ORIGINAL

IN THE SUPREME COURT OF OHIO

State, ex rel. SEARS ROEBUCK & COMPANY	: :
	: On Appeal from the Tenth District : Court of Appeals
Appellee-Relator	:
	: Court of Appeals
v.	: Case No. 09 AP-180
TIMOTHY MATHEWS	: **Supreme Court Case No.**: 2010-0955
And	:
Industrial Commission of Ohio	:
Appellant-Respondents	:

MERIT BRIEF OF APPELLANT RESPONDENT TIMOTHY MATHEWS

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INTRODUCTION

Appellant/Respondent, Timothy Mathews ("Mathews"), appeals the grant of a writ of mandamus, by the Tenth District Court of Appeals ("the appellate court"), to order the Appellant/Respondent Industrial Commission of Ohio ("commission") to vacate its order of October 24, 2008, and enter an order denying claimant's ("Mathews") June 5, 2008 motion for payment of a medical bill for one office visit. *State ex rel. Sears ,Roebuck & Co., v. Timothy Mathews and Indus. Comm.* Franklin App. 09-AP-180. The appellate court found that "the commission" abused its discretion in granting Mathews motion for payment of the office visit. The Appellant/Respondent, Timothy Mathews requests that the Supreme Court overrule the Franklin County Court of Appeals and deny Sear's request for writ of mandamus.

STATEMENT OF THE CASE AND FACTS

Respondent, Timothy Mathews, was 22 years old and was injured on October 13, 1987, 3 weeks after he began working for the Relator, Sears Roebuck & Company (hereafter referred to as "Sears") (Supplement to Brief page 1, hereafter "Supp. p.___). Sears is a self-inured employer. (Supp. P.1). Mr. Mathews was injured when he was caught by a conveyor and pinched between a mobile conveyor and fixed conveyor line. (Supp. P.1). Sears, as the self-insured employer, certified his claim for the conditions for "torn muscle left leg, tears bladder, tears buttock, and internal injuries. (Supp.P.1).

The self-insured employer paid out medical benefits of $71,051.09. The medical payments include $18,141.80 for Doctors and $32, 837.40 in Hospitals. (Supp.P 16). Mr. Mathews received compensation of $54,695.30, including a 24% permanent partial award in January of 1995 and settlement of a VSSR award in the amount of $20,000.00 in January of 1992. (Supp. P. 3 and Supp. P.11-12.). The last payment on the claim was on March 26, 1997, for a medical bill to Scioto Valley physical therapy in the amount of $143.00. (Supp.P.11).

On September 22, 1998, Mr. Mathews presented to Dr. Leah Urbansky at Greater Ohio Orhopedic Surgeons complaining that "his left leg has been feeling 'heavy' with associated tingling of the dorsum of the foot. (Supp. P.6). Dr Urbansky explained in his note that Mr. Mathews had been followed by Dr. Marsalka and described the work injury and the surgeries and treatment he had since. (Supp. P.6). The office note from September 22, 1998, has a received date stamp of December 28, 1998, that appears to be from Frank Gates Service Co. (Supp. P.6).

On March 12, 1999, attorney Stanley Dritz sent a letter to Marcia L. Giesler at Frank Gates Service Company, who was the authorized representative of the self insured employer,

Sears, at that time enclosing the bill from Mr. Mathews office visit with Dr. Urbansky and asking "that the bill is promptly paid". (Supp. P.7). The letter closes:

> **If your client is unwilling to pay this bill, please advise me immediately in order that we may take the appropriate action relative to this matter. Your prompt response is appreciated.**

On April 21, 1999, Marcia L. Giesler responded to Mr. Dritz by letter indicating that "the employer agrees to consider accepting payment for this date of service, but we request you provide us with the office notes to prove the relationship and diagnosis to his October 13, 1997 claim. (Supp. P.8). There was no mention in the letter of the fact that Frank Gates was already in possession of the office note from Dr. Urbansky. There is no record of any further response from the self-insured employer denying the payment of the bill. There is no record of a letter to the claimant from the self-insured employer notifying him that the payment of the bill was denied and that he could request a hearing on the matter. There was no letter to the Bureau of Worker's Compensation from the self-insured employer that the bill was denied and the matter should be referred to hearing.

The next contact between the parties was on May 16, 2008, when Matthew Sherwood from Helmsman Management Services, the self-insured employer, Sears, current authorized representative sent a fax to Patty Evans at the office of Mr. Mathews attorney. (Supp. P.9). The fax indicated the last payment on the claim was on March 26, 1997, and acknowledged submission of the bill for service with Dr. Urbansky, from September 22,1998. (Supp. P.5). Mr. Sherwood then indicated that the bill was denied as the diagnoses was not an allowed condition in the claim and that the statute of limitations had passed. (Supp. P.9). The May 16, 2008, fax from Sears's representative is the first and only record that the bill for the service with Dr. Urbansky from September 22, 1998, was denied.

That denial prompted Mr. Mathews to file a motion with the Bureau of Worker's Compensation requesting payment of the bill from Greater Ohio Orthopedic Surgeons for the date of service September 22, 1998. (Supp. P.17). The Motion was filed on June 5, 2008, less than one month after receiving notification of the denial of the bill. On September 3, 2008, the motion for payment of the bill was heard by the District Hearing Officer of the Industrial Commission. (Supp. P.18). The district hearing officer granted the motion and ordered payment of the bill. (Supp. P.18).

Sears appealed the order and the appeal was heard by the Staff Hearing Officer of the Industrial Commission on October 24, 2008. (Supp. P.21). The Staff Hearing Officer again ruled in favor of Mr. Mathews. (Supp. P.21). The Staff Hearing Officer found that the medical service was reasonably related to the allowed injury, that the bill had been submitted to the self-insured employer within two years of the date of service, and that the date the bill was filed with the third party administrator was within ten years following last payment of compensation and thus there was jurisdiction to hear the matter. (Supp. P.21-22).

The employer's appeal to the Industrial Commission was denied and Motion for Reconsideration was submitted. (Supp. P.26-37). This Motion for reconsideration was also denied by the Industrial Commission. (Supp. P.38).

On February 20, 2009, Sears initiated a mandamus action in the Court of Appeals for Franklin County Ohio, asking that the order of the Industrial Commission of Ohio be vacated. *State ex rel. Sears, Roebuck & Co., v. Timothy Mathews and Indus. Comm.* Franklin App. 09-AP-180. The Court of Appeals referred the matter to a magistrate. On December 7, 2009, the magistrate issued a decision granting the writ of mandamus. (Supp. P.50-62).

Mr. Mathews and the Industrial Commission filed objections to the magistrate's decision. On April 27, 2010, the appellate court upheld their magistrate's decision and found that "the commission" abused its discretion in granting Mathews motion for payment of the office visit. (Supp. P.40-49). This Court should overrule the Franklin County Court of Appeals and deny Sears's request for writ of mandamus.

The Appendix to this brief includes additional documents (Exhibits 1-6), submitted to the claim file after the Industrial Commission hearings on this issue. These documents would seem to be relevant should the Court conclude that a limited writ be issued with further proceedings before the Industrial Commission. (See appendix).

