[Cite as *State ex rel. Dana Driveshaft Mfg., L.L.C. v. Ford*, 2013-Ohio-4053.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Dana Driveshaft Manufacturing, LLC,	:	
Relator,	:	No. 12AP-941
v.	:	(REGULAR CALENDAR)
Paul W. Ford, Jr., and Industrial Commission of Ohio,	:	
Respondents.	:	

D E C I S I O N

Rendered on September 19, 2013

Bugbee & Conkle, LLP, and *Janelle M. Matuszak*, for relator.

Larrimer and Larrimer, and *Thomas L. Reitz*, for respondent Paul W. Ford, Jr.

Michael DeWine, Attorney General, and *Naveen V. Ramprasad*, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

SADLER, J.

{¶ 1} In this original action, relator, Dana Driveshaft Manufacturing, LLC, requests a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its award of permanent total disability ("PTD") compensation to respondent, Paul W. Ford, Jr. ("claimant"), and to enter an order denying said compensation.

I. BACKGROUND

{¶ 2} Pursuant to Civ.R. 53 and Loc.R. 13(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 concluded the commission abused its discretion by relying on medical reports that do not constitute some evidence upon which the commission can rely to support the award of PTD compensation. Accordingly, the magistrate recommended that this court grant the requested writ of mandamus.

II. OBJECTIONS

A. Claimant's Objection

> The Magistrate erred in concluding that neither Dr. Brown's Medco-14 nor Dr. Brown's report provide evidence that the allowed conditions independently prelude [sic] the claimant from returning to sustained remunerative employment.

B. The Commission's Objections

> 1. The Magistrate erred in substituting his judgment for that of the commission as the trier of fact, as Dr. Brown's medical reports constituted some evidence that one or more allowed conditions of the claim independently prevented the claimant from returning to sustained remunerative employment.
>
> 2. The Magistrate erred in ordering a writ of mandamus requiring the commission to deny PTD compensation, as, even excluding Dr. Brown's report, the remainder of the medical evidence reveals Ford has a limited ability to return to work solely as the result of his allowed medical conditions and an analysis of the non-medical factors is required before a decision could be made as to the issue of PTD.

III. DISCUSSION

{¶ 3} To award PTD compensation, the commission relied upon the MEDCO-14 and August 11, 2011 report of Dr. Brown. Claimant's objection and the commission's first objection to the magistrate's decision challenge the magistrate's conclusion that neither report provides some evidence upon which the commission could rely to award PTD.

{¶ 4} This issue has been thoroughly addressed by the magistrate in his decision. For the reasons stated therein, we conclude the reports of Dr. Brown expressly relied

upon by the commission do not constitute some evidence upon which the commission could rely. Accordingly, we overrule the commission's first objection and claimant's sole objection to the magistrate's decision.

{¶ 5} In its second objection, the commission contends that if this court agrees with the magistrate's conclusions regarding Dr. Brown's reports, the proper remedy is not to grant a full writ of mandamus but, rather, to grant a limited writ of mandamus so that the commission can consider claimant's non-medical factors in conjunction with the medical restrictions indicated in the remaining medical reports. We find the commission's second objection well-taken.

{¶ 6} Accordingly, the commission's second objection is sustained.

IV. CONCLUSION

{¶ 7} Upon review of the magistrate's decision, an independent review of the record, and due consideration of the objections presented by claimant and the commission, we find that the magistrate has properly stated the pertinent facts and applied the appropriate law. Therefore, with the exception of the remedy recommended by the magistrate, we adopt the magistrate's decision.

{¶ 8} In accordance with our decision, we overrule the commission's first objection and claimant's sole objection to the magistrate's decision, we sustain the commission's second objection to the magistrate's decision, and reject the magistrate's recommendation to issue a full writ of mandamus. Accordingly, we issue a limited writ of mandamus ordering the commission to vacate its order awarding PTD compensation to claimant and to issue a new order, either granting or denying the requested compensation, after the requisite analysis.

Objections overruled in part,
sustained in part;
limited writ of mandamus granted.

TYACK and DORRIAN, JJ., concur.

A P P E N D I X

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel.
Dana Driveshaft Manufacturing, LLC, :

No. 12AP-941

Relator, :

(REGULAR CALENDAR)

v. :

Paul W. Ford, Jr. and 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 May 13, 2013

Bugbee & Conkle, LLP, and *Janelle M. Matuszak*, for relator.

Larrimer and Larrimer, and *Thomas L. Reitz*, for respondent Paul Ford.

Michael DeWine, Attorney General, and *Naveen V. Ramprasad*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶ 9} In this original action, relator, Dana Driveshaft Manufacturing, LLC, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its award of permanent total disability ("PTD") compensation to respondent Paul W. Ford, Jr. ("claimant") and to enter an order denying the compensation.

Findings of Fact:

{¶ 10} 1. On September 30, 1998, prior to the industrial injury at issue here, claimant underwent a left total hip arthroplasty.

