

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio ex rel. Waldemar B. Clodfelter,	:	
	:	
Relator,	:	
	:	
v.	:	No. 10AP-1077
	:	
Industrial Commission of Ohio and Gossing Construction Co.,	:	(REGULAR CALENDAR)
	:	
Respondents.	:	

D E C I S I O N

Rendered on March 15, 2012

Philip J. Fulton Law Office, Ross R. Fulton, and Chelsea J. Fulton, for relator.

Michael DeWine, Attorney General, and Kevin J. Reis, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

KLATT, J.

{¶1} Relator, Waldemar B. Clodfelter, commenced this original action in mandamus seeking an order compelling respondent, Industrial Commission of Ohio ("commission"), to vacate its order denying relator's request for payment of chiropractic treatments rendered from July 25, 2003 through February 11, 2009 and to enter an order granting that payment.

{¶2} Pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth District Court of Appeals, we referred this matter to a magistrate who issued a decision, including findings of fact and conclusions of law, which is appended hereto. The magistrate found that the

commission applied the correct legal standard in concluding that the chiropractic services at issue were not reasonably necessary for treatment of the industrial injury. Therefore, the magistrate has recommended that we deny relator's request for a writ of mandamus.

{¶3} Relator has filed objections to the magistrate's decision. In his first objection, relator argues that the magistrate erred by failing to apply *State ex rel. Wallace v. Indus. Comm.*, 57 Ohio St.2d 55, 59 (1979). Relator contends that because Dr. Day did not expressly acknowledge all of the medical evidence submitted in connection with relator's claim, her reports cannot constitute evidence upon which the commission can rely under the principle articulated in *Wallace*. We disagree.

{¶4} Although the magistrate found that the *Wallace* decision was inapplicable to the issue before the commission, he also found that, even if *Wallace* applied, Dr. Day's reports complied with *Wallace*. We agree. The *Wallace* case stands for the proposition that a non-examining physician must accept the clinical findings of the examining physician when asked to determine whether the injured worker has the alleged medical condition and, if so, whether it is casually related to the industrial injury. Here, Dr. Day was asked to determine whether certain chiropractic services should be paid. That determination largely turned on whether the services were reasonably necessary given the nature of the allowed conditions and the objective findings. For the period of time in question, Dr. Day expressly accepted the objective findings of the examining physicians and the allowed conditions in concluding that the chiropractic services were not reasonably necessary for treatment of the allowed claims. Consequently, even if *Wallace* applied under these circumstances, the commission did not abuse its discretion when it relied upon Dr. Day's reports in denying payment for the chiropractic treatments at issue. Therefore, we overrule relator's first objection.

{¶5} In his second objection, relator contends that the magistrate violated relator's due process rights because he relied upon the Mercy Guidelines in denying relator's request for a writ of mandamus. Again, we disagree.

{¶6} First, the magistrate did not rely upon the Mercy Guidelines. Rather, Dr. Day cited to the Mercy Guidelines as support for her opinion that the chiropractic treatments at issue were not medically necessary. Second, relator has not pointed to anything in the record indicating that it was improper for Dr. Day to rely upon the Mercy

Guidelines in rendering her opinion. For these reasons, we overrule relator's second objection.

{¶7} Following an independent review of this matter, we find that the magistrate has properly determined the facts and applied the appropriate law. Therefore, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein. In accordance with the magistrate's decision, we deny relator's request for a writ of mandamus.

Objections overruled; writ of mandamus denied.

FRENCH, J., concurs.

TYACK, J., dissents.

TYACK, J. dissenting.

{¶8} I respectfully dissent.

{¶9} CareWorks, the managed care organization ("MCO") handling workers' compensation matters for Waldemar B. Clodfelter's case fought recognition of any additional conditions for his workers' compensation claim. It took a judgment in common pleas court entered in December 2008 to allow Clodfelter to participate for "aggravation of disc degeneration at L5-S1." Two months after the additional condition was recognized, Clodfelter's treating physician sought payment for chiropractic treatment from July 2003 through February 2009.

{¶10} A file review was arranged by the Ohio Bureau of Workers' Compensation. The chiropractor who did the review found the treatments were reasonably related to the injury. However, the review indicated the services were not reasonably necessary for the treatment of the injury and that no alternative treatment was available. These latter findings were based at least in part upon the fact that no specialist consults had occurred. CareWorks had consistently fought payment for the pain suffered by Clodfelter alleging that the pain was not the result of lumbar strain/sprain which was the primary condition recognized until the court order. Strains and sprains normally resolve in less than one year.

