

[Cite as *State ex rel. Barber v. Indus. Comm.*, 2011-Ohio-5886.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Bret M. Barber,	:	
Relator,	:	
v.	:	No. 10AP-912
Industrial Commission of Ohio and	:	
Mental Retardation & Dev[elopmental]	:	(REGULAR CALENDAR)
Disab[ilities], Gallipolis Developmental	:	
Center,	:	
Respondents.	:	
	:	

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D E C I S I O N

Rendered on November 15, 2011

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*The Bainbridge Firm, LLC, and Christopher J. Yeager*, for relator.

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

*Michael DeWine*, Attorney General, and *Douglas R. Unver*, for respondent Department of Developmental Disabilities, Gallipolis Developmental Center.

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IN MANDAMUS  
ON OBJECTION TO THE MAGISTRATE'S DECISION

FRENCH, J.

{¶1} Relator, Bret M. Barber ("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 denied relator's request for authorization of a thoracic MRI and to enter an order granting that request.

{¶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 were submitted concerning the magistrate's findings of fact, and we adopt them as our own.

#### I. BACKGROUND

{¶3} In brief, relator suffered a work-related injury in June 2006. The claim was allowed for an open wound of the left wrist, contusion of the back, and sprain of the neck, thoracic region, and lumbar region. Relator received treatment for his injuries.

{¶4} Relator sought chiropractic care in March 2010. Richard E. Thompson, D.C., completed a C-9 requesting authorization for "Thoracic MRI For Diagnostic Purpose." The employer's managed care organization ("MCO") denied the request, but thereafter obtained a review by Todd Conley, D.C. Dr. Conley concluded that the requested MRI was not related to the original injuries, which were self-limiting, and was "not reasonably necessary for any of the allowed conditions of this 2006 claim."

{¶5} Relying on Dr. Conley's report, a district hearing officer denied relator's request to authorize the MRI, and a staff hearing officer affirmed. As noted, relator filed this mandamus action, and the magistrate recommended that we deny the request for a writ.

## II. RELATOR'S OBJECTION

{¶6} Relator filed an objection to the magistrate's decision. In it, relator contends the following: " 'Contrary to the magistrate's finding, there is no evidence relied upon by the commission in denying the requested diagnostic MRI that properly considered or employed [Ohio Adm.Code] 4123-6-31(F).' " We disagree.

{¶7} As the magistrate explained, the commission relied on Dr. Conley's report to deny the request for authorization of an MRI under Ohio Adm.Code 4123-6-31(F) because it was not medically necessary. In his report, Dr. Conley concluded that the request for an MRI was not reasonable. Specifically, it was not related to the 2006 claim or the allowed injuries, given the passage of time and the self-limiting nature of the allowed conditions. Because Dr. Conley's report was some evidence upon which the commission could rely, the commission did not abuse its discretion by denying relator's request. Therefore, we overrule relator's objection.

## III. CONCLUSION

{¶8} In conclusion, based on our independent review, 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.

*Objection overruled;  
writ of mandamus denied.*

BRYANT, P.J., and CONNOR, J., concur.

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

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Relator,	:	
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	:	
Industrial Commission of Ohio and	:	(REGULAR CALENDAR)
Mental Retardation & Dev[elopmental]	:	
Disab[ilities], Gallipolis Developmental	:	
Center,	:	
	:	
Respondents.	:	
	:	

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

Rendered on August 10, 2011

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*The Bainbridge Firm, LLC, and Christopher J. Yeager, for relator.*

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

*Michael DeWine, Attorney General, and Douglas R. Unver, for respondent Department of Developmental Disabilities, Gallipolis Developmental Center.*

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IN MANDAMUS

{¶9} In this original action, relator, Bret M. Barber, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order

denying his request for authorization of a thoracic MRI, and to enter an order granting the request.

Findings of Fact:

{¶10} 1. On June 7, 2006, relator sustained an industrial injury when he attempted to subdue a resident of the Gallipolis Developmental Center. The industrial claim (No. 06-834422) is allowed for:

Open wound of left wrist; contusion of back; sprain of neck; sprain thoracic region; sprain lumbar region.

