[Cite as *State ex rel. Ellinwood v. Honda of Am. Mfg., Inc.*, 2012-Ohio-1372.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Donald Ellinwood,	:	
Relator,	:	
v.	:	No. 11AP-169
Honda of America Mfg., Inc. and Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on March 29, 2012

Agee, Clymer, Mitchell & Laret, and *Robert M. Robinson*, for relator.

Vorys, Sater, Seymour and Pease LLP, Robert A. Minor and *Bethany R. Spain*, for respondent Honda of America Mfg., Inc.

Michael DeWine, Attorney General, and *LaTawnda N. Moore*, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO MAGISTRATE'S DECISION

BRYANT, J.

{¶ 1} Relator, Donald Ellinwood, commenced this original action requesting a writ of mandamus that orders respondent Industrial Commission of Ohio to vacate its August 19, 2010 order exercising R.C. 4123.52 continuing jurisdiction over the May 5,

2010 order of its staff hearing officer and to enter an order that reinstates the staff hearing officer's order of May 5, 2010 awarding temporary total disability compensation to relator beginning December 2, 2009.

I. Facts and Procedural History

{¶ 2} Pursuant to Civ.R. 53 and Section (M), Loc.R. 10 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 his decision, the magistrate identified the main issue as whether the staff hearing officer's order of May 5, 2010 contains the clear mistake of law the commission identified in its August 19, 2010 order and upon which the commission based its exercise of continuing jurisdiction. Concluding the May 5, 2010 order contains the clear mistake of law the commission identified in its August 19, 2010 order, resulting in the commission's having properly exercised its continuing jurisdiction, the magistrate determined this court should deny relator's request for a writ of mandamus.

II. Objections

{¶ 3} Relator filed two objections to the magistrate's conclusions of law:

> A. The Magistrate did not analyze the claimant's argument that the final order of the commission contained an abuse of discretion.
>
> B. The Magistrate erred in finding the commission was correct to exercise continuing jurisdiction.

Relator's two objections are interrelated, and we address them jointly. Together they challenge the magistrate's determination that the commission properly identified a clear mistake of law that supports not only the commission's exercising its continuing jurisdiction but also the commission's determination that the staff hearing officer's May 5, 2010 order improperly reinstated temporary total disability compensation to relator.

{¶ 4} As the magistrate appropriately noted, to properly reinstate temporary total disability compensation beginning December 2, 2009, relator needed to present, and the staff hearing officer had to rely upon, evidence that one or more of the allowed conditions of the claim had worsened temporarily. The staff hearing officer instead cited and relied on relator's own hearing testimony as evidence that one or more of the allowed conditions

of the claim had worsened. Relator's testimony alone is insufficient, as he lacks the medical expertise to render the necessary medical opinion. *See State ex rel. Cleveland Clinic Found. v. Indus. Comm.*, 10th Dist. No. 10AP-329, 2011-Ohio-2269.

{¶ 5} The staff hearing officer's May 5, 2010 order also relied on Dr. Bartley's February 24, 2010 and March 26, 2010 C-84s. Those documents indicate relator had pain, weakness, and decreased range of motion on the date of examination. As the magistrate properly concluded, "[T]he C-84s do not relate the reported pain, weakness, and decreased range of motion to the time at or near the termination of [temporary total disability] on [maximum medical improvement] grounds." (Magistrate's Decision, ¶ 54.) As a result, they "by themselves, or even in conjunction with relator's hearing testimony, provide no medical evidence supporting a finding that an allowed condition is worse than it was at or near the time of [temporary total disability] termination." (Magistrate's Decision, ¶ 54.)

{¶ 6} Due to the absence of the necessary evidence, the magistrate properly determined the commission correctly found a clear mistake of law in the staff hearing officer's May 5, 2010 order, because the staff hearing officer cited no medical evidence to support a finding of new and changed circumstances that would support reinstatement of temporary total disability compensation. Relator's second objection is thus unpersuasive.

{¶ 7} The magistrate's determination concerning continuing jurisdiction in itself addresses relator's first objection that the magistrate did not resolve the merits of relator's application to reinstate temporary total disability compensation. In concluding the commission properly exercised continuing jurisdiction due to a clear mistake of law, the magistrate necessarily and appropriately analyzed the evidence before the staff hearing officer and concluded relator's evidence does not constitute some evidence on which the staff hearing officer could rely to support a finding that one or more of the allowed conditions temporarily had worsened. Absent evidence of such a temporary worsening, the commission properly denied reinstatement of relator's temporary total disability compensation.