{¶11} What I fear this means is that a person who needs additional medical or chiropractic care cannot get the care until additional conditions are recognized. The recognition process can take several years, during which the injured worker must make do

as best she or he can. Here, Clodfelter went to his chiropractor three times every two months for pain relief. Clodfelter apparently could afford no more treatments. Specifically, he could not afford specialist referrals for a condition that would normally resolve in a matter of months.

{¶12} This situation rewards the MCO which resists paying for treatment for injured workers who are clearly in pain. The MCO says "we will not pay because your pain is not from the recognized condition." Thus, when an additional condition is recognized, the MCO says "we will not pay because you should have had more treatments before now."

{¶13} The reviewing expert here found that Clodfelter should have had more treatments, but makes no suggestion as to how Clodfelter was supposed to pay for that treatment when the MCO refuses to pay for it and the injured worker is neither wealthy nor covered by health insurance any longer.

{¶14} The workers' compensation system is supposed to help injured workers who are in pain, not reward entities who make it hard for injured workers to get the help they need. I think this case reaches the wrong result. I would grant the requested writ for payment for the treatment for the pain Clodfelter suffered, especially since all who reviewed Clodfelter's situation found the medical services were reasonably related to the injury. Since the majority of this panel reaches a different conclusion, I respectfully dissent.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel.	:	
Waldemar B. Clodfelter,	:	
	:	
Relator,	:	
	:	
v.	:	No. 10AP-1077
	:	
Industrial Commission of Ohio	:	(REGULAR CALENDAR)
and Gossing Construction Co.,	:	
	:	
Respondents.	:	

MAGISTRATE'S DECISION

Rendered on September 20, 2011

Philip J. Fulton Law Office, Ross R. Fulton, and Chelsea J. Fulton, for relator.

Michael DeWine, Attorney General, and Kevin J. Reis, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶15} In this original action, relator, Waldemar B. Clodfelter, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order denying his request for payment of chiropractic treatments rendered from July 25, 2003 through February 11, 2009 and to enter an order granting payment.

Findings of Fact:

{¶16} 1. On September 25, 1990, relator sustained an industrial injury while employed as a laborer for respondent Gossing Construction Co. The industrial claim (No. 90-37667) was initially allowed for "lumbar sprain/strain; pain disorder associated with psychological factors and general medical condition (chronic back); depressive disorder."

{¶17} 2. On December 15, 2003, the Ohio Bureau of Workers' Compensation ("bureau") mailed an order that determined a dispute between relator and the managed care organization. The bureau's order states:

Dispute number 0090306 filed with BWC on 12/03/2003 reads as follows:

[Managed Care Organization] Careworks denied C9 dated 9/19/03 for 8 retro visits for spinal manipulation, electric muscle stimulation and manual therapy from 4/25/03 – 8/25/03, requested by Robert Briggs DC. [Dates of service] were 4/25, 5/6, 6/26, 7/7, 7/25, 8/6, 8/22, and 8/25/03.

It is the administrator's decision that the treatment/services be disallowed because:

Peer review determined treatment request is not related, medically necessary or cost effective relative to the 1990 lumbar sprain condition which long ago resolved. Letter from previous [physician of record] dated 6/28/00 noted problems of [injured worker] are real as attested to by x-ray and MRI findings which showed L4-5 posterior joint arthrosis annular bulging of L5-S1 disc and disc narrowing/dessication at L4, L5 and S1. 6/9/99 peer [independent medical examination] by K Schoenman DC noted exam was positive for Waddell signs and non-physiologic pain factors. Per Mercy Guidelines, passive methods of care are not appropriate when such significant non-organic factors are present. On 11/11/03, current [physician of record] requested additional conditions of "radicular neuralgia and intervertebral disc disorder" which indicates provider is treating nonallowed conditions. Allowed sprain condition typically resolves within 4-12 weeks, it is now 13 years since [date of injury]. Continued passive therapies 13 years post [date of injury]

are not related, necessary or appropriate relative to the 1990 sprain condition.

This decision was based on:

Peer review done by R Bachelder DC, 1999 [Independent Medical Examination] by K Schoenman DC, 6/28/00 letter from C Hearon DC indicates symptoms of [injured worker] are related to findings shown on x-ray and MRI, 11/11/03 current [physician of record] request for additional conditions of radicular neuralgia and intervertebral disc disorder, allowed sprain condition is now 13 years (natural history is 4-12 weeks), treatment guidelines of Mercy, Milliman & Robertson and Interqual, adopted by BWC.

{¶18} 3. Apparently, the December 15, 2003 bureau order was not administratively appealed.

