[Cite as *State ex rel. McCormick v. McDonald's*, 2013-Ohio-766.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Ruth McCormick,	:	
Relator,	:	
v.	:	No. 11AP-902
McDonald's and Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on March 5, 2013

Ronald E. Slipski, and *Shawn D. Scharf*, for relator.

Michael DeWine, Attorney General, and *Cheryl J. Nester*, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

CONNOR, J.

{¶ 1} Relator, Ruth McCormick ("relator"), 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 terminating her application for temporary total disability ("TTD") compensation and issue a new order reinstating TTD compensation.

{¶ 2} The court referred this matter to a magistrate pursuant to Civ.R. 53(C) and Loc.R. 13(M) of the Tenth District Court of Appeals. The magistrate issued a decision, including findings of fact and conclusions of law, which is appended to this decision. Therein, the magistrate concluded that *State ex rel. Sellards v. Indus. Comm.*, 108 Ohio St.3d 306, 2006-Ohio-1058, does not compel the issuance of a writ of mandamus in this case. Finding that *Sellards* does not stand for the proposition that a doctor's opinion as to maximum medical improvement ("MMI") is automatically rendered premature by another doctor's subsequent request and approval of a treatment plan, the magistrate recommended denial of the writ requesting the reinstatement of TTD compensation.

{¶ 3} Relator filed objections to the magistrate's decision. The commission filed a memorandum opposing the objections. This cause is now before the court for a full review regarding relator's objections. Although relator's arguments are essentially the same arguments which were presented to and considered by the magistrate, we shall briefly address them.

{¶ 4} Relator has not delineated specific objections. However, she generally asserts that the magistrate erred by misconstruing *Sellards* and by relying on a medical opinion that is based upon an incomplete factual foundation to support a finding of MMI. Relator contends the principle established in *Sellards* is that a doctor's opinion regarding MMI is invalid where the doctor rendering the opinion is unaware of a medical treatment plan contemporaneously approved by a medical care organization and/or the bureau of workers' compensation. Specifically, relator argues the commission cannot rely upon the opinion of Amardeep Chauhan, D.O., finding that relator has reached MMI, because Dr. Chauhan was unaware of and did not consider a contemporaneously approved medical treatment plan from Shawn M. Donatelli, D.O.

{¶ 5} Relator also takes issue with the magistrate's presumption that the commission considered Dr. Donatelli's reports and his approved C-9 request for cervical epidural steroid injections and his conclusion that, because they were considered by the commission, the fact that Dr. Chauhan did not consider those reports is of no consequence. Relator argues the commission cannot consider the contemporaneously approved medical treatment plan while simultaneously relying solely upon a medical

opinion which did not consider that treatment plan. Relator asserts this is particularly true where the bureau and the commission are aware of this lack of consideration.

{¶ 6} Thus, pursuant to *Sellards*, relator submits the commission cannot rely upon the opinion of Dr. Chauhan because his opinion did not consider the contemporaneously approved medical treatment plans of Dr. Donatelli. However, as generally noted by the magistrate, we find the factual circumstances here to be different from those in *Sellards*.

{¶ 7} In *Sellards*, a psychiatrist submitted a treatment plan that was approved by the commission. On the same date of that approval, another psychiatrist concluded the claimant had reached MMI. However, the second psychiatrist was unaware of the newly approved treatment plan. The Supreme Court of Ohio found the second psychiatrist's opinion to be premature based upon the commission's contemporaneous approval of the first psychiatrist's treatment program, and consequently, it could not serve as evidence to support the denial of TTD compensation.

{¶ 8} In the instant case, there is a different time frame involved. Here, the record demonstrates the commission was aware that approximately two weeks after Dr. Chauhan's examination of relator, Dr. Donatelli completed a C-9 request for authorization of three cervical epidural steroid injections, as Dr. Chauhan's report was dated two weeks prior to Dr. Donatelli's completion of a C-9 request for authorization of the steroid injections. More than two weeks after that, the C-9 request was approved by the managed care organization (rather than by the commission, as in *Sellards*). The record further reflects the first steroid injection was given within a couple of days of approval, followed by a second injection. Approximately three weeks after approval of the C-9 request, a hearing was held before the district hearing officer, meaning relator received two cervical epidural injections prior to the hearing.

