[Cite as *State ex rel. McMaster Carr Supply Co. v. Indus. Comm.* , 2009-Ohio-4832.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. McMaster Carr Supply Company,	:	
Relator,	:	
v.	:	No. 08AP-825
Industrial Commission of Ohio and Scott Bartlett,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on September 10, 2009

Scheuer Mackin & Breslin LLC, J. Kent Breslin, and *Eric A. Rich*, for relator.

Richard Cordray, Attorney General, and *John R. Smart*, for respondent Industrial Commission of Ohio.

Melanie V. Miguel-Courtad, for respondent Scott Bartlett.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

BROWN, J.

{¶1} Relator, McMaster Carr Supply Company, has filed an original action requesting that this court issue a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its order granting temporary total disability

("TTD") compensation to respondent, Scott Bartlett ("claimant"), and to issue an order terminating said compensation, as of November 9, 2007, on the basis that claimant had reached maximum medical improvement ("MMI").

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

{¶3} Relator has filed objections to the magistrate's decision, arguing that the magistrate erred by ignoring the language of Ohio Adm.Code 4121-3-32(A)(1) (defining MMI), and by failing to determine that the evidence relied upon by the staff hearing officer ("SHO") was equivocal in nature and should have been disqualified. Relator also argues that the magistrate erred in concluding there was no evidence in the record that relator raised before the SHO the issue whether a "physician's report of work ability" ("MEDCO-14 form") constituted a medical opinion that claimant had reached MMI.

{¶4} Relator's primary contention is that a MEDCO-14 form, signed by claimant's treating physician, Dr. Steven A. Cremer, and dated November 9, 2007, constitutes a statement of MMI as defined by Ohio Adm.Code 4121-3-32(A)(1). The contents of the MEDCO-14 form was described by the magistrate in the findings of fact as follows:

> On November 9, 2007, Dr. Cremer completed a MEDCO-14 physician's report of work ability form. On that form, Dr. Cremer checked the box indicating that claimant could return to work with restrictions on November 9, 2007. Those restrictions included lifting up to ten pounds frequently, up to 50 pounds occasionally, and never lifting above 50 pounds. Dr. Cremer also noted that claimant could sit continuously, stand/walk frequently, push/pull, reach below knee, twist/turn, and bend occasionally, and claimant could not squat/kneel.

> Dr. Cremer also noted that the aforementioned restrictions were permanent. There is a section on the MEDCO-14 form where the examining physician can give an opinion as to whether or not the patient has reached MMI. Dr. Cremer did not check either of the two boxes (yes or no), and did not give an opinion as to whether or not claimant has reached MMI.

{¶5} In addressing relator's contention that the MEDCO-14 form constituted conclusive proof that claimant's allowed condition had reached MMI, the magistrate noted that, at the time Dr. Cremer completed the MEDCO-14 form, the physician's request for additional acupuncture treatment had not yet been approved.[1] The magistrate deemed it reasonable to conclude that the physician's checkmark on the form with respect to permanent restrictions "meant that those restrictions were permanent at that time because claimant was not authorized to pursue additional treatment."

{¶6} The Supreme Court of Ohio has cautioned that a court cannot "assume that every doctor who uses the term 'permanency' is denoting 'MMI.' " *State ex rel. Miller v. Indus. Comm.*, 71 Ohio St.3d 229, 234, 1994-Ohio-204. Thus, "a condition may be permanent, in that it cannot be completely resolved, yet it may also respond positively to treatment, making a declaration of 'permanency' as used in [*State ex rel. Ramirez v. Indus. Comm.* (1982), 69 Ohio St.2d 630] premature. *State ex rel. Adams v. Teledyne Ohiocast* (1994), 71 Ohio St.3d 182, 185, citing *State ex rel. Kaska v. Indus. Comm.*, 63 Ohio St.3d 743, 1992-Ohio-7. Accordingly, " '[p]ermanency * * * may bar temporary total disability compensation only where 'there is a *clear* indication that the claimant's condition will not improve.' " *Adams* at 185, quoting *Kaska* at 746 (emphasis sic).

[1] On December 7, 2007, the commission authorized the acupuncture treatment.

{¶7} Upon review, we find no abuse of discretion by the commission in failing to construe the term "permanent," in the context of listed restrictions on the MEDCO-14 form, as mandating a determination that claimant's allowed condition had reached MMI. The record reflects that Dr. Cremer previously opined, on October 11, 2007 and on October 31, 2007, that claimant had not attained MMI, and Dr. Cremer specifically noted at the time, in addressing the issue of MMI, that acupuncture treatment had been requested. Further, although the subsequently signed MEDCO-14 form contained a section permitting the physician to render an opinion as to MMI, Dr. Cremer did not respond to that question.

