[Cite as *State ex rel. Cleveland Browns Football Co., L.L.C. v. Indus. Comm.*, 2011-Ohio-5656.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Cleveland Browns Football Company, LLC,	:	
Relator,	:	
v.	:	No. 10AP-564
Industrial Commission of Ohio et al.,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on November 3, 2011

Scheuer Mackin & Breslin LLC, *J. Kent Breslin*, and *Robert S. Corker*, for relator.

Michael DeWine, Attorney General, and *John R. Smart*, for respondent Industrial Commission of Ohio.

Patrick J. Alcox, for respondent Justin Sandy.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

FRENCH, J.

{¶1} Relator, Cleveland Browns Football Company, LLC ("relator"), filed an original action, which asks this court to issue a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate the March 18, 2010 order that

awards respondent Justin Sandy ("claimant") temporary total disability ("TTD") compensation for the periods of (1) August 22, 2007 through February 25, 2008, (2) March 1 through June 9, 2008, and (3) August 12, 2008 through July 1, 2010, and to enter an order denying that compensation.

{¶2} This matter was referred 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 grant a writ ordering the commission to vacate that portion of the March 18, 2010 order that grants compensation for any period prior to May 4, 2009 on grounds of res judicata.

I. BACKGROUND

{¶3} On August 22, 2007, claimant suffered a work-related injury to his right knee, and a claim was allowed for right knee sprain. In February 2008, Anthony Miniaci, M.D., completed a C-84 that certified TTD beginning on August 22, 2007, and ending on an undetermined date. J. Richard Steadman, M.D., thereafter filed additional C-84's.

{¶4} Following a hearing on May 4, 2009, a staff hearing officer ("SHO") of the commission issued an order that denied TTD compensation. The SHO denied the claim for lack of credible medical evidence and because Dr. Steadman considered non-allowed conditions.

{¶5} In August 2009, claimant moved for additional allowances for chondral defect and diffuse atrophy. Relator agreed to allow the claim for substantial aggravation of pre-existing chondral defect.

{¶6} Following a March 18, 2010 hearing, an SHO issued an order that found claimant was entitled to TTD compensation during the following three periods of time: (1) August 22, 2007 through February 25, 2008, based on the February 25, 2008 C-84 submitted by Dr. Miniaci; (2) March 1 through June 9, 2008, based on the August 4, 2009 C-84 submitted by Dr. Miniaci; and (3) August 12, 2008 through July 1, 2010, based on C-84's submitted by Dr. Steadman.

{¶7} As noted, relator filed this mandamus action. The magistrate concluded that the doctrine of res judicata precluded the SHO from awarding TTD compensation for any time period that had been considered in the May 4, 2009 order; therefore, the commission abused its discretion by awarding compensation the May 4, 2009 order denied. As for the SHO's award of compensation for the period following May 4, 2009, however, the magistrate concluded that the commission had some evidence on which to grant compensation for the period from May 5, 2009 through July 1, 2010, and the commission did not err by doing so.

{¶8} Both relator and claimant filed objections to the magistrate's decision. We begin with claimant's objections.

II. CLAIMANT'S OBJECTIONS

{¶9} Claimant objects to the magistrate's findings of fact and identifies seven additional facts he would like added to those findings. These additional facts, he

contends, lead to the legal conclusion that the commission had continuing jurisdiction to address his injuries based on a changed condition. Specifically, the addition of the allowance for substantial aggravation of his pre-existing chondral defect, he argues, precludes application of res judicata.

{¶10} As the magistrate noted, however, claimant did not attempt to invoke the continuing jurisdiction of the commission based on new or changed circumstances, and the commission never addressed its exercise of continuing jurisdiction for that or any other reason. The commission now concedes that it was without authority to address claimant's second application, which covered a previously-denied period, without explicitly exercising continuing jurisdiction.[1] For all the reasons given by the magistrate, we overrule claimant's objections on these grounds.

III. RELATOR'S OBJECTIONS

{¶11} In its objections, relator contends that the magistrate erred by concluding that the commission had some evidence on which it could rely to grant TTD compensation for the period of May 5, 2009 through July 10, 2010. Specifically, relator contends that the commission should not have relied on medical evidence submitted by Dr. Steadman because there was an 11-month gap in treatment and little explanation or analysis to support his conclusions. Relator also contends that Dr. Steadman's opinion is equivocal in that he essentially finds that claimant had reached maximum medical improvement, but nevertheless certified a period of TTD compensation. Relator made

[1] The commission asks us to remand the matter to the commission and set it for a hearing to determine whether it is appropriate to exercise continuing jurisdiction. Because claimant did not ask the commission to exercise continuing jurisdiction, we decline to do so.

these same arguments to the magistrate, and we agree with the magistrate that relator essentially asks us to reweigh the evidence before the commission. We agree with the magistrate's analysis and conclusions concerning relator's arguments and the evidence submitted by Dr. Steadman. Accordingly, we overrule relator's objections.

