

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

|                                |   |                    |
|--------------------------------|---|--------------------|
| State of Ohio ex rel.          | : |                    |
| Wendy's International, Inc.,   | : |                    |
|                                | : |                    |
| Relator,                       | : |                    |
|                                | : |                    |
| v.                             | : | No. 04AP-975       |
|                                | : |                    |
| Otis Jefferson, and            | : | (REGULAR CALENDAR) |
| Industrial Commission of Ohio, | : |                    |
|                                | : |                    |
| Respondents.                   | : |                    |

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D E C I S I O N

Rendered on August 2, 2005

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*Earl, Warburton, Adams & Davis, Bruce L. Hirsch and Christopher R. Walsh, for relator.*

*Philip J. Fulton Law Office, and William A. Thorman, II, for respondent Otis Jefferson.*

*Jim Petro, Attorney General, and Derrick Knapp, for respondent Industrial Commission of Ohio.*

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IN MANDAMUS

FRENCH, J.

{¶1} Relator, Wendy's International, Inc., filed an original action requesting that this court issue a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its order, which found that relator had not timely responded to

the request of respondent-claimant, Otis Jefferson, for surgery within ten days of receipt of the request, deemed the request granted, and ordered relator to pay for claimant's surgery.

{¶2} This matter was referred to a magistrate of this court pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. As corrected by the magistrate's April 14, 2005 order, the magistrate issued a decision, including findings of fact and conclusions of law, recommending that this court issue a writ ordering the commission to vacate its order authorizing surgery based upon Dr. John W. Morgenstern's April 15, 2004 C-9 request as that issue was not properly before the commission. (Attached as Appendix A.) No objections to that decision have been filed.

{¶3} Finding no error of law or other defect on the face of the magistrate's decision, and based upon an independent review of the evidence, this court adopts the magistrate's decision, as corrected by the magistrate's April 14, 2005 order, as our own, including the findings of fact and conclusions of law contained in it, subject to the following correction. The reference on page 5 of the magistrate's decision (¶19 in Appendix A) to the "February 15, 2004" C-9 submitted by Dr. Morgenstern is corrected to read "April 15, 2004." Otherwise, in accordance with the magistrate's decision, a writ of mandamus is issued ordering the commission to vacate its order authorizing surgery based upon Dr. Morgenstern's April 15, 2004 C-9 request.

*Writ of mandamus granted.*

McGRATH and CHRISTLEY, JJ., concur.

CHRISTLEY, J., retired of the Eleventh Appellate District, assigned to active duty under authority of Section 6(C), Article IV, Ohio Constitution.



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

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| Otis Jefferson and             | : | (REGULAR CALENDAR) |
| Industrial Commission of Ohio, | : |                    |
|                                | : |                    |
| Respondents.                   | : |                    |

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

Rendered on April 11, 2005

*Earl, Warburton, Adams & Davis, Christopher R. Walsh and Bruce L. Hirsch, for relator.*

*Philip J. Fulton Law Office and William A. Thorman, III, for respondent Otis Jefferson.*

*Jim Petro, Attorney General, and Derrick Knapp, for respondent Industrial Commission of Ohio.*

**IN MANDAMUS**

{¶4} Relator, Wendy's International, Inc., 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 found that relator had not timely responded to the request of respondent Otis Jefferson ("claimant") for surgery

within ten days of receipt of the request and therefore deeming the request granted and ordering relator to pay for claimant's surgery.

Findings of Fact:

{¶5} 1. Claimant sustained a work-related injury on June 7, 2001, and his claim has been allowed for: "contusion of knee, bilateral; contusion of face; sprain of neck; sprain lumbar region; sprain thoracic region; L4-5 bulging disc, protruding disc L4-5; lumbar radiculopathy, left; herniated disc L4-5."

{¶6} 2. Claimant's treating physician, John W. Morgenstern, D.C., referred claimant to Larry T. Todd, Jr., D.O., because of his continued back problem. Ultimately, Dr. Todd determined that claimant would benefit from back surgery and notified Dr. Morgenstern of this finding in a letter dated March 31, 2004.

{¶7} 3. On March 31, 2004, Dr. Todd completed a C-9 form requesting authorization for surgery.

{¶8} 4. The employer denied claimant's request for the following reasons: "Dr. Morgenstern is P[hysician] O[f] R[ecord] / Pending Medical Review."

{¶9} 5. According to claimant, on April 15, 2004, a second C-9 form was faxed to ESIS, relator's third-party administrator for its workers' compensation system, requesting approval for the surgery with Dr. Todd. The request was identical in every way to the March 31, 2004 C-9 submitted by Dr. Todd and previously denied by relator.

{¶10} 6. Relator maintains that it never received a copy of the April 15, 2004 fax.

{¶11} 7. On April 27, 2004, claimant filed a motion requesting a hearing to consider the following:

Claimant, through his attorney, hereby requests that the treatment requests and surgery request of Dr. Todd be authorized. The employer has denied the request so please schedule the matter for hearing.

In support of that motion, claimant noted that the following documentation was attached in support: "C-9 of Dr. Todd dated 3/31/04 [and] 3/31/04 report of Dr. Todd."

{¶12} 8. Relator had claimant examined by Ann Middaugh, M.D. Pursuant to a report dated April 22, 2004, Dr. Middaugh opined as follows regarding her opinion relative to claimant's request for the authorization of surgery:

\* \* \* Based on my review of the medical records it is my opinion that the current treatment being requested, of lumbar fusion, lumbar fixation, iliac bone grafting and lumbar laminectomy is not medically necessary and/or appropriate for the allowed conditions of this claim only.

