

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

| | | |
|-----------------------------------|---|--------------------|
| State ex rel. Terry L. Huffman, | : | |
| Relator, | : | |
| v. | : | No. 10AP-1200 |
| Industrial Commission of Ohio and | : | (REGULAR CALENDAR) |
| Service Transport Group, Inc., | : | |
| Respondents. | : | |
| | : | |

D E C I S I O N

Rendered on April 10, 2012

Urban Co., L.P.A., and Anthony P. Christine, for relator.

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

IN MANDAMUS
ON OBJECTION TO THE MAGISTRATE'S DECISION

SADLER, J.

{¶ 1} In this original action, relator, Terry L. Huffman, requests a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its October 29, 2010 order affirming an order that terminated relator's temporary total disability ("TTD") compensation based on a finding that relator had reached maximum medical improvement ("MMI") and to enter a new order granting TTD compensation.

{¶ 2} Pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth District Court of Appeals, this matter was referred to a magistrate who issued a decision, including findings of fact and conclusions of law, which is appended hereto. The magistrate concluded that the commission did not abuse its discretion in terminating relator's TTD compensation based on the finding that relator's allowed conditions had reached MMI. Accordingly, the magistrate recommended that this court deny the requested writ of mandamus.

{¶ 3} Relator has filed an objection to the magistrate's decision. Without delineating a specific objection, relator contends the magistrate's decision lacks "all logic" and incorporates the arguments asserted in his merit brief. (Objection, 1.) For the reasons set forth in the magistrate's decision, we do not find relator's objection well-taken.

{¶ 4} The arguments presented herein are based on the premise that the commission's finding of MMI was premature given that relator is still in the process of determining the existence of additional conditions. However, as noted by the magistrate, payment of TTD compensation is not appropriate if based, even in part, upon non-allowed conditions. *State ex rel. Jackson Tube Servs., Inc. v. Indus. Comm.*, 99 Ohio St.3d 1, 2003-Ohio-2259. As explained by the magistrate, to the extent relator's complaints are due to allowed conditions, the record contains evidence that he has reached MMI for the same. If the complaints are due to non-allowed conditions, pursuant to *Jackson*, TTD based on non-allowed conditions is not appropriate. Accordingly, we conclude the commission's findings herein are not premature.

{¶ 5} The dissent characterizes the medical report of Dr. Watkins-Campbell as internally inconsistent and concludes said report cannot constitute some evidence upon which the commission can rely to support its finding that relator has reached MMI for the allowed conditions. Not only do we disagree with the dissent's characterization of Dr. Watkins-Campbell's medical report, but, also, a review of the record reveals relator did not challenge, either administratively or in this mandamus action, Dr. Watkins-Campbell's report as being internally inconsistent. It is well-settled law that issues not raised administratively cannot be raised in a mandamus action. *State ex rel. Burns Internatl. v. Smith*, 10th Dist. No. 05AP-488, 2006-Ohio-6731, ¶ 3, citing *State ex rel. Quarto Mining Co. v. Foreman*, 79 Ohio St.3d 78 (1997). As stated in *Burns*, a failure to pursue this issue administratively "bars this court from addressing it de novo in this

action." *Burns Internatl.* at ¶ 3, citing *State ex rel. Tussing v. Indus. Comm.*, 10th Dist. No. 05AP-178, 2006-Ohio-703, ¶ 4 (issue of internal inconsistencies in medical report raised for the time in objections and not pursued administratively bars court's review of the same); *State ex rel. Berman Industries, Inc. v. Indus. Comm.*, 10th Dist. No. 04AP-1254, 2005-Ohio-5083, ¶ 3.

{¶ 6} Upon review of the magistrate's decision, an independent review of the record, and due consideration of relator's objection, we find the magistrate has properly determined the pertinent facts and applied the appropriate law. We, therefore, overrule relator's objection to the magistrate's decision and adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein. Accordingly, the requested writ of mandamus is hereby denied.

