[Cite as *State ex rel. Roxbury v. Indus. Comm.*, 2012-Ohio-1310.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Delores M. Roxbury,	:	
Relator,	:	
v.	:	No. 11AP-125
Industrial Commission of Ohio and Catholic Healthcare Partners, Inc.,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on March 27, 2012

Nager, Romaine & Schneiberg Co., L.P.A., Jerald A. Schneiberg, Jennifer L. Lawther and *Christopher B. Ermisch,* for relator.

Michael DeWine, Attorney General, and *Sandra E. Pinkerton,* for respondent Industrial Commission of Ohio.

Andres & Wyatt, LLC, Thomas R. Wyatt and *Jerry P. Cline,* for respondent Catholic Healthcare Partners, Inc.

IN MANDAMUS
ON OBJECTION TO MAGISTRATE'S DECISION

BRYANT, J.

{¶ 1} Relator, Dolores M. Roxbury, commenced this original action requesting a writ of mandamus that orders respondent Industrial Commission of Ohio to vacate its

order denying her request for temporary total disability compensation and to find she is entitled to that compensation.

I. Facts and Procedural History

{¶ 2} Pursuant to Civ.R. 53 and Section (M), Loc.R. 12 of the Tenth Appellate District, this matter was referred to a magistrate who issued the appended decision, including findings of fact and conclusions of law. In her decision, the magistrate noted relator's arguments that the commission abused its discretion in determining (1) Dr. Lichstein's retroactive certification of disability was not some evidence on which the commission could rely, and (2) relator voluntarily abandoned the work force. In resolving those issues, the magistrate determined the commission did not abuse its discretion in either respect. Accordingly, the magistrate determined the requested writ of mandamus should be denied.

II. Objection

{¶ 3} Relator filed an objection to the magistrate's conclusions of law. Although not objecting to the magistrate's conclusion concerning Dr. Lichstein's retroactive certification of disability, relator objected to the magistrate's determination that she voluntarily abandoned the work force and thus had no wages to replace. For the reasons set forth in the magistrate's decision, relator's objection is unpersuasive

{¶ 4} As the magistrate pointed out, relator's allowed physical condition caused her to leave the work force in September 2004, but her allowed physical condition was found to have reached maximum medical improvement in July 2006, resulting in termination of her temporary total disability compensation. Relator initially appealed but withdrew her appeal.

{¶ 5} Relator then sought to have her claim additionally allowed for psychological conditions, and, although a psychological condition was allowed, the commission denied her request for temporary total disability compensation, concluding she was not temporarily and totally disabled due to the allowed psychological condition. Relator did not appeal the ruling. When she requested permanent total disability compensation, the commission denied it, determining relator remained physically capable of performing sedentary employment.

{¶ 6} Despite those findings, relator did not attempt to re-enter the work force. To relator, the argument must seem somewhat circular in that the commission denied relator benefits because she did not re-enter the work force, yet relator contends she could not re-enter the work force due to her injury. Relator's argument fails, however, because the prior rulings determined (1) her allowed psychological condition did not prevent her from returning to work, and (2) she is physically capable of sedentary employment. Accordingly, we cannot say the commission abused its discretion in concluding both that relator's lack of earnings was not due to her psychological condition and that her failure to seek other work or vocational rehabilitation evidenced her voluntarily abandoning the work force. Relator's objection is overruled.

III. Disposition

{¶ 7} Following independent review pursuant to Civ.R. 53, we find the magistrate has properly determined the pertinent facts and applied the salient law to them. Accordingly, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained in it, with one small correction: following "contrary" in ¶62 of the magistrate's decision, we add "to relator's argument." In accordance with the magistrate's decision, we deny the requested writ of mandamus.

Objection overruled;
writ denied.

CONNOR and DORRIAN, JJ., concur.

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APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Delores M. Roxbury,	:	
Relator,	:	
v.	:	No. 11AP-125
Industrial Commission of Ohio and Catholic Healthcare Partners, Inc.,	:	(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 21, 2011

Nager, Romaine & Schneiberg Co., L.P.A., Jerald A. Schneiberg, Jennifer L. Lawther, and *Christopher B. Ermisch*, for relator.

Michael DeWine, Attorney General, and *Sandra E. Pinkerton*, for respondent Industrial Commission of Ohio.

Andres & Wyatt, LLC, Thomas R. Wyatt, and *Jerry P. Cline*, for respondent Catholic Healthcare Partners, Inc.

IN MANDAMUS

{¶ 8} Relator, Delores M. Roxbury, 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:

{¶ 9} 1. Relator sustained a work-related injury on September 21, 2004 and her workers' compensation claim was originally allowed for the following physical conditions: "lumbar sprain; aggravation of pre-existing spondylosis L3-L4, L4-L5; retrolisthesis L3 on L2 and spinal stenosis L2-3."

{¶ 10} 2. Relator has not returned to work since the injury.

{¶ 11} 3. Relator received TTD compensation until July 10, 2006 when a District Hearing Officer ("DHO") found that her allowed physical conditions had reached maximum medical improvement ("MMI"). The DHO relied on a report from Dr. Erikson which is not in the record. As such, relator's physical condition, as of July 10, 2006, cannot be assessed.

{¶ 12} 4. Relator appealed from the DHO order terminating her TTD compensation; however, relator withdrew that appeal. As such, the DHO order terminating her TTD compensation as of July 10, 2006 remained in full force and effect.

{¶ 13} 5. In September 2007, relator filed a motion asking to have her claim allowed for certain psychological conditions and for an award of TTD compensation. Relator's application was supported by the August 24, 2007 C-84 of Raymond Richetta, Ph.D., of Weinstein & Associates. Dr. Richetta certified that relator was unable to return to her position of employment beginning August 24, 2007 and continuing. The record also contains the August 24, 2007 report of Dr. Richetta. In his report, Dr. Richetta noted that relator last worked in 2004 and that she was receiving Social Security disability benefits. Dr. Richetta also provided the results of the psychological testing:

> The BDI-II suggests a severe level of depression, although chronic physical pain can exaggerate the responses to the BDI-II. She acknowledged feeling so sad she cannot tolerate the feeling. She thinks of her future as hopeless and she no longer experiences pleasure from formerly pleasurable activities. She feels guilty all of the time and is disappointed in herself. She is self-critical, cries easily, feels restless, has little interest in anything, has difficulty making decisions, and feels worthless. Her energy is reduced, she experiences insomnia, is irritable all of the time, and has an increased

> appetite. She has difficulty concentrating, is fatigued, and has lost her libido.

