

[Cite as *State ex rel. Walker v. Indus. Comm.*, 2009-Ohio-3550.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Jeffrey Walker,	:	
Relator,	:	
v.	:	No. 08AP-606
Industrial Commission of Ohio et al.,	:	(REGULAR CALENDAR)
Respondents.	:	
	:	
State of Ohio ex rel.	:	
Coca-Cola Enterprises, Inc.,	:	
Relator,	:	
v.	:	No. 08AP-884
The Industrial Commission of Ohio et al.,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on July 21, 2009

Heinzerling, Goodman & Reinhard, LLC, and Jonathan H. Goodman, for Jeffrey Walker.

Richard Cordray, Attorney General, and Sandra E. Pinkerton, for Industrial Commission of Ohio.

Thompson Hine LLP, and M. Scott Young, for Coca-Cola Enterprises, Inc.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION
FRENCH, P.J.

{¶1} Relator, Jeffrey Walker, filed an original action asking this court to issue a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its orders (1) finding that relator's allowed conditions had reached maximum medical improvement ("MMI") and (2) denying relator's request that it exercise its continuing jurisdiction, and ordering the commission to reinstate temporary total disability ("TTD") compensation from May 21, 2007 forward.

{¶2} In addition, relator's employer, Coca-Cola Enterprises, Inc. ("employer"), filed an original action asking this court to issue a writ of mandamus ordering the commission to vacate its order reinstating relator's TTD compensation effective November 19, 2007, and ordering the commission to deny this new period of TTD because relator failed to establish new and changed circumstances warranting the new period.

{¶3} We consolidated these matters and referred them to a magistrate pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate issued a decision, which includes findings of fact and conclusions of law and is appended to this decision, recommending that this court (1) deny the writ requested by relator and (2) grant the writ requested by the employer. Relator filed objections to the magistrate's decision. For ease of discussion, we break relator's objections into two categories: (1) those relating to the magistrate's conclusion that the commission did not abuse its discretion by terminating TTD compensation based on a January 2007 report by Matthew D. McDaniel, M.D., and (2) those relating to the magistrate's conclusion that

the commission abused its discretion by reinstating TTD compensation effective November 19, 2007.

The Commission's Termination of TTD Compensation

{¶4} As the magistrate's decision details, relator sustained a work-related injury in March 2006. Although he performed light-duty work for a short time thereafter, he suffered an exacerbation, and TTD compensation began in August 2006.

{¶5} Dr. McDaniel examined relator in October 2006. At that time, Dr. McDaniel opined that relator had not reached MMI. In a report dated January 22, 2007, however, Dr. McDaniel stated that relator had reached MMI. The employer moved to terminate TTD. Following a hearing in May 2007, a district hearing officer ("DHO") issued an order relying on Dr. McDaniel's January 2007 report and terminating TTD compensation effective May 21, 2007. A staff hearing officer ("SHO") subsequently affirmed the termination.

{¶6} In the meantime, however, in April 2007, Mark E. Coggins, M.D., had requested authorization for further treatment, and the employer approved it. Dr. Coggins also requested additional physical therapy in June 2007. In his objections, relator contends that the magistrate erroneously stated that the employer approved Dr. Coggins' June request, when the employer actually denied it. The record shows that relator is correct. Accordingly, we strike the substance of Finding of Fact ¶9 of the magistrate's decision and replace it with the following: "In June 2007, Dr. Coggins requested additional physical therapy, which CCE denied." Nevertheless, we agree with the employer that this error does not have a substantive impact on the resolution of this case.

{¶7} In January 2008, relator asked the commission to exercise its continuing jurisdiction and vacate the orders terminating his TTD compensation. Citing *State ex rel. Sellards v. Indus. Comm.*, 108 Ohio St.3d 306, 2006-Ohio-1058, relator contended that reliance on Dr. McDaniel's January 2007 report was a clear mistake of law because Dr. McDaniel was unaware that additional physical therapy would be approved. Relator also argued that Dr. McDaniel's consideration of relator's degenerative disc disease was inadequate. A DHO denied his request, and an SHO affirmed.

{¶8} Relator argued before the magistrate, as he argues here, that authorization of additional physical therapy in April 2007 precluded the commission from relying on Dr. McDaniel's January 2007 report, which stated that he was at MMI. We agree, however, with the magistrate's analysis and resolution of this issue. The matter before us is distinguishable from *Sellards*, in which a doctor issued a report finding MMI on the same day that the commission approved further treatment based on another doctor's request submitted a few days earlier. It is also distinguishable from *State ex rel. Lloyd v. Indus. Comm.*, 10th Dist. No. 07AP-79, 2007-Ohio-5020, in which the doctor finding MMI was not aware of the claimant's past treatment or plans for future treatments.

{¶9} Here, fully aware of relator's treatment history and of possible future treatment, Dr. McDaniel concluded that relator's condition had "become chronic and stable." Although the employer authorized additional treatment three months later, there was no other approval existing or even pending at the time of Dr. McDaniel's report.

