

[Cite as *State ex rel. Shaffer v. Indus. Comm.*, 2009-Ohio-5466.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

The State of Ohio ex rel. Johnda Shaffer, :
Relator, :
v. : No. 08AP-975
Industrial Commission of Ohio : (REGULAR CALENDAR)
and :
The Childrens Center of Ohio, Inc., :
Respondents. :

D E C I S I O N

Rendered on October 13, 2009

Ward, Kaps, Bainbridge, Maurer & Melvin, and Christopher J. Yeager, for relator.

Richard Cordray, Attorney General, and Andrew J. Alatis, for respondent Industrial Commission of Ohio.

IN MANDAMUS

FRENCH, P.J.

{¶1} Relator, Johnda Shaffer, filed an original action in mandamus requesting this court to issue a writ of mandamus ordering respondent, Industrial Commission of Ohio, to vacate its order that denied relator's motion filed under R.C. 4123.57(B) for a partial loss of vision award and to enter an order granting an award.

{¶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, which includes findings of fact and conclusions of law and is appended to this decision, recommending that this court deny the requested writ. No objections to the magistrate's decision have been filed.

{¶3} Finding no error of law or other defect on the face of the magistrate's decision, this court adopts the magistrate's decision as our own, including the findings of fact and conclusions of law contained in it. In accordance with the magistrate's decision, the requested writ is denied.

Writ of mandamus denied.

BRYANT and TYACK, JJ., concur.

A P P E N D I X

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	:	
Relator,	:	
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v.	:	No. 08AP-975
	:	
Industrial Commission of Ohio and	:	(REGULAR CALENDAR)
The Childrens Center of Ohio, Inc.,	:	
	:	
Respondents.	:	
	:	

MAGISTRATE'S DECISION

Rendered on July 31, 2009

Ward, Kaps, Bainbridge, Maurer & Melvin, and Christopher J. Yeager, for relator.

Richard Cordray, Attorney General, and Andrew J. Alatis, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶4} In this original action, relator, Johnda Shaffer, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate the December 19, 2007 order of its staff hearing officer that denies relator's January 18, 2007 motion for an R.C. 4123.57(B) partial loss of vision award, and to enter an order granting an award.

Findings of Fact:

{¶5} 1. On March 6, 2006, relator sustained an industrial injury when her head was struck by a falling window. The industrial claim (No. 06-814890) is allowed for "concussion without coma."

{¶6} 2. Earlier, on July 9, 2004, prior to the industrial injury, relator was examined by optometrist James T. Brom, O.D., who determined that left eye uncorrected visual acuity was "20/40+."

{¶7} 3. On May 4, 2006, following the industrial injury, optometrist James W. Elliott, O.D., determined that uncorrected left eye visual acuity was at "20/60 -2."

{¶8} 4. On May 23, 2006, ophthalmologist Maurice J. Oakley, M.D., reported:

Ms. Johnda Shaffer apparently sustained a concussion on 03/07/2006 [sic]. Since that time she has had vision problems. Her vision in her left eye is 20/70 uncorrected, 20/50 corrected. Her Goldmann Visual Field's are constricted and she shows enlarged blind spots. Her ocular exam shows blurred optic disc borders in the left eye. She is also very photophobic OS. With these findings the next logical step in her diagnostic procedure is an MRI.

{¶9} 5. On June 30, 2006, Dr. Oakley wrote to relator's counsel:

Ms. Johnda Shaffer was initially seen by me on 5/9/06 nearly two months after injury, therefore, I have no pre-accident visual acuity. She was referred by Dr. James Elliott, D.O. at the Cannonsburg, KY Walmart Vision Center. You may be able to get a pre-accident Visual Acuity from him.

As to her head trauma being a direct cause for her visual problems, I think it is reasonable to attribute them to the accident. Also, a decrease in visual acuity is accompanied by a constriction of her visual field.

