

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Vincent E. Milton, II,	:	
Relator,	:	
v.	:	No. 10AP-1072
Industrial Commission of Ohio and	:	(REGULAR CALENDAR)
United States Can Company,	:	
Respondents.	:	

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D E C I S I O N

Rendered on January 31, 2012

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*Heller, Maas, Moro & Magill Co., L.P.A., and Robert J. Foley,*  
for relator.

*Michael DeWine, Attorney General, and Kevin J. Reis,* for  
respondent Industrial Commission of Ohio.

*Stefanski & Associates LLC, and R. Mark Gottfried,* for  
respondent United States Can Company.

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IN MANDAMUS

TYACK, J.

{¶1} Vincent E. Milton, II, filed this action in mandamus seeking a writ to compel the Industrial Commission of Ohio to grant authorization for a lumbar MRI and three lumbar epidural blocks.

{¶2} In accord with Loc.R. 12, the case was referred to a magistrate to conduct appropriate proceedings. The parties stipulated the pertinent evidence and filed briefs.

The magistrate then issued a magistrate's decision, attached hereto, which contains detailed findings of fact and conclusions of law. The magistrate's decision includes a recommendation that we deny the request for a writ of mandamus.

{¶3} No party has filed objections to the magistrate's decision. The case is now before the court for review.

{¶4} No error of law or fact is present on the face of the magistrate's decision. We therefore adopt the findings of fact and conclusions of law present in the magistrate's decision. As a result, we deny the request for a writ of mandamus.

*Writ of mandamus denied.*

KLATT and FRENCH, JJ., concur.

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**A P P E N D I X**

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United States Can Company,	:	
	:	
Respondents.	:	
	:	

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

Rendered on September 22, 2011

*Heller, Maas, Moro & Magill Co., L.P.A., and Robert J. Foley,*  
for relator.

*Michael DeWine, Attorney General, and Kevin J. Reis,* for  
respondent Industrial Commission of Ohio.

*Stefanski & Associates LLC, and R. Mark Gottfried,* for  
respondent United States Can Company.

**I N M A N D A M U S**

{¶5} In this original action, relator, Vincent E. Milton, II, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order denying his April 29, 2010 motion for authorization of a lumbar MRI and three lumbar epidural blocks, and to enter an order granting authorization.

Findings of Fact:

{¶6} 1. On July 22, 1986, relator injured his lower back while employed with respondent Ball Corporation, f/k/a United States Can Company ("employer"), a self-insured employer under Ohio's workers' compensation laws. On his application for workers' compensation benefits, relator states that he was employed as a "Scroll Shear Operator" and that he "[b]ent over to unload bottom tray on Scroll Shear #19, felt pain in lower back."

{¶7} 2. The industrial claim (No. 948667-22) is allowed for "strain low back; disc herniations at L3-4 and L4-5 with nerve root compression left L4-L5."

{¶8} 3. In December 2009, relator underwent cervical disc surgery which was performed by a Dr. Kang. This surgery was unrelated to the industrial injury.

{¶9} 4. On February 1, 2010, relator was examined by treating physician Patrick J. Shaughnessy, M.D., during an office visit. In his office note of that date, Dr. Shaughnessy wrote:

SUBJECTIVE: Vincent was last here on October 26, 2009. He states that he has seen improvement since his neck surgery which was done on December 16, 2009 with Dr. Kang. He believes physical therapy is helping him with movement. He does have the pain between the shoulder blades where the surgery was done. It is about a 6 today, ranged between a 6 and a 10. It is very achy and it throbs.  
\* \* \*

{¶10} 5. On March 22, 2010, relator was again examined by Dr. Shaughnessy during an office visit. In his office note of that date, Dr. Shaughnessy wrote:

SUBJECTIVE: Vincent was last here on February 01, 2010. He states that last week was the bad week with him only because he went back to work. The neck pain was increased with the work. The low back pain increased over the

weekend. He noticed that standing on concrete with his shoes off made it worse. He is about a 4 today, ranged between a 4 and a 7, very achy. Numbness in the right finger.

ACTIVITY LEVEL: His activity level has improved with work. He is back to working 8 hours 5 days a week. His sleep quality is good. He is actually able to sleep 5 to 6 hours straight.

\* \* \*

IMPRESSION:

[One] Status post cervical disc surgery 3 months ago.

[Two] Old lumbar disc herniation.

PLAN:

\* \* \*

[Two] We did discuss work setting. He did have release back to work a week ago. He does note mild increased back discomfort.

[Three] I feel it is likely due to deconditioning, but we may need to re-image his back. I do not think we have done that in 6 or 7 years.

{¶11} 6. On April 1, 2010, Dr. Shaughnessy completed a C-9 on which he requested authorization for three lumbar epidurals.

{¶12} 7. On April 8, 2010, Dr. Shaughnessy completed a C-9 on which he requested authorization for a lumbar MRI.

