

[Cite as *State ex rel. Ohio State Univ. Hosp. v. Indus. Comm.*, 2011-Ohio-4758.]
IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State ex rel. The Ohio State University Hospital,	:	
	:	
Relator,	:	
	:	
v.	:	No. 10AP-720
	:	
Industrial Commission of Ohio and Jeanette F. Bolin,	:	(REGULAR CALENDAR)
	:	
Respondents.	:	

D E C I S I O N

Rendered on September 20, 2011

Kegler, Brown, Hill & Ritter Co., LPA, Randall W. Mikes and Margeaux Kimbrough, for relator.

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

The Bainbridge Firm, LLC, and Christopher Yeager, for respondent Jeanette F. Bolin.

IN MANDAMUS
ON OBJECTIONS TO MAGISTRATE'S DECISION

TYACK, J.

{¶1} The Ohio State University Hospital ("OSUH") has filed this action in mandamus, seeking a writ to compel the Industrial Commission of Ohio ("commission") to vacate its award of permanent total disability ("PTD") compensation to Jeanette F. Bolin.

{¶2} In accord with Loc.R. 12, 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 including detailed findings of fact and conclusions of law, which is appended to this decision. The magistrate's decision includes a recommendation that we grant a writ to change the starting date for the PTD compensation, but not the fact that an award of PTD compensation is warranted.

{¶3} Counsel for OSUH has filed objections to the magistrate's finding that PTD compensation is appropriate. Counsel for Ms. Bolin has filed objections to the modification of the starting date recommendation. Counsel for the commission has filed a memorandum in response to OSUH's objections. Counsel for Ms. Bolin has done likewise. Counsel for OSUH has filed a memorandum in response to the objections filed on behalf of Ms. Bolin.

{¶4} The case is now before the court for a full, independent review.

{¶5} Ms. Bolin was injured on September 2, 2001. Her workers' compensation claim was initially recognized for contusion of her buttock, face and back, concussion without coma and post-concussion syndrome. Approximately three years later, her claim was extended to include "cognitive disorder (294.9) and traumatic brain injury."

{¶6} Ms. Bolin's psychiatric history is complex. Some experts have seen her as seriously impaired. Others have reported her as embellishing and magnifying her symptoms. Some have reported that she has reached maximum medical improvement ("MMI"). Others have disagreed.

{¶7} Perhaps because of the various conflicting reports, the commission had Ms. Bolin examined by Marianne N. Collins, Ph.D. Dr. Collins reported that Ms. Bolin had reached MMI and suffered from a whole person impairment of 38 percent.

{¶8} The commission relied upon the report of Dr. Collins in granting PTD compensation. The commission also relied upon the reports of Robert M. Hess, M.D., a neurological surgeon who examined Ms. Bolin on behalf of Ms. Bolin's counsel in July 2006 and again on June 19, 2009. The Hess report specifically mentioned was file stamped July 24, 2009 at the commission.

{¶9} Addressing first the objections filed on behalf of Ms. Bolin, we do not see the problem with the report of Dr. Hess dated July 24, 2009, especially in light of his examination and report from 2006. Dr. Hess specifically listed the allowed claims in both of his reports. Dr. Hess made no mention of depression in his 2006 report but still concluded that Ms. Bolin was PTD.

{¶10} In his 2009 report upon which the commission specifically relied, Dr. Hess again listed the allowed claims. He again listed Ms. Bolin as PTD based upon post-concussion syndrome. He mentions depression only in conjunction with persistent headaches, which he clearly views as a symptom of the recognized conditions. We conclude that the brief mention of depression in the context of this report is nothing more than a fleeting reference to a symptom of post-concussion syndrome.

{¶11} We sustain the objections with respect to the report of Dr. Hess and its impact on the starting date for Ms. Bolin's PTD compensation.

{¶12} OSUH's objections are not specifically set forth, but really consist of a re-argument of the merit brief it submitted to the magistrate. OSUH states:

The distinct issue before this Court is whether the Commission can, on the one hand, consistently find that Claimant feigned symptomatology of her conditions and then, on the other hand, find that the Claimant is permanently and totally disabled as a result of these same conditions. OSHU submits that it cannot.

