[Cite as *State ex rel. Gualdoni v. Indus. Comm.*, 2015-Ohio-1009.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. William T. Gualdoni,	:	
Relator,	:	
v.		No. 14AP-316
	:	
The Industrial Commission of Ohio and Quail Hollow Management Inc., et. al dba Quail Hollow Country Club,	:	(REGULAR CALENDAR)
	:	
Respondents.	:	

D E C I S I O N

Rendered on March 19, 2015

John P. McGinnis, for relator.

Michael DeWine, Attorney General, and *Lisa R. Miller*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

SADLER, J.

{¶ 1} Relator, William T. Gualdoni, commenced this original action requesting a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order finding relator had reached maximum medical improvement ("MMI") and terminating his temporary total disability ("TTD") benefits and to order the commission to find that he has not reached MMI and reinstate his award of TTD.

{¶ 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 considered the action on its merits

and issued a decision, including findings of fact and conclusions of law, which is appended hereto. The magistrate determined that an independent medical report was not premature under *State ex rel. Sellards v. Indus. Comm.*, 108 Ohio St.3d 306, 2006-Ohio-1058, but rather did constitute some evidence to support the commission's findings, and therefore the commission did not abuse its discretion. Accordingly, the magistrate recommended that this court deny the requested writ of mandamus.

{¶ 3} No objections have been filed to the magistrate's decision.

{¶ 4} We have found no error in the magistrate's findings of fact or conclusions of law. However, we modify the magistrate's decision in two respects. First, in the opening paragraph under "Conclusions of Law," the magistrate misstates that she "agrees" with relator's argument that the independent medical report did not constitute some evidence upon which the commission could rely. (Nov. 25, 2014 Magistrate's Decision, ¶ 22.) The decision clearly refutes relator's argument, and we therefore modify the last sentence of the first paragraph under "Conclusions of Law" to state "disagrees."

{¶ 5} Second, we modify the magistrate's decision to incorporate the specific "two factors" language, stated below, from the recent Supreme Court of Ohio opinion in *State ex rel. McCormick v. McDonald's*, __ Ohio St.3d __, 2015-Ohio-123, ¶ 19. In *McCormick*, the court reviewed and applied *Sellards* in determining that a doctor's opinion on MMI was not premature and therefore was "some evidence" on which the commission could rely. *Id.* The court noted that *Sellards* was "narrowly decided based on its unique facts" and "based on two factors: the bureau's error or delay in paying for Sellards's psychiatric prescriptions" for a recently allowed condition and the doctor's "lack of awareness of the contemporaneous approval of [another doctor's] treatment plan" by the commission. *Id.* The magistrate addressed these two factors, although under different language,[1] and arrived at an ultimate decision consistent with the *McCormick* analysis. Accordingly, we modify the magistrate's decision to include the specific "two factor" language of *McCormick*.

[1] The magistrate's decision provided that the *Sellards* court was "concerned about two issues. First, it was the commission that both approved additional treatment and found he reached MMI. * * * Second, the court felt that Sellards should have the opportunity to take the specific medications his doctor had wanted him to take." (Nov. 25, 2014 Magistrate's Decision, ¶ 37.)

{¶ 6} Therefore, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law as modified herein. In accordance with the magistrate's decision, the requested writ of mandamus is denied.

Writ of mandamus denied.

KLATT and BRUNNER, JJ., concur.

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A P P E N D I X

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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 November 25, 2014

John P. McGinnis, for relator.

Michael DeWine, Attorney General, and *Lisa R. Miller*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶ 7} Relator, William T. Gualdoni, 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 finding that relator had reached maximum medical improvement ("MMI") and terminating his temporary total disability ("TTD") benefits, and ordering the commission to find that he has not yet reached MMI, and reinstating his award of TTD compensation.

Findings of Fact:

{¶ 8} 1. Relator sustained a work-related injury on August 2, 2005 and his workers' compensation claim had been allowed for the following conditions:

> Sprain left ankle; closed fracture left fibula; closed fracture left lateral malleolus; deep vein thrombosis post traumatic; pulmonary embolism; peroneal tendonitis; post traumatic arthritis left knee; tear left medial meniscus; post traumatic arthritis left ankle subtalar joint; single episode, depressive disorder.

