

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

The State of Ohio ex rel. Brian E. Sturgill, :
Relator, :
v. : No. 08AP-649
P & G Sheet Metal, Inc. and : (REGULAR CALENDAR)
Industrial Commission of Ohio, :
Respondents. :

D E C I S I O N

Rendered on July 30, 2009

Ward, Kaps, Bainbridge, Maurer & Melvin, and Christopher J. Yeager, for relator.

Richard A. Cordray, Attorney General, and *Douglas R. Unver*, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

CONNOR, J.

{¶1} Relator, Brian E. Sturgill, filed this original action seeking a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order denying his application for temporary total disability ("TTD") compensation and ordering the commission to enter a new order granting said compensation.

{¶2} The court referred this matter to a magistrate pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate issued a memorandum decision, including findings of fact and conclusions of law, which is appended to this decision, recommending that this court deny relator's request for a writ of mandamus. Specifically, the magistrate concluded that because psychologist Ralph Skillings, Ph.D., a non-examining physician, indicated an express understanding of the *Wallace* rule,¹ his failure to explicitly reference the report of psychologist Lee Howard, Ph.D., does not necessarily suggest that he failed to review that report or to accept its findings. Therefore, the magistrate concluded Dr. Skillings' report constitutes some evidence upon which the commission could rely to deny TTD compensation and, thus, the commission did not abuse its discretion in denying relator's request for compensation.

{¶3} Relator filed objections to the magistrate's decision, which restate the same arguments that were considered by the magistrate. The commission filed a memorandum opposing the objections. This cause is now before the court for a full review.

{¶4} Relator argues that the commission's reliance upon the medical review conducted by Dr. Skillings represents an abuse of discretion because Dr. Skillings failed to comply with the applicable law set forth in *Wallace*. Relator contends that Dr. Skillings' failure to reference either the report or the findings of Dr. Howard, one of relator's examining physicians, suggests that Dr. Skillings may have overlooked the report and failed to accept Dr. Howard's objective findings. Relator argues this runs afoul of the *Wallace* rule and of this court's decision in *State ex rel. Masters v. Nationsway Transport*

¹ *State ex rel. Wallace v. Indus. Comm.* (1979), 57 Ohio St.2d 55.

Serv., Inc., 174 Ohio App.3d 526, 2008-Ohio-295. Relator further argues that *Masters* and *Wallace* require acceptance of all objective findings of examining physicians, rather than merely acceptance of one examining physician's findings as interpreted through the report of a second examining physician.

{¶5} Where the record contains "some evidence" to support the commission's findings, there is no abuse of discretion and mandamus will not lie. *State ex rel. Lampkins v. Dayton Malleable, Inc.* (1989), 45 Ohio St.3d 14, 15, citing *State ex rel. Burley v. Coil Packing, Inc.* (1987), 31 Ohio St.3d 18.

{¶6} Under the *Wallace* rule, a reviewing physician must accept all of the findings of the examining physicians, but not their opinions drawn therefrom. If a non-examining physician fails to expressly accept those findings, the reviewing physician's medical opinion does not constitute some evidence to support an order of the commission. *Wallace* at 59. Following the decision in *Wallace*, the Supreme Court of Ohio subsequently relaxed the express acceptance requirement and permitted reliance upon a non-examining physician's report where the report *impliedly* accepted the findings of the examining physicians. *Lampkins* at 16.

{¶7} A reviewing physician must examine all of the medical evidence generated prior to that time and also accept the objective findings contained therein. *State ex rel. Timmerman Truss, Inc. v. Indus. Comm.*, 102 Ohio St.3d 244, 2004-Ohio-2589, ¶27, citing *Wallace* at 59-60.

{¶8} Relator argues this court expanded the *Wallace* test in *Masters*. Relator contends that, because Dr. Skillings failed to mention Dr. Howard's report or his findings, Dr. Skillings therefore failed to accept the findings contained in Dr. Howard's report.

Relator essentially advances the proposition that under *Masters*, a non-examining physician is required to expressly refer to each and every examining physician by name and indicate that each physician's objective findings were expressly accepted or the report does not constitute some evidence upon which the commission could rely. However, *Masters* does not stand for that proposition. Furthermore, the case at bar is distinguishable from *Masters*.

