

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio, ex rel.	:	
Douglas A. Pilcher,	:	
	:	
Relator,	:	No. 12AP-671
	:	
v.	:	(REGULAR CALENDAR)
	:	
Coca-Cola Refreshments	:	
USA, Inc. and Industrial	:	
Commission of Ohio,	:	
	:	
Respondents.	:	
	:	

D E C I S I O N

Rendered on May 23, 2013

Lisa M. Clark and Mark B. Weisser, for relator.

Thompson Hine LLP, and M. Scott Young, for respondent
Coca-Cola Refreshments USA, Inc.

Michael DeWine, Attorney General, and *John R. Smart*, for
respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

DORRIAN, J.

{¶ 1} Relator, Douglas A. Pilcher, has filed this original action requesting that this court issue a writ of mandamus ordering the Industrial Commission of Ohio ("commission") to vacate its orders exercising continuing jurisdiction, as requested by respondent Coca-Cola Refreshments USA, Inc. ("employer"), and (1) denying his request for temporary total disability ("TTD") compensation, and (2) denying his request that certain medical treatment and a consultation be authorized. Relator asks us to order the

commission to find that he is entitled to that compensation and that the requested treatment is based on the allowed conditions in his claim.

{¶ 2} Pursuant to Civ.R. 53(D) 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 recommends that this court deny the request for a writ of mandamus.

{¶ 3} Relator has filed three objections to the magistrate's decision which can be summarized, as follows:

(1) The magistrate erred in finding that the commission did not abuse its discretion in exercising its continuing jurisdiction on January 19, 2012 regarding the TTD order because it is ambiguous as to why it exercised continuing jurisdiction.

(2) The magistrate erred in not addressing the issue of whether Dr. Sheridan's May 23, 2011 report constitutes some evidence in support of the commission's January 19, 2012 denial of TTD, including relator's arguments that (a) non-allowed conditions cannot advance or defeat a request for TTD, and (b) Dr. Sheridan did not have any medical records prior to April 4, 2011 and therefore was not aware of ongoing, continuous treatment by Dr. Stern.

(3) The magistrate erred in not vacating the commission's order relying on Dr. Sheridan's July 25, 2011 report as evidence to deny authorization of certain medical treatment.

{¶ 4} The arguments raised in relator's objections are essentially the same as those raised to and addressed by the magistrate.

{¶ 5} While relator continues to argue that the staff hearing officer's ("SHO") incorrect listing of non-allowed claims was a mistake of fact and ambiguous, for the reasons stated in the magistrate's decision, we reject relator's claims and find no merit to relator's first objection.

{¶ 6} Furthermore, we reject relator's claims that it was error to rely on Dr. Sheridan's report to deny TTD. For the reasons stated in the magistrate's decision, we find Dr. Sheridan's May 23, 2011 report constituted some evidence upon which the commission could rely to deny TTD. Dr. Sheridan expressly opined that the requested

period of TTD is not due to the allowed conditions. Also, although in his May 23, 2011 report, upon which the commission relied, he did not expressly state that he had reviewed medical records prior to April 4, 2011, in a prior report, he indicated that he had reviewed them. In his April 19, 2011 report, he stated that he had reviewed Dr. Stern's (Tri-State Orthopedic) medical records from August 9, 2006 to August 31, 2010, as well as the 2006 and 2008 MRIs, a report from Mayfield Clinic dated August 11, 2008, and records related to the 2010 work-related injury. We do not find merit to relator's second objection.

{¶ 7} Finally, we reject relator's claims that the commission relied upon the same evidence from Dr. Sheridan to deny treatment. As pointed out by the magistrate, the commission relied on the July 25, 2011 report of Dr. Sheridan to deny additional treatment, not the May 23, 2011 report on which it relied to deny TTD. To the extent the July 25, 2011 report is consistent with Dr. Sheridan's May 23, 2011 report, for the reasons articulated by the magistrate and by this court above regarding relator's second objection, we also find no merit to relator's third objection.

{¶ 8} 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 three 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 denied.

BROWN and SADLER, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio, ex rel.	:	
Douglas A. Pilcher,	:	
	:	
Relator,	:	No. 12AP-671
	:	
v.	:	(REGULAR CALENDAR)
	:	
Coca-Cola Refreshments	:	
USA, Inc. and Industrial	:	
Commission of Ohio,	:	
	:	
Respondents.	:	

MAGISTRATE'S DECISION

Rendered on February 26, 2013

Lisa M. Clark and Mark B. Weisser, for relator.

*Thompson Hine LLP, and M. Scott Young, for respondent
Coca-Cola Refreshments USA, Inc.*

*Michael DeWine, Attorney General, and John R. Smart, for
respondent Industrial Commission of Ohio.*

IN MANDAMUS

{¶ 9} Relator, Douglas A. Pilcher, has filed this original action requesting that this court issue a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its orders exercising continuing jurisdiction and granting the requests for reconsideration filed by respondent Coca-Cola Refreshments USA, Inc.

("employer"), and ultimately denying his request for temporary total disability ("TTD") compensation and his request that certain medical treatment and a consultation be authorized, and ordering the commission to find that he is entitled to that compensation and that the requested treatment is based on the allowed conditions in his claim.

Findings of Fact:

{¶ 10} 1. Relator sustained a work-related injury on July 7, 2006.