{¶13} 8. On April 22, 2010, relator was again examined by Dr. Shaughnessy during an office visit. In his office note, Dr. Shaughnessy wrote:

SUBJECTIVE: He was last here on March 22, 2010. He is actually having some increased neck pain that started about 2 weeks ago and progressively getting worse. It does cause some headaches in the frontal part of the head at least twice a day. He says it aches and throbs and will have it for about 2 to 3 hours. His low back continues to be a little bit stiff but he has noticed this only because of increased yard work. His overall pain is a 7/8 today, ranged between a 7 and a 9, very

dull and achy. Certain movements especially when he is moving his head or range of motion it does make his pain worse. He is now experiencing tingling in the hands and he is noticing this at night.

ACTIVITY LEVEL: He has been laid off but he is open to be called back to work on Monday \* \* \*.

\* \* \*

PHYSICAL EXAMINATION:

\* \* \*

He is able to flex forward nicely in the lumbar but has pain arising in flexion and pain in extension. Tenderness lumbosacral junction.

\* \* \*

IMPRESSION:

[One] Status post cervical disc injury and surgery, mild flare up.

[Two] Old lumbar disc work injury with flare up.

PLAN:

[One] I think Vince had been off work 3 or 4 months and returning did reaggravate his back injury from 10 years ago. We gave him Medrol pack and that did help.

[Two] We are going to put him back on Celebrex.

[Three] We will start physical therapy if we can get that approved. \* \* \*

{¶14} 9. On April 29, 2010, relator moved for authorization of the C-9 requests, following the self-insured employer's denial of the requests.

{¶15} 10. On July 15, 2010, at the employer's request, relator was examined by Manhal A. Ghanma, M.D. In his six-page narrative report, Dr. Ghanma opines:

RESPONSES to QUESTIONS: The following questions are answered based on reasonable medical probability, on my examination of and history obtained from Mr. Milton, and from review of the medical evidence in the file.

I have accepted the allowed conditions in the claim and the examination findings of his treating physicians, though not necessarily their conclusions.

**Question #1: Once you have had an opportunity to personally evaluate the Claimant and review the enclosed medical records, please provide me with a detailed narrative medical report setting forth your opinion, within a reasonable degree of medical certainty, as to whether the treatment currently being requested by Dr. Shaughnessy, namely a repeat MRI of the lumbar spine and three lumbar epidurals are medically necessary and appropriate for the allowed [conditions] in this claim.**

**Answer:** In my opinion the requests are not appropriate or medically necessary based on the allowed conditions of the claim. Mr. Milton has received more than adequate treatment for his work injury of 1986 that resulted in a low back strain and disc herniations at L3-4 and at L4-5 with nerve root compression with left L4-5. He underwent surgery in 1998 performed by Dr. Kalfas to excise the offending disc by a laminectomy.

He had no objective examination findings documented in the medical records to date that are consistent with lumbar disc herniation at this time. The same is true with respect to his current examination findings with no current objective evidence of an acute radiculopathy relating to disc herniation at L3-L4 or at L4-L5 based on his current physical examination findings.

In addition, Dr. Shaughnessy, his treating physician, has indicated that the examinations that he performed were negative for neurological findings in the lower extremities as detailed in the medical record review above. Dr. Shaughnessy had examined him on multiple occasions in March and April of 2010 and indicated on April 22, 2010 that there were no major neurological signs in the lower extremities.

These documented examination findings are not consistent with L3-4 and L4-5 disc herniations with noted nerve root compression at left L4-5.

Although subjective complaints have been documented, there is no objective evidence to support recurrence of his allowed conditions.

The medical evidence indicates that his low back strain resolved long ago and that the disc herniations at L3-4 and L4-5 were successfully treated in the past.

Accordingly, there is no medical basis for obtaining a repeat MRI of the lumbar spine or for having him undergo three lumbar epidurals at this time for the allowed conditions of his claim. Those allowed conditions have resolved. Any current lumbar pathology would be unrelated by causation or aggravation to the original work injury since that original work injury was successfully treated long ago. In addition, there is no mention of any specific work incident that occurred when he returned to work on March 15, 2010 to support that he developed a new injury at work that would require current evaluation or treatment.

Any current low back evaluation would be for current conditions and current complaints unrelated to the work injury of his claim.

(Emphasis sic.)

{¶16} 11. Following a July 28, 2010 hearing, a district hearing officer ("DHO") issued an order denying relator's April 29, 2010 motion. The DHO's order explains:

The request for Mr. Milton to undergo diagnostic testing, in the form of a lumbar MRI scan, and to undergo three lumbar epidural blocks is denied. The preponderance of the medical evidence on file fails to establish that the proposed diagnostic testing and injections are reasonably related to or medically necessary for treatment of the conditions recognized in this claim.

