[Cite as *State ex rel. Barko Ents., Inc. v. Indus. Comm.*, 2010-Ohio-5435.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Barko Enterprises, Inc.,	:	
Relator,	:	
v.	:	No. 09AP-572
The Industrial Commission of Ohio and Wolfgang G. Fifer,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on November 9, 2010

Coolidge Wall Co., L.P.A., David C. Korte, Michelle D. Bach, and *Joshua R. Lounsbury*, for relator.

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

Connor, Evans & Hafenstein LLP, Katie L. Woessner, Nicole E. Rager, and *Kenneth S. Hafenstein*, for respondent Wolfgang G. Fifer.

IN MANDAMUS

BROWN, J.

{¶1} Relator, Barko Enterprises, Inc., has filed this original action requesting that this court issue a writ of mandamus ordering respondent, Industrial Commission of Ohio

("commission"), to vacate its order that denied relator's May 2, 2008 motion that the commission exercise continuing jurisdiction over a February 28, 2008 order of the Ohio Bureau of Workers' Compensation ("bureau") that allowed the industrial claim of respondent Wolfgang G. Fifer ("claimant"), and to enter an order exercising continuing jurisdiction over the February 28, 2008 order of the bureau.

{¶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, including findings of fact and conclusions of law which is appended to this decision, and recommended that this court deny relator's request for a writ of mandamus. No objections have been filed to that decision.

{¶3} As there have been no objections filed to the magistrate's decision, and it contains no error of law or other defect on its face, based on an independent review of the file, this court adopts the magistrate's decision. Relator's request for a writ of mandamus is denied.

Writ of mandamus denied.

TYACK, P.J., and KLATT, J., concur.

_____

[Cite as *State ex rel. Barko Ents., Inc. v. Indus. Comm.*, 2010-Ohio-5435.]

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Barko Enterprises, Inc.,	:	
Relator,	:	
v.	:	No. 09AP-572
The Industrial Commission of Ohio and Wolfgang G. Fifer,	:	(REGULAR CALENDAR)
Respondents.	:	

M A G I S T R A T E ' S D E C I S I O N

Rendered on July 27, 2010

Coolidge Wall Co., L.P.A., David C. Korte, Michelle D. Bach and *Joshua R. Lounsbury*, for relator.

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

Connor, Evans & Hafenstein LLP, Katie L. Woessner, Nicole E. Rager and *Kenneth S. Hafenstein*, for respondent Wolfgang G. Fifer.

IN MANDAMUS

{¶4} In this original action, relator, Barko Enterprises, Inc. ("relator" or "Barko"), requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order denying relator's May 2, 2008 motion that the

commission exercise continuing jurisdiction over a February 28, 2008 order of the Ohio Bureau of Workers' Compensation ("bureau") that allowed the industrial claim of respondent Wolfgang G. Fifer ("claimant"), and to enter an order exercising continuing jurisdiction over the February 28, 2008 order of the bureau.

Findings of Fact:

{¶5} 1. On December 19, 2007, claimant filed an application for workers' compensation benefits on a form captioned "First Report of an Injury, Occupational Disease or Death" (FROI-1). On the application, claimant named Barko Relocation Services, Inc. ("Barko Relocation") as his employer on the date of injury. Claimant alleged that he injured both shoulders on November 16, 2007 while employed as a truck driver for Barko Relocation.

{¶6} 2. On January 8, 2008, the bureau mailed an order allowing the industrial claim (No. 07-882783) against Barko Relocation.

{¶7} 3. Barko Relocation administratively appealed the bureau's January 8, 2008 order.

{¶8} 4. Following a February 19, 2008 hearing, a district hearing officer ("DHO") mailed an order on February 22, 2008:

> The District Hearing Officer finds that the employer named on the FROI-1 and against whom this claim was allowed (Barco [sic] Relocation Services) is not the correct employer. The District Hearing Officer notes the tax information submitted by the claimant indicating that "Barko Enterprises, Inc." was an employer with whom the claimant worked in 2007.
>
> As such, the claim file is referred back to the Administrator for determination of the correct employer and for issuance of an order either allowing or denying the claim.

(Emphasis sic.)

{¶9} 5. Earlier, on January 10, 2008, claimant submitted to the bureau a two-page typewritten statement explaining why he believed he was an employee of Barko rather than an independent contractor.

{¶10} 6. The record contains notes from the bureau's claim service specialists ("CSS") involved with this industrial claim.