IV. CONCLUSION

{¶12} Based on our independent review, we overrule the objections of claimant and relator. We adopt the magistrate's decision, including the findings of fact and conclusions of law contained in it, as our own. We grant a writ of mandamus ordering the commission to vacate that portion of the March 18, 2010 order that finds claimant is entitled to TTD compensation for the following periods: (1) August 22, 2007 through February 25, 2008; (2) March 1 through June 9, 2008; and (3) August 12, 2008 through May 4, 2009. We deny relator's remaining requests.

Objections overruled;
writ of mandamus granted.

BRYANT, P.J., and SADLER, J., concur.

A P P E N D I X

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Cleveland Browns Football Company, LLC,	:	
Relator,	:	
v.	:	No. 10AP-564
Industrial Commission of Ohio et al.,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on July 28, 2011

Scheuer Mackin & Breslin LLC, *J. Kent Breslin* and *Robert S. Corker*, for relator.

Michael DeWine, Attorney General, and *John R. Smart*, for respondent Industrial Commission of Ohio.

Patrick J. Alcox, for respondent Justin Sandy.

IN MANDAMUS

{¶13} In this original action, relator, Cleveland Browns Football Company, LLC, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate the March 18, 2010 order of its staff hearing officer ("SHO") that awards respondent Justin Sandy ("claimant") temporary total disability ("TTD")

compensation for the periods August 22, 2007 through February 25, 2008, March 1 through June 9, 2008, and August 12, 2008 through July 1, 2010, and to enter an order denying the compensation.

Findings of Fact:

{¶14} 1. On August 22, 2007, claimant injured his right knee while employed as a professional football player for relator, a self-insured employer under Ohio's workers' compensation laws.

{¶15} 2. On September 5, 2007, claimant underwent right knee surgery which was performed by Anthony Miniaci, M.D. In his operative report, Dr. Miniaci describes the operation as "right knee arthroscopy and debridement and femoral trochlear microfracture procedure." In his operative report, Dr. Miniaci states:

> OPERATIVE INDICATION: The patient is a 25-year-old professional football player, previously with Cleveland Browns Organization, who had off-season surgery back in February 2007 for debridement of his patellofemoral joint with small microfracture procedure. He attempted recovery and had been doing relatively well, although never free of effusions or completely rid of his pain, but was able to start practicing. In view of his ongoing training and practice, he started having large effusions in his knee joint related to patellofemoral pain. Preoperative MRI had revealed irregular cartilage filling of his previous cartilage defect as well as what appeared to be some loose cartilage flaps. In view of the ongoing symptoms and the large recurrent effusions, it was decided to proceed with further surgical management.
> * * *

{¶16} 3. On February 25, 2008, Dr. Miniaci completed a C-84 on which he certified TTD beginning August 22, 2007. The C-84 form asks the examining physician to

"list diagnosis(es) for allowed conditions being treated which prevent return to work." In response, Dr. Miniaci wrote "844.9 [right] knee sprain."

{¶17} The C-84 form asks the examining physician to indicate a "return to work date." In response, Dr. Miniaci did not list a return to work date, but instead wrote "[t]o be determined."

{¶18} 4. Claimant eventually filed an Ohio workers' compensation claim which is assigned claim No. 07-890819.

{¶19} 5. In response to an August 11, 2008 letter from the Ohio Bureau of Workers' Compensation ("bureau"), relator certified the claim for a "right knee strain" on August 18, 2008.

{¶20} 6. The record contains three C-84s from J. Richard Steadman, M.D., all dated September 17, 2008

{¶21} Two of the C-84s list "844.9 [right] knee sprain" as the condition being treated that prevents a return to work.

{¶22} The third C-84 lists "733.90 chondral defect" and "728.2 diffuse atrophy" as allowed conditions being treated that prevent return to work.

{¶23} 7. On January 27, 2009, claimant moved, inter alia, for TTD compensation.

{¶24} 8. Following a March 9, 2009 hearing, a district hearing officer ("DHO") issued an order denying TTD compensation.