{¶ 8} In attempting to rebut that conclusion, relator points to Dr. Rohner's February 24, 2010 report on which the commission relied to determine claimant did not demonstrate new and changed circumstances. Relator challenges Dr. Rohner's report,

contending it is not evidence upon which the commission could rely. Relator, however, does not present grounds that would preclude the commission from relying on Dr. Rohner's report; rather, relator argues the commission should not have relied on it because Dr. Rohner's examination was not thorough or adequate. Although such factors implicate the reliability and credibility of Dr. Rohner's report, matters for the commission's assessment, they do not exclude the report as a matter of law from the commission's consideration.

{¶ 9} In end, relator failed to present evidence supporting a reinstatement of temporary total disability compensation. Absent such evidence, the commission did not abuse its discretion in finding a clear mistake of law in the staff hearing officer's May 5, 2010 order, a mistake that supported the commission's not only exercising its continuing jurisdiction but denying relator's application to reinstate temporary total disability compensation. Accordingly, we overrule relator's two objections.

III. Disposition

{¶ 10} 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. In accordance with the magistrate's decision, we deny the requested writ of mandamus.

Objections overruled;
writ denied.

BROWN, P.J., and DORRIAN, J., concur.

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APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Donald Ellinwood,	:	
Relator,	:	
v.	:	No. 11AP-169
Honda of America Mfg., Inc. 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 29, 2011

Agee, Clymer, Mitchell & Laret, and *Robert M. Robinson*, for relator.

Vorys, Sater, Seymour and Pease LLP, *Robert A. Minor*, and *Bethany R. Spain*, for respondent Honda of America Mfg., Inc.

Michael DeWine, Attorney General, and *LaTawnda N. Moore*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶ 11} In this original action, relator, Donald Ellinwood, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its August 19, 2010 order that exercised R.C. 4123.52 continuing jurisdiction over the May 5, 2010 order of its staff hearing officer ("SHO"), and to enter an order that reinstates

the SHO's order of May 5, 2010 that awards temporary total disability ("TTD") compensation beginning December 2, 2009.

Findings of Fact:

{¶ 12} 1. On July 13, 2005, relator injured his right knee while employed with respondent Honda of America Mfg., Inc. ("Honda"), a self-insured employer under Ohio's workers' compensation laws.

{¶ 13} 2. The industrial claim (No. 05-873694) is allowed for:

> Right knee strain; right knee medial meniscus tear; post-traumatic arthritis of the right knee; degenerative joint disease of the right knee.

{¶ 14} 3. On August 24, 2009, at Honda's request, relator was examined by orthopedic surgeon Ralph G. Rohner, Jr., M.D. In his five-page narrative report, Dr. Rohner opined:

> **SUMMARY** – Mr[.] Ellinwood is a 58-year-old individual who sustained an injury to his right knee at work and has subsequently undergone four surgical procedures culminating in a total knee arthroplasty which did require an exchange of the polyethylene[.] At the present time, the patient continues to have problems with the knee in terms of aching and feelings of instability, although there is no locking[.]
>
> * * *
>
> Mr[.] Ellinwood has reached maximum medical improvement based solely upon the patient's statement that he would not accept further surgery to correct the instability of his total knee arthroplasty[.] Absent surgery, I do not believe there is any additional treatment which would bring about any fundamental, functional or physiological change in his condition[.] My examination showed the knee is stable as noted above[.]

{¶ 15} 4. On September 14, 2009, citing Dr. Rohner's report, Honda moved for termination of TTD compensation.

{¶ 16} 5. Following an October 22, 2009 hearing, a district hearing officer ("DHO") issued an order terminating TTD compensation on grounds that the industrial injury had reached maximum medical improvement ("MMI"). Termination of

compensation was effective the date of the hearing, i.e., October 22, 2009. The DHO stated reliance upon the MMI opinion of Dr. Rohner.

{¶ 17} The DHO's order also recognized that Honda had approved relator's request for a functional capacities evaluation. The DHO also authorized work conditioning that was supported by a C-9 request from relator's attending physician, R. Earl Bartley, M.D.

{¶ 18} 6. Relator administratively appealed the DHO's order of October 22, 2009.

