

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Packaging Corporation of America,	:	
	:	
Relator,	:	No. 11AP-273
	:	
v.	:	(REGULAR CALENDAR)
	:	
Industrial Commission of Ohio and Gregory Murphy,	:	
	:	
Respondents.	:	

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D E C I S I O N

Rendered on May 8, 2012

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*Ice Miller LLP, Robert M. Robenalt, and Meghan M. Majernik, for relator.*

*Michael DeWine, Attorney General, and Rema A. Ina, for respondent Industrial Commission of Ohio.*

*The Stocker Pitts Law Firm, and Thomas R. Pitts, for respondent Gregory Murphy.*

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IN MANDAMUS  
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

FRENCH, J.

{¶ 1} Relator, Packaging Corporation of America ("relator"), filed an original action, which asks this court to issue a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its order that awarded

temporary total disability ("TTD") compensation to respondent Gregory Murphy ("claimant") and to order the commission to deny that compensation.

{¶ 2} This matter was referred to a magistrate pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate issued a decision, which includes findings of fact and conclusions of law and is appended to this decision, recommending that this court deny the requested writ. No objections have been filed concerning the magistrate's findings of fact, and we adopt them as our own.

## **I. BACKGROUND**

{¶ 3} In brief, claimant suffered work-related injuries in 2001 and 2006. Claimant also was involved in a motorcycle accident in 2009. As detailed in the magistrate's decision, claimant underwent numerous medical exams and treatments during this time period and thereafter. A district hearing officer denied claimant's request for TTD compensation; a staff hearing officer ("SHO") vacated that decision and granted the compensation, beginning in February 2010. The magistrate concluded that the commission did not abuse its discretion in granting that compensation.

## **II. OBJECTIONS**

{¶ 4} Relator submitted five objections to the magistrate's legal conclusions. Each of these objections reiterates arguments made to the magistrate.

{¶ 5} In its first objection, relator contends that the magistrate erred by concluding that the commission's order sufficiently addressed its argument that claimant's cervical condition had reached maximum medical improvement ("MMI"). We agree with the magistrate, however, that the commission did not err by not addressing this issue explicitly. The SHO expressly relied on the C-84s and June 10, 2010 narrative report completed by Norman Lefkovitz, M.D., who rejected the opinion of Elizabeth Mease, M.D., that claimant had reached MMI and indicated that claimant was receiving ongoing treatment. Accordingly, we overrule this objection.

{¶ 6} In its second objection, relator contends that the magistrate erred by determining that the commission considered evidence that claimant's disability is related to the non-allowed condition of stenosis. In this objection, relator attacks the

medical evidence submitted by claimant. We will not, however, reweigh the evidence, and we overrule this objection.

{¶ 7} In its third objection, relator contends that the magistrate erred by determining that the report of Curtis R. Noel, M.D., was some evidence on which the commission could rely. We agree with the magistrate, however, that Dr. Noel's report was relevant to the overlapping issues in the 2001 and 2006 claims and, for the reasons given by the magistrate, overrule this objection.

{¶ 8} In its fourth objection, relator contends that the magistrate erred by finding that the April 21, 2008 order did not preclude TTD benefits. We disagree, however, that the magistrate did not "recognize the importance" of that prior order. Instead, we agree with the magistrate's thorough analysis of this issue, as well as her conclusion that the two orders "cover two different time periods, two very different issues were addressed, and the April 21, 2008 SHO's order does not require the commission to deny this request for TTD compensation." We overrule this objection.

{¶ 9} In its fifth objection, relator contends that the magistrate erred by concluding that evidence supported a finding that claimant's physical therapy relating to the 2006 claim caused an increase in his neck symptoms in the 2001 claim. We disagree, however, with relator's characterization of the magistrate's opinion. The issue is whether there is some evidence to support the commission's order, not the manner in which the magistrate stated the issues. Regardless of her statement of the critical issue, the magistrate examined all of the alleged errors thoroughly and concluded that some evidence exists to support the order. We agree. The objection is overruled.