{¶ 11} 2. On April 29, 1999, claimant injured his left hip while employed as a machine operator for relator, a self-insured employer under Ohio's workers' compensation laws. On that date, claimant fell backwards onto the floor striking his left hip and buttocks.

{¶ 12} 3. On April 30, 1999, claimant presented to the emergency room of St. Rita's Medical Center located at Lima, Ohio. X-rays were taken. The interpreting radiologist wrote, "findings are suggestive of loosening of the femoral stem component."

{¶ 13} 4. The industrial claim (No. 99-399473) was initially certified by relator for "contusion of left hip."

{¶ 14} 5. On June 7, 1999, claimant was examined by attending physician William A. Sanko, M.D., who wrote:

> Paul returns today. He is status post left total hip arthroplasty. He had a fall at work back on 04/29/99, injuring his left hip. He also complains today of some persistent left knee pain since the injury. Left hip and groin pain is persisting with pain on the medial aspect of his thigh. He has noticed some painful catching and clicking involved in the left knee since the injury.
>
> * * *
>
> X-RAYS of bilateral knees were taken today including standing views and are normal. X-ray of his left hip shows the bones to be in place, some questionable loosening of the femoral component.
>
> IMPRESSION:
>
> [One] Left knee patellofemoral pain syndrome.
> [Two] Probable loosening of cement/bone interface, left total hip femoral stem.
>
> RECOMMENDATIONS: I had a long discussion with Paul. At this point, I am afraid that this fall several weeks ago may have loosened his left femoral component. We have given him several weeks now since the fall to see if the pain has

> persisted and unfortunately it has. We have talked to him about possible revision of the femoral stem. At this point, I think there is very little chance of this healing or bone growing at the cement/bone interface. We will try again through the remainder, letting him work, giving him some work restrictions and tentatively plan revision surgery next fall if he remains symptomatic.

{¶ 15} 6. On November 11, 1999, Dr. Sanko wrote:

> Paul is a healthy 51 year old active male who underwent a left total hip arthroplasty by myself on 9/30/98. He did well postoperatively and returned back to work without sequela. He had a fall at work on 4/30/99 [sic] landing on his left hip. Radiographic examination at that time showed what appeared to be an acute loosening of his left femoral stem prosthesis. The loosening appeared to be at the cement bone interphase. As a result of his fall I have recommended revision left total hip arthroplasty with exchange of the left femoral component.
>
> I certainly feel that this loosening is directly related to his fall at work.

{¶ 16} 7. On February 15, 2000, claimant underwent a surgical revision of his previous left total arthroplasty. The surgery was performed by Dennis Brown, M.D. In his operative report, Dr. Brown describes the pre-operative and post-operative diagnosis as "loosening left total hip replacement, femoral stem." The operation is described as "revision cemented, long stem."

{¶ 17} 8. In his February 15, 2000 operative report, Dr. Brown describes how the surgery was performed:

> Utilizing his old incision distally and a posterior lateral turn to the incision proximally we opened the skin for a total of 10 inches. This was carried through the skin and subcutaneous tissue to identify the tensor and gluteal fascia which was divided in the line with the incision and held retracted with a Charnley. He had a lot of scarring to the anterior tissues. It was difficult to mobilize the anterior tensor and gluteal musculature easily. * * * The retractor was placed to hold the tensor and gluteal fascia apart.
>
> * * *

> Tensor and gluteal fascia were closed with interrupted figure-of-eight #1 vicryl suture.

{¶ 18} 9. On October 29, 2003, claimant underwent a three-phase bone scan that showed:

> Increased activity on the proximal and distal ends of the left hip prosthesis, most likely related to hip prosthesis loosening. The possibility that there may be a healing stress-type facture at the distal end of the prosthesis and the mid left femoral shaft cannot be excluded. Routine radiographs of the left femur are recommended for further evaluation.

{¶ 19} 10. On January 6, 2004, at relator's request, claimant was examined by Richard B. Peoples, M.D., who performed an orthopedic evaluation. In his seven-page narrative report, Dr. Peoples opined:

> [One] It would be my opinion that the bone scan indeed showed what was felt to be a stress fracture of the left femoral shaft.
>
> * * *
>
> The fall of April 29, 1999, caused loosening of the femoral component of the total hip arthroplasty, and the surgical procedure was complete replacement of that femoral component. There was nothing broken as far as the metal prostheses were concerned.
>
> It is certainly not unusual to develop a stress fracture distal to the femoral component after a total hip arthroplasty, especially in ones that have to be revised.
>
> It would therefore be my opinion that the stress fracture of the left femoral shaft was indeed directly and causally related to the industrial incident of April 29, 1999.

{¶ 20} 11. On November 16, 2004, relator additionally certified the claim for "mechanical complication of an internal orthopedic device; stress fracture of the left femoral shaft."

{¶ 21} 12. On August 29, 2006, claimant underwent another revision of his left total hip replacement. The surgery was performed by Dr. Brown.

