

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State ex rel. Robert C. Ochs, Executor of the	:	
Estate of William D. Ochs, Deceased,	:	
	:	
Relator,	:	No. 11AP-506
	:	
v.	:	(REGULAR CALENDAR)
	:	
Industrial Commission of Ohio and	:	
Ohio Bureau of Workers' Compensation,	:	
	:	
Respondents.	:	

D E C I S I O N

Rendered on July 19, 2012

James L. Deese; Robert C. Ochs Co., L.P.A., and Robert C. Ochs, for relator.

Michael DeWine, Attorney General, and Stephen D. Plymale, for respondents.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

SADLER, J.

{¶ 1} In this original action, relator, Robert C. Ochs, as the executor of the estate of William D. Ochs ("Ochs"), seeks a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order which denied relator's request for an award of compensation for the loss of use of Ochs's lower extremities up to the date of his death and the payment of both medical and funeral expenses and ordering the commission to find that those benefits are payable.

I. BACKGROUND

{¶ 2} Pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth District Court of Appeals, this matter was referred to a magistrate who issued a decision, including findings of fact and conclusions of law, which is appended hereto. The magistrate determined that the commission abused its discretion by failing to acknowledge that relator's former employer, LTV Steel Corporation ("LTV Steel"), had allowed Ochs's claim for more substantial knee conditions, which rendered flawed the underlying premise upon which the commission's orders are based. The magistrate consequently recommended that we issue a writ of mandamus ordering the commission to: (1) acknowledge that prior to his surgery and death, Ochs's claim had been allowed for the conditions listed on the August 17, 2005 motion for clarification; (2) determine whether or not Ochs's death was causally related to the allowed conditions in the claim, and, if so, make a determination concerning the payment of medical, hospital, surgery, and funeral expenses; and (3) to the extent it was raised, determine whether or not there was any accrued permanent total disability ("PTD") compensation which had not been paid to Ochs prior to his death and issue an order addressing the aforementioned issues.

{¶ 3} The commission has filed objections to the magistrate's decision. For the following reasons, we sustain the commission's objections and deny the requested writ of mandamus.

II. THE COMMISSION'S OBJECTIONS

{¶ 4} The commission first objects to number 17 of the magistrate's findings of fact in which the magistrate implies Ochs's cause of death was a heart attack. As set forth by the commission, though a death certificate is not contained in the record, an autopsy report describes the cause of death as "Acute bronchopneumonia following bilateral knee total arthroplasty for bilateral degenerative joint disease of the knees. THERAPEUTIC COMPLICATION." Thus, we agree with the commission's contention that in its current state, finding of fact number 17 is inaccurate. Accordingly, we sustain the commission's objection to the magistrate's finding of fact regarding Ochs's cause of death and strike the phrase "after suffering a heart attack" from the magistrate's seventeenth finding of fact. With the exception of said stricken phrase, we adopt the remainder of the magistrate's factual findings.

{¶ 5} Next, the commission objects to the magistrate's conclusion recommending that this matter be remanded to the commission for rehearing. According to the commission, because Ochs withdrew his application for approval of the knee replacement surgeries and because relator failed to produce any evidence of unpaid PTD compensation, relator is not entitled to a writ of mandamus. We find the commission's position to be well-taken.

{¶ 6} The magistrate noted the April 13, 2005 letter of the Bureau of Workers' Compensation ("BWC") acknowledged LTV Steel's prior allowance of osteoarthritis of both knees, thoraco-lumbar spine, medial menisectomies of both knees, lumbar laminectomy, and left leg phlebitis with pulmonary embolism. However, in the magistrate's view, the commission failed to acknowledge these prior conditions, therefore, the commission's orders denying payment of medical, hospital, surgery, and funeral expenses and accrued PTD compensation are fundamentally flawed and must be reconsidered by the commission.

{¶ 7} Contrary to the magistrate's view, we conclude the lack of prior approval for the knee surgeries, as well as the lack of evidence in the record are dispositive of relator's claim and require that this court deny the requested writ of mandamus.

{¶ 8} In the matter before us, the commission did not deny Ochs's request for prior authorization of surgery, but, rather, Ochs *withdrew* his application seeking prior authorization. The purpose behind securing prior authorization of surgical procedures and hospitalizations is to permit the bureau, the commission or the employer, in the absence of an emergency, to obtain a second opinion as to surgical necessity and to explore other options that may be both less costly and more beneficial to the claimant. *State ex rel. Mercy Hosp. Anderson v. Indus. Comm.*, 66 Ohio St.3d 263, 266 (1993) (affirming judgment in favor of the employer where no emergency existed for which surgeries at issue would have been compensable without prior approval). *See also State ex rel. Rutherford v. Indus. Comm.*, 10th Dist. No. 03AP-1225, 2004-Ohio-5712 (no abuse of discretion in commission's denial of request for payment where relator did not await prior authorization).