*Objection overruled;
writ of mandamus denied.*

DORRIAN, J., concurs
TYACK, J., dissents.

TYACK, J., dissenting.

{¶ 7} I respectfully disagree and therefore dissent.

{¶ 8} Terry Huffman's TTD compensation was terminated based upon a finding that he had reached maximum medical improvement ("MMI"). Counsel contested that finding before the commission and continues to contest it.

{¶ 9} Huffman injured his back when the truck he was driving flipped. His workers' compensation claim for this claim has been recognized for "low back strain and contusions." These injuries occurred on March 29, 2009. He has a significant history of back problems.

{¶ 10} The information in the file before us indicates that Huffman tried to return to work after his injury, but could not continue driving a truck because he could not hold down the clutch.

{¶ 11} Huffman has complained of pain radiating down his right leg and ongoing pain in his back. The radiating pain is consistent with radiculitis, which is not a recognized condition in this claim. Further, back strain as a stand-alone condition without his history of back problems normally resolves in a matter of months.

{¶ 12} Caseworks, the managed care organization for Huffman's employer, has consistently resisted additional testing and additional treatment. Administrative hearings before the commission have been required to get the diagnostic tests and treatment Huffman feels he needs to show his current treatment needs are related to the March 2009 incident.

{¶ 13} A district hearing officer noted that a recent CT scan shows ankylosis at L1-2 and disc problems at L2-3 and L4-5. A myelogram showed disc protusion at L3-4 and L4-5. A staff hearing officer ("SHO") noted that Huffman has had three prior surgeries on his low back for problems not related to this claim. Again, part of why diagnostic testing has consistently been allowed is in an effort to see if Huffman's ongoing back problems are a result of prior injuries or a result from the recent truck mishap.

{¶ 14} The same SHO who noted the surgeries found that Huffman had reached MMI for the contusion and low back strain which are the recognized conditions. The SHO relied on a medical report indicating that such conditions resolve quickly.

{¶ 15} Huffman's lower back area is not a normal lower back area. To rely on a report which says, in essence, most people's back strains resolve quickly is to miss the real issue here. Huffman has had three surgeries on his back. Additional diagnostic testing was authorized to see if the ongoing problems are treatable and if they are related to the most recent incident.

{¶ 16} The report upon which the SHO relied in terminating TTD compensation based upon a finding that Huffman had reached MMI was the opinion of Catherine Watkins-Campbell, M.D., dated June 8, 2010. Dr. Campbell was critical of the fact that Huffman was receiving Percocet for pain and had been receiving it for over one year when the only recognized conditions were lumbar sprain and a back contusion.

{¶ 17} Dr. Watkins-Campbell also reported that "physical therapy short term is appropriate treatment for the allowed conditions." Dr. Watkins-Campbell expressed reservations about Huffman's ability to participate in physical therapy due to unspecified, nonallowed conditions. She also indicated that the results of physical therapy may be limited.

{¶ 18} The fact that Dr. Watkins-Campbell feels that physical therapy is appropriate for Huffman is inconsistent with her opinion expressed elsewhere in her

report that he has reached MMI. If physical therapy is appropriate because it will improve Huffman's physiological conditions with respect to the allowed conditions, then a change in his physiological condition can be expected and his condition is not stable to the point that it has reached MMI.

{¶ 19} Stated more succinctly, Dr. Watkins-Campbell's opinion that physical therapy is appropriate is inconsistent with her opinion that Huffman has reached MMI. Because of this inconsistency, the SHO could not use her report for the sole medical basis for finding Huffman to have reached MMI.

{¶ 20} In light of the above, the commission did not have "some evidence" before it to find Huffman had reached MMI. I would grant a writ vacating the order terminating TTD and return the case to the commission for appropriate proceedings.