{¶19} 4. On December 8, 2008, the Delaware County Court of Common Pleas entered judgment in favor of relator in a civil action brought pursuant to R.C. 4123.512. The judgment finds that relator is entitled to participate in the workers' compensation fund for "aggravation of disc degeneration at L5-S1." The judgment further disallows the claim for "radicular neuralgia at L5-S1."

{¶20} 5. On February 12, 2009, treating chiropractor Robert E. Briggs, D.C., completed eight C-9s that together request payment for chiropractic treatments from July 25, 2003 through February 11, 2009.

{¶21} 6. At the bureau's request, chiropractor Sherry Day, D.C., performed a file review. In her three-page report dated March 16, 2009, Dr. Day states:

Allowed ICD codes: 847.2 Sprain Lumbar Region, 300.4 Neurotic Depression, 300.09 Anxiety State Nec, 722.52 DDD Degen Disc Dis L5-S1 lumbar.

Disallowed ICD codes: 729.2 Neuralgia Spinal Nerve RO.

Review of Medical Records:

- Appeal from Robert Briggs, DC dated 2/24/09.

- C9s dated 2/12/09 from Dr. Briggs.
- Physician review from Robert Blank, DC, FACO dated 2/24/09.
- Letter from Dr. Briggs fax date[d] 3/9/09
- Medical records from Dr. Briggs dated 4/25/03 through 12/08.
- Physician review from Robert Bachelder, DC, DABCO dated 11/12/03.
- Physician review from Gregory Mellon, DC, DABCO dated 3/2/00.
- Physician review from Fred Graff, DC dated 6/22/00.

Three (3) Pronged Miller Test:

[One] The requested medical services are reasonably related to the injury? Yes.

[Two] The requested services are reasonably necessary for treatment of the injury? No.

[Three] The cost of the services are medically reasonable, or is there a medically supported, alternative treatment available for this condition? No.

Treatment Guidelines Used:

M and R, Mercy Guidelines, and/or ODG Guidelines

I accept the objective findings of the examining physician(s) in regard to the allowed condition(s) in this claim.

Discussion:

Medical records indicate that the claimant was injured on 9/25/1990 when lifting a 400 lb wooden beam with a co-worker. This claim is allowed for 847.2 Sprain Lumbar Region, 300.4 Neurotic Depression, 300.09 Anxiety State Nec, and 722.52 DDD Degen Disc Dis L5-S1 lumbar. Medical records reflect a history of chiropractic treatment with the [physician of record], Dr. Briggs, since 2001. There is also evidence of chiropractic treatment with different providers prior to 2001. There are no specialist consults or advanced diagnostic studies on file at this time. This claim was recently allowed for degenerative disc disease L5-S1 on 2/12/09. Dr. Briggs then submitted eight C9's dated 2/12/09 requesting multiple retro dates of service starting 7/25/03 and continuing through 2/11/09. Based upon review of the available medical records, these multiple requests are not currently supported in relation to the management of the

allowed conditions in this 1990 claim. The medical file reveals that the claimant received approximately 60 chiropractic visits prior to 7/25/03 with persistent lower back and leg symptoms reported. Mercy Guidelines define an adequate trial of chiropractic treatment as "A course of two weeks each of two different types of manual procedures (four weeks total), after which, in the absence of documented improvement, manual procedures are no longer indicated". There does not appear to have been any specialist referrals for consideration of alternative treatment options despite the injured worker[s] ongoing lower back symptoms and fairly consistent pain levels ranging from 6-10/10. Specific clinical rationale and reasoning for continued same said type of care based upon the injured worker's previous clinical response was not identified. Mercy also indicates that continued failure should result in patient discharge as inappropriate for chiropractic care. Current medical evidence is not sufficient to support the requested treatment/services at this time. The Miller criteria have been applied upon review of this claim.

Opinion/Conclusion:

The medical necessity of the requested treatment/services on the eight C9's dated 2/12/09 has not been reasonably demonstrated in relation to the management of the allowed conditions in this claim. Treatment may have been reasonably related to the allowed conditions; however, the medical necessity of continued same said care was not established. Daily notes reflect ongoing lower back/leg symptoms with fairly consistent pain levels of 6-10/10 reported. There does not appear to have been any specialist consults despite the injured worker's unrelenting symptoms.

In addition, the medical file indicates that the injured worker had already received approximately 60 chiropractic visits prior to July 2003. This would have represented an adequate trial of chiropractic treatment as defined in Mercy Guidelines. Specific clinical rationale for several years of ongoing chiropractic treatment based upon the injured worker's previous clinical response was not identified in the available medical record. However, due to clinical inconsistencies identified within the medical file, an ADR IME per BWC policy is recommended.

