[Cite as *State ex rel. Navistar Internatl. Transp. Corp. v. Indus. Comm.*, 2005-Ohio-3284.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Navistar International Transportation Corporation,	:	
Relator,	:	
v.	:	No. 04AP-638
The Industrial Commission of Ohio et al.,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on June 28, 2005

Joseph A. Brunetto and *Gina R. Russo*, for relator.

Jim Petro, Attorney General, and *Dennis H. Behm*, for respondent Industrial Commission of Ohio.

Robert Bumgarner, for respondent Thomas A. Clifford.

ON OBJECTIONS TO THE MAGISTRATE'S DECISION
IN MANDAMUS

FRENCH, J.

{¶1} Relator, Navistar International Transportation Corporation, has filed an original action in mandamus requesting this court to issue a writ of mandamus ordering

respondent, Industrial Commission of Ohio ("commission"), to vacate its order authorizing respondents, Toney Adams, Thomas A. Clifford, and Arthur W. Cason ("claimants") to receive physical therapy at a facility other than relator's on-site physical therapy facility ("on-site facility") and ordering the commission to require claimants to receive their physical therapy at relator's on-site facility.

{¶2} This court referred the matter to a magistrate, pursuant to Civ.R. 53(C) and Section (M), Loc.R. 12 of the Tenth District Court of Appeals, who rendered a decision including findings of fact and conclusions of law. (Attached as Appendix A.) The magistrate concluded that this court should deny relator's request for a writ of mandamus.

{¶3} Relator has filed objections to the magistrate's decision, arguing that the magistrate: (1) misunderstood the issues and arguments presented; and (2) erroneously concluded that the commission did not abuse its discretion in finding that the claimants' requests for physical therapy at an off-site facility satisfied the criteria set forth in *State ex rel. Miller v. Indus. Comm.* (1994), 71 Ohio St.3d 229. Relator contends it has not argued for a blanket rule requiring its injured employees to always receive necessary physical therapy at its on-site facility, but has argued that injured workers do not have an unfettered right to choose where they receive treatment and that the commission must consider the employer's interests, including the employer's costs, when applying the *Miller* criteria. The commission and claimant Thomas A. Clifford filed memoranda in opposition to relator's objections and in support of the magistrate's decision.

{¶4} For the reasons below, we sustain relator's first objection and overrule relator's second objection.

{¶5} The magistrate's decision includes detailed findings of fact, and we adopt those findings as our own. As indicated therein, claimants sustained work-related injuries while employed by relator. Claimants' treating physician, Dr. Paul Nitz, completed C-9 forms requesting relator to authorize a certain period of physical therapy for each claimant. Relator approved the requests, conditioned on the claimants receiving their physical therapy at relator's on-site facility rather than at Springfield Physical Therapy ("Springfield") as Dr. Nitz recommended in the C-9 forms. Because claimants did not agree to receive physical therapy at relator's on-site facility, relator denied claimants' C-9 requests.

{¶6} Claimants filed motions with the Ohio Bureau of Workers' Compensation ("BWC") requesting approval of their requests to receive physical therapy at Springfield. As claimants' motions proceeded through the administrative process, a District Hearing Officer, Staff Hearing Officer, and the commission heard each claimant's motion. In unanimous decisions, the commission determined that claimants were entitled to receive physical therapy at Springfield. The commission's decision provides, in relevant part, as follows:

> The issue in this case is whether the injured worker has the right to have the physical therapy performed at a private therapy facility – in this case Springfield Physical Therapy – or whether the therapy can be performed only at the on-site physical therapy facility of the employer. Physical therapy is a medical service and the employer has cited no authority that would allow the employer to control where the injured worker receives medical services. Therefore, as with any request for medical services, the Commission finds that this decision simply comes down to an interpretation of the test

enunciated in the case of State ex rel. Miller v. Indus. Comm. (1994), 71 Ohio St.3d 229. In Miller, the Supreme [C]ourt fashioned 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 condition?

2) are the services reasonably necessary for treatment of the allowed conditions? and

3) is the cost of such service medically reasonable?

Id. at 32, citing State ex rel. Campbell v. Indus. Comm. (1971), 28 Ohio St.2d 154. This is otherwise known as the Miller test.

In this case, there is no dispute by the employer that the first two prongs of the Miller test are met. The employer disputes only the third prong. The injured worker has argued that Dr. Nitz's request to have the therapy performed at Springfield Physical Therapy meets the requirement of this test, as the facility is a BWC approved provider, and the cost would, therefore, be subject to the UCR guidelines of the BWC, which by definition would be a medically reasonable cost. The employer does not argue that the costs at Springfield Physical Therapy are medically unreasonable per se, as even the employer approves requests to have physical therapy performed at Springfield Physical Therapy in certain situations. The employer, rather, has argued that the injured worker should be required to undergo the therapy at their on-site therapy facility in this case, as to hold otherwise will, in effect, result in a double billing for the therapy, as the employer has already paid for the equipment and services of a licensed physical therapist at their on-site facility.