{¶ 22} 13. On July 17, 2008, claimant underwent yet another revision of his left total hip replacement. The surgery was again performed by Dr. Brown. In his operative report, Dr. Brown describes the pre-operative and post-operative diagnoses as "failed left total hip replacement, acetabular component, and leg shortening." Dr. Brown describes the operation as a "revision left total hip replacement, acetabular component, with [illegible] bone graft."

{¶ 23} In his operative report, Dr. Brown describes how the surgery was performed. He states in part:

> Utilizing about 6-1/2 inches of his old 10-inch incision, we dissected through the skin and subcutaneous tissue, ___ tensor and gluteal fascia. This was divided in line with the incision and held retracted with a Charnley apparatus.

{¶ 24} 14. On August 8, 2008, claimant underwent yet another surgery performed by Dr. Brown. In his operative report, Dr. Brown describes the pre-operative and post-operative diagnoses as "infected left total hip revision."

{¶ 25} 15. On January 4, 2010, claimant was examined by Dr. Brown. In his office note of that date, Dr. Brown states:

> CHIEF COMPLAINT: New evidence of drainage lateral LEFT infected hip revision[.]
>
> * * *
>
> X-RAYS: Long AP of his LEFT hip shows the cup has loosened and is migrated vertically and somewhat superiorly. The stem remains well fixed.
>
> IMPRESSION/PLAN: His LEFT acetabular shell has become loose secondary to infection.
>
> My recommendation would be to do an aggressive I and D of the LEFT hip and remove all the prosthetic components. He wants to be able to continue to walk. I think I would do a DePuy Prostalac. This should allow him to remain mobile. He will call us should he want to do that procedure. We would then consider reconstruction within 2 months.

(Emphasis sic.)

{¶ 26} 16. On March 16, and May 24, 2010, relator underwent a two-stage surgical procedure performed by Dr. Brown. That two-stage procedure is described as follows in the November 7, 2011 report of Paul T. Hogya, M.D.:

> Mr. Ford continued to have recurrent problems with drainage, despite long term antibiotic suppressive therapy. As a result, Dr. Brown recommended he undergo definitive surgical treatment for the infected hip prosthesis. That surgery was performed on 3/16/2010, which included removal of well-fixed left femoral hip components; incision and drainage of left hip and remaining bone with trochanteric osteotomy; placement of antibiotic-loaded DePuy prosthetic antibiotic-loaded acrylic cement. This was followed by second stage revision on 5/24/2010. Ultimately, he ended up with seven surgeries to the left hip.

{¶ 27} 17. On May 23, 2011, Dr. Brown completed a form provided by the Ohio Bureau of Workers' Compensation ("bureau"). The form is captioned "Physical Report of Work Ability" ("MEDCO-14").

{¶ 28} The form asks the physician to indicate the date of injury. Dr. Brown correctly listed the injury date. The form does not ask the physician to list the allowed conditions of the claim nor did Dr. Brown list the allowed conditions of the claim.

{¶ 29} 18. Under "Work Activity," the form asks the physician to mark one of three boxes. Marking the top box would indicate that the claimant can return to work with no restrictions. Marking the middle box would indicate that the claimant may return to work with restrictions. Marking the bottom box indicates that the claimant "[i]s totally disabled from work." Dr. Brown marked the bottom box and then wrote "permanent as of 5/23/11."

{¶ 30} The form also asks the physician for "further explanation of work abilities or why the injured worker is unable to perform any work." In the space provided, Dr. Brown wrote in his own hand:

> Complete atrophy, [left] gluteal and hip abductor muscles, no protective sensation of the [left] buttocks, chronic [left] [sacroiliac] joint inflammation, due to abnormal gait. Cannot sit due to abnormal sensation.

{¶ 31} 19. On August 11, 2011, Dr. Brown wrote to claimant's counsel. The report correctly references the industrial claim number (99-399473) above the body of the report. The body of the report states in its entirety:

> In reference to you[r] letter of June 28, 2011, Mr. Ford's last exam, on 5/23/2011 was one year since he had a major revision of his left hip for infection and a retained Prostalac. He had done as well is possible but has made no progress over the last 9 months. He still has numbness in the left buttock region due to repeated dissection and stretching of his gluteal nerves. Also due to damage of the gluteal nerves he has no gluteal function. He walks with a significant Trendelenburg limp on the left. At rest or standing he does not complain of pain but once he starts walking he gets pain in his right total knee replacement and also in his left SI joint. His left hip range of motion is poor. Flexion is to 90 abduction 30 and adduction is less than 10. He has a 3 minus/5 hip abductor strength on the left and normal strength on the right. Adductor strength is good. Hip flexor strength is 4 minus/5. He is very tender to palpation in the left SI joint. He also has pain around the joint line of his right total knee replacement without effusion. He's [sic] right total knee replacement has zero to 125 range of motion. There is no instability. X-rays on 5/23/2011 show that his revision hip [is] in good position with no evidence of loosening or subsidence and there is no evidence of infection.
>
> I believe with a reasonable degree of medical certainty, that Paul Ford is permanently disabled from any remunerative employment. Due to the loss of protective sensation in the gluteal region, he cannot sit safely for prolonged periods of time. He has significant weakness and stiffness in around the left hip that preclude standing or walking as well as any lifting, pulling, pushing, climbing, squatting, or kneeling on any portion of the hip or pelvis. He has no educational training to do any type of sit down or work from home job. I believe he should pursue complete and total disability. I do not know that he would benefit from any type of vocational rehabilitation due to my significant limitations noted above. These restrictions are due to his work injury of April 29, 1999 and the subsequent surgeries and surgical complications on his left hip.