{¶10} 6. On September 7, 2006, relator was examined by ophthalmologist John C. Gross, M.D. In his five-page narrative report, dated September 22, 2006, Dr.

Gross determined that left eye visual acuity was "20/60." Apparently, this is uncorrected visual acuity.

{¶11} 7. On October 9, 2006, relator was examined by ophthalmologist Karl C. Golnik, M.D., who reported:

* * * Johnda Shaffer * * * was hit in the head by a window that fell on the top of the head at work in March of 2006. She initially stated that she passed out but then stated that she did not completely lose consciousness. She has had some problems with left eye blurry vision and nose bleeds since that time. She complains of seeing occasional dots that are floating and can be black, gray, or white. There is no particular pattern to this. She also will get a headache following these. She has been treated by a neurologist, Dr. Bansal, for seizures with Lamictal and I do not know the details of this evaluation. She states that she does not think the medicine is helping in any way. There is a family history of migraine in the mother.

On examination today, visual acuity was 20/40 OD, 20/30 OS, pinholing to 20/20 OU. She was J2 OU at near. Pupils were briskly reactive from 4 to 2 mm and there was no relative afferent papillary defect. Fields were full to confrontation and I did not obtain automated perimetry. She saw 9/10 HRR color plates with each eye. Slit lamp examination, dilated funduscopy, and tensions by applanation were all normal.

In summary, Ms. Shaffer would seem to have a refractive error, but good color vision, no relative afferent papillary defect, and normal optic disc appearance which I think rules out any left optic nerve problem. * * *

{¶12} 8. On October 19, 2006, relator was examined by ophthalmologist George M. Chioran, M.D., who reported:

* * * Johnda Shaffer * * * was involved in an accident when a piece of window fell on the left side of her head hitting the frontal bone. The patient suffered confusion and has subsequently had headaches and complaints of blurred vision. She now presents for further evaluation.

On exam, visual acuity is correctable to 20/20 in each eye with a myopic and astigmatic correction of -1.00 -1.00 x 127 on the right and -0.75 -0.75 x 58 on the left. Pupillary exam is unremarkable and shows no afferent pupillary defect. Confrontation visual fields were full. Intraocular pressure is 21 mm Hg on the right and 20 mm Hg on the left. Extraocular motility is full and she is orthophoric in distance viewing. Slit lamp exam is unremarkable and shows no evidence of trauma. Fundus exam shows a cup-to-disc ratio of 0.2. There is no optic nerve pallor or retinal scars. The peripheral fundus is unremarkable and the macula is within normal limits. Goldmann visual field testing shows mild generalized constriction of both eyes slightly worse in the left than the right but this is non-localizing.

In summary, Johnda suffered blunt head trauma. She maintains good visual acuity correctable to 20/20 in each eye with a myopic and astigmatic correction. I could find no evidence that the injury of March 6th caused any permanent damage to her eyes or to her visual system. * * *

{¶13} 9. In December 2006, Dr. Oakley wrote to relator's counsel: "Ms. Shaffer at her July 26, 2006 visit had 20/80 vision in her left eye uncorrected, however with the proper corrective lens she could see 20/30- with her left eye."

{¶14} 10. On January 18, 2007, relator moved for an R.C. 4123.57(B) award for partial loss of vision of her left eye. In support of her motion, relator cited reports from Drs. Brom, Oakley, and Gross. (Relator also cited to "Medical Report James W. Elliott, O.D. 1-12-2007" which is not contained in the stipulated record.)

{¶15} 11. Relator's motion prompted a request from the Ohio Bureau of Workers' Compensation ("bureau") to ophthalmologist James G. Ravin, M.D., for a medical records review. On February 14, 2007, Dr. Ravin issued a five-page narrative report which states in part:

ALLOWED CONDITIONS: Concussion without coma.

I accept the exam findings of the examining physicians.

