

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel.	:	
Cassens Transport Co.,	:	
	:	
Relator,	:	No. 11AP-680
	:	
v.	:	(REGULAR CALENDAR)
	:	
Industrial Commission of Ohio	:	
and Thomas Totterdale,	:	
	:	
Respondents.	:	

D E C I S I O N

Rendered on October 18, 2012

Schottenstein Zox & Dunn Co., LPA, Corey V. Crognale, and Meghan M. Majernik, for relator.

Michael DeWine, Attorney General, and LaTawnda N. Moore, for respondent Industrial Commission of Ohio.

Wellman, Jeren, Hackett & Skoufatos Co., L.P.A., John A. Jeren, Jr., and Timothy R. Hackett, for respondent Thomas Totterdale.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

SADLER, J.

{¶ 1} Relator, Cassens Transport Co., seeks a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its order authorizing the surgical procedure requested by respondent, Thomas Totterdale ("claimant"), and ordering the commission to find that the requested surgery is not directed at the allowed conditions in the claim.

{¶ 2} Pursuant to Civ.R. 53 and Loc.R. 13(M) of the Tenth Appellate District, 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 recommended that this court issue a writ of mandamus ordering the commission to: (1) vacate its order authorizing surgery, and (2) determine whether claimant's claim should be additionally allowed for the condition of spinal stenosis and, if so, consider whether surgery should be allowed. No objections were submitted concerning the magistrate's findings of fact, and we adopt them as our own.

{¶ 3} In January 2010, claimant was injured in the course of and arising from his employment with relator. His claim was allowed for disc protrusions at L3-4 and L4-5. Claimant filed a request for surgery in January 2011, which the commission, through its district hearing officer ("DHO"), initially denied based on evidence that an MRI requested by the surgeon had yet to be conducted. Claimant appealed to the staff hearing officer ("SHO"), and, while the appeal was pending, the MRI was performed. Following a June 2011 hearing, the SHO vacated the DHO's order and granted claimant's request for surgery, authorizing decompression and fusion treatment at the L3 through S1 levels with eight weeks post-operative physical therapy.

{¶ 4} Relator filed the instant mandamus action, arguing that the commission abused its discretion by granting claimant's request for surgery because it was not medically necessary or reasonably related to the allowed conditions in the claim. Specifically, relator argued that the surgery was related to claimant's spinal stenosis, a non-allowed condition. The magistrate agreed and recommended that this court issue a writ of mandamus vacating the commission's order and remanding the matter for a determination as to whether the claim should be additionally allowed for spinal stenosis.

{¶ 5} Claimant and the commission have filed objections to the magistrate's conclusions of law, and relator has filed a memorandum in response. Claimant objects on the following ground:

The Magistrate erred by applying the incorrect legal standard to the facts in this case. Instead of determining whether "some evidence" existed to support the order of the Staff Hearing Officer, Industrial Commission, which it did, the Magistrate embarked on a weighing of the evidence.

The commission presents a similar objection:

The Commission Had Some Evidence To Support Its Finding That Surgery Was Reasonably Necessary For Treatment Of

The Allowed Conditions, And The Magistrate's Reasoning is Hypertechnical.

{¶ 6} Both objections essentially allege that the magistrate incorrectly reweighed the evidence in determining that the commission's authorization of surgery constituted an abuse of discretion. For ease of discussion, we will address the objections together.

{¶ 7} To obtain a writ of mandamus, a relator must show that it 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. AutoZone, Inc. v. Indus. Comm.*, 117 Ohio St.3d 186, 2008-Ohio-541, ¶ 14. "To show the clear legal right, relator must demonstrate that the commission abused its discretion by entering an order unsupported by some evidence in the record." *State ex rel. Hughes v. Goodyear Tire & Rubber Co.*, 26 Ohio St.3d 71, 73 (1986). When the record contains "some evidence" to support the commission's factual findings, a court may not disturb the commission's findings in mandamus. *State ex rel. Fiber-Lite Corp. v. Indus. Comm.*, 36 Ohio St.3d 202 (1988), syllabus.

