

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio ex rel.	:	
Cleveland Clinic Foundation,	:	
	:	
Relator,	:	
	:	
v.	:	No. 10AP-329
	:	
Industrial Commission of Ohio	:	(REGULAR CALENDAR)
and Martha Banks,	:	
	:	
Respondents.	:	

D E C I S I O N

Rendered on May 12, 2011

Moscarino & Treu, L.L.P., Michael J. Bertsch, Kathleen E. Gee, and Michael J. Kahlenberg, for relator.

Michael DeWine, Attorney General, and *Andrew J. Alatis*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

BROWN, J.

{¶1} Relator, Cleveland Clinic Foundation, has filed an original action requesting that this court issue a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its order granting the March 12, 2009 motion of claimant-respondent, Martha Banks ("claimant"), for authorization of treatment, and to enter an order denying the motion.

{¶2} This matter was referred to a magistrate of this court pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate issued a decision which is appended to this decision, including findings of fact and conclusions of law, recommending that this court issue a writ of mandamus ordering the commission to vacate its order granting claimant's motion for treatment. No objections have been filed to that decision.

{¶3} Finding no error of law or other defect on the face of the magistrate's decision, this court adopts the magistrate's decision as our own, including the findings of fact and conclusions of law. In accordance with the magistrate's recommendation, we issue a writ of mandamus ordering the commission to vacate its staff hearing officer's order of August 7, 2009, which granted claimant's March 12, 2009 motion for treatment, and to enter a new order denying the motion.

Writ granted.

FRENCH and DORRIAN, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel.	:	
Cleveland Clinic Foundation,	:	
	:	
Relator,	:	
	:	
v.	:	No. 10AP-329
	:	
Industrial Commission of Ohio	:	(REGULAR CALENDAR)
and Martha Banks,	:	
	:	
Respondents.	:	

MAGISTRATE'S DECISION

Rendered on January 31, 2011

Moscarino & Treu, L.L.P., Michael J. Bertsch, Kathleen E. Gee and Michael J. Kahlenberg, for relator.

Michael DeWine, Attorney General, and Andrew J. Alatis, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶4} In this original action, relator, Cleveland Clinic Foundation, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order granting the March 12, 2009 motion of respondent Martha Banks ("claimant") for authorization of right total knee arthroplasty and post-operative therapy, and to enter an order denying the motion.

Findings of Fact:

{¶5} 1. On December 29, 2000, claimant injured both her knees while employed as a shuttle bus driver for relator, a self-insured employer under Ohio's workers' compensation laws. On that date, claimant fell from a curb onto both knees while placing a wheelchair patient onto her bus.

{¶6} 2. On the day following the injury, December 30, 2000, both knees were x-rayed at the Cleveland Clinic Foundation. According to a report from Jonathan Waldbaum, M.D., who later examined at claimant's request, the x-rays showed "tricompartamental joint space narrowing with osteophytosis involving the bilateral knees consistent with osteoarthritis."

{¶7} 3. Initially, the industrial claim (No. 00-812125) was allowed for "bilateral knee sprain and contusions and bilateral leg contusions."

{¶8} 4. On January 8, 2001, claimant was examined and treated for her industrial injury by her attending physician, Dr. Waldbaum. Thereafter, Dr. Waldbaum saw claimant for follow-up evaluations on January 22, April 2, June 27, and October 12, 2001.

{¶9} 5. On December 18, 2001, at the request of claimant's counsel, Dr. Waldbaum issued a five-page narrative report stating:

Martha Banks was seen most recently with regard to her work related knee injury on October 12, 2001. At this time, the patient reported ongoing severe pain in the bilateral knees which was made worse with activities. Physical examination demonstrated bilateral knee effusions. Painful crepitus was noted with patellofemoral rub bilaterally. Range of motion was decreased in the bilateral knees. Tenderness to palpation was noted in the medial and lateral joint lines bilaterally. The McMurray's test was positive bilaterally. The

ligamentous structures of the knees were stable. At this time, we continued to await for approval for treatment for the patient's work related injuries.

SUMMATION:

In summary, Martha Banks sustained the following injuries in a work related accident which occurred on December 30 [sic], 2000:

- [One] Right knee contusion.
- [Two] Right knee sprain.
- [Three] Left knee contusion.
- [Four] Left knee sprain.
- [Five] Right leg contusion.
- [Six] Left leg contusion.
- [Seven] Symptomatic aggravation of pre-existing right knee osteoarthritis.
- [Eight] Symptomatic aggravation of pre-existing left knee osteoarthritis.

