[Cite as *State ex rel. Wilson v. United Parcel Serv.*, 2011-Ohio-775.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Everett D. Wilson,	:	
Relator,	:	
v.	:	No. 10AP-68
United Parcel Service and Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on February 22, 2011

Gallon, Takacs, Boissoneault & Schaffer Co. L.P.A., and *Theodore A. Bowman*, for relator.

Garvin & Hickey, LLC, Preston J. Garvin, Daniel M. Hall, and *Matthew D. Shufeldt*, for respondent United Parcel Service, Inc.

Michael DeWine, Attorney General, *Colleen C. Erdman*, and *Eric Tarbox*, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO MAGISTRATE'S DECISION

TYACK, J.

{¶1} Everett D. Wilson filed this action in mandamus, seeking a writ to compel the Industrial Commission of Ohio ("commission") to vacate its order which denied him an award of temporary total disability ("TTD") compensation.

{¶2} In accord with Loc.R. 12, the case was referred to a magistrate to conduct appropriate proceedings. The parties stipulated the pertinent evidence and filed briefs. The magistrate then issued a magistrate's decision containing detailed findings of fact and conclusions of law, which is appended to this decision. The magistrate's decision includes a recommendation that we grant a writ of mandamus which compels the commission to issue an amended order that vacates the commission's determination that Everett Wilson is ineligible for TTD compensation but nevertheless denies the compensation based upon a specific medical report.

{¶3} Counsel for Wilson has filed objections to the magistrate's decision. Counsel for the commission has filed a memorandum in response. Counsel for United Parcel Service, Inc. ("UPS"), Wilson's former employer, has also filed a memorandum in response. The case is now before the court for a full, independent review.

{¶4} Wilson was injured in 2004 and has undergone a series of hernia operations to repair his incisional hernia. He eventually was able to return to work in 2006, but was fired in October 2006 for allegedly violating a substance abuse policy of UPS.

{¶5} The commission has never found that Wilson voluntarily abandoned his employment with UPS. In fact, a staff hearing officer ("SHO") expressly found unpersuasive, the argument of UPS that Wilson had voluntarily abandoned his

employment. Comments in the SHO's order that Wilson was not under restriction when he was fired seems to be nothing more than an effort to address the case law which says that a firing when an injured worker is already disabled is never considered a voluntary abandonment of employment for purposes of denying TTD compensation. Still, if the SHO's order can be misconstrued, the magistrate's suggestion that a writ issue to clarify Wilson's general eligibility for TTD in light of the employer's earlier argument about voluntary abandonment is appropriate. No party contests this.

{¶6} Counsel for Wilson primarily contests the recommendation that no TTD compensation be awarded, based upon the report of Thomas E. Lieser, M.D. The report was retrospective. Dr. Lieser examined Wilson on May 2, 2008 and reported that Wilson had been capable of returning to work since December 13, 2007. Dr. Lieser had reviewed medical reports and records dating back to 2002. He found no significant changes in Wilson's medical condition for the six months preceding his examination and report.

{¶7} Counsel for Wilson posits a problem with Dr. Lieser's report which we do not perceive. Actually, Dr. Lieser's report indicated no changes in Wilson's condition for over two years. Wilson's treating physician found no recurrent hernia in 2007. The commission could rely on Dr. Lieser's report in denying TTD compensation.

{¶8} We overrule the objections to the magistrate's decision. We adopt the findings of fact and conclusions of law contained in the magistrate's decision and therefore issue a writ of mandamus ordering the commission to issue an amended order which clarifies that Wilson is not ineligible for TTD compensation due to a voluntary

abandonment of employment, but is not entitled to TTD compensation during the time addressed by the report of Dr. Lieser.

Objections overruled; writ of mandamus granted.

KLATT and CONNOR, JJ., 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. Everett D. Wilson,	:	
Relator,	:	
v.	:	No. 10AP-68
United Parcel Service 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 November 30, 2010

Gallon, Takacs, Boissoneault & Schaffer Co. L.P.A., and *Theodore A. Bowman*, for relator.

