

TENTH APPELLATE DISTRICT

State ex rel. Kaiser Foundation Health Plan Ohio,	:	
	:	
Relator,	:	
	:	
v.	:	No. 09AP-706
	:	
Industrial Commission of Ohio and Edward C. Montgomery,	:	(REGULAR CALENDAR)
	:	
Respondents.	:	

D E C I S I O N

Rendered on September 21, 2010

Zashin & Rich Co., L.P.A., and Scott Coghlan, for relator.

Richard Cordray, Attorney General, *Latawnda N. Moore*, and *Sandra E. Pinkerton*, for respondent Industrial Commission of Ohio.

Wellman, Jeren, Hackett & Skoufatos Co., L.P.A., Timothy R. Hackett, and *John A. Jeren, Jr.*, for respondent Edward C. Montgomery.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

BROWN, J.

{¶1} Relator, Kaiser Foundation Health Plan Ohio ("Kaiser"), 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 that awarded

permanent total disability ("PTD") compensation to respondent, Edward C. Montgomery ("claimant"), and to enter a new order denying said compensation.

{¶2} This matter was referred to a court-appointed magistrate pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate issued a decision, including findings of fact and conclusions of law, which is appended to this decision, and recommended that this court deny Kaiser's request for a writ of mandamus. Kaiser has filed objections to the magistrate's decision.

{¶3} The crux of Kaiser's argument is that the magistrate erred when he found *State ex rel. Wallace v. Indus. Comm.* (1979), 57 Ohio St.2d 55, was inapplicable because Dr. Anil Choudary Nalluri was an examining physician with respect to the physical conditions allowed in the claim. Pursuant to *Wallace*, a non-examining physician is required to accept the findings of the examining physician, but not the opinion drawn therefrom. Here, Kaiser maintains there was no evidence that Dr. Nalluri examined claimant with respect to the allowed physical conditions, but only examined his psychiatric conditions. Kaiser also claims that Dr. Nalluri never reviewed or accepted the report of Dr. Edward Uberti, who was claimant's treating physician with respect to his physical injuries and who found claimant was not PTD, before rendering his "combined effects" opinion. Thus, Kaiser asserts that Dr. Nalluri must be considered a non-examining physician, and, because he did not accept the findings of Dr. Uberti, the commission could not consider Dr. Nalluri's report.

{¶4} Initially, we note that the magistrate did not find that Dr. Nalluri was an examining physician with respect to the physical conditions. Rather, the magistrate found that Dr. Nalluri's reference to the "combined effects" of the allowed physical and psychiatric conditions did not render him a non-examining or reviewing physician with

respect to the physical conditions; thus, his opinion did not violate *Wallace*. Therefore, the underlying basis of Kaiser's objection is flawed.

{¶5} The key issue in the present case is whether Dr. Nalluri's opinion was in violation of *Wallace* and whether his opinion could constitute some evidence. Because we find the magistrate and commission did not err when they relied upon Dr. Nalluri's opinion as to both the physical and psychiatric conditions, and Dr. Nalluri's report does not fall within the purview of *Wallace*, we find it could constitute some evidence. In support of the commission's determination, claimant directs the court to *State ex rel. Hughes v. Goodyear Tire & Rubber Co.* (1986), 26 Ohio St.3d 71. We agree that the present circumstances are analogous to those in *Hughes*, and the holding is instructive. In *Hughes*, two psychiatrists, Drs. Giray and Goold, each opined that the claimant's "combined" physical and psychiatric conditions rendered the claimant PTD. However, neither doctor indicated in his report that he either physically examined the claimant or expressly accepted all the findings of the examining physicians. The commission denied the claimant's request for PTD.

{¶6} After this court denied claimant's writ of mandamus and claimant appealed, the Supreme Court of Ohio found that the reports of several doctors, including Drs. Giray and Goold, could constitute some evidence to support a commission allowance or disallowance of a PTD claim, even though none of the doctors specifically examined the claimant as to both the physical and psychological conditions. The court explained:

A review of the record before us indicates that Drs. Giray, Goold, [and several other doctors] specifically examined claimant as to either the physical or psychological condition but not both. In all these cases it is clear that while the physician might not literally "expressly adopt" the factual findings with respect to conditions outside his field of expertise, each was familiar with those findings to various

degrees when he made his evaluation, as indicated in the facts herein.