### **III. CONCLUSION**

{¶ 10} Following an independent review, and having overruled relator's objections, we adopt the magistrate's decision, including the findings of fact and conclusions of law contained in it, as our own. In accordance with the magistrate's decision, we deny the requested writ.

*Objections overruled;  
writ denied.*

BROWN, P.J., and SADLER, J., concur.



**A P P E N D I X**

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Packaging Corporation of America,	:	
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Relator,	:	No. 11AP-273
v.	:	(REGULAR CALENDAR)
Industrial Commission of Ohio and Gregory Murphy,	:	
	:	
Respondents.	:	

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M A G I S T R A T E ' S   D E C I S I O N

Rendered on January 31, 2012

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*Ice Miller LLP, Robert M. Robenalt and Meghan M. Majernik, for relator.*

*Michael DeWine, Attorney General, and Allan K. Showalter, for respondent Industrial Commission of Ohio.*

*Stocker Pitts Co., L.P.A., and Thomas R. Pitts, for respondent Gregory Murphy.*

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IN MANDAMUS

{¶ 11} Relator, Packaging Corporation of America, 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 awarding temporary total

disability ("TTD") compensation to respondent Gregory Murphy ("claimant") and ordering the commission to find that he is not entitled to that compensation.

Findings of Fact:

{¶ 12} 1. Claimant sustained two work-related injuries during his employment with relator. The first injury occurred on April 24, 2001,<sup>1</sup> and his claim has been allowed for the following conditions: "Cervical strain; aggravation of pre-existing cervical spondylosis at C5-C7 and aggravation of cervical spine disc herniations at C5-6 and C6-7."

{¶ 13} 2. Claimant was off work for a limited period of time after this injury and returned to work with relator until he sustained his second injury on September 5, 2006. His 2006 claim has been allowed for the following conditions: "Strain right shoulder, strain right elbow, lumbar strain, right rotator cuff tear, right bicep tendinitis, and right shoulder impingement tendinitis."

{¶ 14} 3. Ultimately, claimant underwent shoulder surgery and was paid TTD compensation under the 2006 claim from October 5, 2007 through February 9, 2010.

{¶ 15} 4. During the time claimant was receiving TTD compensation under the 2006 claim, his treating neurologist, Norman Lefkovitz, M.D., completed C-84s certifying that the allowed cervical conditions in his 2001 claim rendered him temporarily totally disabled from June 19, 2007 through July 2, 2007, and from October 5, 2007 through an estimated return-to-work date of February 1, 2008.

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<sup>1</sup> In their briefs, the parties all indicate that the date of this first injury is February 24, 2011; however, the commission orders and the medical records all support the conclusion that the date of injury was actually April 24, 2001.

{¶ 16} 5. In response to a motion for TTD compensation filed under the 2001 claim, claimant was examined by Richard N. Kepple, M.D. In his January 15, 2008 report, Dr. Kepple referenced electrodiagnostic studies of claimant's upper extremities obtained in August 2006 and November 2007. The results of those two tests were normal. After noting his physical findings upon examination, Dr. Kepple opined that claimant's allowed cervical conditions had not reached maximum medical improvement ("MMI"); however, Dr. Kepple attributed his current symptomatology to the 2006 shoulder injury and not to the 2001 cervical injury. Dr. Kepple concluded that claimant needed to continue maintenance therapy with medication and the TENS unit and that any disability was a result of the 2006 claim and not the 2001 claim.

{¶ 17} 6. Claimant's motion was heard before a district hearing officer ("DHO") on March 10, 2008. The DHO relied on the report of Dr. Kepple and concluded that claimant's current symptomatology was the result of the right shoulder injury in the 2006 claim and denied his request for TTD compensation in the 2001 claim.