{¶10} We acknowledge the evidence subsequent to January 2007 indicating that additional physical therapy helped relator, evidence that, at first glance, might suggest that Dr. McDaniel's MMI finding was premature. The February 20, 2008 report by Dean W. Erickson, M.D., is helpful in this respect, however. Dr. Erickson explains that the physical therapy was part of a maintenance exercise program to address relator's chronic back pain. Dr. Erickson states that relator "has had a waxing and waning course with his chronic back pain consistent with degenerative condition that would require chronic attention to such as a maintenance exercise program." Dr. Erickson concludes that "there has been no material change in [relator's] condition since he was declared at maximal medical improvement on May 21, 2007." This evidence supports the conclusion that Dr. McDaniel's January 2007 report was not premature and that he had correctly surmised, at least in Dr. Erickson's view, that further treatment would not improve relator's condition. We overrule relator's second objection.

{¶11} In his third objection, relator contends that the magistrate erred by failing to find that Dr. McDaniel's January 2007 MMI finding did not take into account all the allowed conditions. We disagree.

{¶12} Dr. McDaniel's January 2007 report identifies the allowed conditions as "Lumbar sprain HNP L5-S1." He notes that an April 2006 MRI "indicated a degenerative disc protrusion at L4-5 and L5-S1 along with a prior laminectomy on the left at L5-S1." He notes that relator had been "diagnosed with a disc herniation at L5-S1 and this condition was additionally allowed in the claim." Relator had received the same diagnosis 14 years earlier, due to a prior injury. Dr. McDaniel concluded that relator's current status was "secondary to pre-existing degenerative disc disease." He

indicated that a prior note had "diagnosed a non-allowed disc herniation at L4-5." Finally, he concluded, as part of his MMI finding, that there were "non-allowed conditions impacting medical management of the claim."

{¶13} Relator does not dispute that degenerative disc disease is not an allowed condition. Nevertheless, he points to a December 10, 2007 DHO order, which states that the allowed condition of herniated disc at L5-S1 encompasses aggravation of degenerative disc disease at L5-S1. Therefore, relator's request for an additional allowance of aggravation of degenerative disc disease was moot. The DHO's statement is consistent with Dr. Erickson's November 2007 report, which states that an additional allowance for aggravation of degenerative disc disease at L5-S1 is unnecessary because the allowed condition of herniated disc at L5-S1 "should cover any symptoms emanating from the L5-S1 disc space." Given the DHO's statement that aggravation of degenerative disc disease at L5-S1 is included within an allowed condition, relator argues, Dr. McDaniel "failed to consider the full scope of the allowed conditions," and his MMI finding is invalid.

{¶14} We disagree with relator's reading of Dr. McDaniel's report. Dr. McDaniel correctly identified herniated disc at L5-S1 as an allowed condition; he did not identify aggravation of degenerative disc disease as a non-allowed condition. And, while his report identified pre-existing degenerative disc disease and facet arthritis as the causes of relator's status, it did not identify aggravation of degenerative disc disease as a cause. Therefore, we overrule relator's third objection.

{¶15} In his first objection, relator contends that the magistrate erred by failing to mention the DHO's statement that an additional allowance for aggravation of

degenerative disc disease was unnecessary because it was encompassed within the herniated disc allowance. We do not agree that this statement was so important to the magistrate's resolution of this issue as to require its inclusion. Therefore, we overrule this portion of relator's first objection.

{¶16} Having overruled relator's second and third objections, and having addressed the relevant portion of his first objection, we conclude that the magistrate did not err in determining that the commission did not abuse its discretion by terminating relator's TTD compensation and refusing to exercise its continuing jurisdiction to review that termination.

The Commission's Reinstatement of TTD Compensation

{¶17} Following a hearing on March 13, 2008, an SHO issued an order reinstating TTD compensation beginning on November 19, 2007, and continuing upon evidence of continued disability. The SHO determined that relator had established new and changed circumstances.

{¶18} Before the magistrate, the employer argued that the SHO erred by making this determination because relator had not shown new and changed circumstances justifying TTD reinstatement. The magistrate agreed, determining that the medical records did not contain evidence that relator's condition had worsened since the May 2007 MMI finding. The parties agree that a finding of MMI does not bar the reinstatement of TTD compensation if a claimant shows that new and changed circumstances have arisen. See *State ex rel. Bing v. Indus. Comm.* (1991), 61 Ohio St.3d 424; R.C. 4123.56(A). The parties also agree that the evidence must show a

temporary worsening of the claimant's condition. See *State ex rel. Josephson v. Indus. Comm.*, 101 Ohio St.3d 195, 2004-Ohio-737.

{¶19} In his fourth objection, relator contends that the magistrate acted as a "super commission" by concluding that the December 5, 2007 report of Robert K. Nichols, D.C., did not satisfy the requirement of new and changed circumstances. The purpose of the report, Dr. Nichols states, is to comment upon Dr. Erickson's November 7, 2007 report, which concluded that an additional allowance for aggravation of degenerative disc disease was unnecessary and recommended additional treatment. Within his report, Dr. Nichols states that relator's "condition became worse because he wasn't able to get recommended treatment." This reference to "recommended treatment" refers to the employer's denial of additional physical therapy in June 2007. This statement alone, relator argues, is some evidence to support the commission's reinstatement of TTD compensation, effective November 19, 2007, because it documents that relator's condition had worsened since the May 2007 MMI finding.