{¶11} 2. Following the industrial injury, relator received treatments from chiropractor Kelly J. Roush, D.C., at the Holzer Clinic. Relator's last treatment at the clinic was on August 21, 2006.

{¶12} 3. On March 15, 2010, relator initially was examined by chiropractor Richard E. Thompson, D.C.

{¶13} 4. On March 29, 2010, Dr. Thompson completed a C-9 requesting authorization for "thoracic MRI, for diagnostic purpose."

{¶14} 5. By letter dated April 1, 2010, the employer's managed care organization ("MCO") denied the C-9 request. The letter states in part:

The clinical rational for this determination is as follows:

THERE HAS BEEN A 3.5 YEAR GAP IN CARE. THIS CLAIM IS ALLOWED FOR SELF-LIMITING SPRAINS AND CONTUSIONS THAT HAVE FAR EXCEEDED HEALING TIME.

{¶15} 6. On April 7, 2010, Dr. Thompson responded to the MCO's denial of the C-9 request:

When Mr. Barber entered the office on March 15, 2010, he stated that he obviously had stayed away from care because

he basically had no access to conservative, natural care. He has been taking some muscle relaxers for his work injury of 2006 but he doesn't like to take a lot of medications. Upon his visit on March 15th, he stated about three weeks prior to that he started having exactly the same pain that he has for his allowed diagnoses on his worker's comp claim of June 7, 2006. Another reason that he has been unable to receive care for this injury is the fact of traveling to his doctor and my office is closer for him to receive proper care.

His diagnoses at this time are listed as cervical, thoracic and lumbar sprain/strain. Typically this seems to sound like it is not a serious condition; however, Mr. Barber has never had the opportunity to have his case totally worked up. It is my professional opinion that he has got more serious injuries resulting from this June 7, 2006 injury and from the results of his exam of restricted motion in these 3 areas along with muscle testing showing a weakness in the lower lumbar spine.

{¶16} 7. The MCO obtained a review from chiropractor Todd Conley, D.C., dated April 29, 2010. Dr. Connley wrote:

The [injured worker] was ultimately approved for 25 chiropractic sessions, the last one being on 8/21/06. This note states "...Seen for evaluation of the cervicothoracic and lumbar spine. Patient rates the pain 2-3/10...Thoracolumbar region is tense and aches but is improving overall..." There is a gap in medical care until 3/15/10. The orthopedic neurological and physical examination from Richard Thompson, DC dated 3/15/10 reports cervical, thoracic and lumbar pain, tenderness and swelling and recommends further chiropractic treatment and x-rays.

\* \* \*

The [attorney of record] is appealing the denial of C-9 dated 03/29/10 requesting thoracic MRI for diagnostic purposes for [dates of service] 3/28/10 to 4/29/10 as requested by Richard Thompson, DC. This claim is allowed for a self limiting thoracic sprain from date of injury 6/7/06. Per Official Disability Guidelines, ODG, sprains have a normal period of resolution of nine to ten weeks. The [injured worker] had an initial trial of 25 chiropractic treatments in 2006 and did not seek further care for over three and a half years. The

thoracic x-ray dated 6/8/06 report[s] no evidence of an osseous injury. This claim is allowed for a self limiting thoracic sprain now almost four years post-injury. PER ODG, this allowed condition is well past the normal period of resolution. The requested thoracic MRI is no longer related to the original injury and is not reasonably necessary for any of the allowed conditions of this 2006 claim. Therefore, the requested treatment remains denied.

{¶17} 8. Following a June 15, 2010 hearing, a district hearing officer ("DHO") issued an order denying the C-9:

The Injured Worker's request to approve a thoracic MRI in this claim is denied. The District Hearing Officer is not persuaded that the requested diagnostic care is related to, and reasonably necessary for the treatment of, the allowed soft-tissue conditions in this claim or the 2006 work injury that is the subject of this claim.

This order is based on Dr. Conley's 04/29/2010 report.

{¶18} 9. Relator administratively appealed the DHO's order of June 15, 2010.

{¶19} 10. Following a July 27, 2010 hearing, a staff hearing officer ("SHO") issued an order stating:

The order of the District Hearing Officer, from the hearing dated 06/15/2010, is affirmed.

