

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio ex rel. Robert J. O'Toole,	:	
Relator,	:	
v.	:	No. 14AP-858
SCS Construction Services, Inc. and	:	(REGULAR CALENDAR)
Industrial Commission of Ohio,	:	
Respondents.	:	

D E C I S I O N

Rendered on June 30, 2015

Clements Taylor Butkovich & Cohen, and William E. Clements, for relator.

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

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

TYACK, J.

{¶ 1} Robert J. O'Toole filed this action in mandamus, seeking a writ to compel the Industrial Commission of Ohio ("commission") to grant his application for temporary total disability ("PTD") compensation.

{¶ 2} In accord with Loc.R. 13(M) of the Tenth Appellate District, the case was referred to a magistrate to conduct appropriate proceedings. The parties stipulated the pertinent evidence and filed briefs. The magistrate then issued a magistrate's decision, appended hereto, which contain detailed findings of fact and conclusions of law. The magistrate's decision includes a recommendation that we deny the request for a writ.

{¶ 3} Counsel for O'Toole has filed objections to the magistrate's decision. Counsel for the commission has filed a memorandum in response. The case is now before the court for a full, independent review.

{¶ 4} O'Toole injured his back on March 4, 2008. He was off work for a few weeks, but then his treating physician certified him for a return to work.

{¶ 5} In August, his back pain returned. This led to an MRI in September. The MRI showed disc extrusion at L5-S1 and mild disc disease at L3-L4 and L5. As a result, O'Toole was placed on restricted duty.

{¶ 6} In October 2013, O'Toole's industrial claim was extended to include "herniated disc at L5-S1."

{¶ 7} O'Toole did not improve despite epidural injections and a laminectomy. A second MRI was performed in December 2013 which revealed additional disc problems.

{¶ 8} O'Toole's treating physician, Jaideep Chunduri, M.D., then reported that O'Toole should not return to work as a carpenter. This led to a physician review by Ryan D. Herrington, M.D., who reported that O'Toole was not totally disabled.

{¶ 9} Another physician review by Timothy P. Graham, M.D., resulted in a report indicating that the back injury, treated as a sprain, would have resolved and, treated as a herniated disc, had been surgically repaired. Dr. Graham was specifically addressing a request for a CT myelogram of the lumbar spine.

{¶ 10} A district hearing officer denied the requests for the CT myelogram and for TTD compensation. A staff hearing officer reached the same conclusion.

{¶ 11} The whole issue before us is whether or not the back pain which O'Toole now endures is the result of his original injury suffered when he was lifting and carrying drywall. His treating physician says, "yes." Two other physicians say, "Not likely."

{¶ 12} The reports of Dr. Herrington and Dr. Graham constitute some evidence to support the commission's order.

{¶ 13} On factual disputes, we must give a certain amount of deference to the commission's findings. That duty to defer is decisive here.

{¶ 14} We overrule the objections to the magistrate's decision and adopt the findings of fact and conclusions of law contained therein. As a result, we deny the request for a writ of mandamus.

Objections overruled; writ denied.

KLATT and LUPER SCHUSTER, JJ., concur.

A P P E N D I X

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Industrial Commission of Ohio,	:	
Respondents.	:	

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

Rendered on April 22, 2015

Clements Taylor Butkovich & Cohen, and William E. Clements, for relator.

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

IN MANDAMUS

{¶ 15} Relator, Robert J. O'Toole, 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 which denied his application for temporary total disability ("TTD") compensation, and ordering the commission to find that he is entitled to that award.

Findings of Fact:

{¶ 16} 1. Relator sustained a work-related injury on March 4, 2008, and his workers' compensation claim was originally allowed for: "sprain lumbar region."

{¶ 17} 2. Relator originally treated with John D. Brannan, M.D., on March 7, 2008. Dr. Brannan noted the following:

He has an acute left radiculopathy, perhaps S1 and/or L5, due to a work-related injury, likely due to a displaced, degenerative L5-S1 disc.