{¶ 9} While the approval of the treatment plan and the examination by the second psychiatrist in *Sellards* was very contemporaneous, the same cannot be said here. As stated by the magistrate, approval from the managed care organization occurred more than one month after Dr. Chauhan's examination of relator. Furthermore, we agree with the magistrate's conclusion that *Sellards* does not stand for the proposition that a doctor's opinion with regard to MMI is automatically classified as "premature" simply as a result

of a subsequent request for and approval of a treatment plan. We find no error in the magistrate's interpretation of *Sellards*.

{¶ 10} Based upon this analysis, we find no violation of *Sellards* and we overrule relator's objections.

{¶ 11} In conclusion, after an independent review, pursuant to Civ.R. 53, we find the magistrate has properly determined the pertinent facts and applied the appropriate law. Therefore, relator's objections to the magistrate's decision are overruled and we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein. In accordance with the magistrate's decision, we deny the requested writ of mandamus.

Objections overruled;
writ of mandamus denied.

KLATT, P.J., and DORRIAN, J., concur.

A P P E N D I X

IN THE COURT OF APPEALS OF OHIO

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v.	:	No. 11AP-902
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Respondents.	:	

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

Rendered on July 26, 2012

Ronald E. Slipski and *Shawn D. Scharf,* for relator.

Michael DeWine, Attorney General, and *Eric Tarbox,* for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶ 12} In this original action, relator, Ruth McCormick, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate that portion of its November 15, 2010 order that terminates temporary total disability ("TTD") compensation, and to enter an order reinstating the compensation.

Findings of Fact:

{¶ 13} 1. On December 6, 2002, relator sustained an industrial injury when she slipped on a wet surface while employed at a McDonald's restaurant. The employer is a state-fund employer.

{¶ 14} 2. The industrial claim (No. 02-470208) is allowed for:

> Concussion; contusion scalp; sprain of neck; C4-C5 bulging disc; aggravation of pre-existing degenerative disc disease C4-5, C5-6, C6-7; bilateral stenosis C5-6, C6-7.

{¶ 15} 3. Relator began receiving TTD compensation from the Ohio Bureau of Workers' Compensation ("bureau").

{¶ 16} 4. On August 13, 2010, at the bureau's request, relator was examined by Amardeep Chauhan, D.O. In his four-page narrative report, Dr. Chauhan states:

> **Medical History:**
>
> Ms. McCormick is a 45-year-old left-hand dominant female who sustained injuries to her cervical spine while working at McDonalds. On 12/06/2002, she slipped on a wet surface and hit the back of her head injuring her neck, head, and shoulder. She was initially seen at St. Elizabeth's Hospital where x-rays were performed and demonstrated degenerative changes in the cervical spine. She had no loss of consciousness. CT scan of the brain on 12/07/2002 was normal without any evidence of bleed. Initially she was treated by her family physician, Dr. Kolopas; then started treatment with Dr. Getsy, chiropractor. Treatment initially was conservative with therapy and chiropractic adjustments.
>
> * * *
>
> She returned to Dr. Getsy's care who continued to manage her for most of 2006. There was a lapse in any treatment up until 12/15/2008. She had been seen by Dr. Getsy on 09/06/2006, and therefore more than two years had passed. She related some issues with substance abuse and that was the primary reason why she was not seeking any treatment. She then returned to Dr. Getsy's care and he continued to provide physical therapy in his office including modalities, electric stim, and myofascial treatment. She continues to see Dr. Getsy on a fairly regular basis for chiropractic care.

She was seen on 07/05/2010 by Dr. Shawn Donatelli for consultation. On examination, [she] was found to have intact motor and sensory function. An EMG/nerve conduction study was repeated on 04/12/2010, which was reviewed by Dr. Donatelli and was read as normal. The remainder of the studies including x-rays and MRIs were reviewed as well and a repeat MRI was recommended by Dr. Donatelli and this was performed only two weeks ago. The results are not available at the time of this dictation. Treatment going forward has been recommended to be conservative with ongoing chiropractic care being recommended by Dr. Getsy.

Specific questions to be addressed:

[One] In your medical opinion, has the injured worker reached a treatment plateau that is 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 rehabilitation procedures (maximum medical improvement)? Please explain.

Yes, she has reached a treatment plateau. She has had an abundant amount of conservative treatment and chiropractic treatment. She has had some interventional treatment provided by two different pain specialists as well, most recently Dr. Donatelli. Trigger point injection therapies have been performed as have paravertebral facet injections.

[Two] Can the injured worker return to his/her former position of employment? If yes, are there any restrictions or modifications?

