[Cite as *State ex rel. Ustaszewski v. Universal Serv. & Repair, Ltd.*, 2013-Ohio-2427.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Richard J. Ustaszewski,	:	
Relator,	:	
v.	:	No. 12AP-678
Universal Service & Repair, Ltd., and Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on June 11, 2013

Gallon, Takacs, Boissoneault & Schaffer Co., L.P.A., and *Theodore A. Bowman*, for relator.

Michael DeWine, Attorney General, and *Stephen D. Plymale*, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

SADLER, J.

{¶ 1} In this original action, relator, Richard J. Ustaszewski, requests a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its order that denied his application for permanent total disability ("PTD") compensation and to enter an order granting said compensation.

{¶ 2} Pursuant to Civ.R. 53 and Loc.R. 13(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 the commission did not abuse its discretion in denying relator's application for PTD compensation. Accordingly, the magistrate recommended that this court deny the requested writ of mandamus.

I. RELATOR'S OBJECTIONS

{¶ 3} Relator has filed the following objections to the magistrate's decision:

> [I.] The Magistrate incorrectly finds that the report of Dr. Lieser constitutes some evidence upon which the commission can rely.
>
> [II.] The Industrial Commission improperly relied on the presence of non-allowed conditions to deny Relator's application for permanent total disability compensation.

{¶ 4} In his objections, relator challenges the medical report of Thomas, E. Lieser, M.D., and argues the commission improperly relied on non-allowed conditions to deny his application for PTD compensation. These are not new arguments, however, as they are essentially a reiteration of the same arguments previously made to and addressed by the magistrate. For the reasons stated in the magistrate's decision, we do not find merit to relator's objections.

{¶ 5} Accordingly, relator's objections to the magistrate's decision are overruled.

II. CONCLUSION

{¶ 6} Upon review of the magistrate's decision, an independent review of the record, and due consideration of relator's objections, we find the magistrate has properly determined the pertinent facts and applied the appropriate law. We, therefore, overrule relator's objections 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.

Objections overruled;
writ of mandamus denied.

BROWN and DORRIAN, JJ., concur.

[Cite as *State ex rel. Ustaszewski v. Universal Serv. & Repair, Ltd.*, 2013-Ohio-2427.]

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Richard J. Ustaszewski,	:	
Relator,	:	
v.	:	No. 12AP-678
Universal Service & Repair, Ltd., 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 February 19, 2013

Gallon, Takacs, Boissoneault & Schaffer Co., L.P.A., and *Theodore A. Bowman*, for relator.

Michael DeWine, Attorney General, and *Stephen D. Plymale*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶ 7} In this original action, relator, Richard J. Ustaszewski, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order denying him permanent total disability ("PTD") compensation, and to enter an order granting the compensation.

Findings of Fact:

{¶ 8} 1. On April 2, 2008, relator sustained an industrial injury while employed as a forklift operator for respondent Universal Service & Repair, Ltd., a state-fund employer. On that date, the forklift relator was operating was rear-ended by a co-worker's vehicle.

{¶ 9} 2. The industrial claim (No. 08-324244) is allowed for:

> Sprain of neck; sprain lumbosacral; contusion of wrist, left; substantial aggravation cervical disc osteophyte complex, C5-6; substantial aggravation of cervical spinal stenosis, C5-6; protrusion of C5-6 and C6-7.

{¶ 10} 3. Apparently, relator was paid temporary total disability ("TTD") compensation by the Ohio Bureau of Workers' Compensation ("bureau").

{¶ 11} 4. On November 17, 2008, relator underwent neck surgery performed by Leo Clark, M.D. In his operative report, Dr. Clark states the pre-operative and post-operative diagnoses:

> Cervical myelopathy from disk and osteophyte complex at C5-6 causing spinal cord compression.

In his report, Dr. Clark describes the operation:

> Anterior cervical microdiskectomy, anterior cervical fusion, anterior cervical instrumentation, bone graft preparation, microsurgical dissection, and placement of tangent-type graft.