{¶9} In *Masters*, we determined that, where there was a conspicuous lack of reference to a particular examining physician's report and the reviewing physician's report contained no indication, either express or implied, that he accepted the objective findings of the examining physician, such a failure suggested that the non-examining physician overlooked the report. Therefore, we found the non-examining physician's report could not constitute "some evidence" upon which the commission could rely.

{¶10} Despite relator's contention to the contrary, there is evidence here that Dr. Skillings accepted the findings of Dr. Howard. Dr. Skillings made a general statement that he accepted the objective findings of the other physicians. In the conclusion of his February 8, 2008 report, Dr. Skillings stated: "I accept the findings of examining physicians but not necessarily the opinions drawn therefrom." Thus, Dr. Skillings indicated an understanding of the requirements of the *Wallace* rule.

{¶11} Furthermore, as the magistrate found, Dr. Skillings referenced the reports of psychologists Donald J. Tosi, Ph.D. and Michael A. Murphy, Ph.D. which in turn both referenced the report of Dr. Howard. A review of the reports of Drs. Tosi and Murphy most certainly would have revealed the existence of Dr. Howard's report, if in fact Dr. Skillings was unaware of its existence, but such an observation does not require us to

conclude that Dr. Skillings accepted Dr. Howard's findings only by way of the reports of Drs. Tosi and Murphy. Given the unrebutted presumption of regularity in these proceedings, we support the view that Dr. Skillings properly followed the *Wallace* rule. See *State ex rel. Lovell v. Indus. Comm.* (1996), 74 Ohio St.3d 250, 252.

{¶12} It is, at a minimum, implicit in Dr. Skillings' report that he did review and accept the findings contained in the reports of the examining physicians, including Dr. Howard. Thus, the commission did not abuse its discretion by relying upon the report of Dr. Skillings as "some evidence."

{¶13} Following an independent review, pursuant to Civ.R. 53, we find the magistrate has properly determined the pertinent facts and applied the appropriate law. Therefore, relator's objections to the magistrate's decision are overruled and 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 deny the requested writ of mandamus.

Objections overruled; writ denied.

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

A P P E N D I X

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

The State of Ohio ex rel. Brian E. Sturgill, :

Relator, :

v. : No. 08AP-649

P & G Sheet Metal, Inc. and : (REGULAR CALENDAR)

Industrial Commission of Ohio, :

Respondents. :

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

Rendered on February 25, 2009

Ward, Kaps, Bainbridge, Maurer & Melvin, and Christopher J. Yeager, for relator.

Richard Cordray, Attorney General, and Douglas R. Unver, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶14} In this original action, relator, Brian E. Sturgill, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order denying him temporary total disability ("TTD") compensation and to enter an order granting said compensation.

Findings of Fact:

{¶15} 1. On August 18, 1992, relator sustained an industrial injury while employed as an HVAC installer for respondent P & G Sheet Metal, Inc., a state-fund employer. The industrial claim (No. 92-66942) is allowed for: "lumbar disc displacement; herniated disc L3-4, L5-S1; lumbar radiculopathy; spinal stenosis lumbar; major depressive disorder."

{¶16} 2. On September 12, 2006, at his own request, relator was examined by psychologist Lee Howard, Ph.D., who issued a 17-page narrative report. Dr. Howard's report indicates that several standardized written tests were administered and interpreted in addition to the examination itself.

{¶17} On page 14 of his report, Dr. Howard opined:

* * * A major depression, currently in partial remission is present.

* * * It is directly caused by the Industrial accident in question.

* * * This condition results in 15% permanent partial impairment rating of a psychological/psychiatric nature directly related to the Industrial accident.

* * *

* * * The claimant should continue with his Paxil treatment as it has been effective.

{¶18} 3. On October 27, 2006, at the request of the Ohio Bureau of Workers' Compensation ("bureau"), relator was examined by psychologist Michael A. Murphy, Ph.D., who issued a seven-page narrative report.