{¶ 18} 7. Claimant appealed and the matter was heard before a staff hearing officer ("SHO") on April 21, 2008. The SHO affirmed the prior DHO order and denied claimant's request for TTD compensation in the 2001 claim. The SHO denied TTD compensation from June 19 through July 1, 2007 because claimant had not treated with Dr. Lefkowitz during that time period. The SHO denied TTD compensation beginning July 2, 2007 because Dr. Lefkowitz's treatment note of the same day indicated that claimant was capable of returning to work on that date without restrictions. The SHO denied TTD compensation from October 5, 2007 through April 21, 2008 and found that

claimant failed to present sufficient probative medical evidence substantiating that this period of alleged disability was due to the allowed conditions in the 2001 claim. The SHO specifically found:

\* \* \* While Dr. Lefkovitz contends that the injured worker's disability is a result of the allowed cervical conditions in this claim, rather than the right shoulder condition recognized in claim number 06-865981, Dr. Lefkovitz does not address the EMG/NCV testing of the right upper extremity dated 11/10/2007 and 11/29/2007 which disclosed no cervical radiculopathy. Both of these studies were performed by Dr. Lefkovitz and were found to be "normal."

(Emphasis sic.) The SHO noted that, in the 2006 claim, claimant had recently filed a request for the allowance of right rotator cuff tear as supported by an MRI.

{¶ 19} 8. Claimant's further appeal was refused by order of the commission mailed May 9, 2008.

{¶ 20} 9. In June 2009, claimant was involved in a motorcycle accident when a vehicle pulled out in front of him. Claimant hit the vehicle, rolled over the handlebars of his motorcycle, across the hood of the other vehicle, and landed on his feet. Claimant complained of right wrist and leg pain and some neck pain.

{¶ 21} 10. In October 2009, claimant underwent surgery on his right shoulder in the 2006 claim.

{¶ 22} 11. Although the surgery on his shoulder was successful, claimant experienced an increase in his neck pain during the physical therapy. As a result, claimant filed a request for treatment under the 2001 claim.

{¶ 23} 12. Regarding his continuing treatment with Dr. Lefkovitz, in a letter dated December 2, 2009, Dr. Lefkovitz noted that claimant had increasing neck pain with

radiation into his right upper extremity. Dr. Lefkovitz then indicated that an updated cervical spine MRI, as well as therapy, were warranted due to the exacerbation of his neck pain. Dr. Lefkovitz also noted that the requests for treatment had been denied at that time and that he was concerned that claimant's cervical disc disease may have progressed to the point where surgery might be warranted.

{¶ 24} 13. Thereafter, claimant filed a motion requesting office medical care, an MRI, and physical therapy in the 2001 claim. Ultimately, this request was heard before an SHO on January 11, 2010. The SHO granted the request, stating as follows:

Pursuant to the usual, customary, and reasonable cost guidelines authorization is granted for office visits with Dr. Lefkovitz at the frequency of one time per month for 12 months effective 01/11/2010, an MRI of the cervical spine, and treatment consisting of hydrotherapy, vasopneumatic, electric stimulation, and instruction for stretch exercises at the frequency of two times per week for five weeks.

This decision is based on the Injured Worker's testimony at hearing regarding the use of weights during physical therapy in claim #06-865981, recognized for right shoulder conditions, which has increased his cervical symptoms; the Injured Worker's testimony regarding the motor vehicle accident in which he was involved in June of 2009 which the Injured Worker states did not involve his cervical area; the treatment records, 10/02/2009 C-9 report, and narrative reports dated 09/28/2009 and 12/02/2009 from Dr. Lefkovitz; and the 12/04/2009 treatment note from Dr. Noel, the treating physician in 06-865981, which reflects the Injured Worker's shoulder surgery was successful, indicates the Injured Worker is currently experiencing radicular cervical symptomatology, and recommends physical therapy for the cervical spine and a repeat cervical MRI.

{¶ 25} 14. Relator's appeal was refused by order of the commission mailed February 11, 2010.

{¶ 26} 15. Relator filed a request for reconsideration, arguing that treatment records from 2008 through 2009 did not reflect any worsening or exacerbation of claimant's neck pain. That request was denied by the commission in an order mailed March 23, 2010.

{¶ 27} 16. Claimant continued treating with Dr. Lefkovitz regarding the cervical injuries sustained in the 2001 claim and with Curtis R. Noel, M.D., for his shoulder complaints related to the 2006 injury.

{¶ 28} 17. In a progress note from Dr. Noel dated February 3, 2010, Dr. Noel noted that claimant was experiencing increased neck pain as he progressed through his physical therapy for his shoulder. Specifically, Dr. Noel's office note provides:

CHIEF COMPLAINT: Greg Murphy returns today for follow-up on his right shoulder, as well as issues with his neck.