{¶11} 7. Two CSS notes dated January 22, 2008 state:

> BWC received copy of appeal filed by Barko Relocation Services Inc. Stating that there is not employer/employee relationship. Per [injured worker] the Correct employer is Barko Enterprises. * * *
>
> * * *
>
> Spoke to Carrie with Barko Enterprises who stated that there is no contract between the alleged [injured worker] and the company. Per conversation the company does not have workers comp coverage. They are the alleged employer of record. * * *

{¶12} 8. Two CSS notes dated February 27, 2008 state:

> — 02/27/2008INITIAL CONTACT * * *
>
> Call to * * *, EMP, spoke to, Tony Wilkins, part owner, stated a contract was signed by, [injured worker], who is a, subcontractor, and he was to carry his own, [workers' compensation] insurance, a copy of contract will be faxed to me. Marshelle CSS
>
> 02/27/2008BWC Order – Initial Allowance BWC Order

{¶13} 9. The record contains a document captioned "Independent Contractor/Employee Questionnaire," dated February 27, 2008. Apparently a bureau form, the document presents 20 questions to be answered "Yes" or "No." The document

indicates that, on February 27, 2008, it was completed by a bureau CSS purportedly during discussion with a "Tony Wilkins."

{¶14} 10. On February 28, 2008, the bureau mailed an order allowing the industrial claim against relator. The order states in part:

> This decision is based on:
> Exam report dated 12-12-07 Dr[.] May.
>
> * * *
>
> BWC grants temporary total disability (TT) payments from 12/12/2007. Payments will continue based on medical evidence.
>
> * * *
>
> Please note employer and employee disagree on the employer/employee relationship. BWC unable to clearly establish that the injured worker is a sub[.]
>
> This decision is based on:
>
> [One] C84 filed 2-7-08 Dr[.] May.
> [Two] 2007 1099 form.
>
> * * *
>
> Ohio law requires that BWC allow the injured worker or employer 14 days from the receipt of this order to file an appeal. * * *
>
> If the injured worker or the employer disagrees with this decision, either may file an appeal within 14 days of receipt of this order. Appeals are filed with the Industrial Commission of Ohio(IC), either via the Internet at www.ohioic.com or at the following IC office.
>
> IC COLUMBUS REGIONAL OFFICE
> 30 W. SPRING STREET
> COLUMBUS OH 43215

> If there are any further questions concerning this decision, contact the BWC representative listed below. However, a telephone call cannot take the place of a written appeal.
>
> THIS DECISION BECOMES FINAL IF A WRITTEN APPEAL IS NOT RECEIVED WITHIN 14 DAYS OF RECEIVING THIS NOTICE.

(Emphasis sic.)

{¶15} 11. On February 28, 2008, Barko faxed to the bureau two documents. One of the document is captioned "Driver's Application for Employment." This document is apparently a Barko form filled out by claimant. The other document is captioned "Equipment and Service Agreement." This document is seven pages in length and is purportedly signed by claimant.

{¶16} 12. The two documents described above were faxed to the bureau with a Barko form captioned "Fax Cover Sheet." The "Fax Cover Sheet" contains the Barko name and the number "07-882783" corresponding to the industrial claim number involved here. The "Fax Cover Sheet" indicates that the faxed documents are from "Tony" to "Marshelle." "Marshelle" is a bureau CSS.

{¶17} 13. It is undisputed that with respect to the February 28, 2008 order, relator did not file a notice of appeal on the form provided by the bureau or commission for such appeals, nor did relator file an appeal via the internet at the website provided.

{¶18} 14. On May 2, 2008, relator filed a motion on bureau form C-86. The motion states:

> Now comes the employer, Barko Enterprises, Inc., by and through counsel, and moves the Industrial Commission to exercise its continuing jurisdiction and deny the claim. The BWC issued an Order dated February 28, 2008, which allowed the claim for "bilateral shoulder sprains[.]" The Order indicates, "please note employer and employee disagree on

> the employer/employee relationship[.] BWC unable to clearly establish that the injured worker is a sub[.]" The employer has now provided additional evidence to the BWC supporting its position that the claimant was an independent contractor[.] Therefore, the employer respectfully requests that the Industrial Commission exercise its continuing jurisdiction based on new and changed circumstances and a mistake of law[.]

{¶19} On the C-84 form, relator cited to the following documents in support of the May 2, 2008 motion:

> [One] CSS claim notes for February 27, 2008
> [Two] BWC Order dated February 28, 2008
> [Three] Independent Contractor/Employee Questionnaire
> [Four] Driver's Application for Employment

{¶20} 15. Following a July 2, 2008 hearing, a DHO issued an order denying relator's motion for the exercise of continuing jurisdiction.

