

[Cite as *State ex rel. Penske Truck Leasing Co., L.P., v. Indus. Comm.*, 2011-Ohio-5764.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Penske Truck Leasing Co., LP,	:	
	:	
Relator,	:	
	:	
v.	:	No. 10AP-774
	:	
Industrial Commission of Ohio and Michael Carfora,	:	(REGULAR CALENDAR)
	:	
Respondents.	:	

D E C I S I O N

Rendered on November 8, 2011

Schottenstein, Zox & Dunn, Robert M. Robenalt, and Jennifer McDaniel, for relator.

Michael DeWine, Attorney General, and *Sandra E. Pinkerton*, for respondent Industrial Commission of Ohio.

Philip J. Fulton Law Office, Philip J. Fulton, and Ross R. Fulton, for respondent Michael Carfora.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

FRENCH, J.

{¶1} Relator, Penske Truck Leasing Co., LP ("relator"), filed this original action, which asks this court to issue a writ of mandamus ordering respondent Industrial

Commission of Ohio ("commission") to vacate its order that granted the C-9 request filed by respondent Michael Carfora ("claimant") and authorized claimant to have an MRI, bilateral shoulder x-rays, and four office visits per year to monitor the medications being prescribed, based on the commission's finding that the treatment was reasonable and necessary to treat the allowed conditions in the claim.

{¶2} This matter was referred to a magistrate pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate issued a decision, which includes findings of fact and conclusions of law and is appended to this decision, recommending that this court deny the requested writ. No objections have been submitted concerning the magistrate's findings of fact, and we adopt them as our own.

I. BACKGROUND

{¶3} As detailed in the magistrate's decision, claimant suffered a work-related injury in 2003, and a claim was allowed for bilateral shoulder sprain and bilateral rotator cuff tear. Claimant also had pre-existing shoulder issues.

{¶4} Following his injury, claimant had surgery and other treatments. Claimant was eventually released to return to work in 2005, but continued to seek medical treatment thereafter.

{¶5} In January 2009, claimant sought treatment from Charles B. May, D.O. On January 14, 2009, Dr. May issued a report that requested the following: (1) reactivation of the claim; (2) updated x-rays of the bilateral shoulders; (3) an updated MRI of the right shoulder; and (4) four office visits per year for evaluation and

medication management. Claimant submitted a C-9 form requesting authorization of these services.

{¶6} Following a hearing on November 17, 2009, a staff hearing officer ("SHO") affirmed an order of a district hearing officer and authorized the following: (1) an MRI of the right shoulder; (2) bilateral shoulder x-rays; and (3) four office visits per year to monitor the medications being prescribed. The SHO found that claimant presented sufficient evidence to show that the authorized treatment is related to the allowed conditions in the claim. In reaching this finding, the SHO relied on the medical reports of Dr. May and Thomas L. Rapp, D.O.

II. OBJECTIONS

{¶7} As noted, relator filed this mandamus action, and the magistrate recommended that we deny the requested writ. Relator objects to the magistrate's conclusion that the commission could rely on the following to support its authorization of services: (1) Dr. May's January 14, 2009 report; (2) Dr. Rapp's treatment notes; and (3) claimant's testimony. Relator raised these same issues before the magistrate. For the reasons explained by the magistrate, we disagree with relator's contention that the commission could not rely on this evidence.

{¶8} First, as to Dr. May's report, relator contends that it was not evidence on which the commission could rely because Dr. May had not reviewed claimant's prior treatment record and claimant had told him that he had no pre-existing shoulder problems. As the magistrate explained, however, the weight to be given to Dr. May's report was an issue for the commission to resolve. But more importantly, even if Dr.

May's report were eliminated as evidence, there still exists other evidence to support the commission's order.

{¶9} Second, as to Dr. Rapp's treatment notes, relator states that the SHO cited to an office note that does not exist and that the notes themselves do not support authorization of the treatment requested. We agree with the magistrate that the SHO obviously intended to refer to an office visit that occurred on November 21, 2005, rather than November 21, 2007. And, it was for the commission to interpret Dr. Rapp's records and determine the weight to be given those records.

{¶10} Finally, relator contends that claimant's testimony was not evidence on which the commission could rely. We agree with the magistrate, however, that the commission could consider claimant's testimony as part of its determination, particularly to explain the gaps in his treatment.