{¶ 19} 7. Following a December 10, 2009 hearing, an SHO mailed an order on December 16, 2009 that affirmed the DHO's order of October 22, 2009. The SHO's order explains:

> * * * The work conditioning the Injured Worker underwent did not, and was not intended to bring about a fundamental change in the allowed knee condition. Reliance is placed on the 08/24/2009 report from Dr. Rohner.

{¶ 20} 8. On January 6, 2010, another SHO mailed an order refusing relator's administrative appeal from the SHO's order of December 10, 2009.

{¶ 21} 9. Earlier, on December 2, 2009, Dr. Bartley wrote the following office note:

> Patient back today for follow-up of his right knee. It's still symptomatic. Tenderness noted along the proximal tibia. There was still some residual MCL/LCL laxity. He seems to gain laxity even after the polyethylene exchange. He's in the work conditioning and it's still problematic. Today on examination, good active [range of motion] of 0-123 degrees. Tenderness along the proximal tibia. The work conditioning is not gaining strength on a substantial basis.
>
> PLAN: To hold work conditioning for now. A C-9 request for a second opinion with Dr. Polite.

{¶ 22} 10. Also on December 2, 2009, Dr. Bartley completed a C-9 request for a "consult/2nd opinion" from a Dr. Polite.

{¶ 23} 11. Also on December 2, 2009, Dr. Bartley completed another C-9 request that is nearly identical to the other C-9 request.

{¶ 24} 12. Also on December 2, 2009, Dr. Bartley completed a C-84 on which he certified a period of TTD from July 22, 2008 to an estimated return-to-work date of February 1, 2010 based upon a December 2, 2009 examination.

{¶ 25} The C-84 form asks the examining physician to state the objective and subjective clinical findings that are the basis of the physician's recommendation of TTD compensation. In response, Dr. Bartley wrote "[p]ain, weakness [decreased range of motion]" for the objective clinical findings. He wrote "[p]ainful [right] knee" for the subjective clinical findings.

{¶ 26} 13. On January 14, 2010, relator moved for TTD compensation beginning December 2, 2009. In support, relator submitted Dr. Bartley's December 2, 2009 office note, his December 2, 2009 C-84, and his two C-9s dated December 2, 2009. Relator's motion, filed on form C-86, states:

> Now comes claimant, through counsel, and hereby requests temporary total disability compensation beginning 12/2/09. Claimant was previously found to have reached a level of maximum medical improvement, however, his knee condition significantly worsened while participating in a work conditioning program. This necessitated a second opinion and consultation with a specialist. Therefore, claimant, once again, became temporarily and totally disabled.

{¶ 27} 14. Subsequent to the filing of his January 14, 2010 motion, Dr. Bartley completed C-84s on February 24 and March 26, 2010. On both of the C-84s, Dr. Bartley wrote "[p]ain, weakness [decreased range of motion]" for his objective clinical findings, and "[p]ainful [right] knee" for his subjective clinical findings.

{¶ 28} 15. On February 24, 2010, at Honda's request, Dr. Rohner issued an addendum to his August 24, 2009 report. The two-page addendum states:

> PURPOSE OF THIS REVIEW: I have been provided with additional material in reference to this individual and the question is does it alter my opinion of the patient having achieved maximum medical improvement in reference to the allowed knee conditions and surgery subsequent to those allowed conditions.
>
> In reviewing the material provided, I find two additional office notes from Dr. Bartley since the final one that had

been given to me on the prior examination. The last note I had seen was 08/05/09. In this material, I have notes from Dr. Bartley dated 10/02/09 and 12/02/09. In October, the patient had been granted a functional capacity evaluation but no work hardening. The examination showed a stable gait pattern being maintained. There is no comment in reference to range of motion and stability.

The second note of 12/02/09 comments upon a range of motion from 0-123 degrees with tenderness of the proximal tibia and comments that the patient had not gained any strength in the work hardening program. The patient also continued to demonstrate residual medial lateral laxity.

The next item of material for evaluation is that of a C86 where the patient was requesting total disability beginning on 12/02/09 based upon his condition worsening while in the functional capacity evaluation and work hardening program. Also, a request had been forwarded for a second opinion with Dr. Polite.