{¶ 8} In *State ex rel. Miller v. Indus. Comm.*, 71 Ohio St.3d 229 (1994), the Supreme Court of Ohio set forth a three-step inquiry to determine whether medical services should be authorized: (1) whether the services are reasonably related to the allowed condition, (2) whether the services are reasonably necessary for treatment of the allowed condition, and (3) whether the cost of the services are medically reasonable. While the claimant bears the burden of proving all three prongs of *Miller* in order to secure authorization for the requested procedure, the relator, as the party seeking a writ of mandamus, bears the burden of proving the commission failed to comply with the *Miller* test. *State ex rel. Maxim Healthcare Servs., Inc. v. Indus. Comm.*, 10th Dist. No. 11AP-122, 2012-Ohio-1012, ¶ 10.

{¶ 9} Here, the SHO relied on five pieces of evidence to support its conclusion that the requested surgery was medically necessary and reasonably related to claimant's allowed disc protrusions: (1) the February 2011 report of Dr. Joel A. Torretti, (2) the May 2011 report of Dr. Torretti, (3) the results of the MRI conducted in May 2011, (4) the April 2010 report of Dr. Todd B. Cousins, and (5) the August 2010 "C-9 Physician's Request For Treatment of Injury Report" completed by Dr. Henry W. Shoenthal. In determining that the SHO abused its discretion, the magistrate found that four of the five pieces of evidence

relied on by the SHO related claimant's need for surgery to spinal stenosis, which the magistrate found to be a non-allowed condition.

{¶ 10} In their objections, the commission and claimant assert that the mere existence of spinal stenosis did not prevent the SHO from finding that surgery was medically necessary and reasonably related to claimant's allowed disc protrusions. Because each of the five pieces of evidence relied on by the SHO established the requisite connection between the allowed condition and the need for surgery and because the magistrate only discounted the first four pieces of evidence, the commission and claimant maintain that the record contains "some evidence" supporting the commission's decision. We agree.

{¶ 11} This case is similar to our decision in *State ex rel. HBD Industries, Inc. v. Indus. Comm.*, 10th Dist. No. 02AP-825, 2003-Ohio-1449. In *HBD*, the claim was allowed for a disc herniation at L4-5, and the commission authorized a surgery described as a decompression fusion L3 to the sacrum. *Id.* at ¶ 13, 20. The employer sought mandamus relief, arguing that the requested surgery was directed to treat spinal stenosis and not the allowed conditions in the claim. *Id.* at ¶ 27. We upheld the authorization of surgery based on a medical report indicating that "by fusing the L3 to the L4-5, claimant had a 50 percent chance of having an improvement in his allowed condition." *Id.* at ¶ 28. We found the report to constitute "some evidence upon which the commission could rely in finding that the requested surgery was for the allowed conditions in the claim." *Id.* at ¶ 29.

{¶ 12} Here, the evidence relied on by the SHO established that the requested surgery was necessary to treat the allowed disc protrusions even though the surgery also related to spinal stenosis. For instance, in Dr. Torretti's February 11, 2011 medical report, he opined, "I feel that [claimant] has demonstrated significant disability related to the L3-4 and L4-5 disc herniations. They have directly contributed to and created the spinal stenosis at L3-4 and L4-5, and [claimant] is appropriate for surgical intervention at this time." (Dr. Torretti Letter, Feb. 11, 2011.) Dr. Torretti explained that "spinal stenosis simply refers to narrowing of the space for the nerve roots," and that "the primary narrowing in [claimant's] spine is a result of the disc herniations at L3-4 and L4-5." (Dr. Torretti Letter, Feb. 11, 2011.) Dr. Torretti also identified the disc herniations at L3-4 and

L4-5 in his May 19, 2010 report. Moreover, the C-9 request for surgery completed by Dr. Shoenthal also related the need for surgery with claimant's allowed conditions. As the magistrate acknowledges, Dr. Shoenthal listed claimant's allowed conditions as the basis for the request.