It is apparent to us today that much confusion has resulted from this court's desire to insure that impairment evaluations be rendered by physicians who were aware of all relevant aspects of a claimant's allowed conditions. We do not suggest, however, that experts in one area of medicine must be experts in all areas of medicine, but merely that physicians in a multiple-conditions claim be aware that other allowed conditions exist that might potentially influence their conclusions with respect to impairment. Similarly, our opinions should not provide the basis for usurping the role of the commission in determining disability by creating arbitrary exclusionary rules that eliminate evidence the commission might find credible because such evidence fails to include "magic words" to conform with hypertechnical evidentiary rules, e.g., "I expressly adopt the findings but not the opinion of Dr. 'X.'" As we noted in [*State ex rel. Teece v. Indus. Comm.* (1981), 68 Ohio St.2d 165] at 168-169, evidence that does not conform with [*State ex rel. Anderson v. Indus. Comm.* (1980), 62 Ohio St.2d 166] can still be used to rebut elements of conforming reports.

To clarify and resolve the difficulties engendered in the application of *Anderson*, we hold today that reports which consider and impliedly accept all the allowed conditions relevant to the claim before rendering a final evaluation with respect to impairment are "some evidence" to support a commission allowance or disallowance of a permanent total disability claim. On this basis the reports of Drs. Hardie, Fallon, McCloud, DeMuth, Goold, and Giray were all permissible evidence to be accepted or not accepted as the commission saw fit. The commission's decision, resting upon the reports of Drs. Hardie, Fallon, DeMuth and McCloud, was thus supported by some evidence. The commission's determination was therefore not an abuse of discretion and relator has not demonstrated a clear legal right to mandamus relief.

Id. at 74-75 (footnote omitted).

{¶7} In the present case, it is apparent that Dr. Nalluri was "aware of all relevant aspects of [the] claimant's allowed conditions." Dr. Nalluri had been treating claimant for two years so as to be very familiar with his physical conditions, reviewed and expressly

acknowledged all of claimant's allowed conditions, referred to claimant's physical pain in some reports, and discussed some of claimant's physical conditions in some reports. Furthermore, the facts in the present case weigh even more in favor of finding that Dr. Nalluri's opinion on both claimant's physical and psychiatric conditions should constitute some evidence than those in *Hughes*. The court in *Hughes* acknowledged that the doctors at issue were only experts in one area of medicine, while Dr. Nalluri was both a neurologist and psychiatrist.

{¶8} In addition, the court in *Hughes* emphasized that of utmost importance in a multiple-conditions claim is that the physicians "be aware that other allowed conditions exist that might potentially influence their conclusions with respect to impairment." *Id.* at 74. Thus, doctors' "reports which consider and impliedly accept all the allowed conditions relevant to the claim before rendering a final evaluation with respect to impairment are 'some evidence.'" *Id.* The court in *Hughes* gave as an example one doctor's report that indicated he evaluated the claimant " 'in regards to the conditions allowed in this claim,' " after articulating these allowed conditions. *Id.* at fn.1. The court said "[t]his type of assertion both considers and impliedly accepts the allowed conditions to render the report 'some evidence.'" *Id.* In the present case, Dr. Nalluri summarized claimant's allowed conditions in his October 24, 2008 report and then went on to render an impairment opinion after "considering his allowed physical and psychiatric impairment." As in *Hughes*, this statement both considered and impliedly accepted the allowed conditions. Therefore, we agree with the magistrate that Dr. Nalluri's report constitutes some evidence.

{¶9} Dr. Nalluri's report does not violate *Wallace* because it does not fall within the purview of its holding. The physician in *Wallace* merely reviewed the claimant's file without performing any type of examination and then failed to accept all the factual

findings of the physicians who actually examined the claimant. The court referred to this type of review-only doctor as a "non-examining physician." Clearly, Dr. Nalluri was not a "non-examining physician" as that term was used in *Wallace*. Here, as explained above, Dr. Nalluri was claimant's treating physician for two years and was familiar with both his physical and psychological conditions. The *Wallace* rule was implemented to prevent "file-review-only" doctors from rejecting the underlying factual findings of doctors who had actually personally met with the claimant. The ill the *Wallace* rule was designed to protect against is not at issue here. Therefore, Dr. Nalluri's opinion did not violate *Wallace*.