{¶ 12} 5. On November 3, 2009, at the bureau's request, relator was examined by James H. Gosman, M.D., who specializes in orthopedic surgery.

{¶ 13} 6. In his five-page narrative report dated November 3, 2009, Dr. Gosman opines that the allowed conditions of the industrial claim have reached maximum medical improvement ("MMI").

In his report, Dr. Gosman further opined:

> [Two] The injured worker is unable to return to his former position of employment.
>
> [Three] The summary of functional limitations solely due to the allowed physical conditions of this claim would place Richard J. Ustaszewski into the unable-to-perform-any-work category. I consider this restriction to be permanent.

{¶ 14} 7. Following a December 14, 2009 hearing, a district hearing officer ("DHO") issued an order terminating TTD compensation effective the hearing date based upon a finding that the industrial injury has reached MMI. The DHO's order states exclusive reliance upon the report of Dr. Gosman.

{¶ 15} 8. Apparently, the DHO's order was not administratively appealed.

{¶ 16} 9. On August 5, 2011, relator filed an application for PTD compensation. In support, relator submitted the November 3, 2009 report of Dr. Gosman.

{¶ 17} 10. On October 13, 2011, at the commission's request, relator was examined by Thomas E. Lieser, M.D. In his five-page narrative report, Dr. Lieser lists and summarizes the medical records he reviewed. Among the records reviewed was the November 17, 2008 operative report of Dr. Clark.

{¶ 18} In his report, Dr. Lieser states:

> Discussion:
>
> The examination today reveals lack of maximum effort. The cervical spine motion clearly reflects impairment from conditions unrelated to the C5-6 and C6-7 levels, as there is only one level of fusion that would not correlate to the marked loss of cervical motion. There is diffuse cervical and upper thoracic degenerative disc disease that is not allowed in the claim that would clearly impact motion. Neurologic function is intact, and there is no evidence of radiculopathy from either the cervical or lumbosacral spine levels. There is no impairment of lumbar motion, which would be consistent with the soft tissue allowance of lumbar sprain.
>
> Using the 5th Edition of the AMA Guides to the Evaluation of Permanent Impairment, Section 15.4, Table 15-3, the claimant has a lumbar DRE category I rating, equal to 0% impairment, consistent with the allowance of soft tissue lumbar sprain.
>
> Using Section 15.6, Table 15-5, the claimant has a cervical DRE category IV rating, equal to 25% whole person impairment based on the loss of motion segment integrity at C5-6 due to the fusion performed by Dr. Clark. Neurologic function remains intact throughout, and there is no evidence of lumbar or cervical radiculopathy.

> Using Section 16.4G, Figures 16-28 and 16-31, the claimant has 0% impairment for the allowed left wrist contusion. Range of motion is intact.
>
> Conclusions:
>
> Based on today's evaluation and within a reasonable degree of medical certainty, I would offer the following:
>
> [One] The claimant has reached maximum medical improvement with respect to the allowed conditions in this claim.
>
> With respect to the allowed conditions of sprain of neck, there is 0%; sprain lumbosacral there is 0% impairment. There is also 0% impairment for the contusion of the left wrist. With respect to the allowed conditions of substantial aggravation of cervical disc osteophyte complex, C5-6 and cervical spinal stenosis at C5-6, and finally, the protrusion of C5-6 and C6-7, the claimant has sustained a 25% whole person impairment based solely on the loss of motion segment integrity due to the fusion performed by Dr. Clark at C5-6. Thus in total, there is a 25% whole person impairment for the allowed conditions in this claim.
>
> [Two] The claimant is capable of performing within a medium demand capacity with respect solely to the allowed conditions in this claim. This is as noted on the attached physical strength rating form.

{¶ 19} 11. On October 13, 2011, Dr. Lieser completed a physical strength rating form. On the form, Dr. Lieser indicated by his mark that relator is capable of "medium work."

The pre-printed portion of the form defines "medium work" as:

> Medium work means exerting twenty to fifty pounds of force occasionally, and/or ten to twenty-five pounds of force frequently, and/or greater than negligible up to ten pounds of force constantly to move objects. Physical demand requirements are in excess of those for light work.

