

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel.	:	
Ronald L. Washington,	:	
	:	
Relator,	:	
	:	
v.	:	No. 05AP-18
	:	
The Industrial Commission of Ohio	:	(REGULAR CALENDAR)
and Kissel Bros Shows, Inc.,	:	
	:	
Respondents.	:	

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D E C I S I O N

Rendered on December 6, 2005

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*M. Blake Stone, L.P.A., Inc.*, and *M. Blake Stone*, for relator.

*Jim Petro*, Attorney General, and *Lasheyl N. Sowell*, for  
respondent Industrial Commission of Ohio.

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IN MANDAMUS  
ON OBJECTIONS TO MAGISTRATE'S DECISION

TRAVIS, J.

{¶1} This is an original action in which relator, Ronald L. Washington, seeks a writ of mandamus to compel respondent, Industrial Commission of Ohio ("commission"), to grant relator's March 1, 2004 motion to adjust his average weekly wage ("AWW") to \$530.24. The matter was referred to a magistrate pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the rules of this court.

{¶2} The magistrate issued a decision on August 30, 2005. (Attached as Appendix A.) After making findings of fact and conclusions of law, the magistrate concluded that this court should deny relator's request for a writ of mandamus. Relator filed objections to the magistrate's decision. For the following reasons, we overrule relator's objections, adopt the magistrate's decision and deny the requested writ.

{¶3} Two issues are presented in this case: (1) whether the commission abused its discretion by not exercising continuing jurisdiction over relator's second motion to modify his AWW; and (2) whether the District Hearing Officer ("DHO"), Staff Hearing Officer ("SHO"), and the magistrate correctly applied the doctrine of res judicata to the administrative proceedings below.

{¶4} Relator sustained a severe industrial injury on October 21, 1993. At the time, relator was 20 years of age with a tenth-grade education. While working for a company that provided amusement rides at fairs and other events, relator was struck by one of the mechanical rides. He received leg and neck fractures and was hospitalized in a coma for six weeks. He underwent a period of rehabilitation and eventually earned a high school equivalency degree.

{¶5} Initially, relator's AWW was set at \$96.31, based on his 1993 annual earnings of \$5,008. On March 24, 2003, relator moved to increase his AWW to \$110 based on records from the Social Security Administration for the two-year period immediately prior to his 1993 injuries. Relator obtained these in early 2003. Relator also requested that certain weeks not be included in the AWW computation.

{¶6} On June 5, 2003, an order was issued increasing relator's AWW to \$107.88, based on the social security. The request to exclude certain weeks from the

computation was denied. Relator filed an administrative appeal from that order, but the order was affirmed. Relator did not pursue further review from that administrative determination.

{¶7} On March 1, 2004, relator filed a second motion to increase his AWW, this time to \$530.24. Relator based his motion on Social Security Administration records that set out his income for the years 1995 through 2001. Relator received the records on February 13, 2004. The records indicated that relator's reported income for the year 2001 was \$27,572.57. The second motion sought the increase under R.C. 4123.62(A), rather than under R.C. 4123.61, which was the basis of his 2003 motion. The motion invoked the commission's continuing jurisdiction.

{¶8} Both the DHO and the SHO concluded that relator had failed to exercise due diligence in obtaining a complete earning history when he applied in 2003 for a modification of his AWW. Relator could have obtained and submitted the same information submitted in 2004 when he moved for modification in 2003. Both hearing officers held that the doctrine of res judicata barred relator from seeking a second modification of his AWW. The motion to modify relator's AWW was denied and relator brought the instant action in mandamus.

{¶9} The magistrate heard this original action based on stipulated facts, the record of proceedings and the briefs of the parties. Although relator claimed that his second motion to modify his AWW was based upon "new facts and circumstances," the magistrate found that the supporting documentation did not amount to new and changed circumstances. The magistrate reasoned that by exercising reasonable diligence, relator could have obtained his 1995 to 2001 income records in 2003, the previous year, when

relator filed his first motion to modify his AWW. Because the commission has broad discretion in determining whether to invoke its continuing jurisdiction, relator's failure to bring all available facts before the commission in his first application to modify his AWW was a reasonable basis to reject the application. Hence, the magistrate recommended that the writ be denied.

