

{¶2} In accord with Loc.R. 12, the case was referred to a magistrate to conduct appropriate proceedings. The parties stipulated the pertinent evidence and filed briefs. The magistrate then issued a magistrate's decision containing detailed findings of fact and conclusions of law which is appended to this decision. The magistrate's decision includes a recommendation that we issue a writ of mandamus compelling the commission to reinstate Knapp's TTD compensation award.

{¶3} Counsel for Ferry Industries, Inc. ("Ferry") has filed objections to the magistrate's decision. Counsel for the commission has likewise filed objections. Counsel for Knapp has filed a memorandum in response. The case is now before the court for a full, independent review.

{¶4} Knapp was injured in May 2008 when his right hand and forearm were struck by a bolt ejected from a machine. A physician authorized his return to work a few days later and Knapp attempted to work at his former job, but felt he was unable to do so.

{¶5} Considerable wrangling occurred over what conditions should be allowed and what conditions should be disallowed as a result of Knapp's injuries. Ultimately, the claim was allowed for contusion of right forearm and abrasion of right forearm. The claim was disallowed for right shoulder strain/sprain and right rotator cuff strain.

{¶6} While the issue of the allowed conditions was not clarified, Knapp was examined by Steven R. Rodgers, M.D. Dr. Rodgers certified a period of TTD beginning September 22, 2008 based upon "forearm contusion." He executed an appropriate C-84 to support that certification.

{¶7} Dr. Rodgers issued subsequent C-84's on October 22, November 19, December 16, 2008 and January 29 and February 24, 2009. On each form, he indicated

that Knapp had not reached maximum medical improvement ("MMI"). Ultimately, Dr. Rodgers certified Knapp's entitlement to TTD compensation up to March 25, 2009.

{¶8} A district hearing officer ("DHO") awarded TTD compensation beginning September 22, 2008 based upon the C-84s. This award was affirmed by a staff hearing officer ("SHO") following a hearing on January 12, 2009.

{¶9} In the meantime, the wrangling over allowed conditions continued. It was not ultimately resolved until April 2009, after the period of TTD at issue in this case.

{¶10} The Ohio Bureau of Workers' Compensation ("BWC") had Knapp examined by another physician, Steven A. Cremer, M.D. Dr. Cremer concluded that Knapp had achieved MMI based upon a single allowed condition—contusion of right forearm. Dr. Cremer did not address whether the other conditions being contested had reached MMI.

{¶11} Dr. Rodgers was sent a copy of Dr. Cremer's report and agreed that, treated as a contusion only, Knapp's condition had reached MMI. Dr. Rodgers indicated that other conditions, then being contested, had not reached MMI. Ultimately, one of those other conditions, right forearm abrasion, was recognized.

{¶12} The BWC terminated Knapp's TTD compensation effective March 24, 2009, based upon Dr. Cremer's report. On the same date as the BWC acted, a DHO issued an order terminating TTD compensation on a theory Knapp had achieved MMI. This order was not appealed.

{¶13} In May 2009, almost two months after the DHO issued the order finding MMI and over a month and one-half after the issue of what conditions were to be recognized was finally resolved, Ferry filed a motion with the commission asking that the prior award of TTD compensation be set aside. Ferry based its motion on a theory that

Dr. Rodgers' note dated March 6, 2009 constituted a new and changed circumstance such that continuing jurisdiction should be exercised. A DHO and an SHO issued orders granting the motion. Those orders are being contested via this mandamus action.

{¶14} We agree with the magistrate that continuing jurisdiction should not have been exercised based upon the note of Dr. Rodgers. First, a slightly more serious condition was in fact recognized after the March note. The only condition not being contested then was a contusion of the right forearm, which could be considered to be no more than a bruise without the skin being broken.

{¶15} An abrasion, later recognized, involves the wearing away of a bodily substance or structure through some abnormal mechanical process. An abrasion can involve more than the skin, but frequently involves the skin or mucous membranes.