{¶13} In the context of the determination of whether or not Ms. Bolin was entitled to temporary total disability compensation, the commission had relied on reports which discussed what can be described as malingering or magnification of symptoms in finding that Ms. Bolin had reached MMI. However, these reports were directed at the issue of the achieving of a medical plateau, not at the subjective belief of the reporting physicians that Ms. Bolin was overstating her symptoms. The commission was not bound to accept the malingering comments as decided fact for purposes of future issues to be addressed, including entitlement to PTD.

{¶14} We find that the magistrate reached the correct conclusion as to Ms. Bolin's entitlement to PTD compensation and therefore overrule the objections of OSUH.

{¶15} As a result of the foregoing, we adopt the findings of fact contained in the magistrate's decision. We adopt the conclusions of law in the magistrate's decision with respect to Ms. Bolin's entitlement to PTD compensation, but not with respect to the July 2009 report of Dr. Hess and not with respect to the starting date for PTD compensation.

{¶16} As a result, we deny OSUH's request for a writ of mandamus.

*Objections on behalf of Ms. Bolin sustained;
Objections on behalf of OSUH overruled;
writ of mandamus denied.*

SADLER and CONNOR, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. The Ohio State University Hospital,	:	
	:	
Relator,	:	
	:	
v.	:	No. 10AP-720
	:	
Industrial Commission of Ohio and Jeanette F. Bolin,	:	(REGULAR CALENDAR)
	:	
Respondents.	:	

MAGISTRATE'S DECISION

Rendered on June 23, 2011

Kegler, Brown, Hill & Ritter Co., LPA, Randall W. Mikes and Margeaux Kimbrough, for relator.

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

The Bainbridge Firm, LLC, and Christopher Yeager, for respondent Jeanette F. Bolin.

IN MANDAMUS

{¶17} In this original action, relator, The Ohio State University Hospital ("OSUH"), requests this court issue a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission"), to vacate its February 24, 2010 order and to enter

a new order denying respondent Jeanette F. Bolin's ("claimant") application for permanent total disability ("PTD") compensation.

Findings of Fact:

{¶18} 1. On September 2, 2001, claimant sustained a work-related injury in the course of her employment with OSUH as a food service worker. Her industrial claim (No. 01-845194) has been allowed for the following conditions: "contusion of buttock; contusion [of] face; concussion without coma; postconcussion syndrome; contusion of back."

{¶19} 2. Following a December 1, 2004 hearing, a district hearing officer ("DHO") issued an order which additionally allowed the following conditions: "cognitive disorder (294.9) and traumatic brain injury." The DHO awarded temporary total disability ("TTD") compensation from August 22, 2003 to the present hearing date and to continue upon the submission of medical evidence.

{¶20} 3. Following a January 18, 2005 hearing, a staff hearing officer ("SHO") issued an order affirming the DHO's order.

{¶21} 4. Apparently, due to a lack of continuing medical evidence of disability, the Ohio Bureau of Workers' Compensation ("BWC") ceased paying TTD compensation as of June 9, 2005.

{¶22} 5. At the BWC's request, Lee Howard, Ph.D., examined claimant and authored a report dated June 22, 2005, and opined:

The claimant has reached maximum medical improvement for her organic brain syndrome. She is approaching four years post head injury with recovery generally occurring within the first six to twelve months or six to eighteen months.

{¶23} 6. On May 11, 2006, claimant again filed a request for TTD compensation and, after a hearing on June 13, 2006, a DHO granted the request and awarded TTD compensation from April 28 to June 5, 2006 and continuing.

{¶24} 7. Following a July 26, 2006 hearing, an SHO issued an order vacating the DHO's order and denied payment of TTD compensation. The SHO's order provides in part:

The request for payment of temporary total compensation from 04/08/2006 [sic] to the present is denied. The Staff Hearing Officer notes that temporary total compensation was last paid on 06/09/2005. There is no explanation as to why Dr. Holtzmeier is certifying the injured worker as temporarily and totally disabled again as of 04/08/2006, [sic] when he has been treating her on a regular basis for several years. The injured worker testified that she worked briefly for a different employer as an order filer last spring, but could not recall the dates. The Staff Hearing Officer relies on the report of Dr. Holtzmeier (09/14/2005) wherein he indicated that the injured worker's symptoms were essentially unchanged since when he first saw her in August of 2003. The Staff Hearing Officer also relies on the fact that the injured worker's recent treatment has been strictly conservative. The Staff Hearing Officer further relies on the report of Dr. Howard (06/22/2005) that the injured worker had reached maximum medical improvement relating to the traumatic brain injury and cognitive dysfunction.