{¶ 9} Also, we agree with the commission's contention that in addition to lacking evidence of medical necessity for medical expenses, this record also lacks evidence of

unpaid PTD compensation. The magistrate's decision recognizes this lack of evidence by noting the stipulated record does not reflect: (1) the existence of out-of-pocket medical expenses, (2) a causal relationship between allowed conditions and the surgery, (3) a causal relationship of Ochs's death to the allowed conditions, or (4) evidence of any unpaid PTD compensation. Given our conclusion that this record lacks evidence to support the issues the magistrate recommends be addressed on remand, we find relator is not entitled to the requested writ of mandamus.

{¶ 10} Accordingly, we sustain the commission's objections to the magistrate's conclusions of law.

III. CONCLUSION

{¶ 11} Upon review of the magistrate's decision and an independent review of the record, we sustain the commission's objections to the magistrate's decision. We find that, with the exception of the phrase "after suffering a heart attack" as set forth in finding of fact number 17, the magistrate has properly determined the pertinent facts, and we, therefore, adopt them as our own. However, in accordance with our decision, we reject the magistrate's conclusions of law. Accordingly, the requested writ of mandamus is hereby denied.

*Objections sustained;
writ of mandamus denied.*

FRENCH and CONNOR, JJ., concur.

A P P E N D I X
IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State ex rel. Robert C. Ochs,	:	
Executor of the Estate of	:	
William D. Ochs, Deceased,	:	
Relator,	:	
 v.	 :	No. 11AP-506
Industrial Commission of Ohio and	:	(REGULAR CALENDAR)
Ohio Bureau of Workers' Compensation,	:	
Respondents.	:	

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

Rendered on February 29, 2012

James L. Deese; Robert C. Ochs Co., L.P.A., and Robert C. Ochs, for relator.

Michael DeWine, Attorney General, and Stephen D. Plymale, for respondents.

I N M A N D A M U S

{¶ 12} Relator, Robert C. Ochs, as the executor of the estate of William D. Ochs ("Ochs"), 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 denied relator's request for an award of compensation for the loss of use of Ochs's lower extremities up to the date of his death and the payment of both

medical and funeral expenses and ordering the commission to find that those benefits are payable.

Findings of Fact:

{¶ 13} 1. Ochs sustained a work-related injury on July 12, 1960 while employed with LTV Steel Corporation ("LTV Steel"), a self-insured employer under Ohio's workers' compensation laws.

{¶ 14} 2. Ochs was found to be permanently and totally disabled in 1974.

{¶ 15} 3. LTV Steel filed for bankruptcy in 2001 and the state surplus fund became responsible for Ochs's claim.

{¶ 16} 4. Following the bankruptcy of LTV Steel, Ochs submitted his medical bills to Medicare.¹

{¶ 17} 5. In its early efforts to reconstruct Ochs's claim file by reviewing the records which had been kept by the self-insured employer (including conditions allowed and medical expenses paid for), the Ohio Bureau of Workers' Compensation ("BWC") would only acknowledge that Ochs's claim had been allowed for the following conditions: "Lumbosacral syndrome and possibly a torn left medial meniscus superimposed upon changes resultant from his remote hemiparesis."

{¶ 18} 6. On February 5, 2004, Ochs filed a C-9 form requesting the authorization for a right total knee replacement surgery based on the diagnosis 836.0 which includes the following: "Tear of medial cartilage or meniscus of knee current." [Http://www.icd9data.com/2009/Volume1/800-999/830-839/836/836.0.htm](http://www.icd9data.com/2009/Volume1/800-999/830-839/836/836.0.htm) (accessed Feb. 23, 2012).

{¶ 19} On that C-9 form, Ochs asked that the following additional condition be added to his claim: "715.96 [right] djd." The ICD-9 code for 715.0, which includes .4 and .9, is identified as follows: "Osteoarthritis unspecified whether generalized or localized involving lower leg." [Http://www.icd9data.com/2009/Volume1/710-739/710-719/715/715.96.htm](http://www.icd9data.com/2009/Volume1/710-739/710-719/715/715.96.htm) (accessed Feb. 23, 2012).

¹ The earliest medical bills paid by Medicare in the file date back to 2004, two years before the filing of relator's motion for the payment of same. Relator indicates that someone at LTV Steel told Ochs to file his bills through Medicare and any other insurance he might have.

{¶ 20} 7. Ochs withdrew this C-9 form. This issue was never adjudicated and Ochs did not, at a later time, seek authorization for any surgery.