APPENDIX
IN THE COURT OF APPEALS OF OHIO
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|-----------------------------------|---|--------------------|
| State ex rel. Terry L. Huffman, | : | |
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| v. | : | No. 10AP-1200 |
| Industrial Commission of Ohio and | : | (REGULAR CALENDAR) |
| Service Transport Group, Inc., | : | |
| Respondents. | : | |

MAGISTRATE'S DECISION

Rendered on November 29, 2011

Urban, Co., L.P.A., and Anthony P. Christine, for relator.

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

IN MANDAMUS

{¶ 21} Relator, Terry L. Huffman, has filed this original action requesting that this court issue a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its October 29, 2010 order which affirmed an order finding relator had reached maximum medical improvement ("MMI") and terminated his

temporary total disability ("TTD") compensation and to enter a new order granting TTD compensation.

Findings of Fact:

{¶ 22} On March 29, 2009, relator sustained a work-related injury in the course of his employment with respondent Service Transport Group, Inc. ("Service Transport") when he was involved in a motor vehicle accident and the truck he was driving flipped over.

{¶ 23} 2. Relator's workers' compensation claim was allowed for "low back strain and contusion."

{¶ 24} 3. On December 28, 2009, an independent medical evaluation was performed by Mark S. Berkowitz, M.D. In his January 5, 2010 report, Dr. Berkowitz noted that relator had a history of three prior surgeries in his lower back. At the time of the injury, relator was able to return to work as a truck driver; however, by November 2009 he was no longer able to hold down the clutch on his truck and had to stop working. Dr. Berkowitz reviewed the records supplied, accepted the findings of the treating physicians, and responded to the questions forwarded from the Ohio Bureau of Workers' Compensation ("BWC") as follows:

Question 1: What treatment is reasonable for this type of condition(s)?

Answer: Treatments that are reasonable for this type of condition include [physical therapy], TENS therapy and paraspinal steroid injections.

Question 2: What is the normal recovery period for this type of condition(s)?

Answer: Normal recovery period for this type of condition is 9 to 14 months.

Question 3: Would on-going treatment be considered medically necessary or appropriate?

Answer: Ongoing treatment should be considered medically necessary and appropriate.

Question 4: Please indicate whether the requested period of disability from 11-18-09 to present relates to the 3-29-09 work related injury. Please base your opinion on a reasonable degree of medical probability. Please provide treatment and re-exam recommendations.

Answer: The period of disability from November 18, 2009, to present does relate to the March 29, 2009, work related injury. He had been able to return to work, but he had recurrent difficulty. Due to safety reasons, he needed to stop as he could not hold down a clutch. In my medical opinion, based on medical certainty and with medical probability, his period of disability from November 18, 2009, to the present relates to his March 29, 2009, work related injury as he was able to work regular duty prior to that injury.

Vocational rehabilitation with work conditioning, FCE, and possibly job retraining should be tried. A re-examination should be considered within 45 days.

{¶ 25} 4. On February 3, 2010, relator filed a C-9 for prior authorization for a neurosurgical consultation with Samuel J. Daisley, D.O. Service Transport's managed care organization, CareWorks, denied the consultation finding that medical necessity was not established based on the allowed conditions. The BWC administrator also denied the request.

{¶ 26} 5. On April 21, 2010, a hearing was held before a district hearing officer ("DHO") upon relator's appeal from the order of the administrator issued on March 2,

2010 denying the request. The DHO vacated the order of the administrator and authorized treatment. He found, as follows:

The District Hearing Officer authorizes treatment in the form of "a neurosurgical consult" as requested by Dr. S. Daisley, D.O., on his C-9 report of 02/03/2010. The District Hearing Officer finds that there is sufficient medical evidence to establish by a preponderance that this consult is warranted and reasonably related to the allowed conditions in this claim. This finding is based upon the C-9 report of 02/03/2010 of Dr. Daisley; as well as the office records for treatment provided by Dr. Daisley in the period subsequent to the injury of 03/29/2009 of this claim. The District Hearing Officer further relies upon the Injured Worker's testimony at hearing that he persists with pain in his back which extends down his right leg. The Injured Worker testified that he did not have these symptoms of pain immediately prior to his injury of 03/29/2009. The totality of the above evidence is found to be persuasive.