ARGUMENT

Argument

THE COMMISSION CLEARLY STATED THE EVIDENCE IT RELIED UPON AND EXPLAINED THE REASONING IT USED IN CONCLUDING THAT THE BILL FOR TREATMENT WITH DR. URBANSKY ON SEPTEMBER 22, 1998, WAS TIMELY FILED AND REASONABLY RELATED TO THE ALLOWED INDUSTRIAL INJURY

The Industrial Commission has considerable discretion and "its actions are presumed to be valid ... so long as there is some evidence in the file to support its findings in orders". *State ex rel. Stephenson v. Indus. Comm.* (1987) 31 Ohio St. 3d 167, 170. Therefore, a court may only grant mandamus relief if the Industrial Commission abuses its discretion by making a decision that is not supported by any evidence. *State, ex rel. Stafford v. Indus. Comm.* (1989) 47 Ohio St. 3d 76. (emphasis added).

The evidence examined and the reasoning used to determine that the bill for treatment was timely filed and reasonably related to the allowed industrial injury is clearly evident in the Staff Hearing Officer's order of October 24, 2008. (Supp. P.21). The Staff Hearing Officer was able to listen to the testimony of Mr. Mathews regarding the description of the severity of his injuries and the extensive treatment he had. Mr. Mathews described the complaints he was having at the time he presented to Dr. Urbansky on September 22, 1998. Together with Dr. Urbansky's office note the staff hearing officer had a firm basis of evidence to relate the office visit to the allowed industrial injury. Furthermore, the hearing officer alone had the responsibility of assessing evidentiary weight and credibility. *State ex rel. Burley v. Coil Packing, Inc.* (1987), 31 Ohio St.3d 18, 20-21.

This Court has established three criteria test for the authorization of medical services in a worker's compensation claim. State ex rel. Miller v. Indus.Comm. (1994), 71 Ohio St. 3d 229. The three parts to the Miller criteria are:

1. Are the medical services reasonably related to the industrial injury, that is, the allowed conditions?
2. Are the services reasonably necessary for treatment of the industrial injury?
3. Is the cost of such service medically reasonable?

Miller. At 232

The first prong is the only one at issue in this case. The medical service in question was the payment of a one time office visit the cost of which was $50.00. (Supp. P.5). The only real question that needs to be decided is whether or not the office visit with Dr. Urbansky was reasonably related to the original injury, and whether or not the Commission's order provides some evidence to support the order.

The Staff Hearing Officer had two documents in front of him which allowed him to find the treatment reasonably related to the claim. First, was Dr. Urbansky's office note, and the second was the claim information report from the self-insured employer. (Supp. P.10-16). The claim information report shows all of the payments made on the claim by the self-insured employer. The report shows that over $70,000.00 in medical bills had been paid out on the claim through April of 2009.

A closer examination shows payments made to Ohio Orthopaedic Surgeons and to Scioto Valley Therapy. (Supp. P.11). Those entries indicate that the Self-Insured employer paid for treatment that Mr. Mathews received from these providers under the claim, thus, accepting that treatment as related to the claim. At the hearing the Staff Hearing Officer had the opportunity to hear Mr. Mathews describe that he received physical therapy treatment to his lower back as his

injury involved his mid section and especially the area around his pelvis. (See Exhibit 1 attached hereto). This was treatment that was accepted and paid for by the self-insured employer even though there was no specific allowance for the lower back.

Dr. Urbansky's office note of September 28, 1998, starts by noting Mr. Mathews was involved in a severe crush type injury to his pelvis and thighs back in October of 1987. (Supp. P.6). Again the Staff Hearing Officer had the benefit of listening to Mr. Mathews' testimony regarding the injury and the complaint that he was relating to the doctor at that time. Mr. Mathews described a "heavy" sensation in his left leg to Dr. Urbansky. This is the same area where the injury occurred. Mr. Mathews did not go to Dr. Urbansky with complaints of pain or tingling or a "heavy" feeling for the right leg. The complaint was for the very specific area of the body where he had a suffered a very serious injury. The Staff Hearing Officer recognized that and decided the treatment was **reasonably related to the allowed industrial injury**. Thus, satisfying to first part of the *Miller* criteria. (emphasis added).

Clearly, the some evidence rule analysis requires that the Industrial Commission's order contain an adequate explanation of the reasons why what evidence has been relied upon and briefly explain the reasoning for its decision. *State ex rel. Noll v. Indus Comm.* (1991) 57 Ohio St. 3d 203, requires that the Commission "must specifically state what evidence has been relied upon and briefly explain the reasoning for its decision". An order is properly supported if it is "readily apparent from the four corners of the decision that there is some evidence supporting it." *Id.* at 206. The orders of the Industrial Commission comply with this requirement.

The record before the Staff Hearing Officer was somewhat limited due to not all of the medical treatment records having been filed and or imaged on the BWC system. Subsequent to the Hearing before the Industrial Commission there has been voluminous medical and claim

related documents filed which were not part of the record. Included in those documents are pertinent medical records and acceptance of conditions by the self-insured employer. (See exhibits 1-6 Appendix). The Respondent submits that should a writ be granted, it should be limited to require the Industrial Commission conduct a new hearing on this matter.

Mr. Mathews agrees that the applicable statute of limitations in this case is ten years pursuant to the version of Ohio Revised Code Section 4123.52, as amended by Am. Sub.H.B. No. 107. effective October 20,1993. This is based on the Supreme Court's decision in *State ex. Rel. Romans v. Elder Beerman Stores Corp.*, (2003), 100 Ohio St. 3d 165. According to the Court in *Romans* the amendment to R. C. 4123.52 did not change the length of time of inactivity; it changed the definition of inactivity. Id. at p.166. The court held that the payment of a bill tolled the statute and was the new point from which to measure. *Romans* at p. 166.

The Supreme Court had previously held "that payment of medical expenses toll the ten-year statute of limitations contained in R. C. 4123.52". *Collingsworth v. Western Elec. Co.* (1992), 63 Ohio St. 3d 268 at p. 271. "Implicit in this determination is the notion that in the context of R.C. 4123.52, the term 'compensation' is sufficiently broad to include the payment of medical bills. * * *" Id. at 270-271.

Sears has endorsed this same reading of the statute of limitations in this case as evidenced by its Motion for Reconsideration filed with The Industrial Commission of Ohio in this case. (Supp. P.28). Sears argues that this claim lapsed on March 27, 2007, 10 years after the last medical bill it paid on March 26, 1997. (Supp. P.28-29). Sears then argues that the submission of the bill to its authorized representative on March 12, 1999, and the response of the representative on April 21, 1999, did not toll the statute of limitations. Mr. Mathews disagrees with this position as did the Industrial Commission.

The only issue in this case is whether or not the March 12, 2009 letter to the self-insured employer's representative and its response April 21, 1999, constitute a tolling of the statute of limitations. The respondent believes it does. The Industrial Commission found that it did. The only fair reading and interpretation of the correspondence dictates affirmation of this position.

Sears, is a self-insured employer, and as such has certain responsibilities commensurate with that privilege. R.C. 4123.35(B). One of its responsibilities is to provide assistance to claimants and make the initial determination of acceptance or rejection of a claim for benefits Ohio Adm. Code 4123-19-03 (I) (1)-(6). In this case the self-insured employer did in fact provide the assistance suggested in the administrative code by agreeing in its letter of April 21, 1999, to consider payment of medical bill from Dr. Urbansky's service September 22, 1998. (Supp. P.8). The problem was that there was never any specific acceptance of rejection of the bill until May 16, 2008. (Supp. P.9).

