[Cite as *State ex rel. Henderson v. Artistic Granite & Marble, L.L.C.*, 2011-Ohio-5052.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Terry T. Henderson,	:	
Relator,	:	
v.	:	No. 10AP-715
Artistic Granite & Marble, L.L.C., Parkway Auto Wash, L.L.C., and Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on September 30, 2011

Clements, *Mahin & Cohen*, *L.P.A.*, *Co.*, *William E. Clements*, and *Paul A. Lewandowski*, for relator.

Michael DeWine, Attorney General, and *Stephen D. Plymale*, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

KLATT, J.

{¶1} Relator, Terry T. Henderson, commenced this original action in mandamus seeking an order compelling respondent, Industrial Commission of Ohio ("commission"), to vacate its order that denied relator's request to reconsider the start date for his award of permanent total disability ("PTD") compensation, and to order that PTD should begin February 5, 2009, instead of December 14, 2009.

{¶2} Pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth District Court of Appeals, we referred this matter to a magistrate who issued a decision, including findings of fact and conclusions of law, which is appended hereto. The magistrate found the commission did not abuse its discretion by relying on the medical report of Dr. Koppenhoefer and using the date of his report as the start date for relator's award of PTD compensation. Therefore, the magistrate has recommended that we deny relator's request for a writ of mandamus.

{¶3} Relator has filed objections to the magistrate's decision. In his first objection, relator argues that the magistrate erred in denying the requested writ of mandamus because the second staff hearing officer ("SHO") applied an incorrect legal standard. We disagree.

{¶4} This case involves two SHO orders. The first order granted relator PTD based upon Dr. Koppenhoefer's report. The SHO issuing the first order used the date of Dr. Koppenhoefer's report as the start date of relator's PTD compensation. Thereafter, relator filed a request to reconsider that start date based upon two reports from Dr. Mannava, which had been previously submitted to the first SHO but were not relied upon by the first SHO. A second SHO denied relator's request. The second SHO speculated that the first SHO did not rely on Dr. Mannava's reports (which would have supported an earlier PTD start date) because the reports were inconsistent. Relator contends that Dr. Mannava's reports were not inconsistent and, therefore, the rationale cited by the second SHO was legally flawed.

{¶5} As the magistrate points out, the argument relator advances in his first objection is essentially irrelevant. The first SHO cited the evidence upon which he relied

(Dr. Koppenhoefer's report) and explained his reasoning for granting PTD beginning December 14, 2009. The first SHO was not required to explain the reasons he did not rely upon other evidence, including Dr. Mannava's reports. In denying relator's request to reconsider the start date for PTD, the second SHO speculated on what those reasons might have been. That speculation is of no consequence. Dr. Koppenhoefer's report is some evidence supporting the start date for relator's PTD. Relator has not challenged that evidence here. Therefore, relator has not shown that the commission abused its discretion in denying his request to reconsider the PTD start date. Accordingly, we overrule relator's first objection.

{¶6} In his second objection, relator contends that the magistrate incorrectly analyzed *State ex rel. Consolidation Coal Co. v. Indus. Comm.*, 78 Ohio St.3d 176, 1997-Ohio-46, and *State ex rel. Sauder Woodworking Co. v. Indus. Comm.*, 10th Dist. No. 05AP-24, 2007-Ohio-3993. Relator contends that these cases support his contention that Dr. Mannava's reports are not inconsistent and should have been relied upon by the commission. For the same reasons noted above, this objection is flawed. Regardless of whether Dr. Mannava's reports are inconsistent, the first SHO relied upon Dr. Koppenhoefer's report. The first SHO was not required to explain why he did not rely on Dr. Mannava's reports. Therefore, the cases cited by relator and the second SHO's speculation regarding why the first SHO rejected Dr. Mannava's reports are of no consequence. Accordingly, we overrule relator's second objection.