{¶19} Under "Review of Medical Records" at page one of his report, Dr. Murphy wrote:

9/12/06 Lee Howard, Ph.D., diagnosed Major depression, currently in partial remission. ["A major depression, currently in partial remission is present. It is directly caused by the Industrial accident in question. This condition results in 15% permanent partial impairment rating of a psychological/psychiatric nature directly related to the Industrial accident."

At page six of his report, Dr. Murphy opined:

* * * The submitted medical evidence and present examination findings do not support the existence of major depression due to this 1992 injury. In my view, mild depression is present, but may not [sic] be attributed to unrelated life stressors and medical conditions that have been reported occurring after the 1992 injury. I can detect no alteration [sic] to his cognitive or social capacities that can be attributed to this claim. Any alteration [sic] to his daily activities is due to overall medical conditions. His inability to work is due to these unrelated conditions and motivational issues.

I cannot establish a causal link of the alleged major depression to the 8/18/1992 injury.

* * *

* * * In my opinion, the alleged condition of major depression, in partial remission, is not direct or proximate to the injury.

{¶20} 4. On July 13, 2007, at the bureau's request, relator was examined by psychologist Donald J. Tosi, Ph.D., who issued a seven-page narrative report.

{¶21} At page two of his report, under "Review of Medical Records," Dr. Tosi wrote:

9/12/06 Lee Howard, Ph.D. stated "A major depression, currently in partial remission is present. It is directly caused by the industrial accident in question. This condition results in 15% permanent partial impairment rating of a psychological/psychiatric mature [sic] directly related to the industrial accident."

On page seven of his report, Dr. Tosi opined:

The Injured Worker sustained a Class II impairment (AMA Guides, 5th Ed).

* * *

A Class II impairment translated into a PPI of 15% to the whole body for Major Depressive Disorder, Single Episode (AMA Guides, 5th Ed).

{¶22} 5. On January 22, 2008, Bal K. Bansal, M.D., completed a C-84 on which he certified TTD from July 28, 2006 to an estimated return-to-work date of March 30, 2008. The C-84 form asks the examining physician to list the allowed conditions being treated which prevent a return to work. In response, Dr. Bansal wrote: "major depression."

{¶23} 6. The record contains typewritten office notes from Dr. Bansal regarding 11 visits/examinations occurring during the period beginning June 14, 2006 through May 23, 2007.

{¶24} 7. On January 31, 2008, relator moved for TTD compensation:

* * * [F]rom July 28, 2006 through January 8, 2007 and from June 18, 2007 through the present and to continue upon the submission of the appropriate psychiatric medical documentation for the newly allowed major depressive disorder. The [injured worker] received [living maintenance compensation] from 1/8/07 – 6/18/07.

In support of the motion, relator submitted the January 22, 2008 C-84 from Dr. Bansal and his office notes.

{¶25} 8. The bureau requested that Ralph Skillings, Ph.D., conduct a claim file review and address the following question:

Based on a reasonable degree of medical probability, please indicate whether the requested period of disability from 07-

28-06 to 01-08-07, and 06-18-07 to continue is related to the [injured worker]'s 08-18-1992 industrial injury.

{¶26} In response to the request, on February 8, 2008, Dr. Skillings issued a report:

Analysis: Allowance of Major Depression was granted Jan 26, 2007. Dr[.] Bansal seemingly has proposed other diagnoses (4) that were considered and dismissed on Jan 08, 2008. C-84 requesting temporary total disability by Dr[.] Bansal on 1/22/08 without any objective or subjective detail on the form supporting total disability request. Progress notes of Dr[.] Bansal were considered 06/14/06 to recent 01/09/08. Most of the records describe [injured worker] "is doing very well as far as the depression is concerned. There is no abnormal thought process or content and the rest of the psychiatric exam is unremarkable." This [physician of record] limited [injured worker] return to work based upon medical issues, not psychological: "I don't think he is in any medical condition to go back to medium to heavy work that requires bending, stooping, or lifting." Jan 05/07 progress note describes [injured worker] wish to be released to attend Work Hardening in order to consider part time work. Nov 08, 2007 note describes symptoms of [injured worker] to be variable depression based upon spouse having benign tumor. Proposed treatment plan on Jan 09/08 includes hypnotherapy and cognitive behavior therapy with positive outcome, "I can make him feel wonderful." Diagnosis for care listed repeatedly within the notes was medical: 722.10, 724.4, and 724.2. The allowed condition was not listed. BWC proceedings on 10/02/07 concluded [injured worker] had 15% disability based upon psychological condition allowed within this claim. Dr. Tosi found 15% impairment within his exam of 7/13/07. Another examiner, Dr[.] Murphy reviewed medical history along with evaluation during the period of time disability is requested; On 10/27/07 he found that worker's inability to work is due to factors unrelated to his injury including motivational issues.