He feels his shoulder is doing great. He has no problems with his shoulder today. His complaint is issues with his neck. He noticed therapy as he is increasing his weights and trying to build up his shoulder it actually makes his neck worse. We are awaiting allowance for his C-spine so that he needs formal therapy or possible least injections in and around the areas that are causing him problems.

PHYSICAL EXAM: On examination today, he has full range of motion of his shoulder. Negative Neer, Jobe's and Hawkins. No pain with range of motion. He appears to have 5/5 strength in forward elevation, external rotation and internal rotation. Examination of the neck, including extension recreates pain into the midline of his neck, somewhat over to the right trap and gives him a headache. He has positive Spurling recreating the same pain.

ASSESSMENT/IMPRESSION: 1. Right shoulder status post ASD, GHD doing well. 2. Cervical disc disease.

PLAN: At this time I believe his shoulder is well healed. There is no intervention on his shoulder. At this time I would

hold off on any therapy that he is doing with his shoulder, as this other thing is just aggravating the neck issue. We need to get the neck issue solved with worker's comp so he can get appropriate treatment, including therapy for his neck, possible selective Cortisone injections. It sounds like he may have a referral to Dr. Markarian. He will follow up with me as needed.

{¶ 29} 18. An independent medical examination was performed by Elizabeth Mease, M.D. In her May 28, 2010 report, Dr. Mease noted the medical records which she reviewed and provided her findings upon examination. Dr. Mease noted that claimant complained of constant pain in the middle to right side of his neck sometimes radiating into the right shoulder. Claimant told her that he has headaches, avoids heavy lifting, has difficulty with overhead activities, as well as difficulties turning his head. Ultimately, Dr. Mease concluded that claimant's cervical condition had reached MMI, that he was capable of returning to his former position of employment as a press operator, and that, in her opinion, claimant's neck complaints were related to the injuries he sustained in the 2009 motorcycle accident.

{¶ 30} 19. In response to Dr. Mease's report, Dr. Lefkovitz authored a letter dated June 10, 2010. Dr. Lefkovitz pointed out that claimant had neck pain before and after the 2009 motorcycle accident and that, in his opinion, his neck pain was a direct and proximate result of the 2001 work-related injury. Dr. Lefkovitz indicated further that claimant had persistent intractable neck pain related to significant cervical spine disc disease at both C5-6 and C6-7 and that he might need surgery. Lastly, Dr. Lefkovitz stated that claimant could not return to the heavy occupational duties of a press operator.

{¶ 31} 20. On March 15, 2010, claimant submitted a C-9 requesting authorization for a cervical spine MRI and a consultation with George Z. Markarian, M.D., a neurosurgeon. Relator approved that request on March 17, 2010.

{¶ 32} 21. In an addendum dated August 15, 2010, Dr. Mease identified additional medical records which she reviewed and stated that her prior opinion had not changed. She pointed out that claimant was able to return to work following the 2001 injury, that the 2007 EMG/NCV studies showed no evidence of cervical radiculopathy and referenced again the 2009 motorcycle accident as an intervening event and the sole cause of claimant's neck pain.

{¶ 33} 22. On May 5, 2010, claimant submitted a C-86 requesting that TTD compensation be paid from February 10, 2010 to an estimated return-to-work date of July 1, 2010 and continuing in the 2001 claim. In support, claimant submitted the April 22, 2010 C-84 from Dr. Lefkowitz opining that claimant had been temporarily and totally disabled due to the allowed conditions from October 5, 2007 through an estimated return-to-work date of July 1, 2010.

{¶ 34} 23. In a report dated April 21, 2010, Dr. Markarian noted that the MRI showed severe stenosis and spondylosis at C5-6 and C6-7, with disc herniations, impingement on the thecal sac, and more right-sided foraminal stenosis at all levels. Dr. Markarian recommended a CAT scan and flexion-extension x-rays to further assess the injury to claimant's neck.

