[Cite as *State ex rel. Sears Roebuck & Co. v. Indus. Comm.*, 2010-Ohio-1818.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Sears Roebuck & Co.,	:	
Relator,	:	
v.	:	No. 09AP-180
Industrial Commission of Ohio and Timothy Mathews,	:	(REGULAR CALENDAR)
	:	
Respondents.	:	

D E C I S I O N

Rendered on April 27, 2010

Reminger Co., LPA, Amy S. Thomas, and *Kevin R. Sanislo*, for relator.

Richard Cordray, Attorney General, and *Colleen C. Erdman*, for respondent Industrial Commission of Ohio.

Butler, Cincione & DiCuccio, and *Matthew P. Cincione*, for respondent Timothy Mathews.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

SADLER, J.

{¶1} Relator, Sears Roebuck & Co. ("relator"), filed this action seeking a writ of mandamus directing respondent, Industrial Commission of Ohio ("commission"), to

vacate its order granting the June 5, 2008 motion for payment of a fee bill for a September 22, 1998 office visit filed by the claimant, Timothy Mathews ("claimant").[1]

{¶2} We referred this case to a magistrate of this court pursuant to Loc.R. 12(M) and Civ.R. 53. On December 7, 2009, the magistrate issued a decision, a copy of which is attached to this decision, granting the writ of mandamus. Respondents each filed objections to the magistrate's decision, and relator filed a memorandum contra. For the reasons that follow, we overrule the objections, and adopt the magistrate's decision.

{¶3} To summarize the facts set forth in the magistrate's decision, on October 13, 1987, claimant sustained an industrial injury during the course of his employment with relator. The industrial claim was initially certified by relator for "torn muscles left leg, tears buttocks and bladder, internal injuries." On September 22, 1998, claimant was examined by Dr. Leah R. Urbanosky. This examination resulted in the creation of an office note, which is quoted in its entirety in the magistrate's decision. The office note describes the nature of the injuries claimant suffered as a result of the 1987 incident, including crush-type injuries to the pelvis and thighs. The office note further states that claimant reported that his left leg felt heavy, and that he was experiencing tingling in his left foot. In the office note, Dr. Urbanosky gave her impression that claimant had mild L5 radiculopathy. Dr. Urbanosky further stated that claimant was at some risk of having a disk herniation even without his prior injuries, and that claimant should return for further evaluation if he experienced pain or numbness.

[1] Claimant and the commission will be referred to collectively as "respondents."

{¶4} By letter dated March 12, 1999, claimant's attorney forwarded a bill for the September 22, 1998 office visit to relator's third-party administrator ("TPA"). The letter indicates that the TPA had previously rejected payment of the bill because the claim had been inactive, and indicated that the TPA should advise counsel immediately if the bill was not going to be paid by relator. The TPA responded by letter dated April 21, 1999. In that letter, the TPA stated that the issue of payment of the bill would be reconsidered upon provision of the office note proving the relationship between the diagnosis and the October 1987 claim. Nothing in the record showed that claimant's counsel responded to the TPA's request for the office note.

{¶5} On April 2, 2008, claimant submitted a C-9 completed by Urological Associates, Inc. The C-9 sought approval for office visits one or two times per year. The TPA denied the C-9 because the industrial claim had expired based on the statute of limitations applicable to such claims. On June 5, 2008, claimant moved for payment of the bill for the September 22, 1998 office visit. In support of the motion, claimant submitted the bill, Dr. Urbanosky's office note, and the April 21, 1999 letter from the TPA to claimant's counsel.

{¶6} After a September 3, 2008 hearing, a district hearing officer ("DHO") issued an order granting claimant's motion for payment of the bill. The DHO cited evidence offered at the hearing that relator had paid for treatment of claimant's lower back in the past. The DHO noted that:

> It is significant to note that the Claimant's 10/13/1987 industrial injury involved a crush type injury to the Claimant's pelvis and thighs. The 09/22/1998 office notes of Dr. Urbanosky sets [sic] forth the priority of treating the Claimant's more serious injuries which required some seven surgeries.

