

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio ex rel.	:	
Carman Walls,	:	
	:	
Relator,	:	No. 10AP-866
v.	:	(REGULAR CALENDAR)
	:	
Karl HC LLC, and Industrial Commission	:	
of Ohio,	:	
	:	
Respondents.	:	

D E C I S I O N

Rendered on November 8, 2011

Peter J. Gibson, for relator.

Michael DeWine, Attorney General, and *Derrick L. Knapp*, for
respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

KLATT, J.

{¶1} Relator, Carman Walls, commenced this original action in mandamus seeking an order compelling respondent, Industrial Commission of Ohio ("commission"), to vacate its order denying her request for temporary total disability ("TTD") compensation and to enter an order granting said compensation.

{¶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 determined that the commission did not abuse its discretion when it denied relator TTD compensation. Specifically, the magistrate found that: (1) there was some evidence in the record upon which the commission relied to support its decision; (2) the commission did not terminate ongoing TTD compensation, but denied a new period of compensation; and (3) the commission properly applied the two-year limitation to relator's request for benefits. Based upon these findings, the magistrate has recommended that we deny relator's request for a writ of mandamus.

{¶3} Relator did not file an objection to the magistrate's decision. However, the commission filed objections to the magistrate's decision. In its first objection, the commission points out what appears to be a typographical error in the last sentence of the first full paragraph on page 14 of the magistrate's decision. According to the commission, the date in the last part of that sentence should be March 19, 2008, rather than March 19, 2010. We agree. Therefore we sustain the commission's first objection.

{¶4} In its second objection, the commission contends that the magistrate erred when she removed Dr. Gula's report from evidentiary consideration because the commission previously rejected his report. Despite the magistrate's removal of Dr. Gula's report from evidentiary consideration, the removal did not warrant granting a writ of mandamus because the commission also relied upon Dr. Sethi's report. Dr. Sethi's report independently supported the commission's decision. There has been no objection challenging the commission's reliance on Dr. Sethi's report. Nevertheless, the commission argues that the magistrate should not have excluded Dr. Gula's report.

{¶5} Because Dr. Sethi's report independently supports the commission's order, we need not decide whether Dr. Gula's report should have been removed from evidentiary consideration by the magistrate. Therefore, we sustain the commission's second objection to the extent that we do not adopt the portion of the magistrate's conclusion of law that addresses the removal of Dr. Gula's report from evidentiary consideration.

{¶6} Following an independent review of this matter, we find that the magistrate has properly determined the facts except for the typographical error previously noted. Therefore, we adopt the magistrate's findings of fact with that correction. We also adopt the magistrate's conclusions of law except for her analysis of whether Dr. Gula's report should be excluded from evidentiary consideration. In accordance with the magistrate's decision, we deny relator's request for a writ of mandamus.

*Objections sustained;
writ of mandamus denied.*

BROWN and DORRIAN, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel.	:	
Carman Walls,	:	
	:	
Relator,	:	No. 10AP-866
	:	
v.	:	(REGULAR CALENDAR)
	:	
Karl HC LLC, and Industrial Commission	:	
of Ohio,	:	
	:	
Respondents.	:	

MAGISTRATE'S DECISION

Rendered on June 23, 2011

Peter J. Gibson, for relator.

Michael DeWine, Attorney General, and *Derrick L. Knapp*, for
respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶7} Relator, Carman Walls, 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 her request for temporary total disability ("TTD") compensation, and ordering the commission to find that she is entitled to that compensation.

Findings of Fact:

{¶8} 1. Relator sustained a work-related injury on August 12, 1996 and her workers' compensation claim was originally allowed for the following conditions: "bilateral thoracic sprain; bilateral lumbosacral sprain; disc protrusion L5-S1." In an order mailed September 7, 2007, relator's claim was additionally allowed for "radiculopathy[,] lumbosacral."

{¶9} 2. On October 18, 2006, relator underwent surgery for her back condition.

{¶10} 3. Relator's treating physician, Stephen Altic, D.O., completed a C-84 certifying that relator was temporarily and totally disabled from the date of surgery, October 18, 2006 through January 18, 2007.

{¶11} 4. In an order mailed November 15, 2006, the Ohio Bureau of Workers' Compensation ("BWC") granted relator's motion for TTD compensation from October 18, 2006 and continuing based on medical evidence submitted.

