

[Cite as *State ex rel. Jerreals v. Indus. Comm.*, 2007-Ohio-1472.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Terrence M. Jerreals,	:	
Relator,	:	
v.	:	No. 06AP-283
The Industrial Commission of Ohio	:	(REGULAR CALENDAR)
and	:	
The Ohio Department of Transportation,	:	
Respondents.	:	

D E C I S I O N

Rendered on March 29, 2007

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

Marc Dann, Attorney General, and *Douglas R. Unver*, for respondent Industrial Commission of Ohio.

Lee M. Smith & Associates Co., L.P.A., *Natalie J. Tackett-Eby*, and *Lee M. Smith*, for respondent Ohio Department of Transportation.

ON OBJECTIONS TO THE MAGISTRATE'S DECISION
IN MANDAMUS

FRENCH, J.

{¶1} Relator, Terrence M. Jerreals, filed an original action in mandamus requesting this court to issue a writ of mandamus ordering respondent, Industrial

Commission of Ohio ("commission"), to vacate its order denying relator temporary total disability ("TTD") compensation, and to enter an order granting such compensation.

{¶2} This court referred this matter to a magistrate pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate issued a decision, including findings of fact and conclusions of law, recommending that this court deny the requested writ. (Attached as Appendix A.)

{¶3} No party has objected to the magistrate's findings of fact, and we adopt them as our own. In brief, relator was assaulted by a co-worker in February 1999. The co-worker threw a crystal candy dish at relator, striking him on the head, and kicked and struck relator with his fist. As a result of this incident, a claim was allowed for "concussion" and contusion of right forearm. The commission subsequently allowed relator's claim for depression and anxiety.

{¶4} TTD compensation was initially paid beginning in February 1999. It was terminated in March 2001, on grounds that the injury had reached maximum medical improvement.

{¶5} On April 11, 2005, relator moved for additional allowances for concussion and/or intracranial injury with brief loss of consciousness and submitted a report from James J. Anthony, M.D., in support. A medical file review by Rafael Ramirez, M.D., also supported additional allowances for concussion with brief loss of consciousness and post-concussion headaches. Following a September 30, 2005 hearing, a staff hearing officer ("SHO") amended the allowed conditions to include "concussion and intracranial injury with brief loss of consciousness and post-concussion headaches."

{¶6} On a C-84 dated October 31, 2005, John Kelly, M.D., certified a period of TTD from the date of injury to an estimated return-to-work date of February 1, 2006. The form identified Dr. Kelly's objective clinical finding as cerebral concussion. On November 15, 2005, relator moved for TTD compensation beginning January 13, 2005.

{¶7} The Ohio Bureau of Workers' Compensation ("bureau") asked Darrin Bright, M.D., to determine whether relator's new conditions warranted a new period of TTD. The bureau's query identified the additionally allowed conditions as "310.2 Postconcussion Syndrome & 850.11 Concussion of LOC 30 Minutes or more[.]" In response, Dr. Bright submitted a detailed, four-page report. He concluded that the documentation in the medical record was not sufficient to substantiate the requested period of disability.

{¶8} Following a January 3, 2006 hearing, a district hearing officer ("DHO") issued an order denying TTD compensation, citing Dr. Bright's report. Following a February 6, 2006 hearing, an SHO issued an order that also denied TTD compensation and cited Dr. Bright's report.

{¶9} As noted, relator filed this mandamus action seeking TTD compensation beginning January 13, 2005. He argued before the magistrate that Dr. Bright's report did not constitute some evidence because it misidentified the additionally allowed condition as "310.2 Postconcussion Syndrome," rather than "post-concussion headaches."

{¶10} The magistrate disagreed and concluded that Dr. Bright's report did constitute some evidence. Relator objects to the magistrate's finding and argues here that the magistrate relied on speculation to conclude that "postconcussion syndrome" is

broad enough to include post-concussion headaches. We disagree with relator, and we adopt the magistrate's analysis and conclusions regarding this issue. Dr. Bright's medical report is comprehensive and clear. In it, Dr. Bright describes "postconcussion syndrome" as characterized by persistent headaches following a closed head injury. Despite his reference to "postconcussion syndrome," rather than the actual allowed condition of "post-concussion headaches," Dr. Bright demonstrated detailed knowledge of relator's injury and medical history, and it was not an abuse of discretion to rely on his report as some evidence. Therefore, we overrule relator's objections.

{¶11} Having overruled relator's objections, and based on an independent review of the evidence, we adopt as our own the magistrate's decision, including the findings of fact and conclusions of law contained in it. Accordingly, we deny the requested writ of mandamus.

*Objections overruled,
writ of mandamus denied.*

BRYANT and McGRATH, JJ., concur.