{¶7} Following an independent review of this matter, we find that the magistrate has properly determined the facts and applied the appropriate law. Therefore, we adopt the magistrate's decision as our own, including the findings of fact. However, we note

that the magistrate's analysis of the cases that address whether inconsistent medical reports can constitute "some evidence" is unnecessary. Therefore, we adopt the magistrate's conclusions of law without that analysis. In accordance with the magistrate's decision, we deny relator's request for a writ of mandamus.

Objections overruled; writ of mandamus denied.

BRYANT, P.J., and TYACK, J., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Terry T. Henderson,	:	
Relator,	:	
v.	:	No. 10AP-715
Artistic Granite & Marble, L.L.C., Parkway Auto Wash, L.L.C., and Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on April 26, 2011

Clements, *Mahin & Cohen*, *L.P.A.*, *Co.*, *William E. Clements*, and *Paul A. Lewandowski*, for relator.

Michael DeWine, Attorney General, and *Stephen D. Plymale*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶8} Relator, Terry T. Henderson, 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 which denied relator's request to reconsider the start date for his award of permanent total disability ("PTD") compensation and ordering the commission to find that his award of compensation should begin on February 5, 2009, instead of December 14, 2009.

Findings of Fact:

{¶9} 1. Relator has sustained two work-related injuries while working for two separate employers and his workers' compensation claims have been allowed for the following conditions:

> 93-81618 SPRAIN LUMBOSACRAL; L1-2 HERNIATED NUCLEUS PULPOSUS; L4-5 HERNIATED NUCLEUS PULPOSUS; AGGRAVATION OF PRE-EXISTING DYSTHYMIC DISORDER; NEUROGENIC BOWEL AND BLADDER; AGGRAVATION OF PRE-EXISTING FACET ARTHRITIS AT L5-S1.
>
> 92-81097 LUMBOSACRAL STRAIN; HERNIATED DISC L4-5 AND L5-S1; LUMBAR FACET ARTHRITIS AND SPONDYLOSIS AT L4-5 AND L5-S1.

{¶10} 2. Relator has undergone several back surgeries as a result of the allowed condition in these two claims.

{¶11} 3. On February 5, 2009, relator's treating physician, V.P. Mannava, M.D., examined him, and on February 11, 2009, Dr. Mannava completed a C-84 certifying that relator was temporarily totally disabled from July 24, 2003 to an estimated return to work date of April 30, 2009. On that form, Dr. Mannava checked the box indicating that relator's back condition had not reached maximum medical improvement ("MMI") and indicated that he was recommending that relator undergo a pain management evaluation.

{¶12} 4. Apparently on the same day he examined relator, February 5, 2009, Dr. Mannava completed a form wherein he stated that, in his opinion, relator was permanently and totally disabled as a result of the allowed conditions in the two claims and that he was unable to participate in sustained remunerative employment. Dr. Mannava indicated that relator had significant ongoing pain, and instability in his lumbar sprain as a result of the allowed conditions and the surgeries which he had undergone.

With regard to relator's physical abilities, Dr. Mannava indicated that he could occasionally lift ten pounds, that he could walk between one and two hours during an eight-hour work day, and that he could walk without interruption for 20 minutes. With regard to sitting, Dr. Mannava indicated that relator could sit from between two to four hours during an eight-hour work day and that he could sit for one-half hour without interruption. He also indicated that relator could occasionally climb stairs provided there were handrails, and he could occasionally crouch and kneel. However, Dr. Mannava opined that relator could not balance nor stoop nor crawl. Dr. Mannava concluded by stating: "In addition to pain, instability in his spine—he is on narcotic analgesics, that prevents him from working around machinery, driving, etc. Due to bowel and bladder issues, he is limited where and how long he can go."

{¶13} 5. Apparently, the Bureau of Workers' Compensation ("BWC") had relator examined by Dr. Wunder because, on March 3, 2009, the BWC filed a motion to terminate relator's temporary total disability ("TTD") compensation. There is no report from Dr. Wunder in the stipulation of evidence.