{¶12} 5. Dr. Altic continued to certify TTD compensation through December 2007. Dr. Altic also requested an MRI and an EMG as well as numerous epidural steroid injections to treat relator's condition. Based on the stipulated evidence, it appears that Rao Lingam, M.D., is the doctor who performed the injections.

{¶13} 6. With regards to the C-84s submitted by Dr. Altic, the record contains one dated November 19, 2007, wherein Dr. Altic certified continuing disability through February 16, 2008.

{¶14} 7. In spite of the above certification of disability, on December 18, 2007, Dr. Altic withdrew his support of TTD compensation in a letter stating:

This is to inform you that Ms. Walls has been lost to follow up. She completed 12 out of 18 scheduled physical medicine

treatments. We have not heard or seen from her since 12/04/2007. We have left multiple phone messages with her to contact us. I personally made a phone call. As of this date, two weeks ago, that was the last time she was seen in our office and she has failed to respond to our contacts. Therefore, because of her noncompliance and failure to contact us being no show and no call for multiple physical medicine visits, I can no longer support the temporary disability to which I had previously attested in a C-84 of 11/19/2007.

{¶15} 8. On December 20, 2007, relator was re-evaluated by Dr. Altic. However, following his examination of relator, Dr. Altic did not again certify disability after December 18, 2007. In his December 20, 2007 report, Dr. Altic states:

Ms. Walls was reevaluated by me on 12/20/2007. She has finally shown up after having not responded to any of our telephone calls. As you know from my December 18th letter, I had indicated that my physical medicine department and I myself had made multiple phone calls to Ms. Walls and she did not return any of our telephone calls. Because of the fact that she was noncompliant and nonresponsive to any of our attempts to contact her, I indicated that I would no longer be able to attest to her disability.

I reviewed this matter with Ms. Walls today and she told me that she did not call us because she does not have a telephone. That is interesting because we were able to leave messages. Then she tells me that she did not call us or contact us because she has trouble getting out of bed. I confronted her about the fact that she is telling me she has such bad back pain today and that she cannot get out of bed and yet she is sitting there on the examination table with her legs crossed with one leg crossed underneath the other leg. It makes it very difficult for me to understand how she has such terrible back pain that she could not get out of bed when she is sitting there up on the exam table with her legs crossed. That really stretches credulity.

I told her that given this matter and given these recent circumstances and given the fact that what she is telling me that she cannot get out of bed and yet she is sitting crossed-legged on my exam table, makes it difficult for me to support any disability at this time. I have advised her to follow up with

Dr. Lingam, her pain management specialist. At this time, I think we need to get a Functional Capacity Evaluation and get her into Vocational Rehabilitation.

{¶16} 9. It is undisputed that relator ceased receiving TTD compensation and ceased submitting medical evidence of continuing disability.

{¶17} 10. Dr. Lingam authored a report dated February 5, 2008, in response to the BWC's denial of continuing sacroiliac joint injections. In that report, Dr. Lingam states:

This is in regards to a client of yours and a patient of mine, Carman Walls. As you know, Ms. Walls sustained a work-related injury on August 12, 1996 resulting in ongoing pain/symptoms in her low back and right lower extremity. I recently submitted a C-9 requesting a series of three sacroiliac joint injections. As you know, the request was denied.

Ms. Walls has sacroiliac joint-mediated pain with physical exam findings confirming this. I believe this is due to two things: 1). An initially inadequately treated lumbosacral sprain (846.0) and 2). Alterations in gait and body mechanics due to the ongoing pain/symptoms in her right lower extremity resulting from her injury. These alterations have further irritated the sacral area.

It is my medical opinion that there is a direct and proximate relationship between the sacroiliac joint irritation and pain Ms. Walls is experiencing and her August 12, 1996 work injury. I believe the requested treatment is medically indicated and appropriate.

(Emphasis sic.)

{¶18} 11. The BWC referred relator to Douglas C. Gula, D.O., for an evaluation. In his February 7, 2008 report, Dr. Gula correctly listed the allowed conditions in relator's claim, provided his physical findings upon examination, and opined that: relator's allowed conditions had reached maximum medical improvement ("MMI"); she was unable to return to her former position of employment, but that she could perform sedentary to light-

duty type of work provided that she was not required to lift more than 20 pounds; could alternate between sitting, standing, and walking; pushing, pulling, and carrying was limited; she avoid any type of overhead activity; and that she avoid repetitive activities with her right lower extremity. While Dr. Gula opined that further injections would temporarily improve relator's condition, he believed that the requested sacroiliac joint injections were not for an allowed condition. He recommended that relator undergo a work conditioning and work rehabilitation type of program in order to assist her to return to some type of gainful employment.