{¶ 32} 20. On September 13, 2011, claimant filed an application for PTD compensation. In support, claimant submitted the August 11, 2011 report of Dr. Brown.

{¶ 33} 21. On October 25, 2011, at relator's request, claimant was examined by Dr. Hogya. In his seven-page narrative report dated November 7, 2011, Dr. Hogya opines:

> In my opinion, the objective medical evidence and examination findings do support Mr. Ford to be capable of engaging in sustained remunerative employment based solely upon the recognized contusion of left hip; mechanical complication of an internal orthopedic devise [sic]; and stress fracture left femoral shaft recognized in the 4/29/1999 industrial injury claim. He will require some permanent restrictions based on those conditions, but is capable of sustained remunerative employment.
>
> * * *
>
> Overall, he is capable of functioning in a sedentary industrial demand capacity.

{¶ 34} 22. On December 1, 2011, at the commission's request, claimant was examined by Steven W. Duritsch, M.D. In his six-page narrative report, dated December 6, 2011, Dr. Duritsch opines:

> I completed the enclosed Physical Strength Rating scale. While this Injured Worker has limited distance ambulated due to his prosthesis, his weakness and his Trendelenburg gait, he can sit, in my opinion, for sedentary activities. There are no restrictions from the allowed conditions in this claim in using his upper limbs. He is able to use his upper limbs without restrictions while working in a sedentary capacity. As long as his job is truly sedentary and does not involve standing or walking for more than a brief period of time, he would be able to perform the activities involved in that type of work. He would need some additional accommodations in having a handicapped parking spot so he would not walk a long distance into his place of employment.

{¶ 35} 23. On December 1, 2011, Dr. Duritsch completed a Physical Strength Rating from. On the form, Dr. Duritsch indicates by his mark that claimant is capable of sedentary work.

{¶ 36} 24. Following a May 21, 2012 hearing, a staff hearing officer ("SHO") issued an order awarding PTD compensation starting May 24, 2011. The SHO's order explains:

> The Injured Worker's industrial injury occurred on 4/29/1999, while he was working as a machine operator for Dana Driveshaft Manufacturing, Spicer Universal Joint Division, in Lima, Ohio. At that time, he was using a steel hook to pull a stack of three wire baskets, which were filled with round bar stock. The wire basket broke and the hook came loose, causing the Injured Worker to lose his balance and fall backwards onto the floor, striking his left hip and buttocks area.
>
> The Injured Worker was then seen at St. Rita's Medical Center where x-rays were taken of his pelvis and left femur. The radiologist indicated that there was no evidence of a fresh fracture, but there was some suggestion of loosening of the femoral stem component of his total left hip prosthesis. The emergency room physician then diagnosed a left buttock contusion and prescribed Darvocet for pain. He was [sic] also instructed the Injured Worker to follow-up with the surgeon that had performed his left total hip replacement previously.
>
> The Injured Worker had previously undergone a left total hip replacement, on 9/30/1998, performed by William Andrew Sanko, M.D. The Injured Worker then returned to work, in December 1998, with restrictions in regard to lifting and placing stress on the left hip joint. Therefore, after the industrial injury of 4/29/1999, the Injured Worker returned to see Dr. Sanko, as instructed by the emergency room physician at St. Rita's [M]edical [C]enter.
>
> Dr. Sanko saw the Injured Worker on 5/3/1999 and noted that, prior to the industrial injury of 4/29/1999, the Injured Worker had been quite active and had returned to his hobby of playing golf. Dr. Sanko also noted that the Injured Worker had been performing heavy physically demanding work, without trouble, until the workplace incident of 4/29/1999. At the time of his examination, on 5/3/1999, Dr. Sanko felt that the Injured Worker had a, "probable left hip contusion, no evidence of fracture, dislocation or loosening of the left hip components." However, as previously indicated above, the radiologist at St. Rita's Medical Center, on 4/30/1999,

did describe some evidence of loosening of the femoral shaft component of the left total hip prosthesis.

When Dr. Sanko saw the Injured Worker at a follow-up appointment, of 6/7/1999, he took repeat x-rays and, this time, he did note loosening of the femoral component. At the time of the follow-up visit, on 11/19/1999, Dr. Sanko recommended a revision of the Injured Worker's left total hip arthroplasty, with an exchange of the left femoral component due to the loosening of the cement/bone interface, as a result of the fall of 4/29/1999.

