

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Matthew T. George, :
Relator, :
v. : No. 09AP-1099
Industrial Commission of Ohio and : (REGULAR CALENDAR)
Honda of America Mfg., Inc., :
Respondents. :
:

D E C I S I O N

Rendered on September 14, 2010

Charles Zamora Co., LPA, and Karen D. Turano, for relator.

Richard Cordray, Attorney General, and Joseph C. Mastrangelo, for respondent Industrial Commission of Ohio.

Vorys Sater Seymour and Pease LLP, Robert A. Minor and Gina R. Russo, for respondent Honda of America Mfg., Inc.

IN MANDAMUS
ON OBJECTIONS TO MAGISTRATE'S DECISION

TYACK, P.J.

{¶1} Matthew T. George ("relator") filed this action in mandamus, seeking a writ to compel the Industrial Commission of Ohio ("commission") to vacate its order which

denied his request for arthroscopy for his right shoulder and to compel the commission to grant his request.

{¶2} In accord with Loc.R. 12, the case was referred to a magistrate to conduct appropriate proceedings. The parties stipulated the pertinent evidence and filed briefs. The magistrate then issued a magistrate's decision containing detailed findings of fact and conclusions of law, which is appended to this decision. The magistrate's decision includes a recommendation that we deny the request for a writ.

{¶3} Relator was injured on October 2, 2003. His workers' compensation claim was initially recognized for "RIGHT SHOULDER LABRAL TEAR; RIGHT SHOULDER PARTIAL THICKNESS TEAR OF ROTATOR CUFF." This led to surgery on relator's right shoulder in January 2004.

{¶4} In May 2004, relator returned to work, but suffered pain and crepitus which his treating physician attributed to the return to work.

{¶5} Due to an unrelated condition, relator was off work from May 2005 until he was fired in January 2007.

{¶6} In February 2008, relator returned to his treating physician complaining of increased shoulder pain. This led to an MRI being done, the second such procedure involving relator's shoulder. Larry W. Watson, M.D., who was relator's treating physician, viewed the results of this MRI as indicating a deterioration of relator's condition. As a result, he signed a C-9 requesting that additional conditions be recognized.

{¶7} An independent medical examination ("IME") was performed by Christopher Holzaepfel, M.D., who found the additional conditions to exist, but expressed doubt that

the conditions resulted from the October 2003 injury. Based upon the IME, Honda refused to recognize the additional conditions.

{¶8} Dr. Watson authored a report in October 2003 in which he disagreed with the IME, despite seeing a surveillance video showing relator doing repetitive heavy lifting.

{¶9} Dr. Holzaepfel provided an additional report on behalf of Honda in which he indicated that the new conditions resulted from relator's activities since the 2004 surgery on relator's shoulder.

{¶10} In January 2009, a district hearing officer ("DHO") entered an order granting the additional conditions of "Partial Thickness Tear of Right Distal Subscapularis Tendon; Right Subscapularis Partial Thickness Tearing; Medical Displacement Biceps Tender with Tendonopathy." A staff hearing officer ("SHO") affirmed this order following Honda's appeal.

{¶11} Dr. Watson submitted a C-9 requesting shoulder arthroscopy for relator. Honda did not approve the C-9.

{¶12} Honda had a surveillance company monitor relator's activities at that time. The company, INFOQUEST, generated a report and DVD showing relator doing a weight workout at Metro Fitness in Hilliard.

{¶13} A second IME, this time by Walter H. Hauser, M.D., was generated on behalf of Honda. Dr. Hauser saw no need for the arthroscopy, attributing relator's problems to relator's active lifestyle since the original surgery.

{¶14} A DHO entered an order granting the arthroscopy. On appeal by Honda, an SHO reached the opposite result, based upon Dr. Hauser's report and rejecting the various reports from Dr. Watson.

{¶15} This mandamus action followed.