{¶14} 6. The matter was heard before a district hearing officer ("DHO") on March 25, 2009 and was granted. The DHO relied on the February 4, 2009 report of Dr. Wunder and found that allowed physical condition had reached MMI.

{¶15} 7. Relator did not appeal the DHO's order finding that he had reached MMI.

{¶16} 8. In November 2009, relator filed an application for PTD compensation.

{¶17} 9. Relator was examined by Ron M. Koppenhoefer, M.D. In his December 14, 2009 report, Dr. Koppenhoefer provided his physical findings upon examination, identified the medical records which he reviewed, and ultimately concluded

that relator was incapable of performing work activities at this time related totally to the allowed conditions in his claim.

{¶18} 10. Relator's motion was heard before a staff hearing officer ("SHO") on February 22, 2010. The SHO relied exclusively on the report of Dr. Koppenhoefer to find that relator was entitled to PTD compensation based solely on the allowed physical conditions. Specifically, the SHO stated:

> The Injured Worker was examined at the request of the Industrial Commission for the recognized physical conditions in each claim by Dr. Ron Koppenhoefer on 12/14/2009. Dr. Koppenhoefer performed a physical examination of the Injured Worker and reviewed selected medical records from the claim file. Dr. Koppenhoefer stated that the Injured Worker has reached maximum medical improvement for the recognized physical conditions in each claim. He apportioned a 31% whole person impairment as a result of the physical conditions from these two claims. He concluded that the Injured Worker was incapable of work activity as a result of these physical conditions. Dr. Koppenhoefer noted that his clinical exam revealed pain in the back when performing the straight leg raise and stiffness noted when the Injured Worker was walking.
>
> * * *
>
> [T]he Hearing Officer finds that the recognized physical conditions in both claims restrict the Injured Worker's functional capacity to such an extent that he is unable to perform the activities of sustained remunerative employment.
>
> The Hearing Officer finds therefore that the Injured Worker is permanently and totally disabled. The Application for permanent and total disability, filed on 11/02/2009, is hereby granted.
>
> Permanent and total disability compensation is hereby awarded beginning 12/14/2009, the date of the report from Dr. Koppenhoefer, and to continue without suspension unless future facts or circumstances should warrant the stopping of the award; and that payment be made pursuant to Ohio Revised Code Section 4123.58(A). The Hearing Officer finds

> that this start date is appropriate because it is the date of the exam by Dr. Koppenhoefer which is the basis for the Hearing Officer's conclusion that the Injured Worker is permanently and totally disabled.
>
> Based upon the report of Dr. Koppenhoefer, it is found that the Injured Worker is unable to perform any sustained or [remunerative] employment solely as the result of the medical impairment caused by the allowed conditions. Therefore pursuant to State ex rel. Speelman v. Indus. Comm. (1992), 73 Ohio App. 3d 757, it is not necessary to discuss or analyze the Injured Worker's non-medical disability factors.
>
> The Hearing Officer orders that this award be allocated as follows:
>
> 75% of the award is to be paid under claim number 03-816181.
>
> 25% of the award is to be paid under claim number 92-81097.

{¶19} 11. Relator did not file an appeal from the SHO's order; instead, he filed a motion requesting that the start date for PTD compensation be changed.

{¶20} 12. Relator's motion was heard before an SHO on April 26, 2010 and was denied. The second SHO specifically noted that the first SHO relied exclusively on the December 14, 2009 report of Dr. Koppenhoefer. However, inasmuch as relator argued that the commission should have used the February 5, 2009 date of Dr. Mannava's report, the second SHO explained why, in his opinion, that report did not constitute some evidence:

> It is the finding of the Staff Hearing Officer that an Industrial Commission order was issued on 02/26/2010, which granted the Injured Worker permanent total disability compensation. The Staff Hearing Officer in the order started the permanent total disability as of 12/14/2009, which was the date of a report from Dr. Koppenhoefer. The report of Dr. Koppenhoefer was the sole medical report relied upon by the Staff Hearing Officer in granting the permanent total disability compensation. It is the finding of the Staff Hearing Officer