The Staff Hearing Officer affirms the denial of the C-9 dated 03/29/2010 from Dr. Thompson requesting authorization of a thoracic MRI. Based on the file review report from Dr. Conley dated 04/29/2010, the Staff Hearing Officer finds that the proposed test is not necessary or appropriate for the allowed conditions of the claim.

The Staff Hearing Officer further finds that the provisions of Ohio Adm. Code 4123-6-31(F), pertaining to payment for diagnostic tests such as the MRI at issue today, limits approval to cases where such tests are "medically necessary." Dr. Conley's report persuasively indicates that the requested MRI in this claim is not medically necessary.

{¶20} 11. On August 20, 2010, another SHO mailed an order refusing relator's administrative appeal from the SHO's order of July 27, 2010.

{¶21} 12. On September 24, 2010, relator, Bret M. Barber, 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 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 service medically reasonable?

{¶24} In *State ex rel. Jackson Tube Servs., Inc. v. Indus. Comm.*, 99 Ohio St.3d 1, 2003-Ohio-2259, the court recognized the problem of the claimant not knowing what conditions to seek additional allowance for without first undergoing surgery to obtain the diagnosis that could be the basis for an additional claim allowance. *Id.* at ¶25. In *Jackson*, the court upheld the surgical authorization.

{¶25} Ohio Adm.Code 4123-6-31(F) provides:

Payment for x-ray examinations (including CT, MRI, and discogram) shall be made when medical evidence shows that the examination is medically necessary either for the treatment of an allowed injury or occupational disease, or for diagnostic purposes to pursue more specific diagnoses in an allowed claim. Providers shall follow all prior authorization requirements in effect at the time when requesting authorization and payment for such studies.



{¶26} Here, relator points out that Ohio Adm.Code 4123-6-31(F) permits authorization of an MRI in two instances: (1) when it is medically necessary for treatment of an already allowed condition, and (2) when it is medically necessary for diagnostic purposes to pursue more specific diagnoses in an allowed claim.

{¶27} Relator further points out that he sought MRI authorization for diagnostic purposes to pursue more specific diagnoses that could be the basis for additional allowances. He did not claim that the MRI request was medically necessary to treat the allowed conditions. As Dr. Thompson stated in his April 7, 2010 letter, "[i]t is my professional opinion that he has got more serious injuries resulting from" the industrial injury.

{¶28} Here, relator claims that the commission failed to properly apply Ohio Adm.Code 4123-6-31(F) by its reliance upon Dr. Conley's report. According to relator, "Dr. Conley never addressed within his review whether the MRI is appropriate as a diagnostic tool to pursue more conditions within the claim." (Relator's brief at 10.) The magistrate disagrees with relator's analysis and argument.

{¶29} In his April 29, 2010 report, Dr. Conley again states:

This claim is allowed for a self limiting thoracic sprain now almost four years post-injury. Per ODG, this allowed condition is well past the normal period of resolution. The requested thoracic MRI is no longer related to the original injury and is not reasonably necessary for any of the allowed conditions of this 2006 claim.

{¶30} In effect, Dr. Conley opines that a thoracic MRI cannot possibly show any medical condition related to the industrial injury because the thoracic sprain has long since resolved.

{¶31} Thus, by its reliance upon Dr. Conley's report, the commission did consider whether the MRI can be authorized for diagnostic services.

{¶32} The DHO's order of June 15, 2010, at least implicitly, recognizes the two-part test set forth at Ohio Adm.Code 4123-6-31(F) when the DHO states that the MRI is not related to either the allowed conditions of the claim "or the 2006 work injury."

{¶33} The DHO's order was administratively affirmed by the SHO's order. Unfortunately, while specifically finding that the MRI is not necessary or appropriate for the "allowed conditions," the SHO does not directly address whether the MRI might be appropriate for diagnostic purposes. In the magistrate's view, this is not fatal to the SHO's order.

{¶34} Again, both orders state reliance upon Dr. Conley's report which clearly provides the appropriate rationale for denying the MRI authorization.

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

*/s/ Kenneth W. Macke*

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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).