

compensation for the period of July 26, 2006 through March 14, 2007, and to enter a new order granting said compensation.

{¶2} In its cross-claim, respondent, Ohio State University Hospital ("OSUH"), requests a writ ordering the commission to vacate that portion of its order awarding TTD compensation beginning March 15, 2007, and to enter an amended order denying compensation. OSUH also challenges a commission order that denied permanent total disability ("PTD") compensation on grounds that the "cognitive disorder" had not reached maximum medical improvement ("MMI"). OSUH claims that the order denying PTD compensation conflicts with a prior order that denied TTD compensation on MMI grounds.

{¶3} This matter was referred to a court-appointed magistrate pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate issued a decision, including findings of fact and conclusions of law which is appended to this decision, and recommended that this court deny relator's request for a writ of mandamus, and issue a writ of mandamus ordering the commission to vacate the December 13, 2007 order of its staff hearing officer ("SHO") that granted in part and denied in part relator's August 1, 2007 motion for TTD compensation and to enter an order denying the motion on grounds that Dr. Beal Lowe's C-84 certifies TTD based upon an allowed condition that had previously been determined to be at MMI. Both relator and the commission have filed objections to the magistrate's decision.

{¶4} The commission presents two objections. The commission argues in its first objection that the magistrate erred when he found that Dr. Earl Greer's medical report must have expressly stated the existence of "new and changed circumstances," consistent with *State ex rel. Josephson v. Indus. Comm.*, 101 Ohio St.3d 195, 2004-Ohio-737, in order to warrant reinstatement of TTD. The commission maintains that it was the

commission's function, not the physician's duty, to find new and changed circumstances. The commission misconstrues the magistrate's decision. Nowhere in his decision does the magistrate hold that the physician's report must mimic this specific language. However, given that Dr. Greer was the only physician relied upon to deny PTD compensation, any evidence supporting new and changed circumstances would have had to appear in his report. The magistrate found there was no claim by relator that his report met this standard, and the report did not, in fact, contain this standard. The commission itself was free to interpret Dr. Greer's report as containing evidence of new and changed circumstances and to include such analysis in its decision, but it did not do so. Given the commission's failure to address this issue, the magistrate looked to Dr. Greer's report to determine if there was, nevertheless, some evidence to support a finding of new and changed circumstances, but found there was not.

{¶5} Although the commission claims the magistrate placed "great significance" upon relator's lack of treatment for a year to draw his own conclusion that there were no new and changed circumstances, the magistrate never mentioned this lack of treatment in making the determination regarding new and changed circumstances. The magistrate's analysis was much more straightforward: *Josephson* requires evidence of new and changed circumstances, and neither the commission nor Dr. Greer ever found such. Despite the commission's emphasis on the argument that the magistrate "substituted" his judgment on the issue of whether new and changed circumstances existed, the commission failed to address the issue in the first instance. Although the commission now wants another chance to address the issue, it already had an opportunity to address it. Lacking any determination by the commission, the magistrate properly examined the

record to determine whether there was some evidence to support the commission's ultimate conclusion. For these reasons, the commission's first objection is overruled.

{¶6} The commission argues in its second objection that the magistrate failed to address relator's argument that the SHO wrongly determined that the May 30, 2006, November 8, 2006, and July 10, 2007 C-84 reports of Dr. Brant Holtzmeier could not be considered for determining TTD eligibility from July 26, 2006 through December 13, 2007, and onward, because a doctor of osteopathic medicine cannot render an opinion as to an alleged disability from a psychological condition. The commission asserts that it has conceded the SHO's finding was in error. In support, the commission cites Industrial Commission Policy Memo C5, which provides that evidence in support of disability due to psychological conditions may be submitted by a doctor of osteopathy.