{¶16} Dr. Rodgers clearly thought that Knapp suffered more than a bruise and the subsequent findings of the commission supported that thinking. His opinion that the injury, treated as a bruise or contusion only, had reached MMI did not undo his prior opinions expressed in the C-84s. No "new and changed circumstances" were present to support the commission's exercise of continuing jurisdiction under R.C. 4123.52.

{¶17} Ferry complains that Dr. Rodgers let his staff do most of the work on the C-84s. This does not mean the C-84s were inaccurate, nor does it invalidate the personal note of Dr. Rodgers in which he stated that other parts of the injury beyond the contusion/bruise disabled Knapp from work.

{¶18} The commission in its objection states that equivocal medical evidence cannot support TTD compensation. However, equivocal evidence cannot support an

exercise of continuing jurisdiction under R.C. 4123.52. The party asking for an exercise of continuing jurisdiction must actually demonstrate new and changed circumstances.

{¶19} In brief, we find that the magistrate correctly resolved the key issue, namely whether or not the commission could exercise continuing jurisdiction after Knapp had received TTD for a closed period.

{¶20} We overrule the objections to the magistrate's decision. We adopt the findings of fact and conclusions of law contained in the magistrate's decision and grant a writ of mandamus ordering the commission to vacate its SHO order of August 6, 2009, and to enter an order that denies Ferry's May 19, 2009 motion for the exercise of continuing jurisdiction and that reinstates the SHO's order of January 12, 2009 that awards TTD compensation beginning September 22, 2008.

*Objections overruled;
writ of mandamus granted.*

BRYANT, P.J., and SADLER, J., concur.

A P P E N D I X

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Timothy Knapp,	:	
	:	
Relator,	:	
	:	
v.	:	No. 09AP-1038
	:	
The Industrial Commission of Ohio	:	(REGULAR CALENDAR)
and Ferry Industries, Inc.,	:	
	:	
Respondents.	:	
	:	

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

Rendered on December 7, 2010

Shapiro, Shapiro & Shapiro Co., LPA, Daniel L. Shapiro and Leah P. VanderKaay, for relator.

Richard Cordray, Attorney General, and Sandra E. Pinkerton, for respondent Industrial Commission of Ohio.

Walter & Haverfield LLP, Michael J. Spisak and Morris L. Hawk, for respondent Ferry Industries, Inc.,

IN MANDAMUS

{¶21} In this original action, relator, Timothy Knapp, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order granting the employer's May 19, 2009 motion for the exercise of continuing jurisdiction over a prior award of temporary total disability ("TTD")

compensation and declaring an overpayment of said compensation beginning September 22, 2008, and to enter an order denying the employer's motion and reinstating the prior award of compensation.

Findings of Fact:

{¶22} 1. On May 30, 2008, relator injured his right forearm while employed as a machinist for respondent Ferry Industries, Inc. ("Ferry Industries" or "employer"), a state-fund employer. On that date, relator's right hand and forearm were struck by a bolt that was ejected from a machine. The industrial claim (No. 08-339110) was initially allowed for "contusion of forearm, right."

{¶23} 2. Relator was treated on the date of his injury at the emergency room of the Akron General Medical Center. X-rays showed no fracture. The emergency room physician diagnosed a "[r]ight forearm contusion."

{¶24} 3. On June 2, 2008, relator was examined by Dr. Marquart who diagnosed a forearm abrasion and contusion and recommended a return to work without restrictions.

{¶25} 4. Relator returned to work at Ferry Industries.

{¶26} 5. Apparently, relator was examined by Steven R. Rodgers, M.D., on September 19, 2008.

{¶27} 6. On September 26, 2008, relator was again examined by Dr. Rodgers.

In his office notes of that date, Dr. Rodgers wrote:

Patient is here for follow-up of his right arm condition. * * *
He notes discomfort in the forearm, elbow, and shoulder.
He's been taking Aleve one tablet b.i.d.. He has not been
working. No new complaints.