{¶11} For all these reasons, we overrule relator's objections.

IV. CONCLUSION

{¶12} In summary, based on our independent review of this matter, we overrule relator's objections. We adopt the magistrate's decision, including the findings of fact and conclusions of law contained in it, as our own. Accordingly, we deny the requested writ.

*Objections overruled;
writ of mandamus denied.*

TYACK and CONNOR, JJ., concur.

A P P E N D I X

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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	:	
Relator,	:	
	:	
v.	:	No. 10AP-774
	:	
Industrial Commission of Ohio and Michael Carfora,	:	(REGULAR CALENDAR)
	:	
Respondents.	:	

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

Rendered on April 21, 2011

Schottenstein, Zox & Dunn, Robert M. Robenalt and Jennifer McDaniel, for relator.

Michael DeWine, Attorney General, and Sandra E. Pinkerton, for respondent Industrial Commission of Ohio.

Philip J. Fulton Law Office, Philip J. Fulton and Ross R. Fulton, for respondent Michael Carfora.

IN MANDAMUS

{¶13} Relator, Penske Truck Leasing Co., LP, 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 which granted the C-9 filed by

respondent, Michael Carfora ("claimant"), and authorizing claimant to have a right shoulder MRI, bilateral shoulder x-rays, and four office visits per year to monitor the medications being prescribed based upon a finding that the treatment was reasonable and necessary to treat the allowed conditions in the claim.

Findings of Fact:

{¶14} 1. Claimant was employed as a truck driver with relator.

{¶15} 2. On August 29, 2003, claimant was delivering a refrigerator when it slipped and he grabbed it, causing pain in both shoulders.

{¶16} 3. Claimant's workers' compensation claim has been allowed for: "bilateral shoulder strain; bilateral rotator cuff tear."

{¶17} 4. It is undisputed that, prior to the August 29, 2003 injury, claimant had problems with both shoulders. Specifically, office notes from claimant's treating physician, Thomas L. Rapp, D.O., chronicle claimant's shoulder problems as early as August 1, 1998. The stipulation of evidence contains numerous office notes from Dr. Rapp covering the time from August 1, 1998 through October 9, 2001. During this time period, claimant's complaints included both left and right shoulder pain and stiffness. According to Dr. Rapp's office notes, at times, claimant's pain would ease up; however, it is apparent that his pain was chronic but was controllable primarily through the use of ibuprofen. There is no evidence that claimant received anything other than conservative treatment for his shoulders during this time period.

{¶18} 5. In 2000, Dr. Rapp referred claimant for an orthopedic consultation with Lawrence W. Serif, D.O. In his March 3, 2000 report, Dr. Serif specifically noted that x-

rays from May 5, 1999 were negative. Thereafter, Dr. Serif provided the following relevant findings upon physical examination:

* * * He has marked tenderness with palpation to the medial superior border of the scapula over the region of his first rib on the left. He has full passive range of motion and active range of motion of the left shoulder[.] Negative drop test is noted[.]¹ There is no instability noted[.] There is no crepitus identified. He has no tenderness with adduction testing. He has no tenderness to palpation along the clavicle, SC joint, AC joint, or biceps tendon[.] No instability is noted to sulcus sign or with anterior and posterior displacement of the humeral head on the glenoid[.] He has an excellent radial pulse[.] He has good sensation throughout the left upper extremity[.] There is no tenderness to palpation along the spinous processes of the cervical spine or upper thoracic region[.]

Dr. Serif diagnosed claimant as having a sprain/strain, left shoulder - 840.9 and somatic dysfunctions, first rib/left shoulder and recommended the following treatment:

* * * Consideration should be given to manipulative therapy in an effort to reduce the 1st rib[.] This may need repeated treatments as the patient is presently in a chronic situation[.] If this does not work, consideration for a trigger point injection into the area might be necessary[.]

{¶19} 6. Following the work-related injury in August 2003, claimant sought treatment with his treating physician, Dr. Rapp, on September 3, 2003.

{¶20} 7. X-rays taken that same day, September 3, 2003, revealed the following:

Right shoulder

¹ The drop arm test definition in Taber's Cyclopedic Medical Dictionary (20th ed.2005) is: "A test used to identify tears of the rotator cuff muscle group, esp. supraspinatus. With the patient sitting or standing, the fully abducted shoulder is slowly lowered to the side. In the presence of rotator cuff tears, the arm will fall uncontrollably to the side from a position of about 90 degrees of abduction."