(Emphasis omitted.)

{¶22} 7. In an undated letter, Dr. Briggs responded to Dr. Day's March 16, 2009

report:

Mr. Clodfelter was injured while working in 1990. He was carrying a very heavy beam on his shoulder and while attempting to throw the beam from his shoulder, he twisted his lowback injuring his lumbar spine.

The patient has been seen at this office on several dates. His current diagnosis is 847.2 lumbar sprain/strain and the diagnosis of lumbar disc degeneration 722.52 was recently added to his claim.

A review was performed by a Dr. Day on 3/16/09. Dr. Day states that there are no specialist consultations, no considerations for alternative treatment or advanced diagnostic studies. These were never allowed due to the patients' [sic] diagnosis at that time, lumbar sprain/strain. Everything that was attempted or requested for this patient was denied due to the diagnosis. Dr. Day also states that there are over 110 retro dates from 2003 to 2009. [S]he states that there is not a treatment plan which follows the diagnosis. Over this 6 year period, that amount of treatment averages to be about 18 visits per year. We requested treatment for the allowed conditions and it was denied, so the patient was paying out of pocket and could not afford Dr. Days' [sic] recommendations or a consistent treatment plan due to the cost. There were times over this 6 year period that the patient went several weeks without treatment. The injury is now 19 years old and the degenerative process will continue. We did request diagnostics such as an MRI years ago and it was denied due to the diagnosis.

The treatment that this patient received is directly related to the injury and was necessary for this patient. * * *

{¶23} 8. On April 28, 2009, Dr. Day issued an addendum, stating:

This addendum is in response to a request to address additional dates of service that were not addressed in my previous peer review dated 3-16-09.

* * *

Allowed ICD codes: 847.2 Sprain Lumbar Region, 300.4 Neurotic Depression, 300.09 Anxiety State Nec, 722.52 DDD Degen Disc Dis L5-S1 lumbar.

Disallowed ICD codes: 729.2 Neuralgia Spinal Nerve RO.
I acknowledge the additional requested dates of service; however, my opinion/conclusion per peer review dated 3/16/09 does not change.

{¶24} 9. On May 8, 2009, the bureau mailed an order denying relator's C-9 requests.

{¶25} 10. Relator administratively appealed the May 8, 2009 bureau order.

{¶26} 11. Following a June 18, 2009 hearing, a district hearing officer ("DHO") issued an order stating:

The Injured Worker's appeal, filed 05/22/2009, is denied and the order of the Administrator, issued 05/08/2009, is affirmed in its entirety.

It is the finding of the District Hearing Officer that the 8 C-9s, dated 02/12/2009, all for spinal manipulation with 2 elected therapies, x 12 from 05/30/2008-02/11/2009, x 14 from 12/11/2007-05/28/2008, x 13 from 01/23/-11/28/2007, x 13 from 07/16-12/22/2006, x 15 from 01/23/2006-06/19/2006, x 16 from 05/04/2005-01/19/2006, x 15 from 01/02/2004-04/20/2005, and x 14 from 07/25-12/01/2003 requested by Robert Briggs, D.C. are denied based upon the 03/16/2009 report of Sherry Day, D.C. Dr. Day opined: "The medical necessity of the requested services on the 8 C-9s dated 02/12/2009 has not been reasonably demonstrated in relation to the management of the allowed conditions in this claim. Treatment may have been reasonably related to the allowed conditions; however, the medical necessity of continued same said care was not established."

{¶27} 12. Relator administratively appealed the DHO's order.

{¶28} 13. Following a July 22, 2009 hearing, a staff hearing officer ("SHO") issued an order stating:

The order of the District Hearing Officer, from the hearing dated 06/18/2009, is affirmed.

At issue at today's hearing is a request for retroactive payment for chiropractic treatment from 07/18/2003 through 02/11/2009. The basis for this new treatment is listed as the "new diagnostic code added."

Per judgment entry on file dated 01/20/2009, the claim was additionally allowed for "aggravation of disc degeneration L5-S1," and this is the claimed basis for the present request for payment of the chiropractic treatment.

The Injured Worker had been granted permanent total disability by the Industrial Commission order from the hearing of 06/10/2009, but the basis of this decision was solely on the allowed psychological condition in the claim.

Dr. Blood examined the Injured Worker related to the allowed physical conditions in the claim on 04/12/2009. He found the Injured Worker capable of medium work related to the allowed back conditions, but did not address the issue of treatment. The fact the Injured Worker has been found permanently and totally disabled provides no information as to his need for medical treatment related to the allowed back claim.