{¶ 11} 2. The employer originally certified the claim for lumbosacral sprain. Four years after the date of injury and following a jury trial, relator's workers' compensation claim was allowed for the following additional conditions:

[A]ggravation of lumbar spondylosis; aggravation of foraminal stenosis at L4-5 and L5-S1 secondary to a bulging L4-5 and L5-S1 disc; aggravation of degenerative disc disease at L4-5 and L5-S1.

{¶ 12} 3. After a period of treatment and TTD compensation, relator was released to return to work without any restrictions on January 25, 2007, and he continued to work without any restrictions due to the allowed conditions in this claim from 2007 to 2011.

{¶ 13} 4. Relator's treating physician was Errol J. Stern, M.D. According to Dr. Stern's report, shortly after relator returned to regular-duty work on January 29, 2007, relator was involved in a motor vehicle accident. Dr. Stern's office note from February 28, 2007 provides, in relevant part:

Clinically he describes pain in the right side of his back and it tends to be quite severe. He says that it got worse several days after the accident and has been progressively worsening since then.

Clinical examination indicates tenderness in the lumbosacral junction, more so in the right sacroiliac area. There is positive sacroiliac joint compression on the right side. There is tenderness in the joint on the right and spasms.

* * *

Impression is lumbosacral strain with right sacroiliac joint strain.

* * *

His present diagnosis related to this motor vehicle accident is left shoulder strain, left shoulder tendinitis, possible rotator cuff injury of the left shoulder, lumbosacral strain and right sacroiliac joint strain. We will see how he fares over the next 3 weeks. He maintains work related activities.

{¶ 14} 5. In an office note dated October 1, 2008, Dr. Stern lists the following diagnoses:

[One] Spinal stenosis
[Two] Lumbar spondylosis
[Three] Degenerative disc disease
[Four] Herniated disc¹

{¶ 15} 6. Thereafter, Dr. Stern noted that Dr. Cohen had recommended a provocative discogram and Dr. Stern opined he believed that relator would require surgical intervention.

{¶ 16} 7. In an office note dated May 12, 2009, Dr. Stern stated:

He has chronic back pain secondary to spinal stenosis and degenerative disc disease and multiple disc bulges.²

{¶ 17} 8. In an office note dated May 11, 2010, Dr. Stern references a second work-related injury which occurred on May 6, 2010 and was allowed for lumbar sprain. (This claim is not part of this mandamus action.) Specifically, Dr. Stern states:

Mr. Pilcher has a history of low back pain from an industrial injury. Apparently he re-injured his back that occurred last Thursday, 5/6/10, when he was pulling up on a dolly and felt pain in his low back on the left side in the left sacroiliac joint and radiates to the left buttock and down the left leg. He has positive straight leg raising on the left, negative on the right. Reflexes are intact. There is no motor or sensory deficit that I can determine. There is pain following the L5-S1 nerve root dermatome with ipsilateral and some contralateral pain to the left side.

Recommend light duty. He takes Percocet and Ibuprofen and we will continue the same medication and see if this doesn't calm down over the next few weeks.

¹ Relator's claim has not been allowed for a herniated disc. In 2010, a jury would find that this claim should be allowed for aggravations of spinal stenosis, lumbar spondylosis, and degenerative disc disease.

² Relator's claim has not been allowed for any disc bulges, but was allowed for aggravation of foraminal stenosis at L4-5 and L5-S1 secondary to a bulging L4-5 and L5-S1 disc.

He should talk to his legal counsel about how he is going to handle the case. Right now we are seeing him under Anthem.

{¶ 18} 9. In an office note dated April 6, 2011, Dr. Stern indicates that relator's back pain had apparently become significantly worse. Specifically, Dr. Stern stated:

Douglas has been having severe low back pain that was spontaneous in onset on Sunday. It is left sided. It radiates into his left buttock and left cheek. It is near his left sacroiliac joint.

We gave him a trigger point injection in the left side of 160 mg of Depo-Medrol and Marcaine. We renewed his medications which include Percocet and Soma. We switched him to Lodine XL to see how that works, 400 mg, b.i.d.

Right now we have him off work. He has been off since 4/4/11 and he will probably be able to resume work on 4/18/11 but we will see how he is. I will see him back on 4/15/11 and if he is doing better at that time we will let him go back to work.

{¶ 19} 10. In an office note dated April 15, 2011, Dr. Stern notes that relator needs three epidural steroid injections.

{¶ 20} 11. In his office note dated November 18, 2011, Dr. Stern indicates that, past MRIs show that relator had a herniated disc at L4-5 and L5-S1, he was continuing to have chronic low back pain, and that Dr. John Roberts, M.D., had recommended surgery. Dr. Stern listed the following impression/diagnosis: "[h]erniated lumbar disc."

{¶ 21} 12. There are two MRIs in the record which reveal the following:

August 3, 2006 MRI

{¶ 22} This MRI, taken one month after relator's work-related injury, revealed the following:

At L4-5 and L5-S1 there is evidence of disc desiccation and associated spondylosis.

At L5-S1: Diffuse disc bulge with associated loss of disc height and spondylosis is present. The disc bulge is asymmetric to the left. Associated short pedicles and facet joint hypertrophy are seen. Combination of findings result in bilateral neural foraminal stenosis, moderate to severe on

the left and moderate on the right. Furthermore, mild spinal canal stenosis is present related primarily to the disc bulge and short pedicles.

