

Ohio ("commission"), to vacate its order that denied relator's request for temporary total disability ("TTD") compensation, and to enter an order granting that compensation.

{¶2} This court referred this matter 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 deny the requested writ.

{¶3} Relator filed objections to the magistrate's decision. In those objections, he contends, generally, that the magistrate erred by determining that he had not met his burden to show an exacerbation of his condition sufficient to justify TTD compensation. In essence, relator asks this court to reweigh the evidence, a task we are not at liberty to undertake. See *State ex rel. LTV Steel Co. v. Indus. Comm.* (2000), 88 Ohio St.3d 284, 287, 2000-Ohio-328. Instead, we agree with the magistrate's analysis of the issues, and we agree that the commission did not abuse its discretion by denying relator's request for TTD compensation. Therefore, we overrule relator's objections.

{¶4} Having conducted an independent review of the record in this matter, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained in it. Accordingly, we deny the requested writ.

*Objections overruled,
writ of mandamus denied.*

BRYANT and KLATT, 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. James N. Ratliff,	:	
	:	
Relator,	:	
	:	
v.	:	No. 09AP-257
	:	
Industrial Commission of Ohio	:	(REGULAR CALENDAR)
and Vec Systems, Inc.,	:	
	:	
Respondents.	:	
	:	

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

Rendered on July 28, 2009

Green Haines Sgambati, Co., L.P.A., Ronald E. Slipski, Shawn D. Scharf and John C. Park, for relator.

Richard Cordray, Attorney General, and Douglas R. Unver, for respondent Industrial Commission of Ohio.

Letson, Griffith, Woodall, Lavelle & Rosenberg Co., LPA, Mark E. Bumstead and Lynn B. Griffith, III, for respondent Vec Systems, Inc.

IN MANDAMUS

{¶5} Relator, James N. Ratliff, has filed this original action requesting that this court issue a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order which denied relator's request for temporary total

disability ("TTD") compensation, and ordering the commission to find that he is entitled to that compensation.

Findings of Fact:

{¶6} 1. Relator sustained a work-related injury on May 26, 2005, and his workers' compensation claim has been allowed for "contusion scalp; sprain of neck; sprain lumbar region; dislocated acromioclavicular closed, right; L5-S1 herniated disc."

{¶7} 2. Relator received TTD compensation until it was terminated on August 1, 2007, based upon the finding that his allowed conditions had reached maximum medical improvement ("MMI"). In terminating his TTD compensation, the commission relied on the June 7, 2007 report of Paul T. Scheatzle, D.O. In his report, Dr. Scheatzle noted the results of certain diagnostic testing with regards to relator's back condition: "Lumbar spine series on July 24, 2005, showed apparent retrolisthesis at L5-S1." With regard to relator's prior treatment, Dr. Scheatzle noted: "He has had therapy and injections. His symptoms have waxed and waned over the last couple of years, but overall, his condition has plateaued and no significant physiological change can be expected." Dr. Scheatzle concluded that relator was able to perform light-duty work with occasional lifting up to 20 pounds, no repetitive bending, twisting, climbing or crawling, unlimited sitting provided he be able to change his position every 30 minutes, standing frequently with the ability to change position every 30 minutes, and walking a block before stopping to rest.

{¶8} 3. Thereafter, relator participated in vocational services. Ultimately, a long-term training program at ITT for Criminal Justice was approved. Unfortunately,

relator was not chosen for the February 2008 training group and was urged to reapply for the next session.

{¶9} 4. In the interim, relator saw Michael T. Engle, M.D., in October 2006. According to Dr. Engle's office note, relator's activities in physical therapy aggravated his pain. Dr. Engle recommended: "We are going to go ahead and repeat his facet joint injections in hopes that we can improve his low back pain symptoms and make him more successful in his work hardening program."

{¶10} 5. Relator's treating physician, Russell A. Morrison, D.O., sought and received authorization for additional injections in January, April, and September 2007 as well as March 2008.

