

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Omni Manor, Inc.,	:	
Relator,	:	
v.	:	No. 08AP-776
Donna J. Mihaley and Industrial	:	(REGULAR CALENDAR)
Commission of Ohio,	:	
Respondents.	:	

D E C I S I O N

Rendered on August 20, 2009

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

Heller, Maas, Moro & Magill Co. LPA, C. Douglas Ames and Joseph A. Moro, for respondent Donna J. Mihaley.

Richard Cordray, Attorney General, and Kevin J. Reis, for respondent Industrial Commission of Ohio.

IN MANDAMUS

KLATT, J.

{¶1} Relator, Omni Manor, Inc., commenced this original action in mandamus seeking an order compelling respondent, Industrial Commission of Ohio ("commission"), to vacate its order awarding permanent total disability ("PTD") compensation to respondent, Donna J. Mihaley ("claimant"), and to enter an order denying said compensation.

{¶2} Pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth District Court of Appeals, this matter was referred to a magistrate who issued a decision, including findings of fact and conclusions of law, which is appended hereto. The magistrate found that the commission did not abuse its discretion when it relied on Dr. Vargo's August 17, 2007 report granting the claimant PTD compensation. The fact that the commission had previously rejected an earlier October 6, 2004 report from Dr. Vargo was of no consequence given that Dr. Vargo's August 17, 2007 report was based upon a new examination. Therefore, there was some evidence supporting the commission's award of PTD compensation. Accordingly, the magistrate has recommended that we deny relator's request for a writ of mandamus.

{¶3} No objections have been filed to the magistrate's decision.

{¶4} We note that the magistrate's decision contains a typographical error in ¶32 wherein it refers to Dr. Vargo's August 17, 2007 report as an August 17, 2004 report. Other than this obvious error, we find no other error of law or defect on the face of the magistrate's decision. Therefore, except for correcting this typographical error, 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 deny relator's request for a writ of mandamus.

Writ of mandamus denied.

FRENCH, P.J., and CONNOR, J., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Omni Manor, Inc.,	:	
Relator,	:	
v.	:	No. 08AP-776
Donna J. Mihaley and Industrial	:	(REGULAR CALENDAR)
Commission of Ohio,	:	
Respondents.	:	

MAGISTRATE'S DECISION

Rendered on April 6, 2009

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

Heller, Maas, Moro & Magill Co. LPA, C. Douglas Ames and Joseph A. Moro, for respondent Donna J. Mihaley.

Richard Cordray, Attorney General, and Kevin J. Reis, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶5} In this original action, relator, Omni Manor, Inc. ("relator" or "Omni"), requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order awarding permanent total disability ("PTD") compensation to respondent Donna J. Mihaley ("claimant"), and to enter an order denying said compensation.

Findings of Fact:

{¶6} 1. Claimant has two industrial claims. On April 13, 1999, claimant sustained an industrial injury while employed as a nurse's aide at a nursing facility operated by Omni. That claim (No. 99-465077) is allowed for "herniated disc at C6-7; major depression single episode, moderate."

{¶7} 2. Earlier, on February 27, 1995, claimant sustained an industrial injury while employed with another employer. This claim (No. 95-1995) is allowed for "cerebral concussion; cervical strain; disc herniation C5-6."

{¶8} 3. Claimant has undergone three surgeries to her cervical spine. The most recent surgery was performed in April 2003.

{¶9} 4. On October 6, 2004, claimant was examined, at her own request, by John J. Vargo, D.O. In his five-page narrative report, Dr. Vargo acknowledges claimant's three surgeries to the cervical spine. Based upon his examination, he opines that claimant has "a total combined value of 34% impairment of the whole person based upon the allowed conditions in this claim."

{¶10} On the last page of his October 6, 2004 report, Dr. Vargo opines:

DISCUSSION

The injured worker has rather severe problems in the cervical spine with deficit in range of motion, as well as continued pain and rigidity which involves inability to function overhead. Her other career besides working at Classic Optical was that she has a beautician's license, however, this requires her to work overhead also. It also requires continued use of her upper extremities which will aggravate her cervical problems. The injured worker, because of the cervical spine injury, cannot push, pull, carry or lift more than five pounds. She cannot work overhead. She cannot maintain continued force with her extremities which means that she can use simple grasp but she cannot use hand controls for long periods of time. She cannot use equipment which would vibrate. She cannot use her upper extremities

to assist with climbing or going up and down steps. She also cannot crawl. This would leave her only able to do sedentary type activities and this does vastly limit the type of employment that she could obtain. Based on her educational level, it would be highly unlikely that she would be able to find employment in the type of activities that she would be able to perform.