Garvin & Hickey, LLC, Preston J. Garvin, Daniel M. Hall, and *Matthew D. Shufeldt*, for respondent United Parcel Service, Inc.

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

IN MANDAMUS

{¶9} In this original action, relator, Everett D. Wilson, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to

vacate its order denying his February 22, 2008 motion for temporary total disability ("TTD") compensation beginning December 13, 2007, and to enter an order granting the motion.

Findings of Fact:

{¶10} 1. On January 13, 2004, relator sustained an industrial injury in the course of and arising out of his employment with respondent United Parcel Service, Inc. ("United Parcel" or "employer"), a self-insured employer under Ohio's workers' compensation laws. Employed as a driver, relator was injured while pulling heavy loads on a dolly. The industrial claim (No. 04-888779) is allowed for "incisional hernia."

{¶11} 2. On April 8, 2004, relator underwent his first hernia repair. The surgery was performed by William C. Sternfeld, M.D.

{¶12} 3. On October 1, 2004, relator underwent a second surgery performed by Dr. Sternfeld. The surgery is described in the operative report as "[h]erniorrhaphy with mesh." The post-operative diagnosis is "[r]ecurrent incisional hernia."

{¶13} 4. On May 9, 2006, relator underwent yet another surgical hernia repair. This third surgery was performed by Peter M. Dziad, M.D. In his operative report, Dr. Dziad describes the operation as "[e]xtensive mesh repair of multiply [sic] recurrent left subcostal incisional hernia" and "[p]ercutaneous placement On-Q pain pump system."

{¶14} 5. On a "Physician's Report of Work Ability" form (MEDCO-14) dated May 16, 2006, attending physician Joseph Peyton, D.O., released relator to return to work on June 5, 2006, under restrictions to end July 5, 2006.

{¶15} 6. Relator did return to light-duty work at United Parcel on June 5, 2006.

{¶16} 7. From July 5, 2006 relator continued to work at United Parcel without medical restrictions until October 2006, when his employment was terminated for an alleged violation of United Parcel's drug policy.

{¶17} 8. On December 13, 2007, relator was examined by Dr. Dziad at his office. Dr. Dziad's office note states:

> * * * My repair was done in 05-08 [sic], we put in a large supporting piece of Composix mesh, which was sewn in intraperitoneally and at the fascial level[.] About three months ago he began noticing some burning sensation along the incision and some pulling sensation[.] This has been uncomfortable for him[.] He has been treated with nonsteroidal antiinflammatories[.] He has not noted any bulging. He does not recall doing anything particularly strenuous at the time that he first noticed his symptoms[.] There has been no change in his overall health status.
>
> * * *
>
> IMPRESSION: Symptomatic hernia area status post many repairs including an extensive mesh repair in 05-06[.] Clinically, I see no evidence of a recurrent hernia at this time, however the pulling sensation and burning sensation underneath the scar does raise some concern[.]
>
> I will obtain a CT scan of the abdomen and pelvis[.] I will see him back after the CT scan[.] If CT confirms no evidence of recurrent hernia I believe he may benefit from pain management with consideration of injections to the area to relieve his burning pain[.]

{¶18} 9. Also on December 13, 2007, Dr. Dziad filled out one of his own forms captioned "Return To Work Or School." On the form, Dr. Dziad states that relator "is able to return to work on 12-13-07," but "[n]o lifting more then [sic] 25#."

{¶19} 10. On December 14, 2007, Dr. Dziad completed a C-9 request for approval of a "CT Scan abdomen / Pelvis." The C-9 was approved by the employer.

{¶20} 11. Also on December 14, 2007, Dr. Dziad completed another C-9 in which he requested approval for "[p]ain [m]anagement." The employer approved the C-9 in early January 2008.