{¶7} After an October 24, 2008 hearing, a staff hearing officer ("SHO") affirmed the DHO's order. The SHO found that the medical service provided was reasonably related to the allowed conditions, concluding that:

> Claimant suffered severe internal injuries in the vicinity of the lower back. A referral to determine if a lower back injury was a part of these severe injuries was reasonable and indicated. Although no lower back injury is allowed in the claim, in the context of the location and severity of the claimant's other injuries, and his complaints at the time, this referral is a reasonable expense of the allowed industrial injury. This is demonstrated by the office notes of the medical service, notwithstanding the conclusion that the claimant did not have a medical condition which is a part of the allowed conditions in the claim.

The SHO further concluded that the bill had been timely submitted to the employer for payment, and that the commission had jurisdiction to consider the matter under R.C. 4123.52 because the application for payment was made within ten years following the date of the last payment of compensation or benefits.

{¶8} On November 20, 2008, another SHO sent a letter denying relator's administrative appeal from the October 24, 2008 SHO order. On January 22, 2009, the commission mailed an order denying relator's motion for reconsideration, which resulted in the filing of this action.

{¶9} The magistrate concluded that the writ sought by relator should be granted. The magistrate concluded that nothing in Dr. Urbanosky's office note related the symptoms for which claimant sought treatment to any of the allowed conditions. The magistrate concluded that the DHO erred by relying on unspecified evidence that relator had been paying for treatment on claimant's lower back, concluding that payment for such

treatment would not act to amend the claim to add additional conditions related to claimant's lower back. See *State ex rel. Schrichten v. Indus. Comm.*, 90 Ohio St.3d 436, 2000-Ohio-91. The magistrate also concluded that the SHO erred in concluding that the office visit was for the purpose of considering whether lower back conditions should be allowed as additional conclusions, finding that no evidence in the record supported this conclusion.

{¶10} Respondents each filed objections to the magistrate's decision. Since the objections present the same arguments, we will address both sets of objections together. Essentially, respondents argue that the magistrate erred by concluding that there was no evidence in the record to support the commission's decision to order payment of the bill.

{¶11} First, respondents argue that the magistrate erred by concluding that there was no evidence in the record to support the conclusion that the medical services for which payment was sought were reasonably related to the allowed conditions. Medical services must be paid for when those services are reasonably related to the industrial injury, and when the cost of the services is medically reasonable. *State ex rel. Miller v. Indus. Comm.*, 71 Ohio St.3d 229, 1994-Ohio-204.

{¶12} However, we agree with the magistrate's conclusion that nothing in the record establishes any connection between the purpose of claimant's office visit and the allowed conditions. Respondents point to Dr. Urbanosky's office note, in which she described claimant's industrial injury before discussing the symptoms for which claimant was seeking treatment. As pointed out by the magistrate, Dr. Urbanosky's discussion of the industrial injury creates, at most, an inference that there was a causal relationship between the radiculopathy identified by Dr. Urbanosky and claimant's industrial injury. In

the absence of any evidence directly connecting the purpose of the visit with the allowed industrial conditions, the commission abused its discretion by concluding that the office visit was reasonably related to claimant's allowed conditions.

{¶13} Next, respondents argue that it was reasonable for the commission to order payment for the medical services because a referral to determine whether claimant's lower back problems were related to claimant's industrial injury was reasonable, even if the allowance of additional conditions did not actually result. In *State ex rel. Jackson Tube Servs., Inc. v. Indus. Comm.*, 99 Ohio St.3d 1, 2003-Ohio-2259, the Supreme Court of Ohio concluded that when surgery or other medical services are necessary to determine whether additional conditions should be allowed, payment for that surgery or other medical service can be paid as being reasonably related to the claim, even if no additional conditions are allowed as a result.

{¶14} Here, the SHO concluded that the office visit with Dr. Urbanosky was for the purpose of obtaining a diagnosis regarding whether claimant's lower back problem was related to his industrial injury. However, nothing in Dr. Urbanosky's office note states that the purpose of the visit was diagnosis for the purpose of determining whether conditions should be added to the claim, nor does any other evidence in the record support this conclusion. Thus, the commission abused its discretion when it accepted the SHO's conclusion in this regard.

{¶15} Consequently, respondents' objections to the magistrate's decision are overruled. Having reviewed the magistrate's decision, we adopt the decision as our own. Therefore, relator's request for a writ of mandamus is granted ordering the Industrial

Commission of Ohio to vacate its SHO's order of October 24, 2008, and to enter an order denying claimant's June 5, 2008 motion for payment of the fee bill.