{¶ 20} 12. Following a February 1, 2012 hearing, a staff hearing officer ("SHO") issued an order denying relator's PTD application. The order explains:

This order is based primarily upon the report of Dr. Lieser, dated 10/13/2011.

The Injured Worker is a 53 year old male with a tenth grade education. He does not have a GED. His work history consists of work as a forklift driver, a buffer, a laborer, a metal plater, an auto worker, a marble polisher, a restaurant worker and as an attendant. His industrial injury occurred on 04/02/2008 when he was in a forklift and was rear-ended by a coworker's car. Treatment for the allowed conditions in the claim has consisted of surgery 11/17/2008 of an anterior cervical microdiskectomy, anterior cervical fusion, anterior cervical instrumentation, bone graft preparation, microsurgical dissection and placement of tangent-type graft. Injured Worker last worked 05/06/2008.

Dr. Thomas Lieser examined the Injured Worker regarding the allowed conditions in his claim. He took a history and examined the medical records of Injured Worker as well as took an examination of the Injured Worker. His examination of Injured Worker revealed lack of maximum effort. He found that the cervical spine motion clearly reflected impairment from conditions unrelated to the C5-6 and C6-7 levels as there was only one level of fusion that would not correlate to the marked loss of cervical motion. He pointed out that there was diffuse cervical and upper thoracic degenerative disc disease that was not allowed in the claim that would clearly impact Injured Worker's motion. Neurologic function was found to be intact and there was no evidence of radiculopathy from either the cervical or lumbosacral spine levels. Dr. Lieser completed a physical strength rating and indicated that Injured Worker would be capable of performing medium level work when the impairment from the allowed conditions is considered.

Based on the report of Dr. Lieser, which is found persuasive, the Hearing Officer finds that when the impairment arising from the allowed conditions is considered, the Injured Worker has a residual functional capacity to perform medium work as described in the report. Therefore, the Staff Hearing Officer finds the Injured Worker is capable of sustained remunerative employment and is not permanently and totally disabled.
The Injured Worker's young age of 53 is found to be a vocational asset in terms of his potential for return to work. His tenth grade education with no GED is found to be a

> negative factor, however, Injured Worker indicates on his IC-2 application that he is able to read and write and do math but not well. The Hearing Officer finds that Injured Worker's educational deficits did not prevent him from performing the jobs that he held in the past. Injured Worker's former positions of employment in various industries including automotive, restaurant, and cemetery work support that if retrained he could perform different employment. Finally, the Hearing Officer finds that the Injured Worker has not attempted any type of vocational retraining. Based on the courts decisions in State ex rel. Speelman v. Industrial Commission (1992) 73 Ohio App. 3d 757 and State ex rel. B F. Goodrich v. Industrial Commission (1995) 73 Ohio St.3d 525, the Hearing Officer may consider not only Injured Worker's past employment skills but those that may reasonably be developed and may consider Injured Worker's failure to undergo rehabilitation or retraining that would permit the Injured Worker's return to work. The fact that the Injured Worker has made no attempts at vocational retraining is found to be dispositive in this case. The Hearing Officer finds that when Dr. Lieser's restrictions are taken into consideration, Injured Worker would be capable of being retrained to perform work in the medium work category.
>
> Accordingly, the Hearing Officer finds that when Injured Worker's age, education and work history are considered, the Injured Worker has the capacity to acquire new skills that could widen the scope of employment options available to him.
>
> Therefore, because the Injured Worker has the residual functional capacity to perform medium work as described by Dr. Lieser, when only the impairment from the allowed conditions is considered, and based upon the above analysis of the Injured Worker's non-medical disability factors, it is found that the Injured Worker is not precluded from returning to any type of sustained remunerative employment. Therefore, Injured Worker's permanent and total disability application filed 08/05/2011 is denied.

{¶ 21} 13. On April 4, 2012, the three-member commission mailed an order denying relator's request for reconsideration.