{¶20} Our review of the December 5, 2007 report indicates, however, that Dr. Nichols also stated, consistent with his November 2, 2007 report and his November 27, 2007 office notes, that relator's condition improved after treatment that began in August 2007. Dr. Nichols states: "He has shown tremendous improvement from where he began on 08/15/07." Far from showing that relator's condition was worse as of November 19, 2007, Dr. Nichols' December 5, 2007 report shows that relator's condition had been improving steadily. Accordingly, we overrule relator's fourth objection.

{¶21} In his first objection, relator contends that the magistrate erred by failing to include a more complete description of Dr. Nichols' December 5, 2007 report. We

conclude, however, that the magistrate's findings and discussions were adequate in this respect, and we overrule this portion of relator's first objection.

{¶22} Having overruled the remainder of relator's first objection and his fourth objection, we conclude that the magistrate did not err in determining that the commission could not rely on Dr. Nichols' December 5, 2007 report as some evidence to support a finding of new and changed circumstances for purposes of reinstating TTD compensation.

Conclusion

{¶23} Having reviewed the evidence independently, sustained a non-substantive portion of relator's first objection, and overruled all of relator's remaining objections, we adopt the magistrate's decision, including the findings of fact and conclusions of law contained in it, except as we have expressly stated herein. Consistent with the magistrate's decision, we deny the writ of mandamus requested by relator. We grant a writ of mandamus ordering the commission to vacate its order that reinstated relator's TTD compensation as of November 19, 2007.

*Objections sustained in part and overruled in part;
Jeffrey Walker's request for a writ of mandamus denied;
Coca-Cola's request for a writ of mandamus granted.*

SADLER and CONNOR, JJ., concur.

A P P E N D I X

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Jeffrey Walker,	:	
	:	
Relator,	:	
	:	
v.	:	No. 08AP-606
	:	
Industrial Commission of Ohio	:	(REGULAR CALENDAR)
and Coca-Cola Enterprises, Inc.,	:	
	:	
Respondents.	:	
	:	
State of Ohio ex rel.	:	
Coca-Cola Enterprises, Inc.,	:	
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Relator,	:	
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	:	
The Industrial Commission of Ohio	:	(REGULAR CALENDAR)
and Jeffrey Walker,	:	
	:	
Respondents.	:	

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

Rendered on February 25, 2009

Heinzerling, Goodman & Reinhard, LLC, and Jonathan H. Goodman, for relator Jeffrey Walker.

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

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

IN MANDAMUS

{¶24} Jeffrey Walker ("Walker"), has filed an original action requesting that this court issue a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its orders finding that Walker's allowed conditions had reached maximum medical improvement ("MMI") as well as the commission's orders denying Walker's request that the commission exercise its continuing jurisdiction, and ordering the commission to reinstate temporary total disability ("TTD") compensation from May 21, 2007 forward (case No. 08AP-606).

{¶25} Walker's employer, Coca-Cola Enterprises, Inc. ("CCE"), has filed an original action requesting that this court issue a writ of mandamus ordering the commission to vacate its order reinstating Walker's TTD compensation effective November 19, 2007, and ordering the commission to deny this new period of TTD because Walker failed to establish new and changed circumstances warranting the new period (case No. 08AP-884).

Findings of Fact:

{¶26} 1. Walker sustained a work-related injury on March 29, 2006 and CCE certified his claim for: "sprain lumbar region; herniated disc L5-S1."

{¶27} 2. Walker performed light-duty work until June 2006, when he suffered an exacerbation of his injury. TTD compensation was paid beginning August 2006.

{¶28} 3. At CCE's request, Walker was examined by Matthew D. McDaniel, M.D., on October 10, 2006. In response to specific questions, Dr. McDaniel opined that the treatment Walker had received to date was medically necessary and appropriate for the allowed conditions. Further, Dr. McDaniel opined that Walker had not reached MMI for herniated disc at L5-S1. Dr. McDaniel opined that the recommended epidural steroid injections should be performed.

{¶29} 4. Ultimately, Walker received a certain number of epidural injections.

{¶30} 5. Dr. McDaniel authored a second report dated January 22, 2007. Dr. McDaniel noted that the office notes from Walker's treating physician indicated that he continued to experience back pain after the epidural injections. Thereafter, Dr. McDaniel opined as follows:

* * * In my professional opinion, given the lack of response to the treatment to date, the current clinical status is secondary to pre-existing degenerative disc disease and facet arthritis seen on MRI. In addition, the 1/10/07 note diagnosed a non-allowed disc herniation at L4-5.

* * * In my opinion, Mr. Walker is at maximum medical improvement for the claim allowances of lumbar strain and HNP at L5-S1. The strain has resolved and the disc herniation has been appropriately treated with medications, activity modification, therapy and epidural injections. Per the 1/10/07 note, the condition has become chronic and stable. There are non-allowed conditions impacting medical management of the claim. No further fundamental, functional or physiological change is likely to occur relative to the allowed conditions despite continued treatment and/or rehabilitation.