Dr. Richetta opined that relator's psychological condition prevented her from returning to her former position of employment and concluded as follows:

> There is no evidence of any event other than the 2004 work injury causing the depressive symptoms. There is no evidence the IW is malingering her depressive symptoms. Therefore, the Dysthymic Disorder, Late Onset, should be considered a direct and proximate consequence of the 2004 work injury. She should engage in psychotherapy, and have a psychiatric evaluation to assess the appropriateness of psychotropic medication. The Dysthymic Disorder, Late Onset, alone causes tearful episodes, insomnia, reduced concentration, irritable mood, agitation, and fatigue, all of which prevent a return to her original position of employment, STNA, at this time.

{¶ 14} 6. An independent medical evaluation was performed by Walter Belay, Ph.D. In his October 17, 2007 report, Dr. Belay concurred with Dr. Richetta's assessment that relator did suffer from a depressive disorder that would meet the criteria for a dysthymic disorder. However, contrary to Dr. Richetta's opinion, Dr. Belay opined that relator's depression was mild and that when considering only dysthymic disorder, late onset, relator was not temporarily and totally disabled.

{¶ 15} 7. Relator's application was heard before a hearing officer on November 14, 2007. The hearing officer relied on the reports of Drs. Richetta and Belay and concluded that relator's claim should be additionally allowed for "dysthymic disorder, late onset." However, the hearing officer determined that TTD compensation was not payable. In making this conclusion, the hearing officer relied on the report of Dr. Belay who found that relator's dysthymic disorder was not totally disabling and the hearing officer further noted that, although Dr. Richetta's C-84 certified a period of TTD, the hearing officer was unpersuaded because Dr. Richetta never discussed relator's ability to work in his narrative report. As such, the hearing officer concluded that the C-84 did not provide sufficient reasons for relator being totally unable to work.

{¶ 16} 8. After relator's claim was allowed for dysthymic disorder, late onset, and relator was denied TTD compensation, relator applied for permanent total disability ("PTD") compensation.

{¶ 17} 9. An independent medical examination was conducted by Loren Shapiro, Ph.D. In his September 8, 2008 report, after his examination and review of medical records and relator's history, Dr. Shapiro concluded that relator's psychological condition was not at maximum medical improvement ("MMI"). Dr. Shapiro opined that relator needed continuing treatment and that, at this time, she had a "29" percent whole person impairment based on the dysthymic disorder, late onset. Dr. Shapiro also opined that relator was capable of work within the following restrictions:

> Based solely on the dysthymic disorder, the [injured worker] would be capable of work with the following limitations: a position which was repetitive to allow for deficits in focus and concentration. She would need a position which allowed for a reasonable learning curve. The position would have to be people oriented. She would not achieve in a position that was machine or data driven. As pain prevention plays a major role in the [injured worker's] cognition, she would need a position which offered much lattitude [sic] in work hours and physical environment.

{¶ 18} 10. Following a hearing on April 9, 2009, the commission denied relator's application for PTD compensation. Regarding her psychological conditions, the commission relied on Dr. Shapiro's report indicating that relator's dysthymic disorder, late onset, had not yet reached MMI. Further, the commission determined that relator remained physically capable of performing sedentary employment. Thereafter, the commission addressed the non-medical disability factors, stating:

> The Injured Worker is 65 years old, which is, of course, approaching traditional retirement age. The Commission finds, however, that the Injured Worker's age is not a barrier to employment in a sedentary capacity when considering Injured Worker's other vocational assets. The Injured Worker has a ninth grade education and on her IC-2 application, the Injured Worker indicated that she can read, write and do basic math. The Commission finds that with this level of education the Injured Worker has functioned effectively in a variety of work settings for over thirty years and learned most of her prior jobs on site by demonstration.

The Commission finds this demonstrated ability to acquire new job skills via on-the-job-training to be an asset to reemployment.

The Commission also finds the Injured Worker's work history to be a distinct asset to reemployment, demonstrating a strong work ethic by extended periods of stable employment over time and an ability to adapt to a variety of diverse work settings. The Injured Worker has previously worked as a nursing assistant, an assembler which included the use of a spot welder, pliers and cutters, an electronic assembler and department supervisor which involved the use of a solderer, pliers, cutters and the supervision of two (2) employees, and state tested nursing assistant (STNA) which involved total care of facility residents. The Injured Worker's ability to adapt to such diverse work environments would clearly benefit her in any effort to reenter the workforce.

The Commission notes that the Injured Worker began receiving Social Security Disability benefits in March of 2005 according to the Injured Worker's IC-2 application.

Finally, the Commission notes that there is no evidence in file of any effort by Injured Worker at rehabilitation or any other employment enhancing activity, which was confirmed by the Injured Worker's testimony at today's hearing. Pursuant to State ex rel. Cunningham v. Indus. Comm. (2001), 91 Ohio St.3d 261, State ex rel. Bowling v. National Can Corp. (1996), 77 Ohio St.3d 148, it is not unreasonable to expect an injured worker to participate in return-to-work efforts to the best of his or her abilities, or to take the initiative to improve reemployment potential. While extenuating circumstances can excuse an injured worker's participation in re-education or retraining efforts, injured workers should no longer assume that a participatory role or lack thereof will go unscrutinized. This omission by the Injured Worker is conspicuous when considering her positive vocational presentation which demonstrates an ability to successfully participate in programs, such as that required for her STNA certification, that might provide new and different job skills.

