

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Donald McNea, Jr.,	:	
Relator,	:	
v.	:	No. 09AP-605
Industrial Commission of Ohio	:	(REGULAR CALENDAR)
and City of Parma, Ohio,	:	
Respondents.	:	

D E C I S I O N

Rendered on September 7, 2010

Paul M. Friedman and Michael P. O'Malley, for relator.

Richard Cordray, Attorney General, and *Derrick L. Knapp*,
for respondent Industrial Commission of Ohio.

*Bashein & Bashein Co., L.P.A., W. Craig Bashein; Paul W.
Flowers Co., L.P.A., and Paul W. Flowers*, for respondent
City of Parma, Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

KLATT, J.

{¶1} Relator, Donald McNea, Jr., commenced this original action in mandamus seeking an order compelling respondent, Industrial Commission of Ohio ("commission"), to vacate its March 17, 2009 order that exercised continuing jurisdiction over the

September 30, 2008 order of its staff hearing officer ("SHO") and declared an overpayment of permanent total disability ("PTD") compensation as of October 1, 2005. Relator also seeks an order reinstating the SHO's order that declared an overpayment as of September 5, 2007.

{¶2} Pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth District Court of Appeals, this matter was referred to a magistrate who issued a decision, including findings of fact and conclusions of law, which is appended hereto. The magistrate found that the commission improperly exercised continuing jurisdiction over the SHO's September 30, 2008 order. The magistrate determined that the commission's basis for finding a mistake of fact and law (the SHO's conclusion that there was "no evidence" of sustained remunerative employment) was insufficient to support its exercise of continuing jurisdiction. Therefore, the magistrate has recommended that we grant relator's request for a writ of mandamus.

{¶3} The commission and respondent, city of Parma, filed objections to the magistrate's decision. We will address the commission's objections first.

{¶4} The commission filed seven separate objections to the magistrate's decision. Because these objections are interrelated, we will address them jointly.

{¶5} The core premise in all of the commission's objections is that the magistrate incorrectly interpreted the scope of the Ohio Bureau of Workers' Compensation's ("bureau") November 5, 2007 C-86 motion. The commission argues that the magistrate erred by not recognizing that the bureau's C-86 motion was based upon relator's alleged drug trafficking activities both before and after the February 2005 PTD hearing. According to the commission, the SHO made the same mistake.

Although the SHO addressed the issue of whether relator was engaged in sustained remunerative employment (drug trafficking) prior to the PTD hearing, the SHO failed to address the impact of relator's admitted drug trafficking after the PTD hearing. The commission emphasizes that relator admitted to selling drugs in October, November, and December 2005 by pleading guilty to four felony counts of drug trafficking and that this admitted conduct is inconsistent with the receipt of PTD compensation during this time frame. The SHO's failure to address the impact of relator's admitted drug trafficking beginning in October 2005 was one of the alleged mistakes of fact and law cited by the commission for exercising continuing jurisdiction over the SHO's September 30, 2008 order. For the following reasons, we agree with the commission that its exercise of continuing jurisdiction was not improper.

{¶6} The bureau's November 5, 2007 C-86 motion sought to terminate relator's PTD and to recover from relator, among other things, PTD benefits received from August 25, 2004 through the date of the motion. In support of its motion, the bureau submitted an investigation report and related documents that contained evidence of relator's alleged drug trafficking activity as early as October 2003. Notably, these documents also contained undisputed evidence that relator pled guilty to four felony drug trafficking offenses based upon controlled drug buys in October, November, and December 2005.

{¶7} The evidence submitted by the bureau did not persuade the SHO that relator was engaged in drug trafficking prior to the February 2005 PTD hearing. Therefore, the SHO determined that there was no proof that relator was engaged in sustained remunerative employment at, or prior to, the time of the PTD hearing. The

SHO also declined to find fraud. Although expressly acknowledging that the illegal sale of drugs constitutes remunerative employment sufficient to terminate PTD compensation, the SHO failed to explain why relator was entitled to retain the PTD compensation he received following his admitted drug trafficking in October 2005. The SHO also failed to address whether relator's receipt of PTD compensation during the period he was selling drugs constituted fraud. Instead, the SHO simply found that PTD compensation should be terminated on September 5, 2007 – the date relator was incarcerated.

{¶8} The commission recognized that the bureau's C-86 motion challenged relator's right to PTD compensation for the entire period at issue – including the period during which relator admitted to drug trafficking by pleading guilty to the criminal charges. The SHO's failure to address the bureau's right to terminate PTD and to recover overpayments beginning on the date relator admitted to drug trafficking was one of the grounds identified by the commission for finding a mistake of fact and law.

{¶9} We recognize that continuing jurisdiction is not unlimited. Continuing jurisdiction can be invoked only where one of these preconditions exists: (1) new and changed circumstances; (2) fraud; (3) clear mistake of fact; (4) clear mistake of law; and (5) error by inferior tribunal. *State ex rel. Gobich v. Indus. Comm.*, 103 Ohio St.3d 585, 2004-Ohio-5990; *State ex rel. Royal v. Indus. Indus.*, 95 Ohio St.3d 97, 2002-Ohio-1935; *State ex rel. Foster v. Indus. Comm.*, 85 Ohio St.3d 320, 1999-Ohio-461; *State ex rel. Nicholls v. Indus. Comm.*, 81 Ohio St.3d 454, 1998-Ohio-616. Moreover, the presence of one of these prerequisites must be clearly articulated in any commission

order seeking to exercise continuing jurisdiction. *Gobich* at ¶15. This means that the prerequisite must be both identified and explained. *Id.*

{¶10} In its interlocutory order dated November 8, 2008, the commission clearly identified the basis for exercising continuing jurisdiction (mistake of fact and law). The interlocutory order also explained the alleged mistake of fact and law. In essence, the commission stated that, although the SHO found there was no evidence of relator's drug dealing prior to the PTD hearing, there was undisputed evidence that relator engaged in drug trafficking during at least part of the time he was receiving PTD compensation. Therefore, the SHO should have addressed the impact of relator's admitted drug trafficking on the bureau's right to recover PTD payments paid to relator during that period of time. In addition, the SHO should have addressed whether relator's receipt of PTD compensation during this period of time constituted fraud, given his admitted his drug dealing. Therefore, we agree with the commission that the SHO's failure to address this portion of the bureau's motion was a mistake of fact and law and permitted the commission to exercise continuing jurisdiction. Therefore, we sustain the commission's objections to this extent. The commission's remaining objections are moot.

