[Cite as *State ex rel. Lorain Glass Co., Inc. v. Indus. Comm.*, 2010-Ohio-2613.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Lorain Glass Co., Inc.,	:	
Relator,	:	
v.	:	No. 09AP-560
Industrial Commission of Ohio and Kevin Wallace,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on June 10, 2010

Zashin & Rich Co., L.P.A., and *Steven P. Dlott,* for relator.

Richard Cordray, Attorney General, and *Joseph C. Mastrangelo,* for respondent Industrial Commission of Ohio.

Plevin & Gallucci, and *Frank Gallucci*; *Paul W. Flowers Co., L.P.A.,* and *Paul W. Flowers,* for respondent Kevin Wallace.

IN MANDAMUS
ON OBJECTIONS TO MAGISTRATE'S DECISION

BRYANT, J.

{¶1} Relator, Lorain Glass Co., Inc., commenced this original action requesting a writ of mandamus that orders respondent Industrial Commission of Ohio to vacate its

order granting respondent Kevin Wallace temporary total disability compensation beginning December 2004 and to enter an order denying said compensation.

I. Procedural History

{¶2} Pursuant to Civ.R. 53 and Section (M), Loc.R. 12 of the Tenth Appellate District, this matter was referred to a magistrate who issued a decision, including findings of fact and conclusions of law, which is appended to this decision. The magistrate determined the court should issue a writ of mandamus.

{¶3} As the magistrate noted, Anthony J. Wyrwas, D.C., initially examined claimant on March 24, 2005, but opined "that claimant was temporarily totally disabled retrospective of the date of his initial examination." (Magistrate's Decision, ¶31.) The magistrate correctly observed that, "under well-settled law, Dr. Wyrwas is not competent to render an opinion as to claimant's disability prior to March 24, 2005" unless the criteria set forth in *State ex rel. Bowie v. Greater Cleveland Regional Transit Auth.* (1996), 75 Ohio St.3d 458, are met. (Magistrate's Decision, ¶31.) *Bowie* requires that the doctor review all relevant medical evidence generated prior to the time of the doctor's examination. Because the record fails to indicate Dr. Wyrwas conducted a *Bowie* file review, the magistrate determined the commission "had no evidence that claimant was temporarily totally disabled prior to the March 24, 2005 examination by Dr. Wyrwas." (Magistrate's Decision, ¶39.)

II. Objections

{¶4} While claimant does not set forth specific objections, his discussion largely suggests the magistrate wrongly applied *Bowie* as a "hard-and-fast rule." (Objections, 3.) He asserts Dr. Wyrwas actually considered pre-examination information in concluding

claimant was temporarily and totally disabled as of December 4, 2004. Claimant's objections are unpersuasive.

{¶5} *Bowie* treats a doctor who offers an opinion as to a claimant's extent of disability retrospective of the examination date as a non-examining doctor with respect to the retrospective opinion. The Supreme Court stated that in such circumstances, "certain safeguards must apply * * *. We find it imperative, for example, that the doctor review all of the relevant medical evidence generated prior to that time." *Bowie* at 460.

{¶6} Although Dr. Wyrwas opined retrospectively from the date of his initial examination, the magistrate pointed out that we do not know either what medical records may have been available for review or what reports or records, if any, Dr. Wyrwas may have reviewed. As a result, when Dr. Wyrwas mentioned "a medical record review," we can only speculate as to the scope of that review. (Magistrate's Decision, ¶36.) In any event, the record suggests less than a complete review, as Dr. Wyrwas does not mention Dr. Lika's medical records even though claimant told Dr. Wyrwas that Dr. Lika treated claimant.

{¶7} On the authority of *Bowie,* the record is insufficient to sustain Dr. Wyrwas's attempt to opine retrospectively from the date of his initial examination of claimant; his opinion is not some evidence on which the commission could rely. Because the commission had no evidence that claimant was totally and temporarily disabled prior to Dr. Wyrwas's March 24, 2005 examination, the commission abused its discretion in granting temporary total disability compensation beginning December 2004, as the commission properly concedes in this mandamus action. Claimant's objections are overruled.

{¶8} Following independent review pursuant to Civ.R. 53, we find the magistrate has properly determined the pertinent facts and applied the salient law to them. Accordingly, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained in it. In accordance with the magistrate's decision, we issue a writ of mandamus ordering the commission to amend its staff hearing officer's order of June 9, 2006 to the extent that temporary total disability compensation shall begin as of March 24, 2005.