{¶8} The SHO, in denying relator's request to terminate TTD, relied upon Dr. Cremer's C-84 report of October 31, 2007, as well as claimant's testimony that he was continuing to improve with acupuncture treatment, and the fact that authorization for additional acupuncture treatment had been recently approved. Here, there was some evidence in the record for the commission to have found that claimant's condition was improving with additional treatment, and that he had not reached MMI.

{¶9} Finally, we note that a supplemental filing, submitted by relator after the magistrate's decision was rendered, supports relator's contention that it raised, at the SHO level, the issue of whether the MEDCO-14 form constituted a statement of MMI. However, in light of the fact that the magistrate went on to analyze the import of the MEDCO-14 form, and because we agree with the magistrate's ultimate determination that the commission did not abuse its discretion in failing to construe the MEDCO-14 form as determinative of MMI, relator cannot demonstrate prejudice as a result of the magistrate's finding of waiver.

{¶10} Based upon the foregoing discussion, relator's objections are overruled, and we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein, except as to the magistrate's finding of waiver. In accordance with the magistrate's recommendation, relator's request for a writ of mandamus is hereby denied.

Objections overruled and writ denied.

BRYANT and CONNOR, JJ., concur

_____

[Cite as *State ex rel. McMaster Carr Supply Co. v. Indus. Comm.* , 2009-Ohio-4832.]

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. McMaster Carr Supply Company,	:	
Relator,	:	
v.	:	No. 08AP-825
Industrial Commission of Ohio and Scott Bartlett,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered March 10, 2009

Scheuer Mackin & Breslin LLC, J. Kent Breslin and *Eric A. Rich*, for relator.

Richard Cordray, Attorney General, and *John R. Smart*, for respondent Industrial Commission of Ohio.

Melanie V. Miguel-Courtad, for respondent Scott Bartlett.

IN MANDAMUS

{¶11} Relator, McMaster Carr Supply Company, has filed this original action requesting that this court issue a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order which granted temporary total

disability ("TTD") compensation to respondent Scott Bartlett ("claimant") and ordering the commission to find that claimant has reached maximum medical improvement ("MMI").

Findings of Fact:

{¶12} 1. Claimant sustained a work-related injury on August 1, 2005, and his workers' compensation claim has been allowed for the following condition: "recurrent herniated disc L4-5." Claimant began receiving TTD compensation beginning August 2, 2005 and continuing.

{¶13} 2. In December 2006, claimant underwent a microdiscectomy at L4-5.

{¶14} 3. According to the office notes of his treating physician, Steven A. Cremer, M.D., claimant continued to have ongoing pain in his back and radiating down his left leg. Specifically, Dr. Cremer noted increased parasthesis of the left leg, asymmetric gait, decreased sensation of left calf, positive straight leg raise, and difficulty with plantar flexion and dorsiflexion.

{¶15} 4. As part of his medical care and in conjunction with his therapy, claimant received a certain number of acupuncture treatments.

{¶16} 5. Ron M. Koppenhoefer, M.D., authored a report dated April 30, 2007. In that report, Dr. Koppenhoefer was asked to provide his opinion on whether Dr. Cremer's recent request for ten visits of acupuncture with electrical stimulation was appropriate. In his report, Dr. Koppenhoefer noted that the Official Disability Guidelines ("OD guidelines") indicate that acupuncture is not recommended for acute low back pain. However, Dr. Koppenhoefer stated that the OD guidelines do indicate that acupuncture has been shown to add to treatment effectiveness of conventional therapy or improve pain and function when compared to conventional therapy alone. Dr. Koppenhoefer opined that

three-to-four visits over a two-week period was appropriate. He stated further that, if there is evidence of objective functional improvement, then eight-to-12 visits over four-to-six weeks would be appropriate.

{¶17} 6. On July 30, 2007, Dr. Cremer completed a C-9 requesting acupuncture treatments two times a week for three weeks.

{¶18} 7. On August 23, 2007, an independent medical examination was performed by Manhal A. Ghanma, M.D. In his report, Dr. Ghanma identified the medical records which he reviewed, presented his physical findings upon examination, and concluded as follows: (1) there is evidence of prior L4-5 radiculopathy with calf atrophy on the left; however, there is no current clinical evidence of acute lumbar radiculopathy with the current finding of atrophy related to prior radiculopathy; (2) claimant has reached MMI; (3) follow-up imagining studies have not revealed any evidence of disc herniation at the present time, and claimant's current clinical examination is characterized by significant abnormal illness behavior and symptom magnification, as opposed to objective findings; and (4) claimant is capable of returning to work provided he avoid lifting items that weigh more than 75 to 100 pounds. However, Dr. Ghanma would not currently recommend any restrictions on a permanent basis.