{¶11} The City of Parma has also filed objections to the magistrate's decision. Parma's objections are similar to those raised by the commission. For the reasons noted above, we sustain Parma's objections to the extent that Parma argues that the magistrate's interpretation of the bureau's C-86 motion was too narrow. Because the bureau's motion included a challenge to relator's right to receive PTD compensation for the period following relator's admitted drug trafficking activity, the SHO should have

addressed this issue. The SHO's failure to do so constituted a clear mistake of fact and law, justifying the commission's exercise of continuing jurisdiction. Parma's remaining objections are moot.

{¶12} Following an independent review of this matter, we find that the magistrate has properly determined the facts, and we adopt those factual findings as our own. However, we do not adopt the magistrate's conclusions of law. For the reasons set forth herein, we sustain respondents' objections to the extent indicated and we deny relator's request for a writ of mandamus.

*Objections sustained;
writ of mandamus denied.*

BRYANT and SADLER, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Donald McNea, Jr.,	:	
	:	
Relator,	:	
	:	
v.	:	No. 09AP-605
	:	
Industrial Commission of Ohio	:	(REGULAR CALENDAR)
and City of Parma, Ohio,	:	
	:	
Respondents.	:	
	:	

MAGISTRATE'S DECISION

Rendered on May 27, 2010

Paul M. Friedman and Michael P. O'Malley, for relator.

*Richard Cordray, Attorney General, and Derrick L. Knapp,
for respondent Industrial Commission of Ohio.*

*Bashein & Bashein Co., L.P.A., Paul W. Flowers and
W. Craig Bashein, for respondent City of Parma, Ohio.*

IN MANDAMUS

{¶13} In this original action, relator, Donald McNea, Jr., requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its March 17, 2009 order exercising continuing jurisdiction over the September 30, 2008 order of its staff hearing officer ("SHO") and declaring an overpayment of permanent total disability ("PTD") compensation as of October 1, 2005,

and to enter an order reinstating the SHO's order that declared an overpayment as of September 5, 2007, the date of relator's incarceration.

Findings of Fact:

{¶14} 1. Relator has three industrial claims related to his employment as a police officer for respondent City of Parma.

{¶15} 2. Claim No. 94-531756 is allowed for "contusion left knee; contusion face, scalp, neck; sprain of neck; medial epicondylitis, right; sprain lumbosacral; sprain of knee and leg nos, left." This claim arose out of a December 18, 1994 incident with a prisoner in a courtroom.

{¶16} 3. Claim No. 00-458922 is allowed for "contusion of left knee; sprain lumbar region." This claim is based upon an alleged July 9, 2000 assault upon relator while he was serving an arrest warrant.

{¶17} 4. Claim No. 03-337494 is allowed for "lumbosacral strain; right knee strain and angina; post traumatic stress disorder and aggravation of pre-existing degenerative disc disease at L4-5 and L5-S1; aggravation of pre-existing disc herniation at L4-5 level." This claim is based upon a March 26, 2003 incident at which relator was allegedly injured during apprehension of a robbery suspect.

{¶18} 5. On June 14, 2004, relator filed an application for PTD compensation.

{¶19} 6. Following a February 3, 2005 hearing, an SHO awarded PTD compensation beginning August 25, 2004. The SHO's order explains:

There is no medical evidence that indicates that claimant can return to his former position of employment as a police officer. Dr. Nemunaitis, who evaluated claimant's allowed physical conditions on 08/20/2004, concluded that claimant would be able to return to sedentary work activity. Dr. Byrnes, in his psychological evaluation report of 08/24/2004,

stated that claimant would be able to return to work in a non-stressful environment. As to claimant's cardiac condition, Dr. Harris (10/19/1994 report) found claimant capable of sedentary employment duties. Other recent evaluations on file, such as those from Dr. Karimpil (05/27/2004) and Dr. Keppler (08/03/2004), are not relied upon as they include non-allowed conditions in their assessments of claimant's impairments.

Claimant is a 52 year old high school graduate with an associate's college degree. Aside from several relatively brief period (months), during which he worked as a bus driver, beer deliveryman and corrections officer, his entire career has been spent as a police officer. Claimant has never worked in a factory or in a purely clerical or office position. His experience with the police department has always been as a front-line officer in street patrol. Claimant's physical conditions limit him to a narrow range of sedentary positions. His allowed psychological condition places further limitations upon the type of environment in which he might work. The Staff Hearing Officer finds it improbable that claimant would be physically and psychologically able to maintain even sedentary employment on a sustained basis. Claimant's psychological condition is fragile and would not permit him to endure the normal workplace stresses inherent in positions for which he might otherwise qualify physically. He would not be able to adapt to a factory setting, with its foreign environment, emphasis on production, and inflexible physical requirements. Likewise, an office or clerical setting would be outside the range of claimant's abilities and career skills and would prove to be too stressful to be tolerated. The Staff Hearing Officer does not find evidence on file in the various psychological evaluations to indicate that claimant possesses the necessary focus, perseverance and concentration to successfully complete a vocational retraining program directed towards placing him into an office or clerical position. As previously stated, claimant has no experience in such employment and, given the vocational and educational shortcomings cited by Mark Anderson (12/07/2004 report), the Staff Hearing Officer does not find it [sic] reasonable to expect that claimant would be successful in acquiring the skills necessary to remediate to such employment. Claimant has no transferable skills from his prior employment and no realistic potential at developing others that would be of use in returning to the workforce.

{¶20} 7. On November 5, 2007, the Ohio Bureau of Workers' Compensation ("bureau") moved for disallowance of claim Nos. 00-458922 and 03-337494. The bureau also moved for termination of PTD compensation and a declaration of its overpayment effective August 25, 2004. The bureau's motion then asked for a "finding of fraud."