Yes, she is able to return to her former position of employment without restriction or modification. She takes care of three of her grandchildren including an 8-month-old, 3-year-old, and a 6-year-old. She does this twice a week. She has no strength deficit. Her range of motion is functional. She does not appear to have the pain that she describes as 10/10. Therefore, she should be able to work at her previous position of employment.

* * *

[Four] Has the injury/disease reached maximum medical improvement? If not, are there any

> **recommendations for vocational rehabilitation and when should a re-examination be considered?**
>
> Yes, she has reached maximum medical improvement. She is not a candidate for vocational rehabilitation and has no transferrable skills. Her motivation to return to work is also highly questionable.
>
> **[Five] Is the current treatment necessary and appropriate for the medical condition(s)?**
>
> No, ongoing chiropractic treatment is not considered appropriate. Referencing Official Disability Guidelines 2009, chiropractic care should be weaned over a period of time. Ms. McCormick's injury was in 2002. Over the year, she has had an abundance of chiropractic treatments, and chiropractic treatment is no longer necessary or appropriate.
>
> **[Six] What are the recommendations for any proposed plan of treatment including the expected length of treatment and results?**
>
> No further treatment is recommended. She should continue with a home-based program to maintain her range of motion.

{¶ 17} 5. On August 31, 2010, citing the report of Dr. Chauhan, the bureau moved for termination of TTD compensation on grounds that the industrial injury has reached maximum medical improvement ("MMI").

{¶ 18} 6. Earlier, on August 27, 2010, treating physician Shawn M. Donatelli, D.O., completed a C-9 request for authorization of three cervical epidural steroid injections. On September 12, 2010, the managed care organization ("MCO") approved the C-9 request.

{¶ 19} 7. On August 30, 2010, treating chiropractor Michael Getsy, D.C., completed a bureau form on which he certified that relator was not at MMI. On the form, Dr. Getsy indicated the existence of a "care plan for epidurals."

{¶ 20} 8. On September 14, 2010, relator underwent her first cervical epidural injection, as reported by Dr. Donatelli in his "procedure report" of that date. On September 28, 2010, Dr. Donatelli performed the second cervical epidural injection. In his "procedure report" of that date, Dr. Donatelli states:

> She had significant improvement in her symptoms for about a week following the first injection followed by significant recurrence. She does remain mildly improved overall at this time.

{¶ 21} 9. Following an October 8, 2010 hearing, a district hearing officer ("DHO") mailed an order on October 13, 2010 that grants the bureau's August 31, 2010 motion for termination of TTD compensation. The DHO's order of October 8, 2010 explains:

> According to the 08/13/2010 report from Dr. Chauhan, the conditions recognized in this claim have achieved a level of maximum medical improvement. However, according to the 09/24/2010 C-84 report completed by the treating chiropractor, M. Getsy, DC, these conditions continue to prevent Ms. McCormick from engaging in any employment whatsoever. Thus, the file contains conflicting medical evidence with regard to the issues of continued temporary total disability and maximum medical improvement.
>
> Based upon the previously noted report from Dr. Chauhan, the conditions recognized in this claim are hereby deemed to have achieved a level of maximum medical improvement. Accordingly, payments of Temporary Total Disability Compensation benefits shall be terminated effective 10/08/2010, the date of this hearing. The Temporary Total Disability Compensation benefits paid for the period subsequent to 10/08/2010 constitute an overpayment subject to recoupment in accordance with the provisions of Ohio Revised Code 4123.511(K).

{¶ 22} 10. Relator administratively appealed the DHO's order of October 8, 2010.

{¶ 23} 11. On October 19, 2010, relator underwent her third cervical epidural injection performed by Dr. Donatelli. In his "procedure report" of that date, Dr. Donatelli states:

> She reports mild improvement overall following the second injection.

{¶ 24} 12. On October 19, 2010, Dr. Getsy completed a C-84 on which he certified a period of TTD. On the C-84, Dr. Getsy indicated by his mark that relator is not at MMI.

{¶ 25} 13. On October 27, 2010, relator was examined by Dr. Donatelli who wrote:

> I also suggested that she may benefit further from a series of left cervical facet blocks. We discussed that procedure in detail, including its risks, benefits and alternatives. She has requested that we file a C-9 seeking authorization for this treatment.

{¶ 26} 14. On October 29, 2010, Dr. Donatelli completed a C-9 on which he requested authorization for "cervical paravertebral facet blocks." Two of the requested facets blocks were approved.