At L4-5: Short pedicles, facet joint hypertrophy and ligamentum flavum thickening noted resulting in mild spinal canal stenosis. Diffuse disc bulge asymmetric to the right is seen with biforaminal extension resulting in association with short pedicles and facet disease in bilateral moderate to severe foraminal stenosis on the right and mild to moderate on the left.

July 23, 2008 MRI

{¶ 23} This second MRI taken, one and one-half years after the motor vehicle accident, revealed the following:

[L4-5]: Spondylosis deformans. Left lateral disc displacement effacing the left L4 root. Right lateral disc displacement in the intermediate zone effacing right L5. Annular tear.

L5-S1: Facet arthropathy. Midline disc displacement with left eccentricity. Annular tear. Bilateral foraminal stenosis.

{¶ 24} 13. On April 28, 2011, relator filed a motion for TTD compensation and submitted a April 20, 2011 C-84 prepared by Dr. Stern certifying that relator was temporarily and totally disabled from April 4, 2011 through an estimated return-to-work date of April 29, 2011. Dr. Stern listed lumbar sprain as the allowed condition which was disabling relator. (By this time, relator's claim had been allowed for the additional and more severe conditions.)

{¶ 25} 14. Dr. Stern completed additional C-84s certifying that relator was disabled from April 29, 2011 through an estimated return-to-work date of June 6, 2011. Dr. Stern listed lumbosacral sprain as the condition being treated as well as the following conditions of aggravation of lumbar spondylosis, bulging discs, and degenerative disc disease.

{¶ 26} 15. Relator was examined by Richard T. Sheridan, M.D. In his April 19, 2011 report, Dr. Sheridan listed the allowed conditions:

I note that the 7/7/06 claim is allowed for a lumbar sprain, aggravation of lumbar spondylosis, aggravation of foraminal

stenosis, at L4-5 and L5-S1 secondary to a bulging to a L4-5 and L5-S1 disc, and aggravation of degenerative disc disease at L4-5 and L5-S1. The 5/6/10 claim is allowed for a lumbar sprain.

{¶ 27} Dr. Sheridan identified the medical records which he reviewed, including the 2006 and 2008 MRIs, reports from Dr. Stern's office from August 9, 2006 to August 31, 2010, a report from Mayfield Clinic dated August 11, 2008, and records related to the 2010 work-related injury. Dr. Sheridan ultimately concluded that the requested period of TTD compensation was not causally related to the allowed conditions, stating:

He had two MRIs of his lumbar spine, one on 8/3/06 and one 7/23/08. The findings in 2008 show annular tears at L4-5 and L5-S1, which may be causing Mr. Pilcher problems. These were not seen in the MRI of 8/3/06. Therefore they are not causally related to the 7/7/06 work event.

I do not believe within a reasonable degree of medical probability that Mr. Pilcher is and has been temporarily and totally disabled from April 4, 2011 through April 18, 2011, and continuing based upon the lumbar sprain allowed in his May 2010 claim. I believe he resolved his lumbar sprain prior to April 4, 2011. Also, he had previously returned to work without restrictions preceding this alleged new period of disability.

{¶ 28} 16. Dr. Sheridan authored a second report, dated May 23, 2011, after reviewing records which it appears he did not have at his April 19, 2011 examination; specifically, the April 6, 15, 20 and May 4, 2011 reports of Dr. Stern. Dr. Sheridan again concluded that the requested period of TTD compensation was not directly related to the allowed conditions in the claim, stating:

I do not believe within a reasonable degree of medical probability that Mr. Pilcher has been temporarily and totally disabled from April 4, 2011 through the present and continuing based upon the allowed conditions in his July 7, 2006 claim. Dr. Stern's office record of April 6, 2011 states, "Douglas has been having serious low back pain that was spontaneous in onset on Sunday." This occurred when Mr. Pilcher was not at work nearly five years after the July 7, 2006 claim arose and more than four years after he returned to work without restrictions on 1/25/07 following that July 2006 incident. Also, his MRI from July 23, 2008 which

showed non-allowed annular tears in his L4-5 and L5-S1 disc levels which were not seen on the August 2006 MRI could not be related to the July 2006 incident.

{¶ 29} 17. Relator's application was heard before a district hearing officer ("DHO") on June 27, 2011. The DHO relied on the May 23, 2011 report of Dr. Sheridan.

{¶ 30} 18. Relator appealed and the matter was heard before a staff hearing officer ("SHO") on August 9, 2011. The SHO's order lists the following three conditions as being allowed in relator's claim when, in fact, they were not: "[s]acroiliac joint strain; sacroilitis; sciatica." Thereafter, the SHO granted relator's request for compensation based on the following evidence:

This order is based upon the report from Dr. Stern dated 05/25/2011, the office note from Dr. Stern dated 04/06/2011, the office note from Dr. Roberts dated 04/28/2011, and the C-84 reports from Dr. Stern dated 04/20/2011, 05/04/2011 and 06/07/2011.

{¶ 31} 19. The employer's appeal was refused by order of the commission mailed September 3, 2011.