{¶ 13} On this record, we find "some evidence" supporting the commission's determination that the requested surgery was medically necessary and reasonably related to claimant's allowed conditions. Contrary to the view expressed by relator and the magistrate, the mere presence of spinal stenosis in this case did not negate the medical evidence establishing that surgery would treat the allowed disc protrusions. Furthermore, " 'the existence of a contributing nonallowed condition is not a legitimate reason for refusing to pay for medical treatment independently required for an allowed condition.' " *State ex rel. Jackson Tube Serv., Inc. v. Indus. Comm.*, 99 Ohio St.3d 1, 2003-Ohio-2259, ¶ 26, quoting *State ex rel. Griffith v. Indus. Comm.*, 87 Ohio St.3d 154, 156 (1999). Accordingly, the commission and claimant's objections are sustained.

{¶ 14} Upon review of the magistrate's decision and an independent review of the record, we find that the magistrate has properly determined the pertinent facts and adopt them as our own. However, in accordance with our decision, we sustain the commission and claimant's objections to the magistrate's conclusions of law and reject the magistrate's recommendation to issue a writ of mandamus. Accordingly, the requested writ of mandamus is denied.

*Objections sustained;
writ of mandamus denied.*

BROWN, P.J., and FRENCH, J., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel.	:	
Cassens Transport Co.,	:	
	:	
Relator,	:	
	:	
v.	:	No. 11AP-680
	:	
Industrial Commission of Ohio	:	(REGULAR CALENDAR)
and Thomas Totterdale,	:	
	:	
Respondents.	:	

MAGISTRATE'S DECISION

Rendered on April 27, 2012

Schottenstein Zox & Dunn Co., LPA, Corey V. Crognale, and Meghan M. Majernik, for relator.

Michael DeWine, Attorney General, and LaTawnda N. Moore, for respondent Industrial Commission of Ohio.

Wellman, Jeren, Hackett & Skoufatos Co., L.P.A., John A. Jeren, Jr., and Timothy R. Hackett, for respondent Thomas Totterdale.

IN MANDAMUS

{¶ 15} Relator, Cassens Transport Co., 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 authorizing the surgical procedure requested by

respondent Thomas Totterdale ("claimant") and ordering the commission to find that the requested surgery is not directed at the allowed conditions in the claim.

Findings of Fact:

{¶ 16} 1. Claimant sustained a work-related injury on January 29, 2010, and his workers' compensation claim is allowed for "L3-4 and L4-5 disc protrusion."

{¶ 17} 2. On February 8, 2010, claimant treated with Amanda L. Kreutzberger, P.A., who, following her examination, made the following assessment: "Pain due to trauma, acute – 338.11 (Primary), low back and bilateral hip," "HTN [Hypertension] – 401.9" and "Depression – 311." An x-ray taken February 9, 2010 revealed the following:

NO FRACTURE OR MALALIGNMENT.

MODERATE L4-5, AND ADVANCED L5-S1 DEGENERATIVE DISC INTERSPACE NARROWING.

DEGENERATIVE L4-5, L5-S1 FACET ARTHRITIS.

CALCIFIED CHOLELITHIASIS.

{¶ 18} 3. Claimant treated with Kreutzberger again on March 3, 2010. Given claimant's symptoms, an MRI was requested.

{¶ 19} 4. The MRI taken March 4, 2010 revealed the following:

L3-4 AND L4-5 DISC PROTRUSIONS WITH MODERATE AND MODERATE TO SEVERE CENTRAL CANAL STENOSIS RESPECTIVELY. ACCOMPANY FORAMINAL NARROWING IS NOTED ABOVE.

HETEROGENEOUS BONE MARROW SIGNAL INTENSITY THROUGHOUT THE LUMBOSACRAL SPINE AND POSTERIOR ELEMENTS AS DESCRIBED CORRELATE WITH UNDERLYING ANEMIA OR METABOLIC PROCESS.

MULTILEVEL DEGENERATIVE FACET ARTHRITIS[.]

SCATTERED HEMANGIOMA WITHIN THE L1, L3 AND L4 VERTEBRAL BODIES.

{¶ 20} 5. Claimant was examined by Todd B. Cousins, D.O. In his April 15, 2010 report, Dr. Cousins did not list the allowed conditions; instead, Dr. Cousins noted that claimant's chief complaint was "[b]ilateral lumbosacral buttock and leg pain." Dr.

