

**From:** Don Drinko  
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**Gallagher Sharp Shop Talk: Workers' Compensation**

**Question: Can a finding of "maximum medical improvement" (MMI) survive when additional treatment is subsequently approved?**

One of the primary ways to terminate temporary total disability compensation ("TTD") in Ohio is to secure an opinion from a physician that the claimant has reached "maximum medical improvement" ("MMI") with regard to the allowed conditions. In 2006, the Ohio Supreme Court issued an opinion in *State ex rel. Sellards v. Indus. Comm.*, 108 Ohio St.3d 306, 2006-Ohio-1058, which held that a physician's report concluding that a claimant has reached MMI could not serve as "some evidence" to deny TTD when another physician's plan for further treatment was approved by the Industrial Commission on the same day. Recently, the Court was presented with an opportunity to revisit *Sellards* and opine on its continued viability.

*State ex rel. McCormick v. McDonald's*, Slip Op. No 2015-Ohio-123, concerned a claimant who suffered head and neck injuries in a fall at work in 2002. On August 13, 2010, a physician examined the claimant on behalf of the BWC and concluded that she had reached a treatment plateau, and was able to return to her former position of employment without restrictions. He also concluded that no further treatment was necessary. On August 27, 2010, the treating physician requested authorization for three steroid injections which were eventually approved by the MCO. On August 30, 2010, the claimant's chiropractor estimated that the claimant would reach MMI in three months. On August 31, 2010, the BWC moved to terminate TTD based upon a finding of MMI. After a hearing before a DHO, the request was granted and TTD was terminated, a decision that was affirmed by an SHO. The claimant asked the Industrial Commission to reconsider, citing *Sellards* but the request was denied. The claimant then filed a complaint for a writ of *mandamus*, asking that TTD be continued and that the decision to terminate benefits was not supported by the evidence in light of the subsequent approval of treatment. The Tenth District affirmed the termination, prompting an appeal as of right to the Supreme Court.

The Supreme Court affirmed, holding that the decision to terminate TTD by the Industrial Commission was supported by evidence in the record. The Court went into a lengthy discussion of *Sellards*, concluding that while it was rightly decided, it was limited to its specific facts. Unlike *Sellards*, which involved a recently allowed condition for which treatment had not been provided pending the appeal, the physician in the *McCormick* case had a good grasp of the lengthy period of treatment and conditions that had been allowed for some time. *Sellards* was narrowly decided based upon its unique facts, including the BWC's error or delay in paying for prescriptions and a physician's lack of awareness of contemporaneous approval of a treatment plan at the time he issued his report, neither of which are present here. The Court also distinguished *State ex rel. Barnett v. Indus. Comm.*, 2014-Ohio-311, which also focused on a mistaken belief that treatment was proposed but not authorized.

*McCormick* is important for two reasons: First, it limits the Court's somewhat confusing ruling in *Sellards* to its narrow set of facts, which involve a condition that was only recently allowed.

Second, employers can use *McCormick* to combat attempts by claimants (or their physicians) to use last-minute requests for treatment to circumvent a finding of MMI.

If you would like to submit a question to Shop Talk, or would like to discuss this or any other workers' compensation issues, please feel free to contact me.

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