The first record concerning Ms. Johnda Shaffer is dated July 9, 2004, and is an eye examination apparently by James Elliott, OD, at Wal-Mart, although it is not signed. Apparently, it was an eye examination prior to driver's license testing. Her visual acuity without glasses was 20/40 right eye, 20/40+ left eye, and 20/30- with the eyes tested together. With -1.00 -.50 x 125 she read 20/20 right eye and with -.75 -.50 x 55 she read 20/20 left eye. The remainder of the examination was normal and she was given glasses.

* * *

* * * The next evaluation is dated October 9, 2006, by Carl [sic] C. Golnik, MD, at the Cincinnati Eye Institute.

On examination, the visual acuity was 20/40 right eye, and 20/30 left eye, pinholing to 20/20 with each eye. She was able to read Jaeger 2 print each eye at near. The pupils were normal. Visual fields were full to confrontation and automated perimetry was not done. On color vision testing she saw 9/10 plates normally. Slit lamp examination, funduscopy and pressure testing were normal. He stated, "In summary, Ms. Shaffer would seem to have a refractive error, but good color vision. No relative afferent pupillary defect and normal optic disc appearance which I think rules out any left optic nerve problem." He concluded no further evaluation is necessary.

* * *

Questions are to be addressed:

1. The visual acuity without glasses is equivalent to that on examination before the injury as noted on the eye examination of July 9, 2004. The examination by Dr. Golnik on October 9, 2006, showed that she could read the 20/20 row with each eye through a pinhole. The visual acuity without glasses was 20/40 right eye and 20/30 left eye, the same as had been found in 2004.
2. The percentage of loss of vision per the *AMA Guides to the Evaluation of Permanent Impairment*, Fifth Edition, is 0%.

{¶16} 12. Following a March 21, 2007 hearing, a district hearing officer ("DHO") issued an order denying relator's January 18, 2007 motion for a partial loss of vision award. The DHO exclusively relied upon the February 14, 2007 report of Dr. Ravin.

{¶17} 13. Relator administratively appealed the March 21, 2007 DHO's order.

{¶18} 14. Following a May 1, 2007 hearing, a staff hearing officer ("SHO") issued an order affirming the DHO's order. The SHO exclusively relied upon the February 14, 2007 report of Dr. Ravin.

{¶19} 15. On May 19, 2007, another SHO mailed an order refusing relator's administrative appeal from the SHO's order of May 1, 2007.

{¶20} 16. Thereafter, relator filed in this court a mandamus action challenging the commission's denial of her January 18, 2007 motion. That mandamus action was assigned case No. 07AP-622.

{¶21} 17. That mandamus action resulted in the parties' filing of a Civ.R. 41(A) stipulation of dismissal on October 25, 2007. In the stipulation of dismissal, the commission agreed to issue an order that vacates the SHO's order of May 1, 2007 and schedules a new hearing to adjudicate de novo relator's January 18, 2007 motion. The stipulation of dismissal further provides:

It is further stipulated among the parties that Dr. James G. Ravin's medical review dated February 14, 2007, shall not, in its present form, constitute some evidence upon which the Staff Hearing Officer may grant or deny the requested award of benefits. Dr. Ravin's medical review fails to review and accept the findings of all examining physicians, including the examination reports of Dr. Gross (dated September 7, 2006) and Dr. Chioran (dated October 19, 2006). As such, in its present form, Dr. Ravin's review does not comply with the holding of State ex rel. Wallace v. Indus. Comm. (1979), 57 Ohio St.2d 55.

{¶22} 18. Thereafter, Dr. Ravin was asked to provide an addendum report which he issued on November 9, 2007. That report states:

I am asked to review records of two other examiners of Ms. Shaffer and to report if my previously based medical opinion has been altered, modified, or changed as a result of the additional records [sic].