A P P E N D I X A
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Relator,	:	
v.	:	No. 06AP-283
The Industrial Commission of Ohio and	:	(REGULAR CALENDAR)
The Ohio Department of Transportation,	:	
Respondents.	:	

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

Rendered on October 16, 2006

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

Jim Petro, Attorney General, and Douglas R. Unver, for
respondent Industrial Commission of Ohio.

Lee M. Smith & Associates Co., L.P.A., and Natalie Tackett-
Eby, for respondent Ohio Department of Transportation.

I N M A N D A M U S

{¶12} In this original action, relator, Terrence M. Jerreals, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to

vacate its order denying him temporary total disability ("TTD") compensation beginning January 13, 2005, and to enter an order awarding said compensation.

Findings of Fact:

{¶13} 1. On February 4, 1999, relator was assaulted by a co-worker while employed with respondent Ohio Department of Transportation. On that date, relator was struck on the head when the co-worker threw a crystal candy dish at him. Relator was also kicked and struck by the co-worker with his fist.

{¶14} 2. The industrial claim was initially allowed for "concussion; contusion of right forearm," and was assigned claim number 99-324221. Relator has not returned to work at the Ohio Department of Transportation or with any other employer since the date of his injury.

{¶15} 3. In November 1999, the commission additionally allowed the claim for "depression and anxiety."

{¶16} 4. TTD compensation was paid in the claim by the Ohio Bureau of Workers' Compensation ("bureau") beginning February 1999 through March 9, 2001, when TTD compensation was terminated on grounds that the industrial injury had reached maximum medical improvement ("MMI").

{¶17} 5. On April 11, 2005, relator moved for additional allowances in the claim. In support of the motion, relator submitted a report dated March 11, 2005, from James J. Anthony, M.D., who had treated relator in February 1999 following the assault. Dr. Anthony had also treated relator for sometime prior to the industrial injury. Dr. Anthony's March 11, 2005 report states:

* * * At that time he had a history of headache associated with so-called cluster headache syndrome.

This patient clearly suffered a concussion in relation to that injury and a significant intracranial injury with brief loss of consciousness.

The result is that the patient did have episodes of loss of consciousness, some of which appeared to have been a mild form of seizure, although testing with EEG was normal.

Subsequently the patient has had persistence of headache problems and he has been followed over time in the office with visits which occurred in relation to his symptoms and more recently he has been referred to a headache specialist, Dr. John Kelly, and saw Dr. Kelly within a matter of weeks after I received your letter. Mr. Jerrals [sic] reports to me that he is pleased with the treatment that he is receiving from Dr. Kelly and hopefully things will continue well for him.

It is my opinion that this patient's claim certainly should include concussion and/or intracranial injury with brief loss of consciousness.

{¶18} 6. Relator's motion for additional claim allowances prompted the bureau to obtain a medical file review from Rafael Ramirez, M.D., who conducted his review on April 7, 2005. Dr. Ramirez's report states:

* * * [Injured worker] had history of migrane [sic] headaches prior to the injuries, which became more frequent and severe following the head truma [sic]. He also developed a possible seizure disorder post trauma and was treated with anti-convulsants.

Conclusion: * * * [Injured worker] suffers from the condition of 850.11 Concussion w/ brief loss of consciousness and 310.2 Post Concussion Headache.

* * * The condition of 850.11 Concussion w/brief loss of consciousness was directly caused by the industrial injury.

* * * 310.2 Post Concussion Headaches aggravated the preexisting migraine headaches.

{¶19} 7. Ultimately, following a September 30, 2005 hearing, a staff hearing officer ("SHO") issued an order additionally allowing the claim for "concussion and

intracranial injury with brief loss of consciousness and post-concussion headaches."

The SHO's order states reliance upon the March 11, 2005 report of Dr. Anthony and the April 7, 2005 report of Dr. Ramirez.

{¶20} 8. On a C-84 dated October 31, 2005, treating physician John Kelly, M.D., certified a period of TTD from the date of injury to an estimated return-to-work date of February 1, 2006.

{¶21} The C-84 form asks the physician to: "List ICD-9 Codes with narrative diagnosis(es) for allowed conditions being treated which prevent return to work." In response, Dr. Kelly wrote simply "850.11."

{¶22} The C-84 form also asks the physician to state his objective clinical findings that premise his recommendation. In response, Dr. Kelly wrote: "Cerebral Concussion."

{¶23} The C-84 form also asks the physician to state his subjective clinical findings that premise his recommendation. In response, Dr. Kelly wrote: "Intractable headaches [greater than] 50% of the time."

{¶24} 9. On November 15, 2005, citing Dr. Kelly's C-84 and office notes, relator moved for TTD compensation beginning January 13, 2005.