Dr. Sanko then performed an arthrogram on 12/22/1999, with aspiration of the left hip, and diagnosed osteolysis of the left total hip arthroplasty. Therefore, he referred the Injured Worker to an outside orthopedic surgeon, Dennis M. Brown, M.D., for a second opinion.

Dennis M. Brown, M.D., then performed a revision of the Injured Worker's left total hip replacement, on 2/15/2000, and replaced the long stem femoral component.

The Injured Worker was then able to resume his work activities and, by 4/24/2002, the Injured Worker was asymptomatic and he was told to merely follow-up with Dr. Brown "every two years."

The Injured Worker then had a bone scan performed, on 10/29/2003, which showed evidence of a stress fracture of the left femoral shaft, which Dr. Brown stated was related to the revision of the left hip arthroplasty. The Self-Insuring Employer obtained an independent opinion from another orthopedic specialist, Richard B. Peoples, M.D., on 1/6/2004, and Dr. Peoples agreed that the stress fracture was related to the industrial injury of 4/29/1999 and the surgical procedure necessitated by that injury. Therefore, this claim was expanded to include a stress fracture of the left femoral shaft. The Injured Worker was taken off work and placed on crutches/walker for treatment of the stress fracture of the left proximal femur.

The Injured Worker returned to work, but subsequently, on 5/5/2006, Dennis M. Brown, M.D., advised another revision surgery. Dr. Brown then performed a revision of the hip arthroplasty on 8/29/2006.

The Injured Worker then retired from Dana Corporation, on 4/1/2007, after over 33 years and 4 months of employment.

After his retirement, the Injured Worker and his wife moved to Florida, where he obtained a job with West Colonial Hyundai. However, since he was working in a position paying a commission based upon sales, he was not making enough money. Therefore, he quit the job with West Colonial Hyundai and began a job at Longwood Auto Acquisitions. However, his wife decided that she did not want to live in Florida and, therefore, he left the job at Longwood Auto Acquisitions after approximately one week.

The Injured Worker then returned to Ohio and continued to look for employment. While he was looking for full-time employment, he obtained part-time "on-call" employment at the Lima Auto Mall, where he was paid to pick up and deliver cars.

Then, in September 2007, the Injured Worker obtained employment, through Staffmark Employment Services, at Kalida Manufacturing, Inc., and he continued to work there through February, 2008. Once that temporary job ended, he then obtained employment at the flooring sales department of a Home Depot store. Unfortunately, the Home Depot store closed three months later.

Furthermore, the Injured Worker's left hip pain returned, in June 2008. X-rays, at that time, revealed a pelvic fracture and the Injured Worker returned to see Dennis Brown, M.D., his attending orthopedic specialist. An x-ray taken on 6/30/2008 revealed insufficiency of the acetabulum. That finding was also confirmed by a CT scan. Therefore, Dr. Brown recommended a revision arthroplasty. Dr. Brown then performed revision arthroplasty of the acetabular component, with bone graft, on 7/17/2008.

Unfortunately, the Injured Worker developed a Methicillin Resistance Staphylococcus Aureus (MRSA) infection at the site of the surgery. Therefore, Dr. Brown advised open irrigation and debridement of the wound site. That I & D surgery was performed on 8/8/2008.

The Injured Worker was then referred to an infectious disease specialist, Timothy Bruce Sorg, M.D., for treatment of the Methicillin Resistance Staphylococcus Aureus. Dr.

Sorg then treated the Injured Worker with a Peripherally Inserted Central Catheter line, on 8/11/2008, for prolonged antibiotic infusion.

Dr. Brown then had to perform another Irrigation and Debridement procedure on the left thigh abscess, on 9/30/2008.

Despite aggressive treatment, the Injured Worker continued to have problems with the left total hip prothesis. Therefore, on 1/4/2010, Dennis M. Brown, M.D., recommended another Irrigation and Debridement of the left hip, with removal of the prosthetic components.

Dr. Brown then performed the placement of an antibiotic cement spacer on 3/16/2010. However, the left hip infection and acetabular loosening continued.

The Self-Insuring Employer then obtained an independent opinion from another orthopedic specialist, Frederick J. Shiple, III, M.D., on 3/30/2010. Dr. Shiple agreed that, "The medical record establishes that the revised total hip arthroplasty, at the site of the surgery, was performed for the allowed mechanical complication of his internal orthopedic device and stress fracture of the left foraminal shaft. All treatments to this point have failed and the next reasonable treatment for the flow-through infected hip arthroplasty and allowed conditions of the claim is irrigation and debridement of the left hip with removal of the prosthetic components, as advised by Dr. Brown."

The Injured Worker then underwent his third left total hip revision surgery, on 5/24/2010. He was discharged from the hospital, after three days, non-weight bearing on the left lower extremity, and then underwent a course of home health physical therapy for a period of four weeks. The Injured Worker then had a course of outpatient physical therapy at St. Rita's Medical Center.

