

medical improvement and therefore was no longer entitled to receive temporary total disability compensation.

{¶2} The case was referred to a magistrate to conduct appropriate proceedings. The parties stipulated the pertinent evidence and filed briefs. The magistrate then issued a magistrate's decision containing detailed findings of fact and conclusions of law which is appended to this decision. The magistrate's decision includes a recommendation that we deny the request for a writ.

{¶3} No party has filed objections to the magistrate's decision. The case is now before the court for review.

{¶4} No error of law or fact is present on the face of the magistrate's decision. We therefore adopt the findings of fact and conclusions of law contained in the magistrate's decision. As a result, we deny the request for a writ of mandamus.

Writ of mandamus denied.

BROWN and SADLER, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Theodore Dalton,	:	
	:	
Relator,	:	
	:	
v.	:	No. 09AP-1136
	:	
The Industrial Commission of Ohio	:	(REGULAR CALENDAR)
and YRC, Inc.,	:	
	:	
Respondents.	:	
	:	

MAGISTRATE'S DECISION

Rendered on October 29, 2010

Shapiro, Marnecheck, Reimer & Palnik, Philip A. Marnecheck and Matthew Palnik, for relator.

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

Thomas & Company, L.P.A., William R. Thomas and Cheryl L. Jennings, for respondent YRC, Inc.

IN MANDAMUS

{¶5} In this original action, relator, Theodore Dalton, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its staff hearing officer's ("SHO") order of October 16, 2009, that granted the

August 19, 2009 motion of respondent YRC, Inc. ("respondent" or "YRC"), to terminate temporary total disability ("TTD") compensation on grounds that the industrial injury has reached maximum medical improvement ("MMI"), and to enter an order denying the motion.

Findings of Fact:

{¶6} 1. On December 14, 2007, relator sustained an industrial injury in the course of his employment as an over-the-road truck driver for YRC, a self-insured employer under Ohio's workers' compensation laws. The industrial claim (No. 07-887209) is allowed for "sprain/strain right leg/knee; right iliopsoas tendon tear; tear of the adductor longus tendon at symphysis pubis origin right thigh; right inguinal hernia."

{¶7} 2. On August 5, 2009, at YRC's request, relator was examined by Ira J. Ungar, M.D., who issued a six-page narrative report dated August 6, 2009. In his report, Dr. Ungar opined that the allowed conditions of the industrial injury had reached MMI.

{¶8} Ultimately, the commission relied upon Dr. Ungar's report to terminate TTD compensation. Here, relator challenges the commission's reliance upon Dr. Ungar's report on grounds that the report had been previously rejected by the commission.

{¶9} The issue regarding Dr. Ungar's report arises in the context of two separate motions filed by YRC seeking termination of TTD compensation. Those motions were filed by YRC respectively on October 20, 2008 and August 19, 2009, and each motion has generated a series of orders from the commission hearing officers.

Accordingly, each motion and the orders generated shall be set forth herein, beginning with the October 20, 2008 motion.

YRC's October 20, 2008 Motion

{¶10} 3. On July 29, 2008, at YRC's request, relator was examined by Richard N. Kepple, M.D., who issued a six-page narrative report. In his report, Dr. Kepple opined that relator is unable to return to his former position of employment as a "line haul driver" due to the injury to his lower extremities. However, Dr. Kepple further opined that relator "is currently able to return to work in a light-duty capacity with restrictions."

{¶11} 4. On September 9, 2008, Dr. Kepple completed a so-called "Work Status Report" wherein he responded to preprinted questions.

{¶12} 5. By letter dated October 3, 2008, YRC offered relator a job as a "supervisor assistant" to begin October 8, 2008. The YRC letter explained that the "light duty jobs you may be assigned" will comport with Dr. Kepple's restrictions.

{¶13} 6. On October 20, 2008, YRC moved to terminate TTD compensation on grounds that relator had refused the job offer.

{¶14} 7. Following a November 19, 2008 hearing, a district hearing officer ("DHO") issued an order denying YRC's motion.

{¶15} 8. YRC administratively appealed the DHO's order of November 19, 2008.

{¶16} 9. Following a January 8, 2009 hearing, an SHO issued an order vacating the DHO's order of November 19, 2008. The SHO determined that relator had refused

a "valid light duty job offer" and therefore terminated TTD compensation effective January 8, 2009, the hearing date.

{¶17} 10. Relator administratively appealed the SHO's order of January 8, 2009 to the three-member commission.

{¶18} 11. Through an interlocutory order mailed March 20, 2009, the commission accepted relator's discretionary appeal and indicated that a hearing would be scheduled before a "deputy regional manager."

{¶19} 12. On April 16, 2009, the commission deputy heard relator's administrative appeal to the commission.

{¶20} 13. On August 3, 2009, a lengthy deputy's order was typed.