{¶25} 8. An appeal of the SHO's order was refused by the commission in an order mailed August 22, 2006.

{¶26} 9. On October 25, 2006, claimant filed an application for PTD compensation and, after a hearing on June 29, 2007, an SHO denied the application finding that the allowed psychological conditions had not reached maximum medical improvement ("MMI") based on a March 15, 2007 finding by Earl F. Greer, Jr., Ed.D.

{¶27} 10. On August 1, 2007, claimant filed a request for TTD compensation beginning July 26, 2006 and, after a hearing on September 19, 2007, a DHO denied claimant's request. The DHO found that claimant had failed to meet her burden of proving that the allowed psychological conditions were temporarily totally disabling. The DHO's order provides, in pertinent part:

* * * The Injured Worker's psychological conditions were found to have reached maximum medical improvement by final Staff Hearing Officer order of 07/26/2006. Then, at a permanent total disability hearing on 06/29/2007, Staff Hearing Officer Latas found that the psychological conditions had not reached maximum medical improvement. This finding was based on report from the Industrial Commission specialist, Dr. Greer. The District Hearing Officer is bound by this Staff Hearing Officer order and therefore finds that the psychological conditions have not reached maximum medical improvement. However, the District Hearing Officer also finds that there [is] insufficient medical evidence to support temporary total disability compensation due to the psychological conditions. This is because the file lacks any office notes from treatment which would support the disability. And the C-84s on file are from Dr. Holtzmeier, the Injured Worker's physician of record who is not qualified to treat or certify disability for the psychological conditions. Although there has been a C-9 submitted requesting psychological treatment, there was not a statement from a physician which indicates the necessity and relatedness of the treatment. That is why the MCO dismissed the C-9. After that dismissal, there has not been a subsequent C-9 request for treatment submitted. For these reasons, temporary total disability compensation is not payable.

{¶28} 11. Claimant filed an appeal from that DHO order and, after a hearing on December 13, 2007, an SHO issued an order vacating the DHO's order and granting TTD compensation from March 15 through December 13, 2007 and continuing. The request for TTD compensation for the period from July 26, 2006 through March 14, 2007 was denied because no medical evidence from a psychologist or psychiatrist that

had evaluated or treated claimant over that period had been submitted. TTD compensation was granted beginning March 15, 2007 based on the March 15, 2007 report of Dr. Greer and the December 5, 2007 C-84 and the December 6, 2007 report of Beal D. Lowe, Ph.D. The SHO's order states in pertinent part: "This medical evidence supports the position that the allowed psychological conditions have again become temporarily and totally disabling."

{¶29} 12. Appeals filed by OSUH and claimant were refused by the commission in an order mailed on January 9, 2008.

{¶30} 13. On February 13, 2008, Richard H. Clary, M.D., evaluated claimant. In his February 14, 2008 report, Dr. Clary noted:

Her affect was reactive and appropriate and she said her mood is depressed off and on. There is no persistent daily dysphoric mood. Depression is a common complaint of post concussion syndrome which is an allowed condition in this claim. * * *

* * *

SUMMARY AND CONCLUSIONS

I reviewed a report from Psychologist Beal Lowe dated 12/6/07. The psychologist diagnoses amnesic disorder, NOS, coded 294.8 and recommended psychotherapy and counseling. Dr. Lowe indicates that Ms. Bolin attempted to work some temporary jobs after her injury. Amnesic disorder, NOS, is not an allowed condition in the claim.

Review of medical records indicate that Ms. Bolin was evaluated by Psychologist Dr. Bornstein, on 1/3/05. Dr. Bornstein did neuropsychological testing to evaluate her memory and concentration. The psychologist indicated that he was unable to evaluate the extent of her deficits because she gave a poor effort and her motivation was poor. In my medical opinion, this indicates that Ms. Bolin is exaggerating her memory problems. According to the AMA Guides Fifth

Edition, inconsistent symptoms and findings cannot be used to evaluate someone for disability.

