

total disability ("TTD") compensation and to enter a new order finding that she is entitled to that compensation.

{¶2} Pursuant to Civ.R. 53 and Loc.R. 12(M) 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. Therein, the magistrate concluded that the commission did not abuse its discretion and recommended that this court not issue the requested writ of mandamus. Relator filed objections to the magistrate's decision, and the commission filed a memorandum opposing the objections. This cause is now before the court for a full review.

{¶3} The issue before this court is whether the commission abused its discretion when it determined that its continuing jurisdiction over TTD compensation in relator's claim had not been invoked because relator had failed to show that a temporary worsening or exacerbation of her condition constituted new and changed circumstances. The commission based its determination on the fact that Dr. Anthony Williams opined that the bilateral radiculopathy, upon which the C-84 is based, did not warrant reinstatement of her TTD because bilateral radiculopathy had been present since 2001, years before relator's TTD was terminated because she was found to be at maximum medical improvement ("MMI"). In other words, according to Dr. Williams, while the claim has been allowed for "L5-S1 radiculopathy," which was not allowed at the time that relator's TTD was terminated, this condition has not temporarily worsened or been exacerbated so as to constitute a new and changed circumstance.

{¶4} For the most part, relator's objections to the magistrate's decision are identical to her brief submitted in the proceedings before the magistrate. However, she

does cite two additional cases: *State ex rel. Basye v. Indus. Comm.*, 64 Ohio St.3d 68, 1992-Ohio-102, and *State ex rel. Airborne Freight Corp. v. Indus. Comm.*, 117 Ohio St.3d 369, 2008-Ohio-1116.

{¶5} In *Basye*, the claimant's TTD was terminated upon a finding that her allowed conditions (which were all physical conditions) had become permanent. Later, her claim was additionally allowed for a psychiatric condition, and she requested a new period of TTD based solely on a psychiatric disability. The commission denied the claimant's request for TTD, citing the earlier permanency finding. The Supreme Court of Ohio affirmed the granting of a writ of mandamus, stressing that "[f]or permanency to be a basis for the denial of temporary total disability compensation, the permanent condition must be one that has been alleged as contributing to the disability." *Id.* at 69.

{¶6} In *Airborne Freight*, too, the employer sought to have a TTD award vacated based on an earlier finding of permanency. There, the court rejected the employer's argument that the C-84s were invalid because they were based on "L4-5 disc protrusion," "right foraminal stenosis L4-5," and "degenerative disc disease L4-S1," when earlier the conditions of "lumbar disc" and "degenerative disc disease L4-5" had been found to be permanent. The court explained:

Contrary to Airborne's representation, the only condition that the commission declared to have reached MMI was "lumbar disc." The sole condition listed on the MMI order is "lumbar disc." Because the commission speaks exclusively through its orders, we cannot assume that degenerative disc disease was also included in that declaration, even though it was an allowed condition at the time. [The C-84's] reference to degenerative disc disease is not, therefore, fatal to temporary total disability eligibility because it is not yet a permanent condition.

(Citation omitted.) *Id.* at ¶10.

{¶7} Neither *Basye* nor *Airborne Freight* persuades us that relator is entitled to a writ of mandamus. In *Basye*, the claimant sought TTD not because of a worsening or exacerbation of the *physical* conditions earlier found to be permanent, but for a wholly distinct *psychiatric* condition. In *Airborne Freight*, the request for TTD was allowed because it was based on physical conditions that were entirely different from the physical conditions that had earlier been determined to be permanent, and the court refused to presume that the commission's earlier permanency order included the then-present conditions when that order had not explicitly said so. In the present case, relator's request for reinstatement of TTD is based upon bilateral radicular symptoms (pain) from which she has suffered, to varying degrees, throughout the period beginning before she was found to be MMI based on a pain specialist's report, and continuing to the present.

