

1 The State ex rel. Abex Corporation, Appellant, v. Industrial Commission of
2 Ohio et al., Appellees.

3 [Cite as *State ex rel. Abex Corp. v. Indus. Comm.* (1995), _____ Ohio St. 3d
4 _____.]

5 *Workers' compensation -- Approval by Industrial Commission of treatment*
6 *provided claimant -- Cause returned to commission when there is*
7 *legitimate question whether all relevant evidence had been*
8 *considered.*

9 (No. 94-952--Submitted October 10, 1995--Decided November 29,
10 1995.)

11 APPEAL from the Court of Appeals for Franklin County, No. 93AP-
12 140.

13 Appellee-claimant, Dewey B. Akers, was injured in the course of and
14 arising from his employment with appellant, Abex Corporation. His
15 workers' compensation claim was later allowed for "lumbosacral strain;
16 thoracic myositis; dysthymic disorder." In 1988, claimant filed a motion
17 with appellee Industrial Commission of Ohio for permanent total disability
18 compensation, which prompted a referral to the commission's rehabilitation

1 division. Subsequently, a case closure memo by the commission's legal
2 section stated:

3 "Case was referred to MDAV (Medical Advisor and
4 Pharmacist) for evaluation of appropriateness and effectiveness of
5 Mr. Akers' medications."

6 On April 13, 1990, Dr. Jon E. Starr, the commission's chief medical
7 advisor, wrote to Abex:

8 "The Bureau of Workers' Compensation Rehabilitation
9 Division in their assessment of the above patient has forwarded
10 concerns to my office relative to potentially excessive/inappropriate
11 prescribing and/or treatment patterns that appear to be having an
12 adverse impact on this patient's successful rehabilitation and
13 recovery.

14 "This information is being forwarded for your action as deemed
15 appropriate."

16 His letter caused Abex to file a motion with the commission:

17 "That this claim file be referred to the Medical Section on an
18 EXPEDITED basis for a peer review on the appropriateness of

1 prescribing and/or treatment patterns and that this matter be set for
2 hearing or referred for further appropriate action based upon the
3 report of the Medical Section.” (Emphasis sic.)

4 The motion was accompanied by the letter of Dr. Starr.

5 In the month that followed, claimant obtained several letters from
6 attending psychiatrist, Dr. John W. Leist, defending the course of
7 psychiatric treatment. The record contains nothing from Dr. Richard F.
8 Stahr, who was treating claimant’s allowed physical conditions.

9 On November 19, 1990, commission physician Dr. Kathryn Drew
10 performed a medical review and concluded:

11 “Addicting medications are not appropriate for treating a
12 chronic benign pain condition. This includes Tylenol # 3, Halcion,
13 Restoril, and Valium * * *. These drugs may cause depression,
14 memory problems, sleep disturbances, and an increased perception of
15 pain when used on a long-term basis. Anxiety and muscle spasm may
16 be features of withdrawal from these drugs, providing a self-
17 perpetuating ‘need’ for them. Tolerance develops to the analgesic
18 and anti-anxiety effects, rendering them ineffective except for

1 relieving withdrawal symptoms. These medications should be
2 tapered and discontinued over one or two months, and further
3 payment should not be made for them, or for any other addicting
4 drugs.

5 “In reviewing Dr. Stahr’s office records, I can find no evidence
6 that the office visits serve any purpose other than renewal of
7 medications, most of which should not be continued. The exception
8 would be anti-depressants (such as Elavil) which are appropriate for
9 treating both depression and chronic pain, but may be more effective
10 when ‘depressant’ drugs are stopped. The frequency of office visits
11 for management of this chronic stable condition should be no more
12 than one every three months.

13 “Weekly psychotherapeutic sessions have not been beneficial.
14 Dr. Leist has not provided the requested records from these visits.
15 Summary letters only were received. Payment should not be made
16 further to Dr. Leist, as he has not provided proper documentation of
17 the medical services provided. He argues in his summary letters that
18 the patient will deteriorate to a ‘primitive level’ without

1 psychotherapy, but there is no medical evidence to suggest that this
2 would happen. After 115 sessions (March 1990) Dr. Leist's
3 description of the claimant's dysthymic disorder shows no
4 improvement, and he states that the claimant is not capable of
5 recovering from the depression. His apparent goal is to keep the
6 claimant functioning in a minimal way rather than to encourage the
7 claimant to increase his level of function. Dr. Leist apparently does
8 not believe that depression and somatic over-concern contribute to
9 chronic pain syndrome, and simply accepts that his patient must
10 remain depressed and have a limited lifestyle because of physical
11 pain. In light of this view, weekly psychotherapy makes no sense.
12 Why Dr. Leist feels his intervention prevents deterioration to a
13 primitive state is a mystery, but hopefully his office notes will
14 provide the answer. These notes again are being requested. If they
15 are not provided, then there will be no evidence of past services, and
16 past payments will be in question."