{¶ 18} Dr. Brannan certified that relator was temporarily and totally disabled from March 7 through March 10, 2008.

{¶ 19} 3. Dr. Brannan re-evaluated relator on March 11, 2008. At that time, Dr. Brannan noted that relator would remain off of work until March 17, 2008, at which time he could return to limited duty including no lifting more than ten pounds and he was to avoid repetitive bending, lifting and twisting.

{¶ 20} 4. An office note from Dr. Brannan, dated April 1, 2008, indicates that relator's radicular symptoms had fully resolved, he was back to work without any symptoms, was no longer using anti-inflammatory medication, and it was estimated that he would reach maximum medical improvement ("MMI") as of May 1, 2008.

{¶ 21} 5. On August 26, 2008, relator experienced a recurrence of low back pain at work and Dr. Brannan indicated that he could return to work with the same light-duty restrictions previously in place through October 1, 2008.

{¶ 22} 6. A lumbar MRI, dated September 17, 2008, revealed the following:

L5-S1 left lateral recess disc extrusion with mass effect on the left SI root.

Mild disc disease from L3 through L5 without significant stenosis.

{¶ 23} 7. Dr. Brannan continued relator on restricted light-duty work and referred him for a surgical consultation with Jaideep Chunduri, M.D., who evaluated relator on June 3, 2009. In his report of that same date, Dr. Chunduri noted:

[One] Chronic lumbosacral strain.

[Two] Left L5-S1 disc herniation.

Risks, benefits, and treatment alternatives were discussed with the patient in detail. I recommend the patient undergo a left L5-S1 microdiscectomy. Risks, benefits, and treatment alternatives were discussed with the patient in detail. I told him that he needs to avoid a fusion at this time secondary to the attempt to return to work. If the discectomy does not work, then a fusion would be necessary. He's in agreement with this plan. He would like to proceed with surgery. I've given him the information that discusses the surgical procedure in detail.

{¶ 24} 8. On July 15, 2009, Dr. Chunduri performed surgery. 9. Thereafter, relator filed a motion asking that his claim be additionally allowed for L5-S1 herniated disc and, following a hearing before a staff hearing officer ("SHO") on October 22, 2013, his claim was amended to include the condition "herniated disc at L5-S1."

{¶ 25} 10. Relator continued to have low back pain and increasing pain with radiation. Dr. Chunduri requested a repeat MRI and epidural injections, which were approved.

{¶ 26} 11. The second MRI was performed on December 11, 2013 and revealed the following:

[One] Postsurgical changes are again seen from left L5-S1 laminectomy. Thecal sac remains widely patent. Minimal disc tissue is again seen in the left lateral recess and foramen with slight left foraminal narrowing. This is unchanged compared with 12-19-12. Slight enhancement surrounding the left S1 root remains present, partially diminished since the previous examination.

[Two] L4-5 disc bulge and facet arthropathy again seen with moderate contact both exiting L4 roots, right greater than left. Again noted is a complex synovial cyst or spur which projects medially from the right L4-5 facet joint and slightly indents the right posterolateral thecal sac.

{¶ 27} 12. Following an office visit on January 15, 2014, Dr. Chunduri noted that relator had not experienced significant improvement and continued to have pain. Dr. Chunduri noted the following:

Assessment:

[One] Acute/Chronic lumbosacral strain.

[Two] Left L5-S1 stenosis status post decompression.

[Three] Mild to moderate foraminal stenosis L4-5 and L3-4.

Plan: At this point, based on the fact the patient has continued pain and has had no relief, I do not think that he can return to work. With regards to his pain, I recommended a CT myelogram to get a better look at the spine and see what potentially is causing his pain besides the L5-S1 level. He does have a facet cyst at L4-5 and I want to make sure that this is not contributing to his symptoms. At this point, he has failed conservative care and may need a surgical procedure as he has had the pain, which has been long lasting. At this point, he is unable to return to work secondary to the pain. He is in agreement with the plan.

{¶ 28} 13. Thereafter, Dr. Chunduri completed a C-9 request for a CT myelogram, which was denied.