{¶7} Initially, we note that the magistrate did implicitly address this argument by concluding that the July 26, 2006 MMI determination precluded all subsequent TTD compensation. We also note that the SHO did not specifically find the C-84 reports of Dr. Holtzmeier could not be considered because he is an osteopathic doctor. The SHO did not mention Dr. Holtzmeier, but merely found there was no evidence from a psychologist or psychiatrist that evaluated and/or treated relator over this period. There may have been other reasons that the SHO did not rely upon Dr. Holtzmeier's reports. Furthermore, although the commission argues that the SHO used this reasoning to reject TTD from July 26, 2006 through December 13, 2007, and onward, the SHO only used this reasoning to reject TTD for the period of July 26, 2006 through March 14, 2007.

{¶8} Notwithstanding these issues, even if the SHO would have considered Dr. Holtzmeier's C-84 reports dated May 30, 2006, November 8, 2006, and July 10, 2007, these reports suffer from the same deficiency as Dr. Greer's reports. Clearly, Dr.

Holtzmeier gave no indication in these reports that there had been any new and changed circumstances since Dr. Lee Howard's finding of MMI on July 26, 2006. This series of C-84 reports is merely a continuation of TTD certification from the prior C-84 reports and contain no suggestion that claimant's condition was worsening and that the worsening was only temporary during this period. Therefore, we overrule the commission's second objection.

{¶9} Relator essentially presents two objections, both centering on the contention that the magistrate improperly applied *Josephson* to the facts of this case to determine that relator is not entitled to any TTD compensation arising out of the commission's December 13, 2007 order. In her first objection, relator argues that the magistrate's decision conflicts with this court's decision in *State ex rel. Johnson v. Cincinnati Schools*, 10th Dist. No. 05AP-1187, 2006-Ohio-5091. We disagree. The present case and *Johnson* have several differences, both factually and procedurally. In *Johnson*, the claimant's TTD compensation was terminated after a doctor found her conditions had reached MMI. The claimant then applied for PTD. The commission denied PTD compensation based upon a second doctor's report that found some of the claimant's conditions were not at MMI. The claimant argued upon mandamus that the commission's first finding, that her conditions had reached MMI, was res judicata, and the commission was not permitted to later find, with respect to her PTD application, that the conditions were not at MMI. This court disagreed. We found that a report in which the first doctor opines that the claimant was MMI at an entirely different point in time does not invalidate the later report of a doctor finding that some of the allowed conditions are now not at MMI. We explained that the first commission determination that relator was MMI

was the earlier "circumstance," and the second doctor's report indicating that she was no longer at MMI was a new and changed circumstance.

{¶10} In the present case, we initially note that neither party framed the issue as being one of *res judicata*, as was the issue argued and analyzed in *Johnson*. More importantly, *Johnson* did not involve a determination of whether the claimant was re-entitled to TTD compensation. The current case and *Josephson* both concern reinstatement of TTD compensation after a prior denial of TTD based upon a finding that the claimant had reached MMI. The holding in *Josephson* applied specifically to claimants seeking to reinstate TTD after a determination of MMI: "[T]he only new and changed circumstance sufficient to re-entitle a worker to TTD is the worsening of the claimant's allowed conditions accompanied by a prognosis that the worsening is only temporary." *Josephson* at ¶16. The parties in *Johnson* never raised the applicability of *Josephson*, and we never addressed *Josephson* in *Johnson*. We decline to find that *Johnson* should control in the present case when the present circumstances more closely mirror those in *Josephson*. Therefore, relator's first objection is without merit.

{¶11} Relator argues in her second objection that, by rendering a decision based on *Josephson*, the magistrate usurped the commission's role as sole evaluator of the evidence because the commission never had an opportunity to consider *Josephson* and Dr. Holtzmeier's reports. We have already addressed these issues above in addressing the commission's objections. With regard to Dr. Holtzmeier's reports, we found they did not support the factors in *Josephson*. As for relator's argument that the magistrate usurped the commission's role as sole evaluator of the evidence by applying *Josephson*, we found above that the commission itself was free to interpret the evidence in the record as being supportive of new and changed circumstances and include such determination

in its decision, but it failed to do so. Given the commission's failure to address such, the magistrate determined whether there was, nevertheless, some evidence to support a finding of new and changed circumstances, but found there was not. Neither this court nor the magistrate has usurped the commission's role as fact finder in making these findings. Instead, we have determined whether the record contained some evidence to support the commission's conclusions. The magistrate and this court have a duty to confirm whether the record supports the order of the commission and have acted within our power to examine the basis of the commission's order. See *State ex rel. DeLany v. Indus. Comm.*, 10th Dist. No. 05AP-281, 2006-Ohio-427, ¶32 (while the magistrate did review and discuss additional evidence in his decision, he did not usurp the commission's role as fact finder because the magistrate has a duty to confirm whether or not the record supports the order of the commission). Therefore, we overrule relator's second objection.