{¶ 21} 8. Relator submitted a letter to the BWC dated May 20, 2004 in an effort to prove that Ochs's claim had been allowed for additional conditions. That letter provides as follows:

As you are well aware and pursuant to our previous discussions I represent the above captioned individual with regards to his workers' compensation claim. The purpose of this letter is to address a number of concerns I have with regards to this file.

[One] On April 29, 2004 I mailed to your office additional information concerning my client's past treatment involving the lumbar spine and the knees that he was putting thru his private insurance. His former employer, the now bankrupt LTV, had advised him to submit his workers' compensation bills for the knees and lumbar spine thru his private insurance. Apparently, you have never received the medical bills nor any other documents that I had forwarded to your attention. Nevertheless, it is a moot point as this office has received the "Disapproval of Settlement Agreement["] letter and my client has decided against settling.

[Two] According to the Dolphin notes on file dated April 21, 2004 they indicated that your office had spoken with my client directly and that he advised your office that because of his medical history that he could not undergo any surgery. This statement is neither accurate nor correct as my client has indicated that he never advised anyone from your office: that he had or has prostate cancer; or that he can not have any surgery because of being [in] poor cardiovascular health. According to my conversations with your office you indicated that this was in fact correct and that this information had actually been gleaned from the recent medical records on file which are also inaccurate.

[Three] As we had also discussed previously, this claim file needs to be updated concerning the allowed conditions in the claim which were previously accepted and paid for by the self insured employer.

The following is a brief history of the claim to help you resolve this matter post haste:

[One] Date of injury 7/12/1960;

[Two] Arthrotomy & medial menisectomy of the left knee performed at Lakewood Hospital in May 1963 with osteoarthritis;

[Three] Arthrotomy & medial menisectomy of the right knee performed at Lakewood Hospital in 1965 with severe osteoarthritis;

[Four] Lumbar laminectomy and fusion at Lakewood Hospital in September 1966;

[Five] Permanent Total Disability granted by the Industrial Commission of Ohio from October 20, 1974 forward.

In accordance with our prior discussions when we discussed and reviewed the medical evidence in the file please update Dolphin to properly reflect the above stated conditions. My client is in intractable pain and in dire need of medical treatment for the allowed conditions but cannot receive it because of circumstances beyond his control.

{¶ 22} 9. It is undisputed that the BWC began attempting to reconstruct Ochs's claim by reviewing the medical records and bills contained in the file from LTV Steel.

{¶ 23} 10. According to relator, the BWC's efforts to reconstruct Ochs's claim file proceeded too slowly. Ten months later, on March 24, 2005, relator sent a letter to then-Governor Bob Taft arguing that LTV Steel had paid medical bills for certain conditions. Relator asserted that Ochs needed surgery and that he was unable to get any results from the BWC.

{¶ 24} 11. In a letter dated April 13, 2005, Bob Riehle, constituent affairs – BWC, informed Ochs of the following:

Your March 24, 2005 letter to Ohio Governor Bob Taft, regarding some already approved medical conditions in the above BWC claim, was referred to our office, for response.

Per my request, BWC Self-Insured Claim Service Specialist Loyazelle Terry, has reviewed Mr. Ochs's self-insured bankrupted claim and found that the knee and lumbar conditions which your letter refers to, had indeed been accepted, and paid for, by the former self-insured employer.

Loyazelle has informed me that she will update the claim's allowed conditions on our computer system, to reflect this. Should you have further questions, Loyazelle's phone number is * * *.

Thank you for bringing this situation to our attention.

{¶ 25} 12. The BWC sent medical records from the 1960s to Michael J. Hoeflinger, M.D., for a medical review to determine whether or not Ochs's claim should be allowed for additional conditions.

{¶ 26} 13. In a letter dated September 12, 2005, Dr. Hoeflinger responded in the affirmative:

After reviewing the documentation which was included, it is clear that Mr. Ochs underwent open meniscectomy of the medial meniscus of each knee. It is well documented in all orthopedic literature that an open meniscectomy predisposes to arthritic changes. Mr. Ochs was noted at the time of his right medial meniscectomy that he already had preexisting arthritis. Despite this, the meniscectomy clearly would have hastened the progression of arthritis and it is my opinion that the additional diagnoses of posttraumatic arthritis of both left and right knees as well as thrombophlebitis (which was a result of medial meniscectomy and PE secondary to medial meniscectomy) are clearly related to the industrial injury.

{¶ 27} 14. Because Ochs wished to proceed with surgery, he was examined by various physicians who informed him that, because of his many health problems, none of which are allowed conditions in this claim, he was a very high-risk candidate for bilateral knee replacement surgery and was cleared for surgery only as a high risk.