14. In a follow-up letter dated February 3, 2014, Dr. Chunduri stated:

This letter is with regards to your client and my patient, Robert O'Toole, who sustained a workers' compensation injury and had surgery on June 15, 2009 [sic]. The patient continues to have significant pain in his back with radiation down the lower extremities. At this point, he has mild to moderate foraminal stenosis at L4-5 and L3-4 and his surgical procedure was done at the left L5-S1 level. He also has a facet cyst at L4-5. At this point, the myelogram would be a more definitive test to determine what type of surgery the patient may need and what condition should be allowed. If the myelogram is not able to be completed, then the patient will just have to go to pain management as I do not recommend surgery without having this further information.

{¶ 29} 15. A follow-up report from Dr. Chunduri dated February 26, 2014, provides:

I, Jaideep Chunduri, M.D., am treating Robert J. O'Toole for Sprain Lumbar, Herniated Disc L5-S1 which is allowed conditions in this claim.

I completed a Medco-14 listing the condition of herniated disc L5-S1 as the condition causing temporary total disability.

To clarify, I am treating Mr. O'Toole for his herniated disc, L5-S1, which independently renders Mr. O'Toole temporarily totally disabled from his occupation as a carpenter apart from the condition of facet cyst at L4-5/mild to moderate foraminal stenosis L4-5 and L3-4 which are currently non-allowed conditions in his claim.

Dr. Chunduri's office note from that same date also provides:

02/26/14: The patient returns to the office today for reevaluation. Since I last saw him, he has not had a CT myelogram approved. Apparently he has a court case coming up with regards to this. At this point, we are treating Mr. O'Toole for his herniated disc at L5-S1, which is what his previous workers' compensation claim is for and that is the reason why he is off work. At this point, he has other issues between L4-5 and L3-4. It is difficult to assess how much of his pain may be associated with that, but the majority of his symptoms are very similar to what he had at the time of his surgery.

* * *

Assessment:

[One] Acute/Chronic lumbosacral strain.

[Two] Left L5-S1 foraminal stenosis with small recurrent disc protrusion.

Plan: At this point, I recommend the patient undergo the CT myelogram to further evaluate his spine and determine the next step in terms of treatment. At this point, we have refilled his medication. We will see him back in the office after the CT myelogram is complete. I did fill out a form for him and he is currently off work until June so that his symptoms will either improve or we can figure out what the next step in the procedure is.

{¶ 30} 16. A physician review was conducted by Ryan D. Herrington, M.D. In his report dated February 12, 2014, Dr. Herrington accepted the allowed conditions, noted the treatment relator had received, reviewed the office records of Dr. Chunduri as provided and concluded:

The allowed conditions are sprain lumbar and herniated disc L5-S1. Given the self-limited nature of sprain related injuries

and a 03/04/08 [date] of injury, the allowed condition of sprain lumbar is resolved and can not account for the requested period of continuing disability beginning on 01/15/14. The allowed condition of herniated disc L5-S1 is reasonably amenable to restricted work activity rather than total disability. In addition, no physical examination findings supportive of total disability are seen in Dr. Chunduri's documentation of 01/15/14. Taking into consideration only the allowed conditions in this claim, the requested period of continuing disability beginning 01/15/14 is not supported.

{¶ 31} 17. Timothy P. Graham, M.D., was asked his opinion concerning relator's C-9 request for a CT Myelogram and he opined that it be denied, stating:

The claimant sustained an injury nearly six years ago. The claim is allowed for a soft tissue sprain, which is now well beyond the point of expected resolution and for an L5-S1 disc herniation, which has been surgically addressed. The claimant underwent an MRI of the lumbar spine a couple of months ago that demonstrated postop changes at the L5-S1 level as well as degenerative pathology at other levels. Only the L5-S1 disc herniation is allowed, and no frank herniation is referenced on the study report. The claimant saw Dr. Chunduri on 1/15/14, at which time he had continued pain. Dr. Chunduri suggested a CT myelogram to get a better look at the spine and see what is potentially causing his pain **besides the L5-S1 level**. Although the testing may be appropriate given his continued pain, it would not be appropriate through this claim based on the current allowances. The allowed conditions are either beyond the point of expected resolution and/or have been surgically addressed. The available notes clearly indicate that the CT is directed toward evaluation of other causes than the allowed L5-S1 level. The medical necessity of the requested CT myelogram as related to the allowed conditions in this claim and the original injury is not established.