At hearing, an undated report from Dr. Briggs was submitted that states his treatment over the years was necessary for the lumbar disc degeneration, but this report is really more just a statement that the treatment was necessary without any factual explanation and was not found persuasive on this issue.

Dr. Day, in a report of 03/16/2009 and Addendum Report of 04/28/2009, states that the medical necessity of continued chiropractic care has not been established. She provides a standard measure of care and analysis regarding the care from Dr. Briggs. Her reports are found more persuasive on the issue than the information provided by Dr. Briggs.

Accordingly, the prior order is affirmed in full and retroactive payment for chiropractic care from 2003 through February 2009 remains denied. This decision is based on the opinion of Dr. Day.

{¶29} 14. On August 7, 2009, another SHO mailed an order refusing relator's administrative appeal from the SHO's order of July 22, 2009.

{¶30} 15. On March 23, 2010, the three-member commission mailed an order denying relator's request for reconsideration.

{¶31} 16. On November 12, 2010, relator, Waldemar B. Clodfelter, filed this mandamus action.

Conclusions of Law:

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

{¶33} Because the commission applied the test for authorization of medical services set forth in *State ex rel. Miller v. Indus. Comm.*, 71 Ohio St.3d 229, 1994-Ohio-204, and relator challenges the commission's decision as a violation of the rule originally set forth in *State ex rel. Wallace v. Indus. Comm.* (1979), 57 Ohio St.2d 55, those two cases and the progeny of *Wallace* merit initial review.

{¶34} In *Miller*, the court set forth a three-pronged test for authorization of medical services: (1) are the medical services reasonably related to the industrial injury, that is, the allowed conditions? (2) are the services reasonably necessary for treatment of the industrial injury? and (3) is the cost of the services medically reasonable? *Id.* at 232.

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

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

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

Id. at 59. (Footnotes omitted.)

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

{¶37} It has been said that, under the *Wallace* rule, the non-examining physician was required to consider—and accept—the factual findings as of the time of the examinations, of all the examiners who proceeded him. *State ex rel. Dobbins v. Indus. Comm.*, 109 Ohio St.3d 235, 2006-Ohio-2286, ¶4, citing *Lampkins* (Dr. Weinerman performed a file review relating to permanent partial disability).

{¶38} However, *Wallace* does not bar evidentiary reliance upon every report of a non-examining physician that fails to expressly or implicitly adopt the factual findings of the examining physicians. *State ex rel. Keith v. Indus. Comm.* (June 26, 1990), 10th Dist. No. 89AP-1031, affirmed (1991), 62 Ohio St.3d 139. The commission's reason for relying on the report of the non-examining physician must be analyzed to determine whether the *Wallace* rule is applicable. Id.

{¶39} Here, Dr. Day's review of the medical file disclosed that relator had received approximately 60 chiropractic visits prior to July 25, 2003. Referring to the "Mercy

Guidelines," Dr. Day concluded that, prior to July 2003 relator had already received "an adequate trial of chiropractic treatment."

{¶40} Dr. Day further noted that:

* * * There does not appear to have been any specialist referrals for consideration of alternative treatment options despite the injured worker['s] ongoing lower back symptoms and fairly consistent pain levels ranging from 6-10/10. * * *

Indicating the "continued failure" of the chiropractic treatments, Dr. Day concludes that the treatments were inappropriate under "Mercy Guidelines." Based upon that analysis, Dr. Day concludes that the chiropractic treatments were not medically necessary under the *Miller* test.

{¶41} Apparently, Dr. Day reviewed and accepted the chiropractic treatment notes of record indicating the fairly consistent pain levels throughout the years of treatment at issue. There is no dispute from relator regarding Dr. Day's conclusion regarding the fairly consistent pain levels, nor is there a dispute that relator underwent approximately 60 chiropractic visits prior to July 25, 2003. Nor is there a dispute from relator regarding the "Mercy Guidelines."

{¶42} In short, Dr. Day simply applied the Mercy Guidelines to undisputed facts. Under such circumstances, another examination of relator would have been largely irrelevant. The *Wallace* rule is clearly inapplicable.

{¶43} Moreover, even if it can be said that the *Wallace* rule is applicable to Dr. Day's reports, Dr. Day expressly states in her March 16, 2009 report, "I accept the objective findings of the examining physician(s) in regard to the allowed condition(s) in this claim." Here, relator fails to address Dr. Day's statement or to explain why the

statement fails to show compliance with the *Wallace* rule. See *State ex rel. Timmerman Truss, Inc. v. Indus. Comm.*, 102 Ohio St.3d 244, 2004-Ohio-2589.

{¶44} 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).