{¶ 32} 20. Thereafter, the employer filed a motion asking the commission to exercise its continuing jurisdiction and, in an interlocutory order mailed October 12, 2011, the commission granted the employer's motion, stating:

It is the finding of the Industrial Commission that the Employer has presented evidence of sufficient probative value to warrant adjudication of the request for reconsideration regarding the alleged presence of a clear mistake of law of such character that remedial action would clearly follow.

Specifically, it is alleged that the Staff Hearing Officer made a clear mistake of law by failing to recognize the correct allowed condition in the claim.

The order issued 09/03/2011 is vacated, set aside and held for naught.

{¶ 33} 21. Thereafter, a hearing was held on January 19, 2012. At that time, the commission found that the SHO had listed incorrect conditions as being allowed:

After further review and discussion, it is the finding of the Industrial Commission that the Employer has met its burden

of proving the Staff Hearing Officer order, issued 08/12/2011, contains a clear mistake of law of such character that remedial action would clearly follow. Specifically, the Commission finds the Staff Hearing Officer order, issued 08/12/2011, listed the incorrect previously allowed conditions for the claim. The correct allowed conditions in the claim are LUMBOSACRAL SPRAIN; AGGRAVATION OF LUMBAR SPONDYLOSIS; AGGRAVATION OF FORAMINAL STENOSIS AT L4-5 AND L5-S1 SECONDARY TO A BULGING L4-5 AND L5-S1 DISC; AGGRAVATION OF DEGENERATIVE DISC DISEASE AT L4-5 AND L5-S1. Therefore, the Commission exercises continuing jurisdiction pursuant to R.C. 4123.52 and State ex rel. Nicholls v. Indus. Comm., 81 Ohio St.3d 454, 692 N.E.2d 188 (1998), State ex rel. Foster v. Indus. Comm., 85 Ohio St.3d 320, 707 N.E.2d 1122 (1999), and State ex rel. Gobich v. Indus. Comm., 103 Ohio St.3d 585, 2004-Ohio-5990, 817 N.E.2d 398, in order to correct this error.

{¶ 34} All three commissioners agreed. Thereafter, the commission denied relator's request for TTD compensation, stating:

The Injured Worker sustained a low back injury 07/07/2006 in the course and scope of his employment. After a period of treatment and temporary total disability, the Injured Worker was released to return to work on 01/25/2007, without any restrictions. The Injured Worker continued to work from 2007 through 2010, without any restrictions due to the allowed conditions in this claim, until his current request for compensation beginning 04/05/2011. The office note from the physician of record, Errol J. Stern, M.D., dated 04/06/2011, documents the Injured Worker had "been having severe low back pain that was spontaneous in onset on Sunday," three days prior to the office visit. The office note further reflected the Injured Worker had been off work since 04/04/2011, and would probably continue off work until after the next office visit on 04/15/2011. In the office visit note, dated 04/15/2011, Dr. Stern noted the continued pain, and recommended a consultation with a spine surgeon, John Roberts, M.D. Dr. Stern indicated "This will be under his private insurance."

It is the finding of the Commission that the requested period of temporary total disability compensation is not substantiated as medically, causally related to the allowed conditions in this claim. This finding is based on the medical

report from Richard Sheridan, M.D., dated 05/23/2011. Dr. Sheridan cites the office note of Dr. Stern dated 04/06/2011, referencing the "spontaneous onset" of low back pain three days before the office visit, the MRI finding from 07/23/2008 revealing annular tears at L4-5 and L5-S1, which had not been present on the MRI dated 08/03/2006, and the Injured Worker's release to return to work with no restrictions on 01/25/2007. Dr. Sheridan opines the requested period of temporary total disability is not due to the allowed conditions from the 2006 industrial injury upon which this claim is predicated.

* * *

The Commission finds the opinion from Dr. Sheridan persuasive, and specifically denies the Injured Worker's request for temporary total disability compensation from 04/05/2011 through 07/11/2011. The Injured Worker returned to work on 07/12/2011.

{¶ 35} 22. At the same time relator's request for TTD compensation was being adjudicated, relator filed a motion asking that certain treatment be allowed and requesting a consultation with Orthopedic Surgeon, Dr. Roberts. In support of his motion, relator submitted the May 25, 2011 report of Dr. Stern, wherein he stated:

I am writing to you as the treating physician with regard to Douglas Pilcher's workers' compensation claim with Coca-Cola Enterprises. It is my understanding that claim 06-857874 has been allowed for the conditions of aggravation of lumbar spondylosis, aggravation of foraminal stenosis at L4-5 and L5-S1 and aggravation of degenerative disc disease at L4-5 and L5-S1. This claim has a date of injury of July 7, 2006.

It is my understanding that the 2010 claim is allowed for lumbar sprain. This claim has a date of injury of May 6, 2010. It is my professional opinion, based upon a reasonable degree of medical certainty, that treatment rendered by my office from May 2010 until August 31, 2010 was related to the lumbar sprain of May 6, 2010. All treatment rendered before that date and all treatment rendered after that date is directly related to the 2006 claim and the aforementioned allowed conditions. The injuries sustained by Mr. Pilcher in 2006 are chronic in nature and will require continued medical treatment and may, in fact, require surgery. This is

why Mr. Pilcher was referred for a surgical consult with Dr. Roberts in April of this year.