{¶21} 12. On December 17, 2007, relator underwent a CT scan of the abdomen and pelvis. The CT scan results were evaluated by Charles C. Genson, M.D., who reported:

> * * * There is a small umbilical hernia containing only fat[.] In the left superior abdominal wall extending towards the midline, there is high-density material just directly underneath the anterior abdominal wall fascia[.] Multiple surgical clips are seen at this site as well[.] This likely represents mesh from previous surgical hernia repair[.] There is adjacent soft tissue thickening and high attenuation[.] Comparison with previous exams would be very helpful[.] At the midline just above the level of the mesh, there is a small defect in the anterior abdominal wall, however, no focal herniation is identified[.]
>
> IMPRESSION
>
> [One] The site of the left subcostal hernia repair mesh shows mild soft tissue thickening[.] A tiny defect in the fascia just superior to this does not show herniation of bowel[.]

{¶22} 13. On December 26, 2007, relator returned to the office of Dr. Dziad for further examination and evaluation. In his office note, Dr. Dziad states:

> * * * He has had a CT scan of the abdomen and pelvis done since his last visit. CT scan shows well healed mesh repair of his incisional hernia with some surrounding thickening and edema in the muscle at the repair edges[.] There is no evidence of recurrent herniation at this time. No other significant abnormalities to explain his persistent pain around the scar and surgical area was noted on the CT scan[.] He continues to have normal GI tract function[.] He states that he has nearly relentless burning type pain underneath his scar[.] He is wanting to have the mesh removed because he is having so much pain[.]

> I examined him carefully today[.] The repair seems to be intact. Abdomen is soft and benign and quite muscular[.] He has tenderness on palpation along the skin scar[.] I am wondering if this is not chronic neuralgia type pain from all of the scarring from many prior procedures in this area. I certainly see no evidence that he has a recurrent hernia. I discussed all of this with him carefully and suggested that we try him on Neurontin for the time being and that we obtain consultation with chronic pain management for possible nerve block to relieve his neuralgia type pain[.]

{¶23} 14. On January 21, 2008, relator was examined and evaluated at "Toledo Pain Services." A report recommended "a trigger point injection of the left rectus abdominus."

{¶24} 15. On January 25, 2008, Dr. Peyton completed a C-84 on which he certified a period of TTD beginning December 13, 2007 to an estimated return-to-work date of May 1, 2008.

{¶25} 16. On February 7, 2008, relator underwent a trigger point injection performed by Amar N. Goyal, M.D., of Toledo Pain Services. According to Dr. Goyal's February 7, 2008 report, the injection was administered at the "[l]eft rectus abdominus."

{¶26} 17. On February 28, 2008, relator was examined by Dr. Goyal. In his three-page report, Dr. Goyal prescribed Neurontin and a "flector external patch" for control of pain.

{¶27} 18. On March 27, 2008, relator was examined by Dr. Goyal. In his report, Dr. Goyal notes that "patient has no pain relief from trigger point injections."

{¶28} 19. On May 2, 2008, at the employer's request, relator was examined by Thomas E. Lieser, M.D. In his nine-page report, Dr. Lieser sets forth a chronological

summary of the medical records he reviewed. The chronology begins in February 2002 and ends with a report dated April 21, 2008, from Toledo Pain Services.

{¶29} 20. In his report, Dr. Lieser concludes:

> Assessment:
>
> [One] Incisional hernia, S/P repair X3, with chronic pain.
> [Two] Additional personal medical conditions, which include overweight status; renal carcinoma, S/P partial left nephrectomy; hypertension; tobacco abuse; left shoulder impingement; diffuse degenerative disc disease of the cervical, thoracic, and lumbosacral spine; S/P cholecystectomy.
>
> Discussion:
>
> The clinical findings today reveal quite stable hernia repair, with no evidence of herniation. Residual discomfort in the abdomen is reported. There is no indication at this time for use of Kadian or TENS unit. The objective findings on clinical examination simply do not provide support for the subjective complaints.
>
> The claimant has derived little benefit from the pain management intervention, and is certainly at maximum medical improvement. No further intervention would be appropriately anticipated or encouraged.
>
> Conclusions:
>
> Based on today's evaluation and within a reasonable degree of medical certainty, I would offer the following:
>
> [One] Based on the allowed condition of incisional hernia, the TENS unit and necessary supplies are not appropriate. Any documented benefit is insufficient to justify continued use of the TENS unit.
>
> [Two] With respect to the allowed condition of incisional hernia, the claimant is capable of returning to his former position of employment.

> [Three] There has been no significant change in the claimant's clinical presentation since December 2007, thus he has indeed been capable of working in his former position of employment since 12/13/07 to the present.
>
> [Four] The claimant has reached maximum medical improvement.

{¶30} 21. Following a May 22, 2008 hearing, a district hearing officer ("DHO") issued an order denying relator's February 22, 2008 motion for TTD compensation. The DHO's order explains:

> Temporary Total Disability Compensation is specifically DENIED as requested from 12/13/2007 to present.
>
> The Injured Worker last received Temporary Total Disability in this claim on 6/5/2006. The Injured Worker made a return to work with no restrictions at the instant employer until being terminated in October of 2006. At present there is no information in file related to this termination to raise the specter of [State ex rel. Louisiana-Pacific v. Indus. Comm., 72 Ohio St.3d 401, 1995-Ohio-153]. However, the Injured Worker, at the time of termination, was under no medical restrictions and has returned to new employment. There is no medical [trial] until a return to Dr. Dziad, on 12/13/2007. The Injured Worker reported ongoing complaints at the surgical site. Dr. Dziad performed a CT-scan on 12/17/2007, that reveals no evidence of herniation.
>
> Greatest weight is given to the report of Dr. Lieser, dated 5/2/2008, not supporting a period of Total Disability related to this injury from 1/13/2008 [sic]. Dr. Lieser opines that there are no medical restrictions necessitated by this injury or any exacerbation in December, 2007.

(Emphasis sic.)

{¶31} 22. Relator administratively appealed the DHO's order of May 22, 2008.

{¶32} 23. Following a July 1, 2008 hearing, a staff hearing officer ("SHO") issued an order stating that the DHO's order is "modified":

> This Staff Hearing Officer DENIES Temporary Total Disability Compensation from 12/13/2007 to the present.
>
> The Staff Hearing Officer finds the Employer's argument regarding voluntary abandonment pursuant to Louisiana-Pacific un-persuasive. This Staff Hearing Officer finds insufficient evidence on file to establish any violation of the Employer's Written Work Policy. While the union contract provisions are on file, there is absolutely nothing from any of the medical facilities indicating that the Injured Worker actually refused any drug testing or was found positive for any drug testing. As a result, this Staff Hearing Officer finds that the there [sic] is insufficient medical in file to establish this. At this point it is the Injured Worker's word against the Employer's.
>
> The Staff Hearing Officer, however, finds that the Injured Worker was released to return to work without restrictions. The last Temporary Total Disability Compensation paid in this claim was on 06/05/2006. The Injured Worker was subsequently terminated in October of 2006, and that termination has been upheld through the grievance process at this time. However, since the Injured Worker was terminated at a time when he was not under any medical restrictions, the Staff Hearing Officer finds that the loss of wages beginning in October of 2006, is not related to the allowed conditions in this claim.
>
> This order is also based upon the report of Dr. Lieser, dated 05/02/2008. Dr. Lieser does not support temporary disability related to this injury from 01/13/2008 [sic]. Dr. Lieser, again, notes that there were no medical restrictions at the time of the termination nor has there been any new injury or exacerbation in December of 2007.

(Emphases sic.)