{¶31} 6. Thereafter, CCE filed a motion to terminate Walker's TTD compensation based on Dr. McDaniel's opinion that Walker's allowed conditions had reached MMI.

{¶32} 7. On April 11, 2007, Mark E. Coggins, M.D., requested authorization for additional epidural injections and physical therapy. That request was approved by CCE.

{¶33} 8. On May 21, 2007, CCE's motion to terminate TTD compensation was heard before a district hearing officer ("DHO"). The DHO relied on the January 22, 2007 report of Dr. McDaniel who opined that Walker's allowed conditions had reached MMI and Walker's TTD compensation was terminated effective May 21, 2007.

{¶34} 9. In June 2007, Dr. Coggins requested additional physical therapy[,] which CCE [denied].

{¶35} 10. Walker's appeal from the DHO's order terminating his TTD compensation was heard before a staff hearing officer ("SHO") on July 3, 2007. The SHO affirmed the prior DHO's order. As such, Walker's TTD compensation was terminated effective May 21, 2007.

{¶36} 11. Walker's further appeal was refused by order of the commission mailed July 18, 2007.

{¶37} 12. Thereafter, in August 2007, Walker changed physicians and began seeking treatment from Robert K. Nichols, D.C.

{¶38} 13. Dr. McDaniel authored an addendum on August 28, 2007. After reviewing the file and the additional medical evidence, Dr. McDaniel opined that Walker's treatment to date had been medically necessary and appropriate for the allowed conditions; Walker's request for additional therapy was not medically necessary and appropriate; and, further, that, in his opinion, it was unlikely that Walker would be able to return to his former position of employment and he recommended vocational rehabilitation in the future.

{¶39} 14. Dr. McDaniel authored another addendum dated September 19, 2007 wherein he opined that Walker's request for pain management evaluation was appropriate, but that continued chiropractic treatment was not necessary.

{¶40} 15. An independent medical evaluation was performed by Dean W. Erickson, M.D. In his November 7, 2007 report, Dr. Erickson opined that Walker's October 5, 2007 request for chiropractic treatment was not medically necessary; that there was no reason to additionally allow Walker's claim for aggravation of degenerative disc disease at L5-S1 since his claim had already been allowed for herniated disc at L5-S1; and that additional treatment was indicated for Walker's herniated disc. Dr. Erickson recommended a work conditioning program followed by a functional capacity evaluation.

{¶41} 16. On November 27, 2007, Dr. Nichols completed a C-84 certifying TTD compensation beginning November 19, 2007 and continuing. Dr. Nichols' November 27, 2007 treatment note indicates that Walker states that "he does feel improved by about 70% from where he started before coming here." Dr. Nichols also indicates, in the objective portion of his note, that Walker's "low back range of motion, actively, involving flexion/extension, right/left lateral flexion and bilateral rotation are improved to 70% of normal range." Dr. Nichols stated that Walker's prognosis was "steadily improving."

{¶42} 17. Dr. Nichols also authored a report dated December 5, 2007, wherein he detailed Walker's injury, his treatment, delays which occurred mid-treatment, his progress and his setbacks. Dr. Nichols stated that: "On 08/15/07, the injured worker came to my office because his condition was regressing further."

{¶43} 18. By order dated December 10, 2007, a DHO granted Walker's September 24, 2007 request for work hardening followed by a functional capacity evaluation and his October 2, 2007 request for additional chiropractic treatment three times a week for eight weeks. Walker testified that he gets significant pain relief from the treatments and the DHO concluded that Walker met his burden of proving that the physical therapy originally requested August 17, 2007 was reasonably related to his allowed conditions and was medically appropriate.

{¶44} 19. On January 14, 2008, Walker's motion for TTD compensation was heard before a DHO. The DHO granted the request for TTD compensation beginning November 19, 2007, as follows:

It has been established that new and changed circumstances exist by way of work hardening which was authorized by the District Hearing Officer in the Industrial Commission order dated 12/10/2007 which justifies a new start-up period of disability subsequent to the finding of maximum medical improvement which was effective 05/21/2007. It has been established that the recognized conditions in this claim independently rendered the Injured Worker temporarily and totally disabled for this new start-up period of disability.

This order is based on the opinion of Dr. Erickson dated 11/07/2007 and the C-84 of Dr. Nichols dated 11/27/2007.

{¶45} 20. CCE's appeal was heard before an SHO on March 13, 2008. The SHO agreed that Walker had established new and changed circumstances warranting the reinstatement of TTD compensation based upon Dr. Nichols' C-84 dated November 27, 2007, his treatment records from November 27 and December 5, 2007, as well as Walker's testimony regarding his participation in a work hardening program in January 2008.

{¶46} 21. CCE's further appeal was refused by order of the commission mailed April 11, 2008.