The April 21, 1999, letter certainly did not comply with Ohio Administrative Code 4123-19-03(K) (5), requiring the self-insured employer to pay or reject a bill with 30 days of receipt of the bill. That section further requires a self-insured employer which does contest a bill to take certain specific actions to notify at minimum the provider and the employee. Again, no such notification was provided.

Mr. Mathews, through his counsel took the proper action under the rules governing self-insured claims to address the payment of the bill, that is, ask the self-insured employer. The March 12, 1999, letter to self-insured employer is clear in its request. It is even clear in direction should the self-insured employer be "unwilling to pay this bill", tell us so that we can take appropriate action. (Supp. P.7). The letter and the self-insured's response were correctly found by the Industrial Commission to toll the statute of limitations.

CONCLUSION

The Industrial Commission has the discretion to evaluate evidence in the hearing, and their decisions are entitled to deference so long as they are not an abuse of discretion. In this case, the Commission's order was well supported by the evidence. The Commission applied the law correctly in finding that the bill was reasonably related to the allowed industrial injury and was timely to invoke the continuing jurisdiction of the Industrial Commission. There is no abuse of discretion mistake of fact or law. This Court should defer to the Commission's properly supported decision and uphold the order of the Industrial Commission. Relator's requested writ should be denied. In the alternative a limited writ should be issued to allow the Industrial Commission to consider the records which have been submitted by both Relator and Respondent, Mathews since the Staff Hearing Officer's hearing October 24, 2008.

Respectfully submitted,

Matthew P. Cincione Esq. (#0029491)
Butler, Cincione, & DiCuccio
2200 W. Fifth Avenue
Columbus, Ohio 43215
Attorney for Respondent, Timothy Mathews

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Appellant-Respondent Timothy Mathew's Merit Brief was mailed via Regular U.S. Mail this 18 day of October 2010 the following individuals:

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Industrial Commission of Ohio

Matthew P. Cincione, Esq.

APPENDIX

Exhibits 1-6

Ex 1

The Industrial Commission of Ohio

RECORD OF PROCEEDINGS

Claim Number: 956928-22 LT-ACC-SI-COV
PCN: 2092391 Timothy Mathews

Claims Heard: 956928-22

TIMOTHY MATHEWS
5872 BIRCH BARK CIR
GROVE CITY OH 43123-8796

Date of Injury: 10/13/1987

Risk Number: 20002696-0

CORRECTED ORDER

This claim has been previously allowed for: TORN MUSCLES LEFT LEG; TEARS OF BUTTOCKS; TEAR BLADDER; INTERNAL INJURIES; FRACTURE LEFT PELVIS; LACERATION LEFT THIGH; SEVERE ABDOMINAL INJURIES.

This matter was heard on 10/14/2009 before District Hearing Officer C. Matthews pursuant to the provisions of R.C. Sections 4121.34 and 4123.511 on the following:

IC-167-T Obj To Tentative Order Awarding PP Disability filed by Injured Worker on 08/26/2009 from the order of the Administrator issued 08/12/2009. Issue: 1) Percentage/Increase Percentage Permanent Partial

Notices were mailed to the Injured Worker, the Employer, their respective representatives and the Administrator of the Bureau of Workers' Compensation not less than fourteen (14) days prior to this date, and the following were present for the hearing:

APPEARANCE FOR THE INJURED WORKER: Mr. Cincione
APPEARANCE FOR THE EMPLOYER: Mr. Sanislo
APPEARANCE FOR THE ADMINISTRATOR: No Appearance

CORRECTED INTERLOCUTORY ORDER

Refer this claim back to the Bureau of Workers' Compensation for a new C-92A review as Dr. Krause's review is defective as he considered the wrong conditions. Once a new C-92A medical review is performed, refer this claim back to a District Hearing Officer C-92 docket on the issue of the Injured Worker's appeal of the 08/12/2009 Bureau of Workers' Compensation order.

The correct claim allowances are: torn left leg muscles, tear of buttocks, tear bladder (per C-50 certification), internal injuries, fracture of left pelvis, laceration of left thigh, and severe abdominal injuries.

This order is interlocutory in nature and not subject to appeal pursuant to the Ohio Adm.Code 4121-3-09.

Typed By: kas
Date Typed: 10/20/2009
Date Original Typed: 10/14/2009
Date Received: 08/26/2009
Notice of Contested Claim: 08/26/2009
Findings Mailed: 10/22/2009

C. Matthews
District Hearing Officer

Electronically signed by
C. Matthews

Pull: Ex 2

Reminger
ATTORNEYS AT LAW

Kevin R. Sanislo
614-232-2483
ksanislo@reminger.com

October 19, 2009

Columbus Industrial Commission of Ohio
Attn: Hearing Officer Christina Matthews
30 West Spring Street, 7th Floor
Columbus OH 43215-2233
Facsimile (614/644-8373)

RE: Tim Mathews v. Sears Logistics Services, Inc.
D/I: 10/13/1987
BWC No.: 956928-22
Our File No.: 2849-06-6251N-08

Request for Amended Order

Dear Ms. Matthews:

I am in receipt of your Interlocutory Order dated 10/16/09, as it pertains to claim number 956928-22. After reviewing the Order, I am respectfully requesting an amendment to the order.

Please add "and bladder" to the condition of "tear of buttocks", so the full condition reads, "tear of buttocks and bladder." I am attaching a copy of a prior Order signifying that this condition was previously a part of the claim. I am also attaching my prior letter to the BWC asking that the claim be amended to include the other conditions, which you kindly addressed in your order.

I appreciate your attention to this quagmire of allowances issue. Please do not hesitate to contact me if you have any additional questions about this request.

Very truly yours,

Reminger Co., L.P.A.

Kevin R. Sanislo

KRS/ae

Cc: Sarah Lehman (Sent Via E-mail)
Matt Cincione (Sent Via Facsimile 614/221-8196)

956928-22

956928-22

Kevin R. Sanislo
614-232-2483
ksanislo@reminger.com

May 8, 2009

VIA FACSIMILE: 866-336-8352

Victor D
Columbus Service Office
30 W. Spring Street - L - 11
Columbus, OH 43215-2256

RECEIVED – 12
INDUSTRIAL COMMISSION
OCT 14 2009
OF OHIO
CR035

Re: Tim Mathews v. Sears Logistics Services, Inc.
BWC No.: 956928-22
D/I: 10/13/1987
Our File No.: 2849-06-6251N-08

Dear Victor D.:

I am in receipt of the BWC correspondence dated April 28, 2009. Please be advised that I represent the interests of Sears Logistics Services, Inc. in the above referenced workers' compensation claim.

I am advising you, at this time, of the employer's acceptance of the C-86 motion dated 04/16/09. This is based upon my prior letter dated April 10, 2009, and the prior letter of the employer dated November 9, 1987.

Therefore, the employer will be accepting the claim for the additional conditions of: fracture left pelvis; laceration left thigh; and severe abdominal injuries.

Therefore, please ensure that no hearings are scheduled on this matter, as the self-insured employer does not dispute these additional conditions.

Very truly yours,

Reminger Co., L.P.A.