{¶21} 8. In support of its motion, the bureau submitted a six-page report from its Toledo Special Investigations Unit ("SIU").

{¶22} 9. According to the SIU report:

On 23 January 2006[,] Special Agent Matthew McCloskey ("SA McCloskey") received the allegation that MCNEA, who is receiving Permanent Total Disability benefits, was arrested for selling 50 unit doses of OxyContin to a confidential informant ("CI") and to an undercover Federal Police Officer.

* * *

On 26 June 2007, MCNEA plead[ed] guilty (*Court of Common Pleas – Cuyahoga County, Docket # CR-06-475663-A*) to the following charges * * *.

- Trafficking Offenses 2925.03 – F5 as charged in count(s) 3 of the indictment
- Trafficking Offenses 2925.03 – F3 as charged in count(s) 6, 9 of the indictment
- Trafficking Offenses 2925.03 – F2 as charged in count(s) 12 of the indictment
- Trafficking Offenses 2925.03 – F1 with Juvenile specification as charged in count(s) 16 of the indictment

On 4 September 2007, MCNEA was sentenced * * *.

* * *

* * * On 01 October, 24 October and 01 November 2005, MCNEA sold OxyContin (Schedule II and III narcotics) to a

Parma Police informant totaling \$4,200.00. On 23 December 2005, MCNEA again sold 50 unit doses of OxyContin to an undercover Federal Agent for \$2,000. MCNEA completed these drug transactions while receiving permanent total disability benefits.

{¶23} 10. Attached to the SIU report is a three-page investigative report of the narcotics unit of the Parma Police Department. The report is signed by Detective Monnolly. The report states in part:

On 24 December 2005[,] this officer arrested Don McNea for Aggravated Trafficking in Drugs. * * *

Information was later received indicating Donald McNea had built a pattern of fictitious injuries while employed by the City of Parma. Don McNea then utilized these injuries to obtain gross amounts of Schedule II Narcotics (which were abused and sold) * * *.

* * *

On 09 October 2003[,] this officer received information from a confidential source that Don McNea was abusing and selling OxyContin from his residence. This narcotics investigation was subsequently initiated. A review of McNea's medical records from Dr. * * * reveals on 8 October 2003[,] McNea while at an office visit with Dr. * * * he was prescribed (monthly) 90 unit doses of Oxycontin 40 mg. along with 120 unit doses of Percocet 7 5/325mg. Don McNea continue to visit Dr. * * * with a basic complaint of back pain until 12 December 2005 where McNea received prescriptions for[:] Ambien 10mg/60 tabs, OxyContin 80mg/200 tabs, and Adderall 10mg/90 tabs. Don McNea subsequently filled the prescriptions and on 23 December 2005 sold 50 unit doses of the OxyContin 80mg to an undercover Police Officer and was arrested.

{¶24} 11. The record contains an 11-page document captioned: "Parma Police Department[,] Narcotics Unit[,] Departmental Information." The document provides, in chronological order, entries relating to the investigation of relator. The first entry is dated October 9, 2003. Pertinent here are the following entries:

09 Oct 03 Information received. Computer makeup started.

* * *

03 Nov 03 Info from CI 03-10 who states that CI 05-10 purchased OxyContin from a Parma Police Officer identified as Don McNea.

* * *

07 Jan 04 Info from CI 03-10 who states that the CI has talked to CI 05-10 who relayed that CI 05-10 is still dealing with McNea.

15 Mar 04 Call from CI 03-10 who states that CI 05-10 "had just picked up 25 from the cop" over the weekend.

18 Mar 04 Several controlled/recorded calls into CI 05-10 who states that McNea is under indictment (along w/ nine other Officers for an overtime overtime [sic]) CI 05-10 further states that Don had his phone turned off. Attempt purchase of 10 OxyContin at \$40.00 from CI 05-10 through Adam Roberts.

24 May 04 1930hrs. Controlled purchase of 6¼ tablets of OxyContin 80 mg. from CI 05-10 who stated that he picked up the Oxy from the "cop" who got them from his wife.

* * *

03 Aug 05 Meet w/CI 05-10 who then responds to Big Creek Convenient 10211 Brookpark Rd. and meets with McNea. McNea and CI 05-10 are observed talking outside of the business. McNea during the conversation (recorded) tells the CI that he will take care of him (Oxy's).

* * *

27 Aug 05 1340hrs. CI 05-10 fitted with Fbird recorder and responds to Big Creek Convenient where he meets w/McNea. McNea engages in conversation and offers to sell six OxyContin on Monday (29 Aug 05) after his Dr. appt.

* * *

01 Oct 05 C/B 1546hrs. CI 05-10 is wired and followed to the home of Pam O'Hearn (6014 Bradley) and meets w/Don

McNea. McNea gives the CI five tablets of generic Hydrocodone 10mg. McNea then offers to sell 10 OxyContin tablets for \$350.00 and explains that he is picking them up around 1800hrs.

1700hrs. McNea responds to the CI's home and delivers 9½ unit doses of generic OxyContin.

* * *

24 Oct 05 1415hrs. CI calls McNea. McNea requests to meet at 1530hrs.

1530hrs. CI responds to Pam's home and meets w/McNea (recorded). McNea subsequently sells 7 u/d of the 80mg. OxyContin. McNea requests to meet with the bikers to make sure everything is OK.

1730hrs. CI calls McNea (recorded). McNea talks of being stopped by CPD for traffic and getting a break due to his father. Discussion about meeting the bikers. McNea further states he has twenty (OC) right now along with 100 Percocet and will get the remaining forty this Thursday. McNea further states that he had already sold forty OxyContin today.

* * *

01 Nov 05 C/B McNea is [sic] picks up CI and drives to Razzle's Bar 27128 Bagley Rd. McNea counts out 40 OC (actually 39) and hands them to CI who then enters bar and meets w/ATF. CI then returns to McNea, waiting in parking lot and gives McNea \$1600.00 in recorded buy money. * * *

* * *

23 Dec 05 1230hrs. Meet w/CI at Brookpark and State where the CI is wired and followed to Pam's where he meets with McNea.