{¶10} Continuing jurisdiction over workers' compensation claims is vested in the commission by R.C. 4123.52. That statutory grant of continuing jurisdiction is broad, but not unlimited. *State ex rel. Nicholls v. Indus. Comm.* (1998), 81 Ohio St.3d 454; *State ex rel. B & C Machine Co. v. Indus. Comm.* (1992), 65 Ohio St.3d 538; *State ex rel. Gatlin v. Yellow Freight System, Inc.* (1985), 18 Ohio St.3d 246. The grant of authority under R.C. 4123.52 "could not have been intended to take away all finality to the orders and findings of the commission." *State ex rel. Griffey v. Indus. Comm.* (1932), 125 Ohio St. 27, 31, as quoted in *State ex rel. Bd. of Ed. of Cuyahoga Heights Local School Dist. v. Johnston* (1979), 58 Ohio St.2d 132, at 135.

{¶11} To invoke the continuing jurisdiction of the commission, one or more of the following prerequisites must be shown: (1) new and changed circumstances; (2) fraud; (3) clear mistake of fact; (4) clear mistake of law; or (5) error by an inferior tribunal. *Nicholls*, supra. Only the first prerequisite is involved in this case.

{¶12} Under the first prong, the evidence presented to invoke the continuing jurisdiction of the commission must be of new and changed circumstances, not merely newly acquired evidence. "[W]e agree with the appellate court's observation that while the evidence \* \* \* was newly acquired, such is not evidence that 'conditions have

changed subsequent to the initial award.' " *State ex rel. Keith v. Indus. Comm.* (1991), 62 Ohio St.3d 139, at 141-142.

{¶13} In this case, the Social Security Administration records of relator's income offered in support of relator's 2004 motion to modify his AWW could readily have been obtained and presented in his 2003 application. Under the circumstances of this case, the commission was within its discretion to decline to exercise continuing jurisdiction.

{¶14} Additionally, we agree that this is a case where the doctrine of res judicata is properly applied to an administrative matter involving the continuing jurisdiction of the commission. The doctrine of res judicata operates "to preclude the relitigation of a point of law or fact that was at issue in a former action between the same parties and was passed upon by a court of competent jurisdiction." *Office of Consumers' Counsel v. Pub. Util. Comm.* (1985), 16 Ohio St.3d 9, 10.

{¶15} The doctrine applies to administrative proceedings that are judicial in nature, such as claims before the commission because each party has an ample opportunity to litigate the issues in the dispute. *Robinson v. AT & T Network Systems*, Franklin App. No. 02AP-807, 2003-Ohio-1513, citing *Set Products, Inc. v. Bainbridge Twp. Bd. of Zoning Appeals* (1987), 31 Ohio St.3d 260, 263. However, because of the commission's continuing jurisdiction under R.C. 4123.52, the doctrine has only limited applicability in compensation cases. *State ex rel. B.O.C. Group v. Indus. Comm.* (1991), 58 Ohio St.3d 199, 200.

{¶16} To apply the doctrine of res judicata requires both an identity of parties and an identity of issues in the proceedings. In this case, the parties for both the 2003 and 2004 motions are identical and the issues presented by both the 2003 and 2004 motions

are identical; whether relator's AWW should be modified. When relator filed his first motion in 2003, he was free to offer any appropriate evidence to demonstrate that "new and changed circumstances" existed since his original AWW was determined. He did so and a full and final determination of that issue was made in 2003. Absent new and changed circumstances since that 2003 determination, the doctrine of res judicata bars relator from attempting to relitigate that issue a second time.

{¶17} Pursuant to Civ.R. 53(E)(4), the court has conducted a full review of the magistrate's decision. The court has considered relator's objections as well as both supporting and opposing memoranda. For the reasons set forth above, we overrule the objections and adopt the decision of the magistrate. The request for a writ of mandamus is denied.

*Objections overruled;  
writ of mandamus denied.*

BRYANT and FRENCH, JJ., concur.