The Injured Worker's attending orthopedic specialist, Dennis M. Brown, M.D.; completed a MEDCO-14 Physician's Report of Work Ability, on 5/23/2011, and stated his professional medical opinion that the Injured Worker is totally disabled from work, on a permanent basis, as of his exam on 5/23/2011. Furthermore, Dr. Brown stated his opinion, on the MEDCO-14, that his patient had reached

> Maximum Medical Improvement, as of 5/23/2011. Therefore, the Self-Insuring Employer terminated the Injured Worker's temporary total disability compensation, effective 5/23/2011, pursuant to Industrial Commission Rule 4121-3-32(B)(1).
>
> Furthermore, Dr. Brown provided a further explanation, of why the Injured Worker is unable to perform any work, in the appropriate box of the MEDCO-14, dated 5/23/2011, and stated that there was, "Complete atrophy left gluteal and hip abductor muscles; no protective sensation of left buttocks; chronic left sacroiliac joint inflammation secondary to abnormal gait; can't sit due to abnormal sensation." Dr. Brown further stated that the Injured Worker would have to change positions every one hour and that his capacity to lift or carry was none at all.
>
> In further support of his IC-2 Application for Compensation for Permanent Total Disability, filed 9/13/2011, the Injured Worker also submitted a narrative report from his attending orthopedic specialist, Dennis M. Brown, M.D., dated 8/11/2011. In that report, Dr. Brown stated that. "Mr. Ford's last examine [sic], on 5/23/2011, was one year since he had a major revision of his left hip for infection and a retained Prostalac. He has done as well as is possible, but has made no progress over the last 9 months. He still has numbness in the left buttock region, due to repeated dissection and stretching of his gluteal nerves. Also, due to damage of the gluteal nerves, he has no gluteal function. ...I believe, with a reasonable degree of medical certainty, that Paul Ford is permanently disabled from any remunerative employment. Due to the loss of protective sensation in the gluteal region, he cannot sit safely for prolonged periods of time. He has a significant weakness and stiffness in and around the left hip that precludes standing or walking, as well as any lifting, pushing, pulling, climbing, squatting, or kneeling on any portion of the hip or pelvis." Dr. Brown then stated his opinion, in regard to the Injured Worker's extent of disability and rehabilitation potential, as follows, "I believe he should pursue complete and total disability. I do not know that he would benefit from any type of vocational rehabilitation, due to my significant limitations noted above. These restrictions are due to his work injury of April 29, 1999, and the subsequent surgeries and surgical complications on his left hip."

The employer's legal counsel objected to the consideration of Dr. Brown's narrative report of 8/11/2011. First of all, he stated that, "The report is based on an exam some time ago." However, the report, dated 8/11/2011, indicates that, "Mr. Ford's last exam, on 5/23/2011, as one year since he had a major revision of his left hip, for infection and a retained Prostalac. He has done as well as is possible, but has made no progress over the last 9 months." Thus, said report was based upon an examination of the Injured Worker which was performed only 2 1/2 months prior to the date of the narrative report and, furthermore, is based upon the fact that there had been, "no progress over the last 9 months." Furthermore, as previously indicated above, Dr. Brown also completed a MEDCO-14 Physician's Report of Work Ability, on 5/23/2012, the date of the referenced exam, and when he completed that form, Dr. Brown also indicated that the Injured Worker was totally disabled from work on a permanent basis, as of 5/23/2011. This Staff Hearing Officer makes note of the fact that the Self-Insuring Employer had no problem accepting Dr. Brown's opinion as having an adequate foundation when it could use that opinion for the purpose of termination of temporary total disability compensation. Thus, this Staff Hearing Officer rejects that objection to the consideration of Dr. Brown's narrative report of 8/11/2011.

Furthermore, the employer's legal counsel objected to Dr. Brown's report of 8/11/2011, based upon the fact that, "he talks about a knee replacement, this claim is not allowed for a knee replacement at all, and it's also not allowed for loss of gluteal sensation." This Staff Hearing Officer makes note of the fact that the Court of Appeals for Franklin County, in the case of State ex rel. Sears Roebuck & Co. v. Industrial Commission, held that it was not improper to rely on a medical report opining that an Injured Worker was permanently and totally disabled, which mentioned the Injured Worker's non-allowed conditions, because the mere mention of those conditions did not mean the report relied on them in reaching its conclusion, and the Industrial Commission logically read the report in a manner which did not rely on the non-allowed conditions. Furthermore, the Ohio Supreme Court confirmed the judgment of the Court of Appeals in the case of State ex rel. Sears Roebuck & Co. v. Industrial Commission (2008), 117 Ohio St.3d 539.