{¶12} After an examination of the magistrate's decision, an independent review of the evidence, pursuant to Civ.R. 53, and due consideration of the objections, we overrule relator's and the commission's objections. Accordingly, we adopt the magistrate's decision as our own with regard to the findings of fact and conclusions of law. We deny relator's request for a writ of mandamus. We grant OSUH's request for a writ of mandamus and order the commission to vacate the December 13, 2007 order of its SHO that granted in part and denied in part relator's August 1, 2007 motion for TTD compensation and to enter an order denying the motion.

*Objections overruled;
Relator's request for writ of mandamus denied;
OSUH's request for writ of mandamus granted.*

SADLER and FRENCH, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

The State of Ohio ex rel. Jeanette F. Bolin, :
Relator, :
v. : No. 09AP-68
Industrial Commission of Ohio and : (REGULAR CALENDAR)
Ohio State University Hospital, :
Respondents. :
:

MAGISTRATE'S DECISION

Rendered on March 26, 2010

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

Richard Cordray, Attorney General, and *Kevin J. Reis*, for respondent Industrial Commission of Ohio.

Kegler, Brown, Hill & Ritter Co., LPA, and Randall W. Mikes, for respondent Ohio State University Hospital.

IN MANDAMUS

{¶13} In this original action, relator, Jeanette F. Bolin, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate that portion of its order denying temporary total disability ("TTD") compensation for the

period July 26, 2006 through March 14, 2007, and to enter an amended order granting said compensation.

{¶14} In its cross-claim, respondent Ohio State University Hospital ("OSUH") requests a writ ordering the commission to vacate that portion of its order awarding TTD compensation beginning March 15, 2007, and to enter an amended order denying compensation. OSUH also challenges a commission order that denied permanent total disability ("PTD") compensation on grounds that the "cognitive disorder" had not reached maximum medical improvement ("MMI"). OSUH claims that the order denying PTD compensation conflicts with a prior order that denied TTD compensation on MMI grounds.

Findings of Fact:

{¶15} 1. On September 2, 2001, relator sustained an industrial injury while employed by OSUH as a food service worker. Initially, the industrial claim (No. 01-845194) was allowed for "contusion of buttock; contusion of face; concussion without coma; postconcussion syndrome; contusion of back."

{¶16} 2. On September 26, 2001, attending physician Vivek Kadyan, M.D., reported:

* * * Examination of cognition shows severe impairment with orientation and attention. She is unable to recite the alphabet, skipping every other letter. She also has deficits with three to five-minute recall. She is unable to do serial sevens, high level cognitive tasks including digit span are also impaired.
* * *

ASSESSMENT: The patient is a 45-year-old, white female status post traumatic brain injury, who seems to have cleared PT, but is suffering from post-concussion syndrome with cognitive deficits. * * *

{¶17} 3. Beginning with an initial examination on August 22, 2003, Brant Holtzmeier, D.O., became the attending physician. In his report, dated August 22, 2003, Dr. Holtzmeier wrote:

In my medical opinion, this patient continues to suffer from symptoms as a direct and proximate result of the allowed conditions in this claim. She requires a neuropsychology referral for her continued headaches and memory loss and cognitive deficits she has sustained as a result of this head trauma. She also indicates that she sustained some speech problems which required speech therapy. With all this considered, I believe a neuropsychologist referral is indicated. This has not been done on this claim as of yet. * * *

{¶18} 4. On October 20, 2003, Martin T. Taylor, D.O., Ph.D., conducted a neurologic examination. In his report to Dr. Holtzmeier, Dr. Taylor states: "Impressions: 1. Traumatic brain injury with continued problems with concentration and memory. 2. Chronic posterior head and neck pain. This chronic pain syndrome most likely plays into her problems with concentration and memory."

