

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

State of Ohio ex rel. Jodi D. Wasinski, :  
Relator, :  
v. : No. 09AP-875  
Industrial Commission of Ohio : (REGULAR CALENDAR)  
and Peco II, Inc., :  
Respondents. :  
:

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D E C I S I O N

Rendered on September 23, 2010

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*Jetta Mencer*, for relator.

*Richard Cordray*, Attorney General, and *Colleen C. Erdman*,  
for respondent Industrial Commission of Ohio.

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IN MANDAMUS  
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

CONNOR, J.

{¶1} Relator, Jodi D. Wasinski, commenced this original action requesting a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its order exercising continuing jurisdiction under R.C. 4123.52 and denying her request for temporary total disability ("TTD") compensation from January 20, 2001 through October 15, 2006.

{¶2} This court referred the matter to a magistrate pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The parties filed a stipulated record and merit briefs. The magistrate issued a decision, including findings of fact and conclusions of law, which is appended to this decision. In the decision, the magistrate recommended that this court deny relator's request for a writ.

{¶3} Relator has filed timely objections to the magistrate's decision. The commission has filed a memorandum in support of the magistrate's decision. The matter is therefore before this court for a full, independent review.

{¶4} In its objections, relator presents the same substantive arguments previously raised before and cogently addressed by the magistrate. Specifically, relator argues that the commission abused its discretion by exercising continuing jurisdiction and by denying TTD compensation from January 20, 2001 onward. With regard to these issues, we agree with the thorough and well-reasoned analysis set forth in the appended decision.

{¶5} After an examination of the magistrate's decision, as well as an independent review of the record and relevant law, we conclude that the magistrate has sufficiently discussed and determined the issues raised by relator. We therefore overrule relator's objections to the magistrate's decision and adopt the appended decision as our own, including the findings of fact and conclusions of law set forth therein. As a result, we deny relator's request for a writ of mandamus.

*Objections overruled; writ denied.*

TYACK, P.J., and McGRATH, J., concur.

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**A P P E N D I X**

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Jodi D. Wasinski,	:	
	:	
Relator,	:	
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v.	:	No. 09AP-875
	:	
Industrial Commission of Ohio	:	(REGULAR CALENDAR)
and Peco II, Inc.,	:	
	:	
Respondents.	:	
	:	

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

Rendered on February 24, 2010

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*Jetta Mencer*, for relator.

*Richard Cordray*, Attorney General, and *Colleen C. Erdman*,  
for respondent Industrial Commission of Ohio.

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IN MANDAMUS

{¶6} Relator, Jodi D. Wasinski, 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 exercising continuing jurisdiction under R.C. 4123.52 awarding temporary total disability ("TTD") compensation from October 16, 2006 and

continuing, but denying her request for TTD compensation from January 20, 2001 through October 15, 2006. Relator argues that she is entitled to compensation from January 20, 2001, and continuing.

Findings of Fact:

{¶7} 1. Relator sustained a work-related injury on January 20, 2001, and her workers' compensation claim was originally allowed for "contusion to scalp and left knee; cervicothoracic strain and lumbosacral strain."

{¶8} 2. On March 28, 2001, relator filed a C-86 motion asking that her claim be additionally allowed for "post-concussion syndrome." Relator also requested TTD and wage loss compensation.

{¶9} 3. Relator's motion was heard before a district hearing officer ("DHO") on April 17, 2001. At that time, relator's counsel withdrew her request for TTD compensation and wage loss compensation. Thereafter, the DHO denied the motion and disallowed her claim for "post-concussion syndrome."

{¶10} 4. Relator appealed and the matter was heard before a staff hearing officer ("SHO") on May 29, 2001. The SHO affirmed the prior DHO's order.

{¶11} 5. On February 7, 2003, relator filed another C-86 asking that her claim be allowed for the following conditions: "Major Depression single episode, Moderate Conversion Disorder," "Deferred, with dependent traits," "Multiple pain sites and neurological symptoms," and "pain symptoms, neurological symptoms, moderate."

{¶12} 6. Relator's motion was heard before a DHO on July 23, 2003, and was denied.