> As previously indicated above, Dr. Brown specifically stated that his opinion, in regard to Mr. Ford's permanent and total disability, was based upon restrictions which, "are due to his work injury of April 29, 1999 and the subsequent surgeries and surgical complications on his left hip."
>
> Thus, it is the finding of this Staff Hearing Officer that the 8/11/2011 narrative report of Dennis M. Brown, M.D., is logically read to indicate that Dr. Brown did not rely on the non-allowed conditions as a foundation for his opinion. It is the further finding of this Staff Hearing Officer that Dr. Brown's reference to a loss of gluteal function is merely a reference to the symptom resulting from the numerous surgeries addressing the allowed c0nditions of mechanical complication of an internal orthopedic device and stress fracture of the left femoral shaft.
>
> Therefore, this Staff Hearing Officer does find the opinion of the Injured Worker's attending orthopedic specialist, Dennis M. Brown, M.D., as expressed in his narrative report of 8/11/2011 and his MEDCO-14 Physician's Report of Work Ability, to be persuasive.
>
> Therefore, after hearing, this adjudicator finds that the medical impairment resulting from the allowed conditions in claim number 99-399473 prohibits the Injured Worker's return to his former position of employment, as well as prohibits the Injured Worker from performing any sustained remunerative employment. Therefore, the Injured Worker shall be, and hereby is, found to be permanently and totally disabled, without reference to the vocational factors listed in paragraph (B)(3) of Industrial Commission rule 4121-3-34, pursuant to Industrial Commission rule 4121-3-34(D)(2)(a).

{¶ 37} 25. On August 16, 2012, the three-member commission mailed an order denying relator's request for reconsideration of the SHO's order of May 21, 2012.

{¶ 38} 26. On November 2, 2012, relator, Dana Driveshaft Manufacturing, LLC, filed this original action.

Conclusions of Law:

{¶ 39} The commission, through its SHO, relied exclusively upon the May 23, 2011 MEDCO-14 and the August 11, 2011 report of Dr. Brown to support its award of PTD compensation.

{¶ 40} Neither of the reports can be interpreted by the commission to provide medical evidence that one or more allowed conditions of the claim independently caused a medical inability to perform any sustained remunerative employment. Moreover, both reports attribute disability in part to non-allowed conditions. Accordingly, neither of the reports provide the some evidence to support a PTD award.

{¶ 41} As more fully explained below, it is the magistrate's decision that this court issue a writ of mandamus.

{¶ 42} A newly identified condition that may be related to an industrial injury must be formally recognized in the claim if that condition is to become the basis for compensation. *State ex rel. Jackson Tube Servs., Inc. v. Indus. Comm.*, 99 Ohio St.3d 1, 2003-Ohio-2259. Moreover, the claimant cannot "circumvent additional allowance by simply asserting a relationship to the original injury." *State ex rel. Sears Roebuck Co. v. Indus. Comm.*, 131 Ohio St.3d 45, 2011-Ohio-6525, ¶ 29, quoting *Jackson Tube* at ¶ 25. Case law sets forth two exceptions to this well-settled law, but the exceptions do not assist the claimant in this action.

{¶ 43} *State ex rel. Miller v. Indus. Comm.*, 71 Ohio St.3d 229 (1994), presents one exception to the general rule that is instructive here. At issue in *Miller* was authorization of a supervised weight-loss program where obesity had worsened subsequent to the industrial injury. The *Miller* court rejected the commission's position that formal recognition of "obesity" as an allowed condition in the claim is a prerequisite for authorization of the weight-loss program. The *Miller* court gave several reasons for its position. First, because obesity is a generalized condition, it cannot be restricted to a specific body part or parts as R.C. 4123.84 envisions. Second, a claimant who is overweight when injured generally cannot maintain the requisite causal relationship for an additional allowance. This would make the pre-existence of obesity, in and of itself, dispositive.

{¶ 44} Thus, the *Miller* court held that additional allowance of obesity is not a prerequisite to consideration of payment for a weight-loss program. Rather, the requisite causal relationship question is to be addressed by the three-step test set forth in the *Miller* decision: (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} The other exception to the rule tying compensability to formal allowance is set forth in *Jackson Tube*. In turn, *Jackson Tube* is succinctly summarized by the court in *Sears,* as follows:

> In *Jackson Tube,* the claimant's workers' compensation claim had been allowed for a torn rotator cuff. Continuing shoulder problems, however, as well as a failure to have a shoulder arthroscopy performed, prompted his doctor to express concern that "substantial pathology [was] still being missed," most likely a secondary tear. *Id*. at ¶ 14. For these reasons, he sought permission both to perform exploratory surgery to determine the cause of claimant's persistent symptoms and to fix the problem he found.
>
> The employer objected to the procedure, arguing that the shoulder conditions identified by the doctor as the potential source of claimant's continuing problems had not been allowed in the claim. The commission allowed the surgery nonetheless, and we upheld that decision. We acknowledged that the issue was a difficult one, with compelling arguments being made by both sides:
>
> On one hand, claimant could not move for additional allowance beforehand, since without the surgery, the problematic conditions could not be identified. On the other hand, self-insured JTS questions its recourse when ordered to pay for surgery that ultimately reveals any conditions to be nonindustrial. It also fears that payment could be interpreted as an implicit allowance of all of the conditions in the postoperative diagnosis. *Id*. at ¶ 22.
>
> Addressing the latter concern first, we stressed that an employee could not "circumvent additional allowance by simply asserting a relationship to the original injury. The problem in this case, however, is that because any conditions are internal, claimant could not know what conditions to seek additional allowance for without first getting the diagnosis that only surgery could provide." *Id*. at ¶ 25.
>
> We were additionally persuaded by the physician's consistent assertion that whatever condition was the source of the claimant's shoulder complaints, that condition was related to