The Commission finds the injured worker's position on this issue to be more persuasive. The charges at the requested facility, Springfield Physical Therapy, are found to be medically reasonable, in that they are within the approved fee structure as established by the BWC for authorized providers of such services. As such, the Commission finds that the request satisfies the third prong of the Miller Test. Therefore, the C-9 request for authorization of physical therapy treatment at Springfield Physical Therapy, submitted by Dr. Nitz on 08/07/2003, is approved.

{¶7} In the instant mandamus action, relator argues that the commission abused its discretion by failing to consider the additional cost to relator of treatment at Springfield and by essentially granting injured workers a free choice, not provided by Ohio law, to select their medical services provider.

{¶8} To be entitled to a writ of mandamus, the relator must demonstrate that: (1) the relator has a clear legal right to the relief requested; (2) respondents are under a clear legal duty to perform the acts requested; and (3) relator has no plain and adequate remedy at law. *State ex rel. Stafford v. Indus. Comm.* (1989), 47 Ohio St.3d 76, 77-78. A clear legal right to a writ of mandamus exists when the relator establishes that the commission abused its discretion, which occurs when the commission enters an order not supported by any evidence in the record. *State ex rel. Elliott v. Indus. Comm.* (1986), 26 Ohio St.3d 76, 78-79. Conversely, where the record contains some evidence to support the commission's finding, there has been no abuse of discretion and mandamus is inappropriate. *State ex rel. Lewis v. Diamond Foundry Co.* (1987), 29 Ohio St.3d 56, 58. Questions of credibility and the weight to be given evidence are clearly within the commission's discretion. *State ex rel. Teece v. Indus. Comm.* (1981), 68 Ohio St.2d 165, 169. Because the commission must have a clear legal duty to act before a writ will issue, "where the evidence is conflicting, a court cannot substitute its judgment for that of the commission and find that the commission abused its discretion." *State ex rel. Marshall v. Keller, Admr.* (1968), 15 Ohio St.2d 203, 205.

{¶9} Relator initially objects to the magistrate's characterization of its argument. In her decision, the magistrate wrote, "[r]elator contends that all of its employees who need physical therapy, as a result of work-related [injuries], ***must be required*** to

receive that physical therapy at relator's on-site facility." (Emphasis sic.) The magistrate further explained relator's argument as "where an employer provides medical services for its injured employees, *Miller* mandates that the commission order the employee to have his/her treatment rendered at the employer's facility because that is the only way to meet the third prong of *Miller*." Relator states that it has not advocated for a blanket rule forcing injured employees of self-insured employers to treat at a particular facility. Rather, relator argues that the commission must apply the *Miller* criteria to the particular facts of each case, taking into account the employer's interests, including the employer's costs.

{¶10} Review of relator's brief and objections confirms that relator is not arguing for a blanket rule giving it complete control over where its injured employees receive treatment. Relator routinely approves an employee's use of an off-site facility when its on-site facility is unable to provide the employee's necessary treatment. Were the commission to consider relator's interests when applying the *Miller* test, relator would likely argue that the commission should not find the costs of an off-site facility medically reasonable if its on-site facility was equipped to provide the requested services. However, relator first argues that the commission must be required to consider the employer's interests and balance the costs to the employer of both facilities, rather than assessing the outside facility's fees in a vacuum, when applying the *Miller* test. To the extent the magistrate characterized relator's argument as in favor of a blanket rule forcing injured employees of self-insured employers to treat at a particular facility, this court sustains relator's first objection.

{¶11} In its second objection, relator argues that the magistrate erroneously concluded that the commission did not abuse its discretion in approving claimants' requests for physical therapy at Springfield. Relator argues that the commission's order effectively granted injured workers an unfettered right to choose their medical services provider, which right does not exist under current Ohio law. Former R.C. 4123.651(A) granted an employee injured in the course of his employment "free choice to select a licensed physician as he may desire to have serve him, as well as medical, surgical, nursing, and hospital services and attention, regardless of whether or not his employer has elected under section 4123.35 of the Revised Code, to furnish medical attention to injured or disabled employees." However, in 1993, the General Assembly deleted the above-quoted language in its entirety.[1] See 1993 H.B. No. 107, effective October 20, 1993. Neither current R.C. 4123.651(A) nor any other section of Revised Code Chapter 4123 addresses whether an injured worker retains free choice to select a physician and medical, surgical, nursing, and hospital services. Relator contends that the General Assembly's repeal of former R.C. 4123.651(A) requires the conclusion that it intended to strip injured workers of that choice.

{¶12} Despite the repeal of former R.C. 4123.651(A), an administrative provision adopted by BWC contains language nearly identical to former R.C. 4123.651(A). See Ohio Adm.Code 4123-7-10, which provides, in pertinent part:

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[1]Currently, R.C. 4123.651(A) provides:

"(A) The employer of a claimant who is injured or disabled in the course of his employment may require, without the approval of the administrator or the industrial commission, that the claimant be examined by a physician of the employer's choice one time upon any issue asserted by the employee or a physician of the employee's choice or which is to be considered by the commission. Any further requests for medical examinations shall be made to the commission which shall consider and rule on the request. The employer shall pay the cost of any examinations initiated by the employer."

