

disability ("TTD") compensation for the closed period from June 30, 2006 to June 28, 2007, and to enter an order denying said compensation.

{¶2} Pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth District Court of Appeals, this matter was referred to a magistrate who issued a decision, including findings of fact and conclusions of law, which is appended hereto. The magistrate found that Dr. Moeller's June 7, 2007 C-84 did not constitute some evidence of TTD prior to Dr. Moeller's June 7, 2007 examination. Citing *State ex rel. Bowie v. Greater Cleveland Regional Transit Auth.* (1996), 75 Ohio St.3d 458, the magistrate noted that the commission can rely on an examining doctor's retrospective opinion only if it is apparent that the doctor reviewed all of the relevant medical evidence generated prior to the date of the examination. Examining doctors giving retrospective opinions are treated as non-examining doctors. Here, Dr. Moeller did not indicate in his June 7, 2007 C-84, nor in any other medical record before this court, that he reviewed the relevant medical evidence generated prior to his June 7, 2007 examination of the claimant. Therefore, the magistrate determined that Dr. Moeller's retrospective certification of TTD is not some evidence upon which the commission could rely to grant TTD. Accordingly, the magistrate has recommended that we grant relator's request for a writ of mandamus.

{¶3} Both respondent and the claimant filed objections to the magistrate's decision. In essence, both respondent and claimant argue that because Dr. Moeller was in the same practice group with the claimant's former treating physician, Dr. Zoller, the commission, and this court, can assume that Dr. Moeller reviewed all of the claimant's medical records prior to the date of Dr. Moeller's examination. Based upon this assumption, respondent and the claimant contend that Dr. Moeller's June 7, 2007 C-84 is

some evidence upon which the commission could rely in granting TTD for the closed period in question. We disagree.

{¶4} In *Bowie*, the court held that a medical report that post-dates the period of disability can, in certain limited circumstances, constitute "some evidence" upon which the commission can rely. However, the commission can rely on this evidence only if certain safeguards are satisfied. The court stated:

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 contemporaneously 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. The key safeguard emphasized by the *Bowie* court is the "imperative" that the doctor review all the relevant medical evidence generated prior to the examination.

{¶5} Here, Dr. Moeller retroactively certified TTD for a period of time when Dr. Zoller was treating the claimant. There is nothing in the record indicating that Dr. Moeller reviewed all of the relevant medical evidence generated prior to his June 7, 2007 examination of the claimant. Because Dr. Moeller and Dr. Zoller were in the same practice group, it is certainly possible, or perhaps even likely, that Dr. Moeller reviewed the medical records reflecting Dr. Zoller's treatment of the claimant. However, reliance upon a bare assumption is not consistent with the safeguards emphasized in *Bowie*. Moreover, as relator points out, Dr. Zoller never took the claimant off work or certified TTD during the period in question. The conspicuous absence of any reference by Dr. Moeller to Dr. Zoller's treatment records suggests that Dr. Moeller may not have reviewed these records. Without some specific indication that Dr. Moeller reviewed Dr. Zoller's

treatment records, Dr. Moeller's report is not some evidence upon which the commission could rely. For this reason, we overrule the objections of respondent and the claimant.

{¶6} Following an independent review of this matter, we find that the magistrate has properly determined the facts and applied the appropriate law. Therefore, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein. In accordance with the magistrate's decision, we grant relator's request for a writ of mandamus.

Objections overruled; writ of mandamus granted.

FRENCH, P.J., and SADLER, J., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Ado Staffing, Inc.,	:	
	:	
Relator,	:	
	:	
v.	:	No. 08AP-1054
	:	
Industrial Commission of Ohio	:	(REGULAR CALENDAR)
and Christuean Colson,	:	
	:	
Respondents.	:	
	:	

MAGISTRATE'S DECISION

Rendered on May 28, 2009

Schottenstein, Zox & Dunn, L.P.A., Robert M. Robenalt, Jennifer M. McDaniel and William J. McDonald, for relator.

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

Weisser & Wolf, Lisa M. Clark and Scott A. Wolf, for respondent Christuean Colson.

IN MANDAMUS

{¶7} In this original action, relator, Ado Staffing, Inc., requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order awarding respondent Christuean Colson ("claimant") temporary total disability

("TTD") compensation for the closed period from June 30, 2006 to June 28, 2007, and to enter an order denying said compensation.

Findings of Fact:

{¶8} 1. On June 29, 2006, claimant sustained an industrial injury while employed with relator, a temporary service agency. On that date, claimant was assigned to work at Art Technologies.