* * *

- A: [One] Forearm abrasion.
[Two] Forearm contusion.
[Three] Right shoulder strain.
[Four] Right rotator cuff strain
- P: [One] He may increase the aleve to two tablets twice a day.
[Two] Await approval for the requested allowed conditions.
[Three] Follow-up in two weeks. Plan will be to initiate physical therapy and possibly request an MRI of the shoulder.
[Four] Light duty restrictions continued.

{¶28} 7. On September 26, 2008, Dr. Rodgers completed a C-84 certifying TTD from September 22, 2008 to an estimated return-to-work date of October 16, 2008. The C-84 form asks the examining physician to "[l]ist diagnosis(es) for allowed conditions being treated which prevent return to work." In response, Dr. Rodgers wrote "923.10," which is the ICD-9 code for a forearm contusion.

{¶29} The C-84 form also asks the examining physician: "Has the work related injury(s) or disease reached a treatment plateau at which no fundamental functional or physiological change can be expected despite continuing medical or rehabilitative intervention? (Maximum Medical Improvement)." In response to the query, Dr. Rodgers marked the "No" box.

{¶30} 8. On subsequent C-84s dated October 22, November 19 and December 16, 2008, and January 29 and February 24, 2009, Dr. Rodgers extended his certification of TTD to an estimated return-to-work date of March 25, 2009. On each C-84, Dr. Rodgers indicated by marking the "No" box that the forearm contusion was not at maximum medical improvement ("MMI").

{¶31} 9. Following a December 1, 2008 hearing, a district hearing officer ("DHO") issued an order awarding TTD compensation beginning September 22, 2008 based upon the September 26, 2008 C-84 from Dr. Rodgers and his "treatment records."

{¶32} 10. The employer administratively appealed the DHO's order of December 1, 2008.

{¶33} 11. Following a January 12, 2009 hearing, a staff hearing officer ("SHO") issued an order that affirms the DHO's order of December 1, 2008. The SHO's order explains:

The Staff Hearing Officer's decision to award the temporary total compensation is based upon the Injured Worker's testimony that he continued to work after the injury until 09/22/2008 when he could no longer continue working because of the allowed conditions in this claim. The Staff Hearing Officer also relies upon Dr. Rodgers' C-84 report of 09/26/2008 as well as his treatment records in file. All of the medical information relied upon indicates the Injured Worker is temporarily and totally disabled because of the allowed injuries in this claim.

{¶34} 12. On November 6, 2008, relator moved for the allowance of additional conditions in the claim.

{¶35} 13. Following a March 5, 2009 hearing, a DHO issued an order additionally allowing the claim for "abrasion right forearm," but disallowing the claim for "right shoulder strain/sprain and right rotator cuff strain."

{¶36} 14. Relator administratively appealed the DHO's order of March 5, 2009.

{¶37} 15. Following an April 1, 2009 hearing, an SHO issued an order affirming the DHO's order of March 5, 2009.

{¶38} 16. On April 23, 2009, another SHO mailed an order refusing relator's administrative appeal from the SHO's order of April 1, 2009.

{¶39} 17. Earlier, on February 13, 2009, at the request of the Ohio Bureau of Workers' Compensation ("bureau"), relator was examined by Steven A. Cremer, M.D. In his five-page report, Dr. Cremer opined: "For the allowed condition in the claim this individual is at maximum medical improvement."

{¶40} 18. By letter dated February 27, 2009, the bureau forwarded to Dr. Rogers a copy of Dr. Cremer's report. The February 27, 2009 letter states:

* * * Please note that the examination report indicates your patient has reached maximum medical improvement.

* * *

Has the work related injury(s) or disease reached a treatment plateau at which no fundamental functional or physiological change can be expected despite continuing medical or rehabilitative intervention? (Maximum Medical Improvement) YES or NO

If YES, please give MMI date.

{¶41} 19. On March 6, 2009, Dr. Rodgers wrote on the February 27, 2009 bureau letter in his own hand:

Regarding the current allowed conditions of forearm contusion the [injured worker] has reached MMI. Other conditions which have been requested as additional allowances have not reached MMI. MMI date for the contusion would have been prior to his initial visit with me, dated 9/19/08.