Mr. Pilcher's need for treatment with regard to his lower back was not affected at all by the motor vehicle collision of February 19, 2007. This accident did result in a need for shoulder surgery, however, while Mr. Pilcher had a brief flare up of his symptoms, they quickly returned to his pre-existing baseline condition.

It is my further opinion that Mr. Pilcher's temporary total disability benefits from April 4, 2011 to the present are directly related to the allowed conditions of his 2006 claim.

{¶ 36} 23. Relator also included the April 28, 2011 report of Dr. Roberts indicating that the radiographs revealed the following:

Radiographs of the lumbar spine obtained today reveal lumbar spondylosis at multiple levels. He has a moderate amount of disc space narrowing and sclerosis at L4-5 and L5-S1. I see nothing of an acute lytic or destructive process.

{¶ 37} 24. Dr. Sheridan authored a report in response dated July 25, 2011. In that report, Dr. Sheridan stated: att. 27

I do not believe within a reasonable degree of medical probability the consult with John Roberts, epidural steroid injections, and a repeat MRI as requested by Errol Stern, M.D., on a June 3, 2011 C9 are medically necessitated by Mr. Pilcher's 7/7/06 worker's [sic] compensation claim and its allowed conditions. Those conditions are lumbar sprain, aggravation of lumbar spondylosis, aggravation of foraminal stenosis at L4-5 and L5-S1 secondary to L4-5 and L5-S1 disc and aggravation of degenerative disc disease at L4-5 and L5-S1. When I examined him on 4/19/11 he had no evidence of lumbar radiculopathy. Because he does not have any radiculopathy, I do not believe he needs a consult with an orthopedic spine surgeon, specifically Dr. Roberts. I do not believe he needs epidural steroid injections which are usually given for people with radiculopathy. I do not believe he needs a repeat MRI as he had no evidence of radiculopathy to suggest a need for an MRI.

It is my opinion, consistent with my opinions rendered in my 4/19/11 and 5/23/11 reports, that any requested orthopedic consult with Dr. Roberts, epidural steroid injections, and

repeat MRI, which I did not believe to be medically necessary, would be directed at the spontaneous onset of low back pain documented in Dr. Stern's records as arising on April 3, 2011 when Mr. Pilcher was not working and not the above-claims of July 7, 2006 or May 6, 2010 or their allowed conditions.

{¶ 38} 25. Relator's motion for treatment and a consultation were heard before a DHO on August 9, 2011. (On this same day, the hearing officer, sitting as an SHO, heard relator's appeal from the DHO which had denied his request for TTD compensation.) The DHO incorrectly listed the following as allowed conditions: "[s]acroiliac joint strain; sacroilitis; sciatica." The DHO granted the request for treatment and consultation, stating:

The Injured Worker requested that the claim be authorized for an MRI of lumbar spine; epidural steroid injections in a series of three and a consultation with Dr. Roberts as prescribed by Dr. Stern.

It is the finding of the District Hearing Officer that the requested consultation, which the Injured Worker had with Dr. Roberts on 04/28/2011, and the requested MRI of the lumbar spine are medically reasonable and appropriate to assist the physician of record in planning a future course of treatment for the allowed conditions.

Further, the requested epidural steroid injections in a series of three were medically reasonable and appropriate for the treatment of the allowed conditions.

Therefore, it is hereby the order of District Hearing Officer that the claim is authorized for the requested lumbar MRI; epidural steroid injections in a series of three and a consultation with Dr. Roberts that occurred on 04/28/2011.

This order is based upon the report from Dr. Stern dated 05/25/2011, the office note from Dr. Roberts dated 04/28/2011, the office note from Dr. Stern dated 04/06/2011 and the office note of Dr. Stern dated 04/15/2011.

{¶ 39} 26. The employer appealed and the matter was heard before an SHO on October 4, 2011. The proper conditions are listed at the outset of this order. At this time, the SHO vacated the prior DHO order, yet granted the request for treatment, stating:

The Staff Hearing Officer finds that the Injured Worker requested authorization for an MRI scan of lumbar spine, epidural steroid injections in a series of three and a consultation with Dr. Roberts as prescribed by Dr. Stern.

The Staff Hearing Officer finds that the requested consultation, which the Injured Worker had with Dr. Roberts on 04/28/11 and the requested MRI scan of lumbar spine are medically reasonable and appropriate to assist the physician of record in planning a future course of treatment for the allowed conditions. Additionally, this Staff Hearing Officer finds that the requested epidural steroid injections in a series of three were medically reasonable and appropriate for treatment of the allowed conditions. Therefore it is the order of this Staff Hearing Officer that the claim is authorized for the requested lumbar MRI scan, epidural steroid injections in a series of three and a consultation with Dr. Roberts that occurred on 04/28/2011.

This order is based on the C-9 report of Dr. Stern dated 06/03/2011, the report from Dr. Stern dated 05/25/2011, office note from Dr. Roberts dated 04/28/2011, and the office notes from Dr. Stern dated 04/06/2011 and 04/15/2011.

{¶ 40} 27. The employer's appeal was refused by order of the commission mailed October 27, 2011.