The Commission finds that permanent total disability compensation is a "compensation of last resort," to be awarded only after failure of all reasonable efforts to return

> to sustained remunerative employment, State ex rel. Wilson v. Indus. Comm. (1997), 80 Ohio St.3d 250.

{¶ 19} 11. A few months after the commission denied relator's application for PTD compensation, relator submitted a C-84 signed by Jamie Lichstein, Psy.D., who, like Dr. Richetta, is affiliated with Weinstein & Associates. Dr. Lichstein certified a period of disability beginning August 24, 2007 through an estimated return-to-work date of October 16, 2009. A later C-84 certified disability beginning November 20, 2007. This C-84 was dated July 16, 2009.

{¶ 20} 12. According to Dr. Lichstein's treatment notes, July 16, 2009 was her "[i]nitial session with Ms. Roxbury to evaluate for a C84 based on the depression." Nothing in that treatment note would indicate that Dr. Lichstein had reviewed any reports concerning relator's earlier psychological treatment. Dr. Lichstein indicated that relator had been struggling to cope with her physical pain and severe limitations resulting from her injury. Dr. Lichstein described relator as expressing hopelessness and that she was overwhelmed by stressful situations. Dr. Lichstein recommended continued treatment to work on decreasing her depressive symptoms and indicated that as a result of the severity of the depressive symptoms, relator could not return to work at that time.

{¶ 21} 13. Relator also submitted the September 9, 2009 report of Dr. Lichstein. Dr. Lichstein noted the following treatment relator had received:

> * * * Ms. Roxbury has been a therapy patient in our practice since December 2007. She was initially evaluated by Dr. Ray Richetta, the Clinical Director in our practice, in August 2007. At the time of his initial evaluation, Dr. Richetta opined and concluded in his report that Ms. Roxbury was temporarily and totally disabled by her depression. Ms. Roxbury currently sees Jennifer Sarosy, PCC, and she is seen on an every other week basis. Ms. Sarosy recently referred Ms. Roxbury to me to determine whether or not Ms. Roxbury's depressive symptoms are temporarily and totally disabling at this time. As you know, per Ohio BWC rules and regulations, only a psychologist or a psychiatrist can complete a C84. Thus, Ms. Roxbury will see me for the purposes of evaluating her and updating her C84.

{¶ 22} Thereafter, Dr. Lichstein discussed the commission's reasons for denying relator's application for PTD compensation and asserted that, if relator was not currently

permanently and totally disabled, then she was obviously temporarily and totally disabled. Dr. Lichstein stated:

> It is obvious based on the above rationale that Ms. Roxbury is considered to be temporarily and totally disabled based on the psychological allowance in this claim. That is, if her PTD was reversed based in part by Dr. Shapiro's statement that she had not yet reached MMI, then it only stands to reason that if she was not PTD then she was (and still is) TTD for this condition. Ms. Sarosy and myself are committed to the best course of treatment for Ms. Roxbury as well as the course of treatment most consistent with the Industrial Commission's findings. That is to say, we plan to continue with psychotherapy on at least an every other week basis with adjunctive psychotropic medication. In addition, we will seek to work collaboratively with Ms. Roxbury's medical doctors to reduce her pain so she can ultimately be referred to vocational rehabilitation. Vocational rehabilitation will, of course, have to be approved in order for Ms. Roxbury to obtain assistance in returning to remunerative employment.

{¶ 23} 14. Relator's motion was heard before a DHO on November 4, 2009 and was denied in its entirety. First, the DHO determined that:

> * * * [T]he period of temporary total disability compensation commencing 11/05/2007 through 11/14/2007 is barred under the doctrine of res judicata based on the fact this period was previously denied by a Staff Hearing Officer at a hearing adjudicated on 11/14/2007. At that time, counsel for the Injured Worker requested temporary total disability compensation based on the psychological allowance of dysthymic disorder late onset from 08/24/2007 through 11/14/2007.
>
> As such, the District Hearing Officer finds that the present request for the period commencing 11/05/2007 through 11/14/2007 has previously been denied by a Staff Hearing Officer and is therefore, barred under the doctrine of res judicata.

Thereafter, the DHO denied TTD compensation commencing November 15, 2007 because the DHO was not persuaded that the psychological allowance precluded relator from returning to work. The DHO noted that relator last worked in 2004 and that there was no

evidence that her failure to return to work was based on the allowed psychological condition. Specifically, the DHO stated:

> To the contrary, the District Hearing Officer finds that the Injured Worker last worked on 09/21/2004.
>
> The District Hearing Officer further notes that temporary total disability was terminated on 07/10/2006 based on the physical conditions in this claim and that the Injured Worker had been declared to have reached maximum medical improvement in regard to the physical allowances in this claim.
>
> The Injured Worker testified that she has never re-entered the work force since her finding of maximum medical improvement based on the physical conditions in her claim. When questioned by the District Hearing Officer as to why the Injured Worker did not seek re-entry into the work force since her finding of maximum medical improvement, the Injured Worker testified that "I could hardly walk; my pain is unbearable." The District Hearing Officer does not find the medical evidence persuasive that the psychological allowance in this claim is precluding the Injured Worker from returning to the work force.
>
> To the contrary, the District Hearing Officer finds that the tenet that is key to temporary total disability cases is that the industrial injury must remove the Injured Worker from his or her job. The District Hearing Officer finds this requirement obviously cannot be satisfied if the Injured Worker had no job at the time of the alleged disability. In the case at bar, the Injured Worker has not been employed since 2004 and has made no attempt to re-enter the work force since her finding of maximum medical improvement effective 07/10/2006. By the Injured Worker's testimony at today's hearing, the basis of her not re-entering the work force was solely related to her physical inability to walk and suffering unbearable pain. At no time did the Injured Worker testify that the reason she could not return to work was due to the psychological allowance in her claim.
>
> The District Hearing Officer finds that temporary total disability compensation is confined to situations in which a working Injured Worker is prevented from doing his or her job by an industrial injury. The District Hearing Officer finds that because the Injured Worker in this claim was not

> working at the time of the alleged onset of disability and has not substantiated that the psychological allowance removed her from her job or precluded her from obtaining employment, the District Hearing Officer does not find that temporary total disability compensation is substantiated by the present evidence and testimony borne out at today's hearing.