{¶8} In *State ex rel. Moore v. Internatl. Truck & Engine*, 116 Ohio St.3d 272, 2007-Ohio-6055, ¶35, the court explained:

When a claimant reaches maximum medical improvement, payment of temporary total disability compensation is barred. R.C. 4123.56(A). The commission's continuing jurisdiction, however, allows for reinstatement of temporary total disability compensation after an MMI determination if new and changed circumstances warrant. *State ex rel. Bing v. Indus. Comm.* (1991), 61 Ohio St.3d 424, 575 N.E.2d 177, syllabus. *Bing* held that the temporary "flare-up" or exacerbation of an allowed condition was a new and changed circumstance supporting renewed compensation. *Id.* at 427, 575 N.E.2d 177. This approach derives from recognition that "claimants who had previously been declared as MMI could experience temporary exacerbation of their condition that justified further treatment or even temporary total disability compensation as the claimant struggled to recover his or her previous level of well-being." *State ex rel. Conrad v. Indus. Comm.* (2000), 88 Ohio St.3d 413, 415-416, 2000-Ohio-365, 727 N.E.2d 872.

{¶9} Therefore, a new period of TTD is warranted when an allowed condition temporarily flares up, requiring further treatment. However, there is some evidence in this case that relator's bilateral radiculopathy was unresponsive to the same treatment relator received prior to the commission's finding of permanency. Thus, relator has not demonstrated any change in her physical condition or from a treatment standpoint that justifies the invocation of the commission's continuing jurisdiction. For this reason, relator's objections are not well-taken and are overruled.

{¶10} Having undertaken an independent review of the record, we find that the magistrate has properly determined the facts and the applicable law. Accordingly, we overrule relator's objections, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein, and we deny the requested writ of mandamus.

*Objections overruled;
writ of mandamus denied.*

FRENCH, P.J., and BROWN, J., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Olabee Ramsey,	:	
	:	
Relator,	:	
	:	
v.	:	No. 08AP-995
	:	
Frisch Fairborn, Inc. and Industrial	:	(REGULAR CALENDAR)
Commission of Ohio,	:	
	:	
Respondents.	:	
	:	

MAGISTRATE'S DECISION

Rendered on May 12, 2009

Cox, Koltak & Gibson, LLP, and Ronald J. Koltak, for relator.

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

IN MANDAMUS

{¶11} Relator, Olabee Ramsey, 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 denied her motion seeking to reinstate her temporary total disability ("TTD") compensation, and ordering the commission to find that she is entitled to that compensation.

Findings of Fact:

{¶12} 1. Relator sustained a work-related injury on February 1, 1988. By 2005, relator's claim was allowed for: "Lumbar subluxation; dislocation lumbar vertebrae; dislocated sacrum; sprain sacrum; dysthymic disorder; pain disorder; adjustment disorder with anxiety; herniated disc at L5-S1; bulging disc at L4-L5."

{¶13} 2. Following her injury, relator received various periods of TTD compensation.

{¶14} 3. On June 3, 2005, a district hearing officer ("DHO") determined that relator's conditions had reached maximum medical improvement ("MMI") and relator's TTD compensation was terminated as of that date. The DHO relied on the April 7, 2005 report of pain management specialist Thomas Lawson. Dr. Lawson provided a synopsis of certain medical reports, performed a physical examination, and obtained a medical history from relator. As part of his history, Dr. Lawson noted that relator underwent a series of three lumbar epidural steroid injections with no improvement in 1995. Further, Dr. Lawson noted that a spinal cord stimulator was also attempted with no improvement. In a progress note from Dr. Todd, an orthopedic surgeon, Dr. Lawson noted that relator had low back pain with radiation into the lower extremities in April 2004. Further, Dr. Lawson referenced a 2002 MRI lumbar scan which revealed degenerative changes with no disc herniation and noted that there was evidence of facet arthritis. Dr. Lawson also noted that relator has had further injections and has participated in aggressive pain management techniques, none of which have resolved her pain. Lastly, Dr. Lawson noted that the October 2002 nerve conduction study revealed no evidence of acute radiculopathy. Dr. Lawson concluded:

For the conditions allowed in this claim with 2 nerve conduction studies interpreted as no radiculopathy and a discography performed by a neurosurgeon as normal, and 3 surgeons recommending no surgical intervention a permanent spinal cord stimulator placed [sic] was placed with Mrs. Ramsey stating continued complaint of pain. For the conditions allowed in this claim Ms. Ramsey has reached maximum medical improvement.

{¶15} 4. In an order dated November 30, 2005, a DHO allowed relator's claim for "facet joint arthritis." The DHO relied on the April 7, 2005 report of Dr. Lawson as well as a May 17, 2005 report from relator's treating physician Charles B. May, D.O.

{¶16} 5. In an order mailed May 2, 2008, the Ohio Bureau of Workers' Compensation ("BWC") considered relator's March 26, 2008 motion and relator's claim was additionally allowed for "bilateral lumbar L5-S1 radiculopathy."

