

{¶2} Pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth District Court of Appeals, this matter was referred to a magistrate who issued a decision which is appended to this decision, including findings of fact and conclusions of law, recommending that this court deny relator's request for a writ of mandamus. Relator has filed an objection to the magistrate's decision.

{¶3} In his objection, relator raises several points. Relator first contends that the C-84 he filed on October 19, 2009, was filed one month after the district hearing officer ("DHO") had additionally allowed the claim for all of the conditions that were the basis of the period of disability from March 5 through April 8, 2007; thus, he could not have previously filed the C-84 in question prior to the claim being additionally allowed because the request would be based on non-allowed conditions. Relator claims that, based upon the magistrate's conclusion, attorneys would have to submit C-84s even though they know the conditions that were the basis for the requested period of disability have not been formally recognized in the claim.

{¶4} We disagree with relator's contention and agree with the commission's view. The circumstances in which relator finds himself are of his own making. Dr. Mark Weiner stated in an April 2007 letter that he believed relator's neck conditions and surgery were related to his industrial injury. Despite Dr. Weiner's report in April 2007, relator waited to apply for additional conditions until July 20, 2009, which was beyond the two-year period provided in R.C. 4123.52. Although relator argues that he could not apply for TTD until the commission allowed his additional conditions on September 11, 2009, he could have applied for additional conditions within the two-year look-back period in R.C. 4123.52. The Supreme Court of Ohio, in *State ex rel. Gen. Refractories Co. v. Indus.*

Comm. (1989), 44 Ohio St.3d 82, 85, found that the filing of an application for additional conditions within two years of the period for which TTD is requested is sufficient to comply with the time limits imposed by R.C. 4123.52. Although relator applied for the same additional conditions on January 29, 2009, he withdrew the application, and he cites no authority for the proposition that his current application should somehow "relate back" to his initial, withdrawn application, and we find none. Likewise, we find no legal support for relator's contention that his application for TTD should relate back to January 29, 2009, because he entered Dr. Weiner's records "into the BWC system" when he filed his January 29, 2009 application for additional conditions, and the commission should have been on notice of his future claim for TTD. The exception found in *Gen. Refractories*, which allows applications for additional conditions to be construed as requests for compensation for purposes of R.C. 4123.52, does not include withdrawn applications for additional conditions. For these reasons, we find the magistrate did not err in his decision, and we overrule relator's objection.

{¶5} After an examination of the magistrate's decision, an independent review of the evidence pursuant to Civ.R. 53, and due consideration of relator's objection, we overrule the objection. Accordingly, we adopt the magistrate's decision as our own with regard to the findings of fact and conclusions of law, and we deny relator's request for a writ of mandamus.

Objection overruled; writ of mandamus denied.

KLATT and DORRIAN, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Matthew J. Goedel,	:	
Relator,	:	
v.	:	No. 10AP-704
The Industrial Commission of Ohio and Hammond Industrial Construction, Inc.,	:	(REGULAR CALENDAR)
Respondents.	:	
	:	

MAGISTRATE'S DECISION

Rendered on July 26, 2011

Brian Law Offices, and *John E. Werren*, for relator.

Michael DeWine, Attorney General, and *Elise Porter*, for
respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶6} In this original action, relator, Matthew J. Goedel, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order denying him temporary total disability ("TTD") compensation pursuant to the two-year limitation period set forth at R.C. 4123.52, and to enter an order awarding TTD compensation.

Findings of Fact:

{¶7} 1. On August 5, 2002, relator sustained an industrial injury in the course of his employment with respondent Hammond Industrial Construction, Inc. ("Hammond"). The industrial claim (No. 02-841738) was initially allowed for "left shoulder contusion; left knee contusion; cervical strain; left knee strain; thoracic contusion and strain; right shoulder contusion."

{¶8} 2. In 2007, relator had surgery on his neck performed by Mark A. Weiner, M.D., who believed the neck problem was related to the 2002 work injury.

{¶9} 3. Relator filed a C-86 motion on January 21, 2009, but after a hearing on March 25, 2009, a district hearing officer ("DHO") dismissed the C-86 at relator's counsel's request.

{¶10} 4. On July 20, 2009, relator filed a motion for additional allowances in the claim.

{¶11} 5. After a hearing on September 11, 2009, a DHO additionally allowed the claim for "disc osteophyte complexes at C4-5, C5-6 and C6-7" and "left upper extremity radiculitis."

{¶12} 6. On October 8, 2009, Dr. Weiner completed a C-84 on which he certified TTD from March 5 to April 8, 2007. The C-84 was filed on October 19, 2009.

{¶13} 7. After a hearing on December 1, 2009, a DHO denied relator's request for TTD compensation finding that the request for compensation was not filed within two years as required by R.C. 4123.52. The DHO reasoned as follows:

* * * The period of disability is related to surgery for a condition that was added to this claim by District Hearing Officer hearing on 09/11/2009. Although a request for an

additional allowance can be construed to include a request for related temporary total disability compensation, the approved C-86 motion for additional allowance was filed on 07/20/2009--more than 2 years after the period at issue. No other requests for temporary total disability compensation over the period at issue were filed prior to the C-84 filed on 10/19/2009. Therefore, there is no jurisdiction to consider the C-84.

{¶14} 8. Relator filed an appeal from the DHO order on December 8, 2009.