{¶13} 7. Relator appealed and the matter was heard before an SHO on September 15, 2003. Following the hearing, relator's motion was denied.

{¶14} 8. Relator appealed further and in an order mailed October 11, 2003, the commission refused her appeal.

{¶15} 9. On May 12, 2006, relator filed another C-86 asking that her claim be allowed for "postural tachycardia syndrome and autonomic neuropathy."

{¶16} 10. Relator's motion was heard before a DHO on August 11, 2006, and was granted.

{¶17} 11. The employer filed an appeal and the matter was heard before an SHO on September 20, 2006. The SHO vacated the prior DHO's order and denied relator's request for the additional allowances.

{¶18} 12. Relator's further appeal was refused by order of the commission mailed October 12, 2006.

{¶19} 13. An ex parte order mailed November 29, 2006, provides: "It is hereby ordered that the request for Temporary Total compensation (C84) filed 10-17-06 and 10-12-06 be withdrawn at their request, per letter dated 11/21/06."

{¶20} 14. Relator filed an appeal to the Crawford County Court of Common Pleas regarding the disallowance of her claim for "postural tachycardia syndrome ["POTS"] and major depression, single episode." In a judgment entry dated June 2, 2008, it was determined that relator's workers' compensation claim would be allowed for the additional conditions of "postural tachycardia syndrome and major depression, single episode."

{¶21} 15. On July 15, 2008, relator filed a C-86 requesting the payment of TTD compensation from January 21, 2001, and continuing based on the C-84 signed by

Robert Jones, M.D., his office notes, and the judgment entry granting the additional allowances.

{¶22} 16. Dr. Jones' office notes are contained at pages 336 through 411 in reverse chronological order beginning December 2001 through June 2004. The magistrate has reviewed each of those records. Beginning in December 2001, relator complained that she had been blacking out, had headaches, numbness in both arms and legs, sore neck, had poor concentration and was easily confused. Dr. Jones noted that her EEGs, brain MRI, and spine MRI were all reportedly normal. Under the title "Problem List," Dr. Jones noted "tension headache [and] depressive disorder nec." Relator continued to see Dr. Jones on a fairly regular basis with relatively little change. In April 2005, Dr. Jones listed the following problems: "tension headache," "depressive disorder nec," "esophageal reflux," "allergic rhinitis nos," "cervical spondylosis," "sprain of neck," "myalgia and myositis nos," "lumbosacral spondylosis," "syncope and collapse," "migraine variant intractable," and "central origin vertigo." In July 2005, it appears that relator was experiencing headaches less often, but they were more severe. Throughout the years, in noting her current problems, Dr. Jones continued to list numerous conditions which were not allowed in her workers' compensation claim. In July 2006, Dr. Jones listed the following diagnoses: "orthostatic hypotension," "autonomic neurophy [sic] in other dis," "migraine variant intractable," "central origin vertigo," "lumbosacral spondylosis," "myalgia and myositis nos," "cervical spondylosis," and "depressive disorder nec." In the records from her July 27, 2007 office visit, Dr. Jones noted work restrictions for the first time indicating: "The patient may not return to work at this time (7/27/07)."

{¶23} 17. Relator's July 15, 2008 motion requesting TTD compensation beginning January 21, 2001, was heard before a DHO on September 9, 2008. The DHO awarded TTD compensation beginning October 12, 2004, and continuing based on the conditions "postural tachycardia syndrome and major depression." The DHO based the award on the October 12, 2006 C-84 from relator alleging disability from the newly allowed conditions and notes from Dr. Jones, specifically, August 26, 2006 and July 29, 2008. The DHO denied relator's request from February 25, 2001, the date of a last payment, through October 11, 2006. Because relator had not filed any motions or C-84s claiming any disability from that time, the DHO concluded that the statute of limitations barred such payment.