> the industrial injury. We also noted that claimant's doctor had indicated that irrespective of any other conditions that may be contributing to claimant's problems, the allowed condition of torn rotator cuff had to be surgically repaired. To deny the surgery simply because more conditions could be found would conflict with our earlier decision in *State ex rel. Griffith v. Indus. Comm.* (1999), 87 Ohio St.3d 154, 718 N.E.2d 423. We closed, however, by clarifying that if other shoulder conditions were indeed found, further treatment or compensation could not be authorized unless the conditions were then additionally allowed in the claim.

Id. at ¶ 26-30.

{¶ 46} A claimant must always show the existence of a direct and proximate causal relationship between his or her industrial injury and the claimed disability. *State ex rel. Waddle v. Indus. Comm.*, 67 Ohio St.3d 452 (1993). Non-allowed medical conditions cannot be used to advance or defeat a claim for compensation. *Id.* The mere presence of a non-allowed condition in a claim for compensation does not in itself destroy the compensability of the claim, but the claimant must meet his burden of showing that an allowed condition independently caused the disability. *State ex rel. Bradley v. Indus. Comm.*, 77 Ohio St.3d 239, 242 (1997).

The May 23, 2011 MEDCO-14

{¶ 47} The May 23, 2011 MEDCO-14, by itself, fails to attribute disability to one or more allowed conditions of the claim.

{¶ 48} On the form, the claim number and the date of injury are listed, but none of the allowed conditions are listed as a cause of disability.

{¶ 49} Even if listing the claim number and date of injury alone is sufficient to attribute disability solely to the allowed conditions in the claim, that cannot be viewed in isolation from Dr. Brown's handwritten explanation for the disability. That handwritten explanation for the disability attributes "chronic [left] [sacroiliac] joint inflammation" as the cause of disability. The claim is not allowed for a sacroiliac condition.

{¶ 50} Moreover, even if it could be argued that the sacroiliac condition is but a symptom of the hip injury and its claim allowances, that alone does not eliminate the requirement that the claim be allowed for a sacroiliac condition if compensation is to be based in part upon the chronic sacroiliac joint inflammation. *See State ex rel. Meridia*

Hillcrest Hosp. v. Indus. Comm., 74 Ohio St.3d 39 (1995) (claimant unsuccessfully argued that her pregnancy complications were symptoms of her allowed abdominal conditions and therefore need not be allowed for her to obtain compensation). Thus, the May 23, 2011 MEDCO-14 provides no evidence connecting an allowed condition to disability, and it impermissibly attributes disability in part to a non-allowed condition. It therefore provides no evidence upon which the commission can rely to support an award of PTD compensation.

Dr. Brown's August 11, 2011 Report

{¶ 51} Much like the MEDCO-14, the August 11, 2011 report of Dr. Brown, by itself, fails to attribute disability to one or more allowed conditions of the claim, while strongly suggesting that the disability opinion is based, at least in part, upon non-allowed conditions.

{¶ 52} Respondents argue that the very last sentence of Dr. Brown's report provides the some evidence upon which the commission could find that one or more allowed conditions of the claim independently cause disability. The last sentence of the report again states:

> These restrictions are due to his work injury of April 29, 1999 and the subsequent surgeries and surgical complications on his left hip.

{¶ 53} While Dr. Brown was presumably aware of the injury date and the claim number, there is no document in the record from Dr. Brown indicating that he knew the allowed conditions of the claim. That Dr. Brown was repeatedly the surgeon in claimant's care, does not create a presumption that he understood what the claim was actually allowed for.

{¶ 54} It can be observed that the body of Dr. Brown's report contains two paragraphs. The first paragraph discusses claimant's "right total knee replacement" and "his left SI joint." Thus, non-allowed conditions are discussed in the first paragraph of his report.

{¶ 55} The second paragraph contains no mention of the knee or the sacroiliac joint. It does however attribute disability to the "loss of protective sensation in the gluteal region."

{¶ 56} The industrial claim is not allowed for a gluteal condition. Accordingly, the second paragraph of Dr. Brown's report attributes disability to a non-allowed condition. *Meridia Hillcrest*.

{¶ 57} Based upon the forgoing analysis, the magistrate finds that the August 11, 2011 report of Dr. Brown provides no evidence that one or more allowed conditions of the claim independently cause disability.

{¶ 58} Accordingly, it is the magistrate's decision that this court issue a writ of mandamus ordering the commission to vacate the SHO's order of May 21, 2012 and to enter an order denying the PTD application.

/S/ MAGISTRATE
KENNETH W. MACKE

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).