{¶42} 20. On March 23, 2009, Dr. Rodgers completed another C-84 on which he certified TTD from March 23 to April 23, 2009 based solely on the right forearm contusion. On the C-84, Dr. Rodgers indicated by his mark that the allowed condition of

the claim had reached MMI. However, Dr. Rodgers did not respond to the query as to the date that MMI had been reached.

{¶43} 21. Apparently, the bureau contacted Dr. Rodgers regarding the March 23, 2009 C-84 and requested that he submit a date for the MMI finding.

{¶44} Dr. Rodgers then amended his C-84 to include an MMI date of March 5, 2009.

{¶45} 22. On March 26, 2009, the bureau issued an order terminating TTD compensation effective March 24, 2009.

{¶46} 23. No appeal was taken from the bureau's March 26, 2009 order.

{¶47} 24. Earlier, on March 4, 2009, the bureau requested that the commission terminate TTD compensation based upon Dr. Cremer's opinion that the industrial injury had reached MMI.

{¶48} 25. Following a March 26, 2009 hearing, a DHO issued an order granting the bureau's March 4, 2009 motion to terminate TTD compensation. However, the DHO's order explains:

The District Hearing Officer finds, based on the undated note of Dr. Rodgers, the Injured Workers' treating physician, filed 03/06/2009, that the allowed conditions of this claim have reached maximum medical improvement.

The District Hearing Officer orders that the Injured Workers' temporary total disability compensation shall be terminated as of 03/06/2009, the date the treating physician opined maximum medical improvement.

Therefore, any temporary total disability compensation paid subsequent to 03/06/2009 is an overpayment and shall be recouped pursuant to R.C. 4123.511(K).

{¶49} 26. Apparently, the DHO's order of March 26, 2009 was not administratively appealed.

{¶50} 27. On May 19, 2009, the employer moved the commission for the exercise of continuing jurisdiction over the commission's award of TTD compensation beginning September 22, 2008. The employer submitted a brief in support of its motion.

The brief argued:

Dr. Rodgers' 3/6/09 note constitutes new and changed circumstances and is an equivocation/repudiation of his earlier C-84 forms upon which the Industrial Commission awarded temporary total compensation. Therefore, the Industrial Commission should exercise its continuing jurisdiction pursuant to R.C. 4123.52 and vacate the award of temporary total compensation.

{¶51} 28. Following a June 26, 2009 hearing, a DHO issued an order granting the employer's May 19, 2009 motion. Relator administratively appealed the order.

{¶52} 29. Following an August 6, 2009 hearing, an SHO issued an order affirming the DHO's order of June 26, 2009. The SHO's order explains:

The District Hearing Officer order from the hearing dated 06/26/2009 is affirmed. Therefore, the Employer's motion filed 05/19/2009 is granted to the extent of this order.

By way of history the Staff Hearing Officer notes this claim was originally allowed by order of the Administrator dated 06/04/2008 for contusion right forearm. No appeal was taken to this order.

On 11/06/2008 the Injured Worker filed a motion requesting the additional allowances of abrasion right forearm, right shoulder sprain/strain, and right rotator cuff strain. This motion was ultimately adjudicated by District Hearing Officer order issued on 03/05/2009 and Staff Hearing Officer order issued on 04/01/2009 which additionally recognized abrasion right forearm. Those orders disallowed right shoulder sprain/strain and right rotator cuff strain.

By District Hearing Officer order issued on 12/01/2008 temporary total compensation was ordered paid from 09/22/2008 through 10/16/2008. This was based on the treatment records and C-84 report of Dr. Rodgers dated 09/26/2008. Additional temporary total compensation was to be considered upon submission of medical proof of disability. This decision was affirmed by Staff Hearing Officer order issued on 01/12/2009 and further appeal was refused by order mailed 02/25/2009.