{¶19} 5. In late February and early March 2004, at the request of relator's counsel, relator was examined by psychologist Barbara S. Baisden, Ph.D. In her report dated March 15, 2004, Dr. Baisden opined:

Diagnostic Impressions

Axis I: 294.9 Cognitive Disorder NOS

II: No Diagnosis

III: Head trauma, lower and cervical back injury, chronic pain

IV: Repeated loss of job, loss of capacity to drive

V: GAF Psychological – 90 Neuropsychological – 40

Opinion

Test results and clinical examination give substantial evidence that Mrs. Bolin is suffering moderate to severe cognitive impairment as a direct and proximate result of industrial injury. The impairment is consistent with head trauma as sustained during her industrial injury, as well as being inconsistent with her academic, employment and social history prior to injury. From a purely psychological standpoint, she is an emotionally stable person, free of clinical depression or anxiety, who is coping well with her injuries and highly motivated to return to work. She would be an excellent candidate for a full neuropsychological evaluation to determine the precise nature and extent of all functional losses followed by a cognitive rehabilitation program.

{¶20} 6. On April 15, 2004, Dr. Holtzmeier wrote:

* * * After review of Dr. Baisden's and Dr. Taylor's reports as well as the review of Ms. Bolin's historical account to this injury and persistent symptoms, it is my medical opinion that Ms. Bolin has sustained a cognitive disorder (294.9) and a traumatic brain injury as a direct and proximate result of the work-related injury sustained on 09/02/01 when she suffered a traumatic head injury.

{¶21} 7. On a C-84 dated April 15, 2004, Dr. Holtzmeier certified TTD from August 22, 2003 to an estimated return-to-work date of June 16, 2004.

{¶22} 8. On April 15, 2004, relator moved for the allowance of additional conditions in the claim and for TTD compensation beginning August 22, 2003.

{¶23} 9. Following a December 1, 2004 hearing, a district hearing officer ("DHO") additionally allowed the claim for "cognitive disorder (294.9) and traumatic brain injury." The DHO also awarded TTD compensation beginning August 22, 2003, and to continue upon submission of medical evidence.

{¶24} 10. OSUH administratively appealed the DHO's order of December 1, 2004.

{¶25} 11. Following a January 18, 2005 hearing, a staff hearing officer ("SHO") issued an order affirming the DHO's order of December 1, 2004. The SHO's order states in part:

The claim remains additionally allowed for "TRAUMATIC BRAIN INJURY, COGNITIVE DISORDER." The Staff Hearing Officer relies on the reports of Drs. Kadyan (2001), Taylor (10/20/2003), Baisden (03/15/2004), and Holtzmeier (04/15/2004).

Temporary total compensation remains awarded from 08/22/2003 through 01/18/2005, and to continue with supporting medical proof * * *.

{¶26} 12. On a C-84 dated March 10, 2005, Dr. Holtzmeier certified TTD to an estimated return-to-work date of June 10, 2005. The C-84 form asks the physician to "[l]ist ICD-9 Codes with narrative diagnosis(es) for allowed conditions being treated which prevent return to work." In response, Dr. Holtzmeier wrote: "310.2 post concussion syn[drome]," "294.8 organ[ic] brain syn[drome]," and "254.01 Traumatic brain inj[ury]."

{¶27} 13. Apparently, because Dr. Holtzmeier had not certified further TTD as of the June 10, 2005 estimated return-to-work date, the Ohio Bureau of Workers' Compensation ("bureau") ceased the payments of TTD compensation as of June 9, 2005.

{¶28} 14. On June 22, 2005, at the bureau's request, relator was examined by psychologist Lee Howard, Ph.D. In his report, Dr. Howard states:

Disabilities Allowed: Contusion buttock/face/back, concussion without coma, post concussion syndrome, traumatic brain injury, organic brain syndrome NEC.

* * *

REVIEW OF RECORDS

* * *

10. 4-15-04 report by Dr. Holtzmeier.