{¶17} 6. In May 2008, relator filed a motion seeking TTD compensation based solely on the newly allowed conditions. Relator submitted a C-84 from Dr. May certifying TTD from March 12, 2007 to an estimated return-to-work date of August 14, 2008. Relator also attached an emergency room record from March 12, 2007. Relator's chief complaint was recurring pain going down her left leg. The doctor diagnosed chronic pain degenerative disc disease and indicated that relator should consider pain management. Relator also attached the March 3, 2007 office note of Dr. May who noted that relator indicated that both her left and right lower extremity pain were worse.

{¶18} 7. Relator was seen by Stephen D. Watson, M.D., on June 23, 2008. Dr. Watson noted that relator complained of bilateral lumbar pain, greater on the left than the right which, at times, rated a nine on a scale of one to ten. Dr. Watson reviewed a

January 25, 2008 EMG which showed mild L5-S1 radiculopathy. He also noted an October 18, 2007 lumbar spine MRI which showed degenerative disc disease, mild annular bulges at L4-L5 and L5-S1, and a small central disc protrusion at L5-S1. Lastly, he noted a September 10, 2007 lumbar spine x-ray that showed facet arthritis. Dr. Watson also noted relator's previous treatment consisting of injection therapy, epidural blocks, Vicodin, physical therapy, and the implantation of a spinal cord stimulator. Thereafter, Dr. Watson provided his physical findings upon examination and indicated that treatment would consist of lumbar TFS injections, a lumbar EDND procedure and other therapeutic activities.

{¶19} 8. A file review on June 29, 2008 was completed by Anthony Williams, M.D. Dr. Williams was asked to provide his opinion on whether the medical evidence supports a finding of new and changed circumstances warranting the reinstatement of TTD compensation beginning March 12, 2007. Dr. Williams noted:

* * * Throughout the course of the claim the [injured worker] has had symptoms of both right and left-sided radicular pain into her feet. She has had a myriad of diagnostic testing including repeated MRIs and EMGs, CT/myelogram and discogram. Her most recent MRI was on 10/18/07 that showed a tiny marginal osteophyte at L1-2; DDD changes at L4-5 with loss of normal signal within the intervertebral disc and diffuse annular bulge, no neural foraminal or canal encroachment, no focal disc herniation, mild facet arthrosis; L5-S1 DDD changes, annular tear posteriorly associated with disc bulge and very small central disc protrusion, no nerve root compression, mild facet arthrosis. These changes are essentially unchanged from April '01 and October '02. She had a normal EMG on 10/24/02 but the most recent one on 1/25/08 described mild bilateral L5-S1 radiculopathy, left greater than right. * * *

In regards to treatment, the [injured worker] has had a variety of injection intervention, without any subjective relief.

This includes epidural steroid injections, facet blocks, and trigger point injections. She has had extended and extensive physical therapy and physical rehabilitation, chiropractic and spinal cord stimulator placement, none with any significant benefit. * * *

No new or changed circumstances have developed to warrant temporary total disability commencing 3/12/07 and to continue. The request was initiated by Dr. C. May in a 5/28/08 C-84. In the objective section it states, "Bilateral L5-S1 radiculopathy". In the subjective section it states, "Low back pain, bilateral lower extremity radicular symptoms". It appears that Dr. May based his request on the new allowance "bilateral L5-S1 radiculopathy". However, the bilateral radicular symptoms reported are not new and indeed spanned as far back as 2001. The additional allowance simply places a label on the chronic radicular symptoms she's expressed for years, it does not reflect any new changes in the claimant's clinical condition. In essence, the [injured worker] has already been treated for radiculopathy with epidural steroid [sic] injections and other pain interventions, even though the condition was not officially recognized in the claim. The claimant has been offered surgery to which she has refused. Hence, MMI remains in effect.