{¶24} 18. Relator appealed and the matter was heard before an SHO on October 17, 2008. The SHO vacated the prior DHO's order and granted relator's request for TTD compensation beginning January 12, 2001, and continuing. The DHO reasoned:

The FROI-1 dated 5/2/2001 and imaged on 5/7/2001 lists the name and body parts fulfilling the requirements of 4123.84 ORC. This application is signed by the injured worker and Dr. Stephen R. Bernie. It indicates that the incident will cause the claimant to miss more than seven days from work and is, therefore, a lost time application. The FROI-1 states "Benefits Application." The C-84 imaged on 10-12-2006 (front) and 10-17-2006 (back) signed by Dr. Robert Jones of the Cleveland Clinic on 8-22-2006 supports temporary total compensation from 1/21/2001.

{¶25} 19. Relator's further appeal was refused by order of the commission mailed November 20, 2008.

{¶26} 20. Thereafter, the administrator of the Ohio Bureau of Workers' Compensation ("BWC") filed a request for continuing jurisdiction. The commission found that the administrator had presented evidence of sufficient probative value regarding a

clear mistake of fact and law. The commission noted that the administrator alleged the following error:

Specifically, it is alleged that the Staff Hearing Officer misapplied Industrial Commission policy, R.C. 4123.52., and the rule of law from Specht v. BP Am., Inc., (1999), 86 Ohio St.3d 29 when the Staff Hearing Officer ordered temporary total disability compensation paid for a period more than two years prior to the date compensation was first requested.

{¶27} 21. Following a hearing on February 12, 2009, the commission took the matter under advisement. Ultimately, the commission vacated the prior SHO's order. The commission did grant relator TTD compensation from October 16, 2006 through October 15, 2008, based upon a C-84 completed by Teresa A. Egan, Ph.D., dated October 15, 2008, which was based on the allowed psychological condition in the claim.

{¶28} 22. Thereafter, the commission denied relator's request for TTD compensation from January 20, 2001 through October 15, 2006. The commission identified the various evidence that relator argued supported her request for the payment of TTD compensation and explained its rationale for finding that the evidence was not sufficient. The commission began its explanation:

The Injured Worker's request for temporary total disability compensation from the date of injury, 01/20/2001 through 10/15/2006, is denied. R.C. 4123.52, addressed in Hearing Officer Manual Memo I2, provides that the Commission shall not "award compensation for a back period in excess of two years prior to the date of filing application therefor." As further enumerated below, the Commission finds no valid application for compensation, or sufficient, contemporaneous medical evidence to support an application for temporary total disability compensation, until Dr. Egan's 10/15/2008 C-84.

The usual application for temporary total disability compensation is the C-84 application. A C-86 motion, or other similar document is sometimes used to request temporary



total disability compensation, usually accompanied by a C-84 application. The Commission further recognizes, that under some circumstances, an application for allowance of additional conditions may be considered a request for temporary total disability compensation. See State ex rel. Gen. Refractories Co. v. Indus. Comm. (1989), 44 Ohio St.3d 82, State ex rel. Garrett v. Indus. Comm., 96 Ohio St.3d 60, 2002-Ohio-3533, and State ex rel. Alston v. Indus. Comm., 2007 WL 1334526 (Ohio App. 10 Dist.), 2007-Ohio-2185. Generally, the manner in which the application is characterized by the parties will determine whether the application will be treated as a request for compensation.

Injured Worker's counsel directs the Commission to several documents in the file, and argues that they be construed as applications for compensation. Specifically, in addition to the FROI-1 filed 05/07/2001, the Injured Worker filed four (4) C-86 motions: 03/29/2001 (request for additional allowances of post concussion syndrome, temporary total, and wage loss compensation); 02/07/2003 (request for additional allowance of major depression single episode, moderate conversion disorder, deferred with dependent traits, multiple pain sites and neurological symptoms, and pain symptoms, neurological symptoms, moderate); 05/12/2006 (request for additional allowance of postural tachycardia syndrome (POTS) ); and 07/15/2008 (request for temporary total at issue at today's hearing). With the exception of the 07/15/2008 request, none of the documents can be relied on to support a retroactive award of temporary total disability compensation.