> A worker who sustained an injury or contracted an occupational disease in the course of and arising out of employment shall have free choice to select a licensed physician for treatment, as well as to select medical, hospital and nursing service, regardless of whether or not the employer is a self-insuring employer * * *.

Ohio Adm.Code 4123-7-10(D) provides that, when an employee of a self-insuring employer exercises the free choice set forth above, rather than having the employer directly furnish services, "the costs of the services, subject to the approval of the industrial commission, shall be the obligation of such employer." Thus, claimants argue that injured workers retain free choice of their physicians and medical services, subject to the commission's approval of costs.

{¶13} Relator argues that Ohio Adm.Code 4123-7-10 conflicts with current R.C. 4123.651(A) and is therefore invalid. An administrative rule that conflicts with a valid, existing statute is invalid. *Kelly v. Accountancy Bd. of Ohio* (1993), 88 Ohio App.3d 453, 458. However, we find no conflict between Ohio Adm.Code 4123-7-10 and R.C. 4123.651(A). Any alleged conflict exists only with relator's interpretation of the General Assembly's intent in eliminating the language of former R.C. 4123.651(A) rather than with any express language in the current statute. "[W]here a potential conflict exists between an administrative rule and a statute, an administrative rule is not inconsistent with a statute unless the rule contravenes or is in derogation of some express provision of the statute." Id. at 459, citing *McAninch v. Crumbley* (1981), 65 Ohio St.2d 31, 34. Because the current version of R.C. 4123.651(A) addresses an entirely different subject than Ohio Adm.Code. 4123-7-10, the administrative code provision does not contravene any express provision of the statute, and we find no basis for declaring Ohio Adm.Code 4123-7-10 invalid.

{¶14} Regardless of whether an injured worker retains the right to choose a physician and medical services under Ohio Adm.Code 4123-7-10, the commission did not base its decision to grant claimants' motions on claimants' right to unfettered free choice of where to receive treatment. Moreover, contrary to relator's argument, the commission's order granted claimants no such right to unfettered free choice. Although the commission noted relator's failure to cite any authority that would allow it to control where an injured worker receives medical services, the commission based its decision on its application of the *Miller* criteria to the facts in the record.

{¶15} It is well-settled that the commission retains broad discretion to approve or disapprove the costs of medical services. *State ex rel. Breno v. Indus. Comm.* (1973), 34 Ohio St.2d 227, 229, citing *State ex rel. Campbell v. Indus. Comm.* (1971), 28 Ohio St.2d 154, 157. Even Ohio Adm.Code 4123-7-10(D) expressly conditions a self-insurer's duty to pay for medical services chosen by an injured worker upon the commission's approval of the costs. With respect to the commission's exercise of its discretion to approve or disapprove costs, the Ohio Supreme Court has adopted a three-pronged test for the authorization of medical services: (1) whether the medical services are reasonably related to the industrial injury that is the allowed condition; (2) whether the services are reasonably necessary for treatment of the industrial injury; and (3) whether the cost of the services is medically reasonable. *Miller* at 232, citing *State ex rel. Noland v. Indus. Comm.* (Aug. 27, 1987), Franklin App. No. 86AP-594. The commission's order granted neither claimants nor employers unfettered choice. Rather, recognizing its broad discretion to approve or disapprove the costs of medical services, the commission applied the tripartite *Miller* test to determine whether to approve the

costs of claimants' physical therapy at Springfield. Thus, this court must determine whether "some evidence" supports the commission's findings that the *Miller* criteria are satisfied. If so, the commission did not abuse its discretion, and we must deny relator's request for a writ of mandamus.

{¶16} Both the commission and the magistrate acknowledged the applicability of the *Miller* test to the commission's consideration of claimants' motions. However, relator argues that the commission abused its discretion and the magistrate erred by failing to consider the cost to relator of off-site physical therapy. Under the second prong of the *Miller* test, relator argues that the commission was required to consider not only whether physical therapy was reasonably necessary for claimants' treatment, but, also, whether physical therapy *at Springfield* was reasonably necessary. Likewise, under the third prong of the *Miller* test, relator argues that the commission was required to consider not only whether the cost of physical therapy at Springfield was medically reasonable per se, but, also, whether the cost was medically reasonable in light of relator's on-site facility, which was equipped to provide claimants the same treatment at no additional cost to relator.

{¶17} The second prong of the *Miller* test requires the commission to consider whether the requested medical services are reasonably necessary for treatment of the claimant's allowed condition. Relator does not dispute that physical therapy is reasonably necessary for treatment of claimants' industrial injuries, but asserts that physical therapy at Springfield is not reasonably necessary. Relator cites no authority, and our independent research has revealed no authority, that the second prong of the *Miller* test requires the commission to consider where the claimant is to receive the

requested treatment. The commission must simply consider whether the medical service itself is reasonably necessary for the claimant's treatment.