{¶ 28} 15. The reason Ochs was considered to be a very high-risk candidate for surgery was that he had numerous significant health problems, including the following: "Congestive heart failure. Obstructive chronic bronchitis. Paroxysmal ventricular tachycardia. Coronary atherosclerosis. Diabetes mellitus. Benign prostatic hyperplasia. Osteoarthritis." "Severe dilated cardiomyopathy. Recurrent Clostridium difficile colitis."

{¶ 29} 16. Ochs underwent bilateral total knee replacement surgery on September 26, 2005.

{¶ 30} 17. Unfortunately, after suffering a heart attack, Ochs died on September 28, 2005.

{¶ 31} 18. On September 29, 2006, relator filed a C-86 motion seeking death benefits, an award for the loss of use of Ochs's legs, payment of medical and funeral expenses, accrued permanent total disability ("PTD") benefits and asked that the claim be additionally allowed for several new conditions. Specifically, that C-84 requested:

The executor on behalf of the estate of William D. Ochs hereby files this application for death benefits; pymnt funeral/medical bills for hospital dates below, addtl. medical conditions; accrued PTD benefits; as well as loss of use of the left and right legs. That the death claim be allowed for the following medical conditions all by the way of either direct causation/aggravation/flow thru basis: paroxymal atrila flutter/sic sinus syncope syndrome; ulcerative protosigmoiditis; acute renal failure; hypercalcemia; left knee laceration; hyperkalemia; CAD; CABG; PTCA; pulmonary hypertension/hypotension; isolated phlebitis left arm; cardiomyopathy; clostridium difficile colitis; leukocytosis; depression; septicemia; right hip/leg hematoma with abcess; anemia; hematoma of the right lower lobe; right trochanteric bursitis/laceration; viral pharyngitis/laryngitis; sprain/contusion right elbow, hip & bilateral knees; right shoulder sprain; closed head injury; right thumb laceration; abrasion/skin tear left shoulder; cervical strain and any others dxs. listed inside medical records not noted above. Autopsy report; Lakewood Hospital records dated: 4/13-18/05; 4/10-13/05; 2/16/04; 11/21/04; 8/21-25/04; 5/14-16/04; 6/18-7/6/05[;] 7/31-8/12/05; 8/10-13/05; 9/5-7/05. Hillcrest Hospital * * *: 5/15-29/05; 4/20-5/2/05; 9/18-28/05. SouthPointe Hospital: 5/2-15/05; Bradley Bay Health Center 4/7-17/05. Medical bills attached. Additional medical documentation to be filed in the form of an expert narrative report as well as additional medical records.

{¶ 32} 19. In an order mailed February 6, 2007, the BWC dismissed relator's motion because of the failure to provide the death certificate as requested. Specifically, that order provides:

The following decision was made by the Bureau of Workers' Compensation (BWC).

The C86 Motion filed 9/29/06 for Death Benefits and additional conditions is dismissed.

This information was requested on 11/21, 11/29, 12/29/06 and 1/22/07.

This decision is based on:
the failure to provide the death certificate as requested for a physician review.

{¶ 33} 20. Relator's appeal was heard before a district hearing officer ("DHO") on October 10, 2007. The DHO affirmed the administrator's order and dismissed the C-86 because relator still had failed to submit a death certificate.

{¶ 34} 21. Relator's further appeal was heard before a staff hearing officer ("SHO") on November 20, 2007. In denying the request, the SHO modified the prior DHO's order stating as follows:

The Staff Hearing Officer has reviewed and considered the evidence contained in the record.

The decedent's counsel alleges the C-86 motion was filed on 09/28/2006. The Staff Hearing Officer is unable to read the receipt stamp on the document provided for hearing. Therefore, the filing date remains 09/29/2006, a timely filing date.

It is the order of the Staff Hearing Officer that the motion for death benefits is denied. The Staff Hearing Officer finds no medical evidence that causally relates the injured worker's death to the injury of 07/12/1960.

It is the finding of the Staff Hearing Officer that there is no evidence of a dependent in this claim. Consequently, accrued compensation is denied.

It is the further order of the Staff Hearing Officer that payment of bills and loss of use of the left and right legs are denied. The Staff Hearing Officer finds no evidence of any unpaid bills related to the conditions allowed in this claim, nor is there any medical evidence of a loss of use of the legs related to this claim.

It is the order of the Staff Hearing Officer that any claim for the additional allowance of any medical condition abated at the injured worker's death.

{¶ 35} 22. Relator's appeal was refused by an order of the commission mailed January 18, 2008.

{¶ 36} 23. Thereafter, relator challenged the commission's order by appealing to the Cuyahoga County Court of Common Pleas pursuant to R.C. 4123.512.