CONCLUSION

Based on my examination, having evaluated all conditions in this claim, as well as having determined the patient does have a rather significant impairment, namely 34% impairment of the whole person due to the allowed conditions in this claim, it is my medical opinion, that within a degree of medical certainty, the injured worker is permanently and totally disabled from returning to remunerative employment.

{¶11} 5. On March 14, 2005, claimant filed an application for PTD compensation. In support of her application, claimant submitted the October 6, 2004 report from Dr. Vargo.

{¶12} 6. Following an August 23, 2005 hearing, a staff hearing officer ("SHO") issued an order denying the PTD application. The SHO's order states reliance upon medical reports from E.A. DeChellis, D.O., Sushil M. Sethi, M.D., and Robert L. Byrnes, Ph.D., in support of the determination that, medically, claimant was able to perform sustained remunerative employment. Thereafter, the SHO's order analyzes the nonmedical factors. The October 6, 2004 report of Dr. Vargo is not mentioned in the order.

{¶13} 7. On August 17, 2007, at claimant's own request, she was again examined by Dr. Vargo. In his six-page narrative report, Dr. Vargo opines that claimant has "a total combined value of 30% impairment of the whole person based upon the allowed conditions in this claim."

Thereafter, the August 17, 2007 report states:

DISCUSSION

The injured worker has considerable pain and discomfort in the cervical spine. There have been three surgeries to the cervical spine in an attempt to reduce pressure and fuse these regions. The injured worker continues to be unable to function as a consequence of the pain in the cervical spine. As a consequence, the injured worker is unable to lift overhead, cannot push, pull, lift or carry more than five pounds, cannot work over her head, cannot climb, cannot readily drive an automobile as this will cause pain to the cervical spine region and it could be dangerous for her to operate a motor vehicle. She should avoid motions with the axial spine as these will aggravate the neck problem. The injured worker therefore is unable to perform the other occupations she did prior to being injured and furthermore, the injured worker, at this point in time, is unable, as a direct consequence of the industrial injuries, to work for any form of remuneration.

CONCLUSION

In conclusion, based upon my examination, having reviewed the chart provided, having evaluated all allowed conditions in this claim, and based on the American Medical Association Guide to the Evaluation of Permanent Impairment – Fifth Edition, I find that this injured worker, at this time, does have a thirty percent (30%) impairment of the whole person which does bear a direct and causal relationship to the industrial injury.

Furthermore, as a direct consequence of the industrial injury, the injured worker is unable to push, pull, lift or carry more than five pounds, cannot work over her head, cannot lift overhead, further cannot carry things with her upper extremities stretched out, cannot climb, cannot use the axial spine to any great degree without aggravating the problems in the cervical spine. It is therefore my medical opinion, that within a degree of medical certainty, the injured worker, at this time, is totally and permanently disabled from returning to any form of remunerative employment.

{¶14} 8. On December 31, 2007, claimant filed another PTD application. In support, claimant submitted the August 17, 2007 report from Dr. Vargo.

{¶15} 9. Following a July 16, 2008 hearing, an SHO issued an order awarding PTD compensation starting August 17, 2007, based in part upon Dr. Vargo's August 17, 2007 report. This SHO's order of July 16, 2008 explains:

In determining this extent of disability issue, the Staff Hearing Officer relies upon the above medical report of Dr. John Vargo, D.O. This evidence persuades the Staff Hearing Officer that the injured worker does not possess the residual physical functional capacity to engage in any sustained remunerative employment. Dr. Vargo states that injured worker has had three separate cervical surgeries to treat the allowed conditions in the above claims; persists with significant impairment as a consequence of the allowed conditions in her above claims; and has severe work restrictions which would preclude an ability to perform work even at the sedentary level. * * *