{¶10} After an examination of the magistrate's decision, an independent review of the evidence, pursuant to Civ.R. 53, and due consideration of Kaiser's objections, we overrule the objections. Accordingly, we adopt the magistrate's decision as our own with regard to the findings of fact and conclusions of law, and we deny Kaiser's request for a writ of mandamus.

Objections overruled; writ of mandamus denied.

TYACK, P.J., and BRYANT, J., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Kaiser Foundation	:	
Health Plan Ohio,	:	
	:	
Relator,	:	
	:	
v.	:	No. 09AP-706
	:	
Industrial Commission of Ohio	:	(REGULAR CALENDAR)
and Edward C. Montgomery,	:	
	:	
Respondents.	:	

MAGISTRATE'S DECISION

Rendered on June 9, 2010

Zashin & Rich Co., L.P.A., and Steven P. Dlott, for relator.

Richard Cordray, Attorney General, Latawnda N. Moore and Sandra E. Pinkerton, for respondent Industrial Commission of Ohio.

Wellman, Jeren, Hackett & Skoufatos Co., L.P.A., Timothy R. Hackett and John A. Jeren, Jr., for respondent Edward C. Montgomery.

IN MANDAMUS

{¶11} In this original action, relator, Kaiser Foundation Health Plan Ohio ("Kaiser" or "relator"), requests a writ of mandamus ordering respondent Industrial Commission of

Ohio ("commission") to vacate its order awarding permanent total disability ("PTD") compensation to respondent Edward C. Montgomery ("claimant"), and to enter an order denying said compensation.

Findings of Fact:

{¶12} 1. On July 6, 2004, claimant sustained an industrial injury while employed as an x-ray technician for relator, a self-insured employer under Ohio's workers' compensation laws. On that date, claimant injured his left knee while attempting to move a patient to a wheelchair.

{¶13} 2. The industrial claim (No. 04-846652) is allowed for "left knee strain; chondromalacia left knee; torn medial meniscus left knee; aggravation of pre-existing arthritis, left knee; major depressive disorder, single episode, moderate."

{¶14} 3. On November 3, 2008, claimant filed an application for PTD compensation.

{¶15} 4. In support of his application, claimant submitted a report dated September 30, 2008, from his treating physician, Edward J. Uberti, D.O., who specializes in orthopedic surgery. In his report, Dr. Uberti indicated that claimant underwent two arthroscopic surgeries to the left knee. Dr. Uberti opined:

In light of Mr. Montgomery's current condition and in light of the fact that he has basically failed all treatment modalities, I do not feel that he will ever be able to return to his former level of employment. I feel that his condition is permanent. The only work that he would be able to participate in would need to involve purely sedentary activities. He will not be able to stand for any length of time other than coming too [sic] and from work. He will not be able to lift, carry, bend, squat, stoop, twist or climb. Any lifting or holding would need to be under 10lbs and this would need to be in a seated position.

Obviously[,] his psychological condition comes into play here. The diagnosis and treatment of these conditions is certainly out of the realm of my expertise and I would therefore defer to Dr. Dioro who is treating him for this. The above work restrictions/recommendations are based solely on his knee condition. Any further restrictions would need to take into consideration his psychological condition. In any event, I do not believe that he will ever be able to return to his former level of employment as an x-ray technician.

{¶16} 5. In further support of his application, claimant submitted a report dated October 24, 2008, from his treating psychiatrist, Anil Choudary Nalluri, M.D. The report is addressed to claimant's counsel:

This report is written in response to your request for a Permanent Total Disability report on the above-named patient. I have performed an updated evaluation on this patient and reviewed his entire chart.

The above-named patient is seen once a month for medication management. He has been under my professional care since 08/04/06. His most recent follow-up visit was on October 24, 2008. I am treating him for the allowed psychiatric condition of 296.22 Major Depressive Disorder, Single Episode, Moderate. He has been cooperative and compliant with medical treatment. He is currently taking Celexa 40mg hs (antidepressant). He sees William D. Diorio, Ph.D., LISW for individual psychotherapy.

This 59-year-old Caucasian, divorced man was injured on 7/6/04 during the course of his employment as a radiology CT for Kaiser Permanente. He was injured when he picked up a patient and attempted to move her from a table to a wheelchair. He said that she was a large woman and all of her weight collapsed onto him, causing his knee to buckle. He was allowed for the general medical conditions of 844.9 sprain of knee & leg nos, left; 717.7 chondromalacia patellae, left; 836.0 tear medial meniscus knee, cur, left; and 716.96 arthropathy nos, left leg. He was off work for four months. When he returned, he re-injured his left knee, tearing his meniscus, in 2005 and again in 2006. He had two operations to repair his left knee. His last date of work was in May 2006. He told me that he is scheduled to undergo another operation on his left knee. He has undergone various medical

interventions, but nothing has provided a great deal of relief. He persistently presents with pain in his left knee and both legs. He has difficulty performing activities of living due to his physical and psychiatric limitations.

