

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

State of Ohio ex rel. Colleen McCue,	:	
Relator,	:	
v.	:	No. 09AP-904
Industrial Commission of Ohio et al.,	:	(REGULAR CALENDAR)
Respondents.	:	

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D E C I S I O N

Rendered on July 20, 2010

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*Margolius, Margolius and Associates, Rigel A. Ariza, Paul W. Newendorp, and Jennifer Hanselman Regas, for relator.*

*Richard Cordray, Attorney General, and Sandra E. Pinkerton, for respondent Industrial Commission of Ohio.*

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IN MANDAMUS  
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

BROWN, J.

{¶1} Relator, Colleen McCue ("claimant"), 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 finding that she was overpaid temporary total

disability ("TTD") compensation from September 9, 2008, through September 30, 2008, and ordering the commission to find that no overpayment exists.

{¶2} This matter was referred to a court-appointed 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 is appended to this decision, including findings of fact and conclusions of law, and recommended that this court deny claimant's request for a writ of mandamus. Claimant has filed objections to the magistrate's decision.

{¶3} We will address claimant's objections together. Claimant argues in her first objection that the magistrate erred when she concluded that claimant's position was that the appropriate date to terminate TTD compensation was the date of the District Hearing Officer's ("DHO") hearing. Instead, claimant contends her position was that October 27, 2008, should have served as the date of any potential overpayment, as it was the date the letter from her treating physician, Dr. Scott Sesny, was submitted to the Bureau of Workers' Compensation ("BWC"). However, this court does not have a record of what claimant orally argued before the magistrate, and claimant's merit brief before the magistrate did not specifically indicate whether she was arguing that the appropriate date for termination of TTD should be the submission date of Dr. Sesny's letter or the date of the DHO hearing. In her reply brief before the magistrate, claimant does state in one sentence that "[t]he October 27 date should have served as the earliest date for any potential overpayment, as it was the date the evidence of the treating physician was evaluated and accepted by the BWC." Thus, at least in the reply brief, claimant did suggest October 27, 2008, as the earliest date of overpayment.

{¶4} Nevertheless, we find this argument is immaterial, as we concur with the magistrate's determination that the commission's finding of an overpayment from September 9, 2008 through September 30, 2008 was proper. Claimant argues in her second objection that the magistrate erred when she determined that claimant's situation falls squarely within *State ex rel. Ramirez v. Indus. Comm.* (1982), 69 Ohio St.2d 630, and Ohio Adm.Code 4121-3-32(B)(1)(c). Ohio Adm.Code 4121-3-32(B) provides, in pertinent part:

(1) Temporary total disability may be terminated by a self-insured employer or the bureau of workers' compensation in the event of any of the following:

(a) The employee returns to work.

(b) The employee's treating physician finds that the employee is capable of returning to his former position of employment or other available suitable employment.

(c) The employee's treating physician finds the employee has reached maximum medical improvement.

(2) Except as provided in paragraph (B)(1) of this rule, temporary total disability compensation may be terminated after a hearing as follows:

(a) Upon the finding of a district hearing officer that either the conditions in paragraph (B)(1)(a) or (B)(1)(b) of this rule has occurred.

(b) Upon the finding of a district hearing officer that the employee is capable of returning to his/her former position of employment.

(c) Upon the finding of a district hearing officer that the employee has reached maximum medical improvement.

(d) Upon the finding of a district hearing officer that the employee has received a written job offer of suitable employment.

If a district hearing officer determines, based upon the evidence, that as of the date of the hearing, the injured worker is no longer justified in remaining on temporary total disability compensation, he shall declare that no further payments may be made. If the district hearing officer determines that the injured worker was not justified in receiving temporary total disability compensation prior to the date of the hearing, he shall declare an overpayment from the date the injured worker was no longer justified in remaining on temporary total disability compensation. Such payment shall be recovered from future awards related to the claim or any other claim. The recovery order shall provide a method for the repayment of any such overpayment as is reasonable, taking into account such factors as the amount of money to be recouped, the length of the periodic payments to be made under any future award, and the financial hardship that would be imposed upon the employee by any specific schedule of repayment.

{¶5} Furthermore, R.C. 4123.56(A) provides, in pertinent part:

Payments shall continue pending the determination of the matter [before the commission], however payment shall not be made for the period \* \* \* when the employee has reached the maximum medical improvement."

The mandate in R.C. 4123.56(A) was reiterated by the Supreme Court of Ohio in *Ramirez*.

{¶6} Here, claimant contends that, although she agrees that TTD compensation should be terminated when Dr. Sesny found she reached maximum medical improvement ("MMI"), she believes that the "when" should refer to the date Dr. Sesny's written statement was submitted to the bureau, October 27, 2008, and not the date in the letter in which he indicated she had reached MMI, September 9, 2008. However, claimant provides no authority to support her reading of Ohio Adm.Code 4121-3-32(B)(1)(c) and R.C. 4123.56(A), and we refuse to adopt it without any authoritative support.