Kevin R. Sanislo /s/

Kevin R. Sanislo

KRS/ae

Cc: Butler Cincione DiCuccio(Via Facsimile: (614) 221-8196)
Sarah Lehman (Sent via e-mail)

Ex 4

SLAGER & MARSALKA, M.D.'S, INC.
1500 DUBLIN ROAD
COLUMBUS, OHIO 43215
614/488-1516

RICHARD F. SLAGER, M.D.
DAVID S. MARSALKA, M.D

ORTHOPAEDIC SURGERY
SPORTS MEDICINE

September 12, 1988

Jamie L. Parman
Rehabilitation Consultant
Ability Recovery Services, Inc.
3379 East Broad St.
Columbus, OH 43213

Re: Tim Mathews

Dear Ms. Parman:

I had the pleasant opportunity of being involved in Tim Mathews care.

His long term orthopedic problems, at this point, consistent with the fact that he did obtain a pelvic fracture with a pubic synthesis diastasis that did heal satisfactorily with some sacroiliac injury. He also had a large thigh laceration that did avulse the saphenous nerve. He will have permanent numbness in the medial aspect of his thigh. He also has a long term possibility of having some sacroiliac pain. This is unlikely, however, but certainly can not be ruled out.

On his last visit, July 1, 1988, he had some pain in his right greater trochanteric area, which I felt was due to old scar tissue from previous bruising.

From an orthopedic standpoint, I have no problem with his plan of rehabilitative therapy and at this point do not expect Tim to have any particular long term orthopedic disability other than the potential for sacroiliac pain at some time in the future.

Sincerely,

David S. Marsalka, M.D.

DSM/lb

RECEIVED
SEP 14 1988
Ability Recovery
Services, Inc.

E-5

Ohio Bureau of Workers' Compensation

REPORT OF MEDICAL EVALUATION

Claimant name	Date of injury	Claim number
Timothy Mathews	10-13-87	956928-22

Past medical history		Yes	No
a. Medical office records	Reviewed		✓
	Enclosed		—
b. Hospital records	Reviewed		✓
	Enclosed		—
c. From patient			
d. From other source (describe)			

Clinical evaluation		Yes	No
a. Physical examination		✓	
	Report enclosed		
b. Specialty evaluation recommended			

. Diagnoses ICD9-CM narrative + code.

a.

b.

c.

. Stability of the medical condition

☐ The clinical condition is not likely to improve with further active medical treatment or surgical intervention-medical maintenance care only is warranted

☐ The degree of impairment is not likely to change by more than 3% within the next year.

5. Impairment evaluation -AMA guides 4th ed

(Attach a complete report of findings and narrative comments for each body part or system)

Body Part/System			Protocol (Section) No.	Table No.
lumbosacral				
flexion	75° → 0%	= 27% wpi combined effects	p. 128	81
extension	15° → 3%		p. 128	81
(R) lateral flexion	15° → 2%		p. 130	82
adduction (R) hip	50% strength → 2%		p. 89	68
skin loss	→ 9%		p. 280	2
bladder (incontinence)	→ 10%		p. 254	—

☑ I have not provided care for this patient. I have seen this patient ____ time(s) for the purpose of evaluating medical impairment.

Signature J. S. Sanghvi M.D. D.O.

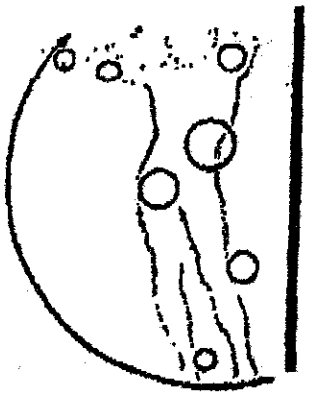
RECEIVED APR 22 1996 THE BANK GATES SERVICE CO. STA

RECEIVED JAN 23 1995 TRAVIS AT LAW

BWC-3906 (2/90)
MEDCO-S

Ex 6

Post-it® Fax Note 7671	Date 12/11/09	# of pages ▶ 3
To Matt Cincione	From Colleen Erdman	
Co./Dept.	Co.	
Phone #	Phone # 466-4867	
Fax # 221-8196	Fax #	



Ohio Orthopaedic Surgeons

March 1, 1996

Ms. Michelle Vouville
Frank Gates Co.
P.O. Box 16580
Columbus, Ohio 43216-6580

RE: Timothy Mathews
Claim No.: 956928-22

Dear Michelle:

Tim Mathews is a patient I have taken care of for quite some time. He had a severe injury to his pelvic ring and sacrum and will undoubtedly have intermittent back pain throughout his life. At this point, he is having some difficulty, and I do think he would benefit from physical therapy. I believe this is the result of his initial injury and should be approved by Workers' Comp.

If you have any further questions, please feel free to ask.

Sincerely,

David S. Marsalka, M.D.

FOR MEDICAL RECORDS ONLY

David S. Marsalka, M.D.

DSM/ptcl

Copy to pt 3/7/96

1405 Dublin Road

Columbus, Ohio 43215

614-488-1816

IN THE SUPREME COURT OF OHIO

10-0955

State, ex rel. SEARS ROEBUCK & COMPANY	:
Appellee-Relator	: On Appeal from the Tenth District : Court of Appeals
v.	: Court of Appeals : Case No. 09 AP-180
TIMOTHY MATHEWS	:**Supreme Court Case No.:**
And	
Industrial Commission of Ohio	
Appellant-Respondents	

NOTICE OF APPEAL OF APPELLANT RESPONDENT TIMOTHY MATHEWS

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FILED
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SUPREME COURT OF OHIO

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Appellant-Respondent Timothy Mathew's Notice of Appeal was mailed via Regular U.S. Mail this 28 day of May 2010 the following individuals:

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APR 28 2010

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

FILED
COURT OF APPEALS
FRANKLIN CO. OHIO
2010 APR 27 PM 12: 17
CLERK OF COURTS

State of Ohio ex rel. Sears Roebuck & Co.,	:	
Relator,	:	
v.	:	No. 09AP-180
Industrial Commission of Ohio and Timothy Mathews,	:	(REGULAR CALENDAR)
Respondents.	:	
	:	

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on April 27, 2010, the objections to the decision of the magistrate are overruled, the decision of the magistrate is approved and adopted by the court as its own, and it is the judgment and order of this court that a writ of mandamus issue against respondent, Industrial Commission of Ohio, ordering it to vacate its SHO's order of October 24, 2008, and to enter an order denying claimant's June 5, 2008 motion for payment of the fee bill. Costs shall be assessed equally against respondents.

Within three (3) days from the filing hereof, the clerk of this court is hereby ordered to serve upon all parties not in default for failure to appear notice of this judgment and its date of entry upon the journal.

Judge Lisa L. Sadler

Judge Patrick M. McGrath

APR 28 2010

FILED
COURT OF APPEALS
FRANKLIN CO. OHIO
2010 APR 27 PM 12: 15
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Sears Roebuck & Co.,	:	
Relator,	:	
v.	:	No. 09AP-180
Industrial Commission of Ohio and Timothy Mathews,	:	(REGULAR CALENDAR)
	:	
Respondents.	:	

D E C I S I O N

Rendered on April 27, 2010

Reminger Co., LPA, Amy S. Thomas, and *Kevin R. Sanislo*, for relator.

Richard Cordray, Attorney General, and *Colleen C. Erdman*, for respondent Industrial Commission of Ohio.

Butler, Cincione & DiCuccio, and *Matthew P. Cincione*, for respondent Timothy Mathews.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

SADLER, J.