Now given to me is a report by George Chioran, MD, dated October 19, 2006. His examination states that he is writing in regards to Johnda Shaffer, a 20 year old who was involved in an accident when a piece of window fell on the left side of her head hitting the frontal bone. She suffered confusion, headaches, and blurred vision. He states that the visual acuity is correctable to 20/20 in each eye with a myopic and astigmatic correction that is not high in power. The pupils were normal. The visual fields were normal to confrontation. The intraocular pressure was normal. The extraocular muscles were normal. Slit lamp examination was unremarkable. Ophthalmoscopy was normal with no optic nerve pallor or retinal scars. The peripheral fundus was normal. Goldmann visual field testing showed mild generalized constriction of both eyes and was nonlocalizing. He concludes in saying that she suffered blunt head trauma and maintains good visual acuity correctable to 20/20 in each eye. He states at the end of his letter, "I could find no evidence that the injury of March 6th caused any permanent damage to her eyes or to her visual system."

A report is also provided by John C. Gross, MD, and it is difficult to read the exact date of the report since the fax is not totally clear, but it seems to be dated September 22, 2006, regarding a visit on September 9, 2006 [sic]. The chief complaint of the patient was vision loss. She said, "I got hurt in March 2006. A window fell on me and hit me in the forehead. It knocked me out." He found at examination that the visual acuity was correctable with the appropriate lenses for her myopia and astigmatism to 20/20 in each eye. Without correction the acuity was 20/30 right eye and 20/60 left eye. The muscles were normal. The external examination was normal. The pupils were normal. Slit lamp examination showed no defects. The intraocular pressure was normal. Ophthalmoscopy was normal. The visual field test he noted showed some nondiagnostic splotchy defects. His conclusion was that no etiology was observed for the

patient's symptoms. He concluded, "Her vision is correctable to 20/20," and that "She is mildly nearsighted with astigmatism." He states, "I cannot imagine that this trauma caused her to develop this astigmatism and myopia." The diagnosis was 368.10, visual disturbance, subjective.

These two reports do not change my original opinion as stated in a letter dated February 14, 2007. There is no evidence of permanent defect from the injury and she has visual acuity of 20/20. The percentage of loss of vision per the *AMA Guides to the Evaluation of Permanent Impairment*, 5th Edition, remains 0%.

{¶23} 19. Following a December 19, 2007 hearing, an SHO issued an order that, again, denies relator's motion. The SHO's order explains:

The Staff Hearing Officer has carefully considered all evidence in the claim file and presented at this hearing. After full de novo hearing, the Staff Hearing Officer makes the following findings.

The Staff Hearing Officer denies the C-86 motion filed by the injured worker on 01/18/2007.

The Staff Hearing Officer denies the request for compensation under R.C. 4123.57 for loss of uncorrected vision of the left eye.

The Staff Hearing Officer finds that the evidence does not sufficiently demonstrate that the injured worker has sustained any loss of visual acuity in her left eye as a result of the allowed industrial injury.

This order is based on the 02/14/2007 original report of Dr. Ravin, as modified by the 11/09/2007 addendum report from Dr. Ravin. It is clear that Dr. Ravin has now considered all of the relevant examination reports on file. He concludes that the percentage of loss of vision remains at 0%.

{¶24} 20. On January 16, 2008, another SHO mailed an order refusing relator's administrative appeal to the three-member commission.

{¶25} 21. On November 4, 2008, relator, Johnda Shaffer, filed this mandamus action.

Conclusions of Law:

{¶26} The issue is whether the reports of Dr. Ravin constitute some evidence upon which the commission can and did rely.

{¶27} Finding that the reports do constitute some evidence, it is the magistrate's decision that this court deny relator's request for a writ of mandamus.

{¶28} In *State ex rel. Wallace v. Indus. Comm.* (1979), 57 Ohio St.2d 55, 59, the Supreme Court of Ohio states:

In light of the frequent use of medical opinions of nonexamining physicians in processing claims for disability compensation, the Court of Appeals for Franklin County has developed an analogy that is employed to insure the reliability of those opinions. The court considers the physician's opinion tantamount to a response to a hypothetical question.