{¶18} Regardless of where such treatment is performed, the medical service for which claimants sought approval was physical therapy, which relator admits is reasonably necessary for claimants' treatment. Were the commission to accept relator's construction and consider, in every case, whether treatment at the specific facility requested by a claimant's physician of record is necessary, treatment at a specific facility would never be necessary as long as the treatment was also available from another facility. We find that the commission did not abuse its discretion by failing to consider whether physical therapy at Springfield, as opposed to physical therapy at relator's on-site facility, was reasonably necessary for claimants' treatment. Because relator admits that physical therapy was reasonably necessary for the treatment of claimants' allowed conditions, the second prong of the *Miller* test was satisfied.

{¶19} In determining whether the costs of the requested medical services were medically reasonable as required by the *Miller* test's third prong, relator argues that the commission abused its discretion and the magistrate erred by failing to consider the additional cost to relator of having claimants treated at Springfield as opposed to relator's on-site facility. Relator does not argue that Springfield's costs are unreasonable per se; in fact, relator has referred its employees to Springfield when relator's on-site facility was unable to provide necessary services. Relator simply suggests that, upon consideration of the cost to relator in this case, the cost of physical therapy at Springfield is not medically reasonable. Claimants argue, to the contrary,

that *Miller* requires no comparison of the cost to relator of physical therapy at Springfield and at its on-site facility.

{¶20} Neither *Miller* nor any subsequent appellate or Supreme Court case applying the *Miller* test clarifies what the commission must consider in assessing the medical reasonableness of requested medical services. Additionally, no statute or administrative rule requires the commission to compare the costs of treatment at relator's on-site facility to the costs of treatment at Springfield. Nevertheless, relator emphatically asserts that the commission must balance the necessity of treatment against the cost to the employer in considering whether to approve or disapprove the costs of medical services.

{¶21} In support of its assertion that *Miller* requires the commission to balance the necessity of treatment against the cost to the employer, relator cites *Campbell* and *Breno*, as well as *State ex rel. Nutt v. Indus. Comm.* (1994), 70 Ohio St.3d 594. In *Campbell*, the claimant sought approval for chiropractic treatments. The Supreme Court held that the commission did not abuse its discretion in approving monthly treatments because the record contained conflicting medical evidence regarding the necessity and frequency of chiropractic treatment. *Campbell* at 157. In *Breno*, the claimant sought approval for 52 physiotherapy treatments for which he had not obtained preauthorization, as required by commission and BWC rules. As in *Campbell*, the record contained conflicting evidence regarding the necessity and extent of the requested treatments. *Breno* at 230. Based on the conflicting evidence in the record, the Supreme Court concluded that the commission did not abuse its discretion in refusing to approve the costs of the requested treatments. Id. In *Nutt*, the claimant

sought continued payment for prescriptions of Fiorinal and Valium for his 13-year-old back injury. After noting the commission's obligation "to address treatment that may be inappropriate, unnecessary or unreasonable," the Supreme Court found no abuse of discretion in the commission's disapproval of the claimant's request because the record contained medical evidence that neither Fiorinal nor Valium was an appropriate treatment modality. *Nutt* at 597.

{¶22} Each of the cases relator cites deals with the necessity and/or the frequency of the claimant's requested treatment. There is no dispute in the instant case about the necessity of physical therapy or about the frequency of therapy requested by Dr. Nitz. The holding in each of the cases upon which relator relies reinforces the rule that the commission does not abuse its discretion when some evidence in the record supports the commission's order. In each case, the record before the commission contained some evidence in support of the commission's finding. Thus, the Supreme Court found no abuse of discretion by the commission. Although two of the cases involved records containing conflicting evidence, the Supreme Court noted that, where the evidence before the commission is conflicting, a court cannot substitute its judgment for that of the commission. *Nutt* at 157; *Breno* at 230.

{¶23} It is undisputed that the record before the commission contained evidence that Springfield is a BWC-authorized facility with fees that are within BWC's usual, customary, and reasonable guidelines. However, relator argues that the record also contained evidence that its on-site facility could provide the same treatment as Springfield at a lower cost to relator. Although relevant, such evidence does not negate the evidence that Springfield's fees were reasonable under the BWC's usual,

customary, and reasonable guidelines. Where the record contains conflicting evidence, the court must conclude that the commission did not abuse its discretion. *Breno* at 230. In mandamus, this court must uphold an order of the commission supported by "some evidence" in the record. "It is immaterial whether other evidence, even if greater in quality and/or quantity, supports a decision contrary to the commission's." *State ex rel. Pass v. C.S.T. Extraction Co*. (1996), 74 Ohio St.3d 373, 376. Evidence that the costs of treatment at Springfield are within BWC's usual, customary, and reasonable price structure constitutes "some evidence" that the cost of treatment at Springfield is medically reasonable. Because the record before the commission contained "some evidence" that the cost of the requested physical therapy at Springfield was medically reasonable, we cannot say that the commission abused its discretion in granting claimants' motions for approval of such treatment.