{¶1} Relator, Sears Roebuck & Co. ("relator"), filed this action seeking a writ of mandamus directing respondent, Industrial Commission of Ohio ("commission"), to

vacate its order granting the June 5, 2008 motion for payment of a fee bill for a September 22, 1998 office visit filed by the claimant, Timothy Mathews ("claimant").[1]

{¶2} We referred this case to a magistrate of this court pursuant to Loc.R. 12(M) and Civ.R. 53. On December 7, 2009, the magistrate issued a decision, a copy of which is attached to this decision, granting the writ of mandamus. Respondents each filed objections to the magistrate's decision, and relator filed a memorandum contra. For the reasons that follow, we overrule the objections, and adopt the magistrate's decision.

{¶3} To summarize the facts set forth in the magistrate's decision, on October 13, 1987, claimant sustained an industrial injury during the course of his employment with relator. The industrial claim was initially certified by relator for "torn muscles left leg, tears buttocks and bladder, internal injuries." On September 22, 1998, claimant was examined by Dr. Leah R. Urbanosky. This examination resulted in the creation of an office note, which is quoted in its entirety in the magistrate's decision. The office note describes the nature of the injuries claimant suffered as a result of the 1987 incident, including crush-type injuries to the pelvis and thighs. The office note further states that claimant reported that his left leg felt heavy, and that he was experiencing tingling in his left foot. In the office note, Dr. Urbanosky gave her impression that claimant had mild L5 radiculopathy. Dr. Urbanosky further stated that claimant was at some risk of having a disk herniation even without his prior injuries, and that claimant should return for further evaluation if he experienced pain or numbness.

[1] Claimant and the commission will be referred to collectively as "respondents."

{¶4} By letter dated March 12, 1999, claimant's attorney forwarded a bill for the September 22, 1998 office visit to relator's third-party administrator ("TPA"). The letter indicates that the TPA had previously rejected payment of the bill because the claim had been inactive, and indicated that the TPA should advise counsel immediately if the bill was not going to be paid by relator. The TPA responded by letter dated April 21, 1999. In that letter, the TPA stated that the issue of payment of the bill would be reconsidered upon provision of the office note proving the relationship between the diagnosis and the October 1987 claim. Nothing in the record showed that claimant's counsel responded to the TPA's request for the office note.

{¶5} On April 2, 2008, claimant submitted a C-9 completed by Urological Associates, Inc. The C-9 sought approval for office visits one or two times per year. The TPA denied the C-9 because the industrial claim had expired based on the statute of limitations applicable to such claims. On June 5, 2008, claimant moved for payment of the bill for the September 22, 1998 office visit. In support of the motion, claimant submitted the bill, Dr. Urbanosky's office note, and the April 21, 1999 letter from the TPA to claimant's counsel.

{¶6} After a September 3, 2008 hearing, a district hearing officer ("DHO") issued an order granting claimant's motion for payment of the bill. The DHO cited evidence offered at the hearing that relator had paid for treatment of claimant's lower back in the past. The DHO noted that:

> It is significant to note that the Claimant's 10/13/1987 industrial injury involved a crush type injury to the Claimant's pelvis and thighs. The 09/22/1998 office notes of Dr. Urbanosky sets [sic] forth the priority of treating the Claimant's more serious injuries which required some seven surgeries.

{¶7} After an October 24, 2008 hearing, a staff hearing officer ("SHO") affirmed the DHO's order. The SHO found that the medical service provided was reasonably related to the allowed conditions, concluding that:

> Claimant suffered severe internal injuries in the vicinity of the lower back. A referral to determine if a lower back injury was a part of these severe injuries was reasonable and indicated. Although no lower back injury is allowed in the claim, in the context of the location and severity of the claimant's other injuries, and his complaints at the time, this referral is a reasonable expense of the allowed industrial injury. This is demonstrated by the office notes of the medical service, notwithstanding the conclusion that the claimant did not have a medical condition which is a part of the allowed conditions in the claim.

The SHO further concluded that the bill had been timely submitted to the employer for payment, and that the commission had jurisdiction to consider the matter under R.C. 4123.52 because the application for payment was made within ten years following the date of the last payment of compensation or benefits.

{¶8} On November 20, 2008, another SHO sent a letter denying relator's administrative appeal from the October 24, 2008 SHO order. On January 22, 2009, the commission mailed an order denying relator's motion for reconsideration, which resulted in the filing of this action.

{¶9} The magistrate concluded that the writ sought by relator should be granted. The magistrate concluded that nothing in Dr. Urbanosky's office note related the symptoms for which claimant sought treatment to any of the allowed conditions. The magistrate concluded that the DHO erred by relying on unspecified evidence that relator had been paying for treatment on claimant's lower back, concluding that payment for such

treatment would not act to amend the claim to add additional conditions related to claimant's lower back. See *State ex rel. Schrichten v. Indus. Comm.*, 90 Ohio St.3d 436, 2000-Ohio-91. The magistrate also concluded that the SHO erred in concluding that the office visit was for the purpose of considering whether lower back conditions should be allowed as additional conclusions, finding that no evidence in the record supported this conclusion.

{¶10} Respondents each filed objections to the magistrate's decision. Since the objections present the same arguments, we will address both sets of objections together. Essentially, respondents argue that the magistrate erred by concluding that there was no evidence in the record to support the commission's decision to order payment of the bill.

{¶11} First, respondents argue that the magistrate erred by concluding that there was no evidence in the record to support the conclusion that the medical services for which payment was sought were reasonably related to the allowed conditions. Medical services must be paid for when those services are reasonably related to the industrial injury, and when the cost of the services is medically reasonable. *State ex rel. Miller v. Indus. Comm.*, 71 Ohio St.3d 229, 1994-Ohio-204.

{¶12} However, we agree with the magistrate's conclusion that nothing in the record establishes any connection between the purpose of claimant's office visit and the allowed conditions. Respondents point to Dr. Urbanosky's office note, in which she described claimant's industrial injury before discussing the symptoms for which claimant was seeking treatment. As pointed out by the magistrate, Dr. Urbanosky's discussion of the industrial injury creates, at most, an inference that there was a causal relationship between the radiculopathy identified by Dr. Urbanosky and claimant's industrial injury. In

the absence of any evidence directly connecting the purpose of the visit with the allowed industrial conditions, the commission abused its discretion by concluding that the office visit was reasonably related to claimant's allowed conditions.

{¶13} Next, respondents argue that it was reasonable for the commission to order payment for the medical services because a referral to determine whether claimant's lower back problems were related to claimant's industrial injury was reasonable, even if the allowance of additional conditions did not actually result. In *State ex rel. Jackson Tube Servs., Inc. v. Indus. Comm.*, 99 Ohio St.3d 1, 2003-Ohio-2259, the Supreme Court of Ohio concluded that when surgery or other medical services are necessary to determine whether additional conditions should be allowed, payment for that surgery or other medical service can be paid as being reasonably related to the claim, even if no additional conditions are allowed as a result.

{¶14} Here, the SHO concluded that the office visit with Dr. Urbanosky was for the purpose of obtaining a diagnosis regarding whether claimant's lower back problem was related to his industrial injury. However, nothing in Dr. Urbanosky's office note states that the purpose of the visit was diagnosis for the purpose of determining whether conditions should be added to the claim, nor does any other evidence in the record support this conclusion. Thus, the commission abused its discretion when it accepted the SHO's conclusion in this regard.