1430hrs. McNea calls the CI and asks the CI if he "wants 40 or 80" and explains he has a lot of errands but tells the CI to let him know in the next fifteen minutes if they could meet with ATF "Bill".

1445hrs. CI 05-10 calls McNea back and tell him it is on.

Controlled purchase of 50 OxyContin 80mg at Razzles Bar. McNea followed back to Parma where he is arrested in the parking lot of Big Creek Convenient.

Subsequent interviews w/Don Cawthra, Pam O'Hearn, and Amaar.

{¶25} 12. The record also contains four investigative reports from Detective Monnolly of the Parma Police Department, Narcotics Unit. Each of these reports details the controlled buys on October 1, October 24, November 1, and December 23, 2005.

{¶26} 13. The record also contains an investigative report from Detective Monnolly stating:

On 09 October 2003[,] CI 03-10 approached this officer and stated that a Parma Police Officer, whom the CI identified as "Don" is using and selling OxyContin tablets from his home. 03-10 stated Don lives with his wife on Bradley Ave. between Pearl and West 54th Street. 03-10 further stated that on at least one occasion the CI was a passenger in a vehicle that had stopped at McNea's residence to purchase OxyContin tablets. CI 03-10 stated "Don" sold 80mg OxyContin to the driver of the vehicle for \$40.00 a piece. CI 03-10 further stated the driver identified the occupant of the home as "Don the Cop". The driver further relayed the [sic] Don * * * are heavy users of the OxyContin and Don had signed himself into several rehabilitation programs in the past to quit using.

On 21 July 2005[,] this Officer along with Captain DeSimone met with a confidential source, referred thereafter as CI 05-10. CI 05-10 identified a Parma Police Officer, Don McNea who is abusing OxyContin prescription drugs and has on several occasions has sold CI 05-10 OxyContin and Valium. CI 05-10 stated that Don McNea has a cell phone but at times would call from pay phones. Don McNea explained the use of the pay phones was to avoid detection by Police. CI 05-10 agreed to cooperate with this officer in an ongoing investigation of Don McNea.

{¶27} 14. For docketing purposes, the commission was required to bifurcate the bureau's November 5, 2007 motion because only a district hearing officer ("DHO") has

original jurisdiction over the request for claim disallowances while only an SHO has original jurisdiction over the request regarding PTD.

{¶28} 15. On September 30, 2008, the bureau's motion to disallow the two industrial claims was heard by a DHO. Following the hearing, the DHO issued an order denying the bureau's motion to disallow the claims.

{¶29} 16. The bureau administratively appealed the September 30, 2008 order of the DHO.

{¶30} 17. Following a February 13, 2009 hearing, an SHO issued an order affirming the DHO's order of September 30, 2008. The commission's denial of the bureau's motion to disallow is not at issue in this action.

{¶31} 18. Earlier, on September 30, 2008, an SHO heard the bureau's motion for termination of PTD compensation and for a declaration that compensation was overpaid as of August 25, 2004.

{¶32} 19. Following the September 30, 2008 hearing, the SHO mailed an order on October 2, 2008 terminating PTD compensation as of September 5, 2007, the date of relator's incarceration. The SHO's order explains:

The Bureau of Workers' Compensation motion, filed on 11/05/2007, is granted to the following extent:

Under the case of [*State ex rel. Lynch v. Indus. Comm.*, 171 Ohio App.3d 453, 2007-Ohio-292, affirmed *State ex rel. Lynch v. Indus. Comm.*, 116 Ohio St.3d 342, 2007-Ohio-6668], exchanging labor for pay on a sustained basis constitutes remunerative employment sufficient to terminate permanent total disability, even when the labor is the illegal selling of drugs. In this case, the injured worker was convicted of selling illegal drugs and was sentenced to prison on 09/05/2007. Accordingly, permanent and total benefits are terminated effective 09/05/2007, the date the claimant was incarcerated. All permanent and total benefits

awarded after 09/05/2007 are found to be an overpayment to be recollected in accordance with 4123.511 of the Ohio Revised Code.

The Staff Hearing Officer finds that the injured worker was found to be permanently and totally disabled by Staff Hearing Officer order dated 02/03/2005. Both the employer and the Administrator were represented at that hearing. Although both of the state's examining physicians indicated that the claimant had the residual functional capacity to engage in sedentary work activities, the Hearing Officer, relying on a vocational report from Mark Anderson, found that the claimant was permanently and totally disabled and benefits were awarded beginning on 08/25/2004.

Neither the employer nor the Bureau of Workers' Compensation offered any medical or vocational evidence at that hearing. That decision was not appealed.

The Bureau of Workers' Compensation motion requested this order be vacated because it requests that permanent and total disability benefits be declared to be overpayment from the first day that they have been awarded. A motion cannot be used as a substitute for an appeal. The record indicated that the claimant was also receiving Social Security (Disability) and Policemen's Disability at the time that the permanent and total disability benefits were awarded. The Staff Hearing Officer finds no basis to find the order of 02/03/2005 to be void ab initio. While the Bureau of Workers' Compensation now presents evidence that the injured worker was being investigated for selling drugs before the date of the permanent and disability order, there is no proof that the injured worker was involved in sustained remunerative employment at the time of the permanent and total disability hearing. Therefore, a finding of fraud is not appropriate concerning the granting of the permanent and total disability application.

{¶33} 20. On October 15, 2008, the bureau moved for reconsideration of the SHO's order of September 30, 2008.

{¶34} 21. The bureau's motion for reconsideration was supported by a six-page memorandum. Under the caption "Brief Summary of Fact," the memorandum asserts:

On June 14, 2004, McNea filed an application for PTD benefits. At hearing on February 3, 2005, a SHO granted the request and ordered the payments to begin effective August 25, 2004.