{¶21} 16. Relator administratively appealed the DHO's order of July 2, 2008.

{¶22} 17. Following an August 13, 2008 hearing, a staff hearing officer ("SHO") issued an order that vacates the DHO's order of July 2, 2008, but, nevertheless, denies relator's May 2, 2008 motion for the exercise of continuing jurisdiction. The SHO's order explains:

> It is the finding of the Staff Hearing Officer that the employer has not presented sufficient evidence to invoke the Authority of Industrial Commission to establish continuing jurisdiction pursuant to O.R.C. 4123.52.
>
> There is no clear mistake of fact or law, no new and change[d] circumstances, fraud, or an error by an inferior tribunal.
>
> The evidence in this claim is clear. On 11/16/2007 the Administrator issued an order allowing a claim against employer Barco [sic] Relocation Services. On 02/19/2008, the District Hearing Officer vacated the order and referred the claim back to the Administrator to process the claim

> against the employer named by the injured worker, Barko Enterprises.
>
> The Administrator issued an order on 02/08/2008 against the named employer. The employer did not file an appeal from this decision. The Bureau of Workers' Compensation order was clear on the issue allowance and ruled upon the merits of claim based upon the medical evidence. Bureau of Workers' Compensation even made a finding of fact and stated that based upon the evidence on file, the injured worker is not a subcontractor. The order clearly stated that an appeal must be filed or the order becomes a final order. The employer chose not to appeal the order. The record even indicated the employer was in contact with Bureau of Workers' Compensation claims examiner concerning the allowance.
>
> At this hearing, the employer's counsel is arguing that the Bureau of Workers' Compensation decision is similar to [the] facts in the [*Greene v. Conrad* (Aug. 21, 1997), 10th Dist. No. 96APE12-1780] case, that the Bureau of Workers' Compensation order [is] [ministerial] in nature, that the employer can present evidence and the Industrial Commission can exercise continuing jurisdiction. The Staff Hearing Officer rejects this argument. In Greene, the injured worker filed the claim without any evidence. In this case there was evidence on file that the Bureau of Workers' Compensation considered in finding that the injured worker was not a subcontractor. Also, the employer had the right to file an appeal of this order.
>
> Continuing jurisdiction is not to be considered lightly and it clearly is not to be used as a method for an appeal.
>
> The motion is denied. The employer failed to file a timely appeal from the Bureau of Workers' Compensation order allowing the claim.

{¶23} 18. On September 24, 2008, another SHO mailed an order refusing relator's administrative appeal from the August 13, 2008 SHO's order.

{¶24} 19. On June 12, 2009, relator, Barko Enterprises, Inc., filed this mandamus action.

Conclusions of Law:

{¶25} This action in mandamus is barred by a plain and adequate remedy at law that relator failed to pursue. Accordingly, it is the magistrate's decision that this court deny relator's request for a writ of mandamus, as more fully explained below.

{¶26} Mandamus will not issue where the relator has a plain and adequate remedy at law. *State ex rel. Berger v. McMonagle* (1983), 6 Ohio St.3d 28. The failure to pursue an adequate administrative remedy bars mandamus. *State ex rel. Reeves v. Indus. Comm.* (1990), 53 Ohio St.3d 212.

{¶27} An appeal of a bureau order to the commission under R.C. 4123.511(B)(1) constitutes an adequate administrative remedy that can bar a mandamus action if not pursued. *State ex rel. Leyendecker v. Duro Test Corp.* (1999), 87 Ohio St.3d 237; *State ex rel. Buckley v. Indus. Comm.*, 100 Ohio St.3d 68, 2003-Ohio-5072.

{¶28} Here, the record shows that relator failed to administratively appeal the bureau's February 28, 2008 order allowing the claim. Seeking to vacate the bureau order despite its failure to appeal the order, relator filed, on May 2, 2008, a motion that the commission exercise R.C. 4123.52 continuing jurisdiction over the bureau order. The commission, through its hearing officers, denied relator's motion for the exercise of continuing jurisdiction. Thereafter, relator filed this mandamus action arguing that the commission abused its discretion in refusing to exercise continuing jurisdiction.

{¶29} Relator cannot eliminate the effect of its failure to administratively appeal the bureau's order by subsequently filing a motion for the exercise of continuing jurisdiction. Whether the commission rightly or wrongly determined not to exercise

continuing jurisdiction is not an issue before this court because relator failed to administratively appeal the bureau's order.

{¶30} Whether or not it can be successfully argued that the bureau's order of February 28, 2008 is res judicata is also not an issue before this court. *Buckley*. Consequently, relator's reliance upon *Greene v. Conrad* (Aug. 21, 1997), 10th Dist. No. 96APE12-1780, is misplaced.

