[Cite as *State ex rel. Lakewood Senior Campus, L.L.C. v. Indus. Comm.*, 2015-Ohio-1732.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

The State of Ohio on relation of Lakewood Senior Campus LLC,	:	
Relator,	:	
v.	:	Case No. 14AP-587
Elizabeth Carpenter and Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on May 7, 2015

Good & Good LLC, and *Jonathan A. Good*, for relator.

Bevan & Associates, LPA, and *Christopher J. Stefancik*, for respondent Elizabeth Carpenter.

Michael DeWine, Attorney General, and *Stephen D. Plymale*, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

TYACK, J.

{¶ 1} Lakewood Senior Campus, LLC, filed this action in mandamus, seeking a writ to compel the Industrial Commission of Ohio ("commission") to vacate its order which approved surgery for Elizabeth Carpenter.

{¶ 2} In accord with Loc.R. 13(M) of the Tenth District Court of Appeals, 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, appended hereto, which contains detailed findings of fact and conclusions of

law. The magistrate's decision includes a recommendation that we deny the request for a writ.

{¶ 3} Counsel for Lakewood Senior Campus, LLC, has filed objections to the magistrate's decision. Counsel for the commission has filed a memorandum in response. The case is now before the court for a full, independent review.

{¶ 4} The objection filed on behalf of Lakewood Senior Campus, LLC reads:

> There is no clarification to Dr. Kepple's contradictory and inherently unreliable statements and therefore his opinions are equivocal and not some evidence upon which to grant surgery for non-allowed conditions.

{¶ 5} The commission had before it conflicting medical reports about the proposed surgery. An independent medical examination conducted at the request of Lakewood Senior Campus, LLC indicated that the surgery was not necessitated by the allowed conditions in her claim. A set of reports from Louis Keppler, M.D. indicates that the surgery was needed as a result of the recognized conditions. The commission relied upon the reports from Dr. Keppler in ordering payments for the surgery.

{¶ 6} In this mandamus action, Lakewood Senior Complex, LLC, argues that Dr. Keppler's reports could not form the basis for ordering the surgery because the surgery is necessitated by non-allowed conditions, namely degenerative change to Elizabeth Carpenter's spine. Our magistrate's conclusions of law rejected that argument. The objections assert that we should not adopt our magistrate's conclusions of law as to that issue.

{¶ 7} Elizabeth Carpenter has degenerative disc disease which was basically asymptomatic until she injured her back while moving a bed so she could clean under the bed. She now has an L1-2 disc bulge and is exhibiting symptoms consistent with pressure upon the nerve root. Specifically, she now has symptoms of low back pain and loss of feeling in her right leg. Dr. Keppler reported that the disc buldge at L1-2 pressing on the nerve root is causing the primary symptoms.

{¶ 8} The commission was clearly within its discretion to rely on Dr. Keppler's report and not to rely on Dr. Glaser's report.

{¶ 9} 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. As a result, we deny the request for a writ of mandamus.

Objections overruled; writ denied.

DORRIAN and LUPER SCHUSTER, JJ., concur.

A P P E N D I X

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v.	:	Case No. 14AP-587
Elizabeth Carpenter and Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on January 29, 2015

Good & Good LLC, and *Jonathan A. Good*, for relator.

Bevan & Associates, LPA, and *Christopher J. Stefancik*, for respondent Elizabeth Carpenter.

Michael DeWine, Attorney General, and *Stephen D. Plymale*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶ 10} Relator, Lakewood Senior Campus, LLC, 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 approved the surgery requested by respondent Elizabeth Carpenter ("claimant"), and ordering the commission

to find that the requested surgery is not related to the allowed conditions in claimant's claim.

Findings of Fact:

{¶ 11} 1. Claimant sustained a work-related injury on May 30, 2013 and relator originally allowed her claim for "lumbar sprain [and] lumbosacral sprain."