The evidence in file reflects the Injured Worker was paid temporary total compensation continuously from 09/22/2008 through 03/24/2009. This was based on the C-84 reports of Dr. Rodgers dated 09/26/2008, 10/22/2008, 11/19/2008, 12/16/2008, 01/29/2009, and 02/24/2009. Each of these C-84 reports indicates the Injured Worker was temporarily and totally disabled exclusively due to the allowed condition of contusion right forearm (ICD code number 923.10) and also indicates the Injured Worker had not reached maximum medical improvement.

The Bureau of Workers' Compensation had the Injured Worker evaluated by Dr. Cremer on 02/13/2009 regarding the extent of [f] disability. In a report also dated 02/13/2009 Dr. Cremer indicated the allowed condition of contusion right forearm had reached maximum medical improvement.

The Bureau of Workers' Compensation send [sic] a copy of of [sic] Dr. Cremer's report to Dr. Rodgers and in correspondence dated 02/27/2009 the Bureau of Workers' Compensation asked Dr. Rodgers to offer an opinion regarding maximum medical improvement. In a handwritten note signed by Dr. Rodgers on 03/06/2009 he indicated the following:

Regarding the current allowed condition of forearm contusion the Injured Worker's has reached MMI. Other conditions which have been requested as additional allowances have not reached MMI. MMI date for the contusion would have been prior to his initial visit with me, dated 09/19/2008.

On 03/23/2009 Dr. Rodgers completed another C-84 report indicating the contusion of the right forearm disabled the Injured Worker from 03/23/2009 through 04/23/2009 and also indicated that this allowed condition had reached

maximum medical improvement. However, Dr. Rodgers gave no date for maximum medical improvement. The corresponding treatment note dated 03/23/2009 from Dr. Rodgers included the diagnoses right forearm abrasion, right forearm contusion, right shoulder strain, right rotator cuff strain, and right elbow strain.

On 03/24/2009 the Bureau of Workers' Compensation contacted Dr. Rodgers regarding the 03/23/2009 C-84 report and requested that Dr. Rodgers submit a date for the maximum medical improvement finding noted on the C-84 report dated 03/23/2009. That C-84 report was resubmitted and the maximum medical improvement date of 03/05/2009 was added. This amended C-84 report was faxed on 03/24/2009. The Bureau of Workers' Compensation then issued an order dated 03/26/2009 terminating the payment of temporary total compensation on 03/24/2009, indicating the order was based on the C-84 report from the physician of record, Dr. Rodgers, received 03/24/2009. No appeal was taken to this order.

Also on 03/26/2009 a hearing was held before a District Hearing Officer regarding the termination of temporary total compensation. This issue had previously been referred to the Industrial Commission by the Bureau of Workers' Compensation pursuant to the 02/13/2009 report of Dr. Cremer. The District Hearing Officer terminated the payment of temporary total compensation and found maximum medical improvement effective 03/06/2009 based on the handwritten note of Dr. Rodgers. This order also found temporary total compensation paid subsequent to 03/06/2009 to be overpaid and indicated it was to be recouped pursuant to the provisions of Ohio Revised Code Section 4123.511(K). No appeal was taken to the District Hearing Officer order.

On 05/19/2009 the Employer filed a motion requesting the Industrial Commission exercise continuing jurisdiction pursuant to Ohio Revised Code Section 4123.52 to vacate the award of temporary total compensation beginning 09/22/2008. The employer contends new and changed circumstances subsequent to the 01/12/2009 Staff Hearing Officer hearing which ordered the payment of temporary total compensation were discovered. Specifically, the Employer alleges the 03/06/2009 handwritten note from Dr. Rodgers is newly discovered evidence which by due diligence could not

have been discovered prior to the final administrative determination regarding the payment of temporary total compensation.

The Employer's position is well-taken. In the 03/06/2009 handwritten note Dr. Rodgers indicated that the contusion of the right forearm, the only condition upon which he predicated temporary total disability in the six C-84 reports he issued, had reached maximum medical improvement prior to the period of disability beginning 09/22/2008. Further, Dr. Rodgers makes it clear in this note that other conditions, which are not specified, disabled the Injured Worker and had not met maximum medical improvement.