{¶ 9} Relator was receiving TTD benefits based on his allowed psychological condition when, on October 24, 2013, relator's treating physician signed a C-9 request for additional psychotherapy sessions, two times a month, beginning October 22, 2013 through April 22, 2014, a period of six months.

{¶ 10} 3. On October 28, 2013, his employer's managed care organization ("MCO") approved the request for services.

{¶ 11} 4. The Ohio Bureau of Workers' Compensation ("BWC") referred relator to Donald J. Tosi, Ph.D., for an independent psychological evaluation. Dr. Tosi conducted his evaluation on November 22, 2013.

{¶ 12} Dr. Tosi indicated that he reviewed the entire referral packet provided by the BWC and specifically identified many of the records he reviewed. Dr. Tosi did not list the recent request for additional psychotherapy that had been approved by the employer's MCO one month earlier. Dr. Tosi noted that relator had been under psychological care for approximately three years at a rate of two times per month (between 70 and 75 sessions). Dr. Tosi noted that relator exhibited a mild depressed mood and was upset with the workers' compensation system. Apparently, six months earlier, relator learned that he owed the BWC $16,000. Dr. Tosi conducted psychological testing involving the Millon Clinical Multiaxial Inventory-III and concluded that test results were probably grossly distorted and invalid because, in his opinion, the testing had a severe "fake bad" exaggeration of pathology. Ultimately, Dr. Tosi opined that relator had reached MMI stating that, according to the Official Disability Guidelines, injured workers with major depressive disorders require between

13 and 20 psychotherapy sessions. Dr. Tosi noted that relator did not take any anti-depressant medication and that unrelated medical conditions, post-injury, played a significant role in his depression. Dr. Tosi specifically noted that any further psychological treatment should be for purposes of maintenance only at a frequency of once a month for the next three to four months.

{¶ 13} 5. Based on Dr. Tosi's report, the BWC filed a motion on December 5, 2013 asking that relator's psychological condition be found to have reached MMI and asking the commission to terminate his TTD compensation.

{¶ 14} 6. On December 10, 2013, Richard C. Halas, the clinical psychologist treating relator, completed a Medco-14 indicating that he had been provided a copy of relator's job description and that relator was temporarily and totally disabled from November 15, 2013 through May 15, 2014. Dr. Halas noted the following clinical findings:

> William's depression is ongoing. He has cried during sessions because he can not do so many things that he loved to do. He feels hopeless at times. Objective is MMPI results.

{¶ 15} 7. In a letter dated December 17, 2013, Dr. Halas discussed Dr. Tosi's opinion that 13 to 20 psychotherapy sessions should have been adequate and agreed, in many cases 13 to 20 psychotherapy sessions would be adequate. However, because of the severity of relator's depression and complications subsequent to his industrial injury, Dr. Halas noted that relator continued to have erratic sleep, a fair appetite, weight gain, chronic pain, low energy, and a diminished sex drive. Specifically, Dr. Halas stated:

> The extent of Mr. Gualdoni's frustrations with his situation and the deterioration of his life quality have been significant. He was forced, by virtue of a hospitalization subsequent to his industrial injury (blood clots), to be hospitalized, thus having to miss his daughter's wedding. The extent of Mr. Gualdoni's anger is significant. He is frustrated and as noted, he takes anger inward and becomes increasingly depressed.
>
> The test results that are provided with Dr. Tosi's report support significant levels of depression. Dr. Tosi doubts the validity of the current test results. I am the ongoing treating psychotherapist for this injured worker. I have had an