Cousins diagnosed: "Moderate-to-severe lumbar spinal stenosis L4-5, moderate L3-L4" and stated further, "I think his symptoms do correlate well with his spinal stenosis."

{¶ 21} 6. On April 29, 2010, Dr. Cousins performed an epidural steroid injection to treat "lumbar spinal stenosis."

{¶ 22} 7. Claimant began treating with Joel A. Torretti, M.D., on May 19, 2010. Dr. Torretti did not list the allowed conditions. He noted that claimant's chief complaint was "claudicant bilateral leg pain." After reviewing both the x-ray and the MRI, Dr. Torretti made the following assessment: "Lumbar spinal stenosis L3-4, L4-5 and L5-S1," "[d]egenerative scoliosis," "[d]isc herniations L3-4 and L4-5" and "[b]ack and leg pain status post fall." Dr. Torretti stated further:

He appears to have work injury related exacerbation of preexisting lumbar spondylosis and given the new onset of the leg symptoms likely has superior imposed acute disc herniations that are poorly tolerated due to some underlying spinal stenosis. As a result he has severe activity limiting pain that warrants surgical intervention. * * * I recommend a decompression and fusion procedure from L3 to the sacrum.

{¶ 23} 8. Claimant began treating with Henry W. Shoenthal, M.D., on March 22, 2010. Dr. Shoenthal's initial assessment was "LUMBAR DISC DISPLACEMENT – 722.10 (Primary)."

{¶ 24} 9. Claimant was examined by Elizabeth Mease, M.D., on May 5, 2010. Dr. Mease noted the alleged conditions: "sprain/strain lumbosacral spine" and "sprain/strain bilateral hips." After identifying the medical records which she reviewed and providing her physical findings upon examination, Dr. Mease stated:

Lumbar spine films showed evidence of degenerative changes to the L4-5 and L5-S1 disc levels and facet arthritis at these levels. A left hip x-ray showed evidence of osteoarthritis. He has had several prior industrial claims involving his lumbosacral spine and he was noted to have radicular symptoms to his left leg in prior claims. X-rays from 2007 showed L4-5, L5-S1 degenerative changes and facet arthrosis and SI joint osteoarthritis. He has multiple non work related medical conditions. He has been told that he had spine curvature many years ago. Current symptoms include pain to the low back with intermittent pain to the left leg to the level of the knee and worse with prolonged positioning and with pain to low back with movement.

Current findings reveal morbid obesity, thoracolumbar scoliosis, mild restriction in lumbar extension, intact lower extremity reflexes, negative straight leg raise, positive Patrick Fabre test left hip.

{¶ 25} Dr. Mease concluded there was insufficient medical evidence to find any medical condition resulting from the work-related injury.

{¶ 26} 10. In 2010, Dr. Mease authored three addendums to her original May 5, 2010 report. On June 25, 2010, Dr. Mease opined that claimant's L3-4 and L4-5 disc protrusions were likely pre-existing and were degenerative in nature. In her November 12, 2010 addendum, Dr. Mease accepted that claimant's claim was allowed for L3-4 and L4-5 disc protrusions. Dr. Mease was asked to opine as to whether or not claimant's current symptoms and disability were a result of the allowed conditions in the claim. Dr. Mease opined that they were not, stating:

[I]t is my opinion that the current disability is related primarily to spinal stenosis and spondylolisthesis L4 on L5, non allowed conditions in the claim.

* * *

Solely for the allowed conditions of L3-4 and L4-5 disc protrusions, he is able to resume his former position of employment with restrictions. He is able to perform light physical demand activities.

* * *

Solely for the allowed conditions of L3-4 and L4-5 disc protrusions, he has reached maximum medical improvement. * * * Surgical treatment solely for disc degenerative protrusions is not a usual and customary treatment. Current symptoms and treatment request are related primarily to conditions not recognized in the claim.

{¶ 27} 11. Dr. Shoenthal completed two C-9 forms requesting authorization for lumbar disc surgery. One appears to be dated August 15, 2010 and the other August 24, 2010. Both list the allowed conditions as the diagnosis.

{¶ 28} 12. Both requests were denied based on the reports of Dr. Mease.