It is my professional opinion, with a reasonable degree of medical probability that the requested medical service is not reasonably related to the injury based on the allowed conditions in the claim and the available documentation. The requested study is clearly, upon review of the documentation, directed toward evaluation of conditions that are outside of this industrial claim. Based on the available documentation and allowances in this claim, **I recommend continued denial of the C-9 dated**

1/15/14 requesting CT Myelogram of the lumbar spine x1.

(Emphasis sic.)

{¶ 32} 18. Relator's requests for TTD compensation and treatment were heard before a district hearing officer ("DHO") on March 1, 2014 and were denied. Specifically, the DHO stated:

The District Hearing Officer denies the Injured Worker's appeal filed 02/20/2014. The District Hearing Officer vacates the Bureau of Workers' Compensation order issued 02/13/2014 concerning Dispute #033379. The District Hearing Officer denies the C-9 Request dated 01/15/2014 requesting a CT myelogram of the lumbar spine as requested by Dr. Chunduri.

The District Hearing Officer finds that the requested CT myelogram of the lumbar spine is not reasonably related to nor reasonably necessary for treatment of the allowed conditions in the claim. The District Hearing Officer finds that the CT myelogram of the lumbar spine is directed toward evaluation of conditions other than the allowed conditions in the claim. Therefore, the C-9 dated 01/15/2014 is denied.

This finding is based on the medical report of Dr. Graham dated 02/10/2014 and the office record of Dr. Chunduri dated 01/15/2014.

The District Hearing Officer denies the C-84 Request for Temporary Total filed by the Injured Worker on 02/14/2014. The District Hearing Officer find that the Injured Worker's request for temporary total from 01/15/2014 through 03/17/2014 is denied. The District Hearing Officer finds that the Injured Worker's request for temporary total from 01/15/2014 through 03/17/2014 is not causally related to the industrial injury of date and the previously recognized conditions in the claim. Therefore, the Injured Worker's request for temporary total from 01/15/2014 through 03/17/2014 is denied. This order is based upon the medical report of Dr. Herrington dated 02/12/2014 and the office record of Dr. Chunduri dated 01/15/2014.

{¶ 33} 19. Relator's further appeal was heard before an SHO on March 5, 2014.

The SHO affirmed the prior DHO order, stating:

It is the finding of the Hearing Officer that the requested CT myelogram of the lumbar spine is not medically reasonable nor appropriate to assist the physician of record in planning a future course of treatment or for the treatment of the allowed conditions.

Therefore, it is hereby the order of the Staff Hearing Officer that the claim is not authorized for the requested CT myelogram of the lumbar spine.

This order is based upon the report of Dr. Graham dated 02/10/2014.

It is the order of the Staff Hearing Officer that the C-84 Request for Temporary Total Disability Compensation, filed by the Injured Worker on 02/14/2014, is denied.

It is the finding of the Hearing Officer that the Injured Worker has not met the burden of proof establishing that he was temporarily and totally disabled as a result of the allowed conditions in the claim from 01/15/2014 through 05/05/2014 due to the allowed conditions. The Hearing Officer finds that the requested period of disability is not related to the previously allowed conditions.

Therefore, it is hereby the order of the Staff Hearing Officer that the Injured Worker's request for payment of temporary total disability compensation from 01/15/2014 through 05/05/2014 is denied.

This order is based upon the report of Dr. Herrington dated 02/12/2014 and the office note of Dr. Chunduri dated 01/15/2014.

