[Cite as *State ex rel. Holland v. Indus. Comm.*, 2011-Ohio-465.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Evon Holland,	:	
Relator,	:	
v.	:	No. 10AP-238
The Industrial Commission of Ohio and Greater Cleveland Regional Transit Authority,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on February 3, 2011

Shapiro, Shapiro & Shapiro Co., LPA, Leah P. VanderKaay and *Geoffrey J. Shapiro*, for relator.

Mike DeWine, Attorney General, and *Stephen D. Plymale*, for respondent Industrial Commission of Ohio.

Anna Hlavacs and *Kathleen A. Minahan*, for respondent Greater Cleveland Regional Transit Authority.

IN MANDAMUS

TYACK, J.

{¶1} Evon Holland filed this action in mandamus, seeking a writ to compel the Industrial Commission of Ohio ("commission") to vacate its refusal to address new issues

regarding the recognition of her workers' compensation claim and her ability to participate in the workers' compensation system.

{¶2} In accord with Loc.R. 12, the case was referred to a magistrate to conduct appropriate proceedings. The parties stipulated the pertinent evidence and filed briefs. The magistrate then issued her initial magistrate's decision on August 30, 2010.

{¶3} The commission then filed a motion to supplement the record with additional evidence. A member of the court journalized an entry granting the motion to supplement the record and returned the case to the magistrate for additional proceedings.

{¶4} The magistrate issued a second magistrate's decision on November 26, 2010, which is appended hereto. The decision contains detailed findings of fact and conclusions of law. The decision includes a recommendation that we deny the request for a writ.

{¶5} No party has filed objections to the second magistrate's decision. The case is now before the court for review.

{¶6} No error of law or fact is present on the face of the November 26, 2010 magistrate's decision except the word "not" was inadvertently omitted from ¶29 of the magistrate's decision. The first sentence of that paragraph should be corrected to read "it is this magistrate's decision that the commission did not abuse its discretion." With that amendment, we adopt the findings of fact and conclusions of law contained in that magistrate's decision. As a result, we deny the request for a writ of mandamus.

Writ of mandamus denied.

CONNOR and DORRIAN, JJ., concur.

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APPENDIX

IN THE COURT OF APPEALS OF OHIO

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State of Ohio ex rel. Evon Holland,	:	
Relator,	:	
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Respondents.	:	

S U P P L E M E N T A L

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

Rendered on November 26, 2010

Shapiro, Shapiro & Shapiro Co., LPA, Leah P. VanderKaay, and *Geoffrey J. Shapiro*, for relator.

Richard Cordray, Attorney General, and *Stephen D. Plymale*, for respondent Industrial Commission of Ohio.

Anna Hlavacs and *Kathleen A. Minahan*, for respondent Greater Cleveland Regional Transit Authority.

IN MANDAMUS

{¶7} Relator, Evon Holland, 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 which refused to adjudicate whether or not she was entitled to participate in the workers' compensation system for the newly diagnosed conditions of neck sprain and back sprain after her claim had been denied by her employer, the commission, and after relator lost her appeal pursuant to R.C. 4123.512 in the Cuyahoga County Court of Common Pleas for the originally diagnosed conditions of lumbago or back pain.[1]

Findings of Fact:

{¶8} 1. Relator was employed as a bus driver for respondent Greater Cleveland Regional Transit Authority ("GCRTA").

{¶9} 2. Relator alleges that on July 20, 2007, the bus she was driving was struck by an automobile and she sustained injuries as a result.

{¶10} 3. Relator presented at the emergency room on July 22, 2007 complaining of back pain.

{¶11} 4. Multiple "First Report of an Injury, Occupational Disease or Death" ("FROI") forms are contained in the record. The supplement to the stipulation filed by the commission indicates that relator alleged that she sustained injuries to both her back and neck.

{¶12} 5. GCRTA denied relator's claim and requested a hearing on the matter.

{¶13} 6. The Ohio Bureau of Workers' Compensation ("BWC") referred the claim to the commission.

[1] A magistrate's decision was previously released on August 30, 2010. Because this court permitted the commission to supplement the record by entry dated September 24, 2010, a supplemental decision is warranted.

{¶14} 7. A hearing was held before a district hearing officer ("DHO") on October 31, 2007. The DHO denied relator's FROI as follows:

> It is the finding of the District Hearing Officer that the claimant did not sustain an injury in the course of and arising out of employment. The claimant alleges that she hurt her neck and low back on 7/20/2007 when a vehicle hit the bus that she was driving.
>
> It is the finding of the District Hearing Officer that the claimant has failed to meet her burden of proof in establishing a compensable claim. The Amherst Hospital diagnosis listed refers to either lumbago or back pain. The District Hearing Officer finds that there is no compensable diagnosis listed in the medical records and there is insufficient evidence of a causal relationship opinion. Therefore, the District Hearing Officer finds that the claim must be denied in its entirety at this time.

(Emphasis sic.)

{¶15} 8. Relator appealed and the matter was heard before a staff hearing officer ("SHO") on December 7, 2007. The SHO affirmed the prior DHO's order and denied relator's application as follows:

> Claimant treated for lumbago and back pain after the 07/20/2007 incident. The claim lacks sufficient proof by way of medically diagnosed injury to establish an independent injury occurring 07/20/2007.
>
> Therefore, the 09/04/2007 application is denied. Evidence is insufficient to establish that a new and independent injury has been sustained in the course of and arising out of claimant's employment.

{¶16} 9. Relator's further appeal was refused by order of the commission mailed January 9, 2008.

{¶17} 10. Thereafter, relator filed a notice of appeal in the Cuyahoga County Court of Common Pleas ("common pleas court").

{¶18} 11. GCRTA filed a motion for summary judgment arguing that neck and back pain are symptoms and not diagnoses. As such, GCRTA argued that relator failed to meet her burden of proving that she sustained an injury as a result of the accident.

{¶19} 12. In a journal entry signed February 17, 2009, the common pleas court granted GCRTA's motion for summary judgment.

{¶20} 13. Relator completed another FROI alleging that she sustained "sprain of lower back an[d] neck" as a result of the July 20, 2007 accident as well as a C-86 motion requesting the BWC to process the matter as a new case and assign a new case number. Relator included the April 4, 2009 report of Emmanuel O. Tuffuor, M.D., who examined her within days of the accident. According to his report, Dr. Tuffuor had advised relator to take some time off from her job