Objections overruled;
writ granted.

KLATT and FRENCH, JJ., concur.

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APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Lorain Glass Co., Inc.,	:	
Relator,	:	
v.	:	No. 09AP-560
Industrial Commission of Ohio and Kevin Wallace,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on February 24, 2010

Zashin & Rich Co., L.P.A., and *Steven P. Dlott*, for relator.

Richard Cordray, Attorney General, and *Joseph C. Mastrangelo*, for respondent Industrial Commission of Ohio.

Plevin & Gallucci, and *Frank Gallucci*; *Paul W. Flowers Co., L.P.A.,* and *Paul W. Flowers*, for respondent Kevin Wallace.

IN MANDAMUS

{¶9} In this original action, relator, Lorain Glass Co., Inc. ("relator" or "Lorain Glass"), requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order granting respondent Kevin Wallace ("claimant")

temporary total disability ("TTD") compensation beginning December 2004, and to enter an order denying said compensation.

Findings of Fact:

{¶10} 1. From July through December 2004, claimant was employed as a glazier for Lorain Glass.

{¶11} 2. On March 24, 2005, claimant was initially examined by chiropractor Anthony J. Wyrwas, D.C. In his four-page report of that date, Dr. Wyrwas diagnosed right and left "shoulder joint sprain/strain" injuries. The report states:

> History:
>
> Mr. Kevin Wallace presents to the clinic today with chief complaints of bilateral shoulder pain. Mr. Wallace reports that he works as a Glazier for Union hall 181 and has been working this job for approximately 27 years. He reports that he has been experiencing shoulder pain for approximately the past six to seven years which has been severely worsening. He reports that his daily job requirements include lifting upwards of two to three hundred pounds with his upper body musculature and arms as he works at job sites which are elevated sometimes forty stories above the ground; he also reports that there is repetitive lifting overhead, pushing and pulling activities above the head and chest level. Mr. Wallace reports that he has had previous care for these injuries from Dr. Larry Lika of Horizon Orthopedic Group. He states that he has had MRIs performed in 2001 and has had numerous treatments from Dr. Lika. He states that the treatments he received from Dr. Lika was enough to help keep him working at that time[.] * * * Because of ongoing symptoms and difficulties with performing his activities of daily living at work and home, Mr. Wallace is presenting for evaluation and treatment options of bilateral shoulder pain.
>
> * * *

Diagnostic Imaging:

Mr. Wallace presents with MRI reports of left shoulder examination performed on April 10, 2001 as well as right shoulder MRI examination performed on the same date; April 10, 2001. The ordering physician was Dr. Larry Lika of Horizon Orthopedic. Medical records will be added to his chart, full report in chart. Impressions from radiologist for MRI of left shoulder include moderate tendinitis/tendonosis along the supraspinatus and subscapularis of the rotator cuff tendon. Moderately advanced chondral degeneration at the glenohumeral articulation, there is degenerative sub-chondral sclerosis and cystic formation noted along the glenoid with marked thinning of the articular cartilage. There is a tear identified at the base of the anterior glenoid labrum. Marked blunting and irregularity of the posterior and superior labrum are noted. Moderate joint effusion with thickening of the inferior joint capsule and stretching of the inferior gleno-humeral ligament with finding suspicious for synovitis/ synovial irritation involving the axillary recess. Probable tenosynovitis of the long head of the biceps tendon sheet. Full radiology report of the right shoulder is contained in the patient chart, impressions from April 10, 2001 report include extensive partial tearing of the distal supraspinatus tendon. Glenohumeral osteoarthritis including chondromalacia and osteophyte formation as well as synovitis and effusion. Probable SLAP lesion type 2 as well as AC degenerative changes.

* * *

Assessment/Plan:

After taking history and performing physical examination including medical record review, I feel that this patient's chief complaints of left and right shoulder pain are directly and casually related to his occupation as a Glazier as he reports no prior shoulder injuries from this occupation and has had recent worsening of symptoms in the past 7 years; has been performing this occupation for 27 years at this time. Due to objective findings and probable soft tissue injuries present in the right and left shoulder joints I do not feel that any treatment is warranted at this time until this patient has orthopedic surgical consultation. I will refer this patient back to Horizon Orthopedic Group, Dr. Kim Sterns for further

> evaluation in regards to right and left shoulder complaints. * * * [H]e states it is impossible to consider taking any time off from his job when he working; at this time he reports that he is currently laid off and it is common during the off season months with the union to intermittently lay workers off, his estimated return to duty is June of 2005. * * *

(Sic passim.)