{¶29} 23. Thereafter, the commission explained why the various documents did not support the payment of TTD compensation:

[A.] The Staff Hearing Officer relied on the FROI-1 to support payment of temporary total disability compensation retro-active to the date of injury. The Commission rejects this finding for two reasons. First, the medical evidence cited in the FROI-1 to support temporary total disability compensation includes post concussion syndrome, a condition specifically denied by the Court. The Commission finds that pursuant to State ex rel. Jackson Tube Services, Inc. v. Indus. Comm. (2003), 99 Ohio St.3d 1, an award of temporary total disability compensation cannot be based, even in part, on non-allowed conditions. Second, inasmuch

as the claim was already allowed when the FROI-1 was filed, the FROI-1 is duplicative of the C-86 motion for additional allowances, temporary total disability compensation, and wage loss compensation filed 03/29/2001. As set forth below, that request for temporary total disability compensation was specifically withdrawn.

[B.] The C-86 motion filed 03/29/2001 was considered with the appeal of the allowance of the claim, and withdrawn, as reflected by the District Hearing Officer order issued 04/20/2001. The District Hearing Officer order was affirmed by the Staff Hearing Officer order issued 06/01/2001 which again reflects the Injured Worker's withdrawal of the request for compensation. As set forth above, the FROI-1 was filed 05/07/2001 and was essentially a duplicate request for compensation which the Commission finds withdrawn as reflected by the 06/01/2001 Staff Hearing Officer order.

[C.] Similarly, the Ex Parte Order issued 11/29/2006 reflects the Injured Worker's withdrawal of any request for compensation which may have been supported by the 05/12/2006 motion, including the C-84 dated 10/17/2006, which appears to support the additional allowance requested by the 05/12/2006 motion. The Commission cannot now construe the FROI-1, the 03/29/2001 motion, or the 05/12/2006 motion as viable requests for compensation because the Injured Worker specifically withdrew those requests.

[D.] Prior to the filing of the C-86 motion on 02/07/2003, the Injured Worker submitted five (5) C-84s, none of which can be relied upon to award temporary total disability compensation. The C-84s dated 06/28/2001 and 08/07/2001 from Stephen Bernie, M.D., list a disallowed condition (post concussion syndrome) and unrelated clinical findings (headaches, seizures, and blackouts). As set forth above, an award of temporary total disability compensation cannot be based, even in part, on non-allowed conditions. See Jackson Tube. The C-84 dated 06/18/2001 from Mark Nitschka, D.C., indicates the Injured Worker is capable of returning to work at her former position of employment.

[E.] The C-84 from M. Gottschling, D.C., filed 10/01/2001, is incomplete and more importantly, inconsistent with his treatment notes. The doctor's signature and date are not legible, Dr. Gottschling provides no estimated return to work date, and the Injured Worker's current status is described as "unknown." The C-84 certifies temporary total disability

compensation from 03/13/2001 to 05/07/2001 and cites only to the allowed conditions of cervical sprain and thoracic sprain; however, a review of his treatment notes over the same period indicates a diagnosis of post concussion syndrome, disallowed in the claim, as well as unrelated findings of headaches and blackouts. Furthermore, Dr. Gottschling submitted a C-9 dated 03/13/2001 requesting a neurological consultation for the diagnosed post concussion syndrome. Therefore, the C-84 cannot be relied on to support payment of temporary total disability compensation pursuant to State ex rel. Genuine Parts Company v. Indus. Comm. (2005), 160 Ohio App.3d 99, because Dr. Gottschling's notes reveal that the Injured Worker's impairment results at least in part from the disallowed post concussion syndrome. See Jackson Tube. Finally, the Commission notes that the Injured Worker has not submitted a medical report from Dr. Gottschling which addresses the inconsistency in the medical evidence. Accordingly, the Commission finds the C-84 and treatment notes of Dr. Gottschling are equivocal at best, and may not be relied on to support the payment of temporary total disability compensation pursuant to State ex rel. Eberhardt v. Flxible Co. (1994), 70 Ohio St.3d 649. The last C-84 filed during this period, from Robert Jones, M.D., dated 01/08/2002, includes the disallowed post concussion syndrome. See Jackson Tube.