{¶16} Our magistrate found that Dr. Hauser's report constituted "some evidence" to support the SHO's order. Counsel for relator submits two objections questioning that finding:

A. The Magistrate Erred By Concluding Dr. Hauser's Report Constitutes "Some Evidence" Upon Which The Commission Could Rely Because Dr. Hauser States Newly Diagnosed Conditions In 2008 Were Resolved By a Previous Surgery in 2004.

B. The Magistrate Erred By Concluding Dr. Hauser's Report Constitutes "Some Evidence" Upon Which The Commission Could Rely Because Dr. Hauser Did Not Accept All Of The Allowed Conditions.

{¶17} A careful review of Dr. Hauser's reports reveals a number of troubling inconsistencies. Dr. Hauser indicates on page four of his six page report that "[t]he first note I see of actual evaluation and treatment for his right shoulder was on 02/06/2008 when he saw Dr. Larry Watson." Yet, Dr. Hauser earlier had acknowledged that relator had seen Dr. Watson on October 20, 2003 for relator's right shoulder injury and that the treatment had progressed to the point of surgery on the shoulder on January 8, 2004, a surgery which is described in great detail on page three of Dr. Hauser's report.

{¶18} Dr. Hauser's report also indicates at page four that "[o]ther than the three mentioned independent medical evaluations, I did not see much of any information in the records about his [relator's] shoulders." Then Dr. Hauser proceeds to discuss for multiple

paragraphs Dr. Watson's recent findings and the results of the most recent MRI on relator's right shoulder.

{¶19} Dr. Hauser lists the allowed conditions, including the conditions allowed most recently. He states in cursory fashion:

Therefore, it is my opinion, after taking a history, physical examination, and accepting his current allowed conditions in this claim, that he has been a very active individual. This is confirmed by the records. * * *

{¶20} Then Dr. Hauser expressed opinions which are inconsistent with his claimed acceptance of all the allowed conditions:

* * * Surveillance indicates that he has been able to use his right shoulder in a very active manner. He has no objective findings on his physical examination other than the rupture of the biceps tendon. It is my opinion that that rupture is totally unrelated to his work-related injury on 10/02/2003, but to his subsequent activities, including his workouts at the health club. Once a biceps tendon has been ruptured, there is no indication to do an open repair at this time, and certainly not based on his original injury on 10/02/2003. He has excellent strength in his upper extremities, and no impairment that can be noted judging by his activities on surveillance video. There is no need to repair his rotator cuff and, hence, in my opinion absolutely no reason for any further surgery, and certainly not for the allowed conditions in this claim, which were resolved with his prior surgery.

{¶21} Dr. Hauser indicated in his report that relator was 5'11", 225 lbs. and age 38 and "very muscular." The fact that relator used weights in the 50 to 75 pound range is an indication that he is experiencing physical problems, not a disproof of such problems. However, the surveillance video seems to have had a significant impact on Dr. Hauser.

{¶22} The statements in Dr. Hauser's reports that certain medical conditions were resolved in 2004 when the conditions did not materialize until later and were not recognized for purposes of workers' compensation until later still are also a concern.

{¶23} After a careful review of the report, the inconsistencies lead us to find that Dr. Hauser's report cannot constitute some evidence to refuse the arthroscopic procedure requested for relator. We, therefore, sustain the objections to the magistrate's decision. We adopt the findings of fact in the magistrate's decision, as amplified herein. We do not adopt the conclusions of law. As a result, we grant a writ of mandamus compelling the commission to vacate its order denying arthroscopy for relator's right shoulder and compelling the commission to enter a new order granting or denying the request for the arthroscopy procedure based upon the medical evidence other than Dr. Hauser's report.

Objections sustained; writ granted.

CONNOR, J., concurs.
BRYANT, J., dissents

BRYANT, J., dissenting.

{¶24} Although Dr. Hauser's report may contain some factual inconsistencies unrelated to his medical opinion, I cannot say his report is not some evidence on which the commission could rely. Dr. Hauser accepted the allowed conditions and concluded they have no role in the problem for which relator seeks arthroscopic surgery. That Dr. Hauser did not find a manifestation of the allowed conditions in examining relator does not mean Dr. Hauser did not accept them.