> that the Hearing Officer in the order issued on 02/26/2010 did not rely upon the report from Dr. Mannava dated 02/05/2009. It is the finding of this Hearing Officer that the opinion of Dr. Mannava regarding the Injured Worker's extent of disability, particularly whether the Injured Worker was permanently and totally impaired as a result of the allowed physical conditions, is contradicted by a C-84 report signed by Dr. Mannava on 02/11/2009. In the report dated 02/05/2009, Dr. Mannava found that the Injured Worker was permanently and totally impaired as a result of the allowed physical conditions. However, in a C-84 report, signed by Dr. Mannava on 02/11/2009, he opined that the Injured Worker had not reached maximum medical improvement for the allowed physical conditions and that the allowed physical conditions remained in a temporary status and continued to prevent the Injured Worker from returning to and performing his former position of employment. It is the finding of the Staff hearing Officer that Dr. Mannava's opinion in regard to the Injured Worker's extent of disability is equivocal and cannot be relied upon as some evidence in basis for determining the start date of a permanent total disability award.

{¶21} 13. Relator did not file an appeal from the second SHO order which denied his motion to change the start date for his award of PTD compensation.

{¶22} 14. Relator filed the instant mandamus action in this court challenging the commission's determination concerning the start date for his PTD compensation.

Conclusions of Law:

{¶23} In this mandamus action, relator contends that the commission abused its discretion when it determined that the February 5, 2009 report from Dr. Mannava opining that relator was permanently and totally disabled was inconsistent with his February 11, 2009 C-84 certifying that relator's allowed physical conditions had not reached MMI and that he was entitled to TTD compensation.

{¶24} It is this magistrate's decision that the commission did not abuse its discretion by relying on the medical report of Dr. Koppenhoefer and using the date of that report as the start date for relator's award of PTD compensation.

{¶25} The Supreme Court of Ohio has set forth three requirements which must be met in establishing a right to a writ of mandamus: (1) that relator has a clear legal right to the relief prayed for; (2) that respondent is under a clear legal duty to perform the act requested; and (3) that relator has no plain and adequate remedy in the ordinary course of the law. *State ex rel. Berger v. McMonagle* (1983), 6 Ohio St.3d 28.

{¶26} Relator cites two cases in support of his argument: *State ex rel. Consolidation Coal Co. v. Indus. Comm.* (1997), 78 Ohio St.3d 176, and *State ex rel. Sauder Woodworking Co. v. Indus. Comm.*, 10th Dist. No. 05AP-24, 2007-Ohio-3993. The magistrate will discuss each of those cases separately. According to relator, those cases permit a doctor to simultaneously opine that a patient is not at MMI and is also permanently totally disabled.

{¶27} In *Consolidation Coal*, the commission had awarded PTD compensation to the claimant, Wayne R. McDaniel, based upon a combined-effects review conducted by Dr. J.J. Fierra. Consolidation Coal argued that Dr. Fierra improperly relied on the report of Thomas O. Hoover, Ph.D., who opined that McDaniel had a 20 percent permanent psychiatric impairment. Consolidation Coal argued that Dr. Hoover's report was so inconsistent that it should be disqualified from consideration. Specifically, Consolidation Coal alleged that "Hoover's assessment of a twenty percent permanent partial impairment contradicts his later statement that it was premature to declare that McDaniel had reached maximum medical improvement."

{¶28} In addressing Consolidation Coal's argument, the Supreme Court of Ohio reiterated that, while a non-examining physician is required to expressly accept all the findings of the examining physician, the non-examining physician is not required to accept the opinion drawn therefrom. As such, the court indicated that it was up to Dr. Fierra to decide which conclusions to draw from Dr. Hoover's report.