[F.] The C-86 motion filed 02/07/2003 was supported by the 09/25/2001 report from Jeff[er]y Hutzler, M.D., who opined major depression and conversion disorder prevented the Injured Worker from returning to work at her former position of employment. Such evidence could be construed as a request for compensation consistent with Gen. Refractories, however, the Injured Worker thereafter failed to submit any other evidence that the psychological condition remained temporarily and totally disabling until 10/16/2008. In addition, it appears that the 09/25/2001 report resulted from a single office visit of that date, and cannot be considered "some evidence" to support temporary total disability compensation for any period prior to Hutzler. The Commission therefore rejects the 09/25/2001 report of Dr. Hutzler. Lacking contemporaneous and competent medical evidence of temporary total disability during this seven year period, the Commission finds temporary total disability compensation not payable until two years prior to the filing of Dr. Egan's C-84 on 10/16/2008, consistent with R.C. 4123.52.

[G.] Finally, in addition to the C-84s discussed above, on file are four (4) subsequent C-84s completed by Dr. Jones dated 07/10/2008, 07/29/2008, 12/16/2008, and 02/02/2009. Like the C-84 he completed on 01/08/2002, Dr. Jones lists non-allowed conditions on the C-84 dated 07/01/2008 and therefore temporary total disability compensation is not payable pursuant to Jackson Tube. The latter C-84s dated 07/29/2008, 12/16/2008, and 02/02/2009 certify the correct allowed conditions as temporarily and totally disabling; however, Dr. Jones has not clarified that he is aware of the allowed conditions or that these conditions solely disable the Injured Worker. Accordingly, the Commission finds the C-84s of Dr. Jones are equivocal pursuant to Eberhardt and further finds no competent and reliable evidence that POTS is temporarily and totally disabling.

{¶30} The payment of compensation to relator was based upon the allowed psychological condition and the medical evidence presented by Dr. Egan. The magistrate notes that the payment of compensation from October 16, 2006 through October 15, 2008, overlaps the C-84s filed by Dr. Jones. As such, even though some of them are unreadable, they cannot improve relator's position since she is being paid TTD compensation during that same time.

{¶31} 24. Thereafter, relator filed the instant mandamus action in this court.

#### Conclusions of Law:

{¶32} 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.

{¶33} 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.

{¶34} Relator makes two arguments in the present case. First, relator contends that the commission abused its discretion by exercising its continuing jurisdiction under R.C. 4123.52. Relator points out that, in the interlocutory order, the commission cited one reason for exercising its continuing jurisdiction and then, after the hearing, the commission provided a different explanation. Relator also contends that the commission abused its discretion by finding that earlier medical evidence did not support the payment of TTD compensation. For the reasons that follow, this magistrate disagrees.

{¶35} Relator's first argument is that the commission abused its discretion by providing one explanation for exercising its continuing jurisdiction in its interlocutory order

and then, after a full hearing, relying on a different reason. In the interlocutory order, the commission stated:

Specifically, it is alleged that the Staff Hearing Officer misapplied Industrial Commission policy, R.C. 4123.52., and the rule of law from Specht v. BP Am., Inc., (1999), 86 Ohio St.3d 29 when the Staff Hearing Officer ordered temporary total disability compensation paid for a period more than two years prior to the date compensation was first requested.

Following the hearing, the commission provided the following rationale:

02/26/2009 – After further review and discussion, it is the finding of the Industrial Commission that the Administrator has met her burden of proving that the Staff Hearing Officer order, issued 10/29/2008, contains a clear mistake of law of such character that remedial action would clearly follow. Specifically, the Staff Hearing Officer mistakenly relied on the FROI-1, First Report of Injury, to award temporary total disability compensation for a period more than two years prior to the date of the request for compensation, contrary to R.C. 4123.52. Therefore, the Commission exercises continuing jurisdiction pursuant to R.C. 4123.52 and State ex rel. Nicholls v. Indus. Comm. (1998), 81 Ohio St.3d 454, State ex rel. Foster v. Indus. Comm. (1999), 85 Ohio St.3d 320, and State ex rel. Gobich v. Indus. Comm. (2004), 103 Ohio St.3d 585, in order to correct this error. The Administrator's request for reconsideration, filed 11/24/2008, is granted. The Administrator's appeal, filed 10/31/2008, from the Staff Hearing Officer order, issued 10/29/2008, is granted to the extent of this order. It is further ordered that the Staff Hearing Officer order, issued 10/29/2008, is vacated.