I reviewed a report from Psychologist Dr. Greer dated 3/15/07. Psychological testing showed evidence of anxiety, depression, somatic preoccupation and "thought disorder." The term thought disorder is also used to report or describe psychotic symptoms. In my medical opinion, Ms. Bolin has never had past or present symptoms of psychosis. In my medical opinion, this would indicate that she was exaggerating her symptoms on psychological testing.

I reviewed a report from Dr. Steiman, a neurologist, dated 12/18/06. Dr. Steiman indicated "no objective findings."

I reviewed a report from Psychologist Lee Howard dated 6/22/05. Psychological testing showed evidence of symptom exaggeration and malingering.

I reviewed a report from Psychologist Dr. Baisden dated 3/15/04. Dr. Baisden reports cognitive disorder, NOS. The psychologist recommended neuropsychological testing which was later done by Dr. Bornstein as noted above.

During my evaluation, Ms. Bolin was exaggerating her long term memory and short term memory problems. In my medical opinion, the exaggeration of memory problems correlates with the exaggeration of psychiatric symptoms.

Ms. Bolin reported to me that she has problems with memory and concentration, which would indicate that she would be a poor candidate for counseling or psychotherapy. In my medical opinion, the request for treatment by Dr. Lowe is not appropriate and is not necessary for the allowed conditions in this claim. In my medical opinion, Dr. Lowe is treating Ms. Bolin for conditions unrelated to the claim.

{¶31} 14. Dr. Clary submitted a supplemental report, dated February 22, 2008, that provides in pertinent part:

In my medical opinion, Ms. Bolin has reached maximum medical improvement for the allowed conditions of post concussion syndrome, concussion without coma, organic brain syndrome and traumatic brain injury. In my medical opinion, the average length of treatment for these conditions

would be 1-2 years and Ms. Bolin is now over 6 years post injury.

In my medical opinion, Ms. Bolin is exaggerating her symptoms and her psychiatric evaluation was inconsistent. According to the AMA Guides Fifth Edition, inconsistent findings on an examination cannot be used to rate temporary or permanent disability. In my medical opinion, the allowed conditions in this claim do not cause any limitations or restrictions in her ability to work.

{¶32} 15. OSUH filed a motion seeking to terminate claimant's TTD compensation.

{¶33} 16. On March 26, 2008, a DHO held a hearing regarding the request by OSUH to terminate TTD compensation and claimant's request seeking the authorization of a psychological consultation. The DHO approved the requested psychological consultation and found that it was related to and necessary for treating the allowed conditions; found that TTD compensation should continue upon submission of proof; and determined that the commission did not have jurisdiction to retroactively terminate TTD compensation from March 15 through December 13, 2007 and declare an overpayment as requested because the period of compensation was ordered by an SHO and as a result, res judicata applied.

{¶34} 17. On appeal from the DHO's order, and upon a request to terminate TTD, following a hearing on May 8, 2008, an SHO issued an order which modified the DHO's order. The SHO granted TTD compensation from the date of last payment through May 8, 2008, the date of the hearing. Payment after May 8, 2008 was denied due to a finding of MMI for the allowed psychological/neuro-psychological condition. The SHO's order provides in pertinent part:

* * * Payment after 05/08/2008 is denied at this time, due to a finding of maximum medical improvement for the allowed psychological/neuropsychological condition. This finding is based on reports from Dr. Clary dated 02/14/2008 and 02/22/2008. There was a prior referral for neuropsychological treatment to Dr. Bornstein in January of 2005. At that time, Dr. Bornstein found that he had no services to offer [the] injured worker, and he suggested another referral for psychological treatment. Despite the fact that this claim has been allowed for the cognitive disorder and traumatic brain injury, there has been no further attempt to obtain neuropsychological treatment. It is therefore found, as stated, the injured worker has reached a level of maximum medical improvement.

{¶35} 18. An appeal by claimant was refused by the commission in an order mailed May 31, 2008.