{¶ 22} 14. On August 15, 2012, relator, Richard J. Ustaszewski, filed this mandamus action.

Conclusions of Law:

{¶ 23} Two issues are presented: (1) whether the reports of Dr. Lieser are so internally inconsistent that they cannot constitute the some evidence upon which the commission relied, and (2) whether the commission improperly relied upon non-allowed conditions in denying the PTD application.

{¶ 24} The magistrate finds: (1) Dr. Lieser's reports are some evidence upon which the commission can rely, and (2) the commission did not improperly rely upon non-allowed conditions to deny the PTD application.

{¶ 25} Accordingly, it is the magistrate's decision that this court deny relator's request for a writ of mandamus, as more fully explained below.

{¶ 26} Turning to the first issue, equivocal medical opinions are not evidence. *State ex rel. Eberhardt v. Flxible Corp.*, 70 Ohio St.3d 649, 657 (1994). Equivocation occurs when a doctor repudiates an earlier opinion, renders contradictory or uncertain opinions, or fails to clarify an ambiguous statement. *Id*.

{¶ 27} A medical report can be so internally inconsistent that it cannot be some evidence upon which the commission can rely. *State ex rel. Lopez v. Indus. Comm.*, 69 Ohio St.3d 445 (1994); *State ex rel. Taylor v. Indus. Comm.*, 71 Ohio St.3d 582 (1995). However, a court will not second-guess a doctor's medical expertise to support a claim of internal inconsistency. *State ex rel. Young v. Indus. Comm.*, 79 Ohio St.3d 484 (1997).

{¶ 28} In *Lopez*, the commission relied upon the January 26, 1990 report of Dr. Katz to deny a PTD application. The *Lopez* court concluded, at 449:

> Katz's report, however, while unequivocal, is so internally inconsistent that it cannot be "some evidence" supporting the commission's decision. Despite "normal" physical findings, Katz assessed a high (fifty percent) degree of impairment. He then, however, concluded that claimant could perform heavy foundry labor. Being unable to reconcile these seeming contradictions, we find that the report is not "some evidence" on which to predicate a denial of permanent total disability compensation.

{¶ 29} In *Taylor*, the commission relied upon the November 21, 1989 report of Dr. Katz. Discussing its earlier decision in *Lopez*, the *Taylor* court concluded that Dr. Katz's report contains the same infirmities as those contained in his report in *Lopez*. In *Taylor*, Dr. Katz also assessed a 50 percent permanent partial impairment despite normal findings.

{¶ 30} In *Young*, the commission relied upon the May 4, 1993 report of Dr. Rammohan to deny PTD compensation. Initially, the claimant suggested that Dr. Rammohan's findings dictate a higher impairment percentage than the 37 percent impairment he assessed. However, the court concluded that the claimant's assertion would require the court to second-guess the medical expertise of Dr. Rammohan which the court declined to do.

{¶ 31} The *Young* court, at 487, also rejected the claimant's invocation of *Lopez*, stating:

> Claimant's reliance on *Lopez* is also misplaced. In *Lopez*, we determined that the commission could not reasonably rely on a physician's report that, despite a fifty percent impairment rating, found the claimant capable of heavy foundry labor. The present situation is not analogous. Rather than a high degree of impairment, the present claimant's impairment is more moderate at thirty-seven percent. The present claimant, moreover, was not released to heavy employment, which would arguably be inconsistent with her level of impairment. Instead, she was limited to sedentary work. No comparable inconsistency, therefore, exists.

{¶ 32} Here, relator contends that it is "contradictory and inconsistent" for Dr. Lieser to find that relator can perform medium work while he suffers a cervical spine DRE category IV rating equal to a 25 percent whole person impairment.

{¶ 33} Relator points out that, under the American Medical Association Guides to the Evaluation of Permanent Impairment, Fifth Edition, at 392, there are five DRE cervical spine categories for rating impairment due to cervical disorders. (*See* Appendix to Brief of Respondent.) DRE cervical category IV is reserved for those who are assessed a 25 to 28 percent whole person impairment. Relator emphasizes that category IV is the second to the highest category for impairment.