11. 3-15-04 report by Dr. Baisden indicates cognitive disorder not otherwise specified.

* * *

In conclusion, one cannot duplicate a previous diagnosis of organic brain syndrome. If previously present, it is in total remission. However, multiple tests results are indicating simulation of head injury complaints. That is, the high subjective presentation is not validated on objective psychometric testing.

* * *

The claimant has reached maximum medical improvement for her organic brain syndrome. She is approaching four years post head injury with recovery generally occurring within the first six to twelve months or six to eighteen months.

* * *

The claimant reports that she is not under the care of a psychologist, psychiatrist, and/or neuropsychologist. There is no one to contact at this time.

* * *

The claimant can return to her previous type of work without restriction and/or modification as her complaints are subjective only and not objectively validated. There are no limitations needed. Any inability to do so would be caused by the high subjective presentation, motivational/attitudinal factors, the physical allowances in this claim, and/or compensatory factors.

* * *

She should be able to perform at the simple to moderate task range. She should be able to perform at the low, moderate, and moderately high stress range. This does not take into account the high subjective presentation, motivational/attitudinal factors, the physical allowances in this claim, and/or compensatory factors.

{¶29} 15. On September 14, 2005, Dr. Holtzmeier wrote:

Jeanette Bolin continues to suffer from memory deficits, lack

of attention, lack of concentration, headaches, fatigue, and depression as a result of her head injury sustained at work on 09/02/01. Overall, her symptoms and clinical presentation has been essentially unchanged since her first evaluation here. I believe she remains symptomatic of her post-concussion syndrome and organic brain syndrome. I certainly do not believe that she is able to return to her former level of employment or any level of employment for that matter. I believe psychological counselling [sic] is warranted for this patient * * *. I certainly do not believe she is able to return to her previous level of employment, as indicated by Dr. Lee Howard. I disagree with Dr. Howard's opinion that she is not disabled. I disagree with his opinion that she is seeking monetary or secondary gain. He seems to imply that she is malingering, and I certainly do not believe this to be the case.
* * *

{¶30} 16. On a C-84 dated May 5, 2006, Dr. Holtzmeier certified a new period of TTD beginning April 28, 2006 to an estimated return-to-work date of June 5, 2006. February 2, 2006 is listed as the date of last examination. Again, the C-84 form asks the physician to "[l]ist ICD-9 Codes with narrative diagnosis(es) for allowed conditions being treated which prevent return to work." In response, Dr. Holtzmeier wrote: "850.0 Concussion [without] Coma," "854.01 traumatic brain inj[ury]," and "294.8 organic brain syn[drome]."

{¶31} 17. It can be noted that the C-84 dated May 5, 2006 was prepared by Dr. Holtzmeier almost 11 months after the June 10, 2005 estimated return-to-work date had past with respect to the C-84 dated March 10, 2005. Also, there was no request for TTD compensation for the period between June 10, 2005 and April 28, 2006, a period of over 10 months.

{¶32} 18. Following a June 13, 2006 hearing, a DHO issued an order awarding TTD compensation from April 28, 2006, to an estimated return-to-work date of June 5, 2006, based upon Dr. Holtzmeier's C-84 dated May 5, 2006.

{¶33} 19. OSUH administratively appealed the DHO's order of June 13, 2006.

{¶34} 20. Following a July 26, 2006 hearing, an SHO issued an order that vacates the DHO's order of June 13, 2006. The SHO's order denies TTD compensation, explaining:

The request for payment of temporary total compensation from 04/08/2006 [sic] to the present is denied. The Staff Hearing Officer notes that temporary total compensation was last paid on 06/09/2005. There is no explanation as to why Dr. Holtzmeier is certifying the injured worker as temporarily and totally disabled again as of 04/08/2006 [sic], when he has been treating her on a regular basis for several years. The injured worker testified that she worked briefly for a different employer as an order filer last spring, but could not recall the dates. The Staff Hearing Officer relies on the report of Dr. Holtzmeier (09/14/2005) wherein he indicated that the injured worker's symptoms were essentially un-changed since when he first saw her in August of 2003. The Staff Hearing Officer also relies on the fact that the injured worker's recent treatment has been strictly conservative. The Staff Hearing Officer further relies on the report of Dr. Howard (06/22/2005) that the injured worker had reached maximum medical improvement relating to the traumatic brain injury and cognitive dysfunction.