{¶20} 9. Relator's request for TTD compensation was heard before a DHO on July 25, 2008 and was granted. The DHO acknowledged that relator's March 12, 2007 hospital visit was not some evidence of a change in her condition; however, the DHO concluded that relator had met her burden of proof. Specifically, the DHO stated:

* * * Specifically, the District Hearing Officer finds that, beginning on 06/23/2008, the injured worker's newly allowed bilateral L5-S1 radiculopathy has rendered the injured worker temporarily and totally disabled again. On that date, Dr. Watson opined that the injured worker was in need of physical therapy and lumbar transforaminal injections bilaterally at the L5-S1 level due to her newly allowed condition of lumbar radiculopathy. Since his 06/23/2008 examination, Dr. Watson has requested authorization for these procedures and the injured worker testified at hearing that she is willing to undergo said treatment when it is

authorized. The District Hearing Officer finds the allowance of this claim for the L5-S1 radiculopathy and the request for specific treatment directed at this condition constitutes new and changed circumstances since the injured worker was determined to be at maximum medical improvement by the Industrial Commission. As such, the District Hearing Officer concludes that the Industrial Commission is vested with continuing jurisdiction to reinstate temporary total disability compensation in this claim, at this time.

Give the foregoing findings and conclusions, it is the order of the District Hearing Officer that temporary total disability compensation is granted from 06/23/2008 to 08/14/2008 and is to continue upon submission of medical evidence that causally relates any further disability to the allowed conditions in this claim. This decision is based upon Dr. Watson's 06/23/2008 pain management consultation and Dr. May's 05/28/2007 C-84 report. * * *

{¶21} 10. Relator appealed because the DHO did not reinstate her TTD compensation effective March 12, 2007.

{¶22} 11. The appeal was heard before a staff hearing officer ("SHO") on August 20, 2008. The SHO vacated the prior DHO's order and denied relator's request for TTD compensation in its entirety. The SHO provided the following rationale:

According to Donald Rice v. I.C. (5021098), 10th Ct. App., No. 97APD06-842, an additional allowance of a new condition is not in-and-of-itself proof of new circumstances to warrant further temporary total compensation, there must be showing of a real change in the physical condition and/or treatment.

According to the 04/07/2005 report from Dr. Lawson, the injured worker last worked on 11/22/2002. The injured worker was found to have reached maximum medical improvement by District Hearing Order of 06/03/2005, based on the 04/07/2005 report from Dr. Lawson.

The claim was additionally allowed for "LUMBAR FACET JOINT ARTHRITIS" by District Hearing Order of 11/30/2005. However, Dr. Lawson clearly notes that treatment for the facet arthritis had already been done before the time of his

examination. No request for any new and different type of treatment for facet arthritis since 04/07/2005 is found in file.

The claim was additionally allowed for "L5-S1 RADICULOPATHY" by Bureau of Workers' Compensation order of 05/02/2008. However, as noted by Dr. Williams in his review of 06/29/2008, the additionally allowed L5-S1 radiculopathy has been ongoing and treated for years. He also notes that all of the treatment now being requested has all been tried in the past. This is consistent with the fact the radiculopathy stems from the L5-S1 disc herniation that was previously treated and found to have reached maximum medical improvement. The treatment now being requested was also all tried before Dr. Lawson's examination according to his report. Nothing has changed other than the formal recognition of the previously treated conditions.

The medical evidence noted above does not indicate new and changed circumstances but instead a gradual worsening of the allowed conditions. Based on this history and evidence, Dr. Williams' opinion that no new and changed circumstances have been demonstrated is found persuasive and the requested temporary total compensation is denied.

(Emphases sic.)

{¶23} 12. Relator's further appeal was refused by order of the commission mailed September 15, 2008.

{¶24} 13. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶25} 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.

{¶26} 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.

{¶27} In the present case, relator was receiving TTD compensation based upon her originally allowed conditions. As of June 3, 2005, a DHO determined that those conditions had reached MMI and as such terminated relator's TTD compensation.

{¶28} It is undisputed that a claimant may receive additional TTD compensation after TTD compensation has been terminated based upon a finding of MMI where the claimant shows that the temporary worsening or exacerbation of their condition constitutes new and changed circumstances. *State ex rel. Bing v. Indus. Comm.* (1991), 61 Ohio St.3d 424. The granting of additional conditions may warrant the

payment of a new period of TTD compensation; however, that is not always the case. As this court stated in *State ex rel. Wyrebaugh v. Indus. Comm.*, 10th Dist. No. 06AP-610, 2007-Ohio-1939 at ¶32:

* * * The commission's granting of an additional claim allowance after a finding of MMI may be cause for resuming TTD compensation if the new claim allowance is not at MMI and the other requirements for TTD compensation are met. See *State ex rel. Basye v. Indus. Comm.* (1992), 64 Ohio St.3d 68. However, the granting of an additional claim allowance after a finding of MMI does not automatically resume the payment of TTD compensation. *State ex rel. Vance v. Marikis* (1999), 86 Ohio St.3d 305.