{¶7} Notwithstanding the lack of authority to support the specific proposition above, the overall crux of claimant's objection is that the commission improperly terminated her TTD as of the MMI date indicated in Dr. Sesny's letter and improperly sought to recoup overpayments from that date forward. With respect to this general contention, claimant cites *State ex. rel. Russell v. Indus. Comm.*, 82 Ohio St.3d 516, 1998-Ohio-212, for the proposition that any eventual discounting of the attending physician's report certifying TTD does not transform those payments into a recoupable overpayment.

{¶8} We agree with the magistrate that *Russell* does not apply to the present case. The syllabus in *Russell*, which claimant relies upon, is alluring at first blush:

The appropriate date on which to terminate disputed temporary total disability compensation on the basis of maximum medical improvement is the date of the termination hearing, and the commission may not declare an overpayment for payments received by the claimant before that date.

{¶9} However, the court in *Russell* clearly limits the syllabus holding to cases in which the date of MMI is contested by the non-attending physician. In addressing the language in R.C. 4123.56(A), the court in *Russell* explained that it relates to the issue of unilateral termination and applies only when there is no dispute as to whether the employee has reached MMI. *Id.* at 522, citing *State ex rel. Crabtree v. Ohio Bur. of Workers' Comp.*, 71 Ohio St.3d 504, 509-10, 1994-Ohio-474. Justice Lundberg Stratton, in her concurrence, acknowledged the limits of the majority's holding, stating "the majority's opinion narrowly addresses only those situations where there is *conflicting* medical evidence concerning the claimant's maximum medical improvement[.]" *Id.* at

525. (Emphasis sic.) She explained that "[t]he majority's conclusion does not appear to apply \* \* \* when there is *uncontested* evidence that the claimant has reached MMI. In those instances, TTD is no longer payable on the date that the claimant has indisputably reached MMI and recoupment of overpayment is available from the undisputed date of termination." *Id.* (Emphasis sic.) This distinction was also recognized by this court in *State ex rel. Walters v. Indus. Comm.*, 10th Dist. No. 01AP-1043, 2002-Ohio-3236, in which this court noted, "[t]he decision in *Russell* applies to disputed terminations of [temporary total disability] that are unresolved until findings of fact are made by the commission on consideration of the competing evidence." *Id.* at ¶41.

{¶10} In the present case, MMI was not contested by a non-attending physician. It was undisputed that claimant's treating physician, Dr. Sesny, found she reached MMI on September 9, 2008. Claimant never appealed the BWC's determination that she had reached MMI as of September 9, 2008. Thus, the BWC's MMI termination, which was based upon Dr. Sesny's uncontested MMI determination, was a unilateral termination. There was no dispute whether claimant had reached MMI and no conflicting medical evidence presented. These circumstances specifically take it out of the purview of *Russell*. See *Russell* at 522. Therefore, TTD was no longer payable on the date that claimant indisputably reached MMI, September 9, 2008, and recoupment of overpayment was available from the undisputed date of termination. See *id.* at 525 (Justice Lundberg Stratton, concurring). For these reasons, claimant's first and second objections are overruled.

{¶11} After an examination of the magistrate's decision, an independent review of the evidence, pursuant to Civ.R. 53, and due consideration of claimant's objections, we

overrule the objections. Accordingly, we adopt the magistrate's decision as our own with regard to the findings of fact and conclusions of law, and we deny claimant's request for a writ of mandamus.

*Objections overruled; writ denied.*

TYACK, P.J., and CONNOR, J., concur.

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## APPENDIX A

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Colleen McCue,	:	
Relator,	:	
v.	:	No. 09AP-904
Industrial Commission of Ohio et al.,	:	(REGULAR CALENDAR)
Respondents.	:	

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### MAGISTRATE'S DECISION

Rendered on March 18, 2010

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*Margolius, Margolius and Associates, Paul W. Newendorp, and Jennifer Hanselman Regas, for relator.*

*Richard Cordray, Attorney General, and Sandra E. Pinkerton, for respondent Industrial Commission of Ohio.*

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### IN MANDAMUS

{¶12} Relator, Colleen McCue, has filed this original action requesting this court issue a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order finding that she was overpaid temporary total disability ("TTD") compensation from September 9 through September 30, 2008, and ordering the commission to find that no overpayment exists.