Objections overruled;
writ of mandamus granted.

McGRATH, J., concurs.
TYACK, P.J., dissents.

TYACK, P.J., dissenting.

{¶16} I would sustain the objections of the commission and of the injured worker. As a result, I would deny the request for a writ of mandamus.

{¶17} Timothy Mathews was seriously injured when he was caught by a conveyor and pinched between a mobile conveyor and a fixed conveyor line while working for Sears, Roebuck & Company ("Sears"), a self-insured employer. He suffered torn muscles of his left leg, torn buttocks, tears of his bladder and unspecified internal injuries. The injuries occurred on October 13, 1987.

{¶18} In 1994, the Ohio Bureau of Workers' Compensation ordered the payment of permanent partial disability of 24 percent. Clearly, the payment of benefits was continuing seven years later, so a medical examination related to the claim done in 1998 would not be time barred.

{¶19} As noted above, the industrial claim has been recognized for "internal injuries." Such a vague phrase to describe a recognized condition is not an ideal choice of language, but apparently means anything or something under the skin was injured.

{¶20} Mathews had surgery on his left leg and had a colostomy, but no back surgery.

{¶21} In 1998, Mathews went to see a doctor because his heavily injured left leg was feeling heavy and he was experiencing tingling down his leg into his left foot. The doctor, Leah Urbanosky of Greater Ohio Orthopedic Surgeons, Inc., diagnosed "mild L5 radiculopathy on the left."

{¶22} The bill for Dr. Urbanosky's examination was submitted to Frank Gates Service Company ("Gates"), which was handling the matter for Sears. In December 1998, payment was refused because "claim is inactive."

{¶23} In March 1999, counsel for Mathews sent another request for payment to Gates. Gates had earlier received a copy of the findings of Dr. Urbanosky with respect to current conditions, examination, impression, and plan for Timothy Mathews. The fact the document was received is evidence by a Gates file stamp reflecting it was received on December 28, 1998.

{¶24} Gates did not have the bill paid, but instead requested "the office notes" for the examination in April 1999 in order to decide whether to pay voluntarily.

{¶25} At some point in time Helmsman Management Services, Inc. ("Helmsman") apparently took over management of the file for Sears. Helmsman sent a fax on May 16, 2008 saying that "the claim is dead by statute" because no payments had been made on the claim since March 1997. Helmsman did not give any indication that it was aware that its predecessor Gates had left payment of the bill in limbo less then ten years earlier.

{¶26} A self-insured employer cannot refuse repeated requests for payment of a bill and then claim the file is dead because it has made no payment within the last 10 years. The Industrial Commission clearly was correct to reject this allegation made on behalf of Sears.

{¶27} The commission also was correct to find that the medical service was reasonably related to the original injury. Mathews had every right to have a doctor tell him what was going on when his seriously injured left leg began feeling heavy and he was experiencing pain and tingling down that leg into his foot.

{¶28} We are not here to decide whether or not the mild radiculopathy experienced by Timothy Mathews should be the basis for an on-going course of treatment. We are here only to decide if Mathews could have a doctor diagnose, at Sears' cost, the cause of the feeling of heaviness and the tingling in his seriously injured left leg. I believe that Mathews clearly had a right to have that diagnosis paid for as a part of his workers' compensation claim. I believe that the commission was completely correct in its handling of the matter.

{¶29} I would sustain the objections to the magistrate's decision and deny the request for a writ of mandamus.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Sears Roebuck & Co.,	:	
Relator,	:	
v.	:	No. 09AP-180
Industrial Commission of Ohio and Timothy Mathews,	:	(REGULAR CALENDAR)
	:	
Respondents.	:	

MAGISTRATE'S DECISION

Rendered on December 7, 2009

Reminger Co., LPA, Amy S. Thomas and *Kevin R. Sanislo*, for relator.

Richard Cordray, Attorney General, and *Colleen C. Erdman*, for respondent Industrial Commission of Ohio.

Butler, Cincione & DiCuccio, and *Matthew P. Cincione*, for respondent Timothy Mathews.

IN MANDAMUS

{¶30} In this original action, relator, Sears Roebuck & Co., requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order granting the June 5, 2008 motion of respondent Timothy Mathews

("claimant") for payment of a fee bill for a September 22, 1998 office visit, and to enter an order denying the motion.