Applying the analogy to a hypothetical question, it follows that the non-examining physician is required to expressly accept all the findings of the examining physicians, but not the opinion drawn therefrom. If a non-examining physician fails to accept the findings of the doctors or assumes the role of the Industrial Commission, the medical opinion that is rendered does not constitute evidence to support a subsequent order of the commission.

{¶29} In *State ex rel. Lampkins v. Dayton Malleable, Inc.* (1989), 45 Ohio St.3d 14, 16, the court agreed with the appellant that the requirement of express acceptance under the *Wallace* rule had been relaxed. The *Lampkins* court held that "even under an implicit acceptance analysis," the two medical reports at issue were deficient.

{¶30} Relator contends that Dr. Ravin's reports violate the *Wallace* rule because allegedly Dr. Ravin failed to expressly accept the findings of all the examining doctors. Relator points out that Dr. Ravin does not expressly state in his November 9, 2007 addendum that he accepts the findings of Drs. Gross and Chioran even though the

findings of these doctors are set forth in the addendum. Relator concludes that Dr. Ravin has failed to "expressly accept" the findings of Drs. Gross and Chioran in violation of the *Wallace* rule. According to relator, "reciting findings and accepting findings are not necessarily the same." (Relator's brief, at 10.)

{¶31} Relator's argument lacks merit and is easily answered. To begin, the *Lampkins* court held that the "expressly accept" language in *Wallace* has been relaxed. Dr. Ravin expressly states in his February 14, 2007 report that he "accepts the exam findings of the examining physicians."

{¶32} While Dr. Ravin does not state in his addendum that he accepts the findings of Drs. Gross and Chioran, it can be easily inferred by the commission that Dr. Ravin was aware of the necessity to do so, given that he expressly did so in his February 14, 2007 report. Moreover, it can easily be inferred that the recitation of findings in the addendum report constitutes acceptance of those findings even in the absence of an express acceptance in the addendum report.

{¶33} Relator further argues that Dr. Ravin's statement in the addendum's concluding paragraph that relator "has visual acuity of 20/20" is evidence that Dr. Ravin refused to accept the findings of the examining physicians. According to relator, to reach the conclusion that relator has 20/20 visual acuity, Dr. Ravin must have rejected Dr. Gross's finding that relator has 20/60 uncorrected left eye visual acuity. This argument also lacks merit.

{¶34} Analysis begins with the observation that Dr. Ravin relied on Dr. Golnik's October 9, 2006 examination findings to support the conclusion that relator has no percentage loss of vision. It can be further observed that Dr. Golnik's October 9, 2006

examination is the last-in-time examination of the examining doctors that provides a determination of uncorrected left eye visual acuity. As previously noted, on October 9, 2006, Dr. Golnik determined that uncorrected left eye visual acuity was at 20/30. Comparing Dr. Golnik's finding with the preinjury July 9, 2004 finding of left eye visual acuity, Dr. Ravin concludes that relator has no percentage loss of vision.

{¶35} Dr. Gross's September 7, 2006 finding of uncorrected left eye visual acuity of 20/60 predates Dr. Golnik's last-in-time determination of uncorrected visual acuity. Thus, Dr. Ravin can indeed accept that relator's uncorrected left eye visual acuity was at 20/60 on September 7, 2006 and at 20/30 on October 9, 2006. Contrary to relator's argument, acceptance of Dr. Golnik's findings does not necessarily preclude acceptance of Dr. Gross's findings.

{¶36} Returning to relator's argument that Dr. Ravin's finding of "visual acuity of 20/20" indicates rejection of the findings of other physicians, it is clear that the 20/20 visual acuity finding is for uncorrected vision. Relator as much concedes this point in a footnote to her brief. (Relator's brief, at 11; footnote 1.)

{¶37} 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

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).