Unknown to all parties present at the SHO PTD hearing, McNea was under investigation for alleged drug trafficking. A tip received by a confidential informant to the Parma Police Narcotics Unit indicated McNea was selling oxycotin [sic]. The tip was received on October 9, 2003 – nine months prior to the PTD application having been filed. The confidential informant identified as CI 03-10 informed police that "Don the cop" was selling oxycotin [sic] from his home. On July 21, 2005[,], a second informant identified in reports as CI 05-10 indicated he directly purchased oxycotin [sic] from McNea and that McNea had a cell phone or would use pay phones "to avoid detection by police". The investigation culminated with oxycotin [sic] buys on October 1, 2005 - \$350.00, October 24, 2005 - \$250.00 (*note McNea offered to sell 50 tabs for \$1,750.00*), November 1, 2005 - \$1,600.00 and December 23, 2005 – 50 unit doses for \$2,000.00. The last buy was conducted along with a federal ATF agent and resulted in McNea's immediate arrest. McNea was charged with four counts of drug trafficking. On September 7, 2007, McNea was sentenced to three years in Lorain Correctional Facility. He has since been moved to the Southern Correctional Facility and is scheduled for release on August 28, 2010.

BWC was made aware of the arrest on January 23, 2006.
* * *

(Emphasis sic.)

{¶35} Under the caption "Law and Argument [sic]," the bureau argues that the SHO's order of September 30, 2008 contains clear mistakes of law and fact upon which the commission should exercise its continuing jurisdiction. The bureau's memorandum argues:

(1) The SHO ruled that there was "no basis to find the order of 02/03/2005 to be void ab initio... as there was no proof that the IW was involved in sustained remunerative employ-

ment at the time of the PTD hearing." This is a mistake of fact and law.

The SHO stated that at the time of the PTD award, there was a vocational report on file that indicated the IW could not engage in sustained remunerative employment. The SHO noted the BWC and EOR were represented at this hearing, yet neither side obtained a vocational report and neither party chose to appeal the order which granted the PTD award. The SHO stated the BWC was attempting to substitute their motion for an appeal of the original PTD order.

The SHO further explained his position for denying BWC request to terminate PTD benefits effective August 25, 2004 as follows[:]

While the BWC now presents evidence that the IW was being investigated for selling drugs before the date of the PTD order, there is no proof that the IW was involved in sustained remunerative employment at the time of the PTD hearing. Therefore[,] a finding of fraud is not appropriate concerning the granting of the PTD application.

This is clearly erroneous. The information and testimony of Detective Kevin Monnolly proved McNea's drug dealing activity was brought to police attention on October 9, 2003 – a date PRIOR to the PTD hearing and award. The Parma Police Department Narcotics Unit Complaint information sheet and accompanying documentation account many instances of McNea's drug activity in the years prior to the PTD application and award. There are recorded calls and controlled buys as early as May 24, 2004 from informants who purchased the drugs from McNea. The first recorded conversation of McNea offering to sell drug[s] to the informant was on August 28, 2005 [sic]. The SHO is mistaken regarding the facts as presented for consideration.

* * *

Evidence submitted with the BWC motion indicated the drug investigation into McNea's activities began on October 9, 2003. The investigation spanned the course of two years, culminating in the arrest following a \$2,000 drug transaction on December 23, 2005. The four sales which resulted in the indictment and three year prison sentence amounted to \$4400.00 over 83 days – averaging \$366.66 a week.

Detective Kevin Monnolly testified at the September 30, 2008 SHO hearing that at the time of the arrest, McNea had planned to sell undercover agents 100 oxycotin [sic] each month at a cost of \$40.00 per pill – or \$4,000.00 per month – which breaks down to earnings of \$1000.00 per week. The evidence is clear that McNea was engaged in selling drugs on a regular basis and received compensation for his activities.

(Emphasis sic.) The bureau's memorandum concludes:

As the *Lynch* court specifically found that criminal activities for profit amounts to sustained remunerative employment, and McNea was convicted of drug trafficking, he would not be eligible for PTD benefits. The proof on file from the drug investigation and testimony at hearing corroborated that McNea was engaged in said activity at the earliest date of October 9, 2003 – a date prior to the PTD application and award. As such, the BWC respectfully requests the SHO order be modified and PTD benefits [be] terminated effective August 24, 2005 [sic] and find [sic] make a finding of fraud on this claim.

{¶36} 22. The bureau's October 15, 2008 motion prompted the three-member commission to mail an "Interlocutory Order" on November 8, 2008. The interlocutory order states:

The Administrator's request for reconsideration, filed 10/15/2008, from the Staff Hearing Officer order, issued 10/02/2008, is referred to the Commission Level Hearings Section to be docketed before the Members of the Industrial Commission. The issues to be heard are:

1. The Administrator's request for the Industrial Commission to invoke its continuing jurisdiction pursuant to R.C. 4123.52, and
2. Issue:
 - 1) Continuing Jurisdiction Pursuant To R.C. 4123.52
 - 2) Terminate Permanent Total-Declare PTD Overpayment – EFFECTIVE 08/25/2004

It is the finding of the Industrial Commission that the Administrator has presented evidence of sufficient probative value to warrant adjudication of the request for reconsideration regarding the alleged presence of a clear mistake of fact in the order from which reconsideration is sought and a clear mistake of law of such character that remedial action would clearly follow.

Specifically, it is alleged that the Staff Hearing Officer mistakenly concluded that there was no evidence to support a finding that the Injured Worker was involved in sustained remunerative employment at the time of the Permanent Total Disability hearing when the Bureau of Workers' Compensation Investigation report reveals that the Injured Worker was selling drugs to undercover agents during and prior to the period for which he was granted permanent total disability compensation.

Based on these findings, the Industrial Commission directs that the Administrator's request for reconsideration, filed 10/15/2008, is to be set for hearing to determine if the alleged mistakes of law and fact as noted herein are sufficient for the Industrial Commission to invoke its continuing jurisdiction.

In the interests of administrative economy and for the convenience of the parties, after the hearing on the question of continuing jurisdiction, the Industrial Commission will take the matter under advisement and proceed to hear the merits of the underlying issue(s). The Industrial Commission will thereafter issue an order on the matter of continuing jurisdiction under R.C. 4123.52. If authority to invoke continuing jurisdiction is found, the Industrial Commission will address the merits of the underlying issue(s).