Findings of Fact:

{¶13} 1. Relator sustained a work-related injury on June 14, 2001 and her workers' compensation claim was allowed for:

SPRAIN OF KNEE AND LEG, LEFT; TEAR MEDIAL MENISCUS KNEE CURRENT, LEFT. AGGRAVATION OF PRE-EXISTING DEGENERATIVE JOINT DISEASE LEFT KNEE; AGGRAVATION OF PRE-EXISTING DEGENERATIVE DISC DISEASE L2-L3, L3-L4 AND L5-S1; DEGENERATIVE DISC DISEASE L4-L5 LUMBAR.

{¶14} 2. On July 10, 2008, relator's treating physician, Scott A. Sesny, D.C., completed a C-84 certifying that relator was temporarily totally disabled from October 5, 2005 through an estimated return-to-work date of October 1, 2008 while she recovered from knee surgery. In response to a request from the employer's managed care organization regarding relator's status, Dr. Sesny submitted a letter dated October 27, 2008 indicating as follows:

I am writing this letter in response to the status of the patient's maximum medical improvement. I feel that the patient had reached her MMI on September 9, 2008.

{¶15} 3. In an order mailed October 31, 2008, the Bureau of Workers' Compensation ("BWC"), sent relator a letter informing her as follows:

Payment of temporary total compensation is terminated on 09/08/2008. The physician of record has submitted a written statement that the injured worker has reached maximum medical improvement for the allowed conditions.

This decision is based on:  
Letter from Dr. Sesney [sic], treating physician, that finds the IW has reached MMI on 9-9-2008.

Ohio law requires that BWC allow the injured worker or employer 14 days from the receipt of this order to file an appeal. \* \* \*

If the injured worker or the employer disagrees with this decision, either may file an appeal within 14 days of receipt of this order. \* \* \*

{¶16} 4. Relator did not file an appeal from the BWC's order finding MMI as of September 9, 2008.

{¶17} 5. In an order mailed November 19, 2008, the BWC informed relator of the following:

The Ohio Bureau of Workers' Compensation (BWC) has made the following decision: The claimant has received benefits to which he or she is not entitled and is found to be overpaid.

The physician of record has submitted a written statement that the claimant has reached maximum medical improvement (MMI) effective 09/09/2008, for the allowed conditions. Temporary total compensation was paid after that date.

This decision is based on:

IW was found to have reached MMI on 9-9-08 by the physician of record. BWC rules and guidelines. BWC can recover your overpayment from future awards to which you become entitled. You will be notified in writing when this happens.

{¶18} 6. Relator did file an appeal from the BWC's order mailed November 19, 2008.

{¶19} 7. Relator's appeal was heard before a district hearing officer ("DHO") on February 6, 2009 at which time the BWC's order affirmed. Specifically, the DHO stated:

It is ordered that the injured worker was found to have reached a level of maximum medical improvement effective 9/8/2008 based on the opinion of the physician of record for the injured worker in this claim. An order was issued by the Bureau of Workers' Compensation dated 10/31/2008 providing that temporary total disability compensation is terminated effective 9/8/2008 as a result of the physician of

records opinion of maximum medical improvement. No appeal was filed by the attorney of record for the injured worker nor by the injured worker to this order. Temporary total disability compensation was paid by the Bureau of Workers' Compensation for the dates 9/9/2008 through 9/30/2008. This specific period is subsequent to the effective date of maximum medical improvement and is therefore overpaid.

This overpayment shall be recouped pursuant to Bureau of Workers' Compensation rules.

{¶20} 8. Relator appealed and the matter was heard before a staff hearing officer ("SHO") on March 13, 2009. The SHO affirmed the finding of an overpayment and modified the prior DHO order to reflect that the overpayment would be recouped pursuant to R.C. 4123.511(K).

{¶21} 9. Relator's further appeal was refused by order of the commission mailed March 31, 2009.

{¶22} 10. Thereafter, relator filed the instant mandamus action in this court.

#### Conclusions of Law:

{¶23} In order for this court to issue a writ of mandamus as a remedy from a determination of the commission, relator must show 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.

{¶24} For the reasons that follow, it is this magistrate's decision that this court deny relator's request for a writ of mandamus.

{¶25} TTD compensation awarded pursuant to R.C. 4123.56 has been defined as compensation for wages lost where a claimant's injury prevents a return to the former position of employment. Upon that predicate, TTD compensation shall be paid to a claimant until one of four things occurs: (1) claimant has returned to work; (2) claimant's treating physician has made a written statement that claimant is able to return to the former position of employment; (3) when work within the physical capabilities of claimant is made available by the employer or another employer; or (4) claimant has reached MMI. See R.C. 4123.56(A); *State ex rel. Ramirez v. Indus. Comm.* (1982), 69 Ohio St.2d 630.

{¶26} Ohio Adm.Code 4121-3-32(B) explains further as follows:

(1) Temporary total disability may be terminated by a self-insured employer or the bureau of workers' compensation in the event of any of the following:

(a) The employee returns to work.