{¶15} Consequently, respondents' objections to the magistrate's decision are overruled. Having reviewed the magistrate's decision, we adopt the decision as our own. Therefore, relator's request for a writ of mandamus is granted ordering the Industrial

Commission of Ohio to vacate its SHO's order of October 24, 2008, and to enter an order denying claimant's June 5, 2008 motion for payment of the fee bill.

Objections overruled;
writ of mandamus granted.

McGRATH, J., concurs.
TYACK, P.J., dissents.

TYACK, P.J., dissenting.

{¶16} I would sustain the objections of the commission and of the injured worker. As a result, I would deny the request for a writ of mandamus.

{¶17} Timothy Mathews was seriously injured when he was caught by a conveyor and pinched between a mobile conveyor and a fixed conveyor line while working for Sears, Roebuck & Company ("Sears"), a self-insured employer. He suffered torn muscles of his left leg, torn buttocks, tears of his bladder and unspecified internal injuries. The injuries occurred on October 13, 1987.

{¶18} In 1994, the Ohio Bureau of Workers' Compensation ordered the payment of permanent partial disability of 24 percent. Clearly, the payment of benefits was continuing seven years later, so a medical examination related to the claim done in 1998 would not be time barred.

{¶19} As noted above, the industrial claim has been recognized for "internal injuries." Such a vague phrase to describe a recognized condition is not an ideal choice of language, but apparently means anything or something under the skin was injured.

{¶20} Mathews had surgery on his left leg and had a colostomy, but no back surgery.

{¶21} In 1998, Mathews went to see a doctor because his heavily injured left leg was feeling heavy and he was experiencing tingling down his leg into his left foot. The doctor, Leah Urbanosky of Greater Ohio Orthopedic Surgeons, Inc., diagnosed "mild L5 radiculopathy on the left."

{¶22} The bill for Dr. Urbanosky's examination was submitted to Frank Gates Service Company ("Gates"), which was handling the matter for Sears. In December 1998, payment was refused because "claim is inactive."

{¶23} In March 1999, counsel for Mathews sent another request for payment to Gates. Gates had earlier received a copy of the findings of Dr. Urbanosky with respect to current conditions, examination, impression, and plan for Timothy Mathews. The fact the document was received is evidence by a Gates file stamp reflecting it was received on December 28, 1998.

{¶24} Gates did not have the bill paid, but instead requested "the office notes" for the examination in April 1999 in order to decide whether to pay voluntarily.

{¶25} At some point in time Helmsman Management Services, Inc. ("Helmsman") apparently took over management of the file for Sears. Helmsman sent a fax on May 16, 2008 saying that "the claim is dead by statute" because no payments had been made on the claim since March 1997. Helmsman did not give any indication that it was aware that its predecessor Gates had left payment of the bill in limbo less then ten years earlier.

{¶26} A self-insured employer cannot refuse repeated requests for payment of a bill and then claim the file is dead because it has made no payment within the last 10 years. The Industrial Commission clearly was correct to reject this allegation made on behalf of Sears.

{¶27} The commission also was correct to find that the medical service was reasonably related to the original injury. Mathews had every right to have a doctor tell him what was going on when his seriously injured left leg began feeling heavy and he was experiencing pain and tingling down that leg into his foot.

{¶28} We are not here to decide whether or not the mild radiculopathy experienced by Timothy Mathews should be the basis for an on-going course of treatment. We are here only to decide if Mathews could have a doctor diagnose, at Sears' cost, the cause of the feeling of heaviness and the tingling in his seriously injured left leg. I believe that Mathews clearly had a right to have that diagnosis paid for as a part of his workers' compensation claim. I believe that the commission was completely correct in its handling of the matter.

{¶29} I would sustain the objections to the magistrate's decision and deny the request for a writ of mandamus.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Sears Roebuck & Co.,	:	
Relator,	:	
v.	:	No. 09AP-180
Industrial Commission of Ohio and Timothy Mathews,	:	(REGULAR CALENDAR)
	:	
Respondents.	:	

MAGISTRATE'S DECISION

Rendered on December 7, 2009

Reminger Co., LPA, Amy S. Thomas and *Kevin R. Sanislo*, for relator.

Richard Cordray, Attorney General, and *Colleen C. Erdman*, for respondent Industrial Commission of Ohio.

Butler, Cincione & DiCuccio, and *Matthew P. Cincione*, for respondent Timothy Mathews.

IN MANDAMUS

{¶30} In this original action, relator, Sears Roebuck & Co., requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order granting the June 5, 2008 motion of respondent Timothy Mathews

("claimant") for payment of a fee bill for a September 22, 1998 office visit, and to enter an order denying the motion.

Findings of Fact:

{¶31} 1. On October 13, 1987, claimant sustained an industrial injury in the course of and arising out of his employment with relator, a self-insured employer under Ohio's workers' compensation laws. On that date, claimant became pinched between a mobile conveyor and a fixed conveyor line. The industrial claim (No. 956928-22) was initially certified by relator for "torn muscles left leg; tears buttocks and bladder; internal injuries."

{¶32} 2. Claimant has attached to his brief filed in this action a November 9, 1987 letter from Associated Risk Services Corp. to claimant. The letter states:

> This will acknowledge receipt of your claim for workers' compensation benefits for an injury suffered while in the employ of Sears, Roebuck and Co. Your claim is allowed for fracture pelvis, laceration left thigh, severe abdominal injuries. Should you have conditions other than listed above which you allege are the result of this compensable injury, please notify this office in writing.

{¶33} 3. Claimant has also attached to his brief filed in this action a May 8, 2009 letter from relator's counsel acknowledging the November 9, 1987 letter, stating:

> * * * [T]he employer will be accepting the claim for the additional conditions of: fracture left pelvis; laceration left thigh; and severe abdominal injuries.

{¶34} 4. The stipulated record does not contain the November 9, 1987 or May 8, 2009 letters described above.

{¶35} 5. On September 22, 1998, claimant was examined by Leah R. Urbanosky, M.D., during a visit to the offices of Greater Ohio Orthopedic Surgeons Inc. The office visit generated an office note from Dr. Urbanosky.

{¶36} 6. By letter dated March 12, 1999, claimant's attorney forwarded a bill for the September 22, 1998 office visit to relator's third-party administrator ("TPA"). In the letter, claimant's attorney explained:

> * * * This was billed to your office for payment and was rejected on the basis that the claim had been inactive. As your file should reflect, Mr. Mathews has been under the care of one or more physicians at Greater Ohio Orthopedic Surgeons, Inc. His previous physician recently died and Dr. Urbanosky has taken over Mr. Mathews' care.
>
> * * *
>
> If your client is unwilling to pay this bill, please advise me immediately in order that we may take the appropriate action relative to this matter. Your prompt response is appreciated.

{¶37} 7. Relator's TPA responded with a letter to claimant's counsel dated April 21, 1999. The letter states:

> We are in receipt of your letter dated March 12, 1999 requesting the employer reconsider their position on the payment of the outstanding bill from Greater Ohio Orthopedic Surgeons for service date September 22, 1998.
>
> We understand your concern regarding this one payment; however, Mr. Mathew's' [sic] has not received any medical treatment from this provider since February 6, 1996. The employer agrees to consider accepting payment for this date of service, but we request you provide us with the office notes to prove the relationship and diagnosis to his October 13, 1987 claim.