{¶ 37} 24. The BWC filed a motion for summary judgment arguing that the court lacked jurisdiction to consider relator's claims because the commission's ruling did not affect Ochs's right to participate in the workers' compensation system; it only affected the determination of the extent and nature of his disability and denied him additional benefits under his claim. The court agreed. The court also granted summary judgment to the BWC on the issue of death benefits finding that there were no dependents with standing to file a claim for death benefits in that case.

{¶ 38} 25. The common pleas court decision granting summary judgment in favor of the BWC was affirmed by the Eighth District Court of Appeals. *Ochs v. Bur. of Workers' Comp.*, 8th Dist. No. 93824, 2010-Ohio-2103.

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

{¶ 40} 27. Relator concedes that death benefits are not payable in this situation, and only seeks accrued PTD compensation, compensation for Ochs's loss of use of his legs, and the payment of both medical and funeral expenses.

Conclusions of Law:

{¶ 41} Because the magistrate finds that the commission abused its discretion by failing to acknowledge that LTV Steel had allowed Ochs's claim for more substantial knee conditions, the underlying premise upon which the commission's orders are based is flawed and it is this magistrate's decision that this court should grant a writ of mandamus.

{¶ 42} The Supreme Court of Ohio has set forth three requirements which must be met in establishing a right to a writ of mandamus: (1) that relator has a clear legal right to the relief prayed for; (2) that respondent is under a clear legal duty to perform

the act requested; and (3) that relator has no plain and adequate remedy in the ordinary course of the law. *State ex rel. Berger v. McMonagle*, 6 Ohio St.3d 28 (1983).

Allowed Conditions/Newly Allowed Conditions

{¶ 43} Relator argues that the commission abused its discretion by not acknowledging that LTV Steel had, in fact, allowed Ochs's claim for certain conditions including osteoarthritis of both knees. Relator contends that his March 24, 2005 letter to then-Governor Taft resulted in an acknowledgement by the BWC that osteoarthritis of the knees and certain back conditions had been accepted by the former self-insured employer—LTV Steel—prior to 2001.

{¶ 44} Despite the fact that the April 13, 2005 response from the BWC indicated that his claim had already been allowed for additional conditions by LTV Steel, Ochs filed a C-86 motion on August 17, 2005, asking that his claim allowances be clarified to include the following conditions:

1) post traumatic arthritis of the left knee; 2) post traumatic arthritis of the right knee; 3) thrombophlebitis and pulmonary embolism secondary to the left medial meniscectomy performed 5/4/1963; 4) laminectomy of L4-S1; bilateral foraminotomy at L4-5, L5-S1; H type spinal fusion at L4-5 & L5-S1; 5) 4" x 2" left iliac graft secondary to fusion. The claim had been previously allowed for the generic conditions of torn medial meniscus of the left & right knees, lumbosacral sprain, DDD of L5-S1.

{¶ 45} The commission's argument for refusing to adjudicate this motion is that because this motion sought the allowance of additional new conditions, which were not already allowed, it abated at the time of Ochs's death pursuant to R.C. 4123.66 and Ohio Adm.Code 4123-5-21(A). The commission has, all along, treated this as a motion asking that new conditions be allowed; however, it is not. Instead, the August 17, 2005 motion asked the BWC to officially, as opposed to unofficially, acknowledge that Ochs's claim had already been allowed for these conditions by LTV Steel.

{¶ 46} The magistrate finds that LTV Steel had allowed Ochs's claim for these conditions long before the time of the surgery despite the fact that no order from the commission lists them. In the April 13, 2005 letter, the BWC acknowledged that LTV Steel had, in fact, allowed Ochs's claim for the following conditions:

1) post traumatic arthritis of the left knee; 2) post traumatic arthritis of the right knee; 3) thrombophlebitis and pulmonary embolism secondary to the left medial meniscectomy performed 5/4/1963; 4) laminectomy of L4-S1; bilateral foraminotomy at L4-5, L5-S1; H type spinal fusion at L4-5 & L5-S1; 5) 4" x 2" left iliac graft secondary to fusion. The claim had been previously allowed for the generic conditions of torn medial meniscus of the left & right knees, lumbosacral sprain, DDD of L5-S1.

Further, it is undisputed that Ochs already had undergone the following surgical procedure: open meniscectomy of the medial meniscus of both knees. This motion did not seek the allowance of any new conditions. It sought official confirmation that LTV Steel had, in fact, already allowed these conditions. As such, the abatement principle should not have been applied.

{¶ 47} Finding that the additional conditions were actually allowed in Ochs's claim, the magistrate will address the next two issues in that context.