{¶25} 9. Claimant administratively appealed the DHO's order of March 9, 2009.

{¶26} 10. Following a May 4, 2009 hearing, an SHO issued an order that vacates the DHO's order of March 9, 2009, and denies TTD compensation. The SHO's order of May 4, 2009 explains:

> The Injured Worker's request for the payment of temporary total disability compensation from 08/23/2007 to the present and continuing is denied. The Staff Hearing Officer finds that the alleged lengthy disability period has not been sufficiently supported by credible medical evidence. The 02/25/2008 C-84 form from Dr. Miniaci does not include an estimated return to work date. The C-84 reports from Dr. Steadman base the Injured Worker's alleged disability on various conditions, some of which are not allowed in this claim. The Staff Hearing Officer notes that there are two C-84 forms on file that were purportedly signed by Dr. Steadman on 09/17/2008 that contain different diagnoses over an overlapping alleged disability period.

{¶27} 11. On May 19, 2009, another SHO mailed an order refusing claimant's administrative appeal from the SHO's order of May 4, 2009.

{¶28} 12. On August 17, 2009, on bureau form C-86, claimant moved:

> To pay TTD based on inclusion of additional allowances below; and to enlarge claim to include chondral defect and diffuse atrophy.

{¶29} 13. On October 16, 2009, at relator's request, claimant was examined by Douglas W. Martin, M.D., who practices in Sioux City, Iowa. In his ten-page narrative report, Dr. Martin opines:

> I have been asked 4 specific questions by [relator's counsel], in his letter of October 13, 2009. I respond as follows:
>
> [One] "Please indicate whether you concur with the diagnosis of 'chondral defect.' Please refer to the diagnostic testing and provide the basis of your opinion."
>
> Yes, I agree with the diagnosis of "chondral defect."

> The chondral defect was first originally indentified by arthroscopic procedure from Dr. Elrod in February of 2007 concerning the right knee. After the event of August of 2007 that created an additional joint effusion and other symptoms, a subsequent MRI scan confirmed that this was continuing to be an issue. Dr. Miniachai's [sic] arthroscopic evaluation and surgical microfracture repair in September of 2007 indicates that a flap chondral defect was present in the trochlear groove, which was debrided and a chondral defect requiring microfracture procedure was, indeed, present.
>
> [Two] "If you concur with the diagnosis of 'chondral defect,' please indicate within reasonable medical certainty whether the condition is a direct and proximate result of Mr. Sandy's work injury in August of 2007, either by direct causation or substantial aggravation."
>
> We have a situation here where this gentleman had a preexisting right knee problem prior to the August 2007 incident. I think this is well documented in Dr. Elrod's notes and I would refer specifically to his operative findings. Clearly, lateral femoral condylar cracks and need for the microfracture procedure in February of 2007 shows this. The issue which is at odds appears to be whether or not the August 2007 incident when he was participating in the defensive back coverage drill was a substantial aggravation to this preexisting problem. Based upon what is contained in the medical notes from Dr. Miniachi [sic] indicating a significant joint effusion, it does appear as though this was an aggravation. Further at odds, then, is whether or not this meets the jurisdictional definition of "substantial" as it applies within the Ohio Workers Compensation jurisdiction. Because of the fact that we have a noted joint effusion, which is an objective clinical finding, which was coupled eventually by MRI scanning and operative findings showing a loose chondral flap, I do believe that this would meet the definition in Ohio of "substantial aggravation." This is no way, shape or form suggesting that a preexisting condition did not exist, as I think it clearly did.
>
> [Three] "Please indicate whether you concur with the diagnosis of 'diffuse atrophy.' Please refer to the diagnostic testing and provide your basis for opinion."

> I do not agree with the diagnosis of "diffuse atrophy." I think that this was likely listed by Dr. Miniachi [sic] to refer to the fact that he had some right leg weakness after his operative procedure. This is not unexpected; however, weakness does not necessarily equal atrophy. Based upon my examination today and a review of the medical record, as well as other objective testing documentation, I see no evidence of muscle atrophy and, therefore, do not agree with that as a diagnosis.
>
> [Four] "If you concur with the diagnosis of 'diffuse atrophy,' please indicate within reasonable medical certainty whether the condition is a direct and proximal result of Mr. Sandy's work injury of August of 2007, either by direct causation or substantial aggravation."
>
> Not Applicable – as I do not concur with that diagnosis.