{¶25} In the final analysis, Dr. Hauser's report attributes relator's need for surgery to other than his allowed conditions. The commission could have discounted his report for some of the factual inconsistencies, unrelated to his medical opinion, which the majority cites but it chose not to do so. Because we cannot substitute our judgment for that of the commission in determining the weight to be given to an expert medical report, I would overrule the objections, adopt the magistrate's decision, and deny the requested writ.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Matthew T. George,	:	
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Relator,	:	
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v.	:	No. 09AP-1099
	:	
Industrial Commission of Ohio and	:	(REGULAR CALENDAR)
Honda of America Mfg., Inc.,	:	
	:	
Respondents.	:	
	:	

MAGISTRATE'S DECISION

Rendered on May 26, 2010

Charles Zamora Co., LPA, and Karen D. Turano, for relator.

Richard Cordray, Attorney General, and Joseph C. Mastrangelo, for respondent Industrial Commission of Ohio.

Vorys Sater Seymour and Pease LLP, Robert A. Minor, and Gina R. Russo, for respondent Honda of America Mfg., Inc.

IN MANDAMUS

{¶26} Relator, Matthew T. George, has filed this original action requesting a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order, which denied his request for right shoulder arthroscopy and ordering the commission to grant his request for that surgery.

Findings of Fact:

{¶27} 1. Relator sustained a work-related injury on October 2, 2003, and his claim was originally allowed for "RIGHT SHOULDER LABRAL TEAR; RIGHT SHOULDER PARTIAL THICKNESS TEAR OF ROTATOR CUFF."

{¶28} 2. Relator was examined by Larry W. Watson, M.D., on October 20, 2003. Following his examination of relator, Dr. Watson stated: "My impression is he has had a right shoulder rotator cuff tendinitis and bursitis with partial thickness tear of the rotator cuff. I cannot rule out a labral tear."

{¶29} 3. An MRI, obtained on November 10, 2003, revealed the following:

MRI OF THE RIGHT SHOULDER WITH CONTRAST

* * *

FINDINGS: The examination demonstrates SLAP-type tear. This is best seen on the axial and coronal post-contrast images. In addition, there is a high grade partial undersurface tear of the supraspinatus tendon. Partial tear of the subscapularis tendon is also noted, and there is medial subluxation of the long head of the biceps tendon which demonstrates mild enlargement and intrasubstance signal abnormality consistent with mild tendinosis.

There is no evidence of a full-thickness rotator cuff tear. A minimal amount of subacromial/subdeltoid bursal fluid is noted. There is no significant glenohumeral or acromioclavicular joint osteoarthritis. The muscles are

normal in signal intensity, and there is no fatty atrophy or muscle edema.

CONCLUSION:

1. SLAP-type labral tear.
2. Partial tear of the subscapularis tendon with medial subluxation of the long head of the biceps tendon.
3. Mild bicipital tendinopathy.
4. High grade partial undersurface tear involving the distal anterior supraspinatus tendon fibers.

{¶30} 4. On January 8, 2004, Dr. Watson performed surgery on relator's right shoulder. The preoperative and postoperative diagnoses were the same: "Right shoulder rotator cuff interval injury with partial thickness tearing at the subscapularis tendon and the supraspinatus tendon and injury to the long head of the biceps." While Dr. Watson did find partial thickness tearing of the rotator cuff, the injury did not require sutures; instead, Dr. Watson was able to debride (clean the fraying/tearing) the various areas as follows:

* * * A full-radius resector was used to debride the undersurface rotator cuff tendinitis, and then we debrided the partial thickness tear of the supraspinatus. We then debrided the partial-thickness tear of the subscapularis tendon. We debrided some of the anterior labral degeneration. We then debrided the SLAP lesion[;] * * * did a thorough bursectomy[;] * * * released the coracoacromial ligament[;] * * * [and] removed his anterior acromial spur with a high-speed bur. * * * The superior surface of the rotator cuff revealed inflammation, but no tearing. * * *

{¶31} 5. Following surgery, relator was unable to return to regular-duty work for an extended period of time and received temporary total disability ("TTD") compensation. In May 2004, relator was able to return to work on a gradual return-to-work basis and, according to the office notes of Dr. Watson, his shoulder recovery progressed, although

he continued to have some crepitus and pain which Dr. Watson attributed to his returning to work.