Within a reasonable degree of medical probability, my opinion is that the patient's symptoms with regard to her bilateral knees were directly and proximately caused by the trauma sustained in the work related accident on December 30 [sic], 2000. * * *

{¶10} 6. Based upon Dr. Waldbaum's report, the commission additionally allowed the claim for "aggravation of pre-existing osteoarthritis, bilateral knees."

{¶11} 7. On November 19, 2008, at claimant's request, she was examined by orthopedic surgeon Richard E. Grant, M.D., who issued a two-page narrative report stating:

* * * Her radiographs revealed evidence of tricompartmental osteoarthritis of both knees with significant genu valgus of the right and the left knee. She is a 59-year-old female who works as a home health aid.

Her height is 5 feet 10 inches, her weight is 260 pounds.

She reports that the pain began approximately 10 years ago. Using our pain intensity scale of 0-10 with 10 being the worst pain possible she selected level 9-10. * * *

* * *

On examination she is a well-developed, well-nourished female alert and oriented to person, place, time and situation. She is in no acute distress. She has obvious bilateral genu varus deformity of both knees. She had standing films to include her hips, knees and ankles which confirms the same diagnosis. On range of motion, she has marked crepitus throughout the entire arc of motion for the right and the left knee. In addition her radiographs show lateral compartment overload for both the right and the left knee.

We had a lengthy discussion regarding the need for total knee arthroplasty. We discussed the indications, risks, benefits and alternatives of operative intervention in the form of right total knee arthroplasty. I explained to Ms. Banks that the principle risks are felt to be non exclusive of nerve damage, hemorrhage, infection, loss of range of motion, deep venous thrombosis, pulmonary embolus, late infection, early infection, recurrence, persistence, need for reoperation, etc. She indicated that she would like to proceed with her right total knee arthroplasty first.

{¶12} 8. On February 16, 2009, Dr. Grant completed a C-9 which is an Ohio Bureau of Workers' Compensation form captioned "Physician's Request for Medical Service or Recommendation for Additional Conditions for Industrial Injury or Occupational Disease."

{¶13} The C-9 form is divided into six sections requesting information. Pertinent here are the first three sections. Section I provides blank spaces for the injured worker's name, the claim number, and the date of injury. On the C-9 at issue, claimant's name, the industrial claim number and the injury date are filled in.

{¶14} Section II is captioned "Requested Services." Section II requests "Treating diagnosis ICD-9 code(s)." In response, "715.96" is written in the appropriate space. At

section II on the C-9 at issue, it is written "Surgery Outpatient CPT 27447 @ UH with Dr. Richard E. Grant." Also written is "Post-op Therapy [for] 2-3x/wk [for] 4-6 wks."

{¶15} Section III is captioned "Additional Conditions." Section III is divided into two parts. The first part is left blank on the C-9 at issue. The second part contains the query: "In your opinion, based on the history from the injured worker, your clinical evaluation and experience, is the diagnosis or condition causally related, either directly or proximately, to the alleged industrial accident or exposure?"

{¶16} In response, there is a mark inside the box that is aside "Yes, please explain." In the blank space below is written by hand "Please see documentation."

{¶17} 9. The C-9 prompted relator to have claimant examined by Nicholas Ahn, M.D. Following a March 11, 2009 examination, Dr. Ahn issued a four-page narrative report:

Impression: After thorough examination of this claimant, I do believe that she has severe osteoarthritis of both knees[.] Certainly her physical examination and physical findings are very consistent with osteoarthritis of the knees, which is worse on the right than on the left[.] Her symptoms are also very consistent[.] Her pain behaviors are appropriate and she does not have findings consistent with nonorganic symptomology[.]

The major question here is whether or not total knee replacement would be related to the injuries as sustained from 12/29/00[.] The claimant had underlying severe degenerative osteoarthritis of both knees, and this is not contested[.] Indeed, the claimant's findings, as noted on her multiple x-rays, as well as MRI scans represent degenerative changes that occurred over many years[.]