{¶ 34} 20. Further appeal was refused by order of the commission mailed May 29, 2014.

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

Conclusions of Law:

{¶ 36} In this mandamus action, relator only challenges the commission's denial of his TTD compensation and it is this magistrate's decision that this court should deny relator's request for a writ of mandamus.

{¶ 37} 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).

{¶ 38} 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).

{¶ 39} Relator argues that he submitted some credible competent evidence that the requested period of disability was, in fact, independently caused by the currently allowed conditions in his claim. Specifically, while acknowledging that Dr. Chunduri does refer to non-allowed conditions in his office records, his Medco-14 and his February 26, 2014 report indicate that the allowed L5-S1 herniated disc is an independent cause of relator's current period of TTD compensation.

{¶ 40} In denying the request for TTD compensation, the commission relied on the January 15, 2014 report of relator's treating physician, Dr. Chunduri, as well as the February 12, 2014 report of Dr. Herrington. In his January 15, 2014 report, Dr. Chunduri specifically notes that relator indicates continuing pain which has not improved. Although it is undisputed that relator's claim is allowed for sprain lumbar region and herniated disc at L5-S1, Dr. Chunduri noted the following in his assessment and plan:

Assessment:

[One] Acute/Chronic lumbosacral strain.

[Two] Left L5-S1 stenosis status post decompression.

[Three] Mild to moderate foraminal stenosis L4-5 and L3-4.

Plan: At this point, based on the fact the patient has continued pain and has had no relief, I do not think that he can return to work. With regards to his pain, I recommended a CT myelogram to get a better look at the spine and see what potentially is causing his pain besides the L5-S1 level. He does have a facet cyst at L4-5 and I want to make sure that this is not contributing to his symptoms. At this point, he has failed conservative care and may need a surgical procedure as he has had the pain, which has been long lasting. At this point, he is unable to return to work secondary to the pain. He is in agreement with the plan.

{¶ 41} In his February 12, 2014 physician review, Dr. Herrington identified and briefly discussed the medical records which he reviewed, including the January 15, 2014 follow-up with Dr. Chunduri and concluded that, taking into consideration only the allowed conditions in the claim, the requested period of disability beginning January 15, 2014 is not supported.

{¶ 42} It is undisputed that relator, as the claimant, bears the burden establishing that this period of disability is independently caused by the allowed conditions in his claim. *See State ex rel. Waddle v. Indus. Comm.*, 67 Ohio St.3d 452 (1993). Claimants who also have non-allowed conditions can still establish entitlement to a TTD compensation provided they establish that the allowed conditions are independently disabling. *WCI Steel Inc. v. Indus. Comm.*, 96 Ohio St.3d 24, 2002-Ohio-3315. Provided the claimant establishes a causal connection between the allowed conditions and the disability, the claimant does not have to additionally prove that the non-allowed

conditions do not cause the inability to return to work. *See State ex rel. Ignatious v. Indus. Comm.*, 99 Ohio St.3d 285, 2003-Ohio-3627.

{¶ 43} Relator cites several cases in support of his argument including the *Ignatious* case where John P. Ignatious suffered a work-related injury and his claim was allowed for sprained neck and herniated discs at C4-5 and C-6. One year later, Ignatious underwent surgery for those conditions and began receiving TTD compensation. Post-surgery, his treating physician Teresa D. Ruch released him to return to work with restrictions. One month later, Dr. Ruch indicated Ignatious could not return to work until after she obtained an MRI and EMG. The findings supported continuing problems in his cervical area. The nerve conduction study also revealed bilateral carpal tunnel. Dr. Ruch completed a new C-84 certifying Ignatious was temporarily totally disabled due to the allowed cervical conditions per her office notes. Because her office notes included treatment regarding the carpal tunnel, Dr. Ruch was asked to clarify why Ignatious was unable to work. Dr. Ruch indicated that Ignatious was totally disabled due to the allowed cervical condition. The commission ultimately concluded that Ignatious' disability was due to the non-allowed condition of bilateral carpal tunnel and cited Dr. Ruch's C-84.