{¶36} Pursuant to R.C. 4123.52, "[t]he jurisdiction of the industrial commission and the authority of the administrator of workers' compensation over each case is continuing, and the commission may make such modification or change with respect to former findings or orders with respect thereto, as, in its opinion is justified." In *State ex rel. B & C Machine Co. v. Indus. Comm.* (1992), 65 Ohio St.3d 538, 541-542, the court

examined the judicially-carved circumstances under which continuing jurisdiction may be exercised, and stated as follows:

{¶37} R.C. 4123.52 contains a broad grant of authority. However, we are aware that the commission's continuing jurisdiction is not unlimited. See, e.g., *State ex rel. Gatlin v. Yellow Freight System, Inc.* (1985), 18 Ohio St.3d 246, 18 OBR 302, 480 N.E.2d 487 (commission has inherent power to reconsider its order for a reasonable period of time absent statutory or administrative restrictions); *State ex rel. Cuyahoga Hts. Bd. of Edn. v. Johnston* (1979), 58 Ohio St.2d 132, 12 O.O.3d 128, 388 N.E.2d 1383 (just cause for modification of a prior order includes new and changed conditions); *State ex rel. Weimer v. Indus. Comm.* (1980), 62 Ohio St.2d 159, 16 O.O.3d 174, 404 N.E.2d 149 (continuing jurisdiction exists when prior order is clearly a mistake of fact); *State ex rel. Kilgore v. Indus. Comm.* (1930), 123 Ohio St. 164, 9 Ohio Law Abs. 62, 174 N.E. 345 (commission has continuing jurisdiction in cases involving fraud); *State ex rel. Manns v. Indus. Comm.* (1988), 39 Ohio St.3d 188, 529 N.E.2d 1379 (an error by an inferior tribunal is a sufficient reason to invoke continuing jurisdiction); and *State ex rel. Saunders v. Metal Container Corp.* (1990), 52 Ohio St.3d 85, 86, 556 N.E.2d 168, 170 (mistake must be "sufficient to invoke the continuing jurisdiction provisions of R.C. 4123.52"). Today, we expand the list set forth above and hold that the Industrial Commission has the authority pursuant to R.C. 4123.52 to modify a prior order that is clearly a mistake of law.

\* \* \*

{¶38} Relator has cited no case law or statute which would bind the commission to only considering the original reason for exercising its continuing jurisdiction. As a practical matter, the interlocutory order was mailed in December 2008 and the hearing

was held in February 2009. As the interlocutory order states, the administrator presented sufficient, probative evidence that the SHO order contained a clear mistake of law and/or fact. The commission then identified the administrator's argument. However, following the hearing, the commission recognized a different mistake of fact and/or law which warranted the exercise of its continuing jurisdiction.

{¶39} The magistrate finds that the commission did not abuse its discretion in this regard. Following the February 2009 hearing, the commission could have concluded that the SHO order did not contain a clear mistake of fact or law. The granting of a hearing, for whatever reason, as long as it is a good-faith reason, is sufficient for the commission to hold the hearing to make the final determination. That is why it is an interlocutory order—it is not final. As such, the commission was not bound to consider only the one argument raised by the administrator. Relator has not demonstrated the commission abused its discretion in this regard.

{¶40} Relator's real challenge is to the commission's interpretation of the medical evidence and the commission's conclusion that her medical evidence was not sufficient to support the payment of TTD compensation beginning January 20, 2001. In findings of fact No. 23, this magistrate set forth the commission's explanations for rejecting each piece of relator's evidence listing those explanations as A. through G. This magistrate's analysis of the commission's explanations follows:

#### **A. The FROI-1**

{¶41} A review of the FROI-1 signed May 2, 2001 by Stephen R. Bernie, M.D., relator last worked January 30, 2001. Further, as the commission noted, Dr. Bernie provided several diagnoses as causing relator's disability. Specifically, knee contusion,



post-concussion syndrome, cervical spine strain/sprain, dorsal spine strain/sprain, lumbar spine strain/sprain, and concussion/neck. The commission properly found that the FROI-1 does not support the payment of TTD compensation beginning January 20, 2001. Dr. Bernie listed nonallowed conditions. As the commission stated, an award of TTD compensation cannot be based, even in part, on nonallowed conditions. As such, the magistrate finds that this was not an abuse of discretion.