Two views of the right shoulder reveal AC joint degenerative change and spurring[.] There is lateral humeral head irregularity and mild spurring[.] No acute osseous disruption[.]

Left shoulder

Two views left shoulder reveal no acute fracture dislocation[.] There is AC joint degenerative change noted with spurring. No bursal calcifications are seen[.]

Impression

Bilateral AC joint degenerative changes[.]

{¶21} 8. An MRI taken November 14, 2003 revealed the following:

[one] 6 X 6-mm high-grade partial thickness tear involving the insertion of the supraspinatus tendon with associated tendinosis and peritendinitis.

[two] Lateral downsloping hypertrophied acromion contributing to lateral arch narrowing suggestive of outlet related cuff impingement.

{¶22} 9. Dr. Rapp referred claimant to Timothy P. Duffey, D.O., who operated on both of claimant's shoulders.

{¶23} 10. On December 3, 2003, Dr. Duffey performed the following procedures on claimant's left shoulder:

[one] Arthroscopy, left shoulder with subacromial decompression and debridement of the rotator cuff

[two] Arthroscopy of the left shoulder with distal clavicle resection

The pre- and post-operative diagnoses were:

PREOPERATIVE DIAGNOSIS Rotator cuff tendon tear, left shoulder with acromioclavicular joint degenerative disease

POSTOPERATIVE DIAGNOSIS Rotator cuff tendon tear, left shoulder with acromioclavicular joint degenerative disease with partial tear of the rotator cuff

{¶24} 11. Dr. Duffey operated on claimant's right shoulder on January 7, 2004.

Dr. Duffey performed the following procedures:

[one] ARTHROSCOPY OF SHOULDER AND
SUBACROMIAL DECOMPRESSION AND DEBRIDEMENT
OF ROTATOR CUFF

[two] ARTHROSCOPY OF THE RIGHT SHOULDER WITH
DISTAL CLAVICLE RESECTION

[three] ARTHROSCOPY OF RIGHT SHOULDER WITH DE-
BRIDEMENT INTERARTICULARLY AND SYNOVECTOMY
WITH REMOVAL OF LOOSE BODIES

The pre- and post-operative diagnosis were:

PREOPERATIVE DIAGNOSIS Rotator cuff tendon tear, right
shoulder, wit acromioclavicular joint degenerative disease

POSTOPERATIVE DIAGNOSIS Rotator cuff tendon tear,
right shoulder, with acromioclavicular joint degenerative
disease – partial rotator cuff tendon tear with synovitis and
loose bodies

{¶25} 12. Dr. Duffey authored several postoperative reports regarding claimant's shoulders. In his report dated December 9, 2003, Dr. Duffey noted that claimant was doing well and that, in his opinion, the left shoulder should do quite well. In his December 23, 2003 report, three weeks following surgery, Dr. Duffey noted that x-rays taken of claimant's left shoulder revealed a well decompressed subacromial space and that claimant was performing activities of daily living with his left upper extremities.

{¶26} 13. Regarding his right shoulder (surgery January 7, 2004), Dr. Duffey authored a report dated January 13, 2004, and opined that claimant's prognosis was guarded. Dr. Duffey informed claimant that there had been severe damage to the rotator cuff of his right shoulder and he opined that it would be very difficult, if not

impossible, for claimant to return to the same employment. Dr. Duffey specifically stated:

* * * I also told him that based on my observation of his shoulder with the supraspinatus and teres minor associated with the subscapularus partial tear and the partial tear of the infraspinatus that this is a six to twelve month process of rehabilitation to get back to moving appliances similar to his pre-operative status. * * * I think he is going to have a very difficult time with his shoulder[.] I have recommended a long term program with therapy and strengthening[.] * * *

{¶27} 14. Claimant continued to treat with Dr. Duffey post-operatively. In his report dated March 9, 2004, Dr. Duffey stated that relator was "not able to go back to his previous employment of moving appliances and refrigerators until he is able to achieve a good strength[.] plus tendon healing is going to be a 4-6 month process." In another report, dated April 20, 2004, Dr. Duffey opined that claimant would need another four-to-six months of therapy in order to return to his original employment. Dr. Duffey opined that the following conditions should be allowed in claimant's claim:

ICD codes that need to be added to the patient's claim to more adequately reflect his injury inclusive of his labral tear are 726 2 and 840 8, rotator cuff tendon tear, 840 4 and 840.6, his synovitis in the joint rather extensive, 727 00, his impingement syndrome with bursitis, 726 1 and 726 2, and again the labral tear in the shoulder[.]