{¶19} 12. In a hearing before a district hearing officer ("DHO") on March 3, 2008, relator's request for a series of three sacroiliac injections as previously requested by Dr. Altic was granted in light of relator's ongoing symptoms as documented by Dr. Lingam.

{¶20} 13. Dr. Lingam requested additional injections and, in a letter dated February 5, 2009, opined that relator should be receiving TTD compensation. Specifically, Dr. Lingam stated:

* * * Ms. Walls is entitled to continuing disability benefits (TTD) as she continues to undergo interventional pain management treatments and has been compliant with the recommended treatment plan.

She is currently in the midst of a series of three sacroiliac joint injections, having completed two of the three. She is to follow up after the series is completed for routine post-treatment evaluation. Based on her response, there are additional treatment options available to her including interventional (injection) treatments and surgical options, particularly, a spinal cord stimulator.

Given the fact that Ms. Walls has neither completed nor has been given the opportunity to complete all treatments available to her, I believe it is appropriate to reinstate disability benefits and to continue with these until maximum medical

improvement is achieved. I cannot give an estimated return to work date given this scenario.

{¶21} 14. Relator continued to receive additional injections and continued treating with Dr. Lingam.

{¶22} 15. On January 18, 2010, Dr. Altic completed a C-9 requesting a lumbosacral MRI.

{¶23} 16. On February 15, 2010, Dr. Altic completed another C-9 requesting lumbar medial branch nerve blocks at L4, L5, and S1.

{¶24} 17. In a letter dated March 10, 2010, Dr. Lingam noted that, in his opinion, relator should be granted the authorization to have another series of lumbar medial branch nerve blocks. Dr. Lingam expressed his reasoning as follows:

* * * She has architectural changes in her back related to the injury-related disc herniation and subsequent surgery and has developed a chronic alteration in her gait and body mechanics due to the ongoing injury-related lower extremity (radicular) pain. It is my medical opinion with reasonable probability that these changes have resulted in an overloading of her lumbar facet joints and the medial branch nerves therein have become chronically irritated and are contributing to a good portion of the low back pain that she reports. Physical exam findings confirm this.

{¶25} 18. On March 12, 2010, relator filed a C-23 form with the BWC changing her physician of record from Dr. Altic to Dr. Lingam.

{¶26} 19. On March 19, 2010, Dr. Lingam completed a C-84 certifying disability from January 1, 2008 through May 3, 2010.

{¶27} 20. Relator's request seeking the authorization of additional injections was heard before a DHO on April 13, 2010 and was granted based on the office notes and report of Dr. Lingam.

{¶28} 21. Sushi M. Sethi, M.D., provided a physician review dated April 21, 2010 in response to the question of whether or not the period of disability certified by Dr. Lingam was warranted. Dr. Sethi provided his analysis of the medical records and concluded that: the medical evidence did not support the requested period of disability; the continuing injections relator had been receiving from Dr. Lingam following the October 2006 surgery were not providing any lasting relief; there were no changes in relator's condition that would warrant the requisite disability; and that further injections were not medically necessary. Dr. Sethi also addressed Dr. Lingam's March 10, 2010 report and stated that Dr. Lingam's statements regarding relator's condition were not supported by any medical evidence. Ultimately, Dr. Sethi opined that there was insufficient medical evidence to document the necessity of TTD from January 1, 2008 through May 3, 2010, stating further that the continuing treatment had no relationship to the nearly 14-year-old injury which had long ago stabilized.

{¶29} 22. In an order mailed April 30, 2010, the BWC informed relator that it was referring relator's request for a "new period of temporary total compensation from 01-01-08 through 05-04-10" to the commission for consideration.

{¶30} 23. In the interim, relator sought an increase in her percentage of permanent partial disability.¹ Following a hearing before a staff hearing officer ("SHO") on April 14, 2009, relator was found to have a permanent partial disability of 28 percent, representing an increase of 5 percent.

¹ This application for an increase in her percentage of permanent partial disability was filed 26 weeks after relator's TTD benefits ceased to be paid as required by R.C. 4123.57.