{¶ 27} 6. Also on April 21, 2010, a staff hearing officer ("SHO") held a hearing of an appeal filed by Service Transport from a DHO order dated March 5, 2010 awarding TTD compensation to relator beginning November 18, 2009. The SHO affirmed the DHO order and granted relator's C-86 motion. In the order, the SHO stated:

The Staff Hearing Officer orders that temporary total disability compensation be paid for the period from 11/18/2009 through 04/21/2010, and continuing upon the submission of medical evidence of ongoing disability independently related to the allowed conditions in this claim. The Staff Hearing Officer finds that there is sufficient medical evidence to establish by a preponderance that the allowed conditions continue to result in the Injured Worker being temporarily and totally disabled during the above time frame. This finding is based upon the C-84 reports of Dr. S. Daisley, D.O., of 01/08/2010, 02/26/2010, and 03/23/2010. The Staff Hearing Officer further relies upon the 12/28/2009 medical narrative report of Dr. M. Berkowitz, M.D. This evidence is found to be persuasive.

{¶ 28} 7. On May 26, 2010, relator was examined by Catherine Watkins-Campbell, M.D., for a 90-day exam. Dr. Watkins-Campbell responded to the questions forwarded from the BWC as follows:

[One] Is the current treatment necessary and appropriate for the allowed condition(s) in the claim according to nationally accepted treatment guidelines? Please explain the rationale for your opinion as it specifically applies to this [injured worker].

No, frequent dose long term narcotic use for a lumbar sprain and a back contusion are not appropriate. A TENS unit, lumbar support and epidural injections are note [sic] appropriate treatment for these allowed conditions.

[Two] Are there additional diagnostic/treatment services consistent with nationally accepted treatment guidelines that should be considered that would be reasonably expected to improve the treatment outcomes of the allowed condition(s)? If so, what are the diagnostic-/treatments that should be considered and what may be the expected outcome in most cases if provided? Please provide rationale such as treatment guidelines, position papers, or standards of medical care to support your opinions.

Physical therapy short term is an appropriate treatment for the allowed conditions. However, this individual's ability to participate in physical therapy due to non-allowed conditions may be limited as would the results from physical therapy.

[Three] What activity (including work) restrictions-/limitations appear to be appropriate based on the current status of the allowed conditions in the claim? (Do not focus on the type of work performed by the individual but rather on their activity capacity, restrictions, or limitations.) Please complete the enclosed "DEP Physician's Report of Work Ability" (C143).

In this particular case one is unable to separate restrictions/limitations related to the allowed conditions from those related to non-allowed conditions.

[Four] In your medical opinion, has the [injured worker] reached maximum medical improvement (MMI)? MMI means the condition has stabilized and no fundamental, functional or physiological change can be expected in the condition despite continued medical treatment and/or rehabilitation. Please explain the rationale for your opinion. If the [injured worker] has not reached MMI, when should a re-examination be considered?

The [injured worker] has achieved MMI for the allowed conditions in the claim. A lumbar sprain/strain and back contusion should have resolved within 3 months. The [injured worker] clearly needs treatment for non-allowed lumbar spine conditions.

[Five] If the injured worker has not reached MMI, is vocational rehabilitation appropriate from a medical perspective? Please specify services recommended.

The [injured worker] is at MMI for the allowed conditions. Due to the medical instability of the non-allowed conditions the individual would not be a viable candidate for vocational rehabilitation.

(Emphasis sic.) Dr. Watkins-Campbell referenced a report dated February 21, 2010, from Ira J. Unger, M.D., who conducted an independent medical examination. Dr. Unger's report notes that relator's subjective complaints and objective findings do not correlate with the allowed conditions.

{¶ 29} 8. On June 15, 2010, relator was examined by Adrian A. Ablá, M.D., for a neurosurgical consultation. Dr. Ablá recommended a CT myelogram of the lumbar spine to better assess the cause of his pain, numbness, and weakness.

