

In the
Supreme Court of Ohio

STATE OF OHIO, ex rel.
SEARS ROEBUCK & CO.,

Appellee,

vs.

TIMOTHY MATHEWS,
et al.,

Appellants.

: CASE NO. 2010-0955
:
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: On Appeal from the Franklin County
: Court of Appeals, Tenth Appellate
: District. Case No. 09AP-0180
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REPLY BRIEF OF APPELLANT, INDUSTRIAL COMMISSION OF OHIO

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INTRODUCTION

Relator-appellee, Sears Roebuck & Co. (“Sears”), has shirked its responsibility as a self-insured employer to administer its claims according to the same statutes and administrative code rules to which the Ohio Bureau of Workers’ Compensation (“bureau”) is subject. Despite that Sears’ third party administrator (“TPA”) had the treatment notes of Leah Urbanosky, M.D., in its possession, and specifically stated that it would consider payment of Dr. Urbanosky’s bill, inexplicably Sears maintains that it rejected the bill submitted by respondent-appellant, Timothy Mathews (“Mathews”). The TPA, Frank Gates, could not possibly have rejected the bill because it explicitly told Mathews’ former attorney that it would agree to consider the bill’s payment if it received the treatment notes for Mathews’ September 1998 office visit with Dr. Urbanosky. Given that Frank Gates already had possession of the treatment notes, and it never accepted nor rejected payment for the office visit, it is Sears, not Mathews, who failed to act.

Respondent-appellant, Industrial Commission of Ohio (“commission”), acted within its discretion in ordering Sears to pay the 1998 bill for services rendered to Mathews by Dr. Urbanosky. Dr. Urbanosky’s office note from that visit is evidence that Mathews had lingering symptoms from the severe mid-section crushing injury he sustained while working for Sears. The commission maintains that there is sufficient evidence to support its order and, thus, respectfully requests that this Court reverse the appellate court’s decision and deny the writ of mandamus.

However, if this Court finds that the commission abused its discretion, the commission asks that the matter be remanded for a new hearing to consider the substantial number of documents Sears provided to Mathews’ counsel after the commission hearing on this matter. Some of these documents demonstrate that Mathews’ former physician, David Marsalka, M.D.,

who was a colleague of Dr. Urbanosky, opined that Mathews would suffer from lower back problems for the remainder of his life due to the 1987 work injury.¹ Thus, there is evidence that Dr. Urbanosky was simply continuing a course of treatment begun by her colleague, and this evidence should be considered by the commission if this Court finds an abuse of discretion.

Moreover, since the commission adjudicated this matter in late 2008, Sears has begun accepting additional conditions in Mathews' claim, including allowances for a fracture left pelvis, laceration left thigh, and severe abdominal injuries.² The medical and indemnity payments for these conditions will become the responsibility of the surplus fund should this Court uphold the appellate court's decision. In that regard, Sears will benefit by shirking its duties as a self-insured employer, and then arguing that Mathews' claim is time-barred. That way, all medical and indemnity payments paid after the adjudication of this issue will fall squarely on the surplus fund, and not on Sears.

This Court should reverse.

LAW AND ARGUMENT

Reply to Appellee's Proposition of Law No. 1:

The commission is within its discretion to weigh evidence in a claim file to determine if it meets the standard in State ex rel. Miller v. Indus. Comm. (1994), 71 Ohio St.3d 229.

Mandamus relief is meant to be an extraordinary remedy, granted only where the complaining party is clearly entitled to relief, and the alleged offending party has a clear legal duty to act. Sears is unable to show that the commission has a clear legal duty to deny the payment of Dr. Urbanosky's \$50.00 fee bill. Sears argues that the commission is charged solely with making a legal determination under *State ex rel. Miller v. Indus. Comm. (1994), 71 Ohio*

¹ See Merit Brief of Mathews, Appendix at 4-6.

² *Supra* at 3.

St.3d 229, but this argument lacks merit. In reality, the hearing officer has *discretion* to order the retroactive payment of medical bills. Ohio Adm.Code 4121-17-07. (Emphasis added). The use of the word “discretion” is significant and undermines Sears’ assertion that the commission is confined to making legal determinations with respect to medical bill payment. In exercising his or her discretion, the hearing officer must be able to weigh evidence to find whether it supports the *Miller* test. In other words, the commission is never obligated to merely parrot a doctor’s conclusions. If that were true, the commission’s existence, and entire adjudication process, would be unnecessary. This Court said as much in *State ex rel. Stephenson v. Indus. Comm.* (1987), 31 Ohio St.3d 167, when it found the following:

The commission is not required to accept the factual findings stated in a medical report at face value and, without questioning such, adopt the conclusions as those of the commission. This court, in *State, ex rel. Teece, v. Indus. Comm.* (1981), 68 Ohio St.2d 165, . . ., stated that *to do so would be tantamount to allowing a physician to determine disability rather than the commission*. Questions of credibility and the weight to be given evidence are clearly within the commission’s discretionary powers. See, generally, *State, ex rel. Ohio Bell Telephone Co., v. Krise* (1975), 42 Ohio St.2d 247, . . .

Id. at 171 (emphasis added). Thus, a commission hearing officer has the discretion to accept or reject factual findings in a doctor’s report.

Here, the hearing officer weighed his knowledge of the claim conditions, the documents in the claim file, and Dr. Urbanosky’s observations from the office visit, to find that the visit was a reasonable claim expense to determine whether a low back condition should be allowed. In so doing, the hearing officer found relevant that Mathews had complained of heaviness and tingling in his left leg into his foot, consistent with a radiculopathy. (Supplement of Industrial Commission of Ohio at 15, hereinafter “S. ___”). Also, the allowed conditions were concentrated in Mathews’ midsection, which was crushed, and he had been treating with Greater Ohio Orthopedic Surgeons, Inc. (“Ohio Orthopedic”), since the year following the work injury.