{¶31} 24. Relator's request for TTD compensation was heard before a DHO on May 26, 2010. The DHO denied relator's request in its entirety.

{¶32} 25. Relator's appeal was heard before an SHO on July 7, 2010. The SHO affirmed the prior DHO's order denying the entire requested period of TTD compensation as follows:

Temporary total disability compensation from 01/01/2008 through 03/18/2008 is denied because this compensation was not requested within two years.

Temporary total disability compensation from 03/19/2008 through 05/26/2010 is denied because the Injured Worker is found to have reached Maximum Medical Improvement related to the allowed conditions in this claim.

This claim represents a 1996 injury. The Injured Worker did undergo a L5-S1 Hemilaminectomy with Discectomy on 10/18/2006. She received temporary total disability compensation after this surgery for over a year until Dr. Altic in a 12/18/2007 letter said that he would no longer certify continuing disability because of the Injured Worker's non-compliance with treatment.

Dr. Gula in an examination report, dated 02/07/2008, stated that the Injured Worker had reached Maximum Medical Improvement. Dr. Sethi in a report of 04/21/2010, stated that temporary total disability was not supported from 01/01/2008 forward. Based on these reports compensation from 03/19/2008 through 05/26/2010 is denied.

The Injured Worker argues that because of approved ongoing treatment the Injured Worker is entitled to temporary total disability compensation. This argument is not found persuasive. The treatment in question is found to have been merely palliative in nature. Dr. Gula noted in his 02/07/2008 report: "Any treatment that this Injured Worker would undergo would definitely improve her condition but I would expect only a very short response in a positive sense." This statement describes the nature of the Injured Worker's treatment since March 2008. The treatment does not represent changed circumstances that would justify the reinstatement of temporary total disability compensation.

To accept the Injured Worker's position on treatment would mean that an Injured Worker that had reached Maximum Medical Improvement would not be entitled to any treatment. In the inverse, it would mean that an Injured Worker receiving any treatment would automatically be entitled to temporary total disability compensation. Clearly, this is not the state of the law.

The Injured Worker argued at hearing that Lumbar Medial Branch Blocks at L4-5 approved by a District Hearing Officer on 04/13/2010 would entitle the Injured Worker to temporary total disability compensation, but clearly the District Hearing Officer approved these on a diagnostic basis only.

The age of the claim and the time passed since the surgery in October of 2006 was a factor in making this decision. In part, Dr. Gula's opinion was more persuasive than the opinion of Dr. Lingam because of the past history of this claim.

{¶33} 26. Relator's further appeal was refused by order of the commission mailed July 29, 2010.

{¶34} 27. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶35} In this mandamus action, relator contends that the commission abused its discretion by denying her request for TTD compensation from January 1, 2008 through May 26, 2010. Specifically, relator contends that the commission abused its discretion by: (1) terminating her TTD compensation without some evidence in the record to support its order; (2) terminating ongoing payment of TTD compensation prior to the date of the DHO hearing; and (3) applying the two-year limitation to her request for compensation.

{¶36} It is this magistrate's decision that the commission did not abuse its discretion in denying the entire period of requested compensation. Specifically, the magistrate finds that (1) there was some evidence in the record upon which the

commission relied; (2) the commission did not terminate ongoing TTD compensation, instead the commission denied a new period of compensation; and (3) the commission properly applied the two-year limitation to relator's request for benefits.

{¶37} 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.

{¶38} 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.

{¶39} The central issue in relator's case revolves around her contention that she was receiving ongoing payments of TTD compensation, beginning October 18, 2006 and continuing. According to relator, there was no event which occurred upon which the commission could properly terminate her TTD compensation prior to the hearing before the DHO on May 26, 2010. For the following reasons, this magistrate disagrees.

{¶40} No one disagrees that claimants are required to meet a certain burden of proof in order to establish that they are entitled to participate in the workers'

compensation system and receive any compensation under that system. Further, it is undisputed that claimants have a continuing burden to establish ongoing compensation such as temporary total and wage loss compensation. In fact, when an open-ended request for TTD compensation is made and granted, orders from either the BWC or the commission specifically state that "[p]ayments will continue based on medical evidence."