This order is issued pursuant to State ex rel. Nicholls v. Indus. Comm. 1998 81 Ohio St.3d 454, State ex rel. Foster v. Indus. Comm. (1999) 85 Ohio St.3d 320, and in accordance with Ohio Administrative Code 4121-3-09.

{¶37} 23. Following a March 17, 2009 hearing, the three-member commission mailed an order that vacates the SHO's order of September 30, 2008 (mailed October 2,

2008), and enters a determination that the appropriate date to terminate PTD compensation is October 1, 2005. The commission's order of March 17, 2009 explains:

* * * After further review and discussion, it is the finding of the Industrial Commission that the Administrator has met her burden of proving that the Staff Hearing Officer order, issued 10/02/2008, contains a clear mistake of fact and contains a clear mistake of law of such character that remedial action would clearly follow. Specifically, the Staff Hearing Officer mistakenly concluded that there was no evidence to support a finding that the Injured Worker was engaged in sustained remunerative employment at the time of the permanent total disability hearing, whereas the Bureau of Workers' Compensation (BWC) investigation report reveals that the Injured Worker was selling drugs to undercover agents during and prior to the period for which he was granted permanent total disability benefits. Therefore, the Commission exercises continuing jurisdiction pursuant to R.C. 4123.52 and State ex rel. Nicholls v. Indus. Comm. (1998), 81 Ohio St.3d 454, State ex rel. Foster v. Indus. Comm. (1999), 85 Ohio St.3d 320, and State ex rel. Gobich v. Indus. Comm. (2004), 103 Ohio St.3d 585, in order to correct this error. The Administrator's request for reconsideration, filed 10/15/2008, is granted. It is further ordered that the Staff Hearing Officer order, issued 10/02/2008, is vacated.

A Staff Hearing Officer order, issued 02/15/2005, granted permanent total disability benefits in claim numbers 94-531756, 00-458922 and 03-337494, starting on 08/25/2004. BWC filed a C-86 motion on 11/05/2007 requesting that the Commission: disallow claim numbers 00-458922 and 03-337494; terminate permanent total disability benefits in claim numbers 00-458922 and 03-337494 effective 08/25/2004; declare permanent total disability benefits overpaid in claim numbers 00-458922 and 03-337494 from 08/25/2004 through the present; declare all medical benefits overpaid in claim numbers 00-458922 and 03-337494; and declare a finding of fraud. The requests on this motion were bifurcated at docketing, as follows: the issues of disallowance of claim numbers 00-458922 and 03-337494, fraud, and overpayment of medical benefits were set before a District Hearing Officer; the issues of the request to terminate permanent total disability benefits and declare an overpayment were set before a Staff Hearing Officer on 09/30/2008. It is noted that the notice of hearing for the

09/30/2008 Staff Hearing Officer hearing did **not** include the issue of fraud and it is the Administrator's request for reconsideration from that order that is before the Commission at today's hearing.

It is the order of the Commission that the BWC C-86 motion, filed 11/05/2007, requesting the termination of permanent total disability benefits and the declaration of an over-payment, is granted to the extent of this order.

The motion was based on evidence obtained through a BWC investigation which revealed that the Injured Worker had been incarcerated since 09/05/2007 after pleading guilty to selling controlled prescription medication to undercover agents in late 2005. The police investigation which culminated in a guilty plea and conviction began in late 2003 when the first tip of illegal activity was received. The motion was heard at a Staff Hearing Officer hearing on 09/30/2008. The order issued from the hearing terminated permanent total disability benefits as of 09/05/2007, the date the Injured Worker was incarcerated based on his guilty plea. The order went on to deny the requested termination of benefits prior to that date, finding that while the Injured Worker was being investigated for illegal activity prior to that date, there was no proof that he was engaged in sustained remunerative employment as of the date of the permanent total disability hearing.

At today's hearing, the Administrator argued that the investigation which culminated in a guilty plea by the Injured Worker took place over a two year period, starting on 10/09/2003, when authorities first received a tip of illegal activity on the part of the Injured Worker, and ending on 12/23/2005 when the Injured Worker had the fourth recorded sale of the controlled prescription narcotic medication OxyContin, at which time he was arrested. Other recorded sales occurred on 10/01/2005, 10/24/2005, and 11/01/2005. The amount of money involved in these four sales totaled \$6,200.00. The Administrator argued that this amount of activity constituted sustained remunerative employment, as it was at least comparable to the activity of the Injured Worker in the case of State ex rel. Lynch v. Indus. Comm. (2007), 116 Ohio St.3d 342. The Administrator pointed out that had the Injured Worker not been arrested on 12/23/2005 his activity most likely would have continued for quite some time.

The Injured Worker's representative argued that the correct date of termination of permanent total disability benefits is 09/05/2007, the date of the Injured Worker's incarceration, as found by the Staff Hearing Officer, and pursuant to R.C. 4123.54. Counsel for the Injured Worker argued that there was no proof of illegal activity as of the date of the original Staff Hearing Officer order of 02/15/2005. He pointed out that the issue involved here is an evidentiary interpretation issue, and that courts in such cases have routinely found that such interpretations do not normally give rise to a finding of a clear mistake of fact. He further argued that the issue in this case is whether the Injured Worker's activity can support a finding that he was engaged in sustained remunerative employment, not just remunerative employment, pointing out that the documented sales activity only occurred over a two month period.

The Commission finds that the Injured Worker's activity of selling the prescription narcotic medication OxyContin over a period of months does constitute sustained remunerative employment, sufficient to require a termination of his permanent total disability benefits. The Commission relies on the fact that the amount of money involved in the four sales to undercover agents over a two month period in late 2005 would equate to an annual figure of \$24,000, which clearly would amount to sustained remunerative employment. The Commission also agrees with the Administrator that, had the Injured Worker not been arrested as of 12/23/2005, he most likely would have continued the activity for quite a while. The Commission relies on the holding in Lynch, that such activity can amount to sustained remunerative employment, even though it is illegal. The Commission further finds that the appropriate date of termination of the Injured Worker's permanent total disability benefits is 10/01/2005, as this was the first documented date of such activity to which the Injured Worker pled guilty.