{¶36} 19. Claimant filed a mandamus action in this court requesting this court issue a writ ordering the commission to vacate its order that denied TTD compensation for the period of July 26, 2006 through March 14, 2007 and to enter a new order granting said compensation. This court referred the matter to a magistrate who determined that this court should issue a writ of mandamus ordering the commission to vacate the December 13, 2007 order of its SHO that granted in part and denied in part claimant's motion for TTD compensation and to enter an order denying said compensation on grounds that the C-84 of Dr. Lowe upon which the commission relied is, in effect, a request for compensation based upon an allowed condition that had previously been determined to be at MMI. Following a July 26, 2006 hearing, an SHO had determined, based upon Dr. Howard's report, that the industrial injury had reached MMI relating to the "traumatic brain injury and cognitive dysfunction." Thus, TTD compensation was precluded subsequent to July 26, 2006. The court adopted the

magistrate's findings of fact and conclusions of law. See *State ex rel. Bolin v. Indus. Comm.*, 10th Dist. No. 09AP-68, 2010-Ohio-3834.

{¶37} 20. On July 24, 2009, claimant filed a second application for PTD compensation. In support, claimant submitted the report of Robert M. Hess, M.D. Dr. Hess examined claimant on June 19, 2009 and noted, as follows:

[O]n one MRI which was performed that they found some abnormalities on the T2 scan in the white matter deep within the brain substance but no gross focal loss of brain tissue was identified.

I agree with her that she has a significant cognitive defect. I also agree with Dr. Beal Lowe about her ability to function. I have no access to Dr. Clary's examination. I have no access to Dr. Martin Taylor's neurological recommendations. I do not know Dr. Mary Hill, neuropsychologist. The Cleveland Clinic MRI dated 3-16-09 was reported by Dr. Jay Costantini that there is no convincing acute intracranial pathology or abnormality. Non-specific foci of white matter changes in the cerebral hemispheres are present. Inflammatory changes in the paranasal sinuses, ethmoid air cells are noted.

I think she is permanently and totally disabled and I base this upon the post concussion syndrome, the persistent headaches, the depression and this is related to the accident that occurred on 9-2-01.

{¶38} 21. On August 31, 2009, Gerald S. Steiman, M.D., examined claimant at OSUH's request and submitted a report dated September 8, 2009. In his report, Dr. Steiman concluded as follows:

Presently Ms. Bolin's exam is characterized by magnification, embellishment, inconsistencies and illness affirming behaviors. Ms. Bolin's complaints and perceptions of her pain and ability to perform activities of daily living, when correlated with the history, medical record review and physical examination, reveals inconsistencies and raises issues of incongruity. There is a paucity of objective physical findings when compared to the magnitude of the subjective complaints. Both the subjective complaints and

the objective physical findings appear inconsistent with the objective diagnostic studies. Ms. Bolin's response to treatment appears incongruent with well-established medical diagnoses. More so, the current subjective complaints and physical findings found on examination are inconsistent with the findings within the medical record review. Ms. Bolin's subjective complaints and physical examination demonstrate excessive pain behaviors characterized by magnification, embellishment, and inconsistencies which raise issues of reliability and credibility. Consequently, neither Ms. Bolin's subjective complaints, pain perceptions nor the reported restrictions in activities of daily living should be considered as valid indicators of their diagnoses.

OPINION: The medical opinions set forth are based on my education, training and experience as well as Ms. Bolin's history, physical examination, and the pain and functional assessment. The medical records were reviewed and taken into consideration. The medical opinions are expressed to a reasonable degree of medical probability and certainty.

Based on the history, medical record review, physical examination, Ms. Bolin's perception of her pain and functional capabilities, and considering only the allowed conditions within claim 01-845194 Ms. Bolin has reached Maximum Medical Improvement. Ms. Bolin's condition appears permanent, stable, and unlikely to change. There is insufficient credible evidence that further harm, injury, or additional impairment will be caused by the performance of activities of daily living.

Ms. Bolin's history, medical record review and physical exam provide credible evidence she is able to perform sustained remunerative employment.

Ms. Bolin's history, medical record review and physical exam provide no credible evidence to indicate the necessity of restrictions with respect to her job activity. Although Ms. Bolin has numerous and multiple subjective complaints, there are no objective physical findings on her exam nor have there been objective diagnostic studies to substantiate the chronicity of her symptom complex. In addition, her symptom complex is magnified, embellished, inconsistent, and functional.

In summary, Ms. Bolin is not permanently and totally impaired from sustained remunerative employment. Based on the current allowed conditions she is able to return to her prior job activity without restriction or limitation.