{¶13} 9. Claimant's April 27, 2004 motion for authorization of treatment was heard before a district hearing officer ("DHO") on May 26, 2004. The DHO denied the request for authorization of treatment based upon the report of Dr. Middaugh as well as a report by Scott M. Otis, M.D., who found that claimant had minimal problems from a neurological standpoint.

{¶14} 10. Claimant appealed and the matter was heard before a staff hearing officer ("SHO") on June 29, 2004. The SHO vacated the prior DHO order and granted claimant's request for authorization of service for the following reasons:

The Injured Worker's Attending Physician, John W. Morgestern, D.C., sent a C-9 Physician's Request for Medical Service, dated 04/15/2004, to the Self-Insured Employer's authorized representative, ESIS, via facsimile, on 04/15/2004 at 3:36 p.m.

Ohio Administrative Code Section 4123-19-03(K)(5) requires the following "Minimal level of performance as a criterion for

granting and maintaining the privilege to pay compensation directly" (i.e. to be a Self-Insured Employer):

["]The employer shall approve or deny a written request for treatment within ten days of the receipt of the request. If the employer fails to respond to the request, the authorization for treatment shall be deemed granted and payment shall be made within thirty days of receipt of the bill." (emphasis added).

Since the self-insured employer did not approve or deny Dr. Morgenstern's C-9 request, within ten days of 04/15/2004, the authorization for the treatment requested by John W. Morgenstern, D.C. is "deemed granted".

Therefore, it is the order of this Staff Hearing Officer that: authorization is granted for pre-admission testing, lumbar fusion, lamifusion at L4-5, lumbar fixation, iliac bone graft, lumbar laminectomy, and compression orthosis, provided by Larry [T]. Todd, Jr., D.O. with surgical assistance by Thomas Taylor, P.A.-C., and a lumbar brace for post-operative immobilization, subject to BWC/IC Rules and Regulations.

This order is based upon the 04/15/2004 C-9 Physician's Request for Medical Service from John W. Morgenstern, D.C. and Ohio Administrative Code Section on 4123-19-03(K)(5).

(Emphasis sic.) As is clear from the order, the SHO granted the request for surgery solely because it determined that relator failed to timely deny claimant's request.

{¶15} 11. Relator's subsequent appeal wherein relator argued that it never received the April 15, 2004 C-9 from Dr. Morgenstern was refused by order of the commission mailed July 17, 2004.

{¶16} 12. Thereafter, relator filed the instant mandamus action in this court.

#### Conclusions of Law:

{¶17} In order for this court to issue a writ of mandamus as a remedy from a determination of the commission, relator must show that she has a clear legal right to

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

{¶18} In its brief, the commission concedes that a writ of mandamus should issue for the following reasons:

The issue properly before the SHO was whether or not the low back surgery requested by Dr. Todd on March 31, 2004 was medically necessary. However, instead of deciding that issue the SHO found that a second request for the same surgery was "deemed granted" because Wendy's failed to timely respond to the second C-9 submitted by Dr. Morgenstern for the same surgery. The commission concedes that the issue of whether or not Wendy's timely responded to this second C-9 was not properly before SHO and that the SHO should not have rendered a decision involving this second C-9.

(Respondent commission's brief, at 2-3.)

{¶19} In response, claimant asserts that, pursuant to the Ohio Administrative Code cited by the commission, the [April] 15, 2004 C-9 submitted by Dr. Morgenstern was deemed granted when relator did not deny it within ten days. However, in *State ex rel. Wal-Mart Stores, Inc. v. Indus. Comm.*, Franklin App. No. 04AP-188, 2005-Ohio-



1517, this court recently held that the word "receive" as used in Ohio Adm.Code 4123-19-03(K)(5) does not simply mean "to come into possession of." Rather, the concept of receipt necessarily entails delivery or exchange or change of possession of a written request from the employee requesting treatment and the employer. In the present case, the employer denied receiving the C-9 sent April 15, 2004. The SHO never discussed this issue and instead, automatically applied Ohio Adm.Code 4123-19-03(K)(5). This was an abuse of discretion.

{¶20} The magistrate finds that claimant's argument also overlooks the fact that the motion specifically before the commission for which relator was given notice was the motion signed by claimant's counsel requesting the authorization of surgery based upon the March 31, 2004 C-9 of Dr. Todd and supported by the March 31, 2004 report of Dr. Todd. That was the motion filed by claimant; that was the motion for which relator received notice; that was the motion which was scheduled and heard before the DHO on May 26, 2004; that was the motion determined by the DHO on that date; and it was from that order addressing that motion that claimant appealed. As the commission correctly notes in its brief, the issue of whether or not the April 15, 2004 request for surgery was deemed granted by relator because of its "failure" to deny it within ten days was not before the commission and should not have been determined. As such, relator has demonstrated an abuse of discretion on the part of the commission and a writ of mandamus is appropriate.

{¶21} Furthermore, on April 7, 2004, when relator denied claimant's March 31, 2004 C-9, the employer did so for two reasons: (1) Dr. Morgenstern is the physician of record (and not Dr. Todd); and (2) pending a medical review. Within two weeks, relator

had claimant examined by Dr. Middaugh who opined that the surgery was not necessary. Clearly, relator was opposed to authorizing the surgery.

{¶22} Based on the foregoing, it is the magistrate's decision that a writ of mandamus should issue ordering the commission to vacate its order authorizing surgery based upon Dr. Morgenstern's April 15, 2004 C-9 request as that issue was [not] properly before the commission. Whether or not claimant has actually filed a motion requesting a hearing relative to the April 15, 2004 C-9 of Dr. Morgenstern can be determined by the commission and, if a motion has been filed, the commission can set the matter for hearing after providing notice to the parties. Therefore, the commission can determine the relevant issues as set forth in this decision.

/s/ Stephanie Bisca Brooks  
STEPHANIE BISCA BROOKS  
MAGISTRATE