The DHO also relied on the report from Dr. Belay who had opined that relator was not temporarily and totally disabled. Lastly, the DHO considered respondent Catholic Healthcare Partners, Inc.'s ("employer") argument that Dr. Lichstein was not able to certify any period of alleged disability prior to July 16, 2009, the date relator first treated with Dr. Lichstein. The DHO agreed and stated:

> Lastly, counsel for the Employer argued that Dr. Lichtenstein [sic] has not provided a basis for the present temporary total disability request.
>
> Furthermore, counsel for the Employer argued that Dr. Lichtenstein [sic] did not begin to treat the Injured Worker until 07/16/2009. As such, counsel argued that Dr. Lichtenstein [sic] was not able to certify any period of alleged disability prior to 07/16/2009.
>
> While counsel for the Injured Worker argued that Dr. Petron, who is also affiliated with Dr. Lichtenstein's [sic] office, saw the Injured Worker on 01/04/2008, the District Hearing Officer does not find that Dr. Petron is certifying disability.
>
> To the contrary, the District Hearing Officer finds that the disability is being certified by Dr. Lichtenstein [sic] and the first treatment provided by this physician was not rendered until 07/16/2009. As such, the District Hearing Officer does not find that Dr. Lichtenstein [sic] may certify disability prior to this date.

{¶ 24} 15. Relator appealed and the matter was heard before a staff hearing officer ("SHO") on December 16, 2009. The SHO agreed with the DHO's conclusion that TTD compensation was barred from November 5 through November 14, 2007 based on res judicata. However, the SHO determined that TTD compensation should be awarded beginning November 20, 2007 as follows:

> It is the order of the Staff Hearing Officer that temporary total compensation is awarded from 11/20/2007 through 12/16/2009 inclusive and continuing based upon submission of medical proof. This portion of the Staff Hearing Officer's order is based upon the C-84 reports from the office of Weinstein & Associates.

{¶ 25} 16. The commission initially refused the employer's appeal and the employer moved for reconsideration. In an order mailed March 27, 2010, the commission granted continuing jurisdiction for the following reason:

> Specifically, it is alleged that the Staff Hearing Officer improperly relied on medical evidence certifying disability for a period of time prior to the date the Injured Worker was examined by the physician who provided evidence of disability.

{¶ 26} 17. In a letter dated February 17, 2010, Dr. Lichstein responded to a report authored by Donald J. Tosi, Ph.D., who had opined that relator's psychological condition had reached MMI. Dr. Lichstein stated that relator's condition had not reached MMI and that relator's psychological condition can improve if she continued treatments. Dr. Lichstein opined that relator was temporarily and totally disabled. Although Dr. Lichstein commented on the reports or office notes of various evaluators, Dr. Lichstein never indicated that she reviewed the report of Dr. Belay.

{¶ 27} 18. A hearing was held before the commission on June 22, 2010. First, the commission determined that the employer had met its burden of proving that the SHO's order contained a clear mistake of law requiring further action:

> * * * After further review and discussion, it is the finding of the Industrial Commission that the Employer has met its burden of proving that the Staff Hearing officer order, issued 02/19/2009, contains a clear mistake of law of such character that remedial action would clearly follow. Specifically, the Staff Hearing Officer failed to apply State ex rel. Bowie v. Greater Cleveland Regional Transit Auth. (1996), 75 Ohio St.3d 458, when she awarded temporary total disability compensation based upon the retrospective opinion of Jamie Lichstein, Psy.D. Therefore, the Commission exercises continuing jurisdiction pursuant to R.C. 4123.52 and State ex rel. Nicholls v. Indus. Comm. (1998), 81 Ohio St.3d 454, and State ex rel. Foster v. Indus.

> Comm. (1999), 85 Ohio St.3d 320, and State ex rel. Gobich v. Indus. Comm., 103 Ohio St.3d 585, 2004-Ohio-5990, in order to correct this error. The Employer's request for reconsideration, filed 01/29/2010, is granted. The Employer's appeal, filed 01/04/2010, from the Staff Hearing Officer's order, issued 12/19/2009, is granted to the extent of this order. It is further ordered that the Staff Hearing Officer order, issued 12/19/2009, is vacated.

Thereafter, the commission denied the entire period of requested compensation finding that there was insufficient persuasive evidence to support the request. The commission relied on the November 14, 2007 report of Dr. Belay and relied on *State ex rel. Bowie v. Greater Cleveland Regional Transit Auth.*, 75 Ohio St.3d 458, 1996-Ohio-142, and *State ex rel. Ado Staffing, Inc. v. Indus. Comm.*, 10th Dist. No. 08AP-1054, 2009-Ohio-5579, and found that Dr. Lichstein's C-84s certifying disability for the period of time before Dr. Lichstein first examined relator could not be relied upon. Specifically, the commission stated:

> Temporary total disability compensation is denied from 11/15/2007 to 07/15/2009 for the reason that there is insufficient persuasive evidence to support that the allowed condition "dysthymic disorder, late onset" rendered the Injured Worker temporarily and totally disabled over this period. The Commission notes that by District Hearing Officer order issued 11/17/2007, temporary total disability compensation was denied through 11/14/2007 based upon the opinion from Walter Belay, Ph.D., dated 10/17/2007. Dr. Belay supported the allowance of "dysthymic disorder, late onset" but described the condition as mild and opined the condition did not result in temporary total disability. The Injured Worker did not request temporary total disability compensation again, but instead, applied for permanent total disability compensation.
>
> Permanent total disability compensation was denied by Commission order issued 06/13/2009. The decision was based in part upon the opinion from Loren Shapiro, Ph.D., dated 09/08/2008, who concluded the psychological condition was not at maximum medical improvement (MMI). Ten months later, the Injured Worker came under the care of Jamie Lichstein, Psy.D., who first evaluated the Injured Worker on 07/16/2009. Dr. Lichstein completed a C-84, Request for Temporary Total Compensation, on