{¶ 35} 24. Claimant followed up with Dr. Markarian on July 7, 2010. Dr. Markarian noted that claimant continued to have problems with his neck and arms, that

neurologically he was stable, that he needed to be "scheduled for C5-7 ACDF with plate, he also needs a Cervical Collar and External Bone Stimulator." This request would be denied following an October 6, 2010 hearing.

{¶ 36} 25. Claimant's request for TTD compensation was heard before a DHO on June 28, 2010, and the request for compensation beginning February 10, 2010 was denied. The DHO stated that claimant had limited time off work following the 2001 injury and that he had been able to return to his former position of employment, without restriction, until the 2006 injury rendered him temporarily and totally disabled. The DHO also relied on the report of Dr. Mease, who had concluded that claimant's cervical injuries had reached MMI and that claimant was able to return to his former position of employment. However, the DHO specifically disagreed with Dr. Mease's opinion that the intervening motorcycle accident in 2009 caused injury to claimant, thereby breaking the chain of causation to the work-related injury.

{¶ 37} 26. Claimant appealed, and the matter was heard before an SHO on September 8, 2010. The SHO vacated the prior DHO order and granted claimant's request for TTD compensation beginning February 10, 2010 and continuing. The SHO relied on the C-84s and the June 10, 2010 narrative report of Dr. Lefkovitz, as well as the January 11, 2010 SHO's order, which had authorized 12 months of therapy beginning January 11, 2010, an MRI, and treatment consisting of hydrotherapy, vasopneumatic, electric stimulation, and instruction for stretch exercises. With regard to relator's continuing argument that the 2009 motorcycle accident broke the causal

connection between the neck injury sustained in the 2001 claim, the SHO rejected the argument, stating:

The Staff Hearing Officer notes that counsel for the Self-Insuring Employer contends that on 06/21/2009 the Injured Worker was involved in a motorcycle accident that caused an increase in his symptoms and that the Injured Worker's disability is due to this intervening incident. The Staff Hearing Officer notes, however, that the issue of what impact, if any, the 06/21/2009 motorcycle accident had on the allowed conditions in this claim is *res judicata*. In an order dated 01/11/2010 a Staff Hearing Officer authorized office visits with Dr. Lefkovitz at a rate of one time a month for 12 months beginning 01/11/2010, an MRI of the cervical spine, and therapy at a rate of two times a week for five weeks. In granting this treatment, the Staff Hearing Officer determined that the Injured Worker had an increase in his cervical symptoms while participating in physical therapy for the allowed conditions in claim number 06-865981 for which the Injured Worker had been paid temporary total compensation through 02/09/2010. The Staff Hearing Officer also noted the motorcycle accident of 06/21/2009 but found the same was insignificant based on the Injured Worker's testimony regarding his symptoms as a result of the same. Subsequent to the 01/11/2010 Staff Hearing Officer order, the Self-Insuring Employer approved a consultation with Dr. Markarian, a neurosurgeon. On 07/15/2010 Dr. Markarian completed a C-9 requesting surgery for the allowed conditions in this claim. The Self-Insuring Employer has since denied the surgery and a C-86 motion was filed by the Injured Worker on 09/07/2010 requesting the surgery recommended by Dr. Markarian. A review of the C-84 reports of Dr. Lefkovitz note that the Injured Worker was awaiting a surgical opinion regarding the allowed conditions in this claim.

Lastly, the Staff Hearing Officer relies on the 02/03/2010 report of Dr. Noel contained in claim number 06-865981. Dr. Noel, who performed the surgery on the Injured Worker's right shoulder in that claim and who disabled the Injured Worker as a result of the same stated that the Injured Worker's shoulder is well healed and that the Injured Worker needs to hold off on any therapy that he is doing with his shoulder as the same is just aggravating the Injured

Worker's neck issue. Dr. Noel then stated that the Injured Worker needs to get the neck issue solved so that the Injured Worker can get appropriate treatment, including therapy for his neck, and possible selective cortisone injections. Dr. Noel then mentions a possible referral to Dr. Markarian, the neurosurgeon, who is currently requesting surgery in this claim.