{¶ 12} 2. Following a hearing before a staff hearing officer ("SHO") on September 17, 2013, claimant's claim was additionally allowed for:

> L1-L2 disc bulge with impingement on the exiting right L1 nerve root.
>
> 3. An MRI taken October 10, 2013 revealed the following:
>
> [One] Disc/osteophyte complex disease at multiple levels with poster element hypertrophy, with varying degrees of foramina compromise, as noted above.
>
> [Two] L1-L2 disc and adjacent endplate changes, as described above, which appear relatively stable from previous exam; this favors nonaggressive process. Correlate clinically and with lab values as well as with plain films.
>
> [Three] Endplate changes at L2-L3 as well as superiorly as L1, which demonstrate mild enhancement, significance uncertain, again relatively stable. See above discussion.
>
> [Four] No significant central canal compromise.
>
> [Five] Possible renal atrophy/scarring on the right.

{¶ 13} 4. On October 21, 2013, claimant met with Samir J. Shaia, D.O., to discuss the results of her MRI. Dr. Shaia's office notes provide:

> This is a pleasant patient who returns for recheck and reevaluation. The patient was last seen on 8/12/13. Since that time, I had ordered an MRI of the lumbar spine for further evaluation. This study revealed again an abnormal bright T2 STIR signal within the L1-L2 disc. This was comparable to the previous exam. The end plate margins remain unchanged. This does not favor any acute discitis or adjacent osteomyelitis. Also noted was a right renal scarring or atrophy. The patient states she knows about this issue and has been followed closely by her primary-care physician. The patient continues to have significant pain in her back. The

> patient states she has had weight gain because of her inability to do any of her activities. She is uncomfortable on today's visit. She does feel occasional paresthesia going down her right anterior thigh.
> * * *
>
> PLAN: At this time, the patient continues to have significant pain in her back. She has tried physical therapy in the past that only aggravated her discomfort. At this time, I would like to get another ESR, C-reactive protein and white blood cell count. I will also refer her over to Dr. Jeffrey Roberts for an evaluation as well. Red flags were discussed with the patient extensively. The patient verbalized understanding of current diagnoses and treatment plan.

{¶ 14} 5. Claimant was examined by Louis Keppler, M.D. In his October 21, 2013 office note, as dictated by Lisa Smolinski, PA-C, Dr. Keppler noted:

> **HISTORY:** Elizabeth comes in today as a new patient with severe low back pain. She was referred to us by Dr. Young. She states the pain is in her lower back as well as her right leg. She says the pain is constant, sharp, and throbbing in nature that she relates as an 8-10/10 on the pain scale. She has had these symptoms since May 30, 2013. She was moving a bed at a nursing home to do some cleaning underneath the bed when she had a sudden onset of this severe low back pain. She has been working with a chiropractor as well as a primary care physician to help her along with this pain that she has been experiencing. She has had MRIs as well as x-rays taken. Her symptoms are improved with rest, heat and ice, lying down, reclining as well as medications. The current symptoms disturb her sleep. She is not currently working. * * * Conservative care has consisted of physical therapy, application of cold and heat, pain medications of Ultram, Vicodin, Percocet.
>
> * * *
>
> **PHYSICAL EXAMINATION:** X-rays do show some diminished disc height at L1-L2 as well as L2-L3. Her MRI does demonstrate that there [is] inflammation, diffuse changes at L1-L2 as well as some stenosis and foraminal stenosis noted at L2-L3. She states she has had multiple sets of blood work done through her chiropractor to rule out discitis and Dr. Keppler would like to review the blood work results to ensure that there were no signs of infection noted.

> Dr. Keppler reviewed her studies and feels she may be helped by XLIF. She is neurovascularly intact and ambulates with the use of a cane.
>
> PLAN: However Dr. Keppler would like to review the blood work and I would like to see the patient back in the office prior to discussing surgical intervention.