When Dr. Rodgers authored this note on 03/06/2009, he had not yet been apprised of the District Hearing Officer order issued on 03/05/2009 which additionally recognized this claim for abrasion right forearm and disallowed this claim for right shoulder sprain/strain and right rotator cuff strain. The treatment records of Dr. Rodgers also make reference to right elbow complaints and Dr. Rodgers indicated in the C-9 report dated 11/18/2008 that right elbow strain should be added to this claim.

Newly discovered evidence which was not in existence at the time of the adjudications regarding the payment of temporary total compensation constitutes new and changed circumstances. Therefore, the Employer has demonstrated a ground upon which the extraordinary relief of continuing jurisdiction can be invoked. Accordingly, the Staff Hearing Officer invokes the continuing jurisdiction pursuant to the provisions of Ohio Revised Code Section 4123.52 and vacates the District Hearing Officer order issued on 12/01/2008, the Staff Hearing Officer order issued on 01/12/2009, and the refusal order mailed on 02/25/2009.

This newly discovered evidence is a repudiation by the physician of record, Dr. Rodgers, of the Injured Worker's disability status. Dr. Rodgers has indicated that the right forearm contusion, the only condition listed in the multiple C-84 reports issued by the physician, had reached maximum medical improvement prior to the period of disability commencing on 09/22/2008. Further, Dr. Rodgers has indicated that the Injured Worker was disabled for conditions which were not listed on the C-84 report and which in part have been disallowed in this claim. Therefore, no probative

evidence substantiating temporary total disability for the period 09/22/2008 through 03/06/2009 is presently in file.

When a physician repudiates an opinion this amounts to equivocation. *State ex rel. Eberhardt v. Flxible Corp.* (1994), 70 Ohio St. 3d 649. Equivocal medical opinions are of no probative value and therefore do not constitute evidence upon which the Industrial Commission may rely.

The Staff Hearing Officer finds the Injured Worker was not entitled to the temporary total compensation he received for the period 09/22/2008 through 03/06/2008 [sic]. Therefore, the temporary total compensation paid to the Injured Worker for this period is found to be overpaid and shall be recouped pursuant to the provisions of Ohio Revised Code Section 4123.511(K).

The temporary total compensation paid to the Injured Worker for the period 03/07/2009 through 03/24/2009 has previously been adjudicated by District Hearing Officer order issued on 03/26/2009. The temporary total compensation paid for that period was found to be overpaid and was ordered recouped pursuant to Ohio Revised Code Section 4123.511(K). Therefore, the doctrine of *res judicata* precludes the Staff Hearing Officer from revisiting that period of temporary total disability compensation.

{¶53} 30. On September 15, 2009, another SHO mailed an order refusing relator's administrative appeal from the SHO's order of August 6, 2009.

{¶54} 31. On November 5, 2009, relator, Timothy Knapp, filed this mandamus action.

Conclusions of Law:

{¶55} The main issue is whether the commission had continuing jurisdiction to revisit its award of TTD compensation beginning September 22, 2008.

{¶56} Finding that the commission did not have continuing jurisdiction to revisit its award of TTD compensation beginning September 22, 2008, it is the magistrate's decision that this court issue a writ of mandamus, as more fully explained below.

{¶57} The commission's continuing jurisdiction under R.C. 4123.52 is not unlimited. Its prerequisites are: (1) new and changed circumstances; (2) fraud; (3) clear mistake of fact; (4) clear mistake of law; or (5) error by an inferior tribunal. *State ex rel. Nicholls v. Indus. Comm.* (1998), 81 Ohio St.3d 454.

{¶58} The *Nicholls* court suggests that new and changed circumstances also encompasses the rule regarding previously undiscoverable evidence. See also *State ex rel. Keith v. Indus. Comm.* (1991), 62 Ohio St.3d 139.

{¶59} The submission of a new medical report to challenge a final commission order does not automatically constitute new and changed circumstances. *State ex rel. Poneris v. Indus. Comm.*, 111 Ohio St.3d 264, 2006-Ohio-5702, ¶9; and *State ex rel. Ross v. Indus. Comm.*, 118 Ohio St.3d 73, 2008-Ohio-1739, ¶17.