{¶39} 22. Marianne N. Collins, Ph.D., examined claimant at the commission's request on October 28, 2009. In her report of the same date, Dr. Collins stated:

Her attention was sufficient to understand simple instructions, but her concentration is very poor, making it difficult for her to carry out those instructions. Also, her memory was quite poor for immediate and recent memory. She was unable to do even simple arithmetic problems consistently. She became confused sometimes, and could not refocus. She was quietly tearful on several occasions during her interview.

She does exhibit symptoms consistent with a Cognitive Disorder, which include emotional lability, poor memory, confusion, and a need for supervision and help with some [activities of daily living]. She has also become avoidant of groups of people, including family get-togethers, exhibiting a personality change from her former outgoing social self.

*

Opinions:

[One] Has the Injured Worker reached maximum medical improvement with regard to each specific allowed condition? Briefly describe the rationale for your opinion.

Ms. Jeanette Bolin has reached maximum medical improvement with regard to her Cognitive Disorder. She has received several modalities of therapy, including psychotherapy, and has improved over time. She has continued to see her psychotherapist for three years. She has been maintaining her level of improvement cognitively, without additional gains for over six months. It is not expected that she would improve further at this time. However, it is recommended that she have maintenance sessions with Dr. Lowe once a month.

[Two] Based on the AMA Guides, 2nd and 5th Editions, and with reference to the Industrial Commission Medical Examination Manual, provide the estimated percentage of whole person impairment arising from each allowed psychological/psychiatric condition. Please list each condition and whole person impairment separately, and then provide a combined whole person impairment. If there is no impairment for an allowed condition, indicate zero (0) percent.

This injured worker, Ms. Jeanette Bolin, is estimated to have a whole person impairment of 38%, based on her Cognitive Disorder. This estimation is arrived at based on the above named reference materials. This is a Class III level of impairment.

(Emphases sic.)

{¶40} 23. Following a February 24, 2010 hearing, the commission granted claimant's PTD application, relying on the reports of Drs. Collins and Hess. An SHO awarded PTD compensation beginning July 24, 2009, the date of Dr. Hess' report. In the order, the SHO stated:

Based upon the report(s) of Dr(s). Marianne Collins, Ph.D. dated 10/28/2009 as well as the report of Dr. Hess dated 7/24/2009, it is found that the Injured Worker is unable to perform any sustained remunerative employment solely as a result of the medical impairment caused by the allowed condition(s). Therefore, pursuant to State ex rel. Speelman v. Indus. Comm. (1992), 73 Ohio App.3d 757, it is not necessary to discuss or analyze the Injured Worker's non-medical disability factors.

Dr. Hess found permanent total disability and stated that he bases this on the "post concussion syndrome, the persistent headaches." She [sic] finds that this is all related to the injury of 9/02/2001. Dr. Collins found the Injured Worker incapable of work and states that his [sic] cognitive disorder "manifested itself by poor memory, some confusion, a change in personality, and emotional lability. These symptoms are sufficiently severe that she would have difficulty remembering and carrying out simple routine instructions reliably. Her concentration is poor and her pace

is slow for the most part...She would have poor ability to tolerate any work-related stress as she cries and becomes confused when stressed, as she did during her evaluation."

{¶41} 24. OSUH filed a request for reconsideration which was denied in an order mailed April 22, 2010.

{¶42} 25. On July 30, 2010, OSUH filed this mandamus action.

Conclusions of Law:

{¶43} The issue raised in this action is whether the commission abused its discretion by granting PTD compensation to claimant.

{¶44} OSUH advances two arguments in support of its contention that the commission abused its discretion. First, OSUH contends that the commission erred in relying on Dr. Hess' report which was based, in part, on a non-allowed condition. Second, OSUH argues that the commission abused its discretion by finding claimant's cognitive disorder permanently and totally disabling contrary to its prior orders and it failed to provide an explanation for the basis of its contradictory orders.

{¶45} The magistrate finds that the commission did not abuse its discretion in granting claimant's PTD compensation application. However, inasmuch as the magistrate concludes that the report of Dr. Hess should be removed from evidentiary consideration, that start date for the award should be October 28, 2009, the date of the report of Dr. Collins, upon which the commission also relied and which constitutes some evidence.