> 07/16/2009, certifying temporary total disability beginning 08/24/2007 through 10/16/2009.
>
> The Court in Bowie, supra, requires an examining physician review all of the relevant medical evidence generated prior to the physician's involvement in the claim to support a retrospective opinion of disability. See also, State ex rel. Ado Staffing, Inc. v. Indus. Comm., 10th Dist. App. No. 08AP-1054, 2009-Ohio-5579. Retrospective certification of disability is not some evidence upon which an order may be based unless the certifying physician has documented that he has reviewed all relevant medical evidence. Dr. Lichstein authored two narratives, dated 09/09/2009 and 02/17/2010, in which the Injured Worker's psychological history is discussed. Dr. Lichstein reviewed the Injured Worker's treatment with other caregivers within the Weinstein and Associates practice group and the Commission's order denying permanent total disability compensation. Dr. Lichstein mentions the report of Dr. Shapiro, but does so solely in the context of the Commission's order; Dr. Lichstein does not recite any examination findings or treatment recommendations from Dr. Shapiro. Dr. Lichstein never mentions the reports from Dr. Belay, dated 10/17/2007 and 08/04/2008. The Commission therefore finds that Dr. Lichstein failed to review all of the relevant prior medical evidence and her retrospective certification of temporary total disability compensation from 11/15/2007 through 07/15/2009 is not "some evidence" upon which the Commission may rely.

The commission also denied any TTD compensation from July 16, 2009 forward because relator had made no attempt to return to work. Specifically, the commission stated:

> Temporary total disability compensation is denied from 07/16/2009 to 06/22/2010 for the reason that there is insufficient persuasive evidence that the Injured Worker's inability to work is causally related to the claim.
>
> The Injured Worker has not returned to work since 09/21/2004, the date of injury. The physical conditions allowed herein were determined to have reached MMI on 07/10/2006. The Commission further determined, pursuant to the order issued 06/13/209, that the Injured Worker is physically capable of sedentary work. As recorded in the District Hearing Officer's order, issued 11/06/2009, the Injured Worker has made no attempt to return to work.

> Temporary total disability compensation replaces lost earnings; an injured worker cannot have lost earnings if the injured worker is no longer a part of the active workforce. State ex rel. Pierron v. Indus. Comm., 120 Ohio St.3d 40, 2008-Ohio-5245. Accordingly, the Commission finds the Injured Worker voluntarily abandoned the entire workforce and the claimed temporary total disability, from 07/16/2009 to 06/22/2010, is not causally related to the claim.

{¶ 28} 19. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶ 29} For the reasons that follow, it is this magistrate's decision that this court should deny relator's request for a writ of mandamus.

{¶ 30} In order for this court to issue a writ of mandamus as a remedy from a determination of the commission, relator must show a clear legal right to the relief sought and that the commission has a clear legal duty to provide such relief. *State ex rel. Pressley v. Indus. Comm.* (1967), 11 Ohio St.2d 141. A clear legal right to a writ of mandamus exists where the relator shows that the commission abused its discretion by entering an order which is not supported by any evidence in the record. *State ex rel. Elliott v. Indus. Comm.* (1986), 26 Ohio St.3d 76. On the other hand, where the record contains some evidence to support the commission's findings, there has been no abuse of discretion and mandamus is not appropriate. *State ex rel. Lewis v. Diamond Foundry Co.* (1987), 29 Ohio St.3d 56. Furthermore, questions of credibility and the weight to be given evidence are clearly within the discretion of the commission as fact finder. *State ex rel. Teece v. Indus. Comm.* (1981), 68 Ohio St.2d 165.

{¶ 31} Relator challenges both of the commission's reasons for denying her the requested period of TTD compensation. Relator argues that the commission abused its discretion by: (1) determining that Dr. Lichstein's retroactive certification of disability did not constitute some evidence, and (2) by finding that relator had voluntarily abandoned the work force.

{¶ 32} For the reasons that follow, it is this magistrate's conclusion that the commission did not abuse its discretion by: (1) finding that the retroactive certification of disability by Dr. Lichstein did not constitute some evidence, and (2) by finding that relator had voluntarily abandoned the work force and had no wages to replace.

{¶ 33} TTD compensation awarded pursuant to R.C. 4123.56 has been defined as compensation for wages lost where a claimant's injury prevents a return to the former position of employment. Upon that predicate, TTD compensation shall be paid to a claimant until one of four things occurs: (1) claimant has returned to work; (2) claimant's treating physician has made a written statement that claimant is able to return to the former position of employment; (3) when work within the physical capabilities of claimant is made available by the employer or another employer; or (4) claimant has reached MMI. See R.C. 4123.56(A); *State ex rel. Ramirez v. Indus. Comm.* (1982), 69 Ohio St.2d 630.

{¶ 34} In the order from the December 16, 2009 hearing, the SHO awarded relator TTD compensation beginning November 20, 2007 and continuing based upon C-84's signed by Dr. Lichstein on July 16, 2009 and October 13, 2009, certifying disability beginning approximately two years before Dr. Lichstein evaluated relator. This order was the focus of the commission's determination that it was appropriate to exercise continuing jurisdiction. The commission found a clear mistake of law because the SHO improperly relied on medical evidence.