{¶25} 10. Relator's motion prompted the bureau to obtain a physician file review from Darrin Bright, M.D. On November 18, 2005, a bureau nurse posed the following query to Dr. Bright:

The claim was additionally allowed for 310.2 Postconcussion Syndrome & 850.11 Concussion w/ LOC 30 Minutes or more on 10-6-2005. The [injured worker] was found MMI on 3/9/2001 for the other conditions of the claim including Concussion, Contusion of Forearm, Depression & Anxiety (Post Traumatic Stress) on 3/9/2001.

There is a C86 motion on file requesting TT benefits be paid from January 13, 2005 to the present based on the newly allowed condition of the claim (850.11 & 310.2). Based on your review of the medical records, do these new condition[s] warrant a new period of temporary total disability as requested on the C86 motion?

Dr. Bright responded with a four-page typewritten report, stating:

DISCUSSION / RECOMMENDATION

I have reviewed and accept the allowed conditions of the claim. I accept the objective findings of the examining physician in regard to the allowed conditions in this claim. I have made my conclusions based on a review of the online medical records provided by the Bureau of Workers Compensation. All of the records were read and carefully reviewed. I have been asked to perform a file review for determination of whether the requested period of disability is related to the [injured worker's] industrial injury.

The claimant sustained an injury on February 14, 1999 while working for the Ohio Department of Transportation. The mechanism of injury described by the [injured worker] from the FROI states "while discussing work assignment with Jeff Lewis in the presence of Doug Raters, Jeff became agitated. He picked up a crystal candy dish and threw it like a baseball hitting me in the head. He then threw a coffee mug the same way. I rose from my seat and attempted to leave. Jeff followed and the next thing I knew I was on the floor in [sic] Jeff was kicking my head." The current claim allowances are 920 R Contusion, 923.10 Right Contusion of Forearm, 296.22 Depressive Psychosis, 309.81 Prolonged Post Traumatic Stress, 850.11 Concussion w/ LOC 30 minutes or more and 310.2 Post Concussion syndrome. A request is being made for a period of disability from January 13, 2005 to present.

The claimant sustained an injury over 6½ years ago when he was assaulted at work. The claim has been allowed for previously mentioned conditions. The [injured worker] was initially found to be at MMI on March 9, 2001. However, given the persistence of the headaches the additional claim allowances of concussion with loss of consciousness 30

minutes or more and postconcussion syndrome were added to the claim on October 16, 2005. Official Disability Guidelines (ODG) data suggests that this claim is well beyond the anticipated healing time for the allowed conditions of the claim. * * *

* * *

Postconcussion syndrome is a condition characterized by the mild, chronic symptoms that persist after a closed head injury (where there hasn't been penetration or fracture of the skull) such as headache, giddiness, and a subjective feeling of impaired intellectual ability, as well as personality changes and depression. As a sports medicine physician who has done research on concussions and postconcussion syndrome I can say it is highly atypical for a patient to have postconcussion symptoms persist[ing] more than 6½ years after the injury. As the ODG data would suggest the [injured worker] should have returned to work within 365 days from the industrial injury. Therefore this requested period of disability is more than 4 1/2 years beyond the expected period of disability. Furthermore, the [injured worker] was noted to have migraine headaches prior to the injury. Therefore [it] is my professional opinion within a reasonable degree of medical probability that the [injured worker] is being treated for his pre-existing migraine headaches as opposed to postconcussion syndrome. It is my professional opinion within a reasonable degree of the medical probability that the medical record indicates that the requested period of disability is secondary to symptoms related to non-allowed conditions in the claim. Furthermore, the progress notes surrounding the requested period of disability do not provide rationale for the persistence of the [injured worker] symptoms. There is a glaring absence in the medical record of formal neuropsychological testing that could confirm the persistence of or resolution of postconcussion syndrome. The medical record provides no rationale for the requested period of disability nearly 5 1/2 years after the injury. Therefore it is my professional opinion that the documentation in the medical record does not substantiate the requested period of disability.

Conclusion: It is my professional opinion, within a reasonable degree of medical probability that the documentation in the medical record is NOT sufficient to substantiate the

requested period of disability from January 13, 2005 to present.

(Emphasis sic.)

{¶26} 11. Following a January 3, 2006 hearing, a district hearing officer ("DHO") issued an order stating:

The Injured Worker's motion requests the payment of temporary total disability compensation from 01/13/2005 to the present and continuing.

The District Hearing Officer finds that the Injured Worker's inability to work during the requested period is not causally related to or the result of the conditions that are recognized in this claim. Therefore the Injured Worker's motion is denied.