{¶21} 14. Thereafter, the typed order was presumably circulated, first to the deputy for her signature and then to the three commissioners who each approved the order by their signing.

{¶22} 15. On August 26, 2009, the deputy's order, as approved by the commission, was mailed to the parties. The order denies YRC's October 20, 2008 motion to terminate TTD compensation, and awards TTD compensation beginning the date of the SHO's hearing (January 8, 2009), and to continue upon submission of medical evidence:

It is the order of the Deputy that the order of the Staff Hearing Officer, from the hearing dated 1/8/2009, is vacated.

Employer's C-86 Motion, filed 10/20/2008, requesting termination of temporary total disability compensation is denied. Temporary total disability compensation is to be paid from 1/8/2009 to date, less any compensation previously

paid over this period, and to continue upon submission of competent medical evidence.

This order and payment of temporary total disability compensation are based on the C84 reports of the physician of record, Dr. Marshall, dated 11/10/2008, 1/19/2009, 3/06/2009, and 5/20/2009 wherein he opines that the Injured Worker remains temporarily and totally disabled as a result of the allowed conditions in this claim and the 7/9/2008 and 11/12/2008 narrative reports of Dr. Marshall wherein he opines that the Injured Worker is not capable of returning to work, even in a light duty capacity, as a result of the allowed conditions which are "easily exacerbated."

* * *

In his 7/9/2008 report, Dr. Marshall responded to the employer's inquiry regarding the Injured Worker's ability to perform light work. He stated:

"I am aware of the injury date; however, the patient just came under my medical care as of 5-1-08, and his diagnosis was only clarified after that exam. The only treatment that has resulted in any improvement for this patient are the injections given since 5-1-08. We did try and get him moving with some physical therapy. On his way into the clinic on 6-30-08 (for the initial physical therapy evaluation), his condition was largely exacerbated when he merely stepped up on the sidewalk to get into the clinic. This sheds some light on just how disabling the injury continues to be at present Due to the nature of the injury, his recovery will be slow going . . . In other words, there cannot be any type of fast tracking this patient back to work. When a simple act such as stepping up onto a sidewalk (a very small incline) caused the severe increase in pain, it is clear he is not ready for light duty work."

On July 29, 2008, the Injured Worker was examined by a physician of the Self-Insured employer's choice, Richard N. Kepple, M.D. In such report, Dr. Kepple opined that the allowed conditions in this claim had not reached a level of maximum medical improvement and that the Injured Worker was unable to return to his former position of employment as a line haul driver "as use of the lower extremities while

driving a truck would exacerbate the adductor longus tendon pathology and render him a hazard to himself and others on the road." * * *

* * *

* * * Dr. Kepple concluded that the Injured Worker "is currently able to return to work in a light-duty capacity with restrictions." Dr. Kepple completed a Work Status Report wherein he opined that the Injured Worker could perform sedentary work with no use of the right leg, no kneeling, no crouching or bending over, no climbing, no stairs, no ladders and no squatting.

Based on Dr. Kepple's report and release to return to sedentary work, the employer sent the Injured Worker a letter, dated 10/3/2008, offering the Injured Worker light-duty work that purported to comply with Dr. Kepple's restrictions. Such letter identified the light-duty job as supervisor assistant. * * *

In a letter dated 10/2/2008, the Injured Worker informed his employer that he would not accept the offer of light duty on advice of his doctor. The Injured Worker informed his employer that his doctor had told him that "it is too soon to return at this time."

On 10/20/2008, the Self-Insured Employer filed the C-86 Motion at issue at today's hearing and requested that temporary total disability compensation be terminated as the Injured Worker had refused a valid light-duty job offer for work within his restrictions. * * *

* * *

* * * [W]hat is at issue in this case is whether the Injured Worker can return to work light duty. The Injured Worker's doctor, Dr. Marshall, opines that the Injured [W]orker cannot return to any work. The employer's defense doctor, Dr. Kepple, opines that the Injured Worker can return to sedentary work with restrictions.

It is the finding of this Deputy that Injured Worker cannot return to work in any capacity based on the medical

evidence submitted by the physician of record, Dr. Marshall. The Injured Worker is entitled to continued temporary total disability compensation on this basis alone. As such, the Employer's C-86 Motion requesting termination of temporary total disability compensation is denied.

* * *

* * * [T]emporary total disability compensation will not be terminated and is to continue from 1/8/2009.

YRC's August 19, 2009 Motion

{¶23} 16. As earlier noted, on August 5, 2009, at YRC's request, relator was examined by Dr. Ungar. In his six-page narrative report dated August 6, 2009, Dr.

Ungar concludes:

CONCLUSION/DISCUSSION: Based on the above history and physical, review of available medical records, the following conclusions are rendered with a reasonable degree of medical certainty. I have read and reviewed all available medical information submitted.