17 Some seven weeks later, Dr. Jon Starr wrote:

1 “If I and the employer are forced to draw conclusions solely on
2 the evidence you are presently willing to release for this requested
3 review and hearing, then the following conclusions and opinions are
4 clear and inevitable:

5 “1. There is no evidence ON FILE to suggest (other than Dr.
6 Leist’s personal and inherently biased ‘opinion’) that the patient has
7 derived ANY benefit from the protracted and repetitive ‘treatment’
8 provided by him. On the contrary

9 “2. if one is to accept the opinions and conclusions submitted
10 to the file by Dr. Leist then one can only conclude that the patient’s
11 condition has substantially worsened during his ‘intensive’
12 intervention, which might lead one to the alternative conclusion that
13 the treatment has contributed to the patient’s deterioration.

14 “3. The same conclusions apply to the medical documentation
15 provided by Dr. Stahr. In fact those records suggest a significant
16 failure of the use of acceptable methods in the treatment of this
17 patient. In particular the continued prescribing of central nervous
18 system depressants and the ‘palliative’ treatment documented cannot

1 but have had an adverse impact on the patient's perception of the
2 severity of his disability.

3 "4. The repeated refusal to submit the records of office visits
4 by Dr. Leist and his deferral to legal barriers rather than any contact
5 with this office raises the question as to whether those actions have
6 occurred to protect the patient's or physician's legal right[s] or
7 whether such records (or visits) exist, or if such exist whether those
8 records document services for other than the industrial claim.

9 "None of the above scenarios can be used to support the
10 contention that further reimbursement for such services as has been
11 rendered to date should continue."

12 Dr. Drew concurred.

13 On November 18, 1991, a district hearing officer authorized past
14 payment, but sharply curtailed further treatment. This prompted both
15 parties to appeal. On March 24, 1992, the regional board of review
16 determined:

17 "*** [T]he District Hearing Officer's Order of November 3
18 [sic], 1991 is hereby reversed. The Employer's Motion for a peer

1 review is denied as the motion was not supported by medical or other
2 evidence.

3 “The Board also finds that the reports of Dr. John W. Leist and Dr.
4 Richard F. Stahr support the treatment being provided and as such the self-
5 insured employer is hereby ordered to pay all past medical, pharmaceutical,
6 and doctor bills for the allowed conditions, in accordance with the rules and
7 regulations of the Bureau of Workers’ Compensation and Industrial
8 Commission.”

9 Staff hearing officers affirmed without comment.

10 Abex filed a complaint in mandamus in the Court of Appeals for
11 Franklin County claiming that the commission abused its discretion in
12 approving treatment. The court of appeals disagreed and denied the writ.

13 This cause is now before this court upon an appeal as of right.

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15 *Porter, Wright, Morris & Arthur, Darrell R Shepard and Christopher*
16 *C. Russell*, for appellant.

17 *Betty D. Montgomery*, Attorney General, and *Yolanda L. Barnes*,
18 Assistant Attorney General, for appellee Industrial Commission.

1 *Livorno & Arnett and John F. Livorno*, for appellee Akers.

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3 *Per Curiam.* The disputed order states:

4 “* * * The Employer’s Motion for a peer review is denied as
5 the motion *was not supported by medical or other evidence.*

6 “The Board also finds that the reports of Doctor John W. Leist
7 and Dr. Richard F. Stahr support the treatment being provided * * *.”

8 The emphasized language can be interpreted one of two ways. It can
9 be read as saying that Abex presented no evidence on behalf of its motion.
10 Conversely, the order can be viewed as finding that Abex did submit
11 evidence, but that upon review it was found not to be probative.

12 Resolution turns on which interpretation is correct. If it is the former,
13 the board erred. The reports of Drs. Drew and Starr were asserted and
14 argued on Abex’s behalf. If the second interpretation is adopted, the order
15 must be upheld. Evidentiary weight and credibility are the commission’s
16 province. *State ex rel. Burley v. Coil Packing, Inc.* (1987), 31 Ohio St.3d
17 18, 31 OBR 70, 508 N.E. 2d 936.

1 Where an order is capable of two or more equally valid
2 interpretations, a reviewing court generally should not speculate as to what
3 the commission meant. Instead, “[a]n order of the Industrial Commission
4 which is not sufficiently specific for the Supreme Court to review without
5 searching the record will be remanded to the commission for clarification.”
6 *State ex rel. Gen. Motors Corp. v. Indus. Comm.* (1988), 35 Ohio St.3d 105,
7 518 N.E. 2d 1194, paragraph two of the syllabus.

8 Moreover, where there is a legitimate question as to whether all
9 relevant evidence has been considered, the cause should be returned for
10 clarification and amended order. *State ex rel. Fultz v. Indus. Comm.* (1994),
11 69 Ohio St.3d 327, 631 N.E. 2d 1057. In this case, the possibility that the
12 board erroneously believed that Abex submitted no evidence raises a
13 legitimate question as to the board's awareness of the Starr and Drew
14 reports.

15 Accordingly, the judgment of the court of appeals is reversed, and the
16 cause returned to the commission for further consideration and amended
17 order.

18 *Judgment reversed*

1 *and cause remanded.*

2 MOYER, C.J., DOUGLAS, WRIGHT, RESNICK, F.E. SWEENEY, PFEIFER

3 and COOK, JJ., CONCUR.

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