Findings of Fact:

{¶31} 1. On October 13, 1987, claimant sustained an industrial injury in the course of and arising out of his employment with relator, a self-insured employer under Ohio's workers' compensation laws. On that date, claimant became pinched between a mobile conveyor and a fixed conveyor line. The industrial claim (No. 956928-22) was initially certified by relator for "torn muscles left leg; tears buttocks and bladder; internal injuries."

{¶32} 2. Claimant has attached to his brief filed in this action a November 9, 1987 letter from Associated Risk Services Corp. to claimant. The letter states:

> This will acknowledge receipt of your claim for workers' compensation benefits for an injury suffered while in the employ of Sears, Roebuck and Co. Your claim is allowed for fracture pelvis, laceration left thigh, severe abdominal injuries. Should you have conditions other than listed above which you allege are the result of this compensable injury, please notify this office in writing.

{¶33} 3. Claimant has also attached to his brief filed in this action a May 8, 2009 letter from relator's counsel acknowledging the November 9, 1987 letter, stating:

> * * * [T]he employer will be accepting the claim for the additional conditions of: fracture left pelvis; laceration left thigh; and severe abdominal injuries.

{¶34} 4. The stipulated record does not contain the November 9, 1987 or May 8, 2009 letters described above.

{¶35} 5. On September 22, 1998, claimant was examined by Leah R. Urbanosky, M.D., during a visit to the offices of Greater Ohio Orthopedic Surgeons Inc. The office visit generated an office note from Dr. Urbanosky.

{¶36} 6. By letter dated March 12, 1999, claimant's attorney forwarded a bill for the September 22, 1998 office visit to relator's third-party administrator ("TPA"). In the letter, claimant's attorney explained:

> * * * This was billed to your office for payment and was rejected on the basis that the claim had been inactive. As your file should reflect, Mr. Mathews has been under the care of one or more physicians at Greater Ohio Orthopedic Surgeons, Inc. His previous physician recently died and Dr. Urbanosky has taken over Mr. Mathews' care.
>
> * * *
>
> If your client is unwilling to pay this bill, please advise me immediately in order that we may take the appropriate action relative to this matter. Your prompt response is appreciated.

{¶37} 7. Relator's TPA responded with a letter to claimant's counsel dated April 21, 1999. The letter states:

> We are in receipt of your letter dated March 12, 1999 requesting the employer reconsider their position on the payment of the outstanding bill from Greater Ohio Orthopedic Surgeons for service date September 22, 1998.
>
> We understand your concern regarding this one payment; however, Mr. Mathew's' [sic] has not received any medical treatment from this provider since February 6, 1996. The employer agrees to consider accepting payment for this date of service, but we request you provide us with the office notes to prove the relationship and diagnosis to his October 13, 1987 claim.

{¶38} 8. There is no evidence in the record showing that relator's counsel ever responded to the TPA's April 21, 1999 request for the office notes.

{¶39} 9. On April 2, 2008, claimant submitted for authorization a C-9 completed by Urological Associates, Inc. The C-9 sought approval for urological office visits one to two times per year.

{¶40} 10. Relator's TPA denied the C-9 on grounds that the industrial claim had expired because of the statute of limitations on industrial claims.

{¶41} 11. On June 5, 2008, claimant moved for payment of the bill for the September 22, 1998 office visit with Dr. Urbanosky. Besides the bill, claimant submitted Dr. Urbanosky's September 22, 1998 office note and the April 21, 1999 letter from relator's TPA.

{¶42} 12. Dr. Urbanosky's September 22, 1998 office note states in its entirety:

> CURRENT CONDITION: Timothy is a 33-year-old male, followed previously by Dr. Marsalka, who was involved in a severe crush-type injury to his pelvis and thighs back in October of 1987. At that time, he required soft tissue surgery on his left leg and had to have a colostomy, as well as suprapubic tube and wear a Foley for a while. He did not require any pelvis or back surgery at the time and overall seems to have recovered well. He works as a chemist at Roxanne Labs. He states over the last two days or so his left leg has been feeling "heavy" with associated tingling into the dorsum of his left foot. He states it feels as if his leg falls asleep. However, the tingling seems to be constant. He has minimal associated back pain or other radicular-type pains at this time. He denies any frank weakness of his extremity, difficulties with urination or bowel movements including retention or incompetence.
>
> EXAMINATION: On physical examination, has in touch sensation to pinprick, as well as light touch in the S1, L5, L4, L3, and L2 distributions on his lower extremities. He does have slightly increased two-point discrimination on the left in comparison with the right on the dorsum of his foot with consistent two-point distinction evident at 14 mm. on the left compared with 12 mm. on the right. He has negative straight leg raise while sitting and also while lying supine on both