{¶12} 3. In May 2005, claimant filed an application for workers' compensation benefits. On the application form, claimant listed Dr. Wyrwas as his physician.

{¶13} 4. In January 2006, the Ohio Bureau of Workers' Compensation ("bureau") issued an order denying allowance of the industrial claim. Claimant administratively appealed the bureau's order.

{¶14} 5. Following a March 15, 2006 hearing, a district hearing officer ("DHO") issued an order that affirmed the bureau's order and denied allowance of the industrial claim.

{¶15} 6. Claimant administratively appealed the DHO's order of March 15, 2006.

{¶16} 7. On June 9, 2006, claimant's administrative appeal was heard by a staff hearing officer ("SHO").

{¶17} 8. On June 12, 2006, Dr. Wyrwas completed a C-84 certifying TTD from December 4, 2004 through an estimated return-to-work date of August 1, 2006.

{¶18} 9. On June 13, 2006, the SHO mailed an order that vacates the DHO's order of March 15, 2006, allows the industrial claim for specified conditions, and awards TTD compensation from December 4, 2004 through May 1, 2006, and to continue upon submission of medical proof. The TTD award was based upon "C-84 forms completed by Dr. Wyrwas."

{¶19} The SHO's order of June 13, 2006 allows the claim for: "1) bilateral shoulder sprain/strain; 2) aggravation of bilateral shoulder arthritis; 3) aggravation of left anterior glenoid and labrum tear; 4) aggravation right supraspinatus tear."

{¶20} 10. Relator administratively appealed the SHO's order of June 13, 2006.

{¶21} 11. On July 8, 2006, another SHO mailed an order refusing relator's administrative appeal.

{¶22} 12. On June 10, 2009, relator, Lorain Glass Co., Inc., filed this mandamus action.

Conclusions of Law:

{¶23} It is the magistrate's decision that this court issue a writ of mandamus, as more fully explained below.

{¶24} As a general rule, a doctor cannot offer an opinion on a claimant's extent of disability for a period that precedes the doctor's examination of the claimant. *State ex rel. Foor v. Rockwell Internatl.* (1997), 78 Ohio St.3d 396, 399; *State ex rel. Foreman v. Indus. Comm.* (1992), 64 Ohio St.3d 70, 72; *State ex rel. Abner v. Mayfield* (1992), 62 Ohio St.3d 423; *State ex rel. Kroger Co. v. Morehouse* (1995), 74 Ohio St.3d 129, 133; and *State ex rel. Case v. Indus. Comm.* (1986), 28 Ohio St.3d 383, 387.

{¶25} A doctor who does offer an opinion as to the claimant's extent of disability that is retrospective of the date of his examination is treated as a nonexamining doctor as to his retrospective opinion. Under such scenario, the doctor must observe certain safeguards if his retrospective opinion is to be accepted as evidence in a commission proceeding. *State ex rel. Bowie v. Greater Cleveland Regional Transit Auth.* (1996), 75 Ohio St.3d 458.

{¶26} In *Bowie*, the commission denied the claimant's request for TTD compensation based in part on a report from Dr. Katz who examined the claimant on July 12, 1990, almost seven months after the industrial injury. In his report, Dr. Katz opined that the claimant "should [not] have been out of work at any time after" the date of injury. Id. at 459. Dr. Katz's retrospective opinion was based upon emergency room records on the date of injury and his examination of the claimant.

{¶27} Concerned that Dr. Katz had not reviewed the reports of the claimant's treating chiropractor, Dr. McFadden, the *Bowie* court wrote:

> * * * In this instance, the conspicuous reference to the emergency room reports coupled with the equally conspicuous lack of reference to Dr. McFadden's reports suggests to us that Dr. Katz may have overlooked the latter.

Id. at 460.