{¶32} 6. Due to a back condition, relator was off work in May 2005 and was terminated in January 2007.

{¶33} 7. Relator did not receive any further medical treatment for his shoulder until February 28, 2008, when he returned to Dr. Watson complaining of pain in his right shoulder.

{¶34} 8. According to Dr. Watson's February 6, 2008 office note, relator had been experiencing increased shoulder pain and some burning for the previous six weeks, but he did not recall a new injury. Dr. Watson was concerned that relator had a partial rotator cuff tear and some progressive SLAP tearing. Based upon his examination, Dr. Watson requested a second MRI.

{¶35} 9. The second MRI was performed on March 13, 2008, and revealed the following:

1. Moderate grade partial thickness articular sided tear involving the distal subscapularis tendon as described above. The tear is estimated to involve approximately 50% of the width of the tendon. There is associated medial displacement of the long head of the biceps tendon from the bicipital groove with mild tendinopathy of the biceps tendon.
2. Postsurgical change as described above with extensive micrometallic artifact and resection of a small portion of the distal clavicle.
3. Mild enlargement and intermediate heterogeneous signal intensity of the supraspinatus consistent with postsurgical change and at least moderate tendinopathy with associated bursal sided fraying. Mild tendinopathy also involves the infraspinatus.

4. Postsurgical change with irregularity and relative small size of the superior labrum. No definite recurrent labral tear. There is no paralabral cyst.

5. Mild fatty atrophy of the superior aspect of the subscapularis muscle.

{¶36} 10. In an office noted dated March 26, 2008, Dr. Watson noted that relator's shoulder condition had not improved and that the MRI revealed a progression of his subscapularis tear and medial subluxation of the biceps, a subscapularis tear, as well as some supraspinatus partial thickness tearing. Dr. Watson indicated that he wanted to proceed with a right shoulder arthroscopy, rotator cuff repair, and probable biceps tenodesis.

{¶37} 11. In a letter dated May 30, 2008, Dr. Watson informed relator's counsel that his shoulder condition had gotten progressively worse and that, in his opinion, the worsening of the condition as noted by the second MRI would not need to be added to the original diagnosis, but that it was directly related to the work injury.

{¶38} 12. On June 26, 2008, Dr. Watson signed a C-9 requesting that relator's claim be additionally allowed for the conditions identified in the second MRI.

{¶39} 13. An independent medical examination was performed by Christopher Holzaepfel, M.D., regarding whether the requested conditions should be additionally allowed in relator's claim. In his August 8, 2008 report, Dr. Holzaepfel noted that, following the January 2004 surgery, relator underwent appropriate postoperative physical therapy and was able to return to work without restrictions. Three years following the surgery, relator began experiencing increasing right shoulder pain; however, relator denied any new history of trauma. After providing his physical findings upon examination,

Dr. Holzaepfel opined that the medical evidence does support the existence of the requested conditions; however, Dr. Holzaepfel opined that there was insufficient evidence connecting his current conditions with the October 2003 injury.

{¶40} 14. Based upon the report of Dr. Holzaepfel, respondent Honda of America Mfg., Inc. ("Honda") rejected relator's request that his claim be allowed for the additional conditions.

{¶41} 15. Dr. Watson authored an October 13, 2008 report indicating that the conditions revealed on the MRI were either directly caused or aggravated by the 2003 work injury. Concerning the surveillance video showing relator working, Dr. Watson stated that the "surveillance showing him being involved in repetitive heavy lifting complicates matters as far as could these activities also cause injury or aggravate things. With the above injuries Mr. George can still do activities but he will have associated pain with them; so it does not change my opinion."