{¶30} 14. Following a December 1, 2009 hearing, a DHO issued an order acknowledging that relator has agreed to additionally allow the claim for "substantial aggravation of pre-existing chondral defect." Citing the October 16, 2009 report of Dr. Martin, the DHO disallowed the claim for "diffuse atrophy." Also, the DHO denied the request for TTD compensation.

{¶31} 15. Claimant administratively appealed the DHO's order of December 1, 2009.

{¶32} 16. Following a March 18, 2010 hearing, an SHO issued an order stating that the DHO's order was being modified, and granting TTD compensation for three periods of time. The SHO's order explains:

> The order of the District Hearing Officer, from the hearing dated 12/01/2009, is modified to the following extent. The Injured Worker's C-86 Motion, filed 08/17/2009, is granted in part and denied in part.

The issues presented at today's hearing are complex and complicated for various reasons, and the Staff Hearing Officer makes the following findings.

The Staff Hearing Officer finds that the Self-Insuring Employer has agreed to additionally ALLOW the claim for SUBSTANTIAL AGGRAVATION OF PRE-EXISTING CHONDRAL DEFECT OF THE RIGHT KNEE.

The Injured Worker's request for DIFFUSE ATROPHY is denied for the reason that the Injured Worker has not met his burden of proof that the requested condition is related to the 08/22/2007 injury. The Injured Worker was employed by the Cleveland Browns as a football player and was injured on 08/22/2007. The injury resulted in the Injured Worker undergoing knee surgery on 09/05/2007 at the Cleveland Clinic. The Injured Worker did not play in any games during the 2007 season. The Injured Worker's surgery was performed by Dr. Anthony Miniaci, of the Cleveland Clinic. The 09/05/2007 operative report indicates that the operation was for "right knee arthroscopy and debridement and femoral trochlear microfracture procedure." The post operative diagnosis was "recurrent effusions, right knee status patellofemoral arthrosis." The Employer paid for this surgical procedure and recognized the claim for a "right knee strain".

The Staff Hearing Officer orders that the Inured Worker's request for additional allowance of "DIFFUSE ATROPHY," is denied on direct causal relationship and as a substantial aggravation of a pre-existing condition, theory based upon the fact that diffuse atrophy is not a diagnosis but rather a description of a temporary symptomatology and that while the Injured Worker may have had findings of atrophy following his knee surgery, such findings do not arise to the level of a diagnosis.

The Staff Hearing Officer finds that the Injured Worker is entitled to temporary total disability compensation beginning 08/22/2007 through 02/25/2008 based upon the C-84 Request for Temporary Total Compensation dated 02/25/2008 from Dr. Miniaci. As noted above, the Injured Worker underwent surgery on 09/05/2007 by Dr. Miniaci and the C-84 from Dr. Minaci, dated 02/25/2008 is found to be

> sufficient to award temporary total disability compensation from 08/22/2007 until the date Dr. Miniaci signed the C-84, which is 02/25/2008. It is further noted that the Injured Worker was paid wages in lieu of compensation over this period, thus no Temporary Total Disability benefits are to be paid.
>
> Temporary total disability compensation is awarded from 03/01/2008 through 06/09/2008. This is based upon the C-84 of Dr. Miniaci, dated 08/04/2009 in which Dr. Miniaci finds that the Injured Worker was temporarily and totally disabled from 08/22/2007 to "to date". The Staff Hearing Officer finds that Dr. Miniaci's opinion is not sufficient or competent to award temporary total disability compensation beyond 06/09/2008 through 08/04/2009 for the reason that Dr. Miniaci last saw the Injured Worker on 06/09/2008.
>
> It appears from the record that the Injured Worker then began treating with Dr. Richard Steadman, from Vail, Colorado in August of 2008, thus the period from 06/10/2008 through 08/11/2008 is denied for the reason that the Injured Worker has not submitted competent medical evidence to support his allegation that he was temporarily and totally disabled over this period, specifically, there was no medical evidence from a doctor which was treating him during this period to support his request for temporary total disability compensation.
>
> Temporary total disability compensation is awarded beginning 08/12/2008 through 07/01/2010 based upon the C-84s of Dr. Steadman on file dated 08/17/2008, 01/19/2009, 12/17/2009, further to be considered upon submission of medical evidence.

(Emphasis sic.)

{¶33} 17. On April 23, 2010, another SHO mailed an order refusing relator's Administrative appeal from the SHO's order of March 18, 2010.