{¶46} The purpose of PTD compensation is to compensate injured persons for impairment of earning capacity. *State ex rel. General Motors Corp. v. Indus. Comm.* (1975), 42 Ohio St.2d 278, 282. The commission evaluates the evidence concerning

the degree to which the injured worker's ability to work has been impaired. *State ex rel. Stephenson v. Indus. Comm.* (1987), 31 Ohio St.3d 167. "The ultimate consideration is whether the claimant is 'unfit for sustained remunerative employment.'" ' " *Id.* at 170, quoting *State ex rel. Paragon v. Indus. Comm.* (1983), 5 Ohio St.3d 72. (Emphasis deleted.) "Payment of PTD is inappropriate where there is evidence of (1) actual sustained remunerative employment, * * * (2) the physical ability to do sustained remunerative employment, * * * or (3) activities so medically inconsistent with the disability evidence that they impeach the medical evidence underlying the award." *State ex rel. Lawson v. Mondie Forge*, 104 Ohio St.3d 39, 2004-Ohio-6086, ¶16.

{¶47} A claimant must always show the existence of a direct and proximate causal relationship between his or her industrial injury and the claimed disability. *State ex rel. Waddle v. Indus. Comm.* (1993), 67 Ohio St.3d 452. Non-allowed medical conditions cannot be used to advance or defeat a claim for PTD compensation. *Id.* The mere presence of a non-allowed condition in a claim for compensation does not in itself destroy the compensability of the claim, but the claimant must meet his or her burden of showing that an allowed condition independently caused the disability. *State ex rel. Bradley v. Indus. Comm.*, 77 Ohio St.3d 239, 242, 1997-Ohio-48.

{¶48} The commission granted claimant PTD compensation based upon both the July 24, 2009 report of Dr. Hess and the October 28, 2009 report of Dr. Collins. OSUH contends that the commission abused its discretion in relying on the report of Dr. Hess, arguing that his opinion was based, in part, on the non-allowed condition of depression.

{¶49} Both claimant and the commission contend that Dr. Hess' opinion was based solely on the allowed conditions, and that those allowed conditions cause symptoms, including depression. They argue that Dr. Hess refers to "depression" as a symptom and not as a condition.

{¶50} Dr. Hess opined that claimant was permanently and totally disabled based upon the "post concussion syndrome, the persistent headaches, [and] the depression." While headaches are commonly recognized as a symptom of both, post concussion syndrome and traumatic brain injury (both allowed conditions in the claim), depression is not a commonly recognized symptom of any of the allowed conditions. Further, claimant has consistently complained of headaches since she was injured. However, even if Dr. Hess' report is removed from evidentiary consideration, the commission's order is still based on some competent, credible evidence—the October 28, 2009 report of Dr. Collins. That report provides that claimant suffers from a cognitive disorder, "which has manifested itself by poor memory, some confusion, a change in personality, and emotional lability." The doctor found that claimant's symptoms were so severe that she would have difficulty following simple instructions reliably. The doctor also documented that claimant has poor concentration, a slow pace, cannot relate to more than one person at a time and would not be able to handle work-related stress. The doctor concluded that claimant was incapable of work. Since Dr. Collins' report constitutes some evidence that the allowed conditions support the finding of PTSD compensation upon which the commission could rely, the commission's order should not be disturbed. *Waddle*. Thus, even with the evidentiary elimination of the report of Dr. Hess due to the alleged reliance on a non-allowed condition, the October 28, 2009

report of Dr. Collins remains to support the PTD compensation award and should be used as the start date for the award. Based upon that analysis, OSUH cannot prove its claim to a writ of mandamus. *State ex rel. Galion Mfg. Div. Dresser Industries, Inc. v. Haygood* (1991), 60 Ohio St.3d 38.

{¶51} OSUH also argues that the commission could not find that claimant was totally disabled because the commission had previously denied claimant's requests for TTD compensation, based on medical opinions which concluded that she exaggerated her symptoms. OSUH argues that the "law of the case" prohibits the commission from finding, without more, that the cognitive disorder was symptomatic and totally disabling.

{¶52} The law-of-the-case doctrine: "[P]rovides that the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels." *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, 3.

The doctrine is necessary to ensure consistency of results in a case, to avoid endless litigation by settling the issues, and to preserve the structure of superior and inferior courts as designed by the Ohio Constitution. It is considered a rule of practice, not a binding rule of substantive law.

Hopkins v. Dyer, 104 Ohio St.3d 461, 2004-Ohio-6769, ¶15 (citations omitted).