{¶ 30} 9. On August 11, 2010, relator was examined by Dr. Daisley who determined and discussed that relator's pain was increasing, but they were unable to proceed with further treatment because payment was being denied by the BWC.

{¶ 31} 10. On September 8, 2010, relator's physician completed a C-9 form requesting a follow up with Dr. Ablu, the neurosurgeon. CareWorks denied the request on September 16, 2010.

{¶ 32} 11. On September 9, 2010, a DHO conducted a hearing on the BWC's motion to terminate TTD compensation and relator's appeal from the administrator's order denying relator's request for the authorization of diagnostic treatment. Although the DHO vacated the administrator's order and found that the requested diagnostic testing should be allowed, the DHO granted the BWC's motion to terminate TTD compensation. The DHO stated, as follows:

It is the order of the District Hearing Officer that lab work including bun, and one creatinine, and one lumbar myelogram, and one post contrasting CT scan, pursuant to the C-9 physician's request for medical services from Sam Daisley, D.O., dated 06/16/2010, is specifically granted.

The District Hearing Officer relied on the C-9 of Dr. Daisley, dated 06/16/[2010], and Bureau of Workers' Compensation print-out, filed 09/09/2010, that indicated approval of these diagnostics.

The District Hearing Officer further relied on the office notes of Dr. Daisley, dated 03/22/2010 and 04/05/2010.

It is the decision of the District Hearing Officer that these diagnostics are reasonably related and medically necessary and appropriate and cost effective for the treatment of the allowed conditions in this claim.

It is the order of the District Hearing Officer that the Injured Worker has reached maximum medical improvement as defined under Ohio Administrative Code Section 4121-3-32(A)(1).

The District Hearing Officer relied on the medical report of Catherine Watkins-Campbell, M.D., dated 06/08/2010.

Therefore, it is the order of the District Hearing Officer that temporary total disability compensation is terminated on 09/09/2010, the date of today's hearing, and that any further temporary total disability compensation paid after 09/09/2010 is considered an overpayment and to be recouped pursuant to Ohio Revised Code Section 4123.511(K).

The District Hearing Officer further relied on the CT scan, dated 07/07/2010, that evidenced ankylosis L1-2 and bulging disc L2-3 and disc protusion L4-5, and the myelogram, dated 07/07/2010, that evidenced disc protrusion L3-4 and L4-5.

The District Hearing Officer further relied on the office notes of Dr. Daisley, dated 03/22/2010 and 04/05/2010, that diagnosed post laminectomy syndrome of lumbar.

The Injured Worker argued that a termination of temporary total disability compensation is not supported under Sellards v. Industrial Commission (2006), 108 Ohio State 3d 306, as treatment was approved after the maximum medical improvement report of Dr. Watkins-Campbell, dated 06/08/2010.

The District Hearing Officer distinguished Sellards from this claim as Sellards involved Industrial Commission approval of an active treatment plan and this claim involved approval of diagnostic testing.

The District Hearing Officer further relied on Russell v. Industrial Commission (1998), 82 Ohio State 3d 516 and Industrial Commission Resolution R98-1-04.

{¶ 33} 12. On October 29, 2010, an SHO held a hearing on the appeal of the September 9, 2010 DHO order. The SHO affirmed the DHO order and denied relator's appeal. The SHO granted the BWC's motion to terminate TTD and granted relator's C-9 physician's request for medical services by Dr. Daisley. The SHO stated, as follows:

The Staff Hearing Officer finds that the allowed physical conditions in this claim have reached maximum medical improvement as defined by Ohio Administrative Code 4121-

3-32(A)(1), based upon the opinion of Catherine Watkins-Campbell, M.D., dated 06/08/2010.

Furthermore, the Staff Hearing Officer finds that Samu[a]l J. Daisley, D.O., is certifying that the allowed physical conditions in this claim continue to render the Injured Worker temporarily and totally disabled through 12/31/2010.