{¶ 44} On appeal, the Supreme Court of Ohio ultimately granted a writ of mandamus and stated:

No one disputes claimant's responsibility to establish a causal relationship between his allowed conditions and the claimed disability. He is *not*, however, required to disprove a negative. Having supplied evidence of a direct causal relationship between his allowed neck conditions and his disability, he is not required to further show that his carpal tunnel syndrome is not causing his inability to work. Yet upon review, this is what the commission indeed appears to have done. In response to the bureau's request for clarification, Dr. Ruch supplied a January 9, 2001 C-84 and a May 18, 2001 letter. The former listed "neck pain" as the sole cause of disability and the latter expressly to the allowed conditions of "sprain of neck and herniated discs C4-5 and C5-6." That the commission order continued even after these clarifications to rely on the presence of carpal tunnel syndrome to disqualify this evidence implies but one thing: that the evidence was deemed insufficient because it did not affirmatively state that carpal tunnel syndrome was not

influencing claimant's inability to work. In tacitly requiring this, the commission overstepped its bounds.

(Emphasis sic.) *Id.* at ¶ 33.

{¶ 45} In *State ex rel. Richey v. Indus. Comm.*, 10th Dist. No. 03AP-601, 2004-Ohio-2712, Cheryl L. Richey sustained a work-related injury in August 2000 and her workers' compensation claim was allowed for: "right sprain of wrist, right elbow abrasion, right hip & thigh sprain, sprain of sacrum." *Id.* at ¶ 8. Richey was able to return to work three days later.

{¶ 46} Approximately one year later, Richey complained of increased discomfort in her right posterolateral buttock and thigh area with discomfort down her leg and Dr. Stephen T. Autry, M.D., recommended a program of diagnostic review including an MRI. The MRI results were essentially normal and a fluoroscopy was performed to provide Richey with an epidural steroid injection. The postoperative diagnosis was degenerative disc disease at L5-S1, chronic low back pain radiating into the right leg.

{¶ 47} Dr. Canestri performed a physician review and concluded that the period of TTD compensation was not supported by medical documentation for the allowed conditions. Richey's application for TTD compensation was denied based on a finding that no explanation had been given explaining why Richey had become totally disabled one year after the injury.

{¶ 48} A mandamus action was filed here and Richey asserted that she met her burden of proving that the requested period of TTD compensation was due to the allowed conditions citing *Ignatious*. However, this court found that Richey's situation differed from the situation present in *Ignatious* finding that "In *Ignatious*, the commission dissected one report to conclude that a non-allowed condition rendered [Richey] disabled. By comparison, in the present case, there is evidence that [Richey's] period of disability is due to non-allowed conditions. The commission had before it conflicting medical evidence and relied upon evidence contrary to [Richey's] physician. *Id.* at ¶ 26.

{¶ 49} Relator also cites this court's decision in *State ex rel. Shreck v. McGraw Kokosing Const. Co., Inc.*, 10th Dist. No. 07AP-109, 2007-Ohio-5793. In that case, Denise L. Shreck sustained a work-related injury in February 2005 and her claim was allowed for

"sprain of right knee; popliteal synovial cyst, right; joint effusion right lower leg; right medial femoral condyle cartilage injury; right medial meniscus tear." *Id.* at ¶ 7. Shreck underwent a partial medial meniscectomy and a medial femoral chondroplasty in June 2005.

{¶ 50} In February 2006, Shreck asked that her claim be additionally allowed for post traumatic arthritis, right knee; however, that request was denied. In August 2006, Shreck's treating physician Vikki Owen, D.O., completed a C-84 certifying TTD compensation beginning August 30, 2006. Dr. Owen listed only ICD code number 844.9 which is the ICD-9 code for the allowed condition of sprain right knee. The C-84 form asks the attending physician to state the objective and subjective clinical findings and, in response, Dr. Owen wrote "[s]ame" for her objective findings and "patient scheduled for surgery 8-18-06" for the subjective findings. *Id.* at ¶ 11.