{¶ 41} 28. Thereafter, the employer filed a request for reconsideration asking the commission to exercise its continuing jurisdiction and, in an interlocutory order mailed December 13, 2011, the commission set the employer's request for reconsideration for hearing to determine whether the alleged mistake of law (no evidence causally relating the treatment to the allowed conditions) was sufficient to invoke its continuing jurisdiction.

{¶ 42} 29. On January 19, 2012, the commission held a hearing. (This is the same date that the commission heard the matter concerning TTD compensation.) The commission first determined that the employer met its burden of proving that the SHO's

order contained a clear mistake of law of such character that remedial action would clearly follow:

[T]he Commission finds the medical evidence cited by the Staff Hearing Officer in support of the authorization for treatment does not causally relate the epidural steroid injections, lumbar MRI, and consultation with John M. Roberts, M.D., to the allowed conditions in the claim.

{¶ 43} The commission vacated the SHO's order from the October 6, 2011 hearing; thereafter, the commission denied the request for treatment and consultation, stating:

The Commission orders the C-86 motion filed by the Injured Worker on 06/29/2011, requesting authorization of medical treatment, and the C-9, Physician's Request for Medical Service or Recommendation for Additional Conditions for Industrial Injury or Occupational Disease, signed on 06/03/2011 by Errol J. Stern, M.D., denied. The Injured Worker is requesting approval for three epidural steroid injections, a lumbar MRI, and a consultation with Dr. Roberts.

The Injured Worker sustained a low back injury on 07/07/2006 in the course and scope of his employment. After a period of treatment and temporary total disability, the Injured Worker was released to return to work on 01/25/2007, without any restrictions. The Injured Worker continued to work from 2007 through 2010, without any restrictions due to the allowed conditions in this claim, until his recent request for temporary total disability compensation. By separate Commission order from hearing today, the Injured Worker's request for the payment of temporary total disability compensation, commencing 04/05/2011, has been denied.

It is the finding of the commission that the requested epidural steroid injections, lumbar MRI, and consultation with Dr. Roberts, are not medically substantiated as reasonably related to the allowed conditions, and reasonably necessary for the treatment of the allowed conditions in this 2006 claim. This finding is based on the report from Richard Sheridan, M.D., dated 07/25/2011. Based on Dr. Sheridan's examination from 04/19/2011, a review of the medical reports dated 04/19/2011 and 05/23/2011, the lack of examination findings to support lumbar radiculopathy, and the office note from Dr. Stern, dated 04/06/2011,

referencing the "spontaneous onset" of "severe low back pain on Sunday," three days before that office visit, Dr. Sheridan does not find the epidural steroid injections, lumbar MRI, and consultation with Dr. Roberts medically supported as reasonably related to the allowed conditions and reasonably necessary for the treatment of the allowed conditions. State ex rel. Miller v. Indus. Comm., 71 Ohio St.3d 229, 643 N.E.2d 113 (1994).

The Commission finds the opinion from Dr. Sheridan persuasive, and specifically denies authorization for the three epidural steroid injections, lumbar MRI, and consultation with Dr. Roberts, as requested on the C-9 signed by Dr. Stern on 06/11/2011.

{¶ 44} 30. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶ 45} In this mandamus action, relator contends that the commission abused its discretion by exercising its continuing jurisdiction concerning both his request for TTD compensation as well as his request asking that certain treatment and a consultation be authorized. For the reasons that follow, the magistrate disagrees and recommends that the court deny the request for a writ of mandamus.

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

{¶ 47} Pursuant to R.C. 4123.52, "The jurisdiction of the industrial commission and the authority of the administrator of workers' compensation over each case is continuing, and the commission may make such modification or change with respect to former findings or orders with respect thereto, as, in its opinion is justified." In *State ex rel. B & C Machine Co. v. Indus. Comm.*, 65 Ohio St.3d 538, 541-42 (1992), the court examined the judicially-carved circumstances under which continuing jurisdiction may be exercised, and stated as follows:

R.C. 4123.52 contains a broad grant of authority. However, we are aware that the commission's continuing jurisdiction is not unlimited. See, e.g., *State ex rel. Gatlin v. Yellow Freight*

System, Inc. (1985), 18 Ohio St.3d 246, 18 OBR 302, 480 N.E.2d 487 (commission has inherent power to reconsider its order for a reasonable period of time absent statutory or administrative restrictions); *State ex rel. Cuyahoga Hts. Bd. of Edn. v. Johnston* (1979), 58 Ohio St.2d 132, 12 O.O.3d 128, 388 N.E.2d 1383 (just cause for modification of a prior order includes new and changed conditions); *State ex rel. Weimer v. Indus. Comm.* (1980), 62 Ohio St.2d 159, 16 O.O.3d 174, 404 N.E.2d 149 (continuing jurisdiction exists when prior order is clearly a mistake of fact); *State ex rel. Kilgore v. Indus. Comm.* (1930), 123 Ohio St. 164, 9 Ohio Law Abs. 62, 174 N.E. 345 (commission has continuing jurisdiction in cases involving fraud); *State ex rel. Manns v. Indus. Comm.* (1988), 39 Ohio St.3d 188, 529 N.E.2d 1379 (an error by an inferior tribunal is a sufficient reason to invoke continuing jurisdiction); and *State ex rel. Saunders v. Metal Container Corp.* (1990), 52 Ohio St.3d 85, 86, 556 N.E.2d 168, 170 (mistake must be "sufficient to invoke the continuing jurisdiction provisions of R.C. 4123.52"). Today, we expand the list set forth above and hold that the Industrial Commission has the authority pursuant to R.C. 4123.52 to modify a prior order that is clearly a mistake of law.