{¶ 35} Pursuant to R.C. 4123.52, "[t]he jurisdiction of the industrial commission and the authority of the administrator of workers' compensation over each case is continuing, and the commission may make such modification or change with respect to former findings or orders with respect thereto, as, in its opinion is justified." In *State ex rel. B & C Machine Co. v. Indus. Comm.* (1992), 65 Ohio St.3d 538, 541-42, the court examined the judicially-carved circumstances under which continuing jurisdiction may be exercised, and stated as follows:

> R.C. 4123.52 contains a broad grant of authority. However, we are aware that the commission's continuing jurisdiction is not unlimited. See, *e.g., State ex rel. Gatlin v. Yellow Freight System, Inc.* (1985), 18 Ohio St.3d 246, 18 OBR 302, 480 N.E.2d 487 (commission has inherent power to reconsider its order for a reasonable period of time absent statutory or administrative restrictions); *State ex rel. Cuyahoga Hts. Bd. of Edn. v. Johnston* (1979), 58 Ohio St.2d 132, 12 O.O.3d 128, 388 N.E.2d 1383 (just cause for modification of a prior order includes new and changed conditions); *State ex rel. Weimer v. Indus. Comm.* (1980),

> 62 Ohio St.2d 159, 16 O.O.3d 174, 404 N.E.2d 149 (continuing jurisdiction exists when prior order is clearly a mistake of fact); *State ex rel. Kilgore v. Indus. Comm.* (1930), 123 Ohio St. 164, 9 Ohio Law Abs. 62, 174 N.E. 345 (commission has continuing jurisdiction in cases involving fraud); *State ex rel. Manns v. Indus. Comm.* (1988), 39 Ohio St.3d 188, 529 N.E.2d 1379 (an error by an inferior tribunal is a sufficient reason to invoke continuing jurisdiction); and *State ex rel. Saunders v. Metal Container Corp.* (1990), 52 Ohio St.3d 85, 86, 556 N.E.2d 168, 170 (mistake must be "sufficient to invoke the continuing jurisdiction provisions of R.C. 4123.52"). Today, we expand the list set forth above and hold that the Industrial Commission has the authority pursuant to R.C. 4123.52 to modify a prior order that is clearly a mistake of law. * * *

{¶ 36} In the present case, the commission determined that a clear mistake of law existed. Specifically, the commission found that the SHO failed to apply *Bowie* which requires that an examining physician review all of the relevant medical evidence generated prior to the physician's involvement in the claim in order to support a retroactive opinion of disability. The C-84s signed by Dr. Lichstein did not reference any medical evidence generated prior to the date Dr. Lichstein certified a retroactive period of disability. The magistrate finds that, based upon a review of the record, the commission properly found a clear mistake of law here and was justified in exercising its continuing jurisdiction over the claim.

{¶ 37} In *State ex rel. Gray v. Hurosky*, 10th Dist. No. 05AP-1163, 2006-Ohio-4985, the claimant, June Y. Gray, was evaluated by Dr. Weinstein on December 29, 2003. At that time, Dr. Weinstein opined that Gray suffered from anxiety disorder. However, Gray's claim was not officially allowed for that condition until September 3, 2004. Thereafter, Dr. Weinstein completed a C-84 certifying TTD compensation beginning December 29, 2003, the date of his initial exam, and Gray began ongoing psychotherapy with Dr. Raymond D. Richetta, another doctor in Dr. Weinstein's office, who also completed a C-84.

{¶ 38} Gray filed a motion seeking TTD compensation; however, her request was denied. Specifically, the commission found that Dr. Richetta could not evaluate Gray's disability prior to the date he first treated her. Further, the commission found that Dr.

Weinstein's reports could not be relied on because he did not evaluate her ability to return to her former position of employment.

{¶ 39} Gray filed a mandamus action which this court granted. This court's magistrate set out the issue as follows:

> The main issue is whether the commission ignored or misapplied the holding in *State ex rel. Bowie v. Greater Regional Transit Auth.* (1996), 75 Ohio St.3d 458, in denying relator TTD compensation for the period prior to Dr. Richetta's initial examination of relator on October 8, 2004.

Id. at ¶29. In adopting the decision of the magistrate, this court stated:

> In *Bowie*, the commission denied the claimant's request for TTD compensation based in part on a report from Dr. Katz who examined the claimant on July 12, 1990, almost seven months after the industrial injury. In his report, Dr. Katz opined that the claimant "should [not] have been out of work at any time after" the date of injury. *Id.* at 459. Dr. Katz's retrospective opinion was based upon emergency room records on the date of injury and his examination of the claimant.
>
> Concerned that Dr. Katz had not reviewed the reports of the claimant's treating chiropractor, Dr. McFadden, the *Bowie* court wrote:
>
> * * * In this instance, the conspicuous reference to the emergency room reports coupled with the equally conspicuous lack of reference to Dr. McFadden's reports suggests to us that Dr. Katz may have overlooked the latter.
>
> *Id*. at 460.
>
> The *Bowie* court issued a writ of mandamus returning the cause to the commission for its further consideration of the compensation request after removal of Dr. Katz's report from further evidentiary consideration. The *Bowie* court explains the law that underpins its decision:
>
> There are parallels between an examining doctor who offers a retroactive opinion and a doctor who renders an opinion as to a claimant's current status without examination. The evidentiary acceptability of the latter is long-settled, having been equated to an expert's response to a hypothetical

> question. *State ex rel. Wallace v. Indus. Comm.* (1979), 57 Ohio St.2d 55 * * *; *State ex rel. Hughes v. Goodyear Tire & Rubber Co.* (1986), 26 Ohio St.3d 71 * * * ; *State ex rel. Lampkins v. Dayton Malleable, Inc.* (1989), 45 Ohio St.3d 14[.] * * *
>
> As in the case of a non-examining physician, however, certain safeguards must apply when dealing with a report that is not based on an examination done contemporaneously with the claimed period of disability. We find it imperative, for example, that the doctor review all of the relevant medical evidence generated prior to that time. * * *
>
> *Id.* at 460.
>
> It should be further noted that under the so-called *Wallace* rule, *State ex rel. Wallace v. Indus. Comm.* (1979), 57 Ohio St.2d 55, the nonexamining physician is required to accept the findings of the examining physician but not the opinion drawn therefrom. *State ex rel. Consolidation Coal Co. v. Indus. Comm.* (1997), 78 Ohio St.3d 176, 179.

Id. at ¶31-34.