This decision is based upon the 07/15/2010 report from Dr. Ghanma. All evidence on file with regard to this matter was reviewed and considered.

{¶17} 12. Relator administratively appealed the DHO's order of July 28, 2010.



{¶18} 13. On August 30, 2010, Dr. Shaughnessy wrote:

This is a letter in response to your request for information dated August 10, 2010. I did have the opportunity to review the independent medical examination by Dr. Ghanma.

As you know, Vincent Milton is a 52-year-old male who has had low back pain for many years. He was originally injured in July 1986. He did undergo lumbar surgery in 1998.

I first saw him in March 2000 when he had aggravation of his previous disc herniation. He had a large disc herniation especially on the left at L4-L5. We also noted previous laminectomy at L4-L5. He was seen by anesthesiologist who performed the lumbar epidural steroid injection with eventual success.

As you know, I have been following Vincent over the past 10 years for his neck which has been a problem on and off. He eventually did undergo neck surgery in December 2009.

In reviewing my notes over the past 10 years, there are frequent mentions of ongoing lumbar pain. This is despite treatment for his neck including frequent anti-inflammatories and opiates. In addition since I was treating him for a neck related work injury primarily, I did not specifically address lumbar unless it was really bothering him.

In review of my notes, there is mention of the back in July 2001, April 2002, September 2002, January 2005, September 2006, August 2007, and February 2008. We also looked at the low back in January 2009.

In 2009, most of our attention was directed towards the neck, culminating in surgery in December 2009.

He returned to work fairly quickly after his neck surgery and since that time has had progressive back pain, similar to previous but more severe. I do believe this is just an extension of his ongoing back problem related to his work injury from 1986, status post lumbar surgery with chronic back pain.

We are continuing to try to get approval for an MRI of the lumbar spine to determine how bad it is. At this point, he is still off work due to the neck and the back is not too bad, but

if he has to return to work, I am very concerned that the lumbar condition could be quite limiting.

{¶19} 14. Following a September 10, 2010 hearing, a staff hearing officer ("SHO") issued an order affirming the DHO's order of July 28, 2010. The SHO's order explains:

The Staff Hearing Officer denies the Injured Worker's request for authorization of treatment in the form of "a lumbar MRI study; and three lumbar epidural blocks." The Staff Hearing Officer finds that there is insufficient medical evidence to establish by a preponderance that such treatment is warranted for the allowed conditions in this claim. This finding is based upon the 07/15/2010 medical narrative report of Dr. M. Ghanma, M.D.; as well as the office visit notes of 03/23/2010 [sic] and 04/22/2010 of Dr. Shaughnessy, M.D. In the above office notes, Dr. Shaughnessy opines that the Injured Worker developed increased symptoms of back pain while performing non work related activities such as yard work. This evidence is found to be persuasive.

{¶20} 15. On or about October 5, 2010, another SHO mailed an order refusing relator's administrative appeal from the SHO's order of September 10, 2010.

{¶21} 16. On November 12, 2010, relator, Vincent E. Milton, II, filed this mandamus action.

#### Conclusions of Law:

{¶22} It is the magistrate's decision that this court deny relator's request for a writ of mandamus, as more fully explained below.

{¶23} In *State ex rel. Miller v. Indus. Comm.*, 71 Ohio St.3d 229, 1994-Ohio-204, the court articulated a three-pronged test for the authorization for 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?

{¶24} Relying exclusively upon the report from Dr. Ghanma, the DHO determined that the medical services requested are not reasonably related to the industrial injury nor medically necessary for treatment of the industrial injury.

{¶25} Following relator's administrative appeal, the SHO affirmed the DHO but, instead of exclusive reliance upon Dr. Ghanma's report, the SHO added reliance upon two office notes from Dr. Shaughnessy. The SHO explained that he was relying upon the office notes because "Dr. Shaughnessy opines that the Injured Worker developed increased symptoms of back pain while performing non work related activities such as yard work."

{¶26} Here, relator challenges the conclusion that the SHO drew from the two office notes of Dr. Shaughnessy. According to relator, a careful reading of the office notes shows that they do not support a finding that either yard work or any other non-work related activity caused increased symptoms of back pain.

{¶27} Here, relator ignores the commission's reliance upon Dr. Ghanma's report. That is, relator fails to challenge Dr. Ghanma's report as some evidence upon which the commission can rely.

{¶28} Thus, even if relator is correct in arguing that Dr. Shaughnessy did not opine that relator developed increased back pain while performing non-work related activities, relator has, nevertheless, failed to show that the commission's denial of his motion is unsupported by some evidence, namely, the report of Dr. Ghanma.

{¶29} Because Dr. Ghanma's report independently supports the commission's decision, relator has failed to show entitlement to a writ of mandamus.

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

/s/Kenneth W. Macke  
KENNETH W. MACKE  
MAGISTRATE

#### **NOTICE TO THE PARTIES**

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).