{¶ 48} Pursuant to *State ex rel. Gobich v. Indus. Comm.*, 103 Ohio St.3d 585, 2004-Ohio-5990, in exercising its continuing jurisdiction, the commission must clearly enunciate the reason for exercising the continuing jurisdiction. In *Gobich*, the commission's order had provided:

"It is the finding of the Industrial Commission that the order of the Staff Hearing Officer is based on clear mistakes of law of such character that remedial action would clearly follow; therefore, the exercise of continuing jurisdiction is appropriate in this case. In granting the injured worker's application for permanent total disability, the Staff Hearing Officer failed to consider the fact that the injured worker was working immediately prior to, and after, the hearing on 01/22/1998."

Id. at ¶ 11.

{¶ 49} The Supreme Court of Ohio determined that the commission abused its discretion when it claimed there was a mistake of law, yet cited no misapplication of the

law. The court determined that the commission's finding of continuing jurisdiction was ambiguous and was not clearly articulated as required by law. The court stated further:

Two questions arise from this reasoning: (1) Was there a mistake? (2) If so, was it clear? On close examination, it appears that, regardless of how the bureau tried to characterize it, its complaint with the SHO's order was really an evidentiary one: the bureau produced evidence that it believed established a capacity for sustained remunerative employment, and the SHO found otherwise. *State ex rel. Royal v. Indus. Comm.* 95 Ohio St.3d 97 (2002)] however, has specifically stated that a legitimate disagreement as to evidentiary interpretation does not mean that one of them was mistaken and does not, at a minimum, establish that an error was *clear*. *Id.*, 95 Ohio St.3d at 100, 766 N.E.2d 135.

It is also unclear whether the reason for continuing jurisdiction is a mistake of law or a mistake of fact. While the commission claimed the former, it cited no misapplication of the law. To the contrary, it referred only to an omission of fact.

Id. at ¶ 17-18.

{¶ 50} In the present case, the commission provided the following explanation why it was exercising its continuing jurisdiction over the issue of relator's eligibility for TTD compensation in its interlocutory order:

It is the finding of the Industrial Commission that the Employer has presented evidence of sufficient probative value to warrant adjudication of the request for reconsideration regarding the alleged presence of a clear mistake of law of such character that remedial action would clearly follow.

Specifically, it is alleged that the Staff Hearing Officer made a clear mistake of law by failing to recognize the correct allowed condition in the claim.

The order issued 09/03/2011 is vacated, set aside and held for naught.

{¶ 51} In its order finding a mistake of law justifying continuing jurisdiction, the commission stated:

After further review and discussion, it is the finding of the Industrial Commission that the Employer has met its burden of proving the Staff Hearing Officer order, issued 08/12/2011, contains a clear mistake of law of such character that remedial action would clearly follow. Specifically, the Commission finds the Staff Hearing Officer order, issued 08/12/2011, listed the incorrect previously allowed conditions for the claim. The correct allowed conditions in the claim are LUMBOSACRAL SPRAIN; AGGRAVATION OF LUMBAR SPONDYLOSIS; AGGRAVATION OF FORAMINAL STENOSIS AT L4-5 AND L5-S1 SECONDARY TO A BULGING L4-5 AND L5-S1 DISC; AGGAVATION OF DEGENERATIVE DISC DISEASE AT L4-5 AND L5-S1. Therefore, the Commission exercises continuing jurisdiction pursuant to R.C. 4123.52 and State ex rel. Nicholls v. Indus. Comm., 81 Ohio St.3d 454, 692 N.E.2d 188 (1998), State ex rel. Foster v. Indus. Comm., 85 Ohio St.3d 320, 707 N.E.2d 1122 (1999), and State ex rel. Gobich v. Indus. Comm., 103 Ohio St.3d 585, 2004-Ohio-5990, 817 N.E.2d 398, in order to correct this error.

{¶ 52} Relator contends that this is not a mistake of law; instead, it is a mistake of fact. In arguing that it is a mistake of fact, relator argues that the SHO inadvertently listed non-allowed conditions and contends that it is a clerical error and nothing more.

{¶ 53} It is undisputed that non-allowed conditions cannot be used to advance or defeat a claim for compensation. *See State ex rel. Waddle v. Indus. Comm.*, 67 Ohio St.3d 452 (1993). On the face of the order, it does, in fact, appear that the SHO awarded TTD compensation based, in part, on non-allowed conditions. Further, the evidence cited by the SHO includes the April 6, 2011 office note where Dr. Stern indicated that relator had "severe low back pain that was spontaneous in onset on Sunday. It is left sided. It radiates into his left buttock and left cheek. It is near his left sacroiliac joint"; the C-84s state disabling conditions as lumbar sprain; aggravation of lumbosacral spondylosis, bulging discs, degenerative disc disease; and other respectively; the May 25, 2011 report of Dr. Stern wherein he does correctly identify the allowed conditions as disabling relator for the requested period; and the April 28, 2011 report of Dr. Roberts noting that relator's radiographs reveal:

Radiographs of the lumbar spine obtained today reveal lumbar spondylosis at multiple levels. He has a moderate

amount of disc space narrowing and sclerosis at L4-5 and L5-S1. I see nothing of an acute lytic or destructive process.