{¶11} 6. A functional capacity evaluation ("FCE") was performed on October 17, 2007. In the history portion of the FCE, it was noted that relator reported the following:

He reports he has had X-rays, EMG, and MRI diagnostic tests. He has had 3 epidurals and [illegible] facet blocks injections. He has gone to the emergency room 3 or 4 times since the injury for shots of Toridol when the pain gets bad. He gets shots occasionally now in his physician's office rather than go to the emergency room. He reports he was involved in a car accident 2 weeks ago when someone backed into him which has aggravated his back pain. James Ratliff reported low pain at an intensity of 3 (0 = no pain; 1,2,3 = low; 4,5,6 = moderate; 7,8,9 = severe[;] 10 = emergency pain). He reported that the pain ranges from 1 at best to 10 at its worst. He states that the weather and excess activities or prolonged positions especially bending aggravate his symptoms, and that medication provides relief. Perceived abilities include: sitting 60 minutes, standing 300 minutes, walking 300 minutes, driving 180 minutes, and lifting 25-30 lbs.

{¶12} The evaluator concluded that relator could perform medium work as follows:

The results of this evaluation indicate that James Ratliff is currently able to function in the Medium physical demand level according to the U.S. Department of Labor Dictionary of Occupational Titles for an 8 hour day. He is able to perform at the occasional level: floor to waist lift 130 [sic] pounds, waist to shoulder lift 28 pounds, shoulder to overhead lift 42 pounds, and bilateral carry 53 pounds. He is able to perform at the frequent level: floor to waist lift 30 pounds, waist to shoulder lift 20 pounds, shoulder to overhead lift 20 pounds, and bilateral carry 30 pounds. He is able to constantly walk, grasp, forward reach and stand. He is able to occasionally stoop. He is able to frequently: climb ladders, sit, climb stairs, balance, crouch, kneel, grasp, push, pull, and reach to all levels.

{¶13} 7. In February 2008, relator was referred for a consultation with neurosurgeon Brian P. Brocker, M.D.

{¶14} 8. In his March 13, 2008 report, Dr. Brocker opined that relator was a candidate for a diskectomy and, because relator's most recent MRI was three years old, Dr. Brocker recommended a repeat MRI as well as EMG/NCV tests and x-rays.

{¶15} 9. The lumbar MRI was performed on April 8, 2008. The MRI revealed: "Grade I retrolisthesis of L5 on S1 with bulging of the disc produces foraminal stenosis on the left. No finding to explain the patient's right-sided radiculopathy."

{¶16} 10. Thereafter, Dr. Brocker sought authorization for additional lumbar epidural injections, vocational rehabilitation, an FCE, and a lumbar TENS unit. The EMG testing ultimately revealed right S1 motor radiculopathy.

{¶17} 11. The record also contains office notes from Dr. Brocker from April and May 2008. In his April 2008 office note, Dr. Brocker opined that Grade I retrolisthesis L5 on S1 should be allowed in relator's claim. Dr. Brocker discussed conservative management options with relator, including medications, physical therapy, additional epidural injections, and behavior modification. Dr. Brocker noted that surgery should be

considered only if the conservative measures fail to provide relator with significant pain relief. In his April 2008 office note, Dr. Brocker noted that relator had built up a resistance to the medication Percocet, which he had been taking for some time. Dr. Brocker prescribed Oxycontin for relator and discussed with him the risk of addiction. In his May 2008 office note, Dr. Brocker noted that relator continues with low back, leg, hip and thigh pain which he describes as constant, right-sided, sharp, stabbing, throbbing and aching. Conservative management options were again recommended and Dr. Brocker increased relator's dosage of Oxycontin. Relator received an additional epidural injection.

{¶18} 12. In March 2008, relator filed a C-86 seeking payment of a new period of TTD compensation beginning March 31, 2008 and continuing while relator received an additional series of lumbar epidurals. In support, relator submitted the March 20, 2008 C-9 approving a series of three lumbar epidurals, the March 31, 2008 C-84 signed by Dr. Brocker certifying TTD compensation through an estimated return-to-work date of June 30, 2008, and Dr. Brocker's March 13, 2008 consultation report.

{¶19} 13. In an order mailed April 15, 2008, relator's request for a new period of TTD compensation beginning March 31, 2008 was approved by the Ohio Bureau of Workers' Compensation ("BWC").