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APPENDIX A  
IN THE COURT OF APPEALS OF OHIO  
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Ronald L. Washington,	:	
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The Industrial Commission of Ohio	:	(REGULAR CALENDAR)
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Respondents.	:	

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MAGISTRATE'S DECISION

Rendered on August 30, 2005

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*M. Blake Stone, L.P.A., Inc., and M. Blake Stone, for relator.*

*Jim Petro, Attorney General, and Lasheyl N. Sowell, for respondent Industrial Commission of Ohio.*

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IN MANDAMUS

{¶18} In this original action, relator, Ronald L. Washington, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order denying his March 1, 2004 motion to adjust his average weekly wage ("AWW") to \$530.24, and to enter an order granting said motion.

Findings of Fact:

{¶19} 1. On October 21, 1993, relator sustained an industrial injury which is assigned claim number 93-30718. Relator was 20 years of age on the date of his industrial injury and had a tenth grade education.

{¶20} 2. Initially, AWW was informally set by a claims examiner of the Ohio Bureau of Workers' Compensation ("bureau") at \$96.31. The AWW was based on a W-2 for the year 1993, showing earnings of \$5,008 divided by 52 weeks ( $\$5,008 \div 52 = \$96.31$ ).

{¶21} 3. On March 24, 2003, relator moved that his AWW be increased to \$110. In support, relator submitted records from the Social Security Administration ("SSA") showing earnings for the years 1992 and 1993. The earnings for the two years total \$11,219.51.

{¶22} 4. Following a June 5, 2003 hearing, a district hearing officer ("DHO") issued an order increasing AWW to \$107.88 by dividing \$11,219.51 by 104 weeks.

{¶23} 5. Relator administratively appealed the DHO order of June 5, 2003.

{¶24} 6. Following a July 10, 2003 hearing, a staff hearing officer ("SHO") issued an order affirming the DHO order.

{¶25} 7. On August 5, 2003, another SHO mailed an order refusing relator's administrative appeal from the SHO order of July 10, 2003.

{¶26} 8. On March 1, 2004, relator again moved that his AWW be increased. This time, relator requested that his AWW be increased to \$530.24 based upon SSA records showing earnings for 2001 at \$27,572.57. In his memorandum in support of his



March 1, 2004 motion, relator calculated AWW based on a 52 week period ( $\$27,572.57 \div 52 = \$530.24$ .)

{¶27} 9. In his memorandum, relator explained that he was seeking an adjustment of his AWW under R.C. 4123.62(A) rather than under R.C. 4123.61 as previously requested. He also invoked the commission's continuing jurisdiction under R.C. 4123.52. The memorandum further argued:

Mr. Washington was born May 20, 1973. He was 20 years old when injured on October 21, 1993. He had dropped out of school but he has since gotten his GED.

The social security wage print-out that was received on February 13, 2004 shows that his income steadily increased after the year of injury.

\* \* \*

The doctrine of res judicata is not a bar to increasing the Average Weekly Wage. The AWW of \$107.88 was set by an Industrial Commission Staff Hearing Officer at a hearing held July 10, 2003. Her order was based on 4123.61, not 4123.62 A. At that hearing the claimant had requested that twelve weeks be excluded from the calculation of the \$107.88 AWW. The claimant had testified that he was unemployed for twelve weeks due to losing his jobs and transportation problems. His AWW has not been determined under 4123.62 A.

The fact that the Industrial Commission issued an order setting the AWW does not bar an Industrial Commission Hearing Officer from readjusting the AWW in light of new facts and circumstances. \* \* \*

{¶28} 10. Following a May 3, 2004 hearing, a DHO issued an order denying relator's motion filed March 1, 2004:

The injured worker's average weekly wage remains set at \$107.88.

The Hearing Officer finds the adjustment of average weekly wage is precluded by the doctrine of res judicata.

The injured worker's average weekly wage was previously adjudicated by District Hearing Officer order dated 06/05/-2003 and Staff Hearing Officer order dated 07/10/2003. The injured worker's counsel did not raise the "tender years" argument under the provisions of Ohio Revised Code Section 4123.62(A) at those prior adjudications. Injured worker's counsel indicated that the injured worker's Social Security Earnings records had not yet been obtained at the time of those adjudications.

While the Hearing Officer notes the "tender years" provision is a generally accepted exception to the doctrine of res judicata for average weekly wage purposes, the circumstances in this situation do not render it an exception for this claim. This claim does not present a situation where average weekly wage was calculated early in claim and the injured worker in subsequent years demonstrated a substantial increase in earnings.