{¶29} Thereafter, the court addressed Consolidation Coal's argument that Dr. Hoover's assessment of a 20 percent permanent partial impairment was inconsistent with his later statement that it was premature to declare that McDaniel had reached MMI. Specifically, the court stated:

> [I]n *State ex rel. Kaska v. Indus. Comm.* (1992), 63 Ohio St.3d 743, 591 N.E.2d 235, this court specifically held that permanency is not necessarily indicative of maximum medical improvement. In other words, a person can sustain a permanent injury, of which there is a component that will not heal and a component that will heal. Accordingly, a report that indicates that the injury is permanent and that indicates that it is "premature to assume that maximum medical improvement has been achieved" is not inconsistent and can provide "some evidence" supporting a conclusion that someone is permanently disabled for purposes of workers' compensation.
>
> In the case at bar, Hoover unequivocally stated that McDaniel's injury was permanent, but also indicated that he might have some room to heal. This does not preclude a finding of permanency. The fact that Fierra found permanent impairment based on Hoover's prediction of twenty percent permanency does not render Fierra's conclusion unsupported simply because he might sustain some further recovery.

{¶30} Relator also cites this court's decision in *Sauder Woodworking*. In that case, the employer, Sauder Woodworking, challenged the commission's determination that the claimant, Paul D. Crocker, was entitled to an award of PTD compensation. Sauder Woodworking challenged the commission's reliance on reports by Dr. Allan G.

Clague arguing that "because Dr. Clague continued to be of the opinion that [Crocker]'s condition was improving and would continue to improve, those reports cannot support an award of PTD compensation."

{¶31} From this court's decision in *Sauder Woodworking*, the magistrate quotes the following portions of the decision describing Dr. Clague's report:

> In support of his application for PTD compensation, claimant submitted three new reports from Dr. Clague. In those reports dated June 26, November 24, 2003, and January 5, 2004, Dr. Clague continued to note that claimant was experiencing slight improvements in his ability to move his fingers. However, in spite of the fact that Dr. Clague continued to be of the opinion that claimant would experience some improvement in his condition, a review of his June 26, November 24, 2003, and January 5, 2004 reports indicate that claimant's condition essentially remained the same. * * * Dr. Clague's findings upon physical examination remained essentially unchanged. * * * Dr. Clague consistently noted that his objective with regards to his care of claimant continued to be attempting to reduce the intensity of his pain and discomfort as well as to reduce the swelling in his hands and to increase the mobility of his extremities. In spite of his goal, Dr. Clague noted, in all three reports:
>
> The prognosis in all such cases is poor and I expect this to be a totally disabling condition for the remainder of his lifetime. Certainly on the basis of his current clinical history and neurological examination Mr. Paul D. Crocker is totally and permanently medically disabled from carrying out any form of gainful employment for which he is qualified by education, training and/or experience. I never expect him to be able to carry out any type of gainful, productive activity throughout the remainder of his lifetime.

{¶32} In addressing Sauder Woodworking's argument, this court stated:

> Relator also argues that the reports of Dr. Clague upon which the commission relied in granting claimant PTD compensation do not constitute some evidence because Dr. Clague opined, in all three reports, that claimant's condition would continue to improve. Relator argues that, because Dr. Clague continued to opine that claimant's condition would improve, Dr. Clague

> was really saying that claimant's condition was not permanent. Therefore, relator contends that the commission abused its discretion by relying upon those reports.
>
> * * *
>
> The improvement that Dr. Clague was anticipating was minimal and directed more at increasing his comfort and not his functional abilities. The magistrate finds that this type of minimal improvement directed at increasing comfort does not invalidate the doctor's opinion that the claimant is permanently and totally disabled and unable to perform any sustained remunerative employment. Furthermore, a review of all three reports of Dr. Clague upon which the commission relied to grant him PTD compensation reveals that claimant's condition remained virtually unchanged in spite of ongoing treatment. In the fifth paragraph of all three reports, Dr. Clague noted his physical findings upon examination. Looking at those findings, which were essentially identical, the magistrate finds that the commission did not misinterpret Dr. Clague's reports and did not abuse its discretion when it relied upon those reports.