{¶ 51} Shreck underwent a second surgery and Dr. Owen continued completing C-84 forms listing only 844.9 as the allowed condition and again, indicating that the objective findings were the same. In response to questions regarding Shreck's claim, Brian S. Cohen, M.D., the orthopedic surgeon, indicated that Shreck continued to have pain associated with the injuries, completed a C-84 certifying TTD compensation, and listed only the allowed conditions.

{¶ 52} The commission denied Shreck's request for TTD compensation for two reasons: (1) she had not shown a change in her condition, and (2) there was insufficient evidence to conclude that her current disability was due to the allowed conditions rather than the disallowed arthritis.

{¶ 53} This court, in adopting the decision of its magistrate, granted a writ of mandamus finding that the commission improperly altered the burden of proof and required Shreck to disprove a negative (allowed arthritis condition did not cause her disability) and required her to show a change in her medical status to continue her previously approved disability beyond October 19, 2006. As the magistrate noted, neither Dr. Owen nor Dr. Cohen ever indicated that anything other than the allowed conditions in Shreck's claim were causing her requested period of disability.

{¶ 54} Lastly, relator cites this court's decision in *State ex rel. Kirpekar v. Indus. Comm.*, 10th Dist. No. 10AP-307, 2011-Ohio-2366. In that case, Suresh Kirpekar

sustained a work-related injury and his claim was allowed for: "left thigh, lower back sprain, [right] shoulder under blade pulled muscles." *Id.* at ¶ 16.

{¶ 55} The commission denied Kirpekar's request for TTD compensation finding that he had failed to submit evidence upon which the commission could rely to support that decision, specifically noting there were inconsistencies in the C-84s he submitted. In upholding the decision of the magistrate, this court noted:

As the magistrate properly noted, the C-84 form instructs examining physicians to "[l]ist ICD-9 Codes with narrative diagnosis(es) for allowed conditions being treated which prevent return to work." (Magistrate's Decision ¶ 19.) In addition, the C-84 form instructs examining physicians to "state the clinical findings supporting the disability certification," both objectively and subjectively. (Magistrate's Decision ¶ 20.)

Here, relator's first C-84 form dated April 7, 2009, lists ICD-9 code "836.0" for a knee injury, "[left] knee & hamstring injury" for objective findings and "[left] knee & hamstring pain" for subjective findings. (Magistrate's Decision ¶ 20.) Further, relator's second C-84 form, also dated April 7, 2009, lists ICD-9 code "843.9" for a sprain or strain to an unspecified site of the hip and thigh, "[left] knee & hamstring injury" for objective findings and "[left] knee & hamstring pain" for subjective findings. (Magistrate's Decision ¶ 25.) Finally, relator's third C-84 form, dated December 24, 2009, lists ICD-9 codes "836.0," "843.8," "840.9," and "843.9," for a knee injury, sprain or strain to specified and unspecified sites of the hip and thigh, and sprain of an unspecified site of the shoulder and upper arm, with no written response regarding objective and subjective findings. (Magistrate's Decision ¶ 27, 29.) Each of relator's C-84 forms, presented as evidence of TTD, included consideration of non-allowed conditions and/or inconsistencies regarding the cause of disability.

In reaching his recommendation to deny relator's request for a writ of mandamus, the magistrate primarily relies upon *State ex rel. Waddle v. Indus. Comm.* (1993), 67 Ohio St.3d 452, 619 N.E.2d 1018, and *State ex. rel. Bradley v. Indus. Comm.* (1997), 77 Ohio St.3d 239, 242, 673 N.E.2d 1275. In *Waddle*, the Supreme Court of Ohio held that, although non-allowed conditions cannot be used to advance or defeat a cause, "the mere presence of non-allowed disabling

conditions does not automatically foreclose a finding of permanent total disability." *Id.* at 458, 673 N.E.2d 1275. However, in *Bradley*, the Supreme Court of Ohio subsequently stated that "a claimant must meet his burden of showing that an allowed condition independently caused the disability. The allowed condition cannot combine with a non-allowed medical condition to produce TTD." *Id.* at 242, 673 N.E.2d 1275.