Conclusion: I accept the findings of examining physicians but not necessarily the opinions drawn therefrom. C-84 form requesting total disability was incomplete and progress notes of [physician of record] remain inconsistent. He appears to be treating medical issues primarily. Psychological depression is described within progress notes to be

unremarkable and therefore could not be disabling. Other examiners during the requested period of disability conclude mild limitations. Supporting documents have insufficient details and correlated objective findings to reasonably substantiate requested total disability. Requested disability is not reasonably related to injury in this 1992 claim.

{¶27} 9. Following a March 10, 2008 hearing, a district hearing officer ("DHO")

issued an order denying the motion:

It is the order of the District Hearing Officer that the C-84 Request For Temporary Total Compensation filed by Injured Worker on 01/31/2008 is DENIED.

Claimant's request for a closed period of temporary total benefits from 07/28/2006 to 01/08/2007 and a second period from 06/18/2007 to 03/10/2008 (date of hearing) and continuing is DENIED.

Claimant's request is based upon the allowed psychological condition. According to claimant's own physician, Dr. Howard (09/12/2006), claimant's depression is "mild," in "partial remission," and leaves him with a relatively high GAF score of 80 out of 100. Office notes of the treating physician Dr. Bansal show some definite ups and downs in claimant's psychological condition corresponding to increases and decreases in his physical pain, but considered independently, the psychological condition itself appears to be well controlled with medication. These factors support the BWC file reviewer's opinion that claimant's allowed psychological condition BY ITSELF is NOT so severe that it would prevent his return to the former position of employment.

Claimant failed to meet his burden of proof.

This order is based upon the reports of Drs. Skillings (02/08/2008)] and Howard (09/12/2006).

(Emphases sic.)

{¶28} 10. Relator administratively appealed the DHO's order of March 10, 2008.

{¶29} 11. Following an April 15, 2008 hearing, a staff hearing officer ("SHO") issued an order stating:

The order of the District Hearing Officer, from the hearing dated 03/10/2008, is AFFIRMED.

Therefore, payment of temporary total compensation remains correctly denied for the requested periods of 07/28/2006 to 01/08/2007, and from 06/18/2007 through 03/30/2008.

All evidence was reviewed and considered. This order remains correctly based on the 02/08/2008 report of Dr. Skillings.

(Emphasis sic.)

{¶30} 12. On June 27, 2008, the three-member commission mailed an order denying relator's request for reconsideration of the SHO's order of April 15, 2008.

{¶31} 13. On August 4, 2008, relator, Brian E. Sturgill, filed this mandamus action.

Conclusions of Law:

{¶32} The issue is whether Dr. Skillings' report constitutes some evidence upon which the commission can rely to deny TTD compensation.

{¶33} Finding that Dr. Skillings' report does constitute some evidence upon which the commission can rely, it is the magistrate's decision that this court deny relator's request for a writ of mandamus, as more fully explained below.