{¶53} OSUH cites the commission's July 26, 2006 order in which TTD compensation was denied based upon the June 22, 2005 report of Dr. Howard. In his report, Dr. Howard stated that claimant had reached MMI relating to the traumatic brain injury and cognitive dysfunction. Such a finding precludes TTD compensation but is necessary for granting PTD compensation.

{¶54} Next, OSUH cites the commission's May 8, 2008 order in which claimant's TTD compensation was terminated based upon the February 14 and February 22, 2008 reports of Dr. Clary. Dr. Clary found that claimant was exaggerating her long term and short term memory problems. However, the SHO's order terminated TTD compensation based upon the finding that MMI had been reached.

{¶55} OSUH also cites the April 9, 2009 commission order which denied claimant's request for a neuropsychological consult, finding that claimant exaggerated her symptoms. However, the issue regarding a one-time consultation is different than PTD compensation.

{¶56} OSUH argues that the law of the case in these previous rulings must prevail in the determination of PTD compensation. The law-of-the-case doctrine is similar to the concept of res judicata, although res judicata is a substantive rule of law that applies to a final judgment and the law-of-the-case doctrine is a rule of practice analogous to estoppel. *Hopkins*. It has been held that the doctrine of res judicata does not apply if the issue is the claimant's physical condition or degree of disability at two different times. See *State ex rel. B.O.C. Group, General Motors Corp. v. Indus. Comm.* (1991), 58 Ohio St.3d 199, 201.

"It is almost too obvious for comment that res judicata does not apply if the issue is claimant's physical condition or degree of disability at two entirely different times * * *. A moment's reflection would reveal that otherwise there would be no such thing as reopening for change in condition. The same would be true of any situation in which the facts are altered by a change in the time frame * * *."

{¶57} Id., quoting 3 Larson, Workers' Compensation Law (1989) 15-426,272(99) to 15-426,272(100), Section 79.72(f). For similar reasons, the law-of-the-case doctrine cannot be applied to these facts.

{¶58} Here, the doctors were examining claimant regarding different issues—TTD compensation, further treatment, and PTD compensation. The purpose of TTD compensation is to compensate for loss of earnings where a claimant's injury prevents a return to the former position of employment. *State ex rel. Ramirez v. Indus. Comm.* (1982), 69 Ohio St.2d 630, 634. TTD compensation is awarded where fundamental functional or physiological change is expected from the continuing treatment. *State ex rel. Brown v. Indus. Comm.*, 10th Dist. No. 02AP-108, 2002-Ohio-4313, ¶17. The payment of PTD compensation depends on whether the claimant is capable of sustained remunerative employment. *Stephenson* at 170.

{¶59} Thus, since the doctors were examining claimant regarding different standards and at different times, the law of the case does not apply here. Furthermore, the fact that different doctors rendered different opinions and reached different conclusions are issues of credibility and weight to be given to the evidence. "Questions of credibility and the weight to be given evidence are clearly within the commission's discretionary powers of fact finding." *State ex rel. Teece v. Indus. Comm.* (1981), 68 Ohio St.2d 165, 169.

{¶60} Finally, OSUH argues that the commission failed to provide an explanation for the basis of its contradictory order. As discussed, this magistrate does not find the order contradictory. An order issued by the commission must state the evidence relied upon to reach its conclusions and briefly explain the reasoning for the decision. *State*

ex rel. Noll v. Indus. Comm. (1991), 57 Ohio St.3d 203, 206. "An order of the commission should make it readily apparent from the four corners of the decision that there is some evidence supporting it." *Id.* The commission's order at issue here complies with the *Noll* requirements. The order was supported by medical evidence. The commission is not required to explain why it found certain evidence unpersuasive. *State ex rel. Scouler v. Indus. Comm.*, 119 Ohio St.3d 276, 2008-Ohio-3915, ¶16, citing *State ex rel. DeMint v. Indus. Comm.* (1990), 49 Ohio St.3d 19, 20.

{¶61} Based on the foregoing, it is this magistrate's decision that OSUH has not demonstrated that the commission abused its discretion by granting claimant's application for PTD compensation. However, a limited writ should issue ordering the commission to change the start date of the award to October 28, 2009, the date of the report of Dr. Collins.

/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).