{¶ 34} *Lopez* is the only case relator cites for support of his argument. The *Young* case is not cited. The magistrate finds that the instant case is controlled by *Young*.

> Ohio Adm.Code 4121-3-34(B)(2)(c) presents the pertinent definition:
>
> "Medium work" means exerting twenty to fifty pounds of force occasionally, and/or ten to twenty-five pounds of force frequently, and/or greater than negligible up to ten pounds of force constantly to move objects. Physical demand requirements are in excess of those for light work.

{¶ 35} Significantly, Dr. Lieser finds no "cervical radiculopathy" and he finds that "[n]eurologic function remains intact throughout." There are no restrictions on use of the hands, arms or shoulders in Dr. Lieser's report. Significantly, medium work can mean exerting "greater than negligible up to ten pounds of force constantly to move objects." Given those significant observations regarding Dr. Lieser's lack of hand, arm or shoulder restrictions, and the tripartite definition of medium work, it is difficult to see a contradiction or internal inconsistency in Dr. Lieser's reports.

{¶ 36} Accordingly, the magistrate finds that Dr. Lieser's reports are not contradictory or internally inconsistent and, thus, they can constitute the some evidence upon which the commission can and did rely.

{¶ 37} Turning to the second issue, a claimant must always show the existence of a direct and proximate causal relationship between his or her industrial injury and the claimed disability. *State ex rel. Waddle v. Indus. Comm.*, 67 Ohio St.3d 452 (1993). Non-allowed medical conditions cannot be used to advance or defeat a claim for compensation. *Id*.

{¶ 38} The mere presence of a non-allowed condition in a claim for compensation does not in itself destroy the compensability of the claim, but the claimant must meet his or her burden of showing that an allowed condition independently caused the disability. *State ex rel. Bradley v. Indus. Comm.*, 77 Ohio St.3d 239, 242 (1997).

{¶ 39} In *State ex rel. Ignatious v. Indus. Comm.*, 99 Ohio St.3d 285, 2003-Ohio-3627, the commission denied TTD compensation to John P. Ignatious who had an industrial claim allowed for a sprained neck and herniated discs C4-5 and C5-6.

Ignatious also suffered from a non-allowed carpal tunnel syndrome. Regarding Ignatious' burden of proof, the court states:

> Both sides offer compelling arguments. Claimant has accurately cited both Waddle and the evidentiary consensus as to causal relationship on his case. Equally valid is the commission's emphasis on its evidentiary prerogative. Without question, the commission is entitled to draw inferences from the evidence before it. What it is not empowered to do, however, is alter the burden of proof.
>
> No one disputes claimant's responsibility to establish a causal relationship between his allowed conditions and the claimed disability. He is not, however, required to disprove a negative. Having supplied evidence of a direct causal relationship between his allowed neck conditions and his disability, he is not required to further show that his carpal tunnel syndrome is not causing his inability to work.

Id. at ¶ 32-33.

{¶ 40} Here, Dr. Lieser addresses non-allowed conditions. He notes "[t]here is diffuse cervical and upper thoracic degenerative disc disease that is not allowed in the claim that would clearly impact motion."

{¶ 41} But Dr. Lieser also directly addresses the allowed conditions in the claim. He finds that the allowed conditions place relator at a cervical spine DRE category IV rating equal to 25 percent whole person impairment based on the loss of motion segment integrity at C5-6. He then finds that the industrial impairment permits medium work.

{¶ 42} In short, Dr. Lieser did what the commission asked him to do and what the law requires him to do. That is, he evaluated the allowed conditions of the claim. It was not inappropriate for him to address the relationship between the allowed and non-allowed conditions.

{¶ 43} Clearly, contrary to relator's contention, the commission's reliance upon the reports of Dr. Lieser does not indicate that the commission required relator to prove that his non-allowed conditions were not causing disability. There is no evidence that the commission altered the burden of proof.

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

/*S*/ MAGISTRATE
KENNETH W. MACKE

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).