{¶ 40} In granting a writ of mandamus ordering the commission to award Gray TTD compensation beginning December 29, 2003, this court found that the safeguards noted in *Bowie* were present. Specifically, this court stated:

> In *State ex rel. Lampkins v. Dayton Malleable, Inc.* (1989), 45 Ohio St.3d 14, the court agreed with the appellant that the requirement of express acceptance under the *Wallace* rule had been relaxed. The *Lampkins* court held that "even under an implicit acceptance analysis," the two medical reports at issue were deficient. *Id.* at 16.
>
> Given the above authorities, the issue before the commission as whether Dr. Richetta at least implicitly accepted the findings in Dr. Weinstein's December 29, 2003 report when Dr. Richetta certified TTD on the C-84 filed October 21, 2004. If Dr. Richetta accepted the findings contained in Dr. Weinstein's December 29, 2003 report, then Dr. Richetta was competent under *Bowie* to opine as to relator's disability for the period December 29, 2003 through October 7, 2004. However, the commission never addressed the *Bowie* issue. Instead, the SHO's order of March 16, 2005 strongly suggests that the commission failed to understand that there are

> circumstances under which an examining doctor is indeed competent to render an opinion as to disability retrospective of his initial examination.
>
> Significantly, the record undisputedly indicates that Dr. Richetta practices with Dr. Weinstein. Thus, access to Dr. Weinstein's report can be inferred.
>
> Moreover, Dr. Richetta's selection of December 29, 2003 as the start date for his disability certification cannot be overlooked. Selection of December 29, 2003 as the start date for the disability certification strongly implies that Dr. Richetta relied upon Dr. Weinstein's report for the certification of disability for the period prior to Dr. Richetta's initial examination on October 8, 2004.
>
> In the magistrate's view, given that the commission has already determined the Dr. Richetta's C-84 is credible for the period prospective of his initial examination, there is nothing more for the commission to weight regarding Dr. Richetta's retrospective opinion which is implicitly based upon Dr. Weinstein's December 29, 2003 report-a report which was previously relied upon by the commission in granting the additional claim allowance.

State ex rel. Gray v. Hurosky, 10th Dist. No. 05AP-1163, 2006-Ohio-4985, ¶35-39. Specifically, in adopting the magistrate's decision, this court noted that Drs. Richetta and Weinstein practiced together and because Dr. Richetta used December 29, 2003 (the date Dr. Weinstein certified disability) as the start date for disability, the certification strongly implied that Dr. Richetta relied on Dr. Weinstein's report for the certification of disability prior to Dr. Richetta's initial exam. In other words, there was some evidence demonstrating that Dr. Richetta had reviewed and accepted Dr. Weinstein's opinion.

{¶ 41} Similarly, in *Wagner*, this court found that the commission's denial of TTD compensation for a specific period of time was premised upon a mistake of law and issued a writ of mandamus. In that case, the commission denied TTD compensation to the claimant, Robert Wagner, because Dr. Kimberly A. Wells, who originally saw Wagner on December 17, 2002, did not see him again until April 29, 2003. The commission found that Dr. Wells was not able to certify TTD compensation for the time period between December 17, 2002 and April 29, 2003.

{¶ 42} Wagner filed a mandamus action and this court, through its magistrate, determined that the commission's denial of TTD compensation for the requested period was premised upon a mistake of law and issued a writ of mandamus. Although the commission cited no authority to support the conclusion that Dr. Wells was not able to certify the requested period of TTD compensation, the magistrate determined that the decision strongly suggested a misapplication and misunderstanding of the legal principles set forth in *Bowie*. In adopting the report of its magistrate, this court stated:

> Here, unlike the situation with Dr. Katz in *Bowie*, Dr. Wells examined relator both before and after the period at issue, i.e., January 15 through April 28, 2003. Clearly, the commission cannot arbitrarily declare under *Bowie* that the period at issue is retrospective of the April 29, 2003 examination and ignore that the period at issue is also prospective of the series of examinations ending December 17, 2002.
>
> In short, *Bowie* renders Dr. Wells "able" to certify TTD compensation from January 15 through "April 28, 2003, contrary to the holding of the SHO.
>
> Moreover, the record undisputedly shows that Dr. Wells was informed of relator's treatment during the period at issue because Dr. Wells was actually coordinating the treatment. Thus, even though *Bowie* does not prohibit Dr. Wells' disability certification, there are additional safeguards present beyond what is normally required for prospective disability opinions.
>
> Here, the commission accepted Dr. Wells C-84 certification as of April 29, 2003, but refused to accept it for the period prior to April 29, 2003, because of the commission's misunderstanding of the legal principles set froth in *Bowie*. Thus, the commission, through its SHO, has already weighed the credibility of Dr. Wells' certification and the SHO's order offers no credibility concerns relating to the C-84.
>
> Given that the commission cannot reject Dr. Wells' certification as a matter of law under *Bowie*, and that the commission has already determined the credibility of the C-84, this court should issue a full writ of mandamus ordering the commission to award TTD compensation for the period

> January 15 through April 28, 2003. See *State ex rel. Pleban v. Indus. Comm.* (1997), 78 Ohio St.3d 406, 678 N.E.2d 562.

Id. at ¶44-48.

{¶ 43} As the above case law indicates, a retroactive certification of a period of TTD compensation can be considered some evidence to support a period of TTD compensation provided the doctor certifying the period of TTD compensation is aware of the treatment the claimant received and if the commission had already found the doctor's opinion to be credible.

{¶ 44} Here, it is undisputed that Dr. Lichstein did not evaluate relator until July 16, 2009. However, it is also apparent that relator had been receiving treatment from other members of the team at Weinstein & Associates. Those records are in the stipulation of evidence and indicate that relator had continuing difficulties dealing with her pain and her inability to work. However, there is no argument that those records ever indicated that relator was unable to work until Dr. Lichstein's office note from July 16, 2009.