{¶35} 21. Relator administratively appealed the SHO's order of July 26, 2006. On August 22, 2006, another SHO mailed an order refusing relator's administrative appeal.

{¶36} 22. On October 25, 2006, relator filed an application for PTD compensation.

{¶37} 23. The PTD application prompted the commission to schedule relator for an examination by psychologist Earl F. Greer, Jr., Ed.D., on March 15, 2007. Dr. Greer opined:

The injured worker appears to be experiencing psychological symptoms, with current clinical picture best described as a Cognitive Disorder (including symptoms of depression, anxiety, periodic thought disorganization and psycho-physiological reactions). Her impairment still appears temporary with her reporting never having been involved in psychological/psychiatric treatment.

* * *

1) The injured worker has not reached maximum medical improvement in regards to her Cognitive Disorder with her reporting never having been involved in psychological-psychiatric treatment. Psychological/Psychiatric treatment is highly recommended, with it also recommended that the injured worker be re-evaluated in approximately three months.

2) The degree of emotional impairment due to the injured worker's industrial accident on 9/2/2001 still appears temporary.

3) The degree of emotional impairment from the industrial accident on 9/2/2001 would currently be expected to prevent her from working.

{¶38} 24. Following a June 29, 2007 hearing, an SHO issued an order denying relator's PTD application, but also referring the industrial claim to the bureau to consider whether to award further TTD compensation. The SHO's order explains:

* * * The Staff Hearing Officer finds that the allowed psychological conditions in claim number 01-845194 have not reached maximum medical improvement. This finding is supported by the 03/15/2007 Industrial Commission Specialist report of Dr. Greer. The Staff Hearing Officer found Dr. Greer's medical opinion to be persuasive. Dr. Greer opined that the allowed psychological condition "Cognitive Disorder" has not reached maximum medical improvement and that psychiatric treatment is "highly" recommended. In addition to relying upon the medical report of Dr. Greer in denying the

claimant's IC-2 application, the Staff Hearing Officer also relies on Ohio Administrative Code 4121-3-34(D)(1)(f). Claim numbers 01-845194 and [h]eard with: 85-16477 are referred to the Bureau of Workers' Compensation to consider the issuance of an order, upon submission of a C-84 request, on the issue of whether the claimant is entitled to receive temporary total compensation.

{¶39} 25. On August 1, 2007, relator moved for the payment of TTD compensation.

{¶40} 26. Following a September 19, 2007 hearing, a DHO issued an order denying TTD compensation. Relator administratively appealed the DHO's order of September 19, 2007.

{¶41} 27. On a C-84 dated December 5, 2007, psychologist Beal Lowe, Ph.D., certified a period of TTD from April 27, 2007 to an estimated return-to-work date of May 5, 2008. The C-84 form asks the attending physician to "[l]ist ICD-9 Codes with narrative diagnosis(es) for allowed conditions being treated which prevent return to work." In response, Dr. Lowe wrote: "Organic Brain Syndrome."

{¶42} 28. Earlier, on November 27, 2007, relator was interviewed by Dr. Lowe. In a report dated December 6, 2007, Dr. Lowe wrote:

I am writing to you following the one approved evaluation session in which I assessed Ms. Bolin's situation with regard to her allowed condition of 294.8. This condition is identified in DSM-IV as an Amnestic Disorder, NOS but in BWC Documents is identified as either a Cognitive Disorder or Organic Brain Syndrome. This DSM category is used to diagnose an Amnestic Disorder which does not meet criteria for any more specific causation.

* * *

CONCLUSIONS

This assessment finds Ms. Bolin to be diagnosable with an Amnesic [sic] Disorder, NOS (294.8). She is found to have

significant memory deficits which interfere with vocational performance. She reports being angry and frustrated by her inability to overcome her limitations and by the loneliness which has resulted from her inability to feel like her old self.