{¶38} 8. There is no evidence in the record showing that relator's counsel ever responded to the TPA's April 21, 1999 request for the office notes.

{¶39} 9. On April 2, 2008, claimant submitted for authorization a C-9 completed by Urological Associates, Inc. The C-9 sought approval for urological office visits one to two times per year.

{¶40} 10. Relator's TPA denied the C-9 on grounds that the industrial claim had expired because of the statute of limitations on industrial claims.

{¶41} 11. On June 5, 2008, claimant moved for payment of the bill for the September 22, 1998 office visit with Dr. Urbanosky. Besides the bill, claimant submitted Dr. Urbanosky's September 22, 1998 office note and the April 21, 1999 letter from relator's TPA.

{¶42} 12. Dr. Urbanosky's September 22, 1998 office note states in its entirety:

> CURRENT CONDITION: Timothy is a 33-year-old male, followed previously by Dr. Marsalka, who was involved in a severe crush-type injury to his pelvis and thighs back in October of 1987. At that time, he required soft tissue surgery on his left leg and had to have a colostomy, as well as suprapubic tube and wear a Foley for a while. He did not require any pelvis or back surgery at the time and overall seems to have recovered well. He works as a chemist at Roxanne Labs. He states over the last two days or so his left leg has been feeling "heavy" with associated tingling into the dorsum of his left foot. He states it feels as if his leg falls asleep. However, the tingling seems to be constant. He has minimal associated back pain or other radicular-type pains at this time. He denies any frank weakness of his extremity, difficulties with urination or bowel movements including retention or incompetence.
>
> EXAMINATION: On physical examination, has in touch sensation to pinprick, as well as light touch in the S1, L5, L4, L3, and L2 distributions on his lower extremities. He does have slightly increased two-point discrimination on the left in comparison with the right on the dorsum of his foot with consistent two-point distinction evident at 14 mm. on the left compared with 12 mm. on the right. He has negative straight leg raise while sitting and also while lying supine on both

> extremities. He does have a mildly positive Lasegue on the left with dorsiflexion of the foot at approximately 60° with leg elevation. His reflexes are symmetric bilaterally for the patellar reflex, as well as the Achilles reflex. He does not have any evidence of motor weakness and demonstrates 5/5 strength on single leg toe raises totaling 20 on the bilateral extremities with no knee bending. He has 5/5 strength on toe dorsiflexion, ankle eversion, ankle dorsiflexion and on quads extension activities. He has no bony tenderness to palpation over the spine or SI joints. He is able to demonstrate good range of motion on flexion and extension, lateral rotation and lateral bending with minimal difficulty.
>
> IMPRESSION: Mild L5 radiculopathy on the left.
>
> PLAN: He has been encouraged to take his Motrin on a regular basis which he usually takes for migraines periodically. In addition, he has been encouraged to maintain his regular activities within the limits of any pain which presently is minimal. I have encouraged aerobic-type activities, as well as abdominal exercises and gradual back muscle strengthening-type exercises. I have encouraged him to minimize weight lifting-type activities which he wishes to begin at least until this numbness is resolved. He has been warned that being in his 30's he is, even without his prior injuries, at risk of having a disk herniation. Should this manifest itself with more pain or frank numbness or limping/weakness, I have encouraged him to return for further evaluation. At that time, we would consider possible epidural steroid injections. However, they are not indicated at this time. He is to see me back in four weeks or if there are any problems in the interim.

{¶43} 13. Following a September 3, 2008 hearing, a district hearing officer ("DHO") issued an order granting claimant's June 5, 2008 motion. The DHO's order explains:

> The District Hearing Officer finds that the Industrial Commission has jurisdiction under R.C. 4123.52 to consider the merits of the Claimant's request. At the time that the Claimant submitted the 09/22/1998 bill in the amount of $50.00 from Greater Ohio Orthopedic Surgeons to the self-insured employer for payment[,] the claim was still active.

> The 04/21/1999 letter from the employer's representative acknowledges the receipt of the outstanding bill from the Greater Ohio Orthopedic Surgeons. The letter also indicates that payment will be considered upon submission of office notes.
>
> Authorization is granted for the payment of the $50.00 bill from Greater Ohio Orthopedic Surgeons. The authorization for the payment of this bill is based upon the 09/22/2008 [sic] office notes of Dr. Urbanosky. In addition, the evidence presented at hearing by Claimant's counsel indicated that the self-insured employer had been paying for treatment related to the low back area in the past. It is significant to note that the Claimant's 10/13/1987 industrial injury involved a crush type injury to the Claimant's pelvis and thighs. The 09/22/1998 office notes of Dr. Urbanosky sets forth the priority of treating the Claimant's more serious injuries which required some seven surgeries.

{¶44} 14. Relator administratively appealed the DHO's order of September 3, 2008.

{¶45} 15. Following an October 24, 2008 hearing, a staff hearing officer ("SHO") issued an order affirming the DHO's order of September 3, 2008. The SHO's order explains:

> It is the order of the Staff Hearing Officer that the injured worker's C-86, filed 06/05/2008, is granted to the extent of this order.
>
> The Staff Hearing Officer affirms the District Hearing Officer's direction that the self-insuring employer pay the $50.00 bill from Greater Ohio Orthopedic Surgeons, date of service 09/22/1998. This bill was submitted to the employer soon after the service.
>
> By 04/21/1999 letter[,] the employer's third part[y] administrator acknowledge[d] receipt of the letter and stated that the payment would be considered upon submission of office notes. This letter does not constitute the denial of payment.

> The Staff Hearing Officer has considered [the] employer's four defenses to the payment of this bill, and finds none of them well taken.
>
> First, the medical service is reasonably related to the allowed industrial injury. Claimant suffered severe internal injuries in the vicinity of the lower back. A referral to determine if a lower back injury was a part of these severe injuries was reasonable and indicated. Although no lower back injury is allowed in the claim, in the context of the location and severity of the claimant's other injuries, and his complaints at the time, this referral is a reasonable expense of the allowed industrial injury. This is demonstrated by the office notes of the medical service, notwithstanding the conclusion that the claimant did not have a medical condition which is a part of the allowed conditions in the claim.
>
> Ohio Administrative Code 4123-3-23 is complied with. The fee bill under consideration was filed with the self-insuring employer within two years of the date of service. There is no obligation to file a C-86 or other demand for hearing which [sic] within any specific period following the TPA's request for further evidence on the facts of this claim. There was no denial by the employer of payment at this time.
>
> Ohio Administrative Code 4123-7-01(B) is inapplicable, as this is a claim in which compensation has been paid.
>
> Finally, the date of filing of demand for payment of this bill is the date on which the bill was filed with the third party administrator, not the date of filing of the C-86 under consideration. Consequently[,] there was an application made for payment of this bill within ten years following the date of last payment of compensation or benefits, and there is jurisdiction to consider the matter under Revised Code Section 4123.52.

{¶46} 16. On November 20, 2008, another SHO mailed an order refusing relator's administrative appeal from the SHO's order of October 24, 2008.

{¶47} 17. On January 22, 2009, the three-member commission mailed an order denying relator's motion for reconsideration.

{¶48} 18. On February 20, 2009, relator, Sears Roebuck & Co., filed this mandamus action.

Conclusions of Law:

{¶49} It is the magistrate's decision that this court issue a writ of mandamus, as more fully explained below.