#### **B. The March 29, 2001 C-86**

{¶42} As previously indicated in the findings of fact, relator withdrew her March 29, 2001 C-86 from consideration. To the extent that relator did, arguably, have a motion which could have been interpreted as seeking the payment of TTD compensation filed and pending, relator withdrew that motion from consideration. As such, the commission did not abuse its discretion here.

#### **C. May 12, 2006 Motion; October 17, 2006 C-84**

{¶43} Again, as noted in the findings of fact, there is an ex parte order in the record indicating that relator withdrew any request for compensation which may have been supported by her May 12, 2006 motion. Again, to the extent that relator did have a motion pending which the commission could have considered, she withdrew it. It is not an abuse of discretion for the commission to refrain from reviving a motion relator herself withdrew.

#### **D. Five C-84s**

{¶44} Here, the commission points to the June 28 and August 7, 2001 C-84s signed by Dr. Bernie. The commission indicates that Dr. Bernie listed a disallowed condition (post-concussion syndrome and unrelated clinical findings, headaches,

seizures, and blackouts) as causing relator's disability. To a certain extent, the magistrate disagrees with this portion of the commission's order. On the June 28, 2001 C-84, Dr. Bernie listed the following allowed conditions being treated, which prevent relator from returning to work: "Sprain Lumbosacral," "Sprain of neck," and "Sprain thoracic region." While Dr. Bernie does indicate that he is also treating relator for post-concussion syndrome, Dr. Bernie did not list that as a condition disabling relator. Under his objective clinical findings, Dr. Bernie noted persistent headaches, back, neck, and left knee pain, numbness in arms, and dizziness. Under the subjective findings, Dr. Bernie noted back, neck, thoracic and left knee pain, blackouts, and seizures. The August 7, 2001 C-84 is virtually identical. As such, it appears that the commission incorrectly determined that Dr. Bernie was basing the allowed period of disability on nonallowed conditions. However, the commission also indicated that, in his June 18, 2001 C-84, Mark Nitschka, D.C., indicated that relator returned to her former position of employment on March 7, 2001. Dr. Nitschka's C-84 is based on the exact same allowed conditions which Dr. Bernie indicates were causing relator's disability. When considering all the evidence for this time period, the magistrate finds that the commission did not abuse its discretion in finding that, considered together, relator's evidence failed to support a period of disability based on these allowed conditions. Nothing in Dr. Bernie's C-84 would explain how relator would have been able to return to work on March 7, 2001, and then was again rendered disabled as of May 2, 2001. As such, in spite of the fact that the commission appears to have misinterpreted Dr. Bernie's C-84s, the evidence in the record for that time period is inconsistent and would not support the period of disability.

#### **E. October 1, 2001 C-84 from Dr. Gottschling**

{¶45} First, the commission points to the October 1, 2001 C-84 from Dr. M. Gottschling and indicates that it is inconsistent with his treatment notes. The magistrate has been through the record and there are no treatment notes from Dr. Gottschling to compare with the C-84. As such, the magistrate cannot say that the commission abused its discretion in concluding that it is inconsistent. Further, the March 13, 2001 C-9 requesting a neurological consultation for post-concussion syndrome is not in the record. However, the commission does criticize the C-84 because the doctor's signature and the date on which he signed are illegible. This is true. It is impossible to read the signature or the date. Further, the commission noted that Dr. Gottschling did not provide an estimated return-to-work date. This is also true. However, in reviewing the C-84, the magistrate notes that Dr. Gottschling has checked the box indicating that relator had been released to return to work May 7, 2001. Given the condition of the record, it is easy to see why the commission did not detect that there is an "x" in the box next to the word released; however, that box is marked. Based on the above, this magistrate cannot say that the commission abused its discretion in finding that this evidence did not support the requested period of compensation. This evidence also contradicts the C-84s of Drs. Bernie and Nitschka

#### **F. February 7, 2003 C-86; September 25, 2001 Hutzler Report**

{¶46} The commission found that relator's February 7, 2003 C-86 was supported by the September 25, 2001 report from Jeffery C. Hutzler, M.D. The commission correctly notes that Dr. Hutzler opined that relator was incapacitated from returning to her previous job from a psychiatric standpoint. As such, the commission correctly indicated that the February 7, 2003 C-86 could be construed as a request for TTD compensation.