Rather, the average weekly wage in this claim was formally adjudicated nearly ten years after the date of injury. The "tender years" allegation should have been included in the previous adjudication. The absence of due diligence in obtaining a complete earnings history nearly ten years after the inception of this claim does not qualify as grounds for subverting the doctrine of res judicata.

(Emphasis sic.)

{¶29} 11. Relator administratively appealed the DHO order of May 3, 2004.

{¶30} 12. Following an August 17, 2004 hearing, an SHO issued an order affirming the DHO order of May 3, 2004. The SHO further explained:

In affirming the District Hearing Officer's decision to decline to exercise continuing jurisdiction, to decline to adjust the injured worker's average weekly wage, and to affirm the prior setting of the average weekly wage at \$107.88, this Staff Hearing Officer has relied upon the doctrine of res judicata, as cited by the District Hearing Officer, and the Staff Hearing Officer's order mailed 07/19/2003.

{¶31} 13. On September 8, 2003, another SHO mailed an order refusing relator's administrative appeal from the SHO order of August 17, 2004.

{¶32} 14. On January 6, 2005, relator, Ronald L. Washington, filed this mandamus action.

Conclusions of Law:

{¶33} It is the magistrate's decision that this court deny relator's request for a writ of mandamus, as more fully explained below.

{¶34} R.C. 4123.61 states:

The average weekly wage of an injured employee at the time of the injury or at the time disability due to the occupational disease begins is the basis upon which to compute benefits.

\* \* \*

\* \* \* In ascertaining the average weekly wage for the year previous to the injury, or the date the disability due to the occupational disease begins any period of unemployment due to sickness, industrial depression, strike, lockout, or other cause beyond the employee's control shall be eliminated.

In cases where there are special circumstances under which the average weekly wage cannot justly be determined by applying this section, the administrator of workers' compensation, in determining the average weekly wage in such cases, shall use such method as will enable him to do substantial justice to the claimants.

{¶35} R.C. 4123.62(A) states:

If it is established that an injured or disabled employee was of such age and experience when injured or disabled as that under natural conditions an injured or disabled employee's wages would be expected to increase, the administrator of workers' compensation may consider that fact in arriving at an injured or disabled employee's average weekly wage.

{¶36} The doctrine of res judicata operates to preclude the re-litigation of a point of law or fact that was at issue in a former action between the same parties and was passed upon by a court of competent jurisdiction. *State ex rel. B.O.C. Group, General Motors Corp. v. Indus. Comm.* (1991), 58 Ohio St.3d 199, 200. The principle applies to administrative proceedings. *Id.* The doctrine of res judicata, as applied to administrative proceedings before the commission, is limited by the commission's continuing jurisdiction. *Id.*

{¶37} The commission's continuing jurisdiction under R.C. 4123.52 is not unlimited. Its prerequisites are: (1) new and changed circumstances; (2) fraud; (3) clear mistake of fact; (4) clear mistake of law; or (5) error by an inferior tribunal. *State ex rel. Nicholls v. Indus. Comm.* (1998), 81 Ohio St.3d 454.

{¶38} The *Nicholls* court suggests that new and changed circumstances also encompasses the rule regarding previously undiscoverable evidence. See, also, *State ex rel. Keith v. Indus. Comm.* (1991), 62 Ohio St.3d 139.

{¶39} Here, relator attempted administratively to invoke a prerequisite of R.C. 4123.52 when he argued that he was seeking the readjustment of AWW, "in light of new facts and circumstances."

{¶40} The commission appropriately rejected relator's invocation of continuing jurisdiction. While relator contends that the recent SSA records were not obtained until February 2004, following the July 10, 2003 hearing before the SHO who adjudicated an increase in AWW, it is clear that the SSA records were discoverable and could have been obtained with due diligence in support of the March 24, 2003 motion.

{¶41} Given the above analysis, relator failed to present a case for invoking the commission's continuing jurisdiction over its prior final adjudication of AWW. Relator, with due diligence, could have presented his R.C. 4123.62(A) claim at the time of the adjudication of his first motion for an adjustment of his AWW.

{¶42} Accordingly, for all the above reasons, it is the magistrate's decision that this court deny relator's request for a writ of mandamus.

/s/Kenneth W. Macke

KENNETH W. MACKE  
MAGISTRATE