As a result of the ongoing pain and discomfort, the patient became severely depressed, anxious, and demoralized. He has trouble falling asleep and wakes up frequently throughout the night. He has reduced energy and is unable to participate in his previous pleasurable activities. He also told me that he suffers from a decrease in his sexual desire. He experiences loss of appetite. He described social withdrawal: "I just lay around the house". Increased irritability was specified. According to him, "I have a short temper." he expressed difficulty with his concentration, saying, "I can't think or concentrate. My mind is overwhelmed." This man is significantly ill, mentally and physically.

The patient has attained maximum medical improvement. This suggests that the conditions continue to prevail to the present time and have taken on a permanent status. The onset of his psychiatric symptoms followed his work injury, dated 07/06/04. He presents with sufficient symptomatology to meet criteria for 296.22 Major Depressive Disorder, Single Episode, Moderate. Clearly, clinically, there is a causal relationship between the work-related injury and the psychiatric disorder. Despite his treatment, he still presents with pain, depression, and anxiety. This would suggest that he has not demonstrated any significant improvement in his allowed conditions since the injury. It is reasonable and logical that as long as the pain and discomfort persists, he will continue to present symptoms of depression and anxiety. His condition will last for more than 12 months.

Mental Status Exam: The patient was compliant and cooperative. Interpersonal relationship with me was quite appropriate. His affect was appropriate to his thought content. His mood was moderately depressed and anxious, as evidenced by his facial expressions and general demeanor. Psychomotor activity was reduced. No speech abnormalities noted. Thought process was organized, logical, relevant, and sequential. He was preoccupied with his pain, pending left knee operation, physical limitations, and depressive symptoms. He revealed no suicidal or homicidal ideations, thoughts, or fantasies now. From my overall clinical interview and the way he responded to the questions, I have concluded

that his concentration and memory were decreased. He was oriented to person, place, time (i.e., day, date, month, year), and to the interview circumstances. Insight was fair, and degree of judgment was normal. I have not noticed any delusions, hallucinations, disorganized behavior or speech during my clinical interview.

* * *

Summary and Opinion:

This 59-year-old Caucasian, divorced man was injured on 7/6/04 during the course of his employment as a radiology CT for Kaiser Permanente. As a result of the injury, he was recognized and allowed for the general medical conditions of 844.9 sprain of knee & leg nos, left; 717.7 chondromalacia patellae, left; 836.0 tear medial meniscus knee, cur, left; and 716.96 arthropathy nos, left leg; as well as the psychiatric condition of 296.22 Major Depressive Disorder, Single Episode, Moderate.

Based on the combined effects of the allowed physical and psychiatric conditions, it is my professional clinical opinion that Mr. Montgomery is not capable of any gainful, remunerative employment now. If given benefits, he is capable of managing his funds now.

When considering his allowed physical and psychiatric impairment, Mr. Montgomery is totally and permanently impaired. Impairment is determined by a clinician; disability is a legal or administrative determination. It is up to the discretion of the honorable hearing officer to determine Mr. Montgomery's total level of disability.

My diagnosis and opinion are based upon, with a reasonable medical probability, my 29 years of clinical experience as a medical doctor and specialist in Psychiatry. I have also relied on the DSM-IV-TR, 2000, and AMA guide, Fifth Edition, November 2000.

{¶17} 6. In further support of his application, claimant submitted a report dated July 20, 2008, from William D. Diorio, Ph.D., LISW. Dr. Diorio is a licensed independent

social worker. He is not a psychologist or a psychiatrist. Dr. Diorio treated claimant for his allowed psychiatric condition. In his report, Dr. Diorio opines:

In summary, Mr. Montgomery is suffering from a Major Depressive Disorder, Single Episode, Moderate (#296.22). The degree and intensity of his symptoms are persistent on a daily basis in response to his level of chronic pain and physical restrictions, which will continue to be severe and limiting for a continuous period of twelve months, at least. Consequently, in my clinical opinion, Mr. Montgomery is permanently and totally disabled by a combination of chronic physical conditions, persistent pain, physical disability, high generalized anxiety and Major Depressive symptoms in spite of his continued involvement in cognitive psychotherapy and treatment with psychotropic medication. He demonstrates little, or no, residual functional capacity to do substantial gainful activity, due to persistent cognitive, emotional, and behavioral limitations that will interfere with work in any setting, including unskilled sedentary work. Furthermore, Mr. Montgomery is not a candidate for vocational rehabilitation programming and services for a continuous period of twelve months, at least.