{¶24} In support of its argument that the costs of physical therapy at Springfield are not medically reasonable in this case, relator states that it pays substantial sums to provide a state-of-the-art, on-site physical therapy facility for its injured employees. Relator argues that, under these particular facts, there is no reason for the commission to force it to incur duplicative costs by paying for claimants' physical therapy elsewhere when it can provide claimants' treatment on-site and has already paid for the resources to do so. The commission considered and rejected relator's duplicative cost argument.

{¶25} The magistrate described relator's willingness to establish and staff an on-site physical therapy facility for its injured employees as admirable. Likewise, we acknowledge the value and cost-efficiency of relator's actions. Nevertheless, without some indication from the legislature or some guidance from the Supreme Court in its

interpretation of *Miller*, we cannot conclude that the commission had a clear legal duty to consider relator's actions and expenditures, commendable as they may be, in assessing the medical reasonableness of the costs of claimants' requested medical services at Springfield. Nor can we conclude that the commission abused its discretion in determining that the costs of claimants' treatment at Springfield were medically reasonable.

{¶26} Because we find that the magistrate correctly concluded that the commission did not abuse its discretion by finding that claimants' requests for medical services at Springfield satisfied the *Miller* test, we overrule relator's second objection.

{¶27} For the foregoing reasons, based upon a review of the magistrate's decision and an independent review of the evidence, this court adopts the magistrate's findings of fact and conclusions of law, except as set forth above, as its own. Having found that the commission did not abuse its discretion in granting claimants' motions, this court denies relator's request for a writ of mandamus.

Objections sustained in part and overruled in part, writ of mandamus denied.

BROWN, P.J., and KLATT, J., concur.

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A P P E N D I X A

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Navistar International Transportation Corporation,	:	
Relator,	:	
v.	:	No. 04AP-638
The Industrial Commission of Ohio et al.,	:	(REGULAR CALENDAR)
Respondents.	:	

M A G I S T R A T E ' S D E C I S I O N

Rendered on January 26, 2005

Vorys, Sater, Seymour and Pease, LLP, Joseph A. Brunetto and *Gina R. Russo*, for relator.

Jim Petro, Attorney General, and *Dennis H. Behm*, for respondent Industrial Commission of Ohio.

Robert Bumgarner, for respondent Thomas A. Clifford.

IN MANDAMUS

{¶28} Relator, Navistar International Transportation Corporation, has filed this original action requesting that this court issue a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order authorizing respondents Toney Adams, Thomas A. Clifford and Arthur W. Cason ("claimants") to

obtain physical therapy at a facility other than relator's on-site physical therapy facility ("on-site facility"), and ordering the commission to require claimants to receive their physical therapy at relator's on-site facility.

Findings of Fact:

{¶29} 1. The three claimants are all employees of relator and each claimant sustained certain work-related injuries.

{¶30} 2. Each claimants' treating physician, Dr. Paul Nitz, completed C-9 forms requesting that relator authorize each of the claimants to receive a certain period of physical therapy.

{¶31} 3. Relator approved each of the requests for physical therapy with one caveat: that the claimants receive their physical therapy at relator's on-site facility.

{¶32} 4. Claimants sought to have their physical therapy treatment at Springfield Physical Therapy instead.

{¶33} 5. Because claimants did not agree to have their physical therapy performed at relator's on-site facility, relator denied all three C-9 requests.

{¶34} 6. Claimants filed motions with the Ohio Bureau of Workers' Compensation requesting that they be allowed to receive physical therapy at the site chosen by their physician of record per the C-9 forms completed by Dr. Nitz.

{¶35} 7. The motions were heard before three separate district hearing officers ("DHO"). (Stipulation, at tabs 23, 35, and 44.)

{¶36} 8. By order dated October 22, 2003, a DHO granted the motion of claimant Cason on the grounds that Ohio Adm.Code 4121-17-10 indicates that an injured worker has the initial free choice of physicians and other medical services and,

based upon claimant's testimony that his post-operative therapy following his first surgery was performed at an off-site facility, the DHO concluded that it was appropriate despite the necessarily higher cost that therapy would entail the self-insuring employer, relator herein, to pay. In the other two instances, by orders dated November 4 and November 7, 2003, DHOs denied the motions of claimants Adams and Clifford.

{¶37} 9. By order dated November 25, 2003, a staff hearing officer ("SHO") affirmed the October 22, 2003 DHO order authorizing claimant Cason's motion requesting six weeks of physical therapy at Springfield Physical Therapy as requested by Dr. Nitz.