The claimant did sustain an aggravation of preexisting osteoarthritis when she fell[.] However, this type of aggravation would be expected to have resolved by six weeks post injury[.] The persistent symptoms as

experienced by the claimant are likely the result of the underlying degenerative process and not the aggravation that was incurred on 12/29/00[.] The aggravation was simply a flare-up of the soft tissues around the area of the claimant's degenerative osteoarthritis[.] However, the fall itself did not cause the claimant's osteoarthritis or necessitate surgical management[.] It simply made the claimant's underlying severely degenerative condition more symptomatic[.] The overall deformity, which is really quite dramatic, would demonstrate that the claimant's symptoms would have eventually reached a point where total knee arthroplasty would be necessary if for no other reason, based on the deformity alone[.] As such, total knee arthroplasty would have been necessary with or without the injury from 12/29/00[.] The aggravation did make the claimant's underlying condition more symptomatic[.] However, it did not cause the claimant's condition or cause the claimant's condition to be such that surgical intervention is now warranted[.] Rather, the surgical intervention that is warranted with respect to total knee arthroplasty is related to the claimant's underlying degeneration about the right knee.

* * *

I will now address the questions as posed[.]

What are your objective findings as related to the allowed conditions of this claim? Are these objective findings consistent with this claimant's subjective complaints?

The objective findings are related to the osteoarthritis of both knees[.] However, this is was a preexisting condition[.] The aggravation of preexisting osteoarthritis that was incurred as a result of the injury that took place certainly could have made the claimant's underlying osteoarthritis more symptomatic[.] However, the actual surgery that is being requested is based on the claimant's underlying condition, which would have required surgery anyway because of the severe deformity that is present[.] Certainly the aggravation that was incurred on 12/29/00 did not cause the claimant's severe deformity, as identifiable on the claimant's examination.

As such, the objective findings are consistent with the claimant's subjective complaints[.] The objective findings,

however, are not related to the allowed conditions in the claim. The objective findings are related to the claimant's underlying degenerative osteoarthritis of both knees, which clearly preexisted the injury from 12/29/00, and this is the reason, as opposed to the aggravation that was incurred from 12/29/00, for the surgery that is being recommended[.]

Is the surgery being requested per C9 dated February 16, 2009 for treatment of the industrial injury and the allowed conditions of this claim alone?

The surgery being requested per C9 dated 02/16/09 is not for treatment of the industrial injury or the allowed conditions in this claim alone[.] See above for details[.] It is being requested for the claimant's underlying degenerative osteoarthritis of the knees, which has no relationship to the injury from 12/29/00[.]

Is there objective evidence to support the medical necessity of the requested surgery, based solely on the allowed conditions of this claim? Please explain the basis for your opinion[.]

The objective evidence supports the medical necessity of the requested surgery, and this is confirmed by today's examination[.] However, the surgery is not based on the allowed conditions in this claim, but based on the underlying degenerative osteoarthritis of the right knee as noted above[.] Thus, based on the allowed conditions in the claim, the surgery is neither reasonable nor appropriate[.] The need for the surgery is based on the claimant's underlying degenerative osteoarthritis of the knees, which would have no relationship to the injury in question[.]

(Emphasis omitted.)

{¶18} 10. On March 12, 2009, claimant moved for authorization of the C-9 dated February 16, 2009.

{¶19} 11. Following a May 12, 2009 hearing, a district hearing officer ("DHO") issued an order granting claimant's March 12, 2009 motion:

The District Hearing Officer orders that the Injured Worker's request for the authorization of medical services in this claim is granted.

The District Hearing Officer orders that the following medical services, requested via the 02/16/2009 C-9 form completed by Dr. Grant, are authorized: out-patient surgery for total knee arthroplasty to be performed by Dr. Grant; post-op therapy, at a frequency of three treatments per week for six weeks.

The District Hearing Officer finds that the Injured Worker sustained her burden of proving that the above authorized medical services are appropriate, reasonable, and related to the allowed conditions recognized in this 12/29/2000 work place injury claim in which the Injured Worker fell, landing on her knees in the course of her employment with the listed employer.

The District Hearing Officer finds that the 02/16/2009 C-9 form completed by Dr. Grant and the 11/19/2008 medical report of Dr. Grant support the medical justification for the above authorized medical services.

The District Hearing Officer has reviewed and considered all of the evidence contained in the claim file prior to rendering this decision.

This order is based upon the 02/16/2009 C-9 form completed by Dr. Grant, the 11/19/2008 medical report of Dr. Grant, evidence contained in the claim file, and evidence adduced at hearing.

{¶20} 12. Relator administratively appealed the DHO's order of May 12, 2009.