{¶ 27} 15. Following a November 15, 2010 hearing, a staff hearing officer ("SHO") mailed an order on November 17, 2010 affirming the DHO's order of October 8, 2010. The SHO's order of November 15, 2010 explains:

> It is the finding of the Staff Hearing Officer, based upon the narrative report from the State examining physician, Dr. Amardeep Chauhan, D.O., dated 08/13/2010, that the Injured Worker's condition has reached maximum medical improvement pursuant to a medical examination he performed on the Injured Worker. The Staff Hearing Officer further finds that, as a result of said finding of maximum medical improvement, the Injured Worker's temporary total compensation shall be and is hereby terminated as of 10/13/2010, the date of said prior District Hearing Officer hearing.
>
> Furthermore, based upon the finding of maximum medical improvement, as well as, the termination of the Injured Worker's temporary total compensation as indicated above, the Staff Hearing Officer also finds that any temporary total compensation paid subsequent to 10/13/2010, the date of said termination, is an overpayment and shall be recouped pursuant to R.C. 4123.511(K).
>
> The remaining portion of said order is based upon the narrative report dated 08/13/2010 from the State examining physician, Amardeep Chauhan, D.O., indicating that the Injured Worker's condition has reached maximum medical improvement, thus justifying the termination of temporary total compensation as of the date of said prior District Hearing Officer hearing.

{¶ 28} 16. On December 11, 2010, another SHO mailed an order refusing relator's administrative appeal from the SHO's order of November 15, 2010.

{¶ 29} 17. On December 21, 2010, relator moved for reconsideration of the SHO's order of November 15, 2010.

{¶ 30} 18. On April 16, 2011, the three-member commission, on a two-to-one vote, mailed an interlocutory order stating:

> It is the finding of the Industrial Commission that the Injured Worker has presented evidence of sufficient probative value to warrant adjudication of the request for reconsideration regarding the alleged presence of a clear mistake of law of such character that remedial action would clearly follow.
>
> Specifically, it is alleged that the Staff Hearing Officer erred in terminating temporary total disability compensation based on a medical report that did not consider the contemporaneously approved medical treatment, contrary to a finding of maximum medical improvement, based upon the findings in State ex rel. Sellards v. Indus. Comm. (2006), 108 Ohio St.3d 306.
>
> * * *
>
> Based on these findings, the Industrial Commission directs that the Injured Worker's request for reconsideration, filed 12/21/2010, is to be set for hearing to determine whether the alleged mistake of law as noted herein is sufficient for the Industrial Commission to invoke its continuing jurisdiction.

{¶ 31} 19. On May 5, 2011, the commission heard relator's request for reconsideration.

{¶ 32} 20. On May 20, 2011, the commission, on a three-to-zero vote, mailed an order denying reconsideration. The May 20, 2011 order explains: p. 64

> After further review and discussion, it is the finding of the Industrial Commission that it does not have authority to exercise continuing jurisdiction pursuant to R.C. 4123.52 and State ex rel. Nicholls v. Indus. Comm. (1998), 81 Ohio St.3d 454, State ex rel. Foster v. Indus. Comm. (1999), 85 Ohio St.3d 320, and State ex rel. Gobich v. Indus. Comm., 103 Ohio St.3d 585, 2004-Ohio-5990. The Injured Worker has failed to meet her burden of proving that sufficient grounds exist to justify the exercise of continuing jurisdiction. Therefore, the Injured Worker's request for reconsideration, filed 12/21/2010, is denied, the refusal

> order, issued 12/11/2010, is reinstated, and the Staff Hearing Officer order, issued 11/17/2010, remains in full force and effect.

{¶ 33} 21. On October 20, 2011, relator, Ruth McCormick, filed this mandamus action.

Conclusions of Law:

{¶ 34} The issue is whether the decision of the Supreme Court of Ohio in *State ex rel. Sellards v. Indus. Comm.*, 108 Ohio St.3d 306, 2006-Ohio-1058, compels this court to issue a writ of mandamus.

{¶ 35} The magistrate finds that *Sellards* does not compel a writ of mandamus, as more fully explained below.

{¶ 36} William E. Sellards, Jr., injured his back in 1998. In January 2001, he was deemed to have reached MMI.

{¶ 37} In November 2001, Sellards began seeing psychiatrist, Dr. J.T. Spare for depression. Dr. Spare prescribed an unspecified anti-depressant and initiated "supportive psychotherapy."