Clearly, Mr. Montgomery is not malingering. There is no secondary gain for Mr. Montgomery in any respect that would explain the profound, and compounding, losses that he continues to suffer as a result of his inability to return to gainful employment and to engage in most of the normal, and basic, activities of daily living that were so meaningful and characteristic of the "life" that he enjoyed prior to his industrial accident. Without question, Mr. Montgomery is in need of continuous psychological intervention and treatment with psychotropic medication in order to stabilize and maintain his mental functioning and to increase his resilience in the face of stress associated with his attempt to cope with chronic pain, physical disability, his inability to return to work, and loss of income.

Nevertheless, I have learned through psychotherapy that Mr. Montgomery was always a faithful and dedicated worker, with a strong work ethic and commitment to his re-responsibilities in all aspects of his life. Therefore, I want to emphasize that Mr. Montgomery has always wanted to recover from his extensive injuries, pain, anxiety, and depression, and return to gainful employment. Indeed, this deep, and unrelenting, ***desire to***

work remains the principal cause of his intractable grief; in spite [of] his involvement in psychotherapy and treatment with psychotropic medication.

(Emphasis sic.)

{¶18} 7. The record contains another report from Dr. Nalluri dated "August 4 and 11, 2006." That report states in part:

INITIAL MULTIAXIAL PSYCHIATRIC EXAMINATION

Mr. Edward Montgomery of Niles, Ohio, was examined in my office in Youngstown, Ohio, on August 4 and 11, 2006, at your request for an Initial Multiaxial Psychiatric Examination to determine whether or not he has developed a psychiatric condition or aggravated a pre-existing psychiatric condition as a direct and proximate result of the work-related injury on 7/6/04.

* * *

Psychological Screening Tests Administered: The patient was given the following screening tests:

- ▶ Hamilton Rating Scale for Depression—scored 22, indicating moderate depression.
- ▶ Rey Fifteen Item Test for Memory—the patient recalled 12 out of 15, which revealed normal memory and concentration.
- ▶ Zung's Depression Scale—revealed severe to extreme depression.
- ▶ Hamilton Anxiety Scale—revealed marked to severe anxiety.
- ▶ Pain Diagram—revealed stabbing, aching, and burning pain in the lower back, as well as aching in the head.
- ▶ DSM-IV-TR (2000) Criteria for Major Depressive Episode—revealed a diagnosis of Major Depressive Disorder.

* * *

Chief Complaints, other complaints and their duration: The patient reported, "Depression, headaches and back aches,

loss of sleep and concentration due to knee injury, fatigue." He indicated that his psychiatric problems began in 2005.

History of Present Illness: This 56-year-old Caucasian, divorced man was injured on 7/6/04 during the course of his employment as a radiology CT for Kaiser Permanente. He was injured when he picked up a patient and attempted to move her from a table to a wheelchair. He said that she was a large woman and all of her weight collapsed onto him, causing his knee to buckle. He was allowed for the general medical conditions of 844.9 sprain of knee & leg nos, left; 717.7 chondromalacia patellae, left; 836.0 tear medial meniscus knee, cur, left; and 716.96 arthropathy nos, left leg. He was off work for four months. When he returned, he re-injured his left knee, tearing his meniscus, in 2005 and again in 2006. He had two operations to repair his left knee. His last date of work was in May 2006. He has difficulty performing activities of daily living due to the pain and lack of desire. The patient stated that he became depressed, anxious, and irritable as a result of the ongoing pain, inability to work, and isolation. He reported that he has trouble falling asleep and wakes up frequently throughout the night, getting a maximum of four hours sleep each night. He stated that he has reduced energy and is unable to participate in his previous pleasurable activities, such as working out, walking, and spending time with his grandchildren. * * *

* * *

Mental Status Examination Components:

The mental status examination is the systematic organization and evaluation of information about the patient's current psychiatric functioning.