{¶42} 16. On November 21, 2008, Dr. Holzaepfel completed an addendum to his August 8, 2008 report after reviewing additional office notes from Dr. Watson, as well as Dr. Watson's October 13, 2008 report. Dr. Holzaepfel continued to opine that, while relator's ongoing right shoulder symptoms are due to the contested conditions, those contested conditions were not the result of the 2003 injury. Instead, Dr. Holzaepfel opined that relator's activities following his recovery from the 2004 surgery caused these new conditions.

{¶43} 17. On January 6, 2009, a hearing was held before a district hearing officer ("DHO") to determine whether relator's claim would be allowed for the additional

conditions. The DHO granted relator's request based on the March 13, 2008 MRI, as well as the March 26, 2008 office note and October 13, 2008 report of Dr. Watson. As such, relator's claim was additionally allowed for:

PARTIAL THICKNESS TEAR OF THE RIGHT DISTAL
SUBSCAPULARIS TENDON; RIGHT SUPRASPINATUS
PARTIAL THICKNESS TEARING; MEDIAL
DISPLACEMENT BICEPS TENDON WITH
TENDINOPATHY.

{¶44} 18. On February 2, 2009, Dr. Watson examined relator again and noted the following on physical examination:

It is obvious today he has a tear of the long head of the biceps. He has significant ecchymosis in the upper arm associated with Popeye muscle, associated with a tear of the long head of the biceps. He also with this has a flare up of his rotator cuff tendinitis and bursitis.

Dr. Watson was hopeful that relator had no further rotator cuff damage and recommended relator wait three to four weeks to allow the acute biceps tear to calm down and recommended gentle range of motion, icing, and anti-inflammatories.

{¶45} 19. In an order dated February 27, 2009, a staff hearing officer ("SHO") affirmed the DHO's order additionally allowing relator's claim for the new conditions.

{¶46} 20. On March 12, 2009, Dr. Watson submitted a C-9 requesting right shoulder arthroscopy and postoperative physical therapy for the newly allowed conditions. Honda denied the C-9 pending an independent medical examination.

{¶47} 21. On March 12, 2009, a report was generated by INFOQUEST, a surveillance company. According to the report, relator was observed lifting weights estimated at 50 to 75 pounds while working out at Metro Fitness in Hilliard. Relator's

lifting activities are discussed at pages 29 and 30 of the record and a DVD has been submitted.

{¶48} 22. An independent medical examination was conducted by Walter H. Hauser, M.D. In his April 27, 2009 report, Dr. Hauser noted that, subjectively, relator complained of pain and lack of strength in his right biceps. On physical examination, Dr. Hauser noted that he had normal range of motion, flexion and elevation in abductive position, slight limitation in internal rotation, and that external rotation was normal with no weakness. Concerning relator's biceps, Dr. Hauser stated that there were obvious signs of a rupture of the long head of the biceps. Thereafter, Dr. Hauser summarized his medical records regarding relator's shoulder and noted:

It is my opinion that it is probable that the changes in his right shoulder have come on totally unrelated to his work-related injury on 10/02/2003. The records indicate he has been fairly active. The surveillance video indicates that he has been able to use his right shoulder in a very active manner. In addition, he has no significant objective findings on his physical examination other than the rupture of the biceps tendon. That rupture occurred when he was putting on his boot. The tugging created the rupture, and now that the tendon is ruptured, there is no indication to do another operation. Attempts to repair the tendon are not going to improve the function of the right upper extremity. There is no need to repair his rotator cuff and, hence, in my opinion absolutely no reason for any further surgery, and certainly not for the allowed conditions in this claim, which were resolved with his prior surgery.

* * *

Therefore, it is my opinion, after taking a history, physical examination, and accepting his current allowed conditions in this claim, that he has been a very active individual. This is confirmed by the records. Surveillance indicates that he has been able to use his right shoulder in a very active manner.

He has no objective findings on his physical examination other than the rupture of the biceps tendon. It is my opinion that that rupture is totally unrelated to his work-related injury on 10/02/2003, but to his subsequent activities, including his workouts at the health club. Once a biceps tendon has been ruptured, there is no indication to do an open repair at this time, and certainly not based on his original injury on 10/02/2003. He has excellent strength in his upper extremities, and no impairment that can be noted judging by his activities on the surveillance video. There is no need to repair his rotator cuff and, hence, in my opinion absolutely no reason for any further surgery, and certainly not for the allowed conditions in this claim, which were resolved with his prior surgery.