Payment of Medical and Funeral Expenses

{¶ 48} Because the magistrate has determined that these additional conditions were actually allowed in Ochs's claim, any medical expenses relative thereto that Ochs incurred prior to the date of his surgery could have been submitted to and paid by the BWC. In the present case, Ochs's medical bills have already been paid by Medicare and it is unknown whether or not Ochs had any out-of-pocket expenses.

{¶ 49} Ohio Adm.Code 4123-3-23 requires that bills for medical services be filed with the BWC or the commission within two years of the date of service. In the present case, relator filed the motion for payment of medical expenses on Ochs's behalf on September 29, 2006. Applying Ohio Adm.Code 4123-3-23, to the extent that relator can establish that Ochs had out-of-pocket expenses for medical services rendered from September 29, 2004 until the date of his death, those bills can be submitted to the BWC or the commission and to the extent that the record does or does not establish that there were out-of-pocket expenses, the commission should consider that evidence and make a decision.

{¶ 50} As part of the motion, relator also requested that the BWC pay for the medical services rendered on Ochs's behalf relative to the September 26, 2005 knee

surgery. The commission argues that it is not required to pay for the surgery because the surgery was for non-allowed conditions and because Ochs did not obtain prior authorization for the surgery.

{¶ 51} Ohio Adm.Code 4123-6-37 provides for the payment of hospital bills. As a general rule, the BWC assumes the costs of hospital in-patient services based on usual and customary methods of payment. However, unless prior authorization is obtained in advance of the hospitalization, the BWC may deny paying for room and board charges. Specifically, Ohio Adm.Code 4123-6-37 provides, in pertinent part:

(C) Bureau fees for hospital inpatient services.

(1) Bureau fees for hospital inpatient services will be based on usual and customary methods of payment * * *.

(2) Except in cases of emergency, prior authorization must be obtained in advance of all hospitalizations. * * * Failure to comply with this rule shall be sufficient ground for denial of room and board charges by the bureau * * *. Room and board charges denied pursuant to this rule may not be billed to the injured worker.

{¶ 52} Both the BWC and the commission have consistently refused to consider and accept that LTV Steel had, in fact, allowed Ochs's claim for more significant knee conditions than possible meniscus tears even though Ochs had already undergone open meniscectomy surgery of the medial meniscus of both knees and had been declared permanently and totally disabled in 1974. Given the BWC's position, the BWC never would have authorized this surgery. As such, Ochs never could have been granted prior authorization for the surgery and to refuse to pay for the surgery now solely on those grounds is unreasonable.

{¶ 53} If relator can demonstrate a causal relationship between the allowed conditions in the claim and the surgery, and if relator can demonstrate that those medical services were reasonably related to the allowed conditions, were reasonably necessary to treat the allowed conditions, and that the cost of those services was medically reasonable, then those services should be paid. *State ex rel. Miller v. Indus. Comm.*, 71 Ohio St.3d 229 (1994). The only portion of Ochs's hospital stay for which the

BWC need not even consider reimbursement concerns the room and board charges for which Ochs may not be billed.

{¶ 54} As indicated previously, the record indicates that Ochs's medical bills had been submitted through Medicare; however, it is unclear from the record whether or not relator submitted Ochs's hospital/surgery bills to Medicare. In the event that relator incurred out-of-pocket expenses for room and board, and in the event that the commission finds that relator demonstrated that Ochs's surgery was reasonably related to and necessary for treatment of the allowed conditions and the cost was medically reasonable, the commission should determine whether or not Ochs was actually billed for room and board charges and, to the extent that there were out-of-pocket expenses and in spite of the fact that the hospital, and not the BWC, was responsible for billing Ochs for those charges, it is this magistrate's opinion that the BWC should reimburse relator for those out-of-pocket expenses.

{¶ 55} R.C. 4123.66 provides for the payment of additional compensation, including reasonable funeral expenses. Specifically, R.C. 4123.66(A) provides, in pertinent part:

In addition to the compensation provided for in this chapter, the administrator of workers' compensation shall disburse and pay from the state insurance fund the amounts for medical, nurse, and hospital services and medicine as the administrator deems proper and, in case death ensues from the injury or occupational disease, the administrator shall disburse and pay from the fund reasonable funeral expenses in an amount not to exceed fifty-five hundred dollars. The bureau of workers' compensation shall reimburse anyone, whether dependent, volunteer, or otherwise, who pays the funeral expenses of any employee whose death ensues from any injury or occupational disease as provided in this section.

{¶ 56} Inasmuch as the magistrate has found that Ochs's claim had actually been allowed for certain additional conditions, the commission needs to consider the medical evidence and determine if Ochs's death was causally related to the allowed conditions in the claim. If so, funeral expenses should be paid.