{¶38} 10. By order dated December 11, 2003, an SHO vacated the November 4, 2003 DHO order and granted the request of claimant Adams for physical therapy at the Springfield Physical Therapy facility. The SHO specifically noted as follows:

> While a claimant generally has a free choice of physicians, an exercise of such a choice does not translate into payment for all medical treatment services provided. Treatment issues are judged in terms of the three-prong test set forth in State ex rel. Miller v. Industrial Commission (1994) 71 Ohio St.3d 229. The first two prongs address the necessity of treatment and its relationship to the allowed conditions, which are not at issue in this claim. The third prong addresses the issue of the cost of the medical service being "medically reasonable." In this case, the treatment proposed by Dr. Nitz can be rendered at the employer's in-house facility at a cost lower than that at an outside facility. There is no evidence from Dr. Nitz explaining why the physical therapy treatment should be rendered at Springfield Physical Therapy or any other outside facility. Accordingly, pursuant to Miller, the Staff Hearing Officer finds that the proposed course of physical therapy remains authorized at the employer's in-house facility, but is denied at Springfield Physical Therapy for lack of evidence showing that the cost of treatment at that location is medically reasonable.

{¶39} 11. By order dated January 8, 2004, an SHO affirmed the prior DHO order dated November 7, 2003, and denied the motion of claimant Clifford to have his physical therapy at the Springfield Physical Therapy facility. The SHO cited the following reasoning for denial:

> Pursuant to State ex rel. Miller v. Industrial Commission (1994) 72 Ohio St.3d 229, the proposed course of physical therapy as requested by Dr. Nitz, per C-9, remains authorized at the employer's in-house facility, but denied at Springfield Physical Therapy. Dr. Nitz has not provided a narrative report explaining any special reason or need in this case for the course of physical therapy to be rendered at Springfield Physical Therapy. Without that evidence, the third criterion of Miller has not been met because the employer has demonstrated that the physical therapy can be rendered at a lower cost at the employer's in-house facility.

{¶40} 12. On March 9, 2004, in three separate hearings, the full commission heard appeals from each of the SHO decisions dated November 25 and December 11, 2003, and January 8, 2004 and rendered its findings. The full commission, in unanimous decisions, reached the same conclusions: that claimants Adams, Cason and Clifford are entitled to have their physical therapy performed at the Springfield Physical Therapy facility. The commission's decision provided as follows:

> The injured worker's treating physician and surgeon, Dr. Nitz, submitted a C-9 to the self-insured employer, dated 08/07/2003, requesting approval of a physical therapy program at Springfield Physical Therapy, one to two times per week for six weeks. The therapy was requested based on the fact the [sic] the injured worker had recently undergone surgery on his right shoulder. The employer denied the C-9 on 08/07/2003, indicating that the therapy had to be done on-site, at the employer's physical therapy facility.
>
> The issue in this case is whether the injured worker has the right to have the physical therapy performed at a private

> therapy facility – in this case Springfield Physical Therapy – or whether the therapy can be performed only at the on-site physical therapy facility of the employer. Physical therapy is a medical service and the employer has cited no authority that would allow the employer to control where the injured worker receives medical services. Therefore, as with any request for medical services, the Commission finds that this decision simply comes down to an interpretation of the test enunciated in the case of State ex rel. Miller v. Indus. Comm. (1994), 71 Ohio St.3d 229. In Miller, the Supreme [C]ourt fashioned a three-pronged test for the authorization of medical services:
>
> [One] are the medical services reasonably related to the industrial injury that is the allowed condition?
>
> [Two] are the services reasonably necessary for treatment of the allowed conditions? and
>
> [Three] is the cost of such service medically reasonable?
>
> Id. at 32, citing State ex rel. Campbell v. Indus. Comm. (1971), 28 Ohio St.2d 154. This is otherwise known as the Miller Test.
>
> In this case, there is no dispute by the employer that the first two prongs of the Miller Test are met. The employer disputes only the third prong. The injured worker has argued that Dr. Nitz's request to have the therapy performed at Springfield Physical Therapy meets the requirement of this test, as the facility is a BWC approved provider, and the cost would, therefore, be subject to the UCR guidelines of the BWC, which by definition would be a medically reasonable cost. The employer does not argue that the costs at Springfield Physical Therapy are medically unreasonable per se, as even the employer approves requests to have physical therapy performed at Springfield Physical Therapy in certain situations. The employer, rather, has argued that the injured worker should be required to undergo the therapy at their on-site therapy facility in this case, as to hold otherwise will, in effect, result in a double billing for the therapy, as the employer has already paid for the equipment and services of a licensed physical therapist at their on-site facility.
>
> The Commission finds the injured worker's position on this issue to be more persuasive. The charges at the requested

> facility, Springfield Physical Therapy, are found to be medically reasonable, in that they are within the approved fee structure as established by the BWC for authorized providers of such services. As such, the Commission finds that the request satisfies the third prong of the Miller Test. Therefore, the C-9 request for authorization of physical therapy treatment at Springfield Physical Therapy, submitted by Dr. Nitz on 08/07/2003, is approved.