> extremities. He does have a mildly positive Lasegue on the left with dorsiflexion of the foot at approximately 60° with leg elevation. His reflexes are symmetric bilaterally for the patellar reflex, as well as the Achilles reflex. He does not have any evidence of motor weakness and demonstrates 5/5 strength on single leg toe raises totaling 20 on the bilateral extremities with no knee bending. He has 5/5 strength on toe dorsiflexion, ankle eversion, ankle dorsiflexion and on quads extension activities. He has no bony tenderness to palpation over the spine or SI joints. He is able to demonstrate good range of motion on flexion and extension, lateral rotation and lateral bending with minimal difficulty.
>
> IMPRESSION: Mild L5 radiculopathy on the left.
>
> PLAN: He has been encouraged to take his Motrin on a regular basis which he usually takes for migraines periodically. In addition, he has been encouraged to maintain his regular activities within the limits of any pain which presently is minimal. I have encouraged aerobic-type activities, as well as abdominal exercises and gradual back muscle strengthening-type exercises. I have encouraged him to minimize weight lifting-type activities which he wishes to begin at least until this numbness is resolved. He has been warned that being in his 30's he is, even without his prior injuries, at risk of having a disk herniation. Should this manifest itself with more pain or frank numbness or limping/weakness, I have encouraged him to return for further evaluation. At that time, we would consider possible epidural steroid injections. However, they are not indicated at this time. He is to see me back in four weeks or if there are any problems in the interim.

{¶43} 13. Following a September 3, 2008 hearing, a district hearing officer ("DHO") issued an order granting claimant's June 5, 2008 motion. The DHO's order explains:

> The District Hearing Officer finds that the Industrial Commission has jurisdiction under R.C. 4123.52 to consider the merits of the Claimant's request. At the time that the Claimant submitted the 09/22/1998 bill in the amount of $50.00 from Greater Ohio Orthopedic Surgeons to the self-insured employer for payment[,] the claim was still active.

> The 04/21/1999 letter from the employer's representative acknowledges the receipt of the outstanding bill from the Greater Ohio Orthopedic Surgeons. The letter also indicates that payment will be considered upon submission of office notes.
>
> Authorization is granted for the payment of the $50.00 bill from Greater Ohio Orthopedic Surgeons. The authorization for the payment of this bill is based upon the 09/22/2008 [sic] office notes of Dr. Urbanosky. In addition, the evidence presented at hearing by Claimant's counsel indicated that the self-insured employer had been paying for treatment related to the low back area in the past. It is significant to note that the Claimant's 10/13/1987 industrial injury involved a crush type injury to the Claimant's pelvis and thighs. The 09/22/1998 office notes of Dr. Urbanosky sets forth the priority of treating the Claimant's more serious injuries which required some seven surgeries.

{¶44} 14. Relator administratively appealed the DHO's order of September 3, 2008.

{¶45} 15. Following an October 24, 2008 hearing, a staff hearing officer ("SHO") issued an order affirming the DHO's order of September 3, 2008. The SHO's order explains:

> It is the order of the Staff Hearing Officer that the injured worker's C-86, filed 06/05/2008, is granted to the extent of this order.
>
> The Staff Hearing Officer affirms the District Hearing Officer's direction that the self-insuring employer pay the $50.00 bill from Greater Ohio Orthopedic Surgeons, date of service 09/22/1998. This bill was submitted to the employer soon after the service.
>
> By 04/21/1999 letter[,] the employer's third part[y] administrator acknowledge[d] receipt of the letter and stated that the payment would be considered upon submission of office notes. This letter does not constitute the denial of payment.