This assessment leads to a finding that Ms. Bolin would benefit significantly from psychological counseling to promote adjustment and acceptance of disability and ways to circumvent and cope with her problems.

I hope this information will be helpful in your consideration of my C-9 request to provide counseling services to Ms. Bolin.

{¶43} 29. Following a December 13, 2007 hearing, an SHO issued an order that vacates the DHO's order of September 19, 2007. The SHO's order of December 13, 2007 denies in part and grants in part relator's August 1, 2007 motion for TTD compensation. The SHO's order of December 13, 2007, explains:

It is the order of the Staff Hearing Officer that temporary total compensation is ordered paid from 03/15/2007 through 12/13/2007 and to continue upon submission of medical proof due to the psychological allowances recognized in this claim based on the 03/15/2007 report of Dr. Greer and the 12/05/2007 C-84 and 12/06/2007 report of Dr. Lowe. This medical evidence supports the position that the allowed psychological conditions have again become temporarily and totally disabling.

The request for temporary total compensation for the period from 07/26/2006 through 03/14/2007 is denied as the claimant has not submitted medical evidence from a psychologist or psychiatrist that evaluated and/or treated the claimant over this time period.

{¶44} 30. On January 9, 2008, another SHO refused the administrative appeals of relator and OSUH from the SHO's order of December 13, 2007.

{¶45} 31. On March 3, 2008, OSUH moved to terminate TTD compensation.

{¶46} 32. Following a March 26, 2008 hearing, a DHO issued an order denying OSUH's motion to terminate TTD compensation. The DHO also granted relator's July 20, 2007 request for a psychological consultation with Dr. Lowe.\

{¶47} 33. OSUH administratively appealed the DHO's order of March 26, 2008.

{¶48} 34. Following a May 8, 2008 hearing, an SHO issued an order stating that the DHO's order of March 26, 2008 is "modified." The SHO's order of May 8, 2008, explains:

It is the order of the Staff Hearing Officer that the employer's C-86 motion filed 03/03/2008 is granted to the extent of this order.

All relevant evidence on file has been reviewed and considered.

It is found that the 07/20/2007 request from Dr. Holtzmeier for a consultation with Dr. Lowe is granted. In fact, Dr. Lowe did evaluate the injured worker on 11/20/2007 and payment is authorized for that one visit. Further treatment with Dr. Lowe is not requested at this time.

It is further found and ordered that the employer's C-86 motion is granted to the extent of this order. Payment of temporary total compensation is ordered from the date of last payment through 05/08/2008, the date of this hearing, upon submission of supporting medical evidence. The most recent C-84 form from Dr. Holtzmeier only went through 03/06/2008. Payment from that date through today's date is appropriate upon submission of medical proof. Payment after 05/08/2008 is denied at this time, due to a finding of maximum medical improvement for the allowed psychological/neuropsychological condition. This finding is based on reports from Dr. Clary dated 02/14/2008 and 02/22/2008. * * *

{¶49} 35. On May 31, 2008, another SHO mailed an order refusing relator's administrative appeal from the SHO's order of May 8, 2008.

{¶50} 36. On January 21, 2009, relator, Jeanette F. Bolin, filed this mandamus action. Thereafter, OSUH filed a cross-claim.

Conclusions of Law:

{¶51} OSUH contends that, following the July 26, 2006 hearing, the SHO made a finding, based upon Dr. Howard's report, that the industrial injury had reached MMI relating to the "traumatic brain injury and cognitive dysfunction." According to OSUH, that finding precludes all TTD compensation awarded in the claim subsequent to July 26, 2006. The magistrate agrees.

{¶52} Accordingly, it is the magistrate's decision that this court issue a writ of mandamus ordering the commission to vacate the December 13, 2007 order of its SHO that grants in part and denies in part relator's August 1, 2007 motion for TTD compensation, and to enter an order denying said compensation on grounds that the C-84 of Dr. Lowe upon which the commission relied is, in effect, a request for compensation based upon an allowed condition that had previously been determined to be at MMI.