{¶19} 8. On September 24, 2007, relator filed a motion with the commission seeking to terminate claimant's TTD compensation on grounds that his allowed condition had reached MMI and he attached Dr. Ghanma's August 23, 2007 report in support.

{¶20} 9. Phyllis Kritzer, R.N., opined that claimant's request for acupuncture treatment should be denied because it was not appropriate for the claim allowance and because Dr. Ghanma opined that claimant had reached MMI.

{¶21} 10. On October 11, 2007, Dr. Cremer authored a report in response to his review of Dr. Ghanma's report. Specifically, Dr. Cremer stated:

> * * * I disagree with his evaluation. In particular note in terms of finding him MMI, we had requested acupuncture, which has been documented in my record to be beneficial, but only gets 2-3 days of relief as we only tried it once a week. I would like to try this twice a week for at least three weeks to see if we can break the pain cycle and reduce reliance on medication. In addition, vocational rehabilitation has not been pursued and certainly job skills assessment, job search, and functional capacity evaluation will be appropriate prior to signing permanent restrictions. For all these reasons, this individual is not at MMI.
>
> * * *
>
> Further, on a more subjective basis the medical evaluator noted multiple pain behaviors, which I have not seen documented in our office. Mr. Bartlett has attempted to return to work, but was not able to maintain work based on multiple issues both physical and related to administration of his employer[.] * * *

{¶22} 11. On November 27, 2007, Dr. Ghanma authored an addendum to his report. He stated that according to the OD guidelines, acupuncture was not effective in the management of back pain.

{¶23} 12. Dr. Ghanma did not indicate whether or not he agreed with Dr. Koppenhoefer's opinion that, pursuant to the OD guidelines, acupuncture with conventional therapy is effective when compared to conventional therapy alone.

{¶24} 13. Dr. Cremer completed a C-84 on October 31, 2007 certifying TTD compensation through an estimated return-to-work date of December 13, 2007. On that form, Dr. Cremer indicated that claimant was not at MMI.

{¶25} 14. On November 9, 2007, Dr. Cremer completed a MEDCO-14 physician's report of work ability form. On that form, Dr. Cremer checked the box indicating that claimant could return to work with restrictions on November 9, 2007. Those restrictions included lifting up to ten pounds frequently, up to 50 pounds occasionally, and never lifting above 50 pounds. Dr. Cremer also noted that claimant could sit continuously, stand/walk frequently, push/pull, reach below knee, twist/turn, and bend occasionally, and claimant could not squat/kneel. Dr. Cremer also noted that the aforementioned restrictions were permanent. There is a section on the MEDCO-14 form where the examining physician can give an opinion as to whether or not the patient has reached MMI. Dr. Cremer did not check either of the two boxes (yes or no), and did not give an opinion as to whether or not claimant has reached MMI.

{¶26} 15. Relator's motion to terminate TTD compensation was heard before a district hearing officer ("DHO") on October 18, 2007 and was denied as follows:

> The District Hearing Officer finds that the injured worker's allowed condition in the claim has not yet reached maximum medical improvement.
>
> In so ruling the District Hearing Officer relies on the 10/11/2007 report of Dr. Cremer as well as the testimony of the injured worker. At today's hearing, the injured worker testified that after his most recent back surgery he did not experience any significant relief for a period of time. However, he has noticed significant improvement in his condition which allows him to be much more physically active.

{¶27} 16. Relator appealed and the matter was heard before a staff hearing officer ("SHO") on December 7, 2007. The SHO affirmed the prior DHO's order and

denied relator's request to terminate claimant's TTD compensation. The SHO provided the following additional reasoning for concluding that claimant had not reached MMI:

> * * * The employer's motion is predicated upon the report of Dr. Ghanma of 8/3/2007. The Staff Hearing Officer does not find the report of Dr. Ghanma to [be] persuasive.
>
> The Staff Hearing Officer finds that the allowed conditions in this claim continue to result in the claimant being temporarily and totally disabled. This finding is based upon the C-84 report of Dr. Cremer dated 10/31/2007. The Staff Hearing Officer further relies upon the claimant's testimony at hearing that he is continuing to improve with acupuncture treatment. Although there has been a delay in the authorization of additional acupuncture treatment for claimant's allowed conditions, the Staff Hearing Officer finds that such treatment has been recently granted by companion District Hearing Officer order of 12/7/2007. Given the totality of the above evidence, the Staff Hearing Officer orders that temporary total disability compensation continue to be paid through 12/7/2007, and continuing upon the submission of medical evidence of disability independently related to the allowed conditions in this claim.