> ongoing opportunity to become intimately aware of his issues. The current test results are valid. They reflect the severity of his current situation and ongoing magnitude of his problems.
>
> Mr. Gualdoni has recently started to take Zoloft. This is, and has been an ongoing recommendation. In conjunction with ongoing psychotherapy, the medication should be helpful. Continued treatment is imperative. Termination of his ongoing therapy is contraindicated as [sic] this time. Lastly and more importantly there are some concerns as to the "fake bad" exaggeration of pathology. What Dr. Tosi has failed to appreciate, with this injured worker in mind, is the severity of the stressors, ongoing issues concerning his injury and the life changing events that have occurred because of his industrial injury. Clearly a short visit with the claimant does not afford Dr. Tosi those types of insights.
>
> My professional opinion, based on reasonable medical/psychological probability, is that William Gualdoni can be expected to obtain further functional psychological improvement with additional psychological treatment and he has not reached maximum medical improvement at this time.

{¶ 16} 8. The BWC's motion was heard before a district hearing officer ("DHO") on January 2, 2014. The DHO denied the BWC's motion citing an October 9, 2013 letter from Dr. Halas indicating that relator's psychological condition was expected to improve with continued treatment and his December 17, 2013 report. Further, the DHO considered relator's testimony that he had recently begun a trial of Zoloft, which gave him headaches, a second medication which upset his stomach, and that Dr. Halas was currently trying to find a medication without significant side effects that would help him function better.

{¶ 17} 9. Dr. Halas wrote a summary letter dated January 29, 2014, indicating that relator had made progress in part because of the medication during the past six months and that they were trying to find an anti-depressant medication which did not complicate his other health issues.

{¶ 18} 10. The BWC appealed and the matter was heard before a staff hearing officer ("SHO") on February 18, 2014. The SHO vacated the prior DHO order and,

relying on Dr. Tosi's report, found that relator had reached MMI and terminated his TTD compensation.

{¶ 19} 11. In an order mailed March 12, 2014, relator's appeal was refused.

{¶ 20} 12. Relator filed a motion for reconsideration which was denied by order of the commission mailed April 2, 2014.

{¶ 21} 13. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶ 22} Relator argues that the report of Dr. Tosi does not constitute some evidence upon which the commission could rely because, at the time he opined that relator had reached MMI, Dr. Tosi did not know that the employer's MCO had authorized additional psychotherapy at the rate of two sessions per month for six months. For the reasons that follow, this magistrate agrees.

{¶ 23} 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).

{¶ 24} In order for this court to issue a writ of mandamus as a remedy from a determination of the commission, relator must show a clear legal right to the relief sought and that the commission has a clear legal duty to provide such relief. *State ex rel. Pressley v. Indus. Comm.*, 11 Ohio St.2d 141 (1967). A clear legal right to a writ of mandamus exists where the relator shows that the commission abused its discretion by entering an order which is not supported by any evidence in the record. *State ex rel. Elliott v. Indus. Comm.*, 26 Ohio St.3d 76 (1986). On the other hand, where the record contains some evidence to support the commission's findings, there has been no abuse of discretion and mandamus is not appropriate. *State ex rel. Lewis v. Diamond Foundry Co.*, 29 Ohio St.3d 56 (1987). Furthermore, questions of credibility and the weight to be given evidence are clearly within the discretion of the commission as fact finder. *State ex rel. Teece v. Indus. Comm.*, 68 Ohio St.2d 165 (1981).

{¶ 25} TTD compensation awarded pursuant to R.C. 4123.56 has been defined as compensation for wages lost where a claimant's injury prevents a return to the former

position of employment. Upon that predicate, TTD compensation shall be paid to a claimant until one of four things occurs: (1) claimant has returned to work; (2) claimant's treating physician has made a written statement that claimant is able to return to the former position of employment; (3) when work within the physical capabilities of claimant is made available by the employer or another employer; or (4) claimant has reached MMI. *See* R.C. 4123.56(A); *State ex rel. Ramirez v. Indus. Comm.*, 69 Ohio St.2d 630 (1982).