The remaining material provided consists of the material from the physical work performance evaluation of NovaCare Work Strategies of Columbus, Ohio as well as the work conditioning program notes. The patient went through the programs and is reported to have exerted maximum effort in terms of meeting requested goals, etc. He made 9 of the 10 scheduled appointments. The last appointment was canceled secondary to severe back spasm and difficulty walking but no further delineation or description is made. The work rehabilitation program comments upon the patient complaining of increasing intensity of knee pain but I do not find comments in reference to warmth, redness, swelling, etc.

The material provided to me does not change my opinion in reference to having obtained maximum medical improvement of the allowed conditions and treatment of the right knee since my report of 08/24/09. I find no new and changed circumstances that would lead me to alter my previous opinion that Mr. Ellinwood has reached maximum medical improvement.

It is my conclusion that the material provided strengthens my previous opinion of having achieved maximum medical improvement. When stressed, symptoms increased. I do not

> foresee anything based upon the material provided at the initial examination or the material provided for review at this time to alter my previous opinion as stated in my report of previous exam on 08/24/09.

{¶ 29} 16. Following a March 18, 2010 hearing, a DHO issued an order denying relator's January 14, 2010 motion. The DHO's order explains:

> It is the finding of the Hearing Officer that the Injured Worker is requesting temporary total disability compensation from 12/02/2009 to 03/18/2010 and to continue. Hearing Officer finds that the Injured Worker was found to have reached maximum medical improvement on 10/22/2009. Hearing Officer does not find any new or changed circumstances in which to warrant a new period of temporary total disability compensation at this time. The Injured Worker testified that he has now agreed to have the surgery and the C-9 was filed requesting surgery on 03/15/2010. A date for surgery has not been set and therefore no new or changed circumstances have occurred. It is therefore the order of the Hearing Officer that the request for temporary total disability compensation from 12/02/2009 to 03/18/2010 is denied.
>
> This order is based on the report of Dr. Rohner dated 02/24/2010.

{¶ 30} 17. Relator administratively appealed the DHO's order of March 18, 2010.

{¶ 31} 18. On April 12, 2010, at Honda's request, relator was examined by Mark A. Holt, M.D. In his three-page narrative report, Dr. Holt opined:

> It is my opinion that Dr. Fada's request for right total knee revision/polyethylene exchange is medically necessary and appropriate for the allowed conditions of this claim. The injured worker has undergone right knee replacement and revision with polyethylene exchange for right knee degenerative joint disease and posttraumatic arthritis. The injured worker reports pain and instability in his knee. On examination, he is noted to have instability to both varus and valgus stress in both extension and flexion. It is my opinion therefore with medical probability that the request for right total knee revision/polyethylene exchange is medically necessary and appropriate.

{¶ 32} 19. Following a May 5, 2010 hearing, an SHO mailed an order on May 8, 2010 that vacates the DHO's order of March 18, 2010 and awards TTD compensation beginning December 2, 2009. The SHO's order explains:

> After reviewing all of the evidence pertaining to the issue, considering the testimony of the Injured Worker and arguments of counsel, it is the order of the Staff Hearing Officer that the Injured Worker's C-86 motion, filed 01/14/2010, is granted to the extent of this order.
>
> It is the order of the Staff Hearing Officer that temporary total [disability] compensation is ordered paid from 12/02/2009 to 05/07/2010 and to continue upon the submission of medical proof to disability.
>
> It is the finding of the Staff Hearing Officer that the Injured Worker has presented sufficient evidence to warrant a finding of new and changed circumstances that would warrant resuming temporary total [disability] compensation. The Injured Worker has had four knee surgeries and wanted to avoid a 5th surgery if at all possible. After a finding of maximum medical improvement, the Injured Worker testified that he had entered [in]to a vocational rehabilitation conditioning program through his employer. While in the program, the Injured Worker's knee symptoms worsened to [the] point that surgery was no longer an option but became a necessity. The Injured Worker requested surgery which was approved by the self insured employer after a review by Dr. Holt. The Injured Worker's surgery is scheduled for May 27, 2010.
>
> The Staff Hearing Officer relies upon the C-84s of Dr. Bartley, dated 02/24/2010 and 03/26/2010, wherein he opines that the Injured Worker is disabled.

{¶ 33} 20. On June 3, 2010, another SHO mailed an order refusing Honda's administrative appeal from the SHO's order of May 5, 2010.

{¶ 34} 21. On June 17, 2010, Honda moved for reconsideration of the SHO's order of May 5, 2010.