> The Staff Hearing Officer has considered [the] employer's four defenses to the payment of this bill, and finds none of them well taken.
>
> First, the medical service is reasonably related to the allowed industrial injury. Claimant suffered severe internal injuries in the vicinity of the lower back. A referral to determine if a lower back injury was a part of these severe injuries was reasonable and indicated. Although no lower back injury is allowed in the claim, in the context of the location and severity of the claimant's other injuries, and his complaints at the time, this referral is a reasonable expense of the allowed industrial injury. This is demonstrated by the office notes of the medical service, notwithstanding the conclusion that the claimant did not have a medical condition which is a part of the allowed conditions in the claim.
>
> Ohio Administrative Code 4123-3-23 is complied with. The fee bill under consideration was filed with the self-insuring employer within two years of the date of service. There is no obligation to file a C-86 or other demand for hearing which [sic] within any specific period following the TPA's request for further evidence on the facts of this claim. There was no denial by the employer of payment at this time.
>
> Ohio Administrative Code 4123-7-01(B) is inapplicable, as this is a claim in which compensation has been paid.
>
> Finally, the date of filing of demand for payment of this bill is the date on which the bill was filed with the third party administrator, not the date of filing of the C-86 under consideration. Consequently[,] there was an application made for payment of this bill within ten years following the date of last payment of compensation or benefits, and there is jurisdiction to consider the matter under Revised Code Section 4123.52.

{¶46} 16. On November 20, 2008, another SHO mailed an order refusing relator's administrative appeal from the SHO's order of October 24, 2008.

{¶47} 17. On January 22, 2009, the three-member commission mailed an order denying relator's motion for reconsideration.

{¶48} 18. On February 20, 2009, relator, Sears Roebuck & Co., filed this mandamus action.

Conclusions of Law:

{¶49} It is the magistrate's decision that this court issue a writ of mandamus, as more fully explained below.

{¶50} The Supreme Court of Ohio has 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? *State ex rel. Miller v. Indus. Comm.* (1994), 71 Ohio St.3d 229, 232.

{¶51} In *Miller*, the claimant sought authorization for a supervised weight loss program. The *Miller* court rejected the employer's position that the claimant was required to first obtain an additional claim allowance for obesity.

{¶52} Additionally identified conditions that may be related to an industrial injury must be formally recognized in the claim if they are to become the basis for compensation. *State ex rel. Jackson Tube Servs., Inc. v. Indus. Comm.*, 99 Ohio St.3d 1, 2003-Ohio-2259.

{¶53} Moreover, the Supreme Court of Ohio has repeatedly rejected the proposition that a medical condition is implicitly allowed when a self-insured employer authorizes and pays for surgery performed to treat the condition. *State ex rel. Schrichten v. Indus. Comm.* (2000), 90 Ohio St.3d 436, quoting *State ex rel. Griffith v. Indus. Comm.* (1999), 87 Ohio St.3d 154, 156.

{¶54} Moreover, the payment of TTD compensation for a medical condition that has never been formally allowed does not create an implicit claim allowance for that condition. *State ex rel. Turner v. Indus. Comm.* (2000), 89 Ohio St.3d 373.

{¶55} Where the authorization of surgery or diagnostic medical services is at issue, an exception can occur to the general requirement that formal allowance of medical conditions must be obtained prior to the authorization of the surgery or diagnostic services. In *Jackson Tube*, the industrial claim was allowed for a torn left rotator cuff and other injuries. In May 1998, Dr. Don D. Delcamp performed open surgery on the shoulder and repaired two tears. Despite the operation, the claimant continued to have shoulder problems. In May 2000, the claimant sought to change doctors and get further treatment.

{¶56} Dr. Jonathan J. Paley proposed a video arthroscopic surgery "to delineate the exact cause of the intra-articular problem." Id. at ¶5. He further proposed that he be authorized to repair the shoulder conditions found to need repair during the arthroscopic surgery. Dr. Paley pointed out that it would be unethical to subject the patient to additional risk by simply doing a surgical diagnostic procedure and then seeking additional claim allowances before proceeding with surgical repair. The commission authorized the surgical procedure as proposed by Dr. Paley, thus prompting a mandamus action from the employer.