{¶28} The *Bowie* court issued a writ of mandamus returning the cause to the commission for its further consideration of the compensation request after removal of Dr. Katz's report from further evidentiary consideration. The *Bowie* court explains the law that underpins its decision:

> There are parallels between an examining doctor who offers a retroactive opinion and a doctor who renders an opinion as to a claimant's current status without examination. The evidentiary acceptability of the latter is long-settled, having been equated to an expert's response to a hypothetical question. *State ex rel. Wallace v. Indus. Comm.* (1979), 57 Ohio St.2d 55 * * *; *State ex rel. Hughes v. Goodyear Tire & Rubber Co.* (1986), 26 Ohio St.3d 71 * * *; *State ex rel. Lampkins v. Dayton Malleable, Inc.* (1989), 45 Ohio St.3d 14[.] * * *
>
> As in the case of a non-examining physician, however, certain safeguards must apply when dealing with a report that is not based on an examination done contempor-

> aneously with the claimed period of disability. We find it imperative, for example, that the doctor review all of the relevant medical evidence generated prior to that time. * * *

Id. at 460.

{¶29} It should be further noted that under the so-called *Wallace* rule, *State ex rel. Wallace v. Indus. Comm.* (1979), 57 Ohio St.2d 55, the nonexamining physician is required to accept the findings of the examining physician but not the opinion drawn therefrom. *State ex rel. Consolidation Coal Co. v. Indus. Comm.* (1997), 78 Ohio St.3d 176, 179.

{¶30} In *State ex rel. Lampkins v. Dayton Malleable, Inc.* (1989), 45 Ohio St.3d 14, the court agreed with the appellant that the requirement of express acceptance under the *Wallace* rule had been relaxed. The *Lampkins* court held that "even under an implicit acceptance analysis," the two medical reports at issue were deficient. Id. at 16.

{¶31} In his C-84, Dr. Wyrwas opines that claimant was temporarily totally disabled retrospective of the date of his initial examination. But under well-settled law, Dr. Wyrwas is not competent to render an opinion as to claimant's disability prior to March 24, 2005, unless the *Bowie* criteria are met. Again, under *Bowie*, it is imperative that the doctor review all the relevant medical evidence generated prior to that time.

{¶32} In the history portion of his March 24, 2005 report, Dr. Wyrwas reports that claimant stated that a Dr. Lika of Horizon Orthopedic Group has provided him care for his industrial injuries. Also, claimant reported having undergone MRIs in 2001 and having numerous treatments from Dr. Lika. Under the heading "Diagnostic Imaging," Dr. Wyraws discusses the April 10, 2001 MRI report of the left and right shoulders.

{¶33} Under assessment/plan, Dr. Wyrwas states that he performed a "medical record review."

{¶34} We do not know what medical records exist that might have been available for a file review. Other than the April 10, 2001 MRI reports, we do not know what other reports or records, if any, Dr. Wyrwas may have reviewed.

{¶35} Conspicuously absent from the March 24, 2005 report is any indication that Dr. Wyrwas was being asked to conduct a *Bowie* file review or that Dr. Wyrwas was even aware of the *Bowie* requirements. Compare *State ex rel. Wright v. Indus. Comm.*, 10th Dist. No. 05AP-669, 2006-Ohio-2535 (Dr. Howard retrospectively opined from his January 26, 2004 examination that the psychological claim allowances had reached maximum medical improvement. In his report, Dr. Howard enumerated or identified 28 documents or groups of documents that were sent to him for review. This court held that Dr. Howard's report met the *Bowie* standard).

{¶36} Thus, when Dr. Wyrwas mentions a "medical record review," we are simply left to speculate as to the scope of that review.

{¶37} Moreover, we do know that claimant told Dr. Wyrwas that he had been treated by a Dr. Lika, yet there is no mention of any medical records of Dr. Lika.

{¶38} Speculation as to whether Dr. Wyrwas may have reviewed all the relevant medical evidence generated prior to March 24, 2005 is inconsistent with the safeguards emphasized in *Bowie*. See *State ex rel. Ado Staffing, Inc. v. Indus. Comm.*, 10th Dist. No. 08AP-1054, 2009-Ohio-5579, ¶5.

{¶39} Given the above analysis, the commission had no evidence that claimant was temporarily totally disabled prior to the March 24, 2005 examination by Dr. Wyrwas.

{¶40} Accordingly, it is the magistrate's decision that this court issue a writ of mandamus ordering the commission to amend its SHO's order of June 9, 2006 to the extent that TTD compensation shall begin as of March 24, 2005.

/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).