{¶41} Pursuant to *State ex rel. Russell v. Indus. Comm.* (1998), 82 Ohio St.3d 516, the "appropriate date on which to terminate disputed temporary total disability compensation on the basis of maximum medical improvement is the date of the termination hearing, and the commission may not declare an overpayment for payments received by the claimant before that date." *Id.* at syllabus. *Russell* comes into play when a claimant is receiving TTD compensation and, after undergoing an independent medical evaluation, an examining physician issues a report opining that the claimant has reached MMI. At such time, the commission considers medical evidence from claimant's treating physician supporting ongoing TTD compensation and the report from the independent medical examiner who has opined that the claimant has reached MMI and makes a determination of which report the commission finds to be more credible. In the event that the commission relies on the report of the independent medical examiner, *Russell* provides that the commission may not use the date of that report to terminate the claimant's TTD compensation. Instead, the appropriate date to terminate a claimant's award of TTD compensation based upon a finding of MMI is the date of the DHO's hearing. That is not the situation presented here.

{¶42} In the present case, Dr. Altic began certifying TTD compensation beginning October 18, 2006. Each C-84 form completed by Dr. Altic provided an estimated return-

to-work date. Dr. Altic would complete a new C-84 at a time near the date he had estimated that relator would be able to return to work in his previous C-84. These C-84s constitute ongoing medical proof of relator's continuing disability and, absent continued certification of TTD compensation, relator was not entitled to receive TTD compensation.

{¶43} The last C-84 Dr. Altic completed was dated November 19, 2007. In that C-84, Dr. Altic opined that relator continued to be temporarily and totally disabled through February 16, 2008 with an estimated return-to-work date of February 17, 2008. Based upon this C-84 and the previous C-84s completed by Dr. Altic and submitted, relator continued to receive TTD compensation. However, on December 18, 2007, Dr. Altic authored a report refusing to certify continuing TTD compensation because of relator's non-compliance. Thereafter, following an examination of relator, Dr. Altic drafted another report dated December 20, 2007, in which he again refused to certify continuing disability. In fact, Dr. Altic went so far as to state that relator's multiple comments that her pain was so severe she could not get out of bed "really stretches credulity." Because her physical presentation at this exam was contrary to her statements and his previous certification, Dr. Altic did not re-certify ongoing disability. Instead, Dr. Altic recommended that relator undergo a functional capacity evaluation and vocational rehabilitation.

{¶44} It is undisputed that, while relator was treating with Dr. Altic, she was also treating with Dr. Lingam. After Dr. Altic opined that he could not longer certify continuing disability, relator could have changed her physician from Dr. Altic to Dr. Lingam and Dr. Lingam could have completed a C-84 certifying TTD compensation for the period of time following Dr. Altic's refusal. However, Dr. Lingam did not. While relator continued to seek authorization for more injections, neither Drs. Altic nor Lingam certified that she was

temporarily and totally disabled after Dr. Altic's December 18, 2007 report wherein he withdrew his support of ongoing disability. In fact, it was not until February 5, 2009 that Dr. Lingam wrote a report, addressed to relator's counsel, wherein he opined that relator was entitled to continuing TTD benefits because, in his opinion, she had not reached MMI, and he indicated further that it was appropriate to reinstate her disability benefits and continue with those benefits until MMI was achieved. However, Dr. Lingam did not formally certify this period of disability to the commission. It would not be until March 12, 2010 that relator would formerly change her physician of record from Dr. Altic to Dr. Lingam. Thereafter, in his C-84 dated March 19, 2010, Dr. Lingam certified that relator was temporarily and totally disabled beginning January 1, 2008 through an estimated return-to-work date of May 3, 2010.

{¶45} Nowhere in the record and nowhere in relator's brief does she assert that she continued to receive TTD compensation after Dr. Altic's refusal to certify continuing disability and Dr. Lingam's actual certification of TTD. After Dr. Lingam submitted his C-84, a file review was conducted by Dr. Sethi. In his April 21, 2010 report, Dr. Sethi opined that disability from January 1, 2008 to May 3, 2010 was not medically documented by any objective findings. He also opined that continuing injections were not medically necessary as they provided relator with very little relief.

{¶46} At this time, given Dr. Lingam's C-84 certifying the period of TTD compensation and Dr. Sethi's report opining that there was insufficient objective medical evidence to support the period of disability, the issue of whether or not relator was entitled to TTD compensation was contested and the BWC referred the matter to the commission

for hearing. At that time, the DHO denied the entire period of requested compensation. Relator's appeal was upheld by the SHO.