{¶15} 9. A staff hearing officer ("SHO") conducted a hearing on January 11, 2010. The SHO affirmed the prior DHO's order, finding:

* * * [T]he Injured Worker's C-84 requesting payment of this period of temporary total compensation was not filed until 10/16/2009, more than two years after this period of disability. Pursuant to Ohio revised Code 4123.52, the Industrial Commission cannot award compensation for a back period in excess of two years prior to the date of filing of the application for such compensation. As this period of compensation was not requested within two years as required by statute, the Industrial Commission is without jurisdiction to grant this period of compensation.

{¶16} 10. On January 15, 2010, relator filed an appeal from the SHO's order of January 11, 2010.

{¶17} 11. Relator's appeal was refused by the commission in an order mailed February 3, 2010.

{¶18} 12. On July 26, 2010, relator, Matthew J. Goedel, filed this mandamus action.

Conclusions of Law:

{¶19} The issue is whether the commission abused its discretion in denying relator's request for TTD compensation by relying on R.C. 4123.52 as a basis for its denial. Finding that the commission did not abuse its discretion in relying upon R.C.

4123.52, it is the magistrate's decision that this court deny the requested writ of mandamus, as more fully explained below.

R.C. 4123.52 provides, in pertinent part:

* * * The commission shall not make any modification, change, finding, or award which shall award compensation for a back period in excess of two years prior to the date of filing application therefor. * * *

{¶20} The commission denied relator TTD compensation because his C-84 application was filed on October 19, 2009 for the period of time March 5 through April 8, 2007. The C-84 application was filed more than two years after the requested period of compensation. However, relator argues that his motion for additional conditions should be viewed as his R.C. 4123.52 application.

{¶21} Relator argues that the commission should have found that his R.C. 4123.52 application was filed on January 20, 2009 rather than July 20, 2009, even though his counsel requested and was granted a dismissal of the January 20, 2009 motion. However, relator cites no authority supporting his implied proposition that his July 20, 2009 motion relates back to his dismissed January 20, 2009 motion. Accordingly, the magistrate rejects relator's proposition that the commission should have found that January 20, 2009 was the filing date of his motion for additional conditions.

{¶22} Relator argues that the facts of this case are strikingly similar to the ones in *State ex rel. General Refractories Co. v. Indus. Comm.* (1989), 44 Ohio St.3d 82. In *General Refractories*, Eugene Smith sustained an injury in the course of and arising out of his employment in 1981. Smith's treating physician submitted a report to the employer indicating that Smith had aseptic necrosis of his right femoral head that may be due to the

industrial injury and would prevent his return to work until approximately May 3, 1982. The employer responded that it was unable to pay workers' compensation benefits because aseptic necrosis was not an allowed condition in the claim. In June 1983, Smith filed a motion to have his claim additionally allowed for the aseptic necrosis of his right femoral head and the additional condition was allowed.

{¶23} On May 15, 1985, Smith filed a motion for the payment of TTD compensation from March 16, 1982 through August 15, 1985. After a hearing, the commission granted the request for compensation and construed Smith's June 1983 motion seeking to have his claim additionally allowed for aseptic necrosis as an application for compensation.

{¶24} The employer initially sought in this court a writ of mandamus contending that the commission abused its discretion by awarding Smith TTD compensation for a back period in excess of the two-year period prior to May 15, 1985 in violation of R.C. 4123.52. The employer argued that since Smith did not file his application for the award of TTD compensation until May 15, 1985, he was not entitled to compensation for the period March 16, 1982 to May 15, 1983. The employer's contention was that since Smith did not make a specific request for compensation in the motion for the allowance of additional conditions, such motion could not be construed as an application for compensation. This court disagreed and denied the writ of mandamus.

{¶25} The employer appealed to the Supreme Court of Ohio. The issue before the court was whether Smith's motion for allowance of an additional condition of aseptic necrosis of his right femoral head should be construed as an application for compensation within the meaning of R.C. 4123.52. The employer argued that since

Smith did not specifically request compensation, the motion for allowance could not be construed as an application for compensation. The court cited *Nichols v. Ohio Collieries Co.* (1944), 75 Ohio App. 474, finding that the fact that the application did not expressly request compensation was not conclusive as to whether it was a request for compensation. "The character of the application is to be determined not only from its contents, but also from the nature of the relief sought and how the parties treated the application." *General Refractories*, at 83, citing *Nichols*.

{¶26} The court then noted that the record indicated that the employer knew at the time Smith filed for an allowance of an additional condition that he had not been working at least since March 16, 1982. In its letter of May 4, 1982 which denied the additional condition, the employer indicated that it was not paying compensation benefits because the request was based upon a non-allowed condition. It was the employer's refusal that gave rise to Smith's June 23, 1983 motion seeking the allowance of the refused compensation. The court found it obvious that the parties treated the application for allowance of the additional condition as an application for an additional award of compensation. The court declined to find an abuse of discretion where the record contains sufficient evidence to support it.

{¶27} Thus, in certain circumstances, a request for additional allowances can also constitute a request for compensation. The court in *General Refractories* pointed out that the facts in that case were distinguishable from a situation where the application requesting the back award is predicated on the original allowed condition and there is no filing prior to the application in question which could in any way be construed as an application for compensation within the meaning of R.C. 4123.52. The court

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).