{¶28} 15. In a report dated June 15, 2004, Dr. Duffey opined that claimant should remain off any heavy labor for the next three months.

{¶29} 16. In a letter dated January 28, 2005, Dr. Duffey opined that claimant could return to work in a light-duty capacity and, at a maximum, a medium level.

{¶30} 17. After being released to return to work, claimant continued to treat with Dr. Rapp. On October 24, 2005, claimant indicated that his neck and left shoulder were bothering him. Again, on November 21, 2005, claimant complained that his neck and left shoulder were really hurting. On January 16, 2006, claimant complained that his right shoulder hurts and that the pain keeps him awake at night.

{¶31} 18. Apparently, Dr. Rapp stopped practicing at some point. According to his testimony, claimant waited to see if Dr. Rapp would return to the practice before he decided to begin treating with another physician. As a result, his claim became inactive.

{¶32} 19. Because he continued to have shoulder pain, claimant sought treatment with Charles B. May, D.O. Dr. May authored a report dated January 14, 2009. In the history portion of Dr. May's report, claimant informed Dr. May that he had not had any problems with his shoulder prior to the injury in 2003. Dr. May indicated claimant's complaints as follows:

Mr. Carfora continues to describe bilateral shoulder pain in our office. Again, he states that the right side is more severe than the left. He describes constant pain at the posterior aspect of the right glenohumeral joint. He states that his symptoms increase bilaterally with overuse, range of motion, and *overhead work*. He states that *he has difficulty* with range of motion and any type of overhead work at this time. He does describe intermittent bilateral hand paresthesias as well.

(Emphases sic.)

{¶33} Thereafter, on physical examination, Dr. May noted bilateral trapezius tenderness and spasm as well as bilateral posterior glenohumeral joint tenderness with palpation. Claimant had painful and restricted range of motion in all planes of his bilateral shoulders, his strength was 5/5 bilaterally and Dr. May noted positive

impingement signs bilaterally, more severe on the right. Dr. May indicated that he would complete a C-9 form requesting the following:

- [one] Reactivation of this claim.
- [two] Updated x-rays of the bilateral shoulders
- [three] Updated MRI of the right shoulder
- [four] Office visits four times a year for evaluation and medication management.

{¶34} 20. After filing his C-9 request, claimant was examined by another physician affiliated with the same practice as Dr. Rapp. A review of those records dated July 21, 2009 indicates that claimant was diagnosed with degenerative joint disease of his shoulders.

{¶35} 21. Relator had claimant examined by Jose Luis Chavez, M.D. In his September 8, 2009 report, based upon his findings upon examination, Dr. Chavez opined that there was sufficient objective evidence to support claimant's subjective complaints of pain and restricted range of motion. However, Dr. Chavez opined that claimant's current symptoms were not directly related to the work-related injury but were the result of degenerative joint disease, more significant on the right than the left. As such, Dr. Chavez opined that, in his medical opinion, there was no indication that any additional treatment was appropriate and/or reasonable because the requested treatment was not related to the allowed conditions.

{¶36} 22. Claimant's motion was heard before a district hearing officer ("DHO") on October 8, 2009 and was granted as follows:

The Injured Worker's request for authorization and payment of the following medical services is granted: x-rays of the right and left shoulders; MRI of the right shoulder; and payment of the initial office visit with Dr. May and a second office visit with

Dr. May to evaluate the aforementioned test results. Any further office visits may be requested thereafter if it is determined from the test results that more will be needed.

This decision is based upon the Injured Worker's testimony at hearing regarding the reasons for the inactivity in his claim, and the reports of Dr. May, dated 01/19/2009 and 01/14/2009.

Based upon the foregoing medical evidence, it is found that the requested services are reasonable, necessary and appropriate for an up-dated evaluation of the allowed conditions and determination as to whether further treatment is warranted.