{¶ 57} Finding that Ochs's claim had been allowed for certain additional conditions, and finding that Ochs was entitled to be reimbursed for any out-of-pocket expenses related to the allowed conditions from September 29, 2004 until Ochs's death including the surgery, and finding that relator may be entitled to be reimbursed for reasonable funeral expenses up to \$5,500 if the commission determines that Ochs's death was causally related to the allowed conditions in the claim, this court should grant a writ of mandamus ordering the commission to address these issues.

Loss of Use/Accrued PTD Compensation

{¶ 58} Relator also sought a loss of use award for Ochs's loss of use of both of his legs and payment of accrued PTD compensation.

{¶ 59} Before addressing this issue, the magistrate specifically notes that relator has acknowledged that Ochs died without any dependents. As such, there is no issue to consider regarding dependents under R.C. 4123.59. Relator's entire argument focuses on whether or not Ochs's estate was entitled to an award for Ochs's scheduled loss of use of his legs filed after and not before his death, which award would have terminated at Ochs's death. Relator also seeks any accrued PTD compensation that was not paid to Ochs before he died.

{¶ 60} The Supreme Court of Ohio has held that the estate of a deceased worker's surviving spouse was not entitled to the payment of permanent partial disability benefits that accrued after the death of the spouse, given that the right to compensation was a personal right of the injured worker. *State ex rel. Estate of McKenney v. Indus. Comm.*, 110 Ohio St.3d 54, 2006-Ohio-3562. In that case, the Supreme Court of Ohio also held that a dependent's estate can recover only workers' compensation benefits that had accrued to the dependent, before the dependent's death, but had not been paid. In the *McKenney* case, the injured worker sustained the loss of use of all four limbs and, therefore, would have been entitled to 850 weeks of scheduled loss benefits under R.C. 4123.57(B) if he had lived.

{¶ 61} R.C. 4123.57(B), itself, specifically provides that an award of unpaid installments may only be awarded to the surviving spouse, or if there is no surviving spouse, to the dependent children of the injured worker and, if there are no such

children, then to such dependents as the administrator determines. In the instant claim, Ochs had no surviving spouse, no dependent children, and no other dependents at the time of his death.

{¶ 62} The Supreme Court of Ohio has also held that the workers' compensation statute of limitations, under R.C. 4123.52, bars the retroactive payment of statutory PTD compensation for a period in excess of two years before the motion for compensation was filed. It is undisputed that Ochs had not filed an application for an award of loss of use of his legs at the time of his death. Therefore, the estate of Ochs can only claim, at most, an award that would not exceed the compensation which Ochs might have received for a period of two years prior to the date of his death, September 28, 2005.

{¶ 64} In order to qualify for a loss of use award, relator was required to present medical evidence demonstrating that, for all intents and purposes, Ochs had lost the use of both of his legs. *State ex rel. Alcoa Bldg. Prods. v. Indus. Comm.*, 102 Ohio St.3d 341, 2004-Ohio-3166.

{¶ 65} In *Alcoa*, at ¶ 10, the court set forth the historical development of scheduled awards for loss of use under R.C. 4123.57(B) as follows:

Scheduled awards pursuant to R.C. 4123.57(B) compensate for the "loss" of a body member and were originally confined to amputations, with the obvious exceptions of hearing and sight. In the 1970s, two cases—*State ex rel. Gassmann v. Indus. Comm.* (1975), 41 Ohio St.2d 64, 70 O.O.2d 157, 322 N.E.2d 660, and *State ex rel. Walker v. Indus. Comm.* (1979), 58 Ohio St.2d 402, 12 O.O.3d 347, 390 N.E.2d 1190—construed "loss," as similarly used in R.C. 4123.58, to include loss of use without severance. *Gassmann* and *Walker* both involved paraplegics. In sustaining each of their scheduled loss awards, we reasoned that "[f]or all practical purposes, relator has lost his legs to the same effect and extent as if they had been amputated or otherwise physically removed." *Gassmann*, 41 Ohio St.2d at 67, 70 O.O.2d 157, 322 N.E.2d 660; *Walker*, 58 Ohio St.2d at 403-404, 12 O.O.3d 347, 390 N.E.2d 1190.

{¶ 66} In *Alcoa*, the claimant, Robert R. Cox, sustained a left arm amputation just below his elbow. Due to continuing hypersensitivity at the amputation site, Cox was

prevented from ever wearing a prosthesis. Consequently, Cox filed a motion seeking a scheduled loss of use award for the loss of use of his left arm.

{¶ 67} Through videotape evidence, Alcoa established that Cox could use his remaining left arm to push open a car door and to tuck paper under his arm. In spite of this evidence, the commission granted Cox an award for the loss of use of his left arm.