{¶ 45} In its order, the commission acknowledged that it was aware of these treatment notes. Specifically, the commission referenced Dr. Lichstein's narrative reports, dated September 9, 2009 and February 17, 2010, in which Dr. Lichstein discussed relator's psychological history. The commission correctly found that, while Dr. Lichstein does mention relator's treatment with the other caregivers within the Weinstein & Associates practice group as well as the report of Dr. Shapiro, nothing in either of Dr. Lichstein's reports would indicate that she was aware of Dr. Belay's reports dated October 17, 2007 and August 4, 2008. Dr. Belay's October 17, 2007 report had previously been relied on to deny TTD compensation.

{¶ 46} The magistrate notes that both of those reports are lengthy and provide the results of certain psychological assessments administered. Further, it is obvious that Dr. Belay reviewed all the treatment records from Weinstein & Associates when he assessed a 20 percent whole person impairment and opined that relator's allowed psychological condition did not prevent her from returning to work.

{¶ 47} In *Bowie*, there was concern that Dr. Katz had not reviewed the report of the claimant's treating chiropractor and the court concluded that the conspicuous

reference to the emergency room reports coupled with the equally conspicuous lack of reference to the chiropractor's reports, suggested that Dr. Katz may have overlooked the latter. Here, Dr. Lichstein essentially lists every other report in the record except the reports of Dr. Belay. As in *Bowie*, this conspicuous reference to all the other reports coupled with the equally conspicuous lack of reference to the report of Dr. Belay, suggests that Dr. Lichstein may have overlooked the latter.

{¶ 48} The magistrate finds that the commission did not abuse its discretion in this regard as Dr. Lichstein does not indicate any familiarity with the reports of Dr. Belay. Dr. Lichstein references almost everything except the report of Dr. Belay.

{¶ 49} Lastly, relator makes a one-paragraph argument that the commission abused its discretion by finding that she had voluntarily abandoned the work force. In making this argument, relator does nothing more than cite *State ex rel Pierron v. Indus. Comm.*, 120 Ohio St.3d 40, 2008-Ohio-5245, and lists the dates she was found to be at MMI (2006) and the date she was found capable of sedentary work (2009).

{¶ 50} It is undisputed that TTD compensation is payable when a claimant's injury prevents a return to the former position of employment and that the award is intended to compensate the claimant for the loss of earnings he or she sustained while the injury heals.

{¶ 51} In making the finding that relator had voluntarily abandoned the work force, the commission cited *Pierron*. In that case, Richard Pierron suffered a work-related injury in 1973, that precluded him from performing his former position of employment. Pierron's employer offered him light-duty work which he performed for the next 23 years.

{¶ 52} In 1997, his light-duty position was being eliminated and he was offered the option to retire or be laid off. Pierron chose retirement.

{¶ 53} With the exception of a brief part-time position, Pierron remained unemployed for the next six years. In late 2003, Pierron moved for TTD compensation beginning in June 2001.

{¶ 54} The commission denied him TTD compensation finding that Pierron (1) made no attempt to seek viable work following his retirement, and (2) the choice to

retire was his own. The commission noted that the length of time was critical but that the key point was that his departure from the work force was unrelated to his injury.

{¶ 55} Pierron filed a mandamus action in this court and this court denied the writ of mandamus noting that (1) Pierron's retirement from the light-duty job was not due to the injury, and (2) the fact that he worked only minimally after retirement demonstrated an intent to abandon the entire labor market.

{¶ 56} The Supreme Court of Ohio affirmed this court and found that there was no causal relationship between his departure from the work force and his allowed conditions. Although Pierron did not choose to leave his employer, following the separation, Pierron had a choice to seek other employment or work no further, therefore, his assertion that he lacked income from 2001 forward was not related to the allowed conditions and barred his receipt of TTD compensation.

{¶ 57} In the present case, relator's allowed physical conditions did cause her to leave the work force in September 2004. Thereafter, relator began receiving Social Security disability in March 2005. In July 2006, relator's allowed physical conditions were found to have reached MMI and her TTD compensation was terminated. The report relied on to find that her physical conditions had reached MMI is not in the record.

{¶ 58} In September 2007, relator sought to have her claim additionally allowed for psychological conditions based upon C-84s and a report from Dr. Richetta. In November 2007, a DHO allowed the new conditions but denied her request for TTD compensation based on the October 17, 2007 report of Dr. Belay who opined that relator was not temporarily and totally disabled due to the allowed psychological conditions. Relator chose not to appeal this order.

{¶ 59} The first records indicating that relator sought any help for her psychological condition begin in January 2008. Relator applied for PTD compensation; however, in April 2009, her request was denied based on the report of Dr. Shapiro who opined that her psychological conditions had not reached MMI. The SHO found that relator's age (65) was not a barrier to her ability to perform sedentary work because she had other vocational assets including her ability to work in a wide variety of work settings over the years.

{¶ 60} Thereafter, the SHO noted that relator began receiving Social Security disability benefits in March 2005, that she had made no efforts to seek any vocational rehabilitation in spite of the fact that the SHO found that she had the ability to do so.

{¶ 61} Following the denial of her application for PTD compensation, relator filed a motion requesting TTD compensation based solely on her allowed psychological conditions. In November 2009, a DHO denied relator's request for TTD compensation finding both that she had failed to pursue any rehabilitation and that Dr. Lichstein could not retroactively certify disability prior to July 16, 2009. The evidence supporting the finding that relator's failure to pursue any vocational rehabilitation included: (1) relator's testimony that the fact that she could hardly work and her pain was unbearable, and (2) there was no persuasive psychological evidence that her psychological condition precluded her from returning to work.

{¶ 62} Returning to the June 22, 2010 hearing and the commission's reliance on *Pierron* and finding that relator's lack of earnings was not related to the allowed psychological condition, the above recitation of facts provides evidence to the contrary. It was not an abuse of discretion for the commission to find that relator's lack of earnings was not due to her psychological condition and that her failure to make any efforts to pursue vocational rehabilitation or seek other work was some evidence that she had voluntarily abandoned the work force.

{¶ 63} Based on the foregoing, it is this magistrate's decision that relator has not demonstrated that the commission abused its discretion in denying her TTD compensation, and her 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).