Id. at ¶ 2.

{¶ 38} In July 2002, the commission additionally allowed Sellards' claim for "major depressive disorder, single episode." *Id.* at ¶ 3. Dr. Spare submitted a C-9 treatment plan application that sought approval for psychotherapy and "medication management." *Id.* The C-9 was approved on October 22, 2002.

{¶ 39} Coincidentally, also on October 22, 2002, Sellards was examined by another psychiatrist, Dr. Allen B. Levy. After thoroughly reviewing the medical records (which did not include Dr. Spare's treatment plan), Dr. Levy concluded that Sellards' psychiatric condition had reached MMI.

{¶ 40} On November 26, 2002, Dr. Spare wrote that Sellards had been taking his prescriptions to the pharmacy where he was informed that they cannot be filled because the bureau will not make payment. Dr. Spare further wrote:

> I think with optimizing medication and continued psychotherapy, he can make additional progress.

Id. at ¶ 7.

{¶ 41} On December 23, 2002, Sellards' counsel phoned the bureau regarding prescription payment. The bureau responded with a letter the next day indicating that an error had occurred and, as of that date, had been corrected.

{¶ 42} Earlier, on December 18, 2002, a DHO found that Sellards had reached MMI based upon Dr. Levy's report. Sellards administratively appealed and obtained another letter from Dr. Spare dated January 7, 2003. The letter stated:

> "Mr. Sellards continues to be symptomatic. * * * The intensity of these experiences seem [sic] to fluctuate, to some extent, and clearly there has been some improvement over baseline. However, the symptoms remain severe to moderately severe * * *. As I had previously noted, the patient persistently reports that attempts to get his prescriptions filled at the pharmacy are frustrated by the pharmacist who claims that these psychiatric items are not compensated. Mr. Sellards' antidepressant treatment has been, to some extent, limited as we have been providing him with office samples to keep him in treatment.
>
> "I know there has been some attempt to address this issue since his last visit. However, so far as I am aware, the situation has not changed.
>
> "In any case, Mr. Sellards likely would have some opportunity to benefit from alternative medication or augmentation with a mood stabilizer; however, these approaches would require closer monitoring, blood testing and the availability of medication on a continuous basis. Given the uncertainty of the situation, I have been a bit reluctant to proceed with that because there are some risks involved, particularly if the medication cannot be continuously monitored appropriately."

Id. at ¶ 10-12.

On February 6, 2003, a SHO affirmed the DHO's order explaining:

> "Although Dr. Levy does indicate that counseling and medication management should continue, he indicates it is unlikely that the claimant will experience any further improvement in his psychological condition despite that treatment. The Staff Hearing Officer further finds that although the psychological condition was not formally recognized in this claim as an allowed condition until July of 2002, the claimant has been receiving regular treatment with

> Dr. Spare since at least November of 2001. Although the claimant just recently reported a problem to the BWC in getting his prescriptions filled, it is noted that Dr. Spare has been providing the claimant with free medication samples to treat the allowed psychological condition."

Id. at ¶ 14.

{¶ 43} The SHO's order of February 6, 2003 prompted a third letter from Dr. Spare:

> "[H]is treatment was, to some extent, limited by inability to provide intensive treatment and limits on the medications which were available. As I previously commented, we did provide him with office samples of several antidepressants but they were incompletely [sic] effective [sic]. In such cases, augmentation strategies which involved the prescription of mood stabilizers or small doses of major tranquilizers or more typical antidepressants are often prescribed. Some of these strategies require medication which is not available as samples as well as blood monitoring which is also expensive. As a consequence, our attempts at treatment were limited and Mr. Sellards has not had all of the available aggressive treatments for his depression."

Id. at ¶ 16.

{¶ 44} Sellards' administrative appeal from the SHO's order of February 6, 2003 was refused and reconsideration was denied.

{¶ 45} Sellards then filed a mandamus action in this court. This court denied the writ. On his appeal as of right, the Supreme Court of Ohio reversed the judgment of this court. The *Sellards* court offers this brief, two-paragraph explanation:

> The single issue presented is an evidentiary one. Sellards challenges Dr. Levy's opinion of maximum medical improvement as premature based on Dr. Spare's contemporaneously approved treatment plan and urges its disqualification. We agree with Sellards and accordingly reverse the judgment of the court of appeals.
>
> Prior to his examination by Dr. Levy, Sellards struggled to get the treatment recommended by his treating physician, Dr. Spare, who believed that Sellards would benefit from medication and psychotherapy. The commission, in approving that treatment, obviously wanted to give Sellards

> the opportunity for further treatment. We believe that Sellards merits that opportunity before maximum medical improvement is assessed. Dr. Levy's opinion was premature based on the commission's contemporaneous approval of Dr. Spare's treatment program. Dr. Levy's opinion could not, therefore, serve as evidence supporting denial of temporary total disability compensation.