{¶ 68} Alcoa filed a mandamus action which this court denied. Alcoa appealed as of right to the Supreme Court of Ohio.

{¶ 69} Affirming this court's judgment and upholding the commission's award, the Supreme Court explained, at ¶ 10-15:

Alcoa urges the most literal interpretation of this rationale and argues that because claimant's arm possesses some residual utility, the standard has not been met. The court of appeals, on the other hand, focused on the opening four words, "for all practical purposes." Using this interpretation, the court of appeals found that some evidence supported the commission's award and upheld it. For the reasons to follow, we affirm that judgment.

Alcoa's interpretation is unworkable because it is impossible to satisfy. *Walker* and *Gassmann* are unequivocal in their desire to extend scheduled loss benefits beyond amputation, yet under Alcoa's interpretation, neither of those claimants would have prevailed. As the court of appeals observed, the ability to use lifeless legs as a lap upon which to rest a book is a function unavailable to one who has had both legs removed, and under an absolute equivalency standard would preclude an award. And this will always be the case in a nonseverance situation. If nothing else, the presence of an otherwise useless limb still acts as a counterweight—and hence an aid to balance—that an amputee lacks. Alcoa's interpretation would foreclose benefits to the claimant who can raise a mangled arm sufficiently to gesture or point. It would preclude an award to someone with the hand strength to hold a pack of cards or a can of soda, and it would bar—as here—scheduled loss compensation to one with a limb segment of sufficient length to push a car door or tuck a newspaper. Surely, this could not have been the intent of the General Assembly in promulgating R.C. 4123.57(B) or of *Gassmann* and *Walker*.

Pennsylvania defines "loss of use" much as the court of appeals did in the present case, and the observations of its judiciary assist us here. In that state, a scheduled loss award requires the claimant to demonstrate either that the specific bodily member was amputated or that the claimant suffered the permanent loss of use of the injured bodily member for all practical intents and purposes. Discussing that standard, one court has written:

"Generally, the 'all practical intents and purpose' test requires a more crippling injury than the 'industrial use' test in order to bring the case under section 306(c), supra. However, it is not necessary that the injured member of the claimant be of absolutely no use in order for him to have lost the use of it for all practical intents and purposes." *Curran v. Walter E. Knipe & Sons, Inc.* (1958), 185 Pa.Super. 540, 547, 138 A.2d 251.

This approach is preferable to Alcoa's absolute equivalency standard. Having so concluded, we further find that some evidence indeed supports the commission's decision. Again, Dr. Perkins stated:

"It is my belief that given the claimant's residual hypersensitivity, pain, and tenderness about his left distal forearm, that he is unable to use his left upper limb at all and he should be awarded for the loss of use of the entire left upper limb given his symptoms. He has been given in the past loss of use of the hand, but really he is unable to use a prosthesis since he has had the amputation, so virtually he is without the use of his left upper limb * * *."

{¶ 70} The commission points out that evidence in the record establishes that Ochs had not lost the use of his legs. Specifically, records from Lakewood Hospital dated May 14, 2004 indicate Ochs:

Ambulates [with] cane. Says was in restaurant, knees buckled [and] he fell, to have both knees replaced. * * * Has [electric wheelchair] but can't get it through doorways a[t] home. [Patient] usually uses cane – says [at] times he uses 2 canes to ambulate.

{¶ 71} Records dated June 18, 2005 indicate that: "This patient is severely limited in his physical activities and uses a walker to walk."

{¶ 72} Physical therapy notes indicate that "[patient] amb[ulates] 12 ft [with] ww." Aside from a reference to Ochs recently crawling on his knees at home, the medical evidence indicates that Ochs did not experience a total loss of use of his legs before he died. As such, relator cannot demonstrate that Ochs would have been entitled to award of compensation for the total loss of the use of his legs. The evidence simply does not warrant the granting of such an award and there is no reason to order the commission to re-determine this issue. While there is no evidence in the stipulated record that there is any unpaid PTD compensation that has not already been paid, the commission needs to address this issue.

{¶ 73} Based on the foregoing, it is this magistrate's decision that this court should issue a writ of mandamus ordering the commission to: (1) acknowledge that, prior to his surgery and death, Ochs's claim had been allowed for the conditions listed on the August 17, 2005 motion for clarification; (2) determine whether or not Ochs's death was causally related to the allowed conditions in the claim, and, if so, make a determination concerning the payment of medical, hospital, surgery, and funeral expenses; and (3) to the extent it was raised, determine whether or not there was any accrued PTD compensation which had not been paid to Ochs prior to his death, and issue an order addressing the aforementioned issues.

/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).