{¶ 15} 6. Claimant again saw her treating physician Nicolas A. Young, D.O., on October 29, 2013. According to his office note of the same day, Dr. Keppler's office would be submitting a C-9 request for surgery.

{¶ 16} 7. In his November 7, 2013 office note, Dr. Keppler stated:

> I went over her MRI examination and studies with her. She does not appear to have discitis although it is still a remote possibility. She is miserable with this. We talked about treatment options, the different approaches. I think she would be a good candidate for an XLIF type of approach. The possibility of requiring a second stage procedure and the possible complications, the risks associated with surgery as well as the rehab was discussed with her. The fact that it would [probably] require rib osteotomy was also discussed. My personal experience with the XLIF was discussed. She has no further questions at this point in time and would like to have this done. If she has any further questions she should notify the office.

{¶ 17} 8. On November 14, 2013, Dr. Young signed a C-9 request for certain services, including surgery by Dr. Keppler.

{¶ 18} 9. Relator denied the request for surgery.

{¶ 19} 10. On November 25, 2013, claimant's counsel signed a C-86 motion asking that the commission grant claimant's C-9 request for certain services, including surgery.

{¶ 20} 11. Dennis A. Glazer, M.D., examined claimant at the request of relator. In his January 20, 2014 report, Dr. Glazer identified the allowed conditions in claimant's claim and identified the medical records which he reviewed, provided his physical findings upon examination, and concluded the requested surgery was not appropriate for the allowed conditions in the claim, but was directed at a non-allowed condition. Specifically, Dr. Glazer stated:

> It is my opinion within reasonable medical probability that Ms. Carpenter has degenerative disc disease at multiple levels. The claim is allowed for lumbosacral sprain/strain, lumbar sprain/strain, L1-L2 disc bulge, and L1 impingement. Ms. Carpenter does not have clear cut signs of only L1 impingement and appears to have a degenerative condition of the lumbar spine at several levels.
>
> Therefore, it is my opinion that the requested surgery is not appropriate for any of the allowed conditions of this claim; it would be directed at part of a non-allowed condition.
>
> * * *
>
> It is my opinion within reasonable medical probability that the requested surgery is not necessary for any of the allowed conditions of this claim. Ms. Carpenter has multiple levels with foraminal compromise. She has no clear cut positive physical findings pointing to a radiculopathy and has evidence of degenerative ongoing problems.
>
> Ms. Carpenter had a biopsy and apparently only cultures were taken, which can be negative in discitis. There was no histology presented. In summary, a single level fusion in the presence of multilevel degenerative disease does not appear likely to be reasonable, necessary, or related to the allowed conditions of the claim.

{¶ 21} 12. Dr. Keppler responded to Dr. Glazer's report in a letter dated January 27, 2014, stating:

> I am in receipt of the Medical review by Dr. Dennis Glazer which was done for our patient Elizabeth Carpenter. I accept his exam findings and his historical review of the case. I disagree with his assessment of the C-9. I include all my treatment notes as evidence.
>
> Elizabeth Carpenter was referred here for evaluation and treatment for conditions which resulted from her work injury. She has failed conservative measures and continues with disc related pain and lumbar pain despite the treatment. Her lab work reveals that she does not have an ongoing inflammatory condition or arthritic condition which would raise the SED Rate.

> The pain for our patient is driven by the disc and the surgery requested is necessary.
>
> I have a proposal in our C-9 to repair the damaged area. This is medically necessary. It is for the diagnosis allowed and is cost effective for the allowed condition.