{¶21} 13. Following an August 7, 2009 hearing, a staff hearing officer ("SHO")

issued an order affirming the DHO's order of May 12, 2009:

The Staff Hearing Officer affirms the District Hearing Officer's granting of the C-9 completed by Dr. Grant on 02/16/2009, and authorizes out patient surgery for total knee arthroplasty to be performed by Dr. Grant; post-op therapy, at a frequency of three treatments per week for six weeks.

The Injured Worker credibly testified that she has had swelling in the knee since the 2000 injury. Also significant is the fact that all the doctors agree that osteoarthritis is the major factor in the need for this surgery. This claim has been allowed for aggravation of pre-existing osteoarthritis.

{¶22} 14. On September 9, 2009, another SHO mailed an order refusing relator's administrative appeal from the SHO's order of August 7, 2009.

{¶23} 15. On November 12, 2009, the three-member commission mailed an order denying relator's request for reconsideration.

{¶24} 16. On April 9, 2010, relator, Cleveland Clinic Foundation, filed this mandamus action.

Conclusions of Law:

{¶25} The issue is whether Dr. Grant's report and the C-9 upon which the commission relied provide some evidence that the right total knee arthroplasty and post-operative therapy are reasonably related to one or more allowed conditions of the claim, namely, the aggravation of pre-existing osteoarthritis of the right knee.

{¶26} The magistrate finds that Dr. Grant's report and the C-9 do not provide some evidence that the surgery and therapy are reasonably related to an allowed condition. Therefore, it is the magistrate's decision that this court issue a writ of mandamus, as more fully explained below.

{¶27} 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.

{¶28} At issue here is the first prong of the *Miller* test; that is, whether the medical services are reasonably related to the industrial injury.

Dr. Grant's Report

{¶29} Analysis begins with Dr. Grant's report. Clearly, nothing in Dr. Grant's two-page narrative report connects the industrial injury to the stated need for right total knee arthroplasty. There is no reference in the report to the industrial injury whatsoever. There is no mention of the industrial claim allowances or even that claimant has an industrial claim.

{¶30} The report indicates that claimant has "bilateral genu varus deformity of both knees," and that she has "marked crepitus throughout the entire arc of motion for the right and the left knee." In addition, according to the report, claimant's radiographs show "lateral compartment overload for both the right and the left knee." Presumably, those are the identified clinical findings that support the need for knee surgery. However, none of those clinical findings are said by Dr. Grant to relate in any way to the allowed conditions of the claim.

{¶31} Clearly, Dr. Grant's November 19, 2008 report, by itself, provides no evidence that the arthroplasty and therapy are reasonably related to the industrial injury under the *Miller* test.

The C-9

{¶32} The C-9 does contain the industrial claim number and the injury date which are provided in the appropriate blank spaces of the form. The C-9 also lists ICD-9 code number "715.96" for the "treating diagnosis." That code is for "osteoarthritis unspecified whether generalized or localized involving lower leg."

{¶33} Significantly, use of ICD-9 code 715.96 does not reveal an awareness of the person completing the form that the industrial claim is only allowed for an aggravation of osteoarthritis and not for the pre-existing osteoarthritis.

{¶34} Section III of the form is only applicable to requests for the allowance of additional conditions and, thus, we would not ordinarily expect the physician to mark or write at section III when the only request is for medical services. Notwithstanding the inapplicability of section III to the request for medical services, the commission here nevertheless asserts that the marking of the "yes" box (in response to the query regarding causal relationship) advances the commission's position that the C-9 provides some evidence supporting the authorization of surgery and therapy. The magistrate disagrees.

{¶35} The inappropriate marking of the "yes" box at section III does not advance the claimant's burden of showing that the requested medical services are reasonably related to the aggravation of the pre-existing condition and not the pre-existing condition itself. At best, the marking of the "yes" box in section III shows that the person completing the C-9 form did not completely understand the form.

Claimant's Hearing Testimony, etc.

{¶36} In addition to the stated reliance upon the C-9 and Dr. Grant's report, the SHO's order of August 7, 2009 also offers further justification for granting the motion:

The Injured Worker credibly testified that she has had swelling in the knee since the 2000 injury. Also significant is the fact that all the doctors agree that osteoarthritis is the major factor in the need for this surgery. This claim has been allowed for aggravation of pre-existing osteoarthritis.

{¶37} Clearly, the above-quoted portion of the SHO's order provides no evidence or explanation supporting the commission's decision.

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).