{¶ 35} 22. On July 28, 2010, the three-member commission, on a two-to-one vote, mailed an interlocutory order stating:

It is the finding of the Industrial Commission that the Employer has presented evidence of sufficient probative value to warrant adjudication of the request for reconsideration regarding the alleged presence of a clear mistake of fact in the order from which reconsideration is sought, a clear mistake of law of such character that remedial action would clearly follow, and an error by the subordinate hearing officer in the findings issued on 05/08/2010, which renders the order defective.

Specifically, it is alleged that there was no medical evidence cited by the Staff Hearing [Officer] to support a finding of new and changed circumstances to permit reinstatement of temporary total disability compensation beginning 12/02/2009, after a previous hearing of the Staff Hearing Officer on 12/10/2009 affirmed "a finding of maximum medical improvement," effective 10/22/2009. It is further alleged that the Staff Hearing Officer cited no medical evidence to support a finding that the Injured Worker's participation in a work-hardening program led to the result that "surgery was no longer an option but became a necessity." In addition, the Staff Hearing Officer erred by relying on C-84 forms from R. Earl Bartley, M.D., which do not support a finding of new and changed circumstances.

The order issued 06/03/2010 is vacated, set aside and held for naught.

Based on these findings, the Industrial Commission directs that the request for reconsideration, filed by the Employer on 06/17/2010, is to be set for hearing to determine whether the alleged mistakes of fact and law and error by the subordinate hearing officer as noted herein are sufficient for the Industrial Commission to invoke its continuing jurisdiction.

In the interest of administrative economy and for the convenience of the parties, after the hearing on the question of continuing jurisdiction, the Industrial Commission will take the matter under advisement and proceed to hear the merits of the underlying issue(s). The Industrial Commission will thereafter issue an order on the matter of continuing jurisdiction under R.C. 4123.52. If authority to invoke continuing jurisdiction is found, the Industrial Commission will address the merits of the underlying issue(s).

{¶ 36} 23. Following an August 19, 2010 hearing before the three-member commission, the commission, on a two-to-one vote, mailed an order on October 27, 2010 that exercises continuing jurisdiction. The commission's August 19, 2010 order explains:

> * * * 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 05/08/2010, contains a clear mistake of law of such character that remedial action would clearly follow. Specifically, there was no medical evidence cited by the Staff Hearing Officer to support a finding of new and changed circumstances to permit reinstatement of temporary total disability compensation beginning 12/02/2009, after a previous hearing of a Staff Hearing Officer on 12/10/2009 affirmed "a finding of maximum medical improvement," effective 10/22/2009. 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, 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 06/17/2010, is granted. The Employer's appeal, filed 05/24/2010, from the Staff Hearing Officer order, issued 05/08/2010, is granted only to the extent of this order. It is further ordered that the Staff Hearing Officer order, issued 05/08/2010, is vacated.
>
> It is the order of the Commission that the Injured Worker's C-86 Motion filed 01/14/2010, requesting temporary total disability compensation, is granted only to the extent of this order. It is the order of the Commission that temporary total disability compensation be denied from 12/02/2009 to 05/26/2010. It is the further order of the Commission that temporary total disability compensation be awarded from 05/27/2010 to 09/29/2010 and to continue as long as the evidence supports ongoing payment.
>
> The Commission finds that by Staff Hearing [O]fficer order issued 12/16/2009, temporary total disability compensation was terminated on the basis of maximum medical improvement (MMI). While the Staff Hearing Officer also authorized a functional capacity evaluation and work conditioning program, the Staff Hearing Officer relied upon