{¶29} In this mandamus action, relator argues that she clearly demonstrated that her condition had worsened and that she was again temporarily and totally disabled based solely on the newly allowed condition of bilateral lumbar L5-S1 radiculopathy. Relator points to the following: she was seen at an urgent care center on March 12, 2007; she was referred to a pain management program on May 14, 2008; on August 12, 2008, a request was made for additional physical therapy and reevaluation by Dr. Watson for possible transforaminal injections; in his August 22 and September 20, 2007 reports, Dr. May noted that her symptomatology and pain have worsened; and she submitted a C-84 requesting the reinstatement of TTD compensation based solely upon this new condition. Relator contends that, based upon the above evidence, the commission should have found that she was again temporarily and totally disabled and should have reinstated her TTD compensation.

{¶30} In the present case, the commission did not find relator's evidence to be persuasive and, instead, relied upon other medical evidence in the record. The commission noted that claimant had been experiencing radicular pain for a number of

years prior to the date that she was found to have reached MMI. Specifically, Dr. Williams noted that relator had complained of bilateral radicular symptoms as far back as 2001, four years before her originally allowed conditions were found to have reached MMI. He stated further that the additional allowance of bilateral lumbar radiculopathy "simply places a label on the chronic radicular symptoms she's expressed for years." Further, Dr. Williams stated that relator had "already been treated for radiculopathy with epidural steroid [sic] injections and other pain interventions, even though the condition was not officially recognized in the claim." He concluded that "MMI remains in effect." Further, the commission observed that, although relator was pursuing additional treatment, that treatment had been pursued in the past and relator was not seeking any different treatment from what she had already received.

{¶31} In the present case, relator's evidence of her worsening condition is entirely subjective. The medical evidence reviewed by Dr. Williams demonstrates that, objectively, there have essentially been no changes in relator's conditions from an objective standpoint. As Dr. Williams noted, the October 18, 2007 MRI was essentially unchanged from the April 2001 and October 2002 MRIs. Dr. Williams did note that relator's most recent EMG showed mild bilateral L5-S1 radiculopathy, left greater than right; however, he reiterated that relator has had bilateral radicular symptoms as far back as 2001 and she had already been treated for radiculopathy with epidural steroid injections and other pain interventions, even though the condition was not officially recognized in the claim.

{¶32} After reviewing the stipulated evidence, the magistrate finds that the commission did not abuse its discretion in finding that relator had not established new

and changed circumstances warranting the reinstatement of her TTD compensation. Although relator contends that the commission applied the wrong standard, the magistrate finds the commission did not. Specifically, relator needed to present sufficient evidence that her newly allowed conditions were not at MMI and prevented her from returning to her former position of employment. This would be evidence of new and changed circumstances warranting the reinstatement of her TTD compensation. The allowance of new conditions constitutes a new and changed circumstance; however, the commission found that it did not warrant the payment of TTD compensation. While the SHO did indicate that the medical evidence above cited (the reports of Drs. Watson and Williams) showed a gradual worsening of relator's condition, this magistrate finds that this statement is not the equivalent of a finding that relator's allowed conditions have again rendered her temporarily totally disabled.

{¶33} A review of the reports of Drs. Lawson and Williams reiterates the fact that relator has been experiencing radicular symptoms since 2001. Further, a review of those reports indicates that evidence of radiculopathy was sometimes present and sometimes not. Further, although Dr. Lawson noted that relator had been complaining of radicular symptoms for years, during his physical examination, straight leg raising did not result in classic radiculopathy. The record does indicate that relator has had radicular pain on and off for a number of years and that, at times, her symptomatology is worse. However, as Dr. Williams noted, the additional allowances in relator's claim simply placed a label on the chronic radicular symptoms she has expressed for years. As he stated, her condition remained at MMI. Again, the worsening in this case appears

to be of relator's symptoms without any objective medical evidence substantiating actual new and changed circumstances warranting the reinstatement of TTD compensation.

{¶34} Based on the foregoing, it is this magistrate's conclusion that relator has not demonstrated that the commission abused its discretion in denying her motion to reinstate TTD compensation and relator's request for a writ of mandamus should be denied.

/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 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).