(b) The employee's treating physician finds that the employee is capable of returning to his former position of employment or other available suitable employment.

(c) The employee's treating physician finds the employee has reached maximum medical improvement.

{¶27} In the present case, relator contends that the commission abused its discretion by terminating her TTD compensation as of the date her treating physician

opined that she had reached MMI instead of the date of the hearing before the DHO.

Relator's cites *State ex rel. Russell v. Indus. Comm.* (1998), 82 Ohio St.3d 516 in support.

The court in *Russell* at 519 stated:

This court has unwaveringly held (1) that continuing TTD compensation may not be terminated prior to a hearing before a commission hearing officer so long as claimant's attending physician continues to certify TTD, (2) that the hearing officer may not terminate the claimant's TTD retroactive to a date prior to the date of the hearing, (3) that claimant is entitled to all compensation paid to the date of the hearing, and (4) that any eventual discounting of the attending physician's reports certifying TTD does not transform those payments into a recoupable overpayment. *State ex rel. MTD Products, Inc. v. Indus. Comm.* (1996), 76 Ohio St.3d 593; *State ex rel. Crabtree v. Ohio Bur. of Workers' Comp.* (1994), 71 Ohio St.3d 504; *AT & T Technologies, Inc. v. Indus. Comm.* (1993), 68 Ohio St.3d 55; *State ex rel. Jeep Corp. v. Indus. Comm.* (1991), 62 Ohio St.3d 64; *State ex rel. McGinnis v. Indus. Comm.* (1991), 58 Ohio St.3d 81; *State ex rel. Youghiogheny & Ohio Coal Co. v. Kohler* (1990), 55 Ohio St.3d 109.

{¶28} In *Russell*, the claimant was receiving TTD compensation. In March 1995, an examining physician opined that the claimant's allowed condition had reached MMI. Based upon that report, a hearing was held before a DHO in July 1995. At that time, the DHO terminated claimant's compensation as of March 1995, the date of the medical examination. Thereafter, the commission also found an overpayment.

In *Russell*, the court stated as follows in the syllabus:

The appropriate date on which to terminate disputed temporary total disability compensation on the basis of maximum medical improvement is the date of the termination hearing, and the commission may not declare an overpayment for payments received by the claimant before that date.

{¶29} Relator also cites *State ex rel. Spurgeon v. Indus. Comm.* (1998), 82 Ohio St.3d 583, wherein the claimant's treating physician issued a report indicating that claimant had reached MMI while, at the same time, continuing to submit C-84 forms indicating that claimant was temporarily totally disabled. The court determined that, based on the treating physician's conflicting statements, the issue of MMI was disputed. As such, the court held that the proper date to terminate the claimant's TTD compensation was the date of the hearing and not the date of the doctor's report.

{¶30} Neither *Russell* nor *Spurgeon* apply to the facts of this case. As above noted, in both *Russell* and *Spurgeon*, the issue of whether the claimants had reached MMI was in dispute. In *Russell*, the treating physician certified that claimant was still temporarily and totally disabled and an examining physician opined that the claimant had reached MMI. In *Spurgeon*, the claimant's treating physician issued contradictory opinions by opining that claimant had reached MMI while, at the same time, continuing to certify that claimant was temporarily totally disabled. In the present case, there is no dispute: relator's treating physician opined that she reached MMI on September 9, 2008.

{¶31} Dr. Sesny completed a C-84 in July 2008 certifying that relator was disabled from October 5, 2005 through an **estimated** return-to-work date of October 1, 2008. On October 27, 2008, and in response to inquiries, Dr. Sesny stated that relator had reached MMI on September 9, 2008. Unlike *Spurgeon*, Dr. Sesny did not complete multiple C-84 forms certifying continued disability after opining that relator had reached MMI. Instead, he completed one C-84 in July 2008 certifying TTD until an estimated return-to-work date of October 1, 2008. When asked, Dr. Sesny indicated relator had actually reached MMI

September 9, 2008. This does not constitute a dispute. Further, unlike *Russell*, there is no conflicting medical evidence from another doctor.

{¶32} This situation falls squarely under *Ramirez* and Ohio Adm.Code 4121-3-32(B)(1)(c). Pursuant thereto, TTD compensation may be terminated when the employee's treating physician finds that the employee has reached MMI. That is exactly what happened here.

{¶33} Because there was no conflicting medical evidence in the record, the commission did not abuse its discretion by finding that relator had reached MMI as of September 8, 2008 based upon the report of her treating physician, Dr. Sesny. The commission's finding that TTD compensation paid beyond the date was overpaid does not constitute an abuse of discretion. As such, relator has not demonstrated the commission abused its discretion and this court should deny her request for a writ of mandamus.

/s/ Stephanie Bisca Brooks  
STEPHANIE BISCA BROOKS  
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).