{¶34} Dr. Skillings was a reviewing physician, not an examining physician. Under the so-called *Wallace* rule, *State ex rel. Wallace v. Indus. Comm.* (1979), 57 Ohio St.2d 55, a nonexamining physician must accept the findings of the examining physicians, but not the opinions drawn therefrom. *State ex rel. Consolidation Coal Co. v.*

Indus. Comm. (1997), 78 Ohio St.3d 176, 179; *State ex rel. Blue v. Indus. Comm.* (1997), 79 Ohio St.3d 466, 470. A report of a nonexamining physician that fails to comply with the *Wallace* rule cannot constitute some evidence upon which the commission can rely. *Id.*

{¶35} It is imperative that the nonexamining physician review all the relevant medical evidence generated prior to the time of the physician's review. *State ex rel. Bowie v. Greater Cleveland Regional Transit Auth.* (1996), 75 Ohio St.3d 458, 460.

{¶36} While *Wallace* required the nonexamining physician to "expressly accept" all the findings of the examining physicians, in *State ex rel. Lampkins v. Dayton Malleable, Inc.* (1989), 45 Ohio St.3d 14, 16, the court acknowledged that the rule had been relaxed to an "implicit acceptance."

{¶37} In *State ex rel. Masters v. Nationsway Transport Serv., Inc.*, 174 Ohio App.3d 526, 2008-Ohio-295, this court applied the *Wallace* rule to eliminate from evidentiary consideration the file review of Dr. Rutherford. This court explained:

* * * Our review of Dr. Rutherford's report reveals that he made no mention whatsoever of Dr. Wardlow's report, let alone any of Dr. Wardlow's objective findings. * * * Conspicuous lack of reference to a report generated prior to Dr. Rutherford's file review suggests that he may have overlooked the report. * * * Even under an implicit acceptance analysis, Dr. Rutherford's report does not constitute some evidence because it contains no indication, express or implied, that he accepted the objective medical findings contained in the Wardlow report. * * *

Id. at ¶7.

{¶38} Citing the *Masters* case, relator argues that Dr. Skillings failed to comply with the *Wallace* rule. According to relator, Dr. Skillings' report must be read to indicate

that Dr. Skillings failed to accept the findings contained in Dr. Howard's September 12, 2006 report because Dr. Skillings failed to mention Dr. Howard's report or his findings.

{¶39} In response to relator's argument, the commission points out that, in his report, Dr. Skillings states: "I accept the findings of examining physicians but not necessarily the opinions drawn therefrom." Dr. Skillings thus indicates his understanding of the *Wallace* rule. The commission also points out that the reports of Drs. Tosi and Murphy, which Dr. Skillings specifically addressed in his report, refer to Dr. Howard's report as among the medical records reviewed by them. The commission claims that there is no requirement under the *Wallace* rule that the nonexamining physician identify by name every physician whose report has been reviewed and the findings accepted.

{¶40} In his reply brief, relator responds that the *Wallace* rule does not permit the examining physician to merely accept a summary of a medical report.

{¶41} In the magistrate's view, adopting the commission's position does not compel this court to conclude that the *Wallace* rule permits a nonexamining physician to merely review and accept a summary of a report. Dr. Skillings' review of the reports of Drs. Tosi and Murphy had to have disclosed to him the existence of Dr. Howard's report if its existence was not already known. Given Dr. Skillings' express understanding of the *Wallace* rule, Dr. Skillings' failure to mention Dr. Howard's report does not necessarily suggest a failure to review Dr. Howard's report or to accept the findings contained therein.

{¶42} There is a presumption of regularity that attaches to commission proceedings. *State ex rel. Lovell v. Indus. Comm.* (1996), 74 Ohio St.3d 250, 252. This

presumption, unless rebutted, favors the view that Dr. Skillings reviewed Dr. Howard's report and accepted Dr. Howard's findings as required by the *Wallace* rule.

{¶43} Clearly, the *Masters* case, cited by relator, does not compel this court to declare Dr. Skillings' report to be noncompliant with the *Wallace* rule.

{¶44} In *Masters*, this court found that Dr. Rutherford's report contained no indication, express or implied, that Dr. Rutherford accepted the objective medical findings contained in the Wardlow report. By way of contrast, in this action, it is at least implicit in Dr. Skillings' report that he reviewed and accepted the findings contained in Dr. Howard's report. Thus, relator's reliance on *Masters* is misplaced.

{¶45} Accordingly, it is the magistrate's decision that this court deny relator's request for a writ of mandamus.

/s/ 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).