{¶ 29} 13. In a letter dated January 20, 2011, Dr. Shoenthal opined that claimant's "present back pain and diagnosis of Lumbar Disc Disease is directly related to the injury from January 29, 2010."

{¶ 30} 14. Claimant was again examined by Dr. Torretti on February 11, 2011. At that time, Dr. Torretti made the following assessment/diagnosis: "Low back and bilateral leg pain secondary to spinal stenosis as a result of L3-4 and L4-5 disc protrusions." Dr. Torretti recommended an updated MRI and summarized his conclusions as follows:

I feel he had a work-related exacerbation of a preexisting condition. His degenerative scoliosis was likely present with some degree of facet arthritis and spondylosis that predated his work-related injury. However, given the onset of symptoms and subsequent MR imaging that identified L3-4 and L4-5 disc protrusions, it appears that the disc herniations were the result of his work-related injury, and they have led to the current symptoms. His spinal stenosis is contributed to directly by the disc protrusions, as spinal stenosis simply refers to narrowing of the space for the nerve roots, and the primary narrowing in his spine is a result of the disc herniations at L3-4 and L4-5. As a result, I feel that he has demonstrated significant disability related to the L3-4 and L4-5 disc herniations. They have directly contributed to and created the spinal stenosis at L3-4 and L4-5, and he is appropriate for surgical intervention at this time. I recommend that he obtain a new lumbar MRI prior to proceeding with surgery if he decides that he would like to pursue this route of treatment.

{¶ 31} 15. An updated MRI was taken May 4, 2011. The MRI revealed the following impression:

[One] Transitional vertebral body.
[Two] Intact lower thoracic spinal cord, conus medullaris and cauda equine.
[Three] Lumbar spondylosis.
[Four] Multilevel degenerative disc disease.
[Five] Vertebral hemangiomas.
[Six] L3-L4 and L4-L5 spinal stenosis with bilateral neural foraminal stenosis.

{¶ 32} 16. Claimant saw Dr. Torretti that same day and, after he reviewed the new MRI, Dr. Torretti stated:

He has spinal stenosis. It is moderately severe at L3-4 and severe at L4-5 due to a combination of facet hypertrophy, of ligamentous hypertrophy and central and eccentric disc bulges at L3-4 and L4-5. He has fairly advanced facet arthrosis at L5-S1, worse on the right as well.

* * *

[B]ased upon his reported history and sequence of events it appears that he had preexisting lumbar spondylosis which was minimally symptomatic and caused some normal age-related lower back discomfort that did not preclude activity but following his injury he developed severe disabling symptoms consistent with superimposed disc herniations that led to abrupt worsening of his spinal stenosis and now persistent symptoms due to degree of his stenosis. I recommend surgery * * *.

{¶ 33} 17. Dr. Mease completed two additional addendums, one dated April 1, 2011 and the other dated May 29, 2011. Dr. Mease concluded that the proposed surgery was not directed at the allowed conditions in the claim, stating:

It remains my opinion that the request for decompression and fusion procedure from L3 to the sacrum is intended to treat primarily non allowed conditions of the claim: spinal stenosis, degenerative scoliosis and anterior listhesis at L4-L5. The proposed fusion procedure for three levels of the lumbar spine (L3 to the sacrum) would not be considered a usual and customary treatment for L3-4 and L4-5 disc protrusions. My prior opinions from the September 12, 2010 report have not changed.

{¶ 34} 18. Claimant's motion seeking authorization for the surgery was heard before a district hearing officer ("DHO") on April 5, 2011. The DHO denied claimant's request because, at that time, the new MRI had not been taken.

{¶ 35} 19. Claimant appealed and the matter was heard before a staff hearing officer ("SHO") on June 6, 2011. The SHO vacated the prior DHO order and granted claimant's request for surgery as follows:

It is the order of the Staff Hearing Officer that the 8/24/2010 C-9 Physician's Request For Treatment of Injury be granted to the extent of this order. The Staff Hearing Officer authorizes treatment in the form of "decompression and fusion at the L3-S1 levels; with eight weeks post operative

physical therapy". The Staff Hearing Officer finds that there is sufficient medical evidence to establish by a preponderance that this treatment is warranted and/or reasonably related to the allowed conditions in this claim.