{¶31} In *Greene*, the claimant, Linda L. Greene, filed an application for workers' compensation with the bureau on April 27, 1994. In a letter dated May 27, 1994, the bureau denied the application on grounds that Greene had "not provided all the information requested by BWC to establish a claim." Id. Greene did not administratively appeal. Greene, however, filed another application on January 26, 1995 that, for all practical purposes, was identical to the earlier application except that Greene included medical records. On April 17, 1995, the bureau denied Greene's application based upon the doctrine of res judicata.

{¶32} Greene then appealed the bureau's April 17, 1995 order to a DHO who vacated the bureau order, but similarly ruled that the DHO lacked jurisdiction to hear Greene's appeal on res judicata grounds. Thereafter, an SHO affirmed the DHO's order and the commission refused to hear Greene's further appeal. Greene then appealed to the Franklin County Court of Common Pleas. On cross-motions for summary judgment, the common pleas court entered judgment in favor of Greene.

{¶33} The administrator of the bureau appealed the judgment of the common pleas court to this court. This court affirmed the judgment of the common pleas court.

{¶34} At issue before this court in *Greene* was whether the bureau's decision of May 27, 1994 (that Greene failed to appeal) was res judicata. After much analysis, this court held that the bureau's decision of May 27, 1994 did not have a preclusive effect on Greene's subsequent application because the bureau's "processing of appellee's claim * * * did not constitute an adjudicative proceeding warranting application of the doctrine of *res judicata*." Id.

{¶35} Citing *Greene*, relator here argues that the bureau's February 28, 2008 order allowing the claim (which relator failed to appeal) is a mistake of law and, thus, must be vacated by the commission under its continuing jurisdiction. According to relator, the bureau's February 28, 2008 order was not an adjudication that merits protection under the doctrine of res judicata.

{¶36} Significantly, unlike the instant original action in mandamus, the *Greene* case was an appeal to this court from a common pleas court judgment. Because the *Greene* case was not an original action, there was no issue, as here, as to an adequate administrative remedy.

{¶37} Here, relator inappropriately invites this court to examine the bureau's proceedings that resulted in the issuance of the bureau's February 28, 2008 order allowing the claim in order to determine whether the bureau conducted an adjudication under the doctrine of res judicata. Again, the question of whether it can be said that the bureau conducted an adjudicative proceeding is not before this court.

{¶38} Based upon the above analysis, relator's reliance upon *Greene* is misplaced and there is no issue here as to whether the bureau's February 28, 2008 order was the result of an adjudication by the bureau.

{¶39} Relator also contends that the fax sent to the bureau by Barko on February 28, 2008 must be deemed an appeal of the bureau's February 28, 2008 order. This contention lacks merit.

{¶40} Interestingly, in its May 2, 2008 motion, relator never asserted that the February 28, 2008 fax must be viewed as its administrative appeal of the bureau's February 28, 2008 order. Moreover, in a so-called "position" paper filed by relator in support of its May 2, 2008 motion, relator does not argue that the fax must be viewed as an appeal. Apparently, this argument was never presented to the commission, but was raised for the first time in this mandamus action.

{¶41} R.C. 4123.511(F) provides that a notice of appeal "shall state the names of the claimant and employer, the number of the claim, the date of the decision appealed from, and the fact that the appellant appeals therefrom." The statute does not demand absolute compliance, but only "substantial compliance." *State ex rel. Lapp Roofing & Sheet Metal Co., Inc. v. Indus. Comm.*, 117 Ohio St.3d 179, 2008-Ohio-850, at ¶14.

{¶42} As the *Lapp* court explains:

> * * * "Substantial compliance" occurs "when a timely notice of appeal * * * includes sufficient information, in intelligible form, to place on notice all parties to a proceeding that an appeal has been filed from an identifiable final order which has determined the parties' substantive rights and liabilities." [*Fisher v. Mayfield* (1987)], 30 Ohio St.3d 8, 30 OBR 16, 505 N.E.2d 975, paragraph two of the syllabus.

Id.

{¶43} As earlier noted, the fax cover sheet does contain relator's name and the industrial claim number. The faxed documents do provide the name of claimant. However, the date of the bureau order allegedly being appealed is not contained in any of

the faxed documents. But even more important, the fax does not even purport to be an appeal. The fax is just that—a fax containing a fax cover sheet and the documents being faxed. There is indeed no indication whatsoever in the fax that relator even intended the fax to be an appeal. In short, relator's contention lacks merit.

{¶44} 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

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).