{¶33} 24. On August 2, 2008, another SHO mailed an order refusing relator's administrative appeal from the SHO's order of July 1, 2008.

{¶34} 25. On January 25, 2010, relator, Everett D. Wilson, filed this mandamus action.

Conclusions of Law:

{¶35} Apparently, the parties to this action have concluded that the commission determined that relator is ineligible for TTD compensation for the period of the request, i.e., beginning December 13, 2007 because, at the time of his job separation in October 2006, he had no medical restrictions relating to the industrial injury.

{¶36} Given the parties' conclusion that the commission determined relator to be ineligible for the TTD compensation he requested, two issues are presented: (1) did the commission abuse its discretion in determining relator to be ineligible, and (2) does the commission's reliance upon the report of Dr. Lieser independently support the commission's denial of TTD compensation.

{¶37} The magistrate finds: (1) the commission abused its discretion in determining relator ineligible for TTD compensation beginning December 13, 2007, and (2) the report of Dr. Lieser independently supports the commission's denial of TTD compensation.

{¶38} Because the commission's determination that relator is ineligible for TTD compensation could erroneously impact future requests for TTD compensation in the claim, it is the magistrate's decision that this court issue a writ of mandamus ordering the commission to issue an amended order that vacates its determination that relator is ineligible for TTD compensation but, nevertheless, denies the compensation based upon the report of Dr. Lieser.

The Voluntary Abandonment Doctrine

{¶39} Historically, this court first held that, where the employee has taken action that would preclude his returning to his former position of employment, even if he were

able to do so, he is not entitled to continued TTD benefits since it is his own action, rather than the industrial injury, which prevents his returning to his former position of employment. *State ex rel. Jones & Laughlin Steel Corp. v. Indus. Comm.* (1985), 29 Ohio App.3d 145. The *Jones & Laughlin* rationale was adopted by the Supreme Court of Ohio in *State ex rel. Ashcraft v. Indus. Comm.* (1987), 34 Ohio St.3d 42, wherein the court recognized a "two-part test" to determine whether an injury qualified for TTD compensation. *Ashcraft* at 44. The first part of the test focuses upon the disabling aspects of the injury whereas the latter part determines if there are any other factors, other than the injury, which prevent the claimant from returning to his former position of employment. Id.

{¶40} In *State ex rel. Rockwell Internatl. v. Indus. Comm.* (1988), 40 Ohio St.3d 44, the court held that an injury-induced abandonment of the former position of employment, as in taking a retirement, is not considered to be voluntary.

{¶41} In *State ex rel. Diversitech Gen. Plastic Film Div. v. Indus. Comm.* (1989), 45 Ohio St.3d 381, 383, the court held that a claimant's acceptance of a light-duty job did not constitute an abandonment of his former position of employment. The *Diversitech Gen.* court stated:

> * * * The question of abandonment is "primarily * * * [one] of intent * * * [that] may be inferred from words spoken, acts done, and other objective facts. * * * All relevant circumstances existing at the time of the alleged abandonment should be considered." * * *

{¶42} In *State ex rel. B.O.C. Group, General Motors Corp. v. Indus. Comm.* (1991), 58 Ohio St.3d 199, 202, the claimant, Sandra K. Natali, was laid off from her job at General Motors for reasons unrelated to her industrial injury. Following her layoff,

Natali was awarded TTD compensation. General Motors then filed a mandamus complaint alleging that the layoff precluded TTD compensation. Rejecting General Motors position, the *B.O.C. Group* court explained:

> Relying on Rockwell, B.O.C. asserts that temporary total disability compensation is improper since claimant's departure was not injury-related. This is incorrect. An employer-initiated departure is still considered involuntary as a general rule. Rockwell did not narrow the definition of "involuntary," it expanded it. While certain language in Rockwell may be unclear, its holding is not. The lack of a causal connection between termination and injury has no bearing where the employer has laid off the claimant.