1. Based on the allowed conditions in this claim, can the claimant perform the essential functions of a job as a road driver on a full duty schedule?

As one can imagine, it is extremely difficult to opine on issues of job performance and job capabilities in an individual who is presenting a physical examination, which he wishes to demonstrate as grossly abnormal.

The allowed conditions in this claim, which include muscular tears, would not, in even the severest of conditions, be expected to cause the level of discomfort Mr. Dalton wishes to demonstrate more than one and a half years after they occurred. Even if these conditions are present, as they are allowed conditions in the claim, they must indeed be truly minor as no tissue abnormalities were identified on two MRIs. It is noted that the MRI is particularly sensitive and specific for identifying these types of soft-tissue injuries.

Therefore, even giving Mr. Dalton the significant benefit of the doubt with respect to the allowed conditions in this claim and with reference to the Official Disability Guidelines for recovery from injuries similar to these, Mr. Dalton should be capable of return to work at his previous level of employment without restrictions.

2. Based on the allowed conditions in this claim, what type of treatment or medications, if any, do you believe are reasonable and necessary at this time? Specifically, do you believe the claimant requires ongoing office visits and prescription medications?

Although it is certainly theoretically possible that Mr. Dalson may have some level of minor, ongoing discomfort on the basis of his injury and the allowed conditions in this claim, it is difficult to justify continued use of narcotic pain medications for control of symptoms one and a half years after this injury. This injury is in general neither persistent, nor permanent, nor progressive. In general, these types of muscle/tendon injuries resolve substantially within a 12-week timeframe and only cause ongoing minor symptomatology associated with vigorous physical activities. This is certainly not the presentation that Mr. Dalton wishes to present.

Therefore, I would suggest that medication be weaned, such as the narcotic pain medication, onto antiinflammatory medications, which are available over the counter. This can be done in a very short timeframe of several weeks.

It would appear that further treatment at this time will simply prolong disability behavior and will not promote wellness.

3. Based on medical records, physical exam, and allowed conditions, do you believe the claimant is at maximum medical improvement?

Based solely on the allowed conditions in this claim, giving Mr. Dalton even more than the benefit of the doubt, and noting that he is [sic] has not progressed or improved over a prolonged timeframe despite ongoing and aggressive interventions, it would be my medical opinion that Mr. Dalton has indeed reached maximum medical improvement.

{¶24} 17. On August 19, 2009, citing Dr. Ungar's report, YRC again moved for termination of TTD compensation.

{¶25} 18. Following a September 11, 2009 hearing, a DHO issued an order granting YRC's motion and terminating TTD compensation as of September 11, 2009.

{¶26} 19. Relator administratively appealed.

{¶27} 20. On October 16, 2009, an SHO issued an order affirming the DHO's order of September 11, 2009. The SHO's order explains:

Based upon Dr. Ungar's 08/06/2009 report the Staff Hearing Officer finds that the allowed conditions in this claim have reached maximum medical improvement. Accordingly, the Staff Hearing Officer orders that temporary total compensation is terminated on 09/11/2009, the date of the District Hearing Officer's hearing. * * *

{¶28} 21. On November 18, 2009, another SHO mailed an order refusing relator's administrative appeal to the three-member commission.

{¶29} 22. On December 7, 2009, relator, Theodore Dalton, filed this mandamus action.

Conclusions of Law:

{¶30} It is the magistrate's decision that this court deny relator's request for a writ of mandamus, as more fully explained below.

{¶31} *State ex rel. Zamora v. Indus. Comm.* (1989), 45 Ohio St.3d 17, prohibits the commission from relying on a medical report that the commission had earlier found unpersuasive. *Zamora* is properly invoked when the commission tries to revive evidence that was previously deemed unpersuasive. *State ex rel. Tilley v. Indus. Comm.* (1997), 78 Ohio St.3d 524.

{¶32} According to relator, under the *Zamora* rule, the commission was prohibited from reliance upon Dr. Ungar's report in adjudicating YRC's August 19, 2009 motion to terminate TTD compensation because, allegedly, Dr. Ungar's report was implicitly rejected by the commission when, in its April 16, 2009 order, it denied YRC's October 20, 2008 motion and awarded TTD compensation beginning January 8, 2009. Relator's argument lacks merit.

{¶33} Dr. Ungar's August 6, 2009 report did not come into existence until nearly four months after the April 16, 2007 deputy's hearing and not until three days after the deputy's order, as approved by the commission, was typed. Under such circumstances, it is clear that Dr. Ungar's August 6, 2009 report could not have been considered by the deputy in his adjudication of YRC's October 20, 2008 motion to terminate compensation or in the deputy's award of TTD compensation beginning January 8, 2009. If Dr. Ungar's report was not considered by the deputy, then it could not have been found unpersuasive.

{¶34} Accordingly, for all the above reasons, 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).