{¶49} 23. A hearing was held before a DHO on July 16, 2009. At that time, the DHO granted relator's request for surgery as requested by Dr. Watson. Specifically, the DHO stated:

* * * The claim was additionally allowed for new conditions based upon the medical reports of Dr. Watson and diagnostic testing. Now that the claim was formally allowed for the new condition on 02/27/2009 by Staff Hearing Officer order, Dr. Watson again requested surgery.

The District Hearing Officer reviewed Dr. Hauser's medical report, dated 04/27/2009 and does not find the report persuasive on the issue of surgery, Dr. Watson had recommended surgery for almost a year. Dr. Hauser's report refers to incidents that took place months after Dr. Watson recommended surgery. Injured Worker putting on a boot felt tear in [his] arm. Injured Worker working out at a gym. Injured Worker signed up at a Metro Fitness on 12/18/2008 to try to strengthen his shoulder as he was getting weaker and weaker. Injured Worker testified that he did not lift any heavy weights he was trying to do upper body exercise and keep his muscles from atrophy. He stated that he used a very light weight. Further, Dr. Watson had told him to exercise.

The District Hearing Officer also finds interesting is Dr. Hozepel [sic] report wherein he noted that the Injured

Worker had the same physical symptoms that Dr. Watson noted and for which he is requesting surgery. (See Dr. Holzaepel's [sic] medical report, dated 11/21/2008.)

(Emphasis sic.)

{¶50} 24. Honda appealed and the matter was heard before an SHO on September 2, 2009. The SHO vacated the prior DHO's order and denied relator's C-9 requesting arthroscopic surgery as follows:

The C-86 motion filed 05/21/2009 is denied. The C-9 dated 03/12/2009 from Dr. Larry W. Watson is denied. The Injured Worker is denied pre-operative testing, arthroscopy surgery of the right shoulder and post-operative care. The denial is based on the 04/27/2009 report of Dr. Hauser. In his report Dr. Hauser stated "therefore, it is my opinion, after taking a history, physical examination, and accepting his current allowed conditions in this claim, that he has been a very active individual. This is confirmed by the records. Surveillance indicates that he has been able to use his right shoulder in a very active manner. He has no objective findings on his physical examination other than the rupture of the biceps tendon. It is my opinion that the rupture is totally unrelated to his work related injury on 10/02/2003 but to his subsequent activities, including his workouts at the health club. Once a biceps tendon has been ruptured, there is no indication to do an open repair at this time, and certainly not based on his original injury on 10/02/2003. He has excellent strength in his upper extremities, and no impairment that can be noted judging by his activities on the surveillance video. There is no need to repair his rotator cuff and, hence, in my opinion absolutely no reason for any further surgery, and certainly not for the allowed conditions in this claim, which were resolved with his prior surgery."

Various medical evidence from Dr. Watson was reviewed and considered but not relied upon.

{¶51} 25. Relator's appeal was refused by order of the commission mailed September 19, 2009.

{¶52} 26. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶53} The sole issue in this case is whether the report of Dr. Hauser constitutes some evidence upon which the commission could rely to deny relator's request for surgery. For the following reasons, the magistrate finds that it does.

{¶54} Relator points to that portion of Dr. Hauser's report where he opines that all of the allowed conditions in relator's claim were resolved with the prior surgery in 2004, and that it is probable that the changes in his shoulder are unrelated to the October 2, 2003 injury. As relator argues, the newly allowed conditions could not have been resolved from the 2004 surgery because those new conditions were not yet diagnosed. Relator also asserts that Dr. Hauser did not accept the newly allowed conditions. Further, relator asserts that Dr. Hauser's reliance on the surveillance evidence showing relator working out at the fitness center was improper because Dr. Watson had instructed relator to strengthen his shoulder by lifting light weights and because it is clear that relator was having difficulty lifting those weights.