This order is based upon the 02/11/2011 medical consult report of Dr. J. Torretti, M.D.; the 05/19/2010 consult report of Dr. Torretti; and the MRI study of 05/05/2011. In his above reports, Dr. Torretti explains that the Injured Worker has a spinal stenosis at the L3-4 and L4-5 disc levels and that this stenosis is due in part to the allowed disc protrusions in this claim. Dr. Torretti further explains that this spinal stenosis is resulting, in part, in the Injured Worker's symptoms of back pain. Dr. Torretti explains that the above surgical medical procedure is warranted to help alleviate this Injured Worker's pain complex.

In issuing this decision, the Staff Hearing Officer also relies upon the 04/15/2010 consultation report of Dr. Cousins, D.O. Therein, Dr. Cousins explains that this Injured Worker's symptoms are the consequence of his spinal stenosis – a condition stemming from the allowed disc protrusions in this claim according to Dr. Torretti. Finally, the Staff Hearing Officer relies upon the C-9 Physician's Request For Treatment of Injury Report of Dr. H. Shoenthal, M.D., of 08/24/2010. The totality of this evidence is found to be persuasive.

{¶ 36} 20. Relator's appeal was refused by order of the commission mailed June 30, 2011.

{¶ 37} 21. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶ 38} For the reasons that follow, it is this magistrate's decision that this court should issue a writ of mandamus ordering the commission to vacate its order authorizing claimant's surgery.

{¶ 39} 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).

{¶ 40} The issue raised in this case is whether the requested surgery is reasonably related to the allowed conditions of L3-4 and L4-5 disc protrusion or whether the requested surgery is related to non-allowed conditions, namely spinal stenosis at L3-4 and L4-5. Relator argues that the requested surgery is for the non-allowed condition of spinal stenosis, while claimant argues that the L3-4 and L4-5 disc protrusions have caused spinal stenosis and, therefore, spinal stenosis is causing symptoms which are directly related to the allowed condition.

{¶ 41} The real problem with the facts of this case is that disc protrusion is a separate and distinct condition from spinal stenosis. Specifically, disc protrusion is included under ICD-9 code 722.2: "displacement of intervertebral disc, site unspecified, without myelopathy." ICD9Data.com, <http://www.icd9data.com/2012/Volume1/710-739/720-724/722/722.2.htm> (accessed Mar. 21, 2012). Spinal stenosis of the lumbar region is included under ICD-9 code 724.02: "724.0 Spinal stenosis, other than cervical." "724.02 Lumbar region." http://icd9cm.chrisendres.com/index.php?action=c_hild&recordid=7016 (accessed Mar. 21, 2012).

{¶ 42} Relator contends that the medical evidence establishes that the surgical procedure is being requested for spinal stenosis and that, regardless of whether or not the work-related injury has directly caused the spinal stenosis, because claimant's claim had not yet been allowed for spinal stenosis or an aggravation of any pre-existing degenerative condition, the commission abused its discretion in authorizing the surgery.

{¶ 43} The magistrate agrees with relator's argument.

{¶ 44} In *State ex rel. Miller v. Indus. Comm.*, 71 Ohio St.3d 229 (1994), the Supreme Court of Ohio set out the 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 service medically reasonable?

{¶ 45} In authorizing the surgery, the commission relied on five pieces of evidence. First, the commission relied on the February 11, 2011 report of Dr. Torretti. In that report, Dr. Torretti listed the following assessment/diagnosis: "Low back and bilateral leg pain secondary to spinal stenosis as a result of L3-4 and L4-5 disc protrusions." Thereafter, Dr. Torretti explained:

I feel he had a work-related exacerbation of a preexisting condition. His degenerative scoliosis was likely present with some degree of facet arthritis and spondylosis that predated his work-related injury. However, given the onset of symptoms and subsequent MR imaging that identified L3-4 and L4-5 disc protrusions, it appears that the disc herniations were the result of his work-related injury, and they have led to the current symptoms. His spinal stenosis is contributed to directly by the disc protrusions, as spinal stenosis simply refers to narrowing of the space for the nerve roots, and the primary narrowing in his spine is a result of the disc herniations at L3-4 and L4-5. As a result, I feel that he has demonstrated significant disability related to the L3-4 and L4-5 disc herniations. They have directly contributed to and created the spinal stenosis at L3-4 and L4-5, and he is appropriate for surgical intervention at this time. I recommend that he obtain a new lumbar MRI prior to proceeding with surgery if he decides that he would like to pursue this route of treatment.