This order is based upon the report of Dr. Bright dated 11/20/2005.

{¶27} 12. Relator administratively appealed the DHO's order of January 3, 2006.

{¶28} 13. Following a February 6, 2006 hearing, an SHO issued an order stating:

The order of the District Hearing Officer, from the hearing dated 01/03/2006, is affirmed with additional reasoning.

It is the order of the Staff Hearing Officer that the C-86 motion filed by the injured worker on 11/15/2005 is denied.

The injured worker's motion requests the payment of temporary total disability compensation from 01/13/2005 to the present and continuing.

The Staff Hearing Officer finds that the injured worker's inability to work during the requested period is not causally related to or the result of the conditions that are recognized in this claim. Therefore the injured worker's motion is denied.

This order is based upon the report of Dr. Bright dated 11/20/2005.

{¶29} 14. On February 18, 2006, another SHO mailed an order refusing relator's administrative appeal from the SHO's order of February 6, 2006.

{¶30} 15. On March 22, 2006, relator, Terrence M. Jerreals, filed this mandamus action.

Conclusions of Law:

{¶31} The issue is whether Dr. Bright's report, upon which the commission exclusively relied to deny TTD compensation, fails to constitute some evidence because allegedly "310.2 Postconcussion Syndrome" misidentifies the actual claim allowance.

{¶32} Because relator cannot clearly show that "310.2 Postconcussion Syndrome" is a misidentification of the actual claim allowance, the magistrate finds that Dr. Bright's report is some evidence supporting the commission's decision.

{¶33} Accordingly, it is the magistrate's decision that this court deny relator's request for a writ of mandamus, as more fully explained below.

{¶34} According to relator, the industrial claim is not allowed for "post-concussion syndrome" but is allowed for "post-concussion headaches." It therefore follows, according to relator, that Dr. Bright rendered an opinion premised upon a nonallowed condition and, thus, failed to evaluate relator's disability claim using the correct claim allowance. The magistrate disagrees with relator's analysis.

{¶35} The SHO's order of September 30, 2005, declares that the claim is amended to include: "concussion and intracranial injury with brief loss of consciousness and post-concussion headaches."

{¶36} The order also states reliance upon the March 11, 2005 report of Dr. Anthony and the April 7, 2005 report of Dr. Ramirez.

{¶37} It is clear from a reading of those two medical reports that the SHO relied upon the report of Dr. Anthony to amend the claim to include "concussion and intracranial injury with brief loss of consciousness" and the SHO relied upon the report of Dr. Ramirez to amend the claim to include "post-concussion headaches."

{¶38} Dr. Ramirez concluded that relator suffers from "310.2 Post Concussion Headaches" and that "310.2 Post Concussion Headaches aggravated the preexisting migraine headaches."

{¶39} Dr. Ramirez's conclusion is problematical because ICD-9 code 310.2 corresponds with or identifies "post-concussion syndrome." Apparently, there is no ICD-9 code that specifically identifies "post-concussion headaches."

{¶40} The SHO's order amending the claim to include "post-concussion headaches" does not facially contain the ICD-9 code used by Dr. Ramirez. It can be noted, however, that commission orders amending claims do not generally employ ICD-9 codes whereas bureau orders generally do use ICD-9 codes.

{¶41} That the SHO's order does not facially contain ICD-9 code 310.2 corresponding to post-concussion syndrome does not, in the magistrate's view, compel the conclusion that the industrial claim is not allowed for post-concussion syndrome. In the magistrate's view, given the SHO's reliance upon Dr. Ramirez's report, it was not unreasonable for the bureau nurse to conclude that the claim is allowed for "310.2 post-concussion syndrome" and to convey that information to Dr. Bright.

{¶42} Moreover, Dr. Bright states in his report:

Postconcussion syndrome is a condition characterized by the mild, chronic symptoms that persist after a closed head injury (where there hasn't been penetration or fracture of the skull) such as headache, giddiness, and a subjective feeling of impaired intellectual ability, as well as personality changes and depression. * * *

{¶43} Thus, Dr. Bright recognized that headaches can be a symptom of post-concussion syndrome.

{¶44} Given that post-concussion headaches are among the symptoms of post-concussion syndrome, it is difficult for this magistrate to see how relator is prejudiced by the bureau's view of the allowed condition that appears to be broader than the literal view of the claim allowance advanced by relator here. That is to say, the bureau could not have prejudiced relator by concluding that the claim is allowed for post-concussion syndrome when that condition includes post-concussion headaches.

{¶45} In short, relator cannot clearly show that the bureau was incorrect in concluding that the claim is allowed for "post-concussion syndrome" nor can relator show that he is prejudiced by the bureau's conclusion.

{¶46} 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