Therefore, in reliance upon the Russell decision and Industrial Commission of Ohio Policy Resolution R98-1-04, the Staff Hearing Officer concludes that the proper date of termination of temporary total disability compensation in this claim is 09/09/2010, the date of the prior District Hearing Officer level hearing first addressing this issue.

Any temporary total disability compensation benefits paid beyond said date of termination, is deemed an overpayment and is to be recouped pursuant to Revised Code 4123.511(K).

In granting the Administrator's motion, the Staff Hearing Officer concludes that although several tests have been authorized by the BWC/MCO in this claim, and recently by Industrial Commission order, the Staff Hearing Officer concludes that the termination of temporary total disability compensation is appropriate as the holding in the Sellards case is not controlling in this matter. The Staff Hearing Officer concludes that unlike the situation in the Sellards claim, the approval of testing in this claim is being conducted to ascertain what conditions are the root cause of the Injured Worker's ongoing complaints.

Given that the allowed conditions in this claim are normally categorized as soft tissue injuries and the medical documentation on file reflect that the Injured Worker has had three prior surgeries, including a fusion at the L5-S1 level; a bulging annulus at the L3-4, L4-5 levels; and given the opinion of Dr. Watkins-Campbell that the allowed conditions in this claim should have resolved within three months and therefore the Injured Worker clearly needs treatment for the non-allowed lumbar spine conditions, and also, due to the fact that there is no active treatment plan even being discussed as relates to the allowed conditions in this claim, the Staff Hearing Officer concludes that the holding in Sellards is not controlling in this matter.

Therefore, the Staff Hearing Officer concludes that termination of temporary total disability benefits is appropriate for the currently allowed conditions in this claim at this time.

{¶ 34} 13. The commission refused further appeal.

{¶ 35} 14. Relator sought to undergo a follow-up neurological consultation with Dr. Ablá which the administrator denied.

{¶ 36} 15. On November 15, 2010, a DHO held a hearing from relator's appeal of the administrator's order regarding authorization of treatment or diagnostic testing. The DHO vacated the administrator's order and granted authorization for relator to undergo a follow-up neurosurgical consultation with Dr. Ablá. The DHO stated, as follows:

Authorization is hereby granted for Mr. Huffman to undergo a follow-up neurosurgical consultation with Dr. Ablá, within Bureau of Workers' Compensation/Industrial Commission guidelines. The preponderance of the medical evidence on file serves to establish that this consultation is reasonably related to and medically necessary for treatment of the conditions recognized in this claim in order to determine the extent of the injuries caused by the 03/29/2009 industrial injury recognized in this claim. Furthermore, the cost associated with this consultation will be reasonable in nature, because payment for same shall be based upon the "usual, customary, and reasonable" guidelines set forth by the Bureau of Workers' Compensation.

This decision is based upon the 06/15/2010 consultation report from Dr. Ablá noting that he would need to examine Mr. Huffman once the diagnostic testing he had requested had been completed; the 04/21/2010 District Hearing Officer decision in this claim which granted the original neurosurgical consultation with Dr. Ablá; and, the 09/09/2010 District Hearing Officer decision in this claim which granted authorization for Mr. Huffman to undergo the diagnostic tests recommended by Dr. Ablá. All evidence on file with regard to this matter was reviewed and considered.

{¶ 37} 16. Relator filed the instant mandamus action in this court on December 29, 2010, asking this court to order the commission to vacate its order terminating TTD compensation and to enter a new order granting TTD compensation.

Conclusions of Law:

{¶ 38} The issue is whether the commission abused its discretion in terminating relator's TTD compensation based on the finding that relator's allowed conditions had reached MMI. Finding that the commission did not abuse its discretion in so finding, it is the magistrate's decision that this court deny the requested writ of mandamus, as more fully explained below.

{¶ 39} The Supreme Court of Ohio has set forth three requirements which must be met in establishing a right to a writ of mandamus: (1) that relator has a clear legal right to the relief prayed for; (2) that respondent is under a clear legal duty to perform the act requested; and (3) that relator has no plain and adequate remedy in the ordinary course of the law. *State ex rel. Berger v. McMonagle* (1983), 6 Ohio St.3d 28. 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 to the 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.