{¶9} 2. On June 30, 2006, claimant sought treatment at an Urgent Care where she was diagnosed with acute right wrist tendonitis, given a splint to wear and advised to take Aleve. She claimed that she had been using a power drill at work when she noticed pain in her right wrist.

{¶10} 3. On July 3, 2006, claimant went to the emergency room at St. Luke Hospital West complaining of right wrist pain. Her wrist was x-rayed but was negative for fracture. She was advised to continue her splint, use ice and elevation. She was prescribed Lodine and asked to follow-up at Concentra Medical Center ("Concentra").

{¶11} 4. On July 14, 2006, claimant was examined by Janet Cobb, M.D., at Concentra. Dr. Cobb assessed right wrist tenosynovitis. Dr. Cobb released claimant to return to work with a restriction of limited use of the right hand. Claimant was restricted from using a power tool or impact tool with her right hand. Physical therapy was scheduled.

{¶12} 5. On August 9, 2006, claimant was examined, at relator's request, by Ron Koppenhoeffter, M.D. Dr. Koppenhoeffter found that the right wrist tendonitis was directly related to claimant's employment. Relator, a self-insured employer, certified the industrial claim for "right wrist tendonitis."

{¶13} 6. On September 8, 2006, claimant was first examined by chiropractor Brandon Zoller, D.C., who was employed by Fick Chiropractic Orthopedic Centers, Inc. ("Fick"). Following the September 8, 2006 examination, Dr. Zoller prepared a three-page narrative report on Fick stationery. The report states in part:

When considering the recency [sic] of the injury, the small frame of the wrist, the mechanism of injury involving the heavy lifting and squeezing of the trigger and the continuity of symptoms as well as the clinical findings presented to me, it is my opinion that the injury of 6-29-2006 and the current clinical presentation are directly and causally related. There is also the probability of a more serious underlying condition being present that is complicating the recovery of the patient's injury. The orthopedic findings, tenderness over the wrist joint, loss of mobility as well as the severe loss of functional grip strength all point to a neurological condition that would highly correlate with the mechanism of injury. Further diagnostic testing in the form of an EMG may be warranted at this time.

{¶14} 7. On October 24, 2006, claimant was again examined by Dr. Zoller at one of the Fick centers. Dr. Zoller wrote:

The patient is making progress both symptomatically and objectively. The patient still suffers from the original work injury involving the use of a heavy air-powered drill. Due to the small size of the patient's wrist it is my opinion that this is complicating the patient's recovery as well as the high probability of there being neurological compromise to the wrist. This is evident in the numbness and tingling reported by the patient as well as the marked grip strength deficit and loss of mobility with active resistance. Further diagnostic testing is warranted. An EMG or MRI will be pursued at this time.

{¶15} 8. On November 21, 2006, chiropractor Randall J. Fick, D.C., who was also employed by Fick, conducted electrodiagnostic testing. He diagnosed right carpal tunnel syndrome.

{¶16} 9. On December 4, 2006, claimant moved for an additional allowance in her industrial claim. In support, claimant submitted a report dated March 16, 2007 from Dr. Zoller. In the report, Dr. Zoller opined that claimant's carpal tunnel syndrome is causally related to the industrial injury.

{¶17} 10. Following an April 11, 2007 hearing, a district hearing officer ("DHO") issued an order additionally allowing the claim for "right carpal tunnel syndrome." The DHO relied upon the March 16, 2007 report of Dr. Zoller and Dr. Fick's EMG of November 21, 2006.

{¶18} 11. Relator administratively appealed the DHO's order of April 11, 2007. Following a May 23, 2007 hearing, a staff hearing officer ("SHO") affirmed the DHO's additional claim allowance.

{¶19} 12. On June 14, 2007, relator's third-party administrator ("TPA") authorized a change of physician from Dr. Zoller to chiropractor Reed Moeller, D.C. The TPA's authorization letter indicates that claimant requested the change of physician on June 8, 2007.

{¶20} 13. Earlier, on June 7, 2007, and again on July 13, 2007, Dr. Moeller completed C-84s certifying TTD. The June 7, 2007 C-84 indicates that claimant was last examined on June 7, 2007, and it certifies TTD from the date of injury, June 29, 2006 to an estimated return-to-work date of June 29, 2007.

{¶21} The July 13, 2007 C-84 indicates that claimant was last examined on July 3, 2007, and it certifies TTD from June 29, 2007 to an estimated return-to-work date of August 29, 2007.

{¶22} 14. Apparently, the July 13, 2007 C-84 was filed in July 2007. For whatever reason, the June 7, 2007 C-84 was not filed until December 2007.

{¶23} 15. On August 7, 2007, claimant moved for TTD compensation from June 29 to August 29, 2007, based upon Dr. Moeller's July 13, 2007 C-84.