{¶28} 17. On that same day, December 7, 2007, the commission authorized the acupuncture treatment which Dr. Cremer had sought for claimant. The order provides as follows:

> The District Hearing Officer authorizes treatment in the form of acupuncture at the rate of 2 times per week for 3 weeks. The District Hearing Officer finds that there is sufficient medical evidence to establish by a preponderance that this treatment is warranted and/or reasonably related to the allowed conditions of this claim. This finding is based upon the C-9 report of Dr. Cremer in file, as well as the 10/11/2007 narrative report of Dr. Cremer. The District Hearing Officer further relies upon the claimant's testimony at hearing that a prior course of acupuncture treatment seemed to provide some relief for his radicular pain. In issuing this decision, the District Hearing Officer further relies upon the 4/30/2007 narrative report of Dr. Ron Koppenhoefer, M.D. Therein, Dr. Koppenhoefer opines that

> the acupuncture treatment is reasonably related to the allowed conditions in this claim and reasonably necessary for treatment of his current condition. Dr. Koppenhoefer opined that a total of 10 visits would be appropriate over a 4 to 6 week period of time. Although claimant did have a short course of acupuncture treatment following Dr. Koppenhoefer's report, Dr. Cremer opines that a more frequent course of treatment per week at the rate of 2 times per week for 6 weeks is now warranted. The District Hearing Officer finds the totality of the above evidence, when read together, to be persuasive.

{¶29} 18. Relator's appeal and request for reconsideration were denied by the commission.

{¶30} 19. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶31} The Supreme Court of Ohio has set forth three requirements which must be met in establishing a right to a writ of mandamus: (1) that relator has a clear legal right to the relief prayed for; (2) that respondent is under a clear legal duty to perform the act requested; and (3) that relator has no plain and adequate remedy in the ordinary course of the law. *State ex rel. Berger v. McMonagle* (1983), 6 Ohio St.3d 28.

{¶32} In order for this court to issue a writ of mandamus as a remedy from a determination of the commission, relator must show a clear legal right to the relief sought and that the commission has a clear legal duty to provide such relief. *State ex rel. Pressley v. Indus. Comm.* (1967), 11 Ohio St.2d 141. A clear legal right to a writ of mandamus exists where the relator shows that the commission abused its discretion by entering an order which is not supported by any evidence in the record. *State ex rel. Elliott v. Indus. Comm.* (1986), 26 Ohio St.3d 76. On the other hand, where the record contains some evidence to support the commission's findings, there has been no abuse

of discretion and mandamus is not appropriate. *State ex rel. Lewis v. Diamond Foundry Co.* (1987), 29 Ohio St.3d 56. Furthermore, questions of credibility and the weight to be given evidence are clearly within the discretion of the commission as fact finder. *State ex rel. Teece v. Indus. Comm.* (1981), 68 Ohio St.2d 165.

{¶33} In this mandamus action, relator argues that the commission abused its discretion by finding that claimant was entitled to continued TTD compensation because claimant had reached MMI. For the reasons that follow, this magistrate finds that relator is not entitled to a writ of mandamus.

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

{¶35} In this mandamus action, relator contends that Dr. Cremer's November 9, 2007 MEDCO-14 is conclusive proof that it is his opinion that claimant's allowed condition has reached MMI. On that form (physician's report of work ability), Dr. Cremer indicated that claimant could return to work with restrictions that were permanent. Although Dr. Cremer could have indicated that claimant had reached MMI, he did not. Relator argues that the November 9, 2007 MEDCO-14 form is the most current piece of medical evidence in the record from Dr. Cremer and that it negates both his October 11, 2007

report wherein he specifically stated that claimant had not reached MMI and his October 31, 2007 C-84. In his October 11, 2007 report, Dr. Cremer opined that claimant had not reached MMI based on his belief that, if claimant could have more acupuncture treatments, his cycle of pain and reliance on medications could be broken. In addition, Dr. Cremer indicated that claimant had not pursued vocational rehabilitation or a job skills assessment and that a functional capacity evaluation would be appropriate before claimant would be at MMI with permanent restrictions.

{¶36} Ohio Adm.Code 4121-3-32(A)(1) provides:

> "Maximum medical improvement" is a treatment plateau (static or well-stabilized) at which no fundamental functional or physiological change can be expected within reasonable medical probability in spite of continuing medical or rehabilitative procedures. An injured worker may need supportive treatment to maintain this level of function.