{¶34} 18. On June 16, 2010, relator, Cleveland Browns Football Company, LLC, filed this mandamus action.

Conclusions of Law:

{¶35} The main issue is whether the commission had R.C. 4123.52 continuing jurisdiction to award TTD compensation for the time period that had previously been denied by the SHO's order of May 4, 2009 that had become final.

{¶36} Finding that the commission did not have R.C. 4123.52 continuing jurisdiction to award TTD compensation for the time period previously denied by the SHO's order of May 4, 2009, it is the magistrate's decision that this court issue a writ of mandamus, as more fully explained below.

{¶37} Res judicata operates to preclude the relitigation of a point of law or fact that was at issue in a former action between the same parties and was passed upon by a court of competent jurisdiction. *State ex rel. B.O.C. Group, General Motors Corp. v. Indus. Comm.* (1991), 58 Ohio St.3d 199, 200. The doctrine applies to commission proceedings, but is limited by the commission's continuing jurisdiction over industrial claims under R.C. 4123.52. Id.

{¶38} Continuing jurisdiction is not unlimited. Its prerequisites are: (1) new and changed circumstances; (2) fraud; (3) clear mistake of fact; (4) clear mistake of law; and (5) error by an inferior tribunal. *State ex rel. Gobich v. Indus. Comm.,* 103 Ohio St.3d 585, 2004-Ohio-5990; *State ex rel. Royal v. Indus. Comm*. (2002), 95 Ohio St.3d 97; *State ex rel. Foster v. Indus. Comm.* (1999), 85 Ohio St.3d 320; and *State ex rel. Nicholls v. Indus. Comm.* (1998), 81 Ohio St.3d 454.

{¶39} In *State ex rel. Internatl. Truck and Engine Corp. v. Indus. Comm*., 119 Ohio St.3d 402, 2008-Ohio-4494, ¶15, 16, the court states:

> We have * * * responded over the last decade to abuses of discretion by the commission in invoking continuing jurisdiction. There are now strict requirements on what a continuing jurisdiction order must state. These cases render an informal invocation of continuing jurisdiction impossible.
>
> There are five bases for invoking continuing jurisdiction. *State ex rel. Nicholls v. Indus. Comm.* (1998), 81 Ohio St.3d 454, 692 N.E.2d 188. Any commission order seeking to exercise continuing jurisdiction must clearly state which of the five bases it is relying on. Id. at 459, 692 N.E.2d 188; *State ex rel. Foster v. Indus. Comm.* (1999), 85 Ohio St.3d 320, 322, 707 N.E.2d 1122. The reason for the exercise of continuing jurisdiction must be articulated contemporaneously with the exercise of continuing jurisdiction, not belatedly. *State ex rel. Royal v. Indus. Comm.* (2002), 95 Ohio St.3d 97, 100, 766 N.E.2d 135. An incomplete continuing jurisdiction order cannot be rehabilitated by a subsequent order. Id. *Gobich* described these three cases as "uncompromising in their demand that the basis for continuing jurisdiction be clearly articulated." 103 Ohio St.3d 585, 2004-Ohio-5990, 817 N.E.2d 398, ¶ 18. This rule destroys any assertion that an informal or silent invocation of continuing jurisdiction can occur. * * *

{¶40} Analysis begins with the observation that the SHO's order of May 4, 2009 is a final commission order that denied TTD compensation from August 23, 2007—the day following the industrial injury—"to the present and continuing." Thus, under the doctrine of res judicata, the SHO's order of May 4, 2009 has a binding effect upon any subsequent request for TTD compensation essentially from the date of injury to at least the May 4, 2009 adjudication date.

{¶41} It should additionally be observed that claimant's August 17, 2009 motion on form C-86 requested TTD compensation and enlargement of the claim for additional conditions. The C-86 motion does not purport to invoke the commission's continuing jurisdiction over a prior final order. Moreover, none of the five bases for invoking

continuing jurisdiction are identified. Thus, it is not surprising that the commission's orders ruling on the August 17, 2009 motion do not purport to invoke continuing jurisdiction or to meet the requirements for invoking continuing jurisdiction.

{¶42} Nevertheless, here, claimant contends that his August 17, 2009 motion should be read as one for invoking continuing jurisdiction on grounds that enlargement of the claim can constitute new and changed circumstances to support a reopening of the SHO's order of May 4, 2009.