{¶20} 14. Relator's employer appealed and the matter was heard before a district hearing officer ("DHO") on June 18, 2008. The DHO affirmed the earlier BWC order based on Dr. Brocker's March 31, 2008 report and the C-84.

{¶21} 15. The employer appealed and the matter was heard before a staff hearing officer ("SHO") on July 24, 2008. The SHO denied the requested period of TTD compensation as follows:

It is the finding of the Staff Hearing Officer that temporary total compensation from 3/31/2008 to date is specifically denied as requested for the reason that by prior District Hearing Officer order dated 8/1/2007, the Injured Worker's physical conditions were found to have reached maximum medical improvement, the same conditions temporary total compensation is now being requested and reinstated. Said order was published and was affirmed throughout the remainder of the Administrative Appeal process.

The Staff Hearing Officer finds that for the above stated period that there is insufficient medical evidence on file indicating that the Injured Worker's physical conditions have changed effective 3/31/2008 to once again justify the reinstatement of temporary total compensation as of said date.

The Staff Hearing Officer finds from the numerous C-84s and office notes on on [sic] file from the Injured Worker's attending physician that there is no medical proof that the Injured Worker's disability changed effective as of said date other than the mere indication that the Injured Worker underwent an epidural injection as of said date.

Accordingly, the Injured Worker's request for temporary total compensation is therefore denied in its entirety.

This order is based upon the review of the C-84's on file as well as office notes from Dr. Brocker (Injured Worker's attending physician), a review of prior District Hearing Officer order dated 8/1/2007, the Staff Hearing Officer order dated 9/12/2007, Injured Worker's job search list as well as all evidence and testimony presented at hearing.

{¶22} 16. Relator's appeal was refused by order of the commission mailed August 13, 2008.

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

Conclusions of Law:

{¶24} In order for this court to issue a writ of mandamus as a remedy from a determination of the commission, relator must show a clear legal right to the relief sought and that the commission has a clear legal duty to provide such relief. *State ex rel. Pressley v. Indus. Comm.* (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.

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

{¶26} It is undisputed that, following a finding that allowed conditions have reached MMI, a claimant can suffer an exacerbation or worsening of their allowed condition which renders them again temporarily and totally disabled. The burden is on the claimant to demonstrate new and changed circumstances warranting the payment of a new period of TTD compensation. *State ex rel. Bing v. Indus. Comm.* (1991), 61 Ohio St.3d 424.

{¶27} In the present case, relator contends that the commission abused its discretion in determining that he had not established new and changed circumstances warranting the payment of additional TTD compensation. For the reasons that follow, this magistrate disagrees.

{¶28} As noted in the findings of fact, relator had occasionally received lumbar epidural injections since 2006. Specifically, in October 2006, January, April and September 2007, and March 2008. As such, the fact that he received additional epidural injections in March 2008 did not, automatically, satisfy relator's burden of demonstrating new and changed circumstances warranting a new period of TTD compensation. Further, in Dr. Scheatzle's June 2007 report, he noted that relator's lumbar spine series from July 24, 2005 had showed apparent retrolisthesis at L5-S1. The April 2008 MRI also revealed Grade I retrolisthesis of L5 on S1 with bulging of the disc producing foraminal stenosis on the left. As such, the 2008 MRI does not necessarily establish new and changed circumstances warranting a new period of TTD compensation. Further, nothing in Dr. Brocker's March 2008 report indicates that relator suffered an exacerbation of his condition. Although Dr. Brocker did indicate that relator described his pain as a ten, Dr. Scheatzle had noted in his June 2007 report that relator

described his back pain at that point in time as a nine to ten out of ten, and indicated he had constant with pain radiating down his right leg. As such, contrary to relator's arguments, the record does not unequivocally demonstrate a worsening of his condition after his condition had been found at MMI warranting the payment of an additional period of TTD compensation and this magistrate cannot say that the commission abused its discretion by denying his request.

{¶29} Based on the foregoing, it is this magistrate's conclusion that relator has not demonstrated that the commission abused its discretion in denying him a new period of TTD compensation and relator's request for a writ of mandamus should be denied.

/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).