{¶47} The SHO specifically denied compensation from January 1, 2008 through March 18, 2008 because it was not requested within two years. R.C. 4123.52 is clear:

* * * The commission shall not make any modification, change, finding, or award which shall award compensation for a back period in excess of two years prior to the date of filing application therefor. * * *

Relator's request for TTD compensation had been filed on March 19, 2010; therefore, relator was only eligible to receive compensation from March 19, 2010 and forward.

{¶48} The SHO denied the remaining period of compensation from March 19, 2008 through May 26, 2010 after finding that the evidence did not establish that relator was temporarily and totally disabled during that time period. The SHO relied on the February 7, 2008 report of Dr. Gula who opined that relator had already reached MMI at that time. The SHO also relied on the report of Dr. Sethi who opined that relator's 14-year-old injury had been well stabilized years earlier.

{¶49} After finding that relator's condition had reached MMI in early 2008, the SHO reviewed the medical evidence and, relying on the report of Dr. Gula, agreed that the treatment relator had received in the past two years was only giving her temporary improvement of her symptoms. Finding that relator had failed to establish that there had been a change in her condition since she reached MMI in early 2008, the SHO found that relator had not met her burden of proof and denied the requested compensation.

{¶50} *Russell* does not apply to these facts. Relator was not receiving ongoing TTD compensation which was terminated after a hearing before the commission. Instead, relator's TTD compensation ceased when Dr. Altic refused to certify continuing

disability. There is nothing in the record to suggest that relator challenged the termination of benefits and Dr. Altic did not submit any additional C-84s certifying TTD compensation. It was not until March 12, 2010 that relator changed her physician of record to Dr. Lingam and it was not until March 18, 2010 that Dr. Lingam completed a C-84 certifying disability beginning January 18, 2008. Clearly, any period prior to March 19, 2008 is more than two years from the date Dr. Lingam certified TTD—March 18, 2010. Further, it was not an abuse of discretion for the commission to find that relator's evidence did not support a new period of TTD compensation. The commission relied on some evidence and denied relator's request—the reports of Drs. Gula and Sethi.

{¶51} Relator also argues that Dr. Gula's report does not constitute some evidence because the commission had previously rejected his report when authorizing sacroiliac injections. Dr. Gula had opined that: (1) in his opinion, the injections were not for an allowed condition; and (2) even though the injections would improve her condition, the benefit would be temporary.

{¶52} *State ex rel. Zamora v. Indus. Comm.* (1989), 45 Ohio St.3d 17 prohibits the commission from relying on a medical report that the commission had earlier found unpersuasive. *State ex rel. Tilley v. Indus. Comm.* (1997), 78 Ohio St.3d 524. *Zamora's* holding was summarized in *State ex rel. Jeep Corp. v. Indus. Comm.*, 64 Ohio St.3d 378, 380-81, 1992-Ohio-106:

* * * *Zamora* * * * prohibits the commission from relying on a medical report that the commission had earlier found unpersuasive. In *Zamora*, the claimant simultaneously applied to have an additional psychiatric allowance and to have himself declared permanently totally disabled. The claimant was examined by various specialists, including Dr. Dennis W. Kogut, who stated that the claimant's depression preceded his

industrial injury and that the contribution of the industrial injury to the depression was minimal.

The commission allowed the psychiatric condition and, in so doing, implicitly rejected Kogut's report. However, ten months later, the commission denied the application for permanent total disability based partially on Dr. Kogut's same narrative. The claimant challenged the commission's subsequent reliance on that report, arguing that once rejected, the report was removed from evidentiary consideration. We agreed.

{¶53} Here, relator correctly argues that because the commission had previously rejected Dr. Gula's report in authorizing additional injections, the commission could not rely on that same report here. However, the removal of Dr. Gula's report from evidentiary consideration does not warrant the granting of a writ of mandamus.

{¶54} In denying relator's request for TTD compensation, the commission also relied on the report of Dr. Sethi who had thoroughly reviewed the medical evidence including the records from relator's physicians. Dr. Sethi specifically stated that the medical evidence did not support the requested period of disability. Because the report of Dr. Sethi constitutes some evidence upon which the commission relied, the removal of Dr. Gula's report does not invalidate the commission's order.

{¶55} Based on the foregoing, it is this magistrate's decision that relator has not established 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).