{¶ 22} 13. A hearing was heard before a district hearing officer ("DHO") on January 29, 2014 and resulted in an order denying the C-9 request for surgery. Specifically, the DHO stated:

> [T]he requested surgery is not reasonably related and/or medically necessary for treatment of the allowed conditions in the claim.
>
> District Hearing Officer specifically finds the treatment notes of Dr. Keppler dated 10/21/2013, 11/07/2013 and 01/27/2014 report, fail to substantiate that the requested surgery is directed to the allowed disc bulge at L1-2.
>
> District Hearing Officer finds the MRI dated 10/21/2013 [sic] documents multilevel degenerative disc disease for which the surgery is recommended.
>
> This finding is further based upon the independent medical examination report of Dr. Glazer dated 01/20/2014 documenting the treatment notes and MRI findings for multiple levels of degenerative disc disease with foraminal compromise and [the] opinion that requested surgery would be directed at non-allowed conditions in the claim.

{¶ 23} 14. Claimant appealed and submitted the February 25, 2014 letter of Dr. Keppler wherein he stated:

> Elizabeth presents today after district officer hearing on January 24, 2014, [we are] evaluating her condition and making recommendations for her care. At this time it is my opinion that Elizabeth Carpenter did indeed sustain injuries at her work place and requires the surgery that we advised. I can see after reviewing the paperwork that there is an issue where the MRI from October 21, 2013 [sic], documents multiple level degenerative disc disease. Yes, the patient has degenerative disc disease. However, as I have discovered and is obvious with her patient history, prior to this injury the patient was able to perform all activities of daily living, and

> was able to sustain her activities of daily living including those of work with this degenerative disc disease. It was not until she sustained the injury at work where she could not perform her activities. Also noted[,] she had a significant increase in her pain and symptoms. There is inflammation and changes in the spine which signify an acute component. I believe the reviewing physician is trying to say this is all chronic degenerative old stuff. We see inflammation in this recent MRI which indicates acute and new injury.
>
> As you note in my past letter, January 27, 2014, I would also like to state that she has recent laboratory work which reveals that there is no inflammatory condition or arthritic condition and I stand by my opinion that the injury sustained at work to the [L]1-2 disc bulge pressing on the nerve root is the cause for her current symptoms and is what makes the surgery recommended absolutely necessary. The degenerative disc disease is not what is causing her symptoms.

{¶ 24} 15. The appeal was heard before an SHO on March 12, 2014. The SHO granted the C-9 request for surgery, stating:

> The Staff Hearing Officer approves the C-9 dated 11/14/2013 requesting surgery with Dr. Keppler for intervertebral body fusion, pre-admission testing and lumbar brace post surgery. This order relies on the report from Dr. Keppler, dated 02/25/2014 that was not in evidence at the time of the District Hearing Officer's determination. There is now sufficient evidence on file to relate the requested surgery to the allowed conditions in the claim. Dr. Keppler explains that the Injured Worker has degenerative conditions but they are not the reason for the surgery.

{¶ 25} 16. Relator's appeal was refused by order of the commission mailed April 3, 2014.

{¶ 26} 17. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶ 27} Relator argues that Dr. Keppler's request for surgery is based on non-allowed conditions and his reports are equivocal and cannot constitute some evidence upon which the commission could rely to find that the requested surgery was related to

the allowed conditions in claimant's claim. For the reasons that follow, the magistrate disagrees.

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

{¶ 29} 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.*, 11 Ohio St.2d 141 (1967). 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.*, 26 Ohio St.3d 76 (1986). 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.,* 29 Ohio St.3d 56 (1987). 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.*, 68 Ohio St.2d 165 (1981).

{¶ 30} It is undisputed that non-allowed conditions cannot be used to advance or defeat a claim for compensation. *State ex rel. Waddle v. Indus. Comm.,* 67 Ohio St.3d 452 (1993). However, the mere presence of a non-allowed condition does not necessarily foreclose the compensability of the claim, but the claimant bears the burden of demonstrating that the allowed condition independently caused the disability. *State ex rel. Bradley v. Indus. Comm.*, 77 Ohio St.3d 239 (1997).

{¶ 31} Here, relator argues that the surgery is related to the non-allowed degenerative changes and that Dr. Keppler's reports are ambiguous and contradictory.