{¶60} Equivocal medical opinions are not evidence. *State ex rel. Eberhardt v. Flexible Corp.* (1994), 70 Ohio St.3d 649, 657. Equivocation occurs when a doctor repudiates an earlier opinion, renders contradictory or uncertain opinions, or fails to clarify an ambiguous statement. *Id.*

{¶61} At issue here is the SHO's order of August 6, 2009 and the March 6, 2009 handwritten note of Dr. Rodgers in which he opined that the right forearm contusion had reached MMI prior to relator's initial visit with him on September 19, 2008.

{¶62} The SHO held that Dr. Rodgers March 6, 2009 handwritten opinion was a "repudiation" of all of his prior C-84s on which he certified that the right forearm contusion was not at MMI. The SHO further held that the March 6, 2009 handwritten opinion was "[n]ewly discovered evidence" which constitutes the "new and changed circumstances" upon which continuing jurisdiction can be exercised.

{¶63} Here, the magistrate notes that Industrial Commission Resolution No. R98-1-03, effective May 6, 1998, sets forth the commission's guidelines applicable to reconsideration requests. The resolution states in part:

[One] A request for reconsideration shall be considered only in the following cases:

New and changed circumstances occurring subsequent to the date of the order from which reconsideration is sought. For example, there exists newly discovered evidence which by due diligence could not have been discovered and filed by the appellant prior to the date of the order from which reconsideration is sought. Newly discovered evidence shall be relevant to the issue in controversy but shall not be merely corroborative of evidence that was submitted prior to the date of the order from which reconsideration is sought.

There is evidence of fraud in the claim.

There is a clear mistake of fact in the order from which reconsideration is sought.

The order from which reconsideration is sought contains a clear mistake of law of such character that remedial action would clearly follow.

There is an error by the inferior administrative agent or subordinate hearing officer in the order from which reconsideration is sought which renders the order defective.

{¶64} Without citation to Resolution No. R98-1-03, the SHO's order of August 6, 2009 states:

* * * Specifically, the Employer alleges the 03/06/2009 handwritten note from Dr. Rodgers is newly discovered evidence which by due diligence could not have been discovered prior to the final administrative determination regarding the payment of temporary total compensation.

{¶65} Apparently, the SHO was aware of the Resolution No. R98-1-03 definition of newly discovered evidence in determining that grounds exist for the exercise of continuing jurisdiction.

{¶66} While noting the "due diligence" standard with respect to claims of newly discovered evidence, the SHO's order of August 6, 2009 does not actually address the "due diligence" question.

{¶67} Even if it can be said that, by due diligence, the employer could not have obtained Dr. Rodgers' March 6, 2009 MMI opinion, in the magistrate's view, the March 6, 2009 MMI opinion may not be found to be a repudiation of Dr. Rodgers' C-84 disability opinions. This is so because Dr. Rodgers had no authority, under the circumstances, to render an MMI opinion that is retrospective of his September 19, 2008 initial examination of relator.

{¶68} 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 el. 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.

{¶69} 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.

{¶70} There is no evidence that Dr. Rodgers reviewed any relevant medical evidence generated prior to the date of his September 19, 2008 initial examination of relator—much less all the relevant medical evidence. Given that Dr. Rodgers failed to review the relevant medical evidence, under *Bowie*, he had no authority to render his March 6, 2009 opinion that relator had reached MMI at some point prior to the initial examination date.

{¶71} Given the above analysis, Dr. Rodgers' March 6, 2009 MMI opinion cannot be relied upon by the commission to support the exercise of its continuing jurisdiction.

{¶72} Accordingly, for all the above reasons, it is the magistrate's decision that this court issue a writ of mandamus ordering the commission to vacate its SHO's order of August 6, 2009, and to enter an order that denies the employer's May 19, 2009 motion for the exercise of continuing jurisdiction and that reinstates the SHO's order of January 12, 2009 that awards TTD compensation beginning September 22, 2008.

/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).