{¶37} Relator contends that by indicating that claimant's restrictions were permanent on the work ability form, Dr. Cremer was stating that claimant was at a "treatment plateau * * * at which no fundamental functional * * * change can be expected within reasonable medical probability in spite of continuing medical or rehabilitative procedures." According to relator, noting that claimant had permanent work restrictions is synonymous with stating that he is at MMI.

{¶38} In the present case, the SHO denied relator's motion to terminate claimant's TTD compensation. The SHO specifically stated that relator's "motion is predicated upon the report of Dr. Ghanma of 8/3/2007." The SHO concluded that Dr. Ghanma's report was not persuasive. As such, relator's medical evidence was rejected. The SHO relied instead on Dr. Cremer's October 31, 2007 report and claimant's testimony that his

condition was continuing to improve with acupuncture treatment. The SHO also noted that there had been a delay in the authorization of additional acupuncture treatments for claimant's allowed condition (sought July 2007 and authorized December 2007). In fact, it was not until that same day, December 7, 2007, when the SHO, sitting as a DHO, concluded that the acupuncture treatment sought was appropriate. In finding that the acupuncture treatment was appropriate, the SHO, sitting as a DHO, relied on Dr. Cremer's October 11, 2007 report, claimant's testimony, and the April 30, 2007 report of Dr. Koppenhoefer. Based upon all of this evidence, the SHO concluded that claimant had not reached MMI and awarded continued payment of TTD compensation.

{¶39} There is no transcript from the hearings before this court. As such, claimant's testimony cannot be reviewed. Further, this court is unable to determine whether relator argued that the physician's report of work ability form dated November 9, 2007 constituted Dr. Cremer's medical opinion that claimant had actually reached MMI. Further, it is unclear whether relator raised this argument in its appeal. What is clear is that relator did raise this argument in its request for reconsideration. Pursuant to *State ex rel. Quarto Mining Co. v. Foreman* (1997), 79 Ohio St.3d 78, ordinarily, reviewing courts do not consider an error which the complaining party could have called, but did not call, to the attention of the lower tribunal at a time when it could have been avoided or corrected. See, also, *State ex rel. Gibson v. Indus. Comm*. (1988), 39 Ohio St.3d 319.

{¶40} There is no evidence in the record that relator raised this issue prior to the filing of its motion for reconsideration. As such, it appears that the SHO was not presented with this issue and did not have an opportunity to make this determination. Relator has waived that argument.

{¶41} Even if this court was to consider the issue, the magistrate finds that the commission did not abuse its discretion.

{¶42} It is easy to understand relator's argument. When Dr. Cremer completed the physician's report of work ability form and indicated that claimant's restrictions were permanent, one could concluded that he is indicating that claimant had reached a treatment plateau at which no fundamental functional change could be expected. However, the remainder of claimant's medical evidence indicates that, if an additional course of acupuncture treatment would be administered to claimant, it is Dr. Cremer's opinion that claimant's condition would improve, that he will have less pain, that he will not need as much medication, and that he can begin vocational rehabilitation and pursue job skills assessment. Further, it is clear that this treatment recommended by Dr. Cremer was not authorized until December 7, 2007. At that time, claimant apparently testified that the acupuncture treatments had significantly improved his condition and permitted him to be more physically active. On November 9, 2007, when Dr. Cremer completed the physician's report of work ability form, his request for additional acupuncture treatment had not been approved. It would be reasonable to conclude that his statement that claimant's restrictions were permanent meant that those restrictions were permanent at that time because claimant was not authorized to pursue additional treatment. Because that is a reasonable conclusion that could be drawn considering all the evidence the SHO considered and relied upon, it is this magistrate's conclusion that relator has not demonstrated that the commission abused its discretion in this regard. The SHO was required to list the evidence relied upon and was not required to explain why certain evidence was rejected.

{¶43} Further, when a physician completes a C-84 requesting the payment of TTD compensation, the physician is certifying that the allowed conditions present the claimant from returning to their former position of employment and that those conditions are not at MMI. In comparison, the MEDCO-14 is intended to provide medical evidence regarding what level of work activity the claimant might be able to perform. Although the doctor can indicate if a claimant is at MMI on this form, it is not required and that is not the purpose of the form. Relator asserts that the commission abused its discretion by not finding that Dr. Cremer's permanent restrictions actually meant that claimant was at MMI in spite of Dr. Cremer's statements to the contrary. The magistrate finds that the commission did not abuse its discretion.

{¶44} Based on the foregoing, it is this magistrate's conclusion that relator has not demonstrated that the commission abused its discretion in granting claimant TTD compensation and this court should deny relator's request for a writ of mandamus.

/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).