However, as the commission noted, Dr. Hutzler attributes the period of disability to a nonallowed condition, specifically, conversion disorder. Dr. Hutzler stated: "Her Major Depressive Disorder, single, is modest and should respond to treatment. Her Conversion Disorder is disabling and represents a composite of many feelings of inadequacy resulting in tremendous secondary gain, mainly coming from her family, meeting many of her dependency needs." Because an award of disability cannot be based on a nonallowed condition, the commission properly found that this C-86 and the report of Dr. Hutzler did not support the payment of TTD compensation.

#### **G. Four Subsequent C-84s by Dr. Jones**

{¶47} Here, the commission considered C-84s completed by Dr. Jones from July and December 2008, and February 2009. In his July 10, 2008 C-84, Dr. Jones listed the following conditions as disabling: autonomic neuropathy, central origin vertigo, orthostatic hypotension, syncope, and POTS. His July 29, 2008 C-84 lists major depression, lumbosacral sprain, and some unreadable condition. On his February 16, 2008 C-84, Dr. Jones lists POTS, major depression, and some unreadable condition as causing relator's disability. In his August 24, 2008 C-84, Dr. Jones listed knee, thoracic sprain, neck sprain, lumbosacral sprain, symptoms involving cardiovascular system, rhythm disorder, and an unspecified disorder of autonomic neurological system. Finally, in his February 2, 2009 C-84, Dr. Jones listed POTS, major depression, and lumbosacral sprain as conditions disabling relator.

{¶48} As noted previously, relator's claim has been allowed for contusion to scalp and left knee, cervicothoracic strain and lumbosacral strain, POTS, major depression, single episode. Her claim has been disallowed for post-concussion syndrome, moderate

conversion disorder with deferred dependent traits and multiple pain sites and neurological symptoms, pain symptoms and neurological symptoms moderate, and autonomic neuropathy. Dr. Jones' July 10, 2008 C-84 lists autonomic neuropathy as one of the conditions causing relator's disability. Autonomic neuropathy is a nonallowed condition and cannot be used to support the payment of TTD compensation. Similarly, the August 24, 2008 C-84 lists nonallowed conditions including autonomic neuropathy. What remains are the February 16 and July 29, 2008 C-84s. Unfortunately, there are portions of those C-84s which this magistrate cannot read. However, even if the unreadable condition listed on the February 16, 2008 C-84 was an allowed condition and, as such, could support a period of TTD compensation, it is negated by the July 10 and August 24, 2008 C-84s, which list nonallowed conditions. Likewise, if the unreadable condition listed on the July 29, 2008 C-84 actually is an allowed condition, it is further negated by the August 24, 2008 C-84, which lists nonallowed conditions. That leaves the February 2, 2009 C-84, which does list solely allowed conditions as causing relator's disability. However, using this date would not be helpful for relator as it would only permit the payment of compensation back to February 2, 2007. Instead, the commission used the July 15, 2008 C-86 and awarded TTD compensation beginning October 16, 2006.

{¶49} In her brief, relator repeatedly argues that the commission ignored her C-86s/C-84s. This is not true. As the record indicates, relator withdrew several of her motions from consideration. It is not an abuse of discretion for the commission to not consider motions which have been withdrawn and nothing in this record would indicate that the commission ignored any of relator's evidence.

{¶50} Further, to a certain extent, relator argues that the commission simply did not understand the medical evidence. For example, the commission rejected evidence from Dr. Jones on grounds that he listed nonallowed conditions. Relator argues that many of these conditions were *symptoms* of POTS and not really nonallowed conditions. If relator is correct, that cannot be corrected by mandamus.

{¶51} Based on the foregoing, it is this magistrate's decision that relator has not demonstrated that the commission abused its discretion in denying her request for TTD compensation from January 20, 2001 through October 15, 2006, 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).