{¶43} In *State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.* (1995), 72 Ohio St.3d 401, 403, the claimant was fired for violating the employer's policy prohibiting three consecutive unexcused absences. The court held that the claimant's discharge was voluntary, stating:

> * * * [W]e find it difficult to characterize as "involuntary" a termination generated by the claimant's violation of a written work rule or policy that (1) clearly defined the prohibited conduct, (2) had been previously identified by the employer as a dischargeable offense, and (3) was known or should have been known to the employee. Defining such an employment separation as voluntary comports with [*State ex rel. Ashcraft v. Indus. Comm.* (1987), 34 Ohio St.3d 42] and [*State ex rel. Watts v. Schottenstein Stores Corp.* (1993), 68 Ohio St.3d 118]—*i.e.*, that an employee must be presumed to intend the consequences of his or her voluntary acts.

{¶44} An injured worker who has voluntarily abandoned his employment may thereafter reinstate his TTD entitlement. *State ex rel. McCoy v. Dedicated Transport, Inc.*, 97 Ohio St.3d 25, 2002-Ohio-5305. The syllabus of *McCoy* states:

> A claimant who voluntarily abandoned his or her former position of employment or who was fired under circum-stances that amount to a voluntary abandonment of the

> former position will be eligible to receive temporary total disability compensation pursuant to R.C. 4123.56 if he or she reenters the work force and, due to the original industrial injury, becomes temporarily and totally disabled while working at his or her new job.

{¶45} In *State ex rel. Jennings v. Indus. Comm.*, 98 Ohio St.3d 288, 2003-Ohio-737, the court clarified its holding in *McCoy*. In *Jennings*, the court reemphasized that a claimant who has abandoned his or her former job does not reestablish TTD eligibility unless the claimant secures another job and was removed from subsequent employment by the industrial injury.

Eligibility

{¶46} Apparently, at the July 1, 2008 hearing, the employer argued that relator is ineligible for TTD compensation because he was discharged for an alleged violation of the employer's written drug policy. Under *Louisiana-Pacific* and its progeny, a claimant's discharge can be determined to be voluntary if the employer can show that the three criteria have been met. However, the employer was unable to persuade the commission that relator's discharge was voluntary under *Louisiana-Pacific*. That commission determination is not disputed by the employer in this action, and thus, it must be presumed that relator's discharge was involuntary.

{¶47} Having determined that the discharge was not proven to be voluntary under *Louisiana-Pacific*, the SHO, in her next paragraph, finds that relator is nevertheless ineligible for the compensation because he "was terminated at a time when he was not under any medical restrictions" and thus "the loss of wages beginning in October of 2006, is not related to the allowed conditions in this claim." (Emphases sic.) This ineligibility determination is an abuse of discretion.

{¶48} Clearly, relator did not seek compensation for any alleged wage loss beginning with the date of his termination in October 2006 through the day prior to his December 13, 2007 office visit with Dr. Dziad. Temporary total disability compensation was requested to begin on December 13, 2007, some 14 months after the termination, and based upon medical evidence that the allowed condition was causing disability.

{¶49} That relator had no claim for TTD compensation for some 14 months after the job termination, or for that matter, some lesser or greater period of time, does not automatically create ineligibility for TTD compensation.

{¶50} Obviously, where the claimant has no evidence of disability during a period following a discharge, any wage loss during that time period cannot be related to the industrial injury. But the period of no disability following a discharge does not automatically create ineligibility for future periods of time.

{¶51} While the SHO cites to no authority to support her ineligibility determination, perhaps it can be said that the determination resulted from a misapplication of *Rockwell* that the court corrected in *B.O.C. Group*. As the *B.O.C. Group* case makes clear, that a job departure is not injury-induced does not, by itself, render the job departure voluntary.

{¶52} Thus, the commission abused its discretion in determining that relator is ineligible for TTD compensation. Because that determination, if left to stand, could be unlawfully used to deny a future claim for TTD compensation, a writ of mandamus must issue to correct the ineligibility finding.