{¶47} 22. In the interim, Walker filed a motion asking the commission to exercise its continuing jurisdiction on January 23, 2008. Walker asked the commission to vacate the prior orders which terminated his TTD compensation based upon the finding of MMI. Walker argued that because Dr. McDaniel was not aware that additional physical therapy was approved after his report had been written, the commission's reliance upon that report constituted a clear mistake of law. Walker cited *State ex rel. Sellards v. Indus. Comm.*, 108 Ohio St.3d 306, 2006-Ohio-1058, in support. Further, Dr. McDaniel had stated that Walker's current status was secondary to pre-existing degenerative disc disease, facet arthritis and a non-allowed disc herniation at L4-5. Walker argued that, by order dated December 10, 2007, a DHO had, in reality, additionally allowed his claim for aggravation of pre-existing degenerative disc disease at L5-S1.

{¶48} 23. Walker's motion was heard before a DHO on March 13, 2008. The DHO denied Walker's request that the commission invoke its continuing jurisdiction based upon a mistake of law. Specifically, the DHO stated:

The Claimant was previously found to have reached maximum medical improvement effective 05/21/2007, based on Dr. McDaniel's 01/22/2007 report.

Claimant's counsel asserts that Dr. McDaniel was unaware of the treatment approved in this claim. Therefore, Claimant's counsel asserts the reliance upon Dr. McDaniel's opinion constitutes a mistake of fact.

However, Dr. McDaniel's report was completed on 01/22/2007. The C-9s approved in this claim are dated

04/11/2007 and 08/17/2007, subsequent to Dr. McDaniel's report.

Moreover, Claimant testified medical evidence in his favor was not on file at the time of the District Hearing Officer hearing dated 05/21/2007 and the Staff Hearing Officer hearing dated 07/03/2007.

It is the finding of the Staff Hearing Officer that the Claimant's failure to submit medical evidence in a timely manner for the Industrial Commission to consider does not constitute a new and changed circumstance.

* * *

It is the responsibility of the parties to exercise due diligence in submission of medical evidence.

In this claim, treatment was approved after Dr. McDaniel submitted his report.

Also, the 01/22/2007 report of Dr. McDaniel contains the conditions allowed in this claim.

Accordingly, the Hearing Officer finds the Claimant has failed to establish a mistake of law occurred in the prior orders.

(Emphasis sic.)

{¶49} 24. Walker's appeal was heard before an SHO on April 10, 2008. The SHO affirmed the prior DHO's order and specifically addressed Walker's argument concerning the applicability of the *Sellards* case:

By way of history the Staff Hearing Officer notes that the District Hearing Officer's order of 05/21/2007 found that the allowed conditions had reached maximum medical improvement based on Dr. McDaniel's 01/22/2007 report. The District Hearing Officer's decision was affirmed by the Staff Hearing Officer on 07/03/2007, and the Commission on 07/16/2007. The Injured Worker asserts that the Hearing Officer's reliance on Dr. McDaniel's report in their orders constitutes a mistake of law.

In support of his positions the Injured Worker cites Sellards vs. Indus. Comm. 108 Ohio St. 3d 306, (2006), which according to the Injured Worker, invalidates an examining physician's report that fails to consider evidence of authorized treatment that results in improvement of the Injured Worker's condition whether that evidence is contemporaneous with the doctor's examination or occurs after the examination.

The Staff Hearing Officer finds that the Injured Worker's position lacks merit. In Sellards the evidence showed that the Injured Worker had struggled to get approval for treatments that were recommended by his physician. Finally, on the same day that the finding of maximum medical improvement was made approval for treatment was given. The physician who examined the Injured Worker an[d] opined that the allowed conditions had reached maximum medical improvement had no knowledge that the further treatment had been approved. Considering these facts the Court stated[:]

The single issue presented in [sic] an evidentiary one. Sellards challenges Dr. Levy's opinion of maximum medical improvement as premature based on Dr. Spare's contemporaneously approved treatment plan as [sic] urges it's 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 the denial of temporary total compensation.

Clearly nothing in the Court's holding indicate[s] it is the Court's decision to invalidate a finding of maximum medical improvement based upon evidence that comes into existence three months after the finding was made.

Therefore, the Staff Hearing Officer finds that orders issued based on Dr. McDaniel's report were not predicated upon the mistake of law. Accordingly, the Injured Worker's request to have prior orders vacated pursuant to Section 4123.52 based on a mistake of law is denied.

The Injured Worker also argues that Dr. McDaniels [sic] failed to consider all of the allowed conditions in this claim. The Staff Hearing Officer also finds this position to be without merit. There is no condition that is currently allowed or that was allowed at the time of Dr. McDaniels' [sic] report that was not considered by him. Therefore, the Injured Worker's statement that the doctor failed to consider all of the allowed conditions lacks merit.

{¶50} 25. Walker's further appeal was refused by order of the commission mailed April 30, 2008.

{¶51} 26. Thereafter, both Walker and CCE filed separate mandamus actions in this court.

{¶52} 27. On January 14, 2009, this court consolidated case Nos. 08AP-606 and 08AP-884 for purposes of oral argument.