{¶ 40} The purpose of TTD compensation awarded pursuant to R.C. 4123.56 is to compensate for loss of earnings where a claimant's injury prevents a return to the former position of employment. *State ex rel. Ramirez v. Indus. Comm.* (1982), 69 Ohio St.2d 630, 634. TTD compensation is awarded where fundamental functional or physiological change is expected from the continuing treatment. *State ex rel. Brown v. Indus. Comm.*, 10th Dist. No. 02AP-108, 2002-Ohio-4313, ¶17. 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. R.C. 4123.56(A); *Ramirez*.

{¶ 41} MMI is defined in Ohio Adm.Code 4121-3-32(A)(1), as follows:

"Maximum medical improvement" is a treatment plateau (static or well-stabilized) at which no fundamental functional or [physiological] change can be expected within reasonable medical probability in spite of continuing medical or rehabilitative procedures. An injured worker may need supportive treatment to maintain this level of function.

{¶ 42} Relator was examined by Dr. Watkins-Campbell on May 26, 2010, who determined that frequent long term narcotic use for a lumbar strain and back contusion is not appropriate. Dr. Watkins-Campbell believed physical therapy was an appropriate treatment for the allowed conditions; however, due to non-allowed conditions, Dr. Watkins-Campbell indicated that relator's participation in physical therapy may be limited. Dr. Watkins-Campbell was unable to separate restrictions or limitations related to the allowed conditions from those related to the non-allowed conditions. Finally, Dr.

Watkins-Campbell stated that relator had achieved MMI for the allowed conditions in the claim and that the lumbar strain and back contusion should have resolved within three months.

{¶ 43} The SHO also noted that, relator had three prior surgeries, Dr. Watkins-Campbell opined that the allowed conditions should have resolved within three months, relator needed treatment for non-allowed conditions, and there was no active treatment plan for the allowed conditions.

{¶ 44} Relator argues that *State ex rel. Sellards v. Indus. Comm.*, 108 Ohio St.3d 306, 2006-Ohio-1058, is controlling in this case. In *Sellards*, the relator, William E. Sellards, Jr., suffered an industrial injury in 1998. He was considered to have reached MMI in January 2001. In November 2001, he began treatment for depression and in July 2002, the commission additionally allowed his claim for "major depressive disorder, single episode." *Id.* at ¶3. His psychiatrist submitted a C-9 treatment plan application seeking approval for psychotherapy and medication management and the application was approved on October 22, 2002. Also, on that same day, Sellards was examined by another psychiatrist, Dr. Levy, who reviewed the records, but not the recent treatment plan, and concluded that Sellards' psychiatric condition had reached MMI. In response to Dr. Levy's report, Sellards' physician stated in a report that the reason that there had been no change in his treatment was because the BWC or the employer was refusing to pay for his medication. However, he concluded that with the proper medication and continued psychotherapy, Sellards could make progress.

{¶ 45} In December 2002, a commission DHO found that Sellards had reached MMI and terminated TTD compensation. An SHO affirmed the DHO's order. After

further appeal and an additional request for reconsideration were denied, Sellards filed a mandamus petition in this court. This court denied the writ after finding that the commission order was supported by some evidence. On appeal to the Supreme Court of Ohio, Sellards challenged the psychiatrist's opinion of MMI as being premature based upon the treating psychiatrist's contemporaneously-approved treatment plan.

{¶ 46} The Supreme Court of Ohio found that the MMI opinion was premature based on the commission's contemporaneous approval of the treatment program and therefore, the psychiatrist's opinion could not serve as support for denying TTD compensation. See *Sellards*.