{¶ 46} Second, the commission relied on the May 19, 2010 report of Dr. Torretti, wherein he noted the following assessment/diagnosis: "Lumbar spinal stenosis L3-4, L4-5 and L5-S1," "[d]egenerative scoliosis," "[d]isc herniations L3-4 and L4-5" and "[b]ack and leg pain status post fall."

He appears to have work injury related exacerbation of preexisting lumbar spondylosis and given the new onset of the leg symptoms likely has superior imposed acute disc herniations that are poorly tolerated due to some underlying spinal stenosis. As a result he has severe activity limiting pain that warrants surgical intervention.

{¶ 47} It is undisputed that claimant's claim is allowed solely for L3-4 and L4-5 disc protrusions. While Dr. Torretti acknowledges the allowed condition, he explains further that claimant has certain pre-existing conditions in his back which have been exacerbated by the work-related injury. Specifically, Dr. Torretti notes pre-existing lumbar spondylosis and that, as a result of the allowed conditions, claimant now has spinal stenosis at L3-4 and L4-5 as well.

{¶ 48} The commission also relied on the May 5, 2011 MRI which revealed the following:

- [One] Transitional vertebral body.
- [Two] Intact lower thoracic spinal cord, conus medullaris and cauda equine.
- [Three] Lumbar spondylosis.
- [Four] Multilevel degenerative disc disease.
- [Five] Vertebral hemangiomas.
- [Six] L3-L4 and L4-L5 spinal stenosis with bilateral neural foraminal stenosis.

{¶ 49} This MRI clearly shows lumbar spondylosis and L3-4 and L4-5 spinal stenosis with bilateral neural foraminal stenosis.

{¶ 50} The above three pieces of evidence relied on by the commission indicate that the surgery being requested is clearly directed at the spinal stenosis and not the disc protrusions.

{¶ 51} The commission also relied on the April 15, 2010 report of Dr. Cousins who made the following assessment/diagnosis: "Moderate-to-severe lumbar spinal stenosis L4-5, moderate L3-L4." Dr. Cousins opined further: "I think his symptoms do correlate well with his spinal stenosis."

{¶ 52} As with the two reports from Dr. Torretti and the MRI, Dr. Cousins specifically identifies spinal stenosis L3-4 and L4-5 as being the conditions which were causing claimant's symptoms.

{¶ 53} The last piece of evidence upon which the commission relied is the August 24, 2010 C-9 of Dr. Shoenthal, who related the requested procedure to the allowed conditions in the claim. This is the only evidence relied on that lists the allowed conditions as the cause of claimant's problems.

{¶ 54} Five pieces of evidence are relied upon, and four pieces of that evidence relate claimant's current symptoms to a non-allowed condition. While claimant argues that his spinal stenosis has been caused by the allowed conditions and the allowed conditions have aggravated claimant's underlying problems, the aggravation of pre-existing conditions and the issue of whether or not an injury which caused certain conditions has also caused other conditions require that the commission first allow those additional conditions.

{¶ 55} Spinal stenosis is not a symptom, it is a condition, and a determination must first be made that the condition of spinal stenosis was directly caused by the work-

related injury before the commission can authorize surgery directed at the spinal stenosis. The commission has yet to make that determination and, having failed to do so, the magistrate finds that relator has demonstrated that the commission abused its discretion.

{¶ 56} Again, Dr. Torretti's reports, as well as the MRI and the report from Dr. Cousins, all provide that claimant's symptoms and his surgery are related to spinal stenosis, a non-allowed condition. As such, it is this magistrate's decision that this court should issue a writ of mandamus ordering the commission to vacate its order authorizing claimant's surgery and ordering the commission to first determine whether or not claimant's claim should be additionally allowed for the spinal stenosis at L3-4 and L4-5 and then, at that time, the commission can consider whether or not the surgery should be allowed.

/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).