{¶ 26} Ohio Adm.Code 4121-3-32(A)(1) states in part:

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

{¶ 27} In the present case, it certainly appears that Dr. Tosi was unaware the employer's MCO had recently authorized additional psychotherapy at a rate of two times a month for six months. Further, Dr. Tosi could not have foreseen that Dr. Halas would begin treating relator with Zoloft and would later make efforts to find an anti-depressant medication which relator could take which did not cause him side effects interfere with his other health issues. Given this scenario, the issue becomes whether, as a matter of law, Dr. Tosi's November 22, 2013 report is premature and thus not probative on the issue of MMI, as found in *State ex rel. Sellards v. Indus. Comm.*, 108 Ohio St.3d 306, 2006-Ohio-1058. If Dr. Tosi's report is premature, it cannot constitute some evidence to support the commission's determination of TTD compensation.

{¶ 28} In *Sellards,* treating psychiatrist J.T. Spare, submitted a C-9 treatment plan on October 17, 2002. The commission approved the plan on October 22, 2002. Coincidentally, also on October 22, 2002, Sellards was examined by Dr. Levy. After the examination and a thorough review of the medical records (which did not include Dr. Spare's treatment plan), Dr. Levy concluded that the psychiatric condition had reached MMI.

{¶ 29} Also, Dr. Spare wrote, on November 26, 2002, that his treatment of Sellards had been negatively impacted by Sellards' inability to get his prescriptions filled

at the pharmacy. Later, on December 24, 2002, the bureau admitted that an error had occurred regarding prescription payment and, as of that date, it had been corrected.

{¶ 30} 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.

{¶ 31} On February 6, 2003, an 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.

{¶ 32} 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.

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

{¶ 34} 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 explained:

> 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.

{¶ 35} In the present case, on October 28, 2013, the employer's MCO authorized additional psychotherapy sessions two times a month for six months. One month later, Dr. Tosi evaluated relator and identified many of the records he reviewed. Dr. Tosi did not identify the recent approval for additional treatment. Dr. Tosi indicated that relator was not taking any anti-depressant medication, opined that relator had reached MMI, and that the only further psychological treatment relator needed was one time a month for three to four months for maintenance purposes. One month later, Dr. Halas noted that relator had recently begun taking Zoloft, which Dr. Halas had recommended earlier.

{¶ 36} Sellards had struggled to get the treatment his treating physician had recommended. By comparison, relator had been treating continuously with his treating physician for 3 years. On the same day the commission approved additional treatment for Sellards, which included psychotherapy and medication management, Dr. Levy acknowledged that Sellards' condition had improved somewhat since he began medication, but opined that his psychological condition was permanent and would require indefinite care from a psychiatrist and therapist. By comparison here, the employer's MCO authorized 12 treatments over the course of 6 months. In opining that relator had reached MMI, Dr. Tosi opined that relator only needed 1 treatment a month for 3 to 4 months solely for maintenance purposes.

{¶ 37} In finding that Dr. Levy's report was premature, the *Sellards'* court was concerned about two issues. First, it was the commission that both approved additional treatment and found he had reached MMI. Here, it was the MCO that approved additional treatment but the commission that found relator to be MMI. In other words, one entity authorized additional treatment while a separate entity found relator had reached MMI. Second, the court felt that *Sellards* should have the opportunity to take

the specific medications his doctor had wanted him to take. That was the only way to see if the treatment would be successful.

{¶ 38} Here, those two issues do not exist. The MCO authorized additional treatment but the commission determined relator was at MMI and only needed a few sessions for maintenance. Further, relator had been treating with Dr. Halas for 3 uninterrupted years. In requesting 12 additional therapy sessions, Dr. Halas could have indicated he planned to also start relator on a course of medication. Based on the stipulation of evidence, it is impossible to know if Dr. Halas started relator on Zoloft before or after Dr. Tosi examined relator and discussed the issue.

{¶ 39} Based on the above analysis, the magistrate finds that the facts here are not nearly the same as in *Sellards* and Dr. Tosi's report was not premature and, thus, his report does constitute some evidence upon which the commission could rely.

{¶ 40} Based on the forgoing, it is this magistrate's decision that this court should deny relator's request for a writ of mandamus.

/S/ MAGISTRATE
STEPHANIE BISCA

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).