{¶57} The *Jackson Tube* court upheld the commission's authorization, explaining:

> This is a difficult issue. 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.
>
> * * *
>
> JTS argues that *Miller* does not excuse additional allowance of conditions before surgery where the conditions are specific and can be assigned to a particular body part. It describes *Miller* as carving only a limited exception for those conditions unamenable to allowance because of their generalized nature-Miller's overall obesity, for example.
>
> All agree that *Miller* was never intended to permit an employee to 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 ¶22, 24-25.

{¶58} At issue here is whether the commission abused its discretion in determining that the September 22, 1998 office visit was reasonably related to the industrial injury.

{¶59} In this regard, the DHO's order states in part:

> [T]he evidence presented at hearing by Claimant's counsel indicated that the self-insured employer had been paying for treatment related to the low back area in the past. It is significant to note that the Claimant's 10/13/1987 industrial injury involved a crush type injury to the Claimant's pelvis and thighs. The 09/22/1998 office notes of Dr. Urbanosky sets forth the priority of treating the Claimant's more serious injuries which required some seven surgeries.

{¶60} As earlier noted, the SHO's order states that the DHO's order is affirmed. At issue here is the following paragraph of the SHO's order:

> First, the medical service is reasonably related to the allowed industrial injury. Claimant suffered severe internal injuries in the vicinity of the lower back. A referral to determine if a lower back injury was a part of these severe injuries was reasonable and indicated. Although no lower back injury is allowed in the claim, in the context of the location and severity of the claimant's other injuries, and his complaints at the time, this referral is a reasonable expense of the allowed industrial injury. This is demonstrated by the office notes of the medical service, notwithstanding the conclusion that the claimant did not have a medical condition which is a part of the allowed conditions in the claim.

{¶61} Analysis begins with the observation that it was Dr. Urbanosky's "impresssion" that the symptomology complained of on September 22, 1998 was caused by or the result of a "[m]ild L5 radiculopathy on the left"—undisputedly a nonallowed condition. Nowhere in the office note does Dr. Urbanosky opine that "[m]ild L5 radiculopathy on the left" is a condition arising from the industrial injury of October 13, 1987. But even if Dr. Urbanosky had so opined, the problem would remain that the condition is not allowed.

{¶62} At best, it can perhaps be said that a casual relationship between "[m]ild L5 radiculopathy on the left" and the industrial injury is inferred or suggested by the fact that Dr. Urbanosky begins her office note by discussing the industrial injury. But again, even if causal relationship could be inferred by this initial discussion of the industrial injury, the problem remains that the condition has not been allowed.

{¶63} Clearly, the DHO erred by relying upon unspecified evidence that "the self-insured employer had been paying for treatment related to the low back area in the past." Clearly, that relator may have paid for treatment related to the low back does not automatically amend the claim to include the conditions related to the low back for

which treatment was provided and paid for. *Schrichten*; *Griffith*. To the extent that the SHO adopted the DHO's rationale in affirming the order, the SHO clearly erred.

{¶64} Endeavoring to circumvent the problem created by Dr. Urbanosky's finding that claimant's reported symptomology was caused by a nonallowed condition, the SHO finds that the office visit was a "referral to determine if a lower back injury" should be included in the allowed conditions of the claim. There is no evidence in the record to support this finding.

{¶65} It appears from the September 22, 1998 office note that claimant presented to Dr. Urbanosky's office seeking treatment for the symptoms reported to the doctor on that date. In the paragraph captioned "PLAN," Dr. Urbanosky sets forth a course of future conservative treatment. There is no indication in Dr. Urbanosky's office note that claimant was referred to her office for the purpose of determining whether a low back condition should be included in the claim. Thus, this is not a case, as suggested by the SHO, where a claimant was sent out for a medical examination to determine the extent of his or her injuries for purposes of amending the industrial claim.

{¶66} Given that the record fails to support the SHO's finding that claimant was referred to Dr. Urbanosky for a determination of whether the claim should be amended, this court need not determine whether such a referral would permit payment of the fee bill at issue.

{¶67} In summary, based upon the above analysis, there is no evidence to support the commission's finding that the September 22, 1998 office visit was reasonably related to the industrial injury.

{¶68} Accordingly, for all the above reasons, it is the magistrate's decision that this court issue a writ of mandamus ordering the commission to vacate its SHO's order of October 24, 2008, and to enter an order denying claimant's June 5, 2008 motion for payment of the fee bill.

/S/ *Kenneth W. Macke*
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).