Based on the totality of the medical evidence in this file and the fact that the 06/21/2009 motorcycle accident was deemed to be insignificant by a Staff Hearing Officer in an order dated 01/11/2010, the Staff Hearing Officer finds that the Injured Worker is temporarily and totally disabled for the allowed conditions in this claim beginning 02/10/2010.

{¶ 38} 27. Relator filed an appeal of the order of the SHO following the September 8, 2010 hearing, arguing that the SHO failed to address the evidence establishing that claimant had reached MMI, improperly granted TTD compensation based on the stale findings of Dr. Noel, ignored the evidence that claimant's neck condition (based on the same allowed conditions) had been found not to be disabling by an SHO order dated April 21, 2008, and that the SHO ignored the evidence that claimant's condition was due to the non-allowed condition of stenosis.

{¶ 39} 28. In an order mailed October 2, 2010, relator's appeal was refused.

{¶ 40} 29. Thereafter, relator filed a request for reconsideration, making the same arguments.

{¶ 41} 30. In an order mailed February 3, 2011, the commission took relator's request for reconsideration under advisement; however, the commission found that relator had failed to meet its burden of proving sufficient grounds existed to justify the exercise of continuing jurisdiction and denied relator's request for reconsideration.

{¶ 42} 31. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶ 43} Relator makes the same arguments here that were raised at the commission level. Relator argues that the commission abused its discretion by (1) relying on the report of Dr. Noel; (2) ignoring evidence that the allowed conditions in the 2001 claim had reached MMI; (3) ignoring evidence that claimant's symptoms were caused by either the non-allowed condition of stenosis, the shoulder conditions allowed in the 2006 claim, or the 2009 motorcycle accident; and (4) ignoring the April 21, 2008 SHO order that denied claimant TTD compensation.

{¶ 44} The magistrate finds that: (1) the report of Dr. Noel constitutes some evidence; (2) the commission did not ignore evidence that the neck conditions allowed in claimant's 2001 claim had reached MMI; (3) the commission did not ignore evidence that claimant's current symptoms were caused either by the non-allowed condition of stenosis, the shoulder conditions allowed in the 2006 claim, or the 2009 motorcycle accident; and (4) the April 21, 2008 SHO order did not preclude this award of TTD compensation.

{¶ 45} 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.

{¶ 46} 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.

{¶ 47} Reading through the findings of fact can lead one to conclude that the issue in this case is complicated. However, it is not. The issue is: Did the commission abuse its discretion by finding that the physical therapy for claimant's shoulder conditions in the 2006 claim caused an exacerbation of his neck symptoms in the 2001 claim?

{¶ 48} TTD compensation is not payable if a claimant's allowed conditions have reached MMI. MMI is defined in Ohio Adm.Code 4121-3-32(A)(1) as "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." In *State ex rel. Bing v. Indus. Comm.* (1991), 61 Ohio St.3d 424, the Ohio Supreme Court held that a finding of MMI and the termination of TTD compensation does not preclude the reinstatement of TTD compensation if the allowed condition again becomes temporarily and totally disabling. As the Supreme Court noted: "A claimant who is temporarily totally disabled by a 'flare-up' of an existing injury is no less unable to work—or less deserving of temporary total compensation—than a claimant who is temporarily totally disabled by a worsening of an existing injury." *Id.* at 427.

{¶ 49} In the present case, the SHO relied on evidence which specifically indicated that claimant's neck symptoms worsened as a result of him lifting heavier weights as his physical therapy for his shoulder conditions progressed. Specifically, the SHO relied on the following evidence: (1) the January 11, 2010 SHO order granting claimant's C-9 request in the 2001 claim for office visits with Dr. Lefkovitz, an MRI of the cervical spine, and therapy based upon the SHO's finding that claimant's cervical symptoms increased as a result of the shoulder therapy in the 2006 claim and that the increased symptoms were not due to the 2009 motorcycle accident; (2) relator's approval of a consultation with Dr. Markarian, a neurosurgeon; (3) relator's denial of claimant's July 15, 2010 C-9 requesting surgery; (4) the C-86 filed by claimant on September 7, 2010 requesting the surgery pursuant to Dr. Markarian's opinion; (5) the C-84 from Dr. Lefkovitz indicating that claimant was awaiting a surgical opinion; and (6) the February 3, 2010 report of Dr. Noel in claim 2006 in which he opined that the physical therapy claimant undertook following his shoulder surgery had aggravated claimant's neck condition.