Conclusions of Law:

{¶53} 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.* (1967), 11 Ohio St.2d 141. 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.* (1986), 26 Ohio St.3d 76. 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.* (1987), 29 Ohio St.3d 56. 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.* (1981), 68 Ohio St.2d 165.

{¶54} For the reasons that follow, it is this magistrate's conclusion that this court should deny Walker's request for a writ of mandamus, and grant CCE's request for a writ of mandamus.

{¶55} 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.* (1982), 69 Ohio St.2d 630.

{¶56} In the present case, the commission terminated Walker's TTD compensation based upon a finding that Walker's allowed conditions had reached MMI. Ohio Adm.Code 4121-3-32(A) provides the following relevant definition:

(1) "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.

{¶57} In the present case, Dr. McDaniel conducted an independent medical examination of Walker in October 2006. At that time, Dr. McDaniel indicated that Walker was not at MMI and he needed further treatment, specifically epidural steroid injections. Following the treatment, Dr. McDaniel was again asked to render his opinion as to Walker's condition. In his January 22, 2007 report, Dr. McDaniel reviewed the additional medical evidence and concluded that Walker's allowed conditions had reached MMI. At the time he rendered this opinion, Walker was not requesting authorization for any additional treatment.

{¶58} Three months later, Walker requested authorization for additional physical therapy. Walker argues that, because Dr. McDaniel was unaware of this request for treatment, the commission abused its discretion by relying on his report.

{¶59} Walker cites the *Sellards* case in support of his argument that the commission abused its discretion by relying on the report of Dr. McDaniel. In *Sellards*, the claimant sustained a work-related injury in 1998. The claimant's allowed physical conditions reached MMI in January 2001. In November 2001, the claimant began seeing a psychiatrist for depression. The claimant's claim was additionally allowed for major depressive disorder, single episode in July 2002. Thereafter, on October 17, 2002, the claimant's treating physician submitted a C-9 treatment plan seeking approval for psychotherapy and medication management. That application was approved by the commission on October 22, 2002.

{¶60} On that same day, October 22, 2002, an independent medical examination was conducted by Dr. Levy concerning the extent of the claimant's psychiatric disability. Dr. Levy noted that, despite treatment, the claimant continued to

experience sufficient depressive symptoms to render him disabled; however, Dr. Levy concluded the disability was permanent and that the claimant's allowed psychiatric condition had reached MMI.

{¶61} On December 18, 2002, the commission terminated the claimant's TTD compensation based upon Dr. Levy's report that his allowed psychiatric condition had reached MMI.

{¶62} Ultimately, the claimant's case reached the Supreme Court of Ohio. In its decision, the *Sellards* court stated:

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.

{¶63} Approximately one year later, this court applied the rationale from *Sellards* in *State ex rel. Lloyd v. Indus. Comm.*, Franklin App. No. 07AP-79, 2007-Ohio-5020. In *Lloyd*, the claimant was undergoing treatment for an allowed psychological condition. The employer had the claimant evaluated by a psychiatrist, Dr. Miller, who found that

the claimant's allowed psychological condition had reached MMI. Approximately three weeks later, the claimant's attending psychiatrist submitted a request for additional psychiatric treatment. Specifically, the doctor sought to increase the frequency of treatment from the former rate of one visit per month to a new rate of one visit per week. The commission approved this request approximately two months after the MMI report was authored.

{¶64} This court found that the commission abused its discretion by terminating Lloyd's TTD compensation on grounds that his allowed psychological condition had reached MMI for multiple reasons.

{¶65} First, this court reviewed Dr. Miller's report and discovered that none of the records that Dr. Miller reviewed addressed the actual treatment which Lloyd had been receiving, nor did any of the records indicate the treatment that was being requested. Second, this court applied the rationale from *Sellards* and noted that Dr. Miller had not been aware of the specific psychiatric plan which was being requested for Lloyd. Third, this court specifically noted that there is a big difference between weekly and monthly psychiatric treatment. For those three reasons, this court found that the commission abused its discretion in *Lloyd*.

{¶66} In the present case, Dr. McDaniel first examined claimant in October 2006. Dr. McDaniel was aware of the treatment Walker had received and specifically indicated that further treatment was warranted. Following that additional treatment, Dr. McDaniel reviewed the additional medical records and concluded that Walker's allowed conditions had reached MMI. At that time, there were no requests for additional treatment pending.

{¶67} Three months later, Walker sought additional treatment and that treatment was approved.

{¶68} This situation is distinguishable from *Sellards*. In *Sellards*, on the date one doctor opined that the claimant had reached MMI, the claimant's treating physician sought additional treatment. There is a big difference between a treating physician seeking additional treatment on the same day another doctor renders an MMI opinion and a treating physician seeking additional treatment three months after another doctor renders an MMI opinion.

{¶69} Likewise, this case is distinguishable from *Lloyd*. In the present case, Dr. McDaniel was well aware of the treatment Walker had received as well as the recommended treatment. In *Lloyd*, Dr. Miller was not even aware of the treatment that the claimant had already received. Further, in the present case, the request for additional treatment, which was filed three months after Dr. McDaniel's report, was merely a continuation of the same basic treatment Walker had already received. In *Lloyd*, the claimant's treating physician sought authorization for a significant increase in the frequency of treatment. For those reasons, *Lloyd* is distinguishable.