> the report from Ralph Rohner, Jr., M.D., dated 08/24/2009, to conclude that MMI had been attained. By C-86 motion filed 01/14/2010, the Injured Worker requested temporary total disability compensation be reinstated, beginning 12/02/2009. The Injured Worker relied upon the progress note from R. Earl Bartley, M.D., dated 12/02/2009, recommending that the Injured Worker seek a second surgical opinion. The Injured Worker consulted Robert Fada, M.D., on 02/26/2010, who recommended a right total knee revision which was subsequently authorized and performed on 05/27/2010.
>
> Temporary total disability compensation may be reinstated following a finding of MMI when new and changed circumstances document a worsening of the allowed conditions accompanied by a prognosis that the worsening is only temporary. State ex rel. Josephson v. Indus. Comm., 101 Ohio St.3d 195, 2004-Ohio-737. While the Injured Worker continued to receive treatment and underwent a work conditioning program, the Commission finds the allowed conditions did not temporarily worsen. This finding is supported by the 02/24/2010 report of Dr. Rohner. Dr. Rohner reviewed progress notes from Dr. Bartley, dated 11/20/2009 and 12/02/2009, and concluded there was no evidence of new and changed circumstances, and the allowed conditions remained at MMI. The Commission finds Dr. Rohner's opinion persuasive and concludes that temporary total disability compensation is not payable from 12/02/2009 to 05/26/2010.
>
> The Commission finds that temporary total disability compensation is appropriately reinstated beginning 05/27/2010 when the Injured Worker underwent the authorized right total knee revision surgery. Dr. Fada has certified temporary total disability compensation beginning 05/27/2010 by C-84 form dated 08/11/2010. The Commission, therefore, finds new and changed circumstances to warrant the payment of temporary total disability compensation from the date of surgery and continuing.

{¶ 37} 24. On February 22, 2011, relator, Donald Ellinwood, filed this mandamus action.

Conclusions of Law:

{¶ 38} The main issue is whether the SHO's order of May 5, 2010 actually contains the clear mistake of law that the commission identified in its August 19, 2010 order and upon which it purports to exercise its continuing jurisdiction.

{¶ 39} Finding that the SHO's order of May 5, 2010 does contain the clear mistake of law that the commission identified in its August 19, 2010 order and that the commission has thus properly exercised its continuing jurisdiction, it is the magistrate's decision that this court deny relator's request for a writ of mandamus, as more fully explained below.

{¶ 40} In *State ex rel. Josephson v. Indus. Comm.*, 101 Ohio St.3d 195, 2004-Ohio-737, Sally Josephson sprained her low back at work and she began receiving TTD compensation. Later, she was diagnosed with cancer and surgery was performed in January 2000. On November 7, 2000, the commission determined that the low back sprain was at MMI.

{¶ 41} By February 2001, Sally Josephson had recovered from chemotherapy and was cleared by her oncologist to begin an exercise program. She moved for reinstatement of TTD compensation based upon the allowed condition that had previously been found to be at MMI.

{¶ 42} The *Josephson* court noted that the parties do not contest the initial MMI declaration, nor the principle that TTD can be reinstated notwithstanding that declaration should new and changed circumstances demand.

{¶ 43} Succinctly summarizing relevant prior case law, the *Josephson* court states, at ¶14-16:

> * * * [I]n [State ex rel. Bing v. Indus. Comm. (1991), 61 Ohio St.3d 424], the claimant's condition temporarily worsened after MMI had been declared. We renewed TTC, reasoning that during the flare-up, claimant was not at MMI, and until she regained that level, she should be compensated with TTC.
>
> We reached the same result in State ex rel. Conrad v. Indus. Comm. (2000), 88 Ohio St.3d 413, * * * and State ex rel. Value City Dept. Stores v. Indus. Comm., 97 Ohio St.3d 187 2002-Ohio-5810 * * *. Conrad described Bing as

> "recogniz[ing] that claimants who had previously been declared as MMI could experience temporary exacerbation of their condition that justified further treatment or even temporary total disability compensation, as the claimant struggled to recover his or her previous level of well-being." 88 Ohio St.3d at 415-416[.] * * * Similarly, the claimant in Value City experienced a medical deterioration when the leads on her injury-related nerve stimulator failed. This worsening, combined with the favorable prognosis for improvement once those leads were replaced, was enough to resume TTC despite an earlier declaration of MMI.
>
> These cases establish that, to date, the only new and changed circumstance sufficient to re-entitle a worker to TTC is the worsening of the claimant's allowed conditions accompanied by a prognosis that the worsening is only temporary. * * *

{¶ 44} Analysis begins with some observations regarding the SHO's order of May 5, 2010. Under *Josephson*, in order for the SHO to properly reinstate TTD compensation starting December 2, 2009, as relator requested, the SHO had to state reliance upon evidence that one or more of the allowed conditions of the claim had worsened, accompanied by a prognosis that the worsening is only temporary.

