

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

The State of Ohio ex rel.	:	
Houston Machine Products, Inc.,	:	
	:	
Relator,	:	
	:	
v.	:	No. 08AP-985
	:	
Industrial Commission of Ohio	:	(REGULAR CALENDAR)
and Daryl Sanger,	:	
	:	
Respondents.	:	

D E C I S I O N

Rendered on September 1, 2009

Sebaly Shillito + Dyer, and Danyelle S.T. Wright, for relator.

Richard Cordray, Attorney General, and Stephen D. Plymale, for respondent Industrial Commission of Ohio.

Hochman & Plunkett Co., LPA, Brett Bissonnette, and Don Scott, for respondent Daryl Sanger.

IN MANDAMUS

BROWN, J.

{¶1} Relator, Houston Machine Products, Inc., has filed this original action requesting that this court issue a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its orders that awarded temporary total disability ("TTD") compensation to respondent, Daryl Sanger ("claimant"), and order the commission to find that claimant is not entitled to that compensation. Further, relator

contends that the commission abused its discretion by refusing relator's request for reconsideration.

{¶2} This matter was referred to a magistrate of this court, 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, recommending that this court deny relator's request for a writ of mandamus. No objections have been filed to that decision.

{¶3} As there have been no objections filed to the magistrate's decision, and it contains no error of law or other defect on its face, based on an independent review of the evidence, this court adopts the magistrate's decision. Relator's request for a writ of mandamus is denied.

Writ denied.

FRENCH, P.J., and SADLER, J., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

The State of Ohio ex rel.	:	
Houston Machine Products, Inc.,	:	
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Relator,	:	
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v.	:	No. 08AP-985
	:	
Industrial Commission of Ohio	:	(REGULAR CALENDAR)
and Daryl Sanger,	:	
	:	
Respondents.	:	

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

Rendered on April 21, 2009

Sebaly Shillito + Dyer, and Danyelle S.T. Wright, for relator.

Richard Cordray, Attorney General, and Stephen D. Plymale, for respondent Industrial Commission of Ohio.

Hochman & Plunkett Co., LPA, Brett Bissonnette and Don Scott, for respondent Daryl Sanger.

IN MANDAMUS

{¶4} Relator, Houston Machine Products, Inc., has filed this original action requesting that this court issue a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its orders which awarded temporary total disability ("TTD") compensation to respondent Daryl Sanger ("claimant"), and ordering the commission to find that claimant is not entitled to that compensation. Further, relator

contends that the commission abused its discretion by refusing relator's request for reconsideration.

Findings of Fact:

{¶5} 1. Claimant sustained a work-related injury on February 15, 2007, and his claim was originally allowed for "sprain lumbosacral."

{¶6} 2. Claimant began seeing Kenneth M. Cardlin, M.D., who noted in April 2007 that claimant's symptomatology continues to worsen with pain radiating into both legs. Dr. Cardlin opined that claimant's claim should be allowed for additional conditions due to symptoms of radiculopathy and degenerative disc disease. The record contains treatment notes from Dr. Cardlin from April 6 through May 18, 2007. Dr. Cardlin opined that claimant remained unable to return to work, noted that straight leg raise testing was negative, and indicated that claimant should be evaluated regarding the use of epidurals or possibly surgery.

{¶7} 3. Claimant remained off work and relator paid him his full wages, through salary continuation, beginning February 28, 2007.

{¶8} 4. In June 2007, claimant filed a motion seeking to amend his claim to allow the following additional conditions: disc protrusions at L4-L5 and L5-S1 and lumbar radiculitis.

{¶9} 5. In an order mailed June 13, 2007, the Ohio Bureau of Workers' Compensation ("BWC") issued an order additionally allowing claimant's claim for the requested conditions based upon the June 8, 2007 report of Robert Brown, M.D., who reviewed an MRI study of the lumbar spine and an EMG and concluded that those conditions resulted from claimant's work-related injury.

{¶10} 6. Claimant was examined by Steven S. Wunder, M.D. In his June 19, 2007 report, Dr. Wunder provided his physical findings upon examination and identified the medical evidence which he reviewed. Dr. Wunder concluded that claimant's subjective complaints were not supported by objective findings as claimant did not have true radicular symptoms or signs. Dr. Wunder concluded that the allowed condition of sprain lumbosacral area had reached maximum medical improvement ("MMI").