{¶70} In arguing that the commission abused its discretion by failing to exercise its continuing jurisdiction, Walker contends that Dr. McDaniel had failed to consider all of the allowed conditions when he opined Walker's physical conditions had reached MMI. In support, Walker points to the December 10, 2007 DHO's order authorizing additional physical therapy followed by a work hardening program and a functional capacity evaluation. At that time, Walker had also requested that his claim be

additionally allowed for aggravation of pre-existing degenerative disc disease at L5-S1.

The DHO determined:

The District Hearing Officer finds that the issue presented by the 10/05/2007 C-86 Motion requesting the additional allowance of aggravation of pre-existing degenerative disc disease at L5-S1 is moot. The Employer has previously agreed to certify this claim for herniated disc L5-S1, which allowance encompasses and includes the requested additional allowance of aggravation of pre-existing degenerative disc disease at L5-S1, and the requested additional allowance is therefore subsumed in the previous allowance for herniated disc L5-S1. Therefore, the C-86 Motion filed by the Injured Worker on 10/05/2007 is found to be moot.

{¶71} In his report finding that Walker had reached MMI, Dr. McDaniel had stated:

* * * In my professional opinion, given the lack of response to the treatment to date, the current clinical status is secondary to pre-existing degenerative disc disease and facet arthritis seen on MRI. In addition, the 1/10/07 note diagnosed a non-allowed disc herniation at L4-5.

Because Dr. McDaniel did not consider "pre-existing degenerative disc disease" (allowed by DHO's order of December 10, 2007), he did not consider all the allowed conditions.

{¶72} The magistrate rejects Walker's argument for several reasons.

{¶73} First, in spite of Walker's assertion that aggravation of pre-existing degenerative disc disease at L5-S1 became an allowed condition by a DHO's order of December 10, 2007, none of the commission orders following thereafter included it as an allowed condition. Likewise, Walker's doctor did not list it as an allowed condition thereafter.

{¶74} Second, in his report, Dr. McDaniel had listed three non-allowed conditions then affecting Walker's condition: pre-existing degenerative disc disease; facet arthritis and disc herniation at L4-5.

{¶75} Third, Walker had a pre-existing herniated disc at L5-S1 which had required surgery prior to the date of the injury in this claim. Also, in spite of the fact that CCE certified Walker's claim for herniated disc at L5-S1, none of the MRIs show a herniated disc of L5-S1; they only show disc protrusion at L5-S1.

{¶76} Fourth, none of Walker's medical evidence supports a finding that this new condition caused him to be disabled.

{¶77} The November 27, 2007 C-84 relied on by the commission to reinstate TTD compensation indicates that the disability beginning November 19, 2007 is due to condition 847.2, lumbar sprain/strain. This condition resolved long before November 27, 2007.

{¶78} Lastly, in its order denying Walker's request that the commission exercise its continuing jurisdiction, the commission noted that Walker testified that medical evidence in his favor was not on file at the time of either the DHO's hearing (May 21, 2007) or the SHO's hearing (July 30, 2007). The DHO found that Walker's failure to submit medical evidence in a timely manner did not constitute a new and changed circumstance. Walker had the opportunity to present medical evidence that would contradict Dr. McDaniel's opinion that he had reached MMI. Further, the magistrate finds that Walker's request for additional treatment three months after Dr. McDaniel's report cannot be used to invalidate Dr. McDaniel's report. The three month gap is simply too large. Independent medical examiners cannot see that far into the future

and, to hold otherwise, would ultimately invalidate any number of physicians' reports. Claimant would need only to request additional treatment after the independent medical examiner's report. Because the commission did not abuse its discretion in relying on the report of Dr. McDaniel to terminate Walker's TTD compensation as of May 12, 2007, the commission likewise did not abuse its discretion by refusing to exercise its continuing jurisdiction as reliance upon Dr. McDaniel's report does not constitute a clear mistake of law.

{¶79} Based on the foregoing, it is this magistrate's conclusion that this court should deny Walker's request for a writ of mandamus in case No. 08AP-606.

{¶80} In its mandamus action, CCE argues that the commission abused its discretion when it reinstated TTD compensation to Walker effective November 19, 2007. CCE cites *State ex rel. Josephson v. Indus. Comm.*, 101 Ohio St.3d 195, 2004-Ohio-737, in support. For the reasons that follow, it is this magistrate's conclusion that this court should grant CCE's request for a writ of mandamus.

{¶81} As noted previously, this magistrate concluded that the commission did not abuse its discretion when it determined that Walker's allowed conditions had reached MMI as of May 21, 2007. At that time, the commission terminated Walker's TTD compensation. Having said that, it is undisputed that TTD compensation can be reinstated notwithstanding the declaration that Walker's allowed conditions had reached MMI, if new and changed circumstances warrant the reinstatement. As *State ex rel. Bing v. Indus. Comm.* (1991), 61 Ohio St.3d 424 noted, a claimant whose condition has reached MMI may experience a flare-up of an existing injury which renders the claimant

again temporarily and totally disabled. In those situations, the claimant can receive a new period of TTD compensation.