{¶ 45} According to the SHO's order of May 5, 2010, relator testified at the hearing that, while participating in a vocational rehabilitation conditioning program, his "knee symptoms worsened to [the] point that surgery was no longer an option but became a necessity." Thus, the SHO cited and relied upon relator's hearing testimony as evidence supporting the *Josephson* requirement that one or more of the allowed conditions of the claim must be found to have worsened in order to reinstate TTD compensation.

{¶ 46} Also, the SHO states reliance upon the C-84s of Dr. Bartley dated February 24 and March 26, 2010. As earlier noted, on those C-84s, Dr. Bartley wrote "[p]ain, weakness [decreased range of motion]" for the objective clinical findings, and "[p]ainful [right] knee" for the subjective clinical findings.

{¶ 47} It can be noted that the SHO's order of May 5, 2010 does not state reliance upon Dr. Bartley's December 2, 2009 office note which relator submitted in support of his January 14, 2010 motion.

{¶ 48} The commission's order of August 19, 2010 finds a clear mistake of law in the SHO's order of May 5, 2010 by finding "there was no medical evidence cited by the Staff Hearing Officer to support a finding of new and changed circumstances to permit reinstatement of [TTD] compensation beginning 12/02/2009."

{¶ 49} Given that the commission's exercise of continuing jurisdiction is premised upon its finding that the SHO failed to cite medical evidence to support new and changed circumstances (a worsening of a condition accompanied by a prognosis that the condition is only temporary) the critical question here is whether the commission was correct in holding that the SHO's order of May 5, 2010 fails to cite medical evidence supporting a finding that one or more of the allowed conditions has worsened.

{¶ 50} It is well-settled law that neither the commission nor its hearing officers have medical expertise. *State ex rel. Yellow Freight Sys., Inc. v. Indus. Comm.*, 81 Ohio St.3d 56, 1998-Ohio-654. Nor does the claimant have medical expertise. *State ex rel. Cleveland Clinic Found. v. Indus. Comm.*, 10th Dist. No. 10AP-329, 2011-Ohio-2269. While a claimant can credibly testify or describe the symptoms he is experiencing, he cannot render a medical opinion as to the need for a surgical procedure or even that the symptoms that he describes are necessarily related to the industrial injury. Id. at ¶38.

{¶ 51} Moreover, any alleged worsening of an allowed condition must be related to the status of the condition at or near the time of the finding that the condition was at MMI. Here, TTD compensation had been terminated effective October 22, 2009 based upon Dr. Rohner's August 24, 2009 opinion that the allowed conditions were at MMI. Thus, to satisfy the *Josephson* requirements, relator had the burden of submitting medical evidence that, as of December 2, 2009 (the date relator sought to restart compensation) an allowed condition had worsened in relation to relator's medical status at or near the termination effective date. That is, it is not sufficient to simply show that an allowed condition has become worse than the day before or the week before or even the month before in the absence of a showing that the condition has become worse than at or near the date of termination on MMI grounds.

{¶ 52} Here, relator's testimony, standing alone, is not medical evidence of a condition that is worse than at or near the date of termination on MMI grounds. Relator does not have the medical expertise to render the needed medical opinion.

{¶ 53} Relator's contention here that Dr. Bartley's C-84s dated February 24 and March 26, 2010 provide the needed medical evidence to support a worsening of an allowed condition is also problematical.

{¶ 54} Dr. Bartley's C-84s simply tell us that relator had pain, weakness, and decreased range of motion on the date of the examination supporting the C-84. With respect to the February 24, 2010 C-84, December 2, 2009 is listed as the "last" examination date. With respect to the March 26, 2010 C-84, the "last" examination date is not listed. In any event, the C-84s do not relate the reported pain, weakness, and decreased range of motion to the time at or near the termination of TTD on MMI grounds. Thus, the C-84s, by themselves, or even in conjunction with relator's hearing testimony, provide no medical evidence supporting a finding that an allowed condition is worse than it was at or near the time of TTD termination.

{¶ 55} Based upon the above analysis, it is clear that the commission was correct when it found in its August 19, 2010 order that the SHO's order of May 5, 2010 contained a clear mistake of law because there was indeed no medical evidence cited by the SHO to support reinstatement of TTD compensation under the *Josephson* criteria.

{¶ 56} Accordingly, it is the magistrate's decision that this court deny relator's request for a writ of mandamus.

/s/ Kenneth W. Macke
KENNETH W. MACKE
MAGISTRATE

NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).