* * *

The findings and opinion of Dr. Vargo are found to be persuasive. The persuasiveness of Dr. Vargo's findings and opinion are heightened given the injured worker's testimony at hearing. Injured worker testified at hearing that she persists with severe pain. She testified that his [sic] pain requires the use of significant and daily medication. She stated that she takes two Oxycontin and three Percocet per day. She testified that the pain from her allowed conditions restricts her movement and daily activities. Her IC-2 application states that she cannot drive long distances, she has difficulty sleeping, and she has to have her children assist with housekeeping. She reported to Industrial Commission Specialist, Dr. Paul Bartos, M.D., that she cannot sit, stand, or walk for prolonged periods; that she drops objects; and that she cannot grip or reach. The totality of the above evidence is found to be persuasive.

* * *

* * * The Staff Hearing Officer finds, from the above designated medical evidence, that the injured worker's allowed physical conditions in the above claims preclude her ability to engage in sustained remunerative employment. Accordingly, the Staff Hearing Officer finds that injured worker has satisfied her requisite burden of proof in establishing her entitlement to permanent total disability compensations [sic].

{¶16} 10. On September 5, 2008, relator, Omni Manor, Inc., filed this mandamus action.

Conclusions of Law:

{¶17} The issue is whether the August 17, 2007 report of Dr. Vargo constitutes some evidence upon which the commission can rely to support its PTD award.

{¶18} Finding that the August 17, 2007 report of Dr. Vargo does constitute some evidence upon which the commission can rely, it is the magistrate's decision that this court deny relator's request for a writ of mandamus, as more fully explained below.

{¶19} *State ex rel. Zamora v. Indus. Comm.* (1989), 45 Ohio St.3d 17, prohibits the commission from relying on a medical report that the commission had earlier found unpersuasive. *Zamora* is properly invoked when the commission tries to revive evidence that was previously deemed unpersuasive. *State ex rel. Tilley v. Indus. Comm.* (1997), 78 Ohio St.3d 524, 528.

{¶20} In *State ex rel. Crocker v. Indus. Comm.*, 111 Ohio St.3d 202, 2006-Ohio-5483 ("*Crocker II*"), the Supreme Court of Ohio affirmed this court's decision in *State ex rel. Crocker v. Indus. Comm.*, 10th Dist. No. 04AP-820, 2005-Ohio-4390 ("*Crocker I*"), wherein it was held that *Zamora* prohibited the commission's reliance upon a June 10, 2003 report from treating neurologist Allan G. Clague, M.D., in denying the claimant's motion for an R.C. 4123.57(B) scheduled-loss award.

{¶21} Previously, the commission had implicitly rejected two reports from Dr. Clague dated February 17 and February 28, 2003 when it terminated temporary total disability ("TTD") compensation on grounds that the industrial injury had reached maximum medical improvement ("MMI").

{¶22} As indicated by this court in *Crocker I*, following a February 17, 2003 examination, Dr. Clague opined that the claimant, Paul D. Crocker, had not reached MMI. Earlier, on January 15, 2003, at the employer's request, Crocker was examined by Gregory A. Ornella, M.D., who opined that Crocker had reached MMI. On February 28, 2003, after reviewing Dr. Ornella's report, Dr. Clague reiterated his opinion that Crocker's allowed conditions would improve and that therefore Crocker was not at MMI. *Crocker I*, at ¶17.

{¶23} Thereafter, following an April 25, 2003 hearing, an SHO terminated TTD compensation on MMI grounds based upon Dr. Ornella's report, thus implicitly rejecting the reports from Dr. Clague dated February 17 and February 28, 2003.

{¶24} On June 10, 2003, Dr. Clague authored another report in which he again noted that he expected improvement in Crocker's injuries. *Crocker I*, at ¶25. Following a November 5, 2003 hearing, a commission deputy denied Crocker's motion for a scheduled-loss award based upon Dr. Clague's June 10, 2003 report.

{¶25} Crocker filed a mandamus action in this court challenging the commission's denial of his motion for scheduled-loss compensation. This court agreed with Crocker that *Zamora* prohibited the commission's reliance upon Dr. Clague's June 10, 2003 report, and thus issued a writ of mandamus. The employer (Sauder Woodworking) and the commission appealed as of right to the Supreme Court of Ohio.