{¶82} In the present case, CCE argues that Walker did not present sufficient evidence that he had experienced a flare-up of his condition which would warrant the renewed period of TTD compensation. In granting that new payment of TTD compensation, the commission relied on Dr. Nichols' November 27, 2007 C-84 and his treatment records dated November 27 and December 5, 2007.

{¶83} Dr. Nichols' November 27, 2007 C-84 does not contain any objective clinical findings as the basis for his opinion that Walker was temporarily and totally disabled beginning November 19, 2007. Further, the only condition listed as causing the disability is 847.2, lumbar sprain/strain—a condition which had clearly resolved. This document does not support the reinstatement of TTD compensation.

{¶84} In his November 27, 2007 office note, Dr. Nichols noted under the subjective portion of his note that Walker "does feel improved by about 70% from where he started before coming here." Walker began treating with Dr. Nichols in August 2007. In the objective portion of his treatment note, Dr. Nichols indicates that Walker's "low back range of motion, actively, involving flexion/extension, right/left lateral flexion and bilateral rotation are improved to 70% of normal range." Unfortunately, Dr. Nichols' office records do not contain any objective findings from August 2007, and this treatment note from November 27, 2007 likewise does not provide any objective physical findings. Nothing in this treatment note provides objective medical evidence that Walker's allowed conditions had flared-up or that he had suffered an exacerbation of his allowed conditions since he was found to have reached MMI in May 2007.

{¶85} The commission also cites Dr. Nichols' December 5, 2007 office note. The record does not contain an office note from December 5, 2007; however, Dr. Nichols did author a report on that date in response to Dr. Erickson's independent medical examination report dated November 7, 2007. In this report, Dr. Nichols explains what he believes are the failings of Dr. Erickson's report and argues that Walker's claim should be amended to include aggravation of pre-existing degenerative disc disease at L5-S1 and that rehabilitation services should be approved. In the body of that report, Dr. Nichols does indicate that, "[o]n 08/15/07, the injured worker came to my office because his condition was regressing further." The fact that Walker's condition had regressed in August 2007 does not support a period of disability beginning November 19, 2007. As with the other medical evidence cited by the commission, this report does not contain any objective physical findings. Instead, it merely expresses Walker's subjective belief that his condition was regressing. The report does not constitute some evidence that Walker's allowed conditions had worsened and does not support a new period of TTD compensation.

{¶86} Lastly, the SHO relied on claimant's testimony regarding his participating in a work hardening program in January 2008. However, Walker's participation in a work hardening program without an exacerbation of his allowed conditions does not support the reinstatement of TTD compensation. Furthermore, a review of all the testimony Walker provided at the hearing fails to provide any evidence warranting the reinstatement of TTD compensation. Specifically, at page 112 of the stipulated record, and in response to whether he is still off work, Walker responded in the affirmative. On pages 117 to 118, in response to whether Walker knew when he began the work

hardening program, Walker responded that he began the program on January 8, 2008. On pages 134 to 135, in response to questions regarding what treatment he was receiving at the time of Dr. McDaniel's report that opined that he had reached MMI, Walker responded that he was participating in physical therapy at the time of the hearing. On pages 136 to 137, Walker explained further that, at the hearing to determine the MMI issue, he was attending physical therapy; however, his records were not on the computer and it appears that his attorney did not attend that hearing. Lastly, in response to whether or not his condition was improving, through his participation in the work hardening program, Walker responded that he was getting better.

{¶87} None of the above testimony supports a finding that Walker suffered an exacerbation of his allowed conditions which disabled him in November 2007. It is undisputed that, once a claimant has reached MMI, the claimant may still require treatment. In some instances, a claimant's condition may improve with further treatment. However, participation in that treatment and the subsequent improvement do not support the reinstatement of TTD compensation absent medical evidence that the claimant's allowed conditions had worsened since it was determined that the claimant's allowed conditions were at MMI. The record in this case simply does not support such a finding. Further, in *Josephson*, the Supreme Court of Ohio re-emphasized that the only new and changed circumstance sufficient to re-entitle a claimant to TTD compensation is the worsening of the claimant's condition accompanied by a prognosis that the worsening is only temporary. As such, the magistrate finds that the commission did abuse its discretion in reinstating Walker's TTD compensation.

{¶88} Based on the foregoing, it is this magistrate's conclusion that this court should deny Walker's request for a writ of mandamus because the commission did not abuse its discretion when it found that his allowed conditions had reached MMI nor did the commission abuse its discretion when it refused to exercise its continuing jurisdiction to reconsider the matter. Further, based on the foregoing, it is this magistrate's conclusion that this court should grant CCE's request for a writ of mandamus ordering the commission to vacate its order which reinstated Walker's TTD compensation as of November 19, 2007, because the stipulated evidence does not contain some objective medical evidence that Walker's allowed conditions had worsened following the commission's determination that those conditions had reached MMI.

/s/ Stephanie Bisca Brooks
STEPHANIE BISCA BROOKS
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).