{¶11} 7. Claimant began seeing Richard M. Donnini, D.O., in June 2007. The record contains office notes of Dr. Donnini from June 2007 through June 27, 2008. Dr. Donnini's office notes indicate that claimant repeatedly indicated that he had constant, shooting, sharp, throbbing, and severe back pain which interfered with his daily activities of working, sleeping, and performing household activities. Dr. Donnini's treatment included epidural injections and physical therapy for the lumbar radiculitis. Dr. Donnini's office notes also indicate that the pain medication, including opiates, was not alleviating claimant's pain. Dr. Donnini completed several Medco-14 forms indicating that claimant could return to work as of July 24, 2007; however, Dr. Donnini noted that claimant had serious restrictions. Specifically, claimant could sit, stand and walk four-to-six hours provided that he be able to change positions, have a break, and stand every 15 minutes; claimant could not bend, twist, reach below knee level, push, pull, squat or kneel, and not lift above his shoulders; and claimant could not lift any weight at all. Further, Dr. Donnini indicated that claimant was unable to perform his previous job duties.

{¶12} 8. Dr. Wunder drafted an addendum to his earlier report on August 27, 2007. In that report, Dr. Wunder noted that the medical records indicate that claimant has had lower extremity pain and numbness in the lateral portions of his thighs and calves for

five years. Dr. Wunder also noted that claimant had a history of chronic back pain and noted a 2004 MRI that showed osteophytes from L2-S1 and annular bulging discs from L2-S1. Dr. Wunder indicated that the 2007 MRI was very similar to the earlier MRI and concluded:

* * * I, therefore, do not believe that there is an aggravation of a pre-existing condition nor do I believe that the mild disc bulges at L4-5 and L5-S1 are any different than what he had in the past. There is insufficient evidence to support that there has been a substantial aggravation.

{¶13} 9. Dr. Donnini completed page two of a C-140 on August 31, 2007. On that form, Dr. Donnini indicated that claimant could sit, stand, and walk for up to five hours a day provided he have breaks every 15 minutes; never bend, squat, crawl, climb, or reach; never lift or carry any weight; and was unable to use foot controls. Dr. Donnini indicated that the restrictions were temporary through approximately January 24, 2008, and that claimant was unable to perform his previous duties due to the restrictions.

{¶14} 10. As of September 16, 2007, relator ceased paying claimant salary continuation in lieu of TTD compensation.

{¶15} 11. On October 16, 2007, relator's appeal from the BWC order allowing claimant's claim for additional conditions was heard before a district hearing officer ("DHO"). The DHO vacated the prior BWC order and determined that claimant's claim should not be allowed for the additional conditions based upon Dr. Wunder's August 2007 report and the April 2004 MRI. Further, the DHO concluded that claimant did not present any medical evidence demonstrating that his lumbar conditions were substantially aggravated by his work injury.

{¶16} 12. Dr. Donnini completed a C-84 on November 2, 2007 certifying that claimant was temporarily totally disabled from October 17, 2007 through an estimated return-to-work date of January 16, 2008. Dr. Donnini listed only the original lumbar sprain condition.

{¶17} 13. Dr. Wunder authored a second addendum on November 26, 2007 in response to a report from Dr. Donnini from October 2007. Dr. Wunder again explained why, in his opinion, claimant's claim should not be allowed for the additional conditions.

{¶18} 14. On November 28, 2007, claimant's appeal from the DHO's order disallowing his claim for the additional conditions was heard before a staff hearing officer ("SHO"). The SHO vacated the prior DHO's order and determined that claimant's claim should be additionally allowed for protruding disc L4-5 and L5-S1 as well as lumbar radiculitis. The SHO relied on the reports of Dr. Donnini and comparisons of the MRIs and EMGs in the record, both pre- and post-injury.

{¶19} 15. Claimant's request for TTD compensation was heard before a DHO on December 5, 2007, and the DHO concluded that claimant was entitled to TTD compensation beginning October 17, 2007 and continuing based on Dr. Donnini's office note of October 17, 2007 as well as his C-84.

{¶20} 16. Relator's appeal was heard before an SHO on January 10, 2008. The SHO affirmed the prior DHO's order awarding TTD compensation to claimant.