{¶ 54} As such, the magistrate finds that the commission did clearly articulate a clear mistake of law and did not abuse its discretion by exercising its continuing jurisdiction over relator's motion for TTD compensation.

{¶ 55} Relator next contends that the commission abused its discretion by denying his application for TTD compensation.

{¶ 56} 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 maximum medical improvement. *See* R.C. 4123.56(A); *State ex rel. Ramirez v. Indus. Comm.*, 69 Ohio St.2d 630 (1982).

{¶ 57} In denying his application for TTD compensation, the commission stated:

The Injured Worker sustained a low back injury 07/07/2006 in the course and scope of his employment. After a period of treatment and temporary total disability, the Injured Worker was released to return to work on 01/25/2007, without any restrictions. The Injured Worker continued to work from 2007 through 2010, without any restrictions due to the allowed conditions in this claim, until his current request for compensation beginning 04/05/2011. The office note from the physician of record, Errol J. Stern, M.D., dated 04/06/2011, documents the Injured Worker had "been having severe low back pain that was spontaneous in onset on Sunday," three days prior to the office visit. The office note further reflected the Injured Worker had been off work since 04/04/2011, and would probably continue off work until after the next office visit on 04/15/2011. In the office visit note, dated 04/15/2011, Dr. Stern noted the continued pain, and recommended a consultation with a spine surgeon, John Roberts, M.D. Dr. Stern indicated "This will be under his private insurance."

It is the finding of the Commission that the requested period of temporary total disability compensation is not substantiated as medically, causally related to the allowed conditions in this claim. This finding is based on the medical report from Richard Sheridan, M.D., dated 05/23/2011. Dr. Sheridan cites the office note of Dr. Stern dated 04/06/2011, referencing the "spontaneous onset" of low back pain three days before the office visit, the MRI finding from 07/23/2008 revealing annular tears at L4-5 and L5-S1, which had not been present on the MRI dated 08/03/2006, and the Injured Worker's release to return to work with no restrictions on 01/25/2007. Dr. Sheridan opines the requested period of temporary total disability is not due to the allowed conditions from the 2006 industrial injury upon which this claim is predicated.

* * *

The Commission finds the opinion from Dr. Sheridan persuasive, and specifically denies the Injured Worker's request for temporary total disability compensation from 04/05/2011 through 07/11/2011. The Injured Worker returned to work on 07/12/2011.

{¶ 58} The magistrate finds that Dr. Sheridan's May 23, 2011 report constitutes some evidence upon which the commission could rely to deny relator's motion for TTD compensation. To the extent that relator contends that his medical evidence established that his period of disability was due to the allowed conditions, it must be remembered that 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.*, 68 Ohio St.2d 165 (1981). Furthermore, it is immaterial whether other evidence, even if greater in quality and/or quantity, supports a decision contrary to the commission's. *State ex rel. Pass v. C.S.T. Extraction Co.*, 74 Ohio St.3d 373 (1996). Finding that the evidence cited by the commission to deny relator TTD compensation constitutes some evidence, the magistrate finds that the commission did not abuse its discretion in denying him TTD compensation.

{¶ 59} Relator's final argument is that the commission abused its discretion by denying his motion to authorize medical treatment and for consultation. The Supreme Court of Ohio has articulated three-prong tests for the authorization of medical services:

(1) are the medical services reasonably related to the industrial injury, that is, the allowed conditions; (2) are the services reasonably necessary for treatment of the industrial injury; and (3) is the cost of such service medically reasonable? *State ex rel. Miller v. Indus. Comm.*, 71 Ohio St.3d 229 (1994).

{¶ 60} In arguing that the commission abused its discretion by denying his motion, relator argues that the commission relied on the following flawed rationale: (1) relator was able to work at his regular job between 2007 through 2010; (2) Dr. Stern's April 6, 2011 office note which shows relator had spontaneous onset of severe low back pain three days prior to the office visit; and (3) the commission's order denying relator TTD compensation. However, relator omits the evidence upon which the commission relied to deny his motion seeking the authorization of treatment and a consultation.

{¶ 61} Specifically, the commission relied on the July 25, 2011 report of Dr. Sheridan. After reviewing the medical evidence and, based on his prior examination of relator, Dr. Sheridan concluded that the requested epidural steroid injections, lumbar MRI, and consultation with Dr. Roberts were not reasonably related to the allowed conditions in relator's claim. Relator does not argue that Dr. Sheridan's report does not constitute some evidence; instead, relator again contends that his evidence is more persuasive. As stated previously, questions of credibility and the 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 contrary to the commission's. *Teece and Pass*. Finding that Dr. Stern's report does constitute some evidence upon which the commission could rely, the magistrate finds that relator's position is not well-taken.

{¶ 62} Based on the foregoing, it is this magistrate's decision that relator has not demonstrated that the commission abused its discretion by exercising its continuing jurisdiction and in subsequently denying his application for TTD compensation and his request for the authorization of certain medical treatment and a consultation. As such, this court should deny relator's request for a writ of mandamus.

/S/ MAGISTRATE
STEPHANIE BISCA BROOKS

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).