{¶53} Two main issues are presented: (1) whether Dr. Howard's finding that "organic brain syndrome" has reached MMI is some evidence upon which the commission can rely that the allowed condition, cognitive disorder, is at MMI, and (2) if Dr. Howard's MMI finding is some evidence upon which the commission can rely to deny TTD compensation, is relator's eligibility for TTD compensation revived by the commission's reliance in the PTD proceeding upon Dr. Greer's finding that the cognitive disorder is not at MMI.

{¶54} The magistrate finds: (1) Dr. Howard's finding that "organic brain syndrome" has reached MMI is some evidence upon which the commission can and did rely to deny TTD compensation in the July 26, 2006 order of its SHO, and (2) the July 26, 2006 MMI determination precludes all subsequent TTD compensation in the claim notwithstanding

the June 29, 2007 determination in the PTD proceeding that the cognitive disorder has not reached MMI.

{¶55} Accordingly, as more fully explained below, it is the magistrate's decision that this court deny relator's request for a writ of mandamus. It is further the magistrate's decision that this court grant OSUH's request for a writ of mandamus.

{¶56} The first issue presents the question of whether Dr. Howard's repeated references to "organic brain syndrome" as the allowed condition for which he was examining is equatable to "cognitive disorder" which is the actual claim allowance. The magistrate finds that "organic brain syndrome" and "cognitive disorder" are terms describing essentially similar conditions and, thus, it is clear that Dr. Howard examined and opined on an allowed condition of the claim.

{¶57} Perhaps the strongest evidence in the record indicating the interchangeable nature of the terms "cognitive disorder" and "organic brain syndrome" is found in Dr. Lowe's December 6, 2007 report upon which the commission relied in its SHO's order of December 13, 2007. Again, that portion of Dr. Lowe's report states:

I am writing to you following the one approved evaluation session in which I assessed Ms. Bolin's situation with regard to her allowed condition of 294.8. This condition is identified in DSM-IV as an Amnestic Disorder, NOS but in BWC Documents is identified as either a Cognitive Disorder or Organic Brain Syndrome. This DSM category is used to diagnose an Amnestic Disorder which does not meet criteria for any more specific causation.

{¶58} Moreover, Dr. Lowe himself used "organic brain syndrome" interchangeably with the allowed condition of the claim. For example, in his C-84 dated December 5, 2007, Dr. Lowe certified TTD based upon "organic brain syndrome" even

though he identified his assessment in his December 6, 2007 report as "Amnestic Disorder, NOS."

{¶59} Also, Dr. Holtzmeier listed "294.8 organ[ic] brain syn[drome]" as an allowed condition in his C-84 dated March 10, 2005, even though his April 15, 2004 report, identifying "cognitive disorder (294.9)," was one of four reports relied upon by the commission to support the new claim allowances in the SHO's order of January 18, 2005.

{¶60} In short, the record is replete with examples of physicians using interchangeably, the terms "organic brain syndrome" and "cognitive disorder." Moreover, this conclusion is consistent with the latitude that is often necessary when dealing with psychological diagnoses. *State ex rel. Kroger Co. v. Indus. Comm.* (1998), 82 Ohio St.3d 231, 233.

{¶61} Turning to the second issue, *State ex rel. Josephson v. Indus. Comm.*, 101 Ohio St.3d 195, 2004-Ohio-737, ¶16, sets forth the standard the commission must apply to a request for TTD compensation that follows a prior commission determination that the injury is at MMI: "[T]he only new and changed circumstance sufficient to re-entitle a worker to TTC is the worsening of the claimant's allowed conditions accompanied by a prognosis that the worsening is only temporary."

{¶62} Also at issue here is Ohio Adm.Code 4121-3-34(D)(1)(f):

If, after hearing, the adjudicator finds that the injured worker's allowed medical condition(s) is temporary and has not reached maximum medical improvement, the injured worker shall be found not to be permanently and totally disabled because the condition remains temporary. In claims involving state fund employers, the claim shall be referred to the administrator to consider the issuance of an order on the question of entitlement to temporary total disability compensation. * * *

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).