Id. at ¶ 19-20.

{¶ 46} Analysis begins with the observation that there were two factors that persuaded the *Sellards* court to declare premature Dr. Levy's MMI opinion: (1) a bureau error regarding prescription payment appeared to have caused a delay in Sellards' psychiatric treatment, and (2) Dr. Levy was unaware of the contemporaneous approval of Dr. Spare's treatment plan.

{¶ 47} Here, we clearly do not have anything resembling the first factor. That is, there is no alleged error on the part of the bureau or any other entity involved in relator's claim that delayed relator's treatment.

{¶ 48} With respect to the second factor, relator points out that Dr. Chauhan (who issued his report August 13, 2010) was clearly unaware that two-weeks later, on August 27, 2010, Dr. Donatelli would request authorization of three cervical epidural steroid injections and that request would be approved by the MCO.

{¶ 49} Also, relator seems to cast blame upon the bureau for failing to disclose in its August 31, 2010 motion that Dr. Donatelli had recently submitted the C-9.

{¶ 50} Relator also seems to fault the commission's hearing officers for failing to specifically mention in their orders the approval of Dr. Donatelli's C-9 and his reports on relator's response to the injections given. (Relator's brief, at 3.) Parenthetically, it can be noted that the third injection was given October 19, 2010, which is several weeks prior to the SHO's hearing of November 15, 2010.

{¶ 51} Actually, the DHO's order of October 8, 2010, which was administratively affirmed, does state "[t]he file contains conflicting medical evidence with regard to the issues of continued temporary total disability and maximum medical improvement." Presumably, the conflicting medical evidence included Dr. Donatelli's reports and the C-9 approval.

{¶ 52} In *State ex rel. Lovell v. Indus. Comm.*, 74 Ohio St.3d 250 (1996), the court states:

> *State ex rel. Mitchell v. Robbins & Myers, Inc.* (1983), 6 Ohio St.3d 481, 6 OBR 531, 453 N.E. 2d 721, directed the commission to cite in its orders the evidence on which it *relied* to reach its decision. Reiterating the concept of reliance, *State ex rel. DeMint v. Indus.Comm.* (1990), 49 Ohio St.3d 19, 20, 550 N.E.2d 174, 176, held:
>
> "*Mitchell* mandates citation of only that evidence *relied* on. It does not require enumeration of all evidence *considered*." (Emphasis original.)
>
> Therefore, because the commission does not have to list the evidence considered, the presumption of regularity that attaches to commission proceedings (*State ex rel. Brady v. Indus. Comm.* [1989], 28 Ohio St.3d 241, 28 OBR 322, 503 N.E.2d 173) gives rise to a second presumption-that the commission indeed considered all the evidence before it.

Id. at 252.

{¶ 53} Accordingly, the presumption is that the commission, through its hearing officers, did consider Dr. Donatelli's reports and his approved C-9 request for the injections. Here, the commission, through its hearing officers, relied exclusively upon the report of Dr. Chauhan. The commission was not required to address the evidence that it did not rely upon. *Lovell.*

{¶ 54} In the magistrate's view, the second factor that persuaded the *Sellards* court is not present here either.

{¶ 55} In *Sellards*, Dr. Levy was unaware of the contemporaneous approval of Dr. Spare's treatment plan. By way of contrast, in the instant case, Dr. Donatelli completed his C-9 request on August 27, 2010, some two-weeks after Dr. Chauhan's August 13, 2010 examination. Moreover, approval from the MCO came on September 12, 2010, almost one month after Dr. Chauhan's examination.

{¶ 56} In the magistrate's view, *Sellards* does not stand for the unspoken proposition, as relator seems to suggest, that a doctor's opinion on MMI is automatically rendered premature by a subsequent request and approval of a treatment plan.

{¶ 57} 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/ *Kenneth W. Macke*
KENNETH W. MACKE
MAGISTRATE

NOTICE TO THE PARTIES

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