That last fact establishes that Mathews had unresolved orthopedic issues stemming from the work injury, even if a specific orthopedic condition had not yet been allowed in the claim. Because the commission has the latitude to weigh evidence in the claim file to determine whether it meets the *Miller* test, that Dr. Urbanosky's treatment note does not specifically note that it was a referral to add conditions to the claim does not mean the bill is not payable. The bill is payable because the hearing officer weighed the evidence to find that it fit within the broader context of Mathews' treatment history.

Sears' argument also lacks merit because commission actions are presumed valid, and Sears has not shown that the commission failed to act in good faith. "Unless shown to be otherwise, the commission's action are presumed to be valid and performed in good faith and judgment." *State ex rel. White v. U.S. Gypsum Co.* (1990), 49 Ohio St.3d 134, 136. It is Sears, not the commission, who ignores the vital fact that Mathews had been treating with Ohio Orthopedic nearly from the inception of the claim. After Dr. Marsalka's passing, Dr. Urbanosky took over Mathews' care. The hearing officer viewed the September 28, 1998, office note within the context of that ten year course of treatment. Because the act of finding a bill payable is left to the hearing officer's discretion, and evidence supports that finding, Sears has failed to meet its burden to prove that the commission has a clear legal duty to deny the bill's payment.

Reply to Appellee's Proposition of Law No. 2:

Sears never accepted, nor rejected, payment for the September 1998 medical bill.

As a self-insured employer, Sears is responsible for making the initial determination of whether to pay a bill for medical services. Ohio Adm.Code 4123-19-03(I)(6). A self-insured employer has just 30 days after receiving a bill to pay or contest the matter. Ohio Adm.Code 4123-19-03(K)(5). Sears did neither, and now attempts to pin the blame on Mathews. Sears'

second proposition of law asserts as much when claiming that Mathews cannot treat a medical bill as denied and then “seek the protections of R.C. 4123.52.” (Merit Brief of Sears at 13). Yet, Mathews never treated the medical bill as having been denied by Sears. Nor did Sears. If either party had, the matter would have been referred to the commission for a hearing under the Administrative Code. Instead, Sears, through Frank Gates, left the matter in limbo. Now Sears itself seeks the protections of R.C. 4123.52 by claiming the statute of limitations has run on Mathews’ entire claim.

Sears makes much of Mathews’ former counsel’s wording in the March 12, 1999, letter. (S. 13). Referring to Dr. Urbanosky’s \$50.00 fee bill, the attorney used the word “rejected” in reference to the fact that the claim had been inactive because medical bills had not been paid within a certain amount of time before this fee bill had been submitted. “Inactive” refers to the status of the claim. Frank Gates had not rejected the bill in the sense that Sears asserts here. Again, if it had, a hearing would have been scheduled before the commission. Even Frank Gates did not consider the bill formally rejected, as its April 1999 letter, just a month after Mathews’ former counsel wrote to it, Frank Gates stated that it agreed to consider the bill’s payment when it received the treatment notes. As the dissent below pointed out, Frank Gates already had possession of the treatment notes when it wrote that letter. Decision, ¶23. Sears, through Frank Gates, simply never made a decision on the bill’s payment, never accepted or rejected it, and never referred the matter to a hearing. Sears failed to act here, not Mathews.

The Tenth District’s decision was not unanimous. The dissent below understood that Sears should not benefit by disobeying rules applicable to all self-insured employers. Decision, ¶26. For Sears to attempt to pin any blame on Mathews is preposterous. Although Sears asserts that Mathews has not met his burden of proof establishing that the September 1998 office visit

was related to Mathews' claim, the commission thought otherwise. Simply put, Sears acted improperly in refusing to make a decision on the bill's payment multiple times, and then asserting that Mathews' claim was statutorily dead. Dr. Urbanosky's treatment note is "some evidence" supporting the commission's order. However, if this Court finds otherwise, the commission asks that the matter be remanded to consider additional medical evidence Sears submitted after the commission's adjudication of the matter.

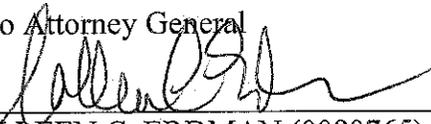
CONCLUSION

The commission respectfully requests that this Court reverse the decision of the court of appeals, and deny the writ sought by Sears. A writ is not warranted primarily because evidence supports the commission's order. The commission has discretion in ordering the retroactive payment of medical bills. Dr. Urbanosky's treatment notes, in conjunction with the broader treatment history, and the location and severity of Mathews' injuries led to the commission's order, which correctly found the bill payable.

Secondly, Sears acted contrary to rules applicable to self-insured employers. Sears' inaction prevented a hearing on the matter at which additional evidence could have been produced. If Sears had complied with the rules, and decided not to pay the bill, a commission hearing would have been scheduled. Sears cannot benefit by failing to act, allow a decade to pass, and then argue that Mathews' claim is statutorily dead.

Respectfully submitted,

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CERTIFICATE OF SERVICE

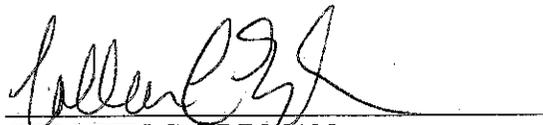
This is to certify that a copy of the foregoing *Reply Brief of Appellant, Industrial Commission of Ohio*, was sent to the following by regular U.S. Mail, postage prepaid, this 23rd day of December, 2010:

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