* * *

Further, we briefly note that, in support of his argument in favor of granting TTD compensation, relator relies largely upon *State ex. rel. Ignatious v. Indus. Comm.*, 99 Ohio St.3d 285, 791 N.E.2d 443, 2003-Ohio-3627. However, *Ignatious* differs greatly from the present appeal in that "[a]ll of the evidence in [*Ignatious*] attributes [the] claimant's inability to work to the allowed conditions only." *Id.* at ¶ 34, 791 N.E.2d 443. Therefore, in *Ignatious*, the claimant met the requisite burden of proof by showing that, in spite of mention of a non-allowed condition, an allowed condition independently caused his disability. *Id.* at ¶ 33, 791 N.E.2d 443.

(Footnote omitted.) *Id.* at ¶ 7-9, 11.

{¶ 56} In the present case, relator points out that Dr. Chunduri's C-84 forms consistently list only the allowed conditions as causing the requested period of disability. Relator is correct in making that statement. However, the January 15, 2014 office note of Dr. Chunduri specifically states:

Assessment:

[One] Acute/Chronic lumbosacral strain.

[Two] Left L5-S1 stenosis status post decompression.

[Three] Mild to moderate foraminal stenosis L4-5 and L3-4.

Plan: At this point, based on the fact the patient has continued pain and has had no relief, I do not think that he can return to work. With regards to his pain, I recommended a CT myelogram to get a better look at the spine and see what potentially is causing his pain besides the L5-S1 level. He does have a facet cyst at L4-5 and I want to make sure that this is not contributing to his symptoms. At this point, he has failed conservative care and may need a surgical procedure as he has had the pain, which has been long

lasting. At this point, he is unable to return to work secondary to the pain. He is in agreement with the plan.

{¶ 57} In *Ignatious*, his file review, Dr. Herrington specifically noted that Dr. Chunduri did not provide any objective findings to support the requested period of TTD compensation. The magistrate agrees with this statement. In his February 27, 2014 Medco-14, Dr. Chunduri notes, under clinical findings, the following: "Unable to perform regular job duties until [estimated] 06-01-14." Although Dr. Chunduri does list solely the herniated L5-S1 condition as causing the disability, his failure to include any clinical findings in conjunction with his January 15, 2014 office note leaves a gap in explanation that Dr. Herrington specifically noted. Although in his February 26, 2014 note, Dr. Chunduri does state that he is currently treating relator for the herniated disc at L5-S1 and that it independently renders him temporarily and totally disabled, this note likewise does not include any clinical findings to support that assessment.

{¶ 58} In *Ignatious*, the court indicated the commission "dissected" the report of Dr. Ruch to find the report did not constitute some evidence that the allowed conditions independently caused the period of disability. The commission even cited Dr. Ruch's report in support of the denial. By comparison, here the commission cited both the reports of Drs. Herrington and Chunduri. Dr. Herrington specifically opined that the allowed conditions were not the cause of the disability. Dr. Herrington's report constitutes some evidence to support the commission's order. Additionally, in *Ignatious*, the claimant's claim was allowed for neck conditions. Dr. Ruch noted claimant also had carpal tunnel—involving the hands. Dr. Ruch certified the allowed neck conditions as causing the disability. By comparison, relator's claim is allowed for specific back conditions and, admittedly, due to his ongoing pain, Dr. Chunduri has questioned whether relator has additional back problems, likely caused by the work-related injury but, unfortunately, not yet allowed in the claim. It is more difficult to separate various back conditions discussed in a medical report than it is to separate neck and hand conditions. As such, the magistrate finds that this case is distinguishable from *Ignatious* and the commission did not abuse its discretion when it denied relator's application for TTD compensation.

{¶ 59} Based on the foregoing, it is this magistrate's decision that the commission did not abuse its discretion when it denied TTD compensation. Accordingly, 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).