Therefore, based on the above findings, the Commission orders that the Injured Worker's permanent total disability benefits are terminated as of 10/01/2005, and that all such benefits paid from that date to the present are declared to be overpaid.

(Emphasis sic.)

{¶38} 24. On June 22, 2009, relator, Donald McNea, Jr., filed this mandamus action.

Conclusions of Law:

{¶39} The main issue is whether the commission abused its discretion in exercising continuing jurisdiction over its SHO's order of September 30, 2008.

{¶40} Finding that the commission did not have continuing jurisdiction to vacate its SHO's order of September 30, 2008, it is the magistrate's decision that this court issue a writ of mandamus, as more fully explained below.

{¶41} Continuing jurisdiction is not unlimited. Its prerequisites are: (1) new and changed circumstances; (2) fraud; (3) clear mistake of fact; (4) clear mistake of law; and (5) error by inferior tribunal. *State ex rel. Gobich v. Indus. Comm.*, 103 Ohio St.3d 585, 2004-Ohio-5990; *State ex rel. Royal v. Indus. Comm.* (2002), 95 Ohio St.3d 97; *State ex rel. Foster v. Indus. Comm.*, 85 Ohio St.3d 320; *State ex rel. Nicholls v. Indus. Comm.*, 81 Ohio St.3d 454.

{¶42} In *Gobich*, the court states:

The presence of one of these prerequisites must be clearly articulated in any commission order seeking to exercise reconsideration jurisdiction. *Nicholls; State ex rel Foster v. Indus. Comm.* (1999), 85 Ohio St.3d 320, 707 N.E.2d 1122. This means that the prerequisite must be both identified and explained. *Id.* It is not enough to say, for example, that there has been a clear error of law. The order must also state what that error is. *Nicholls*, 81 Ohio St.3d at 459, 692 N.E.2d 188; *Foster*, 85 Ohio St.3d at 322, 707 N.E.2d 1122. This ensures that the party opposing reconsideration can prepare a meaningful defense to the assertion that continuing jurisdiction is warranted. *Royal*, 95 Ohio St.3d at 100, 766 N.E.2d 135. It also permits a reviewing court to determine whether continuing jurisdiction was properly invoked. *Id.* at 99-100, 766 N.E.2d 135.

{¶43} In *Gobich*, the court held that the commission had improperly exercised continuing jurisdiction when it vacated an SHO's order awarding PTD compensation by pronouncing that the SHO's order is based upon "clear mistakes of law." In *Gobich*, the bureau had moved for a commission reconsideration of the SHO's order.

{¶44} In *Gobich*, the court found that the bureau's complaint with the SHO's award of permanent total disability was an evidentiary one:

* * * [T]he bureau produced evidence that it believed established a capacity for sustained remunerative employment, and the SHO found otherwise. *Royal*, however, has specifically stated that a legitimate disagreement as to evidentiary interpretation does not mean that one of them was mistaken and does not, at a minimum, establish that an error was *clear*. *Id.*, 95 Ohio St.3d at 100, 766 N.E.2d 135.

It is also unclear whether the reason for continuing jurisdiction is a mistake of law or a mistake of fact. While the commission claimed the former, it cited no misapplication of the law. To the contrary, it referred only to an omission of fact. *Royal*, moreover, has categorized evidentiary disputes as factual. This is significant because *Nicholls*, *Foster*, and *Royal* are uncompromising in their demand that the basis for continuing jurisdiction be clearly articulated. The commission's current justification is ambiguous.

(Emphasis sic.) *Id.* at ¶17-18.

{¶45} In *Royal*, following the commission's award of PTD compensation, the employer moved for reconsideration. The commission granted reconsideration " 'based on the possibility of an error in the previous Industrial Commission order.' " *Id.* at 98. Following a bifurcated hearing that addressed both the propriety of reconsideration and the merits of the PTD claim, two identically dated orders emerged from those proceedings. The first order affirmed the grant of reconsideration based on the presence of a mistake of law or fact. The order identified the mistakes as: (1) the SHO's

misrepresentation of a particular vocational report, and (2) the absence of an analysis of nonmedical disability factors.

{¶46} Holding that the commission improperly invoked its continuing jurisdiction, the *Royal* court explains:

Identification of error *after* reconsideration does allow a reviewing court to adjudicate the propriety of the commission's invocation of continuing jurisdiction. It does little to help the party opposing the motion since it comes too late to allow a meaningful challenge to reconsideration at the administrative level. * * *

(Emphasis sic.) *Id.* at 100.

{¶47} The *Royal* court found further fault with the commission's exercise of continuing jurisdiction:

The reliance on "mistake of fact" is equally untenable. When the initial PTD order and disputed reports are read closely, the perceived error is not so much mistake as a difference in evidentiary interpretation. * * *

Id.

{¶48} R.C. 4123.54(l) states:

Compensation or benefits are not payable to a claimant during the period of confinement of the claimant in any state or federal correctional institution, or in any county jail in lieu of incarceration in a state or federal correctional institution, whether in this or any other state for conviction of violation of any state or federal criminal law.

{¶49} Analysis begins with two observations regarding the bureau's November 5, 2007 motion for termination of PTD compensation and a declaration of overpayment: (1) the bureau's motion was, in effect, a request that the commission exercise continuing jurisdiction over the SHO's order of February 3, 2005, that had awarded PTD compensation, and (2) grounds for the request for the exercise of

continuing jurisdiction was a "finding of fraud." Thus, the SHO who adjudicated the bureau's November 5, 2007 motion could appropriately conclude that fraud was the sole prerequisite that the bureau had selected to support its motion for the exercise of continuing jurisdiction over the prior PTD award.