{¶37} 23. Relator's appeal was heard before a staff hearing officer ("SHO") on November 17, 2009. The SHO affirmed the prior DHO order and found that the treatment was reasonable and necessary to treat the allowed conditions in the claim as follows:

It is the finding of the Staff Hearing Officer that the Injured Worker has presented sufficient evidence to establish that the treatment requested is related to the allowed conditions in the claim. At hearing, the Injured Worker testified that after he had surgery on his shoulders that he had physical therapy, that he returned to his employment as a truck driver. He began to have symptoms in his shoulders of tingling and numbness, the right worse than the left. He testified that he was seeing Dr. Rapp for this condition but he had an accident. He wanted to wait to see if he returned before he sought treatment with another doctor as he was also his family doctor. Dr. Rapp did not come back to the practice.

The medical records from Dr. Rapp's practice document that the Injured Worker was having problems with his right and left shoulder. See office notes dated 01/16/2006 and 11/21/2007.

The Staff Hearing Officer also relies upon the medical report of Dr. May, dated 01/14/2009.

{¶38} 24. Relator's appeal was refused by order of the commission mailed December 16, 2009.

{¶39} 25. Relator's request for reconsideration was denied by order of the commission mailed February 20, 2010.

{¶40} 26. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶41} In this mandamus action, relator argues that the commission abused its discretion in granting claimant's C-9 and authorizing the requested treatment. Specifically, relator argues that there is no evidence in the record establishing that the requested treatment is due to the allowed conditions of rotator cuff tears, that the report of Dr. May does not constitute some evidence upon which the commission could rely, and that claimant's lack of shoulder complaints between 2006 and 2009 indicates that those conditions had healed.

{¶42} It is this magistrate's decision that the commission did not abuse its discretion. The commission had some evidence upon which it relied: claimant's testimony, Dr. Rapp's treatment notes, and the January 14, 2009 report of Dr. May. Further, the magistrate finds that Dr. May's report does constitute some evidence but that, even if that report were removed from evidentiary consideration, the commission's order is still supported by some evidence in the record. And finally, the lack of treatment between 2006 and 2009 constitutes a factor for the commission to consider but does not, in and of itself, establish that the commission abused its discretion.

{¶43} After reviewing the medical evidence in the record, certain facts are clear. First, claimant had been complaining of pain and stiffness in both his right and left shoulders since 1998. Second, prior to the work-related injury, claimant's treatment for his shoulder complaints was conservative and consisted of Ibuprofen and Skelaxin. Third, prior to the related injury, claimant's shoulder complaints were never severe enough to preclude him from working. Fourth, after the work-related injury, claimant's shoulder pain increased considerably. Fifth, the September 3, 2003 x-ray showed joint degenerative changes in both of claimant's shoulders. Sixth, the November 14, 2003 MRI revealed a partial thickness tear in claimant's rotator cuff. Seventh, Dr. Duffey's post-operative diagnosis following a December 3, 2003 surgery on claimant's left shoulder included rotator cuff tendon tear, left shoulder with acromioclavicular joint degenerative disease with partial tear of the rotator cuff. Eighth, Dr. Duffey's post-operative diagnosis regarding claimant's right shoulder following the January 7, 2004 surgery indicated rotator cuff tendon tear, right shoulder, with acromioclavicular joint disease-partial rotator cuff tendon tear with synovitis and loose bodies. Ninth, it was Dr. Duffey's opinion that claimant's right shoulder would likely remain problematic. Tenth, Dr. May's January 14, 2009 report does indicate that claimant complains that his right shoulder pain is more severe than his left shoulder pain.

{¶44} In *State ex rel. Miller v. Indus. Comm.* (1994), 71 Ohio St.3d 229, the Supreme Court of Ohio pronounced a three-part 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 services medically reasonable?

{¶45} 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. The determination of disputed factual situations is within the final jurisdiction of the commission and that determination is subject to correction by an action in mandamus only upon a showing of an abuse of discretion. *State ex rel. Allied Wheel Products, Inc. v. Indus. Comm.* (1956), 166 Ohio St. 47. An abuse of discretion connotes more than just an error of law or judgment; it implies that a decision is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217. Further, 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.*, 74 Ohio St.3d 373, 1996-Ohio-126.