{¶ 32} In *State ex rel. Eberhardt v. Flxible Corp.*, 70 Ohio St.3d 649, 657 (1994), the Supreme Court of Ohio summarized the distinction between the ambiguous, equivocal and repudiated reports as follows:

> [E]quivocal medical opinions are not evidence. See, also, *State ex rel. Woodard v. Frigidaire Div., Gen. Motors Corp.* (1985), 18 Ohio St.3d 110 * * *. Such opinions are of no probative value. Further, equivocation occurs when a doctor repudiates an earlier opinion, renders contradictory or uncertain opinions, or fails to clarify an ambiguous statement. Ambiguous statements, however, are considered equivocal only while they are unclarified. [*State ex rel. Paragon v. Indus. Comm.*, 5 Ohio St.3d 72 (1983).] Thus, once clarified, such statements fall outside the boundaries of [*State ex rel. Jennings v. Indus. Comm.*, 1 Ohio St.3d 101 (1982)], and its progeny.
>
> Moreover, ambiguous statements are inherently different from those that are repudiated, contradictory or uncertain. Repudiated, contradictory or uncertain statements reveal that the doctor is not sure what he means and, therefore, they are inherently unreliable. Such statements relate to the doctor's position on a critical issue. Ambiguous statements, however, merely reveal that the doctor did not effectively convey what he meant and, therefore, they are not inherently unreliable. Such statements do not relate to the doctor's position, but to his communication skills. If we were to hold that clarified statements, because previously ambiguous, are subject to *Jennings* or to commission rejection, we would effectively allow the commission to put words into a doctor's mouth or, worse, discount a truly probative opinion. Under such a view, any doctor's opinion could be disregarded merely because he failed on a single occasion to employ precise terminology. In a word, once an ambiguity, always an ambiguity. This court cannot countenance such an exclusion of probative evidence.

{¶ 33} Relator appears to be arguing that Dr. Keppler's acknowledgment that claimant has degenerative disc disease and his discussion about inflammation demonstrate that, in reality, the requested surgery is actually to treat the degenerative disc disease and not the allowed conditions in claimant's claim. The magistrate disagrees.

{¶ 34} As noted in the findings of fact, Dr. Young referred claimant to Dr. Keppler because the injuries she sustained at work were not improving. The MRI revealed not only degenerative changes, but also the L1-2 disc bulge. Relator appears to focus a lot of attention on whether or not there is an "inflammatory issue" going on. The magistrate specifically notes that, at one point, it was opined that claimant might have discitis which

is inflammation of a disc space often related to infection. *See Taber's Cyclopedic Medical Dictionary,* 618 (20th Ed.2005). As Dr. Keppler notes in his February 25, 2014 report, while claimant does have degenerative disc disease, up until the date of injury, she was able to perform all of the activities of daily living and, it was not until she sustained her injury at work, that she could no longer perform those activities. Dr. Keppler specifically notes that the recent lab work reveals that there is no inflammatory condition at this time. In other words, claimant does not have discitis—it is not discitis that is causing her current problems. He also indicates that although she has degenerative disc disease, there are no arthritic conditions resulting therefrom which are causing the current symptoms necessitating the surgery. The fact that Dr. Keppler acknowledges that claimant has degenerative disc disease does not conflict with his assessment that the allowed conditions in claimant's claim are the reason he is recommending the current surgery. Dr. Keppler's report acknowledges all the medical conditions relative to claimant's back as revealed on the MRI, and further, that the requested surgery is necessary because of the allowed conditions.

{¶ 35} Finding that relator is misreading Dr. Keppler's report, the magistrate finds that the report of Dr. Keppler is not equivocal, inconsistent or ambiguous, and does constitute some evidence upon which the commission could rely. As such, it is this magistrate's decision that this court should deny relator's request for a writ of mandamus.

/S/ MAGISTRATE
STEPHANIE BISCA

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).