{¶55} Relator's position is easy to appreciate. Prior to the 2004 surgery, the MRI showed partial tear of the subscapularis tendon with medial subluxation of the long head of the biceps tendon. During the surgery in 2004, Dr. Watson corrected this condition by debriding the partial tear. Approximately four years following the surgery, a second MRI again revealed a partial thickness tear of the distal subscapularis tendon and medial displacement of the long head of the biceps tendon. The second MRI did not show a recurrence of the SLAP-type labral tear nor did it show any tearing involving the distal

supraspinatus tendon fibers. Instead, the second MRI showed moderate tendonopathy with associated bursal sided frame at the supraspinatus tendon. Further, no one disagrees that the 2008 MRI findings are similar to the 2003 MRI findings. The conditions which Dr. Watson repaired at the time of the 2004 surgery appear to have returned to some extent.

{¶56} Turning to Dr. Hauser's April 27, 2009 report, at the outset, he correctly listed all the conditions allowed in relator's claim including the newly allowed conditions. Dr. Hauser noted relatively normal range of motion findings with regard to relator's right shoulder. The only objective finding found by Dr. Hauser indicated that relator had obvious signs of a rupture of the long head of the biceps. At this point in the report, it is clear that Dr. Hauser has opined that relator's newly allowed conditions are not objectively observed. Instead, Dr. Hauser opines that the difficulties relator is currently having with his right shoulder involve the rupture of the biceps tendon which is not an allowed condition. While Dr. Hauser does opine that these newly allowed conditions are probably not related to the October 2003 injury, he never rejects them as being allowed. It is simply that he believes it is the non-allowed injury to relator's biceps tendon that is causing his symptoms. Reading Dr. Hauser's complete report, as opposed to taking one sentence out of context, he did not reject the new conditions; he opined that it was a non-allowed condition that was causing relator's problems. Thereafter, Dr, Hauser concluded that surgery was not necessary because further attempts to repair the damaged biceps tendon would not improve the condition of relator's right shoulder and there was no reason to repair the damage to relator's rotator cuff.

{¶57} Relator also challenges Dr. Hauser's reliance on the surveillance video of him working out with weights at the health club. The surveillance evidence is certainly capable of interpretation and it is clear that relator made the argument that the weights he was lifting would not be considered heavy for a man such as himself and that he was lifting weights at the direction of Dr. Watson. In reviewing the stipulated evidence, the magistrate cannot find where Dr. Watson recommended that relator lift light weights and relator has not cited to any portion of the evidence. Instead, the magistrate specifically notes that, when Dr. Watson examined relator on February 2, 2009, he recommended gentle range of motion exercises, icing, and the use of anti-inflammatory medications. Nothing in that office note or in any of his reports indicates that relator was advised to lift weights.

{¶58} In *State ex rel. Miller v. Indus. Comm.*, 71 Ohio St.3d 229, 232, 1994-Ohio-204, the court set out a three-pronged test for authorizing medical treatment: (1) are the medical services reasonably related to the allowed conditions, (2) are the services reasonably necessary for treatment of the allowed conditions, and (3) is the cost medically reasonable. Dr. Hauser opined that surgery was neither reasonably related to nor reasonably necessary for the treatment of relator's allowed conditions and the commission agreed. Because there is some evidence in the record to support this conclusion, the magistrate finds no abuse of discretion.

{¶59} The surveillance evidence is subject to interpretation and the magistrate cannot say that either Dr. Hauser or the commission has interpreted that evidence incorrectly or that their interpretation constitutes an abuse of discretion. What is clear

from the surveillance evidence is that, in spite of the new tearing of a portion of relator's rotator cuff, relator is able to use his shoulder. Whether or not surgery is required due to the allowed conditions – there is medical evidence both to support surgery and to find that this surgery was not required.

{¶60} Based on the foregoing, it is this magistrate's conclusion that relator has not demonstrated that the commission abused its discretion in denying his C-9 request for arthroscopic surgery and this court should deny relator's request for a writ of mandamus.

/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).