{¶24} 16. On August 30, 2007, at relator's request, claimant was examined by D. Ann Middaugh, M.D. In her five-page narrative report, dated August 31, 2007, Dr. Middaugh opined that the industrial injury had reached maximum medical improvement ("MMI").

{¶25} 17. Following a September 14, 2007 hearing, a DHO issued an order denying claimant's August 7, 2007 motion for TTD compensation. Claimant administratively appealed.

{¶26} 18. On November 12, 2007, Dr. Middaugh issued an addendum to her report which states in part:

Do you feel there is any reason for the physician of record (Reed Moeller D.C.) to write Ms. Colson off work for the period of 6-29-07 to 8-29-07? Based on the review of the records, the medical history, and my physical examination of 8-30-07, it is my opinion that Ms. Colson was unable to perform the job at Art Technologies due to the right wrist complaints, however, she was able to work at other positions with restrictions regarding use of the right hand and wrist. She worked as a baby sitter through the summer, per her own history.

(Emphasis sic.)

{¶27} 19. Following a November 13, 2007 hearing, an SHO issued an order that vacates the DHO's order of September 14, 2007. The SHO's order of November 13, 2007 awards TTD compensation from June 29 to August 29, 2007. The SHO's order explains:

The injured worker's C-86 motion, filed 08/07/2007, is granted.

The injured worker's motion requesting temporary total disability compensation for the period of 06/29/2007 to 08/29/2007 is granted.

The Staff Hearing Officer finds that the injured worker was unable to return to and perform the duties of her former position of employment for the period of 06/29/2007 to 08/29/2007 as a result of the allowed conditions in this claim.

Therefore, temporary total disability compensation is to be paid for said period less sickness and accident benefits received.

The Staff Hearing Officer finds that the injured worker has reached maximum medical improvement effective 08/30/2007 based on the medical report of Dr. Middaugh dated 08/30/2007.

Therefore, temporary total disability compensation is terminated effective 08/30/2007.

The Staff Hearing Officer further finds that there is no medical evidence on file certifying temporary total disability compensation for any period after 08/29/2007.

This order is based on the reports of Dr. Middaugh dated 08/30/2007 and 11/12/2007, the C-84 of Dr. Moeller dated 07/13/2007 and the EMG dated 09/12/2007.

{¶28} 20. The record does not disclose whether the SHO's order of November 13, 2007 was administratively appealed.

{¶29} 21. On December 28, 2007, claimant moved for TTD compensation from June 29, 2006 through June 29, 2007. In support, claimant submitted Dr. Moeller's June 7, 2007 C-84.

{¶30} 22. Following a February 20, 2008 hearing, a DHO issued an order awarding TTD compensation for the closed period June 29, 2006 through June 29, 2007.

The DHO's order explains:

It is the order of the District Hearing Officer that the C-86 Motion filed 12/28/2007 is granted.

The District Hearing Officer finds that the injured worker's request for temporary total disability compensation is granted. Temporary total disability compensation is granted for the period of 06/29/2006 through 06/29/2007, the estimated return to work date. This determination is based upon the C-84 filed 12/28/2007.

Therefore, the District Hearing Officer orders that temporary total disability compensation be paid for the period of 06/29/2006 through 06/29/2007, the estimated return to work date. Temporary total disability compensation is ordered less any payments for sickness and accident benefits received.

This order is based upon the medical report of Dr. Moller [sic] dated 06/07/2007. This order is also based upon the medical reports of 09/08/2006, 10/24/2006 and 03/16/2007.

{¶31} 23. Relator administratively appealed the DHO's order of February 20, 2008.

{¶32} 24. Following an April 21, 2008 hearing, an SHO issued an order stating that the DHO's order "is affirmed with additional reasoning." The SHO's order explains:

The injured worker's C-84 motion, filed 12/28/2007, is granted.

The injured worker's motion requesting temporary total disability compensation for the period of 06/30/2006 to 06/28/2007 is granted.

The Staff Hearing Officer finds that the injured worker was unable to return to and perform the duties of her former position of employment for the period of 06/30/2006 to 06/28/2007 as a result of the allowed conditions in this claim.

Therefore, temporary total disability compensation is to be paid for said period less sickness and accident benefits received.

The Staff Hearing Officer finds that the injured worker has already received temporary total disability compensation for a period beginning on 06/29/2007.

All evidence on file was reviewed.

This order is based on the C-84 of Dr. Moeller filed 12/28/2007 and the office records of Drs. Moeller and Zoller on file.

{¶33} 25. On May 6, 2008, another SHO mailed an order refusing relator's administrative appeal from the SHO's order of April 21, 2008.