{¶50} The Supreme Court of Ohio has articulated a three-pronged test for the authorization of medical services: (1) are the medical services reasonably related to the industrial injury, that is, the allowed conditions? (2) are the services reasonably necessary for treatment of the industrial injury? and (3) is the cost of such service medically reasonable? *State ex rel. Miller v. Indus. Comm.* (1994), 71 Ohio St.3d 229, 232.

{¶51} In *Miller*, the claimant sought authorization for a supervised weight loss program. The *Miller* court rejected the employer's position that the claimant was required to first obtain an additional claim allowance for obesity.

{¶52} Additionally identified conditions that may be related to an industrial injury must be formally recognized in the claim if they are to become the basis for compensation. *State ex rel. Jackson Tube Servs., Inc. v. Indus. Comm.*, 99 Ohio St.3d 1, 2003-Ohio-2259.

{¶53} Moreover, the Supreme Court of Ohio has repeatedly rejected the proposition that a medical condition is implicitly allowed when a self-insured employer authorizes and pays for surgery performed to treat the condition. *State ex rel. Schrichten v. Indus. Comm.* (2000), 90 Ohio St.3d 436, quoting *State ex rel. Griffith v. Indus. Comm.* (1999), 87 Ohio St.3d 154, 156.

{¶54} Moreover, the payment of TTD compensation for a medical condition that has never been formally allowed does not create an implicit claim allowance for that condition. *State ex rel. Turner v. Indus. Comm.* (2000), 89 Ohio St.3d 373.

{¶55} Where the authorization of surgery or diagnostic medical services is at issue, an exception can occur to the general requirement that formal allowance of medical conditions must be obtained prior to the authorization of the surgery or diagnostic services. In *Jackson Tube*, the industrial claim was allowed for a torn left rotator cuff and other injuries. In May 1998, Dr. Don D. Delcamp performed open surgery on the shoulder and repaired two tears. Despite the operation, the claimant continued to have shoulder problems. In May 2000, the claimant sought to change doctors and get further treatment.

{¶56} Dr. Jonathan J. Paley proposed a video arthroscopic surgery "to delineate the exact cause of the intra-articular problem." Id. at ¶5. He further proposed that he be authorized to repair the shoulder conditions found to need repair during the arthroscopic surgery. Dr. Paley pointed out that it would be unethical to subject the patient to additional risk by simply doing a surgical diagnostic procedure and then seeking additional claim allowances before proceeding with surgical repair. The commission authorized the surgical procedure as proposed by Dr. Paley, thus prompting a mandamus action from the employer.

{¶57} The *Jackson Tube* court upheld the commission's authorization, explaining:

> This is a difficult issue. On one hand, claimant could not move for additional allowance beforehand, since without the surgery, the problematic conditions could not be identified.

> On the other hand, self-insured JTS questions its recourse when ordered to pay for surgery that ultimately reveals any conditions to be nonindustrial. It also fears that payment could be interpreted as an implicit allowance of all of the conditions in the postoperative diagnosis.
>
> * * *
>
> JTS argues that *Miller* does not excuse additional allowance of conditions before surgery where the conditions are specific and can be assigned to a particular body part. It describes *Miller* as carving only a limited exception for those conditions unamenable to allowance because of their generalized nature-Miller's overall obesity, for example.
>
> All agree that *Miller* was never intended to permit an employee to circumvent additional allowance by simply asserting a relationship to the original injury. The problem in this case, however, is that because any conditions are internal, claimant could not know what conditions to seek additional allowance for without first getting the diagnosis that only surgery could provide.

Id. at ¶22, 24-25.

{¶58} At issue here is whether the commission abused its discretion in determining that the September 22, 1998 office visit was reasonably related to the industrial injury.

{¶59} In this regard, the DHO's order states in part:

> [T]he evidence presented at hearing by Claimant's counsel indicated that the self-insured employer had been paying for treatment related to the low back area in the past. It is significant to note that the Claimant's 10/13/1987 industrial injury involved a crush type injury to the Claimant's pelvis and thighs. The 09/22/1998 office notes of Dr. Urbanosky sets forth the priority of treating the Claimant's more serious injuries which required some seven surgeries.

{¶60} As earlier noted, the SHO's order states that the DHO's order is affirmed. At issue here is the following paragraph of the SHO's order:

> First, the medical service is reasonably related to the allowed industrial injury. Claimant suffered severe internal injuries in the vicinity of the lower back. A referral to determine if a lower back injury was a part of these severe injuries was reasonable and indicated. Although no lower back injury is allowed in the claim, in the context of the location and severity of the claimant's other injuries, and his complaints at the time, this referral is a reasonable expense of the allowed industrial injury. This is demonstrated by the office notes of the medical service, notwithstanding the conclusion that the claimant did not have a medical condition which is a part of the allowed conditions in the claim.

{¶61} Analysis begins with the observation that it was Dr. Urbanosky's "impresssion" that the symptomology complained of on September 22, 1998 was caused by or the result of a "[m]ild L5 radiculopathy on the left"—undisputedly a nonallowed condition. Nowhere in the office note does Dr. Urbanosky opine that "[m]ild L5 radiculopathy on the left" is a condition arising from the industrial injury of October 13, 1987. But even if Dr. Urbanosky had so opined, the problem would remain that the condition is not allowed.

{¶62} At best, it can perhaps be said that a casual relationship between "[m]ild L5 radiculopathy on the left" and the industrial injury is inferred or suggested by the fact that Dr. Urbanosky begins her office note by discussing the industrial injury. But again, even if causal relationship could be inferred by this initial discussion of the industrial injury, the problem remains that the condition has not been allowed.

{¶63} Clearly, the DHO erred by relying upon unspecified evidence that "the self-insured employer had been paying for treatment related to the low back area in the past." Clearly, that relator may have paid for treatment related to the low back does not automatically amend the claim to include the conditions related to the low back for

which treatment was provided and paid for. *Schrichten*; *Griffith*. To the extent that the SHO adopted the DHO's rationale in affirming the order, the SHO clearly erred.

{¶64} Endeavoring to circumvent the problem created by Dr. Urbanosky's finding that claimant's reported symptomology was caused by a nonallowed condition, the SHO finds that the office visit was a "referral to determine if a lower back injury" should be included in the allowed conditions of the claim. There is no evidence in the record to support this finding.

{¶65} It appears from the September 22, 1998 office note that claimant presented to Dr. Urbanosky's office seeking treatment for the symptoms reported to the doctor on that date. In the paragraph captioned "PLAN," Dr. Urbanosky sets forth a course of future conservative treatment. There is no indication in Dr. Urbanosky's office note that claimant was referred to her office for the purpose of determining whether a low back condition should be included in the claim. Thus, this is not a case, as suggested by the SHO, where a claimant was sent out for a medical examination to determine the extent of his or her injuries for purposes of amending the industrial claim.

{¶66} Given that the record fails to support the SHO's finding that claimant was referred to Dr. Urbanosky for a determination of whether the claim should be amended, this court need not determine whether such a referral would permit payment of the fee bill at issue.

{¶67} In summary, based upon the above analysis, there is no evidence to support the commission's finding that the September 22, 1998 office visit was reasonably related to the industrial injury.

{¶68} 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 October 24, 2008, and to enter an order denying claimant's June 5, 2008 motion for payment of the fee bill.

/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).