{¶ 50} As stated earlier, the real issue here is whether or not the commission abused its discretion by finding that the physical therapy relator participated in following shoulder surgery in the 2006 claim caused an increase in claimant's neck symptoms allowed in the 2001 claim.

{¶ 51} Relator contends that the commission abused its discretion by relying on the report of Dr. Noel. Relator points out that Dr. Noel was actually treating claimant solely for his shoulder condition in the 2006 claim and never treated him for his cervical condition in his 2001 claim. As such, relator contends that Dr. Noel is a non-examining physician who must clearly indicate that he has examined all the medical records concerning the claim and accepts the physical findings. Relator also contends that it was improper to consider a report filed in the 2006 claim. This magistrate disagrees.

{¶ 52} First, Dr. Noel actually examined claimant. Dr. Noel is an orthopedic surgeon and, to the extent that relator is not arguing that Dr. Noel was incompetent to render a report which discussed claimant's neck symptoms, his report clearly is some evidence upon which the commission could and did rely. Further, the magistrate finds that it is immaterial that this report was actually filed in the 2006 claim. As is evident from the record, these claims have a significant amount of overlap, and the orders themselves, as well as relator's arguments before this court, demonstrate that it was critical for the hearing officers to understand both claims. By arguing that both claims are important, relator's argument that evidence in the 2006 claim cannot be considered is rather disingenuous. The magistrate finds that it was not an abuse of discretion for the commission to rely upon the report of Dr. Noel.

{¶ 53} Relator also contends that the commission ignored evidence that claimant's neck condition in the 2001 claim had reached MMI. Relator contends that, when the issue of MMI is raised, the commission is required to address it.

{¶ 54} In response, claimant asserts that the commission obviously found that claimant's allowed neck conditions had not reached MMI based on the commission's reliance on the numerous C-84s of Dr. Lefkovitz, indicating that claimant's neck conditions were not at MMI, and that the cases cited by relator apply to factual situations where a claimant is receiving ongoing TTD compensation and an employer is attempting to terminate that compensation based on a finding of MMI.

{¶ 55} Pursuant to R.C. 4123.56(A), the payment of TTD compensation is not to be made when an employee has returned to work, when the treating physician has indicated that the employee is capable of returning to the former position of employment, when work within the physical capabilities of the employee has been made available by the employer, or when the employee has reached MMI.

{¶ 56} Clearly, TTD compensation is not payable if it is found that a claimant's allowed conditions have reached MMI. In the present case, the SHO relied on numerous C-84s from Dr. Lefkovitz when he specifically indicated that claimant's allowed neck conditions had not reached MMI. In relying on those C-84s, it is clear that the SHO determined that claimant's allowed neck conditions had not reached MMI.

{¶ 57} As part of this argument, relator contends that it submitted the May 28, 2010 report of Dr. Mease, who opined that the allowed cervical conditions in the 2001 claim had reached MMI. Relator appears to be arguing that the commission was

required to expressly reject the report of Dr. Mease and her finding that claimant had reached MMI. However, the commission is only required to cite that evidence upon which it relied and not evidence which it found not to be persuasive. *State ex rel. Noll v. Indus. Comm.* (1991), 57 Ohio St.3d 203.

{¶ 58} Relator argues further that the SHO ignored evidence that claimant's current problems were not due to the allowed conditions in the 2001 claim but were instead caused by the non-allowed condition of stenosis, the conditions allowed in the 2006 claim or by the 2009 motorcycle accident.

{¶ 59} Claimant's 2001 claim is allowed for: "Cervical strain; aggravation of pre-existing cervical spondylosis at C5-C7 and aggravation of cervical spine disc herniations at C5-6 and C6-7." Relator does not attempt to argue that claimant's neck symptoms have not increased. However, relator contends that any increase in his neck symptoms is actually related to one of three things: (1) the non-allowed condition of stenosis, (2) his shoulder condition; or (3) the 2009 motorcycle accident.