Apperance, Behavior, and Attitude: The patient was 5'8" tall and weighed approximately 157 pounds. He was dressed casually and appropriately. He was compliant and cooperative. Interpersonal relationship with me was quite appropriate. He maintained fair eye contact.

Compulsive and Perseverative (repetition out of context of words, phrases, or ideas) Behavior: None noted.

Station and Gait: Station was normal. Gait was slow with a slight left leg limp.

Affect: His affect was appropriate to his thought content.

Mood: His mood was significantly irritable and moderately depressed and anxious, as evidenced by his facial expressions and general demeanor.

Psychomotor Activity: (Psychomotor movements and speech serve as the expression of thoughts and actions.) Psychomotor activity was reduced.

* * *

Summary and Opinion: This 56-year-old Caucasian, divorced man was injured on 7/6/04 during the course of his employment as a radiology CT for Kaiser Permanente. As a result of the injury, he was recognized and allowed for the general medical conditions of 844.9 sprain of knee & leg nos, left; 717.7 chondromalacia patellae, left; 836.0 tear medial meniscus knee, cur, left; and 716.96 arthropathy nos, left leg.

The patient suffers from 296.22 Major Depressive Disorder, Single Episode, Moderate, which is clinically determined to be a direct and proximate result of the work-related injury dated 7/6/04. This patient will benefit from continued psychiatric intervention. * * *

{¶19} 8. Following a May 28, 2009 hearing, a staff hearing officer ("SHO") issued an order awarding PTD compensation starting October 24, 2008, the date of Dr. Nalluri's report. The SHO's order explains:

* * * [I]t is the order of the Staff Hearing Officer that the Injured Worker's IC-2 Application for Permanent Total Disability Compensation is granted. Permanent total disability compensation is awarded from 10/24/2008 * * *.

Permanent and total disability compensation is awarded from 10/24/2008 for the reason that this is the start date requested by the Injured Worker's legal representative and it is supported by the 07/20/2008 opinion by William D. Diorio, Ph.D., and the 10/24/2008 opinion by Anil [C]. Nalluri, M.D.

The cost of this award is apportioned as follows:

100% in claim 04-846652.

This apportionment is based upon the said opinions of Drs. Nalluri and Diorio. Therein, Dr. Nalluri and Dr. Diorio attribute 100% of the Injured Worker's inability to work, solely to the allowed physical and psychological conditions and/or the allowed psychological condition in this claim respectively. It is noted that Dr. Nalluri's opinion is the only combined effects opinion regarding the issue of Permanent Total Disability.

Based upon the report(s) of Dr(s). Anil C. Nalluri, M.D., William D. Diorio, Ph.D., it is found that the Injured Worker is unable to perform any sustained remunerative employment solely as a result of the medical impairment caused by the allowed physical and psychological condition(s). Therefore, pursuant to State ex rel. Speelman v. Indus. Comm. (1992), 73 Ohio App.3d 757, it is not necessary to discuss or analyze the Injured Worker's non-medical disability factors.

It is found that Edward J. Uberti, D.O., John L. Dunne, D.O., and Elizabeth Mease, M.D., all of whom examined the Injured Worker as relates to the allowed physical conditions in this claim, all were of the opinion that the Injured [W]orker can only perform sustained remunerative employment of a sedentary nature. Steven B. Van Auke, Ph.D., opined that the Injured Worker can perform some sustained re-munerative employment with restrictions, due to the allowed psychological condition and Galit Askenazi, Ph.D., opined that the Injured Worker is capable of performing sustained remunerative employment of a sedentary nature, based upon the allowed psychological condition. Dr. Diorio opines that the allowed psychological condition renders the Injured Worker permanently and totally disabled from all gainful employment. Dr. Anil C. Nalluri opines that the combined effects of the allowed physical and psychological conditions in this claim, render the Injured Worker Permanently and Totally Disabled. The Staff Hearing Officer finds the said opinions of Dr. Diorio and Dr. Nalluri to be more persuasive in this matter and same are relied upon by this Hearing Officer in rendering this decision. * * *

{¶20} 9. On July 20, 2009, relator, Kaiser Foundation Health Plan Ohio, filed this mandamus action.

Conclusions of Law:

{¶21} Treating psychiatrist, Dr. Nalluri, opined in his October 24, 2008 report that, based upon the "combined effects" of the allowed physical and psychiatric conditions, claimant is unable to perform gainful remunerative employment.