{¶34} 26. On December 2, 2008, relator, Ado Staffing, Inc., filed this mandamus action.

Conclusions of Law:

{¶35} The issue is whether Dr. Moeller's June 7, 2007 C-84 constitutes some evidence upon which the commission can rely to award TTD compensation for the closed period June 30, 2006 to June 28, 2007.

{¶36} Finding that Dr. Moeller's June 7, 2007 C-84 fails to constitute some evidence of TTD prior to Dr. Moeller's June 7, 2007 examination, it is the magistrate's decision that this court issue a writ of mandamus, as more fully explained below.

{¶37} In its brief, relator asserts:

* * * It is also undisputed that Dr. Moeller did not examine or provide any treatment to Colson prior to June 7, 2007. Yet, Dr. Moeller has retroactively certified a large period of disability pre-dating his treatment and/or examination of Colson.

Id. at 4.

{¶38} Again, in its reply brief, relator asserts:

In this case Dr. Moeller certified temporary total compensation from June 30, 2006 through June 29, 2007. However, Dr. Moeller did not examine or provide any treatment to Colson prior to June 7, 2007. * * *

Id. at 1.

{¶39} Citing *State ex rel. Earls v. Indus. Comm.*, 97 Ohio St.3d 264, 2002-Ohio-6320, and *State ex rel. Kroger Co. v. Morehouse* (1995), 74 Ohio St.3d 129, relator alleges that the absence of treatment by Dr. Moeller over much of the period he certified for TTD eliminates Dr. Moeller's June 7, 2007 C-84 as some evidence upon which the commission can rely. In the view of the magistrate, the *Earls* and *Kroger* cases fail to examine the true issue before this court. Thus, the magistrate will not further address those cases.

{¶40} 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; *Kroger Co.*, at 133; and *State ex rel. Case v. Indus. Comm.* (1986), 28 Ohio St.3d 383, 387.

{¶41} 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. If the doctor's retrospective opinion is to be relied upon by the commission as some evidence, it is imperative that the doctor has reviewed all of the relevant medical evidence generated prior to the date of the examination from which the retrospective opinion is rendered. *Id.* at 460.

{¶42} In awarding TTD compensation from June 30, 2006 to June 28, 2007, the SHO's order of April 21, 2008 states reliance upon "the C-84 of Dr. Moeller filed 12/28/2007 and the office records of Drs. Moeller and Zoller on file."

{¶43} Dr. Zoller never opined that claimant was temporarily totally disabled in any of his office notes of record. That is, Dr. Zoller's September 8 and October 24, 2006 office notes do not contain an opinion that claimant was temporarily totally disabled, nor a restriction against returning to the former position of employment. Nor does Dr. Zoller's report of March 16, 2007 contain an opinion that claimant is temporarily and totally disabled.

{¶44} According to his June 7, 2007 C-84, Dr. Moeller examined claimant on June 7, 2007. There is no evidence in the record that Dr. Moeller himself ever examined claimant prior to June 7, 2007. (Presumably, the June 7, 2007 C-84 is the one filed on December 28, 2007 as indicated in the SHO's order of April 21, 2008.) Dr. Moeller's June 7, 2007 certification of TTD beginning the date of injury, i.e., June 29, 2006, is, in large part, retrospective of the June 7, 2007 examination. Only the certification of TTD from June 7, 2007 to an estimated return-to-work date of June 29, 2007 is prospective of the June 7, 2007 examination.

{¶45} Given the above analysis of the evidence cited by the SHO in his order of April 21, 2008, the issue here is whether Dr. Moeller's certification of TTD for the period prior to his June 7, 2007 examination can constitute some evidence upon which the commission can rely under *Bowie*. The magistrate finds that it does not.

{¶46} Dr. Moeller does not indicate on his June 7, 2007 C-84 nor in any other medical record before this court that he reviewed the relevant medical evidence

generated prior to the date of the June 7, 2007 examination. Thus, under *Bowie*, Dr. Moeller's retrospective certification of TTD for the period June 29, 2006 to June 6, 2007 cannot constitute evidence upon which the commission can rely. However, under *Bowie*, Dr. Moeller's prospective certification of TTD from June 7, 2007 to June 28, 2007 does constitute some evidence upon which the commission can rely.

{¶47} Accordingly, it is the magistrate's decision that this court issue a writ of mandamus ordering the commission to vacate its SHO's order of April 21, 2008 to the extent that TTD compensation is awarded from June 30, 2006 through June 6, 2007, and to enter an amended order that only awards TTD compensation from June 7 through June 28, 2007.

/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).