{¶41} 13. Thereafter, relator filed the instant mandamus action in this court challenging the commission's decision authorizing treatment for these three claimants at the Springfield Physical Therapy facility in spite of the fact that relator has provided an on-site physical therapy facility for all of its employees.

Conclusions of Law:

{¶42} In order for this court to issue a writ of mandamus as a remedy from a determination of the commission, relator must show that she has a clear legal right to the relief sought and that the commission has a clear legal duty to provide such relief. *State ex rel. Pressley v. Indus. Comm.* (1967), 11 Ohio St.2d 141. A clear legal right to a writ of mandamus exists where the relator shows that the commission abused its discretion by entering an order which is not supported by any evidence in the record. *State ex rel. Elliott v. Indus. Comm.* (1986), 26 Ohio St.3d 76. On the other hand, where the record contains some evidence to support the commission's findings, there has been no abuse of discretion and mandamus is not appropriate. *State ex rel. Lewis v. Diamond Foundry Co.* (1987), 29 Ohio St.3d 56. Furthermore, questions of credibility and the weight to be given evidence are clearly within the discretion of the commission as fact finder. *State ex rel. Teece v. Indus. Comm.* (1981), 68 Ohio St.2d 165.

{¶43} Prior to 1993, former R.C. 4123.651 provided, in pertinent part, as follows:

> Any employee who is injured or disabled in the course of his employment shall have free choice to select such licensed physician as he may desire to have serve him, as well as medical, surgical, nursing, and hospital services and attention, regardless of whether or not his employer has elected under section 4123.35 of the Revised Code, to furnish medical attention to injured or disabled employees. In the event the employee of a self-insurer selects a physician or medical, surgical, nursing, or hospital services, rather than have them furnished directly by his employer, the costs of such services, subject to the approval of the commission, shall be the obligation of such employer.

{¶44} R.C. 4123.35 provided, in pertinent part, as follows:

> * * * [S]uch employers * * * who will abide by the rules of the commission and who may be of sufficient financial ability to render certain the payment of compensation to injured employees or the dependents of killed employees, **and** the furnishing of medical, surgical, nursing, and hospital attention and services and medicines, and funeral expenses, equal to or greater than is provided for in sections 4123.52, 4123.55 to 4123.62, and 4123.64 to 4123.67 of the Revised Code, and who do not desire to insure the payment thereof or indemnify themselves against loss sustained by the direct payment thereof, may, upon a finding of such facts by the commission, be granted the privilege to pay individually such compensation, **and** furnish such medical, surgical, nursing, and hospital services and attention and funeral expenses directly to such injured employees or the dependents of such killed employees. * * *

(Emphasis added.)

{¶45} Former R.C. 4123.651 has been deleted from the Ohio Revised Code in its entirety. In its place, new R.C. 4123.651 addresses an unrelated issues and provides that an employer has the right to cause a claimant who is injured or disabled in the course of their employment to be examined by a physician of the employer's choice one time upon any issue asserted by the employee and that the employer shall pay the

cost of any such examinations initiated by the employer. Relative to the within matter, R.C. 4123.651 further provides as follows: "Any further requests for medical examinations shall be made to the commission which shall consider and rule on the request."

{¶46} Current R.C. 4123.35(B) continues to provide essentially what former R.C. 4123.35 provided:

> Employers who will abide by the rules of the administrator and who may be of sufficient financial ability to render certain the payment of compensation to injured employees or the dependents of killed employees, and the furnishing of medical, surgical, nursing, and hospital attention and services and medicines, and funeral expenses, equal to or greater than is provided for in sections 4123.52, 4123.55 to 4123.62, and 4123.64 to 4123.67 of the Revised Code, and who do not desire to insure the payment thereof or indemnify themselves against loss sustained by the direct payment thereof, upon a finding of such facts by the administrator, may be granted the privilege to pay individually compensation, and furnish medical, surgical, nursing, and hospital services and attention and funeral expenses directly to injured employees or the dependents of killed employees, thereby being granted status as a self-insuring employer. * * *

{¶47} R.C. 4123.35 provides the rules for self-insuring employers. Pursuant to R.C. 4123.35(B), employers willing to abide by the rules of the administrator and who are of sufficient ability may be granted self-insured status to pay compensation to injured employees or dependents of killed employees and to furnish medical, surgical, nursing, and hospital attention and services and medicines, and funeral expenses, provided that the employer is able to provide such equal to or greater than is provided in R.C. 4123.52 (providing for the commission's continuing jurisdiction of the payment of compensation for a period of two years prior to the application for benefits), R.C.

4123.55 (providing that there is no one-week waiting period in connection with disbursements provided by R.C. 4123.66), R.C. 4123.62 (providing for the determination of the average weekly wage and the statewide average weekly wage), R.C. 4123.64 (providing for the computation to a lump-sum payment of an award to an injured worker), and R.C. 4123.67 (providing that compensation shall be exempt from all claims of creditors and from any attachment or execution, and shall be paid only to the employees or their dependents).