{¶ 60} As relator argues, at each hearing relator directed the hearing officer's attention to medical evidence showing that the non-allowed condition of cervical stenosis was actually causing the disability. Relator points to the April 21, 2010 report of Dr. Markarian, who recommended possible surgical intervention following an MRI which revealed some severe stenosis and spondylosis primarily at C5-6 and C6-7 with disc herniations, impingement on the thecal sac and more right-sided stenosis at those levels.

{¶ 61} Relator is asking this court to reweigh the evidence. Stenosis is defined in Taber's Cyclopedic Medical Dictionary (2001), Edition 20 as: "A narrowing of the spinal canal caused by degenerative or traumatic changes at the level of the \* \* \* vertebrae. This condition causes \* \* \* pain, often associated with pain that radiates." In arguing that claimant's symptoms are actually caused by stenosis, relator ignores the fact that claimant's claim is allowed for aggravation of pre-existing cervical spondylosis at C5-7 and aggravation of cervical spine disc herniation at C5-6 and C6-7. Cervical spondylosis is specifically defined in Taber's as "Degenerative arthritis, osteoarthritis, of the cervical \* \* \* vertebrae and related tissues. It may cause pressure on nerve roots with subsequent pain or parasthesia in the extremities." Both stenosis and spondylosis can cause the radiation of pain claimant is experiencing. The mere fact that Dr. Markarian mentioned stenosis in his report submitted in support of claimant's C-9 requesting surgery is not tantamount to a statement by the doctor finding that the stenosis is the cause of any period of disability. Relator is simply asking this court to reweigh this evidence.<sup>2</sup>

{¶ 62} Relator also contends that any increase in claimant's neck condition was caused by the 2009 motorcycle accident. Relator points out that bystanders immobilized claimant's neck after the accident and that claimant indicated at the hospital that he had

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<sup>2</sup> Furthermore, it is inconsequential that, at a later hearing in October 2010, the DHO would deny claimant's request for surgery based in part on stenosis as a cause. The order which relator is challenging here is dated September 8, 2010; as such, the later October 2010 order denying the request for surgery would not have been available for the SHO to review and, again, does not imply that stenosis was causing any disability.

some neck pain. According to relator, this evidence specifically contradicts claimant's later testimony that the 2009 motorcycle accident did not increase his neck symptoms.

{¶ 63} Pursuant to the record, relator has raised this issue on numerous occasions and each time it has been rejected. The credibility and weight to be given evidence are clearly within the discretion of the commission as fact finder and it is immaterial whether other evidence, even if greater in quality and/or quantity, supports a decision that is contrary to the commission's. *Teece; State ex rel. Pass v. C.S.T. Extraction Co.* (1996), 74 Ohio St.3d 373.

{¶ 64} Relator also contends that the SHO ignored the April 21, 2008 SHO's order which had denied claimant's request for TTD compensation from October 5, 2007 through April 21, 2008 based on the finding that the disability was due to the shoulder condition and not to the neck condition. The magistrate finds that the April 21, 2008 SHO order is not binding here. Specifically, at that time, claimant was requesting TTD compensation from October 5, 2007 through April 21, 2008. This was before claimant's 2006 claim would ultimately be allowed for right rotator cuff tear and right shoulder impingement syndrome and precedes the shoulder surgery and the accompanying physical therapy which claimant contends is causing an increase in his neck symptoms now. These orders cover two different time periods, two very different issues were addressed, and the April 21, 2008 SHO's order does not require the commission to deny this request for TTD compensation.

{¶ 65} Based upon a review of the record and consideration of all of the arguments, the magistrate finds that the commission did not abuse its discretion by

finding that claimant's cervical conditions allowed in his 2001 claim were causing the requested period of disability. The evidence relied on by the SHO demonstrates that the commission accepted that the 2001 and 2006 claims complicated each other but that the evidence supported a finding that the physical therapy relator participated in for the 2006 claim had caused an increase in his neck symptoms in the 2001 claim. As such, it is this magistrate's decision that relator has not demonstrated that the commission abused its discretion, and 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).