Dr. Lieser's Report

{¶53} Preliminarily, it can be observed that Dr. Lieser examined relator on May 2, 2008 and that he reviewed and summarized medical records that spanned from October 2002 to April 2008. Based upon his review of the medical records, Dr. Lieser opined that relator "has indeed been capable of working in his former position of employment since 12/13/07 to the present." Based upon his examination on May 2, 2008, Dr. Lieser also opined that relator "is capable of returning to his former position of employment."

{¶54} As earlier noted, on January 25, 2008, Dr. Peyton completed a C-84 on which he certified a period of TTD beginning December 13, 2007 to an estimated return-to-work date of May 1, 2008. It was this C-84 that relator submitted in support of his February 22, 2008 motion at issue here.

{¶55} Given that the claimed period of disability begins December 13, 2007 and runs to an estimated return-to-work date of May 1, 2008, the commission necessarily relied entirely upon Dr. Lieser's retrospective disability opinion, i.e., an opinion that is retrospective of the May 2, 2008 examination.

{¶56} As a general rule, a doctor cannot offer an opinion on a claimant's extent of disability for a period that precedes the doctor's examination of the claimant. *State ex rel. Foor v. Rockwell Internatl.* (1997), 78 Ohio St.3d 396, 399; *State ex rel. Foreman v. Indus. Comm.* (1992), 64 Ohio St.3d 70, 72; *State ex rel. Abner v. Mayfield* (1992), 62 Ohio St.3d 423; *State ex el. Kroger Co. v. Morehouse* (1995), 74 Ohio St.3d 129, 133; and *State ex rel. Case v. Indus. Comm.* (1986), 28 Ohio St.3d 383, 387.

{¶57} A doctor who does offer an opinion as to the claimant's extent of disability that is retrospective of the date of his examination is treated as a nonexamining doctor

as to his retrospective opinion. Under such scenario, the doctor must observe certain safeguards if his retrospective opinion is to be accepted as evidence in a commission proceeding. *State ex rel. Bowie v. Greater Cleveland Regional Transit Auth.* (1996), 75 Ohio St.3d 458. If the doctor's retrospective opinion is to be relied upon by the commission as some evidence, it is imperative that the doctor has reviewed all of the relevant medical evidence generated prior to the date of the examination from which the retrospective opinion is rendered. Id. at 460.

{¶58} Relator does not challenge the commission's reliance upon Dr. Lieser's report under *Bowie*, and thus the analysis here shall proceed no further, other than to note that the commission has relied entirely on a disability opinion that is retrospective of the examination date.

{¶59} However, relator does argue:

> The SHO's citation of the Dr. Lesier [sic] report, as evidence of Relator's medical status at termination, demonstrates the SHO's fundamental misunderstanding of Relator's injury.

(Relator's brief, at 16.)

{¶60} Dr. Lieser specifically concluded in his report that "[t]here has been no significant change in the claimant's clinical presentation since December 2007." Based upon that medical analysis, Dr. Lieser concluded that relator "has indeed been capable of working in his former position of employment since 12/13/07 to the present." Apparently, the SHO felt compelled to add that relator was under no medical restrictions at the time of his termination when he does not claim TTD.

{¶61} Thus, the SHO's order seems to reason that, if there is no TTD at the time of termination up to December 2007, and no new injury or exacerbation in December 2007, there is no disability during the claimed period.

{¶62} Thus, relator's challenge to Dr. Lieser's report lacks merit. Clearly, Dr. Lieser's report is some evidence supporting the denial of TTD compensation beginning December 13, 2007.

{¶63} Accordingly, for all the above reasons, it is the magistrate's decision that this court issue a writ of mandamus ordering the commission to issue an amended order that vacates its determination that relator is ineligible for TTD compensation but, nevertheless, denies the compensation based upon the report of Dr. Lieser.

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).