{¶21} 17. Dr. Donnini continued to certify that claimant was temporarily totally disabled through July 2008.

{¶22} 18. The record contains three surveillance reports from BRI, Inc. ("BRI"). The investigator for BRI videotaped and reported on claimant's observed activities several

times in April and December 2007, as well as one day in January and March 2008, and again on May 10 and 30, 2008. Claimant is observed opening and closing the hatchback on his automobile, bending inside the automobile to pick up certain items and carrying those items inside. Claimant was also observed on one occasion carrying a flat of flowers and, on another occasion, carrying a large bag of dog food.

{¶23} 19. Relator provided copies of the surveillance as well as additional medical records to Marc W. Whitsett, M.D., who conducted an independent medical examination of claimant on June 10, 2008. Following his examination of claimant and his review of the evidence provided to him, Dr. Whitsett concluded that all of claimant's allowed conditions had reached MMI and that claimant was not able to return to his former position of employment. Due solely to the allowed conditions, Dr. Whitsett noted that claimant should not lift anything greater than 20 pounds and only occasionally bend at the waist. Dr. Whitsett did indicate that claimant should not utilize foot controls but indicated that there were no restrictions with regard to his arms and hands and indicated that claimant could lift items overhead. Dr. Whitsett noted that total weight bearing should not exceed 20 pounds except occasionally. Dr. Whitsett also opined that the current request for an additional MRI and additional steroid injections was not reasonable or necessary since there has been no significant neurological change or deterioration of claimant's condition.

{¶24} 20. In response, Dr. Donnini authored a report dated July 16, 2008. Dr. Donnini did not take issue with Dr. Whitsett's report. With regard to the surveillance evidence, Dr. Donnini stated:

I do not find anything particularly alarming in what is noted in this report. I do not think anyone is saying that Mr. Sanger

cannot bend or lift. I think what temporary total disability is that he is not capable of sustained remunerative employment. I do not see any persistent activity in this gentleman and I think it is difficult to tell on a videotape whether a person is having pain or discomfort. He is noted to have reduced range of motion with discomfort on a physical examination, but that does not mean that a person cannot bend over and touch the ground by bending hips, etc. * * * Again, his disability relates to his inability to perform repetitive activities on a 40-hour week basis and at this time, I do not feel with medical probability relating to his work injury that he can do so. * * *

{¶25} Dr. Donnini noted that there has been a significant delay in claimant's treatment which, in his opinion, has delayed claimant's condition from improving. Lastly, Dr. Donnini concluded that, until claimant completed his therapy and, if not improved, a neurosurgical evaluation and possible diskogram, his condition was not at MMI and claimant remained temporarily and totally disabled.

{¶26} 21. On July 23, 2008, relator filed a motion for reconsideration requesting the commission to consider the following:

- 1) Reconsideration of the Industrial Commission's orders denying employers appeals dated January 31, 2008 and May 10, 2008, 2) A finding of fraud, 3) An overpayment order and or reimbursement/return of TTD benefits awarded, and 4) Reimbursement of all medical bills and prescriptions incurred, as a result of Claimant's fraudulent conduct.

{¶27} 22. In two separate orders mailed September 5, 2008, the commission denied relator's request for reconsideration.

{¶28} 23. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶29} 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.

{¶30} In this mandamus action, relator first argues that the commission abused its discretion in awarding claimant TTD compensation. Relator contends that the evidence demonstrates that claimant is not entitled to that compensation. Second, relator argues that the commission abused its discretion by denying its request for reconsideration. Relator asserts that it complied with the commission's own rules and demonstrated that it was entitled to relief. For the reasons that follow, it is this magistrate's decision that this court should deny relator's request for a writ of mandamus.

{¶31} 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.