{¶50} While the SHO's order of September 30, 2008, does not set forth the elements of fraud, it may be helpful to do so here: The elements of fraud are: (1) a representation or, where there is a duty to disclose, concealment of a fact; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred; (4) with the intent of misleading another into relying upon it; (5) justifiable reliance upon the representation or concealment; and (6) a resulting injury proximately caused by the reliance. *Gaines v. Preterm-Cleveland, Inc.* (1987), 33 Ohio St.3d 54, 55.

{¶51} Apparently, the SHO determined that the dispositive issue as to fraud was whether relator had actually engaged in sustained remunerative employment at the time of the February 3, 2005 PTD hearing. Respondents do not seem to challenge the SHO's determination of what the dispositive issue is and the magistrate finds no abuse of discretion on the part of the SHO in so framing the dispositive issue, which focuses essentially upon relator's knowledge and intent on the date of the PTD hearing.

{¶52} In weighing the evidence before him, the SHO concluded there was "no proof" of sustained remunerative employment at the time of the PTD hearing, although the bureau had presented evidence that relator was under investigation for selling drugs long before the hearing date. It is important to note what the SHO did not say in his

order. The SHO did not say that there was no *evidence* of sustained remunerative employment on or before the PTD hearing date. "Proof" is not the same concept as "evidence."

{¶53} Black's Law Dictionary (5th ed.1979) defines "proof" as "the effect of evidence; the establishment of a fact by evidence."

{¶54} Thus, when the SHO states there is "no proof" of sustained remunerative employment at the time of the PTD hearing, the SHO is stating his determination, based upon the evidence, that relator was not engaged in sustained remunerative employment at the time of the PTD hearing date. The evidence of record clearly supports the SHO's determination that relator was not actually engaged in sustained remunerative employment at the time of the February 3, 2005 PTD hearing.

{¶55} The indictment that led to relator's criminal conviction alleges offenses occurring October 1, October 24, November 1, and December 23, 2005. Those alleged offenses were supported by evidence of controlled buys on those dates.

{¶56} While there was indeed evidence that relator engaged in the illegal selling of drugs prior to the February 3, 2005 PTD hearing, that evidence was not the basis for the indictment that resulted in a criminal conviction.

{¶57} The SHO did not abuse his discretion in determining that only the four controlled buys during October, November, and December 2005 were sufficient to support a finding of sustained remunerative employment. It was well within the SHO's fact-finding discretion to conclude that the evidence of relator's drug-selling activities prior to the PTD hearing is insufficient to base a finding of sustained remunerative employment at the time of the PTD hearing or prior to the hearing. For example,

contrary to the bureau's assertion, the SHO was not required to rely upon the May 24, 2004 entry of the Parma Police Department Narcotics Unit to support a finding that sustained remunerative employment occurred on or about May 24, 2004, or at any period prior to the February 3, 2005 PTD hearing date.

{¶58} Reviewing the commission's March 17, 2009 order in light of the above analysis of the SHO's order that it vacated, it is clear that the commission's order of March 17, 2009, provides no basis for the exercise of continuing jurisdiction.

{¶59} To begin, the commission's March 17, 2009 order misstates what the SHO's order says when the commission's order states:

* * * Specifically, the Staff Hearing Officer mistakenly concluded that there was no evidence to support a finding that the Injured Worker was engaged in sustained remunerative employment at the time of the permanent total disability hearing, whereas the Bureau of Workers' Compensation (BWC) investigation report reveals that the Injured Worker was selling drugs to undercover agents during and prior to the period for which he was granted permanent total disability benefits. Therefore, the Commission exercises continuing jurisdiction * * *.

{¶60} As earlier noted, the SHO's order found that "there is no proof that the injured worker was involved in sustained remunerative employment at the time of the permanent and total disability hearing." Again, there is a significant distinction between a lack of evidence and a lack of proof.

{¶61} Interestingly, having faulted the SHO's order for finding "no proof" of sustained remunerative employment at the time of the February 3, 2005 PTD hearing (because of the evidence of illegal drug activity prior to the PTD hearing), the commission then proceeds to determine that sustained remunerative employment only occurred after the PTD hearing, i.e., beginning October 1, 2005, the date of the first

controlled buy upon which the indictment relied. Thus, in essence, the commission made the same factual finding regarding the actual start date of sustained remunerative employment as did the SHO's order.

{¶62} The commission's March 17, 2009 order fails to explain how the SHO's finding that fraud was absent at the time of the February 3, 2005 PTD hearing, is a clear mistake of fact or a clear mistake of law. Instead, the commission seized upon the SHO's use of the term "no proof," misconstruing it as "no evidence," and then used this perceived error as a basis to exercise continuing jurisdiction, even though the commission agreed with the SHO that sustained remunerative employment did not begin until after the February 3, 2005 PTD hearing. By entering a determination that sustained remunerative employment began October 1, 2005, and, on that basis, declaring an overpayment as of October 1, 2005, the commission, in effect, exercised continuing jurisdiction over a prerequisite not put forth by the bureau in its motion. The bureau's motion was premised solely upon fraud. It did not seek continuing jurisdiction based upon "new and changed circumstances" occurring subsequent to the February 3, 2005 PTD hearing. See *State ex rel. Lynch v. Indus. Comm.*, 171 Ohio App.3d 453, 2007-Ohio-292, ¶62, affirmed *State ex rel. Lynch v. Indus. Comm.*, 116 Ohio St.3d 342, 2007-Ohio-6668. Clearly, the commission's determination to terminate PTD compensation as of October 1, 2005, can only be justified on the prerequisite of new and changed circumstances, a prerequisite never alleged by the bureau and never submitted to the SHO.

{¶63} Accordingly, the commission's order of March 17, 2009, constitutes an abuse of discretion in failing to appropriately determine a prerequisite for the exercise of continuing jurisdiction.

{¶64} Given the above analysis, it is the magistrate's decision that this court issue a writ of mandamus ordering the commission to vacate its order of March 17, 2009, and to enter an order that reinstates the SHO's order of September 30, 2008, that terminates PTD compensation effective September 5, 2007, the date of relator's incarceration, as mandated by R.C. 4123.54(l).

/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).