{¶22} The main issue is whether Dr. Nalluri's opinion violates the rule set forth in *State ex rel. Wallace v. Indus. Comm.* (1979), 57 Ohio St.2d 55 ("*Wallace* rule"), because, allegedly, Dr. Nalluri examined claimant only for the allowed psychiatric condition and he did not accept the findings of those physicians who examined claimant for the allowed physical conditions. If, as relator argues, Dr. Nalluri's opinion violates the *Wallace* rule, then it cannot constitute some evidence upon which the commission relied to support its PTD award.

{¶23} Finding that Dr. Nalluri's opinion does not violate the *Wallace* rule and, thus, does constitute some evidence upon which the commission relied, it is the magistrate's decision that this court deny relator's request for a writ of mandamus, as more fully explained below.

{¶24} In *Wallace*, the Supreme Court of Ohio states:

In light of the frequent use of medical opinions of non-examining physicians in processing claims for disability compensation, the Court of Appeals for Franklin County has developed an analogy that is employed to insure the reliability of those opinions. The court considers the physician's opinion tantamount to a response to a hypothetical question.

Applying the analogy to a hypothetical question, it follows that the non-examining physician is required to expressly accept all the findings of the examining physicians, but not the opinion drawn therefrom. If a non-examining physician fails to accept the findings of the doctors or assumes the role of the Industrial Commission, the medical opinion that is rendered

does not constitute evidence to support a sub-sequent order of the commission.

Id. at 59. (Footnotes omitted.)

{¶25} Following the decision in *Wallace*, the Supreme Court of Ohio subsequently relaxed the express acceptance requirement and permitted reliance upon a non-examining physician's report where the report impliedly accepted the findings of the examining physicians. *State ex rel. Lampkins v. Dayton Malleable, Inc.* (1989), 45 Ohio St.3d 14, 15.

{¶26} In *State ex rel. Anderson v. Indus. Comm.* (1980), 62 Ohio St.2d 166, the court held that the commission, when determining whether a claimant is permanently totally disabled, cannot admit an examining physician's report as evidence where the examining physician has not evaluated the combined effect of all conditions for which workers' compensation benefits have been allowed. *State ex rel. Rhodeback v. Johnstown Mfg., Inc.* (1986), 26 Ohio St.3d 115, 117 (summarizing *Anderson's* holding).

{¶27} In *State ex rel. Burley v. Coil Packing, Inc.* (1987), 31 Ohio St.3d 18, the court overruled *Anderson*. In *Burley*, the court reasoned that the practical application of the *Anderson* evidentiary doctrine had ultimately undermined the adjudicatory function of the commission.

{¶28} R.C. 4123.01 sets forth definitions applicable to workers' compensation. It provides:

(C) "Injury" includes any injury, whether caused by external accidental means or accidental in character and result, received in the course of, and arising out of, the injured employee's employment. "Injury" does not include:

(1) Psychiatric conditions except where the claimant's psychiatric conditions have arisen from an injury or occupational disease sustained by that claimant * * *.

{¶29} R.C. 4123.01(C)(1) does not violate the Equal Protection Clauses of the United States and Ohio Constitutions by excluding from the definition of "injury" psychological or psychiatric conditions that do not arise from a compensable physical injury or occupational disease. *McCrone v. Bank One Corp.*, 107 Ohio St.3d 272, 2005-Ohio-6505.

{¶30} The key point of relator's argument that Dr. Nalluri's opinion violates the *Wallace* rule is that Dr. Nalluri acted as a reviewing physician with respect to the allowed physical conditions while his opinion is expressly premised upon both the allowed physical and psychiatric conditions.

{¶31} Dr. Nalluri's reference to the "combined effects" of the allowed physical and psychiatric conditions can be viewed simply as his acknowledgement that the allowed psychiatric condition for which he specifically examined arose from the allowed physical conditions of the claim. That is, an allowed psychiatric condition must always be viewed in the context of the allowed physical conditions that gave rise to the psychiatric condition. That Dr. Nalluri acknowledges that point does not render him a non-examining or reviewing physician with respect to the allowed physical conditions of the claim. Thus, Dr. Nalluri's opinion does not violate the *Wallace* rule.

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

/s/ Kenneth W. Macke
KENNETH W. MACKE
MAGISTRATE

NOTICE TO THE PARTIES

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