{¶ 47} Approximately one year later, this court relied on the rationale of *Sellards* in *State ex rel. Lloyd v. Indus. Comm.*, 10th Dist. No. 07AP-79, 2007-Ohio-5020. In *Lloyd*, the relator, Errol D. Lloyd, Jr., was undergoing treatment for an allowed psychological condition. The employer had Lloyd evaluated by a psychiatrist, Dr. Miller, who found that Lloyd's allowed psychological condition had reached MMI. Approximately three weeks later, Lloyd's attending psychiatrist submitted a request for additional psychiatric treatment, intending to increase the frequency of treatment from the former rate of one visit per month to a new rate of one visit per week. The commission approved this request approximately two months after Dr. Miller examined Lloyd and concluded his condition had reached MMI.

{¶ 48} This court found that the commission abused its discretion by terminating Lloyd's TTD compensation on grounds that his allowed psychological condition had reached MMI because none of the records Dr. Miller reviewed addressed the actual treatment Lloyd had been receiving or requesting. Further, Dr. Miller was not aware of

the specific psychiatric plan being requested. Finally, this court noted there is a big difference between weekly and monthly psychiatric treatments. Thus, this court concluded that Dr. Miller's opinion that Lloyd had reached MMI was premature.

{¶ 49} However, in *State ex rel. Walker v. Indus Comm.*, 10th Dist. No. 08AP-606, 2009-Ohio-3550, this court distinguished the *Sellards* case. The claimant, Jeffrey Walker, was injured and was receiving TTD compensation. After an independent medical examination, the doctor determined his allowed conditions had reached MMI. Three months later, Walker requested authorization for additional physical therapy. The commission terminated his TTD compensation based on the doctor's finding of MMI. The hearing officer was not aware that Walker had requested authorization for further treatment. Walker argued, because the doctor was unaware of this request for treatment, his finding of MMI was premature, and the commission abused its discretion by relying on the report to terminate his TTD compensation. The independent medical examiner was aware of the treatment Walker had received.

{¶ 50} This court distinguished *Sellards*, finding a big difference between a treating physician seeking additional treatment on the same day another doctor renders an MMI opinion and a treating physician seeking additional treatment three months after another doctor renders an MMI opinion. This court also distinguished *Lloyd*, where Dr. Miller was not even aware of the treatment the claimant had already received. In *Walker*, the request for additional treatment was filed three months after the MMI report and was merely a continuation of the same basic treatment whereas, in *Lloyd*, the claimant's treating physician sought a significant increase in the frequency of treatment. This court found those differences distinguishable.

{¶ 51} In this case, relator suffers from both allowed conditions and non-allowed conditions. The doctors here believe the allowed conditions have reached MMI. Relator argues that opinion was premature, as in *Sellards*, because he was still in the state of diagnosing his injury. He argues he should be permitted to receive TTD compensation while he discovers whether other conditions exist. However, relator has not requested that any other conditions be added to his claim. Any additional conditions must be identified, requested, and recognized before becoming a basis for compensation.

{¶ 52} TTD compensation cannot be paid, even in part, based upon non-allowed conditions. *State ex rel. Jackson Tube Servs., Inc. v. Indus. Comm.*, 99 Ohio St.3d 1, 2003-Ohio-2259. In *Jackson Tube*, the claimant injured his shoulder. The claimant requested exploratory surgery and a period of TTD compensation, but the employer objected on the basis that two of the four conditions that the doctor diagnosed were not allowed in the claim. The claimant responded that without surgery, there was no way to definitively identify the conditions that were causing his problems. The Supreme Court of Ohio held that additionally identified conditions must be formally recognized in the claim to be the basis for compensation and a reaffirmation that TTD compensation can never be based, even in part, on non-allowed conditions. See *State ex rel. Waddle v. Indus. Comm.* (1993), 67 Ohio St.3d 452.

{¶ 53} Accordingly, for all the above reasons, it is the magistrate's decision that the commission did not abuse its discretion in relying on the medical evidence before it to find that relator's allowed conditions had reached MMI and to terminate his TTD

compensation and, thus, this court should deny relator's request for a writ of mandamus.

/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).