{¶46} In finding that the request was reasonably related to the allowed conditions, the commission relied on claimant's testimony that, after he returned to work following the August 29, 2003 injury, he again began experiencing tingling and numbness in his shoulders, and that the right shoulder was worse than the left. The commission also noted that it reviewed Dr. Rapp's treatment notes and specifically relied on notes from January 16, 2006 and November 21, 2007.² The commission could review all of the medical evidence and determine whether claimant's current

² The stipulation of evidence does not contain a copy of a November 21, 2007 office note from Dr. Rapp. However, the stipulation of evidence does contain an office note dated November 21, 2005 at page 75 and the parties agree that this is the note upon which the SHO relied. During that visit, claimant complained of pain in his neck and left shoulder.

complaints were related to the allowed conditions or instead were related to the degenerative changes. Although Dr. Chavez opined that claimant's current symptoms were related to the degenerative changes, the commission was not required to accept that opinion or to give it enhanced weight. Further, relator's argument that claimant should have seen Dr. Duffey and should have submitted a report from Dr. Duffey, is immaterial here. The magistrate finds that relator simply has not demonstrated that the commission abused its discretion in this regard.

{¶47} Relator also contends that the commission abused its discretion by relying on the report of Dr. May. Specifically, relator argues that Dr. May did not have an accurate history from claimant. Relator points to that portion of the report where Dr. May indicates that claimant denied any problems with his shoulders prior to the 2003 injury. The magistrate finds that this may or may not be relevant. The information claimant provided Dr. May may be due to the fact that the pain claimant has had following the work-related injury has been significantly different from the pain he experienced before the injury. Inasmuch as claimant's only treatment prior to the injury consisted of Ibuprophen and Skelaxin, his symptoms were controlled relatively easily. Any challenge to Dr. May's report should have been directed to the SHO and relator could have asked to depose Dr. May to determine whether or not his opinion was based on an inaccurate history. However, upon review in mandamus, without the benefit of a transcript, this magistrate cannot find that it was an abuse of discretion for the commission to rely on the report of Dr. May.

{¶48} Relator also argues that Dr. May did not consider all of claimant's allowed conditions. However, while Dr. May only listed bilateral shoulder sprain/strain, his report makes it clear that he was aware of claimant's post-injury rotator cuff surgeries.

{¶49} Relator's final argument concerns the gap in claimant's treatment. However, as noted in the commission's order, the gap in treatment was explained by claimant and the commission found that explanation to be persuasive. The commission is entitled to rely on claimant's testimony and doing so does not constitute an abuse of discretion.

{¶50} As a final matter, the magistrate notes that the commission has not authorized any actual treatment. Instead, the commission has authorized diagnostic testing as well as four office visits per year. The diagnostic testing may or may not confirm whether the allowed conditions are indeed causing claimant's current symptoms.

{¶51} The case of *State ex rel. Jackson Tube Serv., Inc. v. Indus. Comm.*, 99 Ohio St.3d 1, 2003-Ohio-2259, is helpful here. In *Jackson Tube*, the industrial claim had been allowed for torn left rotator cuff and other injuries. In May 1998, Dr. Don D. Delcamp, performed open surgery on the shoulder and repaired two tears. However, despite the operation, the claimant continued to have shoulder problems. In May 2000, the claimant sought to change doctors and get further treatment.

{¶52} Dr. Jonathan Day Paley proposed a video arthroscopic surgery in order to pinpoint the exact cause of the claimant's intra-articular problem and further proposed that he be authorized to repair the shoulder conditions found to need repair during the

procedure. 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.

{¶53} 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* [*v. Indus. Comm.* (1994), 71 Ohio St.3d 229] 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.

{¶54} In the present case, the commission has not authorized arthroscopic surgery. Instead, the commission has authorized x-rays and an MRI in order to pinpoint the exact nature of the problem. Claimant's current symptoms are either due to the allowed conditions or are due to the preexisting degenerative changes or possibly due to an exacerbation of degenerative changes caused by the allowed conditions. In any event, there is some evidence in the record upon which the commission relied to find that the requested diagnostic treatment was reasonably related to the allowed conditions, reasonably necessary and that the medical costs of such procedures was medically reasonable. The commission's order simply does not constitute an abuse of discretion.

{¶55} Based on the foregoing, it is this magistrate's decision that this court should deny relator's request for a writ of mandamus.

/s/ Stephanie Bisca Brooks
STEPHANIE BISCA BROOKS
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).