{¶26} In affirming this court's judgment, the court, in *Crocker II*, explains:

Sauder Woodworking and the commission argue that *Zamora* can block revival of only the February 17, 2003 and February 28, 2003 reports. They argue that it cannot be used to disqualify a June 10, 2003, report that did not exist when the commission issued its April 25, 2003 maximum-medical-improvement order. In some situations, appellants would be correct, but not here.

Appellants' exclusive focus on dates erodes their argument. *Zamora* would be meaningless if it were concerned only with chronology and not content. If only chronology mattered, a doctor could simply copy an old report, put a new date on it, and submit it as new evidence. *Zamora* instead seeks to prohibit exactly what happened here. In all three reports, Dr. Clague consistently issued the same opinion on the subject of further improvement: Crocker would get better with additional treatment. When Clague made that statement in February, it was deemed unpersuasive, and temporary total disability compensation was accordingly denied. When Dr. Clague made the statement in June, the commission suddenly deemed it persuasive and used it to deny Crocker's loss-of-use application. This result is unfair and inappropriate. Dr. Clague's opinion on future improvement is either persuasive or it is not. The commission cannot have it both ways, particularly to Crocker's dual detriment.

Contrary to appellants' representation, this result does not mean that once a doctor's opinion has been rejected, the commission can never rely on any future report from that doctor again. What the commission cannot do is accept the same doctor's opinion on one matter that it previously rejected. In this case, the uniformity of issues rendered the commission's reliance on Dr. Clague's June 10, 2003 report an abuse of discretion.

Id. at ¶14-16.

{¶27} Relying upon *Crocker II*, relator argues that *Zamora* prohibited the commission's reliance upon Dr. Vargo's August 17, 2007 report in awarding PTD compensation.

{¶28} According to relator, the findings in Dr. Vargo's October 6, 2004 report, that the commission rejected, "remained consistent" with the findings contained in Dr. Vargo's August 17, 2007 report which the commission accepted. (Relator's brief, at 6.)

{¶29} Relator's argument for the application of the *Zamora* rule hinges upon relator's point-by-point comparison of findings contained in both reports. For example, relator points out that Dr. Vargo found a 34 percent whole person impairment in his earlier report and a 30 percent whole person impairment in his latter report. According to relator,

Dr. Vargo's latter report "fails to point to any new and intervening circumstances or to any dramatic change in the claimant's physical condition." (Relator's brief, at 7.)

{¶30} In the magistrate's view, relator's point-by-point comparison of the two reports in order to show consistency in Crocker's medical status between 2004 and 2007 misconstrues the holding of *Crocker I* and *II*.

{¶31} In *Crocker I* and *II*, Dr. Clague's February 17, 2003 opinion on MMI was premised upon an examination of that date. Nine days later, Dr. Clague repeated his February 17, 2003 opinion after reviewing Dr. Ornella's report. Less than four months later, Dr. Clague repeated his opinion that improvement in the injuries was expected.

{¶32} Here, Dr. Vargo conducted two very thorough examinations some three years apart. The October 6, 2004 report contains Dr. Vargo's clinical findings from the October 6, 2004 examination. The August 17, 2004 report contains Dr. Vargo's clinical findings from the August 17, 2007 examination. The reports relate to separate and distinct events, i.e., the two examinations. That some similarities between the reports may exist does not show, as relator seems to suggest, that the latter report is simply a repeat of the former.

{¶33} The commission rejected Dr. Vargo's report of his October 6, 2004 examination. The commission later accepted Dr. Vargo's report of his August 17, 2007 examination. The commission did not thereby revive the October 6, 2004 report that it had previously rejected. Relator's reliance upon *Crocker II* is misplaced.

{¶34} Based upon the above analysis, the magistrate concludes that Dr. Vargo's August 17, 2007 report constitutes some evidence upon which the commission can and did rely in awarding PTD compensation. The *Zamora* rule does not require evidentiary elimination of the August 17, 2007 report.

{¶35} Accordingly, it is the magistrate's decision that this court deny relator's request for a writ of mandamus.

KENNETH W. MACKE
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).