{¶43} In effect, claimant is arguing for informal or silent invocation of continuing jurisdiction—something that this court cannot accept. In short, claimant clearly failed to invoke the commission's continuing jurisdiction over the SHO's order of May 4, 2009. Consequently, the commission and this court are required to give a binding effect to the May 4, 2009 order.

{¶44} Given the above analysis, the commission had no authority, through its SHO's order of March 18, 2010, to award TTD compensation for the period that the SHO's order of May 4, 2009 had previously denied.

{¶45} However, the SHO's order of March 18, 2010 awards TTD compensation beyond the May 4, 2009 prior adjudication date. That is, the SHO's order of March 18, 2010 awards TTD compensation through July 1, 2010. In this regard, the SHO's order of March 18, 2010 again explains:

> Temporary total disability compensation is awarded beginning 08/12/2008 through 07/01/2010 based upon the C-84s of Dr. Steadman on file dated 08/17/2008, 01/19/2009, 12/17/2009, further to be considered upon submission of medical evidence.

{¶46} The record contains a C-84 completed by Dr. Steadman on December 17, 2009. In this C-84, Dr Steadman certifies TTD compensation from August 23, 2007 to an estimated return to work date of July 1, 2010. On the form, Dr. Steadman lists "844.9 [right] knee sprain" as the allowed condition that prevents return to work. He also lists "733.90 chondral defect" as an allowed condition being treated.

{¶47} Because Dr. Steadman completed the December 17, 2009 C-84 after the May 4, 2009 adjudication date of the prior final order, the commission had not previously considered the C-84. Also, the commission had not previously considered that portion of Dr. Steadman's TTD certification that is subsequent to the May 4, 2009 adjudication date of the prior order. Accordingly, the doctrine of res judicata does not apply to that portion of the TTD award from May 4, 2009 to July 1, 2010, which is supported by commission reliance upon Dr. Steadman's December 17, 2009 C-84.

{¶48} Here, relator challenges the commission's reliance upon Dr. Steadman's December 17, 2009 C-84. According to relator, a review of Dr. Steadman's December 17, 2009 office note shows that the C-84 is equivocal on the question of maximum medical improvement ("MMI"). On the C-84, Dr. Steadman marked the "No" box in response to the pre-printed query:

> Has the work-related injury(s) or disease reached a treatment plateau at which no fundamental functional or physiological change can be expected despite continuing medical or rehabilitative intervention (maximum medical improvement)?

Dr. Steadman's December 17, 2009 office note reads in part:

> PLAN: We had a long discussion with this patient regarding his problem. At this time, the patient feels like he has

> maximized his physical therapy and his strength. He feels that he is no longer progressing. His activities are somewhat limited, but, at this time, he is adjusting his lifestyle to accommodate his symptoms. The patient is content with his current state. He was informed that if his symptoms become worse or if he wants to pursue other surgical options that we could revise his microfracture and there are other potential surgical options. At this time, the patient wants to hold off. He may reconsider in the next few years if his symptoms start curtailing his activities.

{¶49} Equivocal medical opinions are not evidence. *State ex rel. Eberhardt v. Flxible Corp.* (1994), 70 Ohio St.3d 649, 657. Equivocation occurs when a doctor repudiates an earlier opinion, renders contradictory or uncertain opinions, or fails to clarify an ambiguous statement. Id.

{¶50} Dr. Steadman's December 17, 2009 office note does not render an opinion as to whether any of the allowed conditions of the claim are at MMI. Thus, Dr. Steadman's office note is not in conflict with his certification on the C-84 that the industrial injury is not at MMI.

{¶51} Moreover, neither the commission nor this court has medical expertise. *State ex rel. Yellow Freight Sys., Inc. v. Indus. Comm.*, 81 Ohio St.3d 56, 1998-Ohio-654. In effect, relator invites this court to read Dr. Steadman's office note as supporting an opinion that the industrial injury is at MMI even though the office note contains no such opinion. This court must decline the invitation.

{¶52} Relator has failed to show that Dr. Steadman's December 17, 2009 C-84 and his corresponding office note are equivocal. Thus, the magistrate concludes that Dr. Steadman's December 17, 2009 C-84 is some evidence upon which the commission can and did rely.

{¶53} Accordingly, for all the above reasons, it is the magistrate's decision that this court issue a writ of mandamus ordering the commission to vacate that portion of its SHO's order of March 18, 2010 that awards TTD compensation from August 22, 2007 to May 4, 2009, and to enter an amended order denying TTD compensation from August 22, 2007 to May 4, 2009 on res judicata grounds as explained in this magistrate's decision.

/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).