{¶33} Pursuant to *Consolidation Coal* and *Sauder Woodworking*, there are circumstances under which a physician's statements regarding permanency and MMI can be reconciled. However, in both of those cases, the court found that the doctors had explained the otherwise apparent inconsistency.

{¶34} The magistrate finds that there is a significant difference between the reports of Dr. Mannava in the present case and the reports at issue in *Consolidation Coal* and *Sauder Woodworking*. In both of those cases, specifically in *Consolidation Coal*, the court noted that, while Dr. Hoover unequivocally stated that McDaniel's injury was permanent, Dr. Hoover also indicated that he *might* have some room to heal. Further, in *Consolidation Coal*, the commission relied upon the report of Dr. Fierra who had cited to Dr. Hoover's psychological evaluation. The court noted that the fact that Dr. Fierra found permanent impairment based on Dr. Hoover's prediction of a 20 percent permanency did

not render Dr. Fierra's conclusions unsupported simply because McDaniel might sustain some further recovery. Likewise, in *Sauder Woodworking*, Dr. Clague continued to anticipate minimal improvement directed more at increasing Crocker's comfort but not his functional abilities.

{¶35} In both of those cases, the doctors' reports were detailed and both the commission and this court could understand the meaning and reconcile the perceived inconsistencies. By comparison, in the present case, there is no explanation. On February 5, 2009, Dr. Mannava opined that relator was permanently and totally disabled, and on February 11, 2009, Dr. Mannava certified a period of TTD. Both of these opinions were expressed in one sentence statements (a C-84 and as a response to a questionnaire). There were no reports and no way to understand and reconcile the inconsistency in the two statements. Relator argues that by referring him for a pain management evaluation, Dr. Mannava was essentially doing the same thing that Dr. Clague did with Crocker—hoping to alleviate his pain but realizing that his functional limitations were permanent. The problem with relator's argument is that, while Dr. Clague expressly made those statements, here Dr. Mannava did not.

{¶36} The commission is required to cite the evidence upon which it relies and provide a brief explanation for its finding. The commission is not required to explain why some evidence is found to be more persuasive than other evidence. Here, the SHO who granted PTD compensation beginning December 14, 2009 relied solely on the report of Dr. Koppenhoefer. No explanation was given concerning the report of Dr. Mannava. It was not until relator challenged the SHO's determination that a separate SHO provided an opinion as to why Dr. Mannava's reports were not relied upon: because they were

inconsistent. In reality, this court has no way of knowing why the first SHO determined that Dr. Koppenhoefer's report was more persuasive and why that was the report relied upon. The commission is not required to provide this explanation. Further, the second SHO's potential explanation for why Dr. Mannava's reports were not relied upon is consistent with the law. In spite of relator's attempts to argue that his case should be governed by *Consolidation Coal* and *Sauder Woodworking*, the magistrate has explained why it is not. Without some type of explanation, Dr. Mannava's reports are inconsistent. It is undisputed that equivocal medical opinions are not some evidence upon which the commission can rely. See *State ex rel. Eberhardt v. Flxible Corp.* (1994), 70 Ohio St.3d 649. Equivocation occurs when a doctor repudiates an earlier opinion, renders contradictory or uncertain opinions, or fails to clarify an ambiguous statement. However, ambiguous statements are considered equivocal only while they are unclarified. See *State ex rel. Paragon v. Indus. Comm.* (1983), 5 Ohio St.3d 72.

{¶37} To the extent that Dr. Mannava's statements could be considered ambiguous, they were not later clarified. As such, although it is unnecessary for this court to determine whether or not the first SHO excluded those reports improperly since the first SHO cited the evidence upon which he relied and provided his reasoning and was not required to explain why other evidence was not found to be persuasive, the magistrate likewise finds that it was not an abuse of discretion for the second SHO, in denying relator's motion to change the start date of his PTD award, to find that the reports of Dr. Mannava were inconsistent.

{¶38} Based on the foregoing, it is this magistrate's decision that relator has not demonstrated that the commission abused its discretion and relator's request for a writ of mandamus should be denied.

/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).