settled law, Dr. Chatterjee was competent to certify TTD as early as January 15, 2002, based upon the initial examination.

{¶27} Moreover, the SHO's order incorrectly suggests that Dr. Chatterjee's "within normal limits" statement in the August 8, 2003 office note is a valid reason to reject Dr. Chatterjee's TTD certification. Clearly it is not.

{¶28} As relator here correctly points out, there are two reasons why Dr. Chatterjee's "within normal limits" statement is not a valid reason to reject Dr. Chatterjee's certification: (1) the August 8, 2003 office note is not time relevant to the TTD request beginning May 15, 2002; and (2) the SHO seems to take the quoted language out of its context to reach a disability conclusion quite the opposite of the clear intent of the

August 8, 2003 office note. The SHO has no authority to rewrite the medical opinion of Dr. Chatterjee.

{¶29} In short, the SHO's stated basis for rejecting Dr. Chatterjee's TTD certification is seriously flawed and constitutes an abuse of discretion.

{¶30} The employer and the commission attempt to defend the commission's decision denying TTD compensation by asserting that Dr. Kaplan's report is some evidence supporting the commission's decision. However, this argument, cloaked in the some evidence rule, simply invites this court to review only Dr. Kaplan's report for some evidence and to ignore the commission's explanation for rejecting Dr. Chatterjee's certification in favor of Dr. Kaplan's report. While the commission was under no legal obligation to explain why it accepted Dr. Kaplan's report, having done so, this court cannot simply ignore the flawed reasoning given for the decision.

{¶31} Contrary to relator's claim here, Dr. Kaplan's report could constitute some evidence supporting a denial of TTD compensation as of August 12, 2002, had the commission not accepted the report for an improper reason. However, the commission would still be required to directly address the credibility of Dr. Chatterjee's certification prior to August 12, 2002, because Dr. Kaplan's opinion is not retrospective.

{¶32} Relator incorrectly claims that Dr. Kaplan fails to address or refuses to accept the allowed condition. As the employer correctly points out, Dr. Kaplan's diagnosis was the basis for the employer's certification of the additional claim allowance. Thus, Dr. Kaplan's disability opinion is clearly based on acceptance of the claim allowance.

{¶33} Accordingly, for all the above reasons, it is the magistrate's decision that this court issue a writ of mandamus ordering respondent Industrial Commission of Ohio to vacate its order denying TTD compensation, and in a manner consistent with this magistrate's decision, enter a new order that adjudicates the request for TTD compensation.

KENNETH W. MACKE
MAGISTRATE