{¶48} In an effort to keep down the financial costs of providing physical therapy services to its employees, relator opened its own on-site facility. Relator contends that all of its employees who need physical therapy, as a result of work-related injures, ***must be required*** to receive that physical therapy at relator's on-site facility. Otherwise, relator argues that it will be required to pay for those physical therapy services twice: once by providing the on-site facility and paying a licensed physical therapist to staff the facility; and twice, when an injured worker has the physical therapy services provided to him or her at a physical therapy facility other than relator's on-site facility. Relator contends that the commission has effectively granted the claimants in the within manner the unfettered right to select their own medical services in spite of the fact that R.C. 4123.651 has been repealed. Relator contends that claimants no longer have the right to choose their own medical services.

{¶49} While one of the DHOs did cite the concept that employees should have the freedom to chose their own physicians or medical services, the commission did not adopt this reasoning when it ultimately found that the within claimants could receive their physical therapy treatment at a site other than relator's on-site facility. The

commission noted that relator cited no authority that would allow the employer to have 100 percent control over the facility chosen by the injured worker to receive medical services. Instead, the commission applied the three-prong test for the authorization of medical services from *State ex rel. Miller v. Indus. Comm.* (1994), 71 Ohio St.3d 229: (1) Are the medical services reasonably related to the industrial injury that is the allowed condition?; (2) Are the services reasonably necessary for treatment of the allowed conditions?; and (3) Is the cost of such service medically reasonable? The commission noted that relator did not dispute that the first two prongs were met: the medical services were reasonably related to the industrial injures and the services were reasonably necessary for the treatment of the allowed conditions. The commission noted that relator disputed the third prong arguing not that treatment at the Springfield Physical Therapy facility was medically unreasonable per se, but, that, claimants should be required to undergo therapy at the on-site facility is warranted, under *Miller*, because relator has already paid for the equipment and services of a licensed physical therapist at the on-site facility. As such, relator contends that, where an employer provides medical services for its injured employees, *Miller* mandates that the commission order the employee to have his/her treatment rendered at the employer's facility because that is the only way to meet the third prong of *Miller*. The cost must be medically reasonable.

{¶50} This magistrate is aware that, in this day in age, various health management organizations exist and that the "right" of injured people covered by various forms of insurance has been limited. The court can take judicial knowledge of the fact that, under various insurance coverages, injured employees must select from a

certain number of physicians from whom to have treatment rendered if the injured employees desire to have their medical bills paid to the fullest extent. To the extent that an injured employee is willing to assume more of the burden of the cost of their medical services, injured employees are permitted to select physicians outside of the coverage of the insurance provider. However, the magistrate notes that, while managed health care efforts have limited an injured employee's ability to select their own physicians, employees do still maintain a certain limited right to select the physician of their own choice.

{¶51} In the present case, relator's willingness to set up and staff an on-site physical therapy facility is admirable. In fact, the record reflects that relator is quite generous in authorizing physical therapy at its on-site facility and that, in fact, relator has authorized physical therapy at the Springfield Physical Therapy facility, on occasion, where relator felt that it was warranted. However, relator contends that the commission is required to find that where ***relator determines*** that an injured worker must receive physical therapy at its on-site facility, then the commission is required to order the injured employees to do so. The problem with relator's argument is that relator can cite to no law requiring the commission to order relator's injured employees, claimants herein, to do so. Relator contends that, in essence, the commission has given injured workers an absolute right to choose their treatment facility in contravention of the law. One could argue that relator wants to be able to remove all choices from its employees in this instance. The commission has not given employees an absolute right to select their medical care nor has the commission determined that employees have absolutely no choice. Instead, applying *Miller*, the commission found the requests for

treatment at Springfield Physical Therapy facility to be medically reasonable because it is a BWC authorized facility. This is not an abuse of discretion.

{¶52} It is possible that the issue being raised in this case is simply not amenable to a mandamus action and perhaps legislative changes need to be sought. Accordingly, based upon the law as it currently exists, this magistrate finds that the commission did not abuse its discretion in applying the test from *Miller*, and determining that the physical therapy treatment for these claimants at the Springfield Physical Therapy facility was appropriate and requiring relator to pay the costs of such services. While relator has established the right to be a self-insuring employer, and the right to pay compensation and the cost of medical treatment for its injured workers without paying into the state fund, there is no statute or case law to support relator's argument that, as a self-insuring employer, relator has the right to force its injured workers to treat solely at its on-site facility. Relator simply has not shown a clear legal right to the relief requested and, in spite of the fact that the magistrate understands relator's argument and empathizes with the situation, the commission simply is not required to provide the relief that relator seeks.

{¶53} Accordingly, it is the magistrate's decision that this court deny relator's request for a writ of mandamus.

/s/ Stephanie Bisca Brooks
STEPHANIE BISCA BROOKS
MAGISTRATE