{¶32} In support of its first argument, relator points to the June 19, 2007 report of Dr. Wunder who opined that claimant's allowed conditions of lumbosacral sprain had reached MMI. Further, relator points out that Dr. Wunder stated that there were no objective findings to validate claimant's radicular symptoms or signs. Relator also contends that Dr. Donnini was treating claimant for nonallowed conditions during this time period and that his certification that claimant was temporarily totally disabled was based, in part, on these nonallowed conditions. Lastly, relator contends that the surveillance evidence which it submitted clearly establishes that claimant has been exaggerating his symptoms and that he is clearly capable of performing activities outside the restrictions placed upon him by Dr. Donnini. Specifically, relator notes the following in its brief:

- a. Mr. Sanger is seen sitting for 55 minutes on December 4, 2007, 56 minutes on January 9, 2008, and for over 20 minutes three different times on March 29, 2008.
- b. On March 29, 2008, Mr. Sanger is seen lifting and carrying 4 different items (a gun, suitcase, a dog and a backpack) within a 30-minute period.
- c. On May 10, 2008, Mr. Sanger is seen lifting, holding, and carrying a flat of flowers for more than a few seconds.
- d. On May 30, 2008, Mr. Sanger is seen lifting a 17.6 lb. bag of dog food from a grocery cart into a van and from a van into the house.

(Relator's brief, at 13; footnotes omitted.)

{¶33} In arguing that claimant was, in fact, at MMI in June 2007 when Dr. Wunder examined him, relator argues that, instead of returning to work in February 2007 under the restrictions set out by Dr. Cardlin, claimant began "doctor shopping" so that he would

not have to return to work. In April 2007, Dr. Cardlin indicated that claimant could not return to work. Relator had originally paid claimant wages in lieu of TTD compensation through September 16, 2007. It was after this that claimant sought TTD compensation.

{¶34} Claimant sought TTD compensation beginning October 17, 2007 and continuing. Ultimately, the commission granted claimant this compensation based upon Dr. Donnini's office note from October 17, 2007 as well as his C-84. During this time, the BWC granted claimant's request that his claim be additionally allowed for protruding discs and radiculopathy. While a DHO vacated the BWC's order and denied the additional allowances, in November 2007, an SHO determined that claimant's claim should be additionally allowed for the additional conditions.

{¶35} Relator argues that, inasmuch as Dr. Donnini did not immediately contradict Dr. Wunder's June 2007 report finding claimant's allowed condition had reached MMI, Dr. Donnini must have agreed with Dr. Wunder's opinion. The magistrate finds that conclusion is not required.

{¶36} In the present case, relator paid claimant wages in lieu of compensation through September 2007. As such, even though Dr. Wunder had opined that claimant's allowed conditions had reached MMI in June 2007, relator did not stop paying compensation to claimant. However, after relator ceased paying claimant wages in lieu of compensation in September 2007, claimant sought TTD compensation based upon Dr. Donnini's October 17, 2007 office note and C-84. Relator's argument goes to credibility of the evidence and the commission as fact finder has the discretion to make that determination. Teece.

{¶37} Relator also contends that claimant was not entitled to TTD compensation because Dr. Donnini was treating him for nonallowed conditions. Relator bases this argument on the fact that it was not until November 2007 that the SHO vacated the prior DHO's order and determined that claimant's claim should be additionally allowed for protruding disc L4-5 and L5-S1 as well as lumbar radiculitis. However, in making this argument, relator ignores two pertinent facts: (1) in an order mailed June 13, 2007, the BWC issued an order additionally allowing claimant's claim for the requested conditions, and (2) claimants often receive treatment for conditions which, although not currently allowed in a claim, are pending and ultimately are allowed. For these reasons, relator's argument lacks merit.

{¶38} The remainder of relator's argument focuses on its assertion that it satisfied its burden of proving that it was entitled to reconsideration. Relator asserts that its evidence of claimant's physical activities and his obvious fraudulent conduct clearly supported its request for reconsideration. For the reasons that follow, this magistrate disagrees.

{¶39} In its brief, relator concedes that it failed to file its request for reconsideration within the 14-day period mandated by IC Resolution 05-1-02. The Supreme Court of Ohio has held that the commission does not abuse its discretion when it fails to grant an untimely filed request for reconsideration. *State ex rel. Carter v. Penske Truck Leasing, Inc.* (2002), 94 Ohio St.3d 208. Relator also argues that the commission should have granted it a hearing based on the evidence of fraud it presented instead of denying the request for reconsideration which relator actually requested. However, relator is unable to cite any case law requiring the commission to find some way to

construe an untimely request for reconsideration as a motion requesting the commission to exercise its continuing jurisdiction instead of simply granting or denying the requested motion based upon the actual issue presented. For whatever reason, relator chose to withhold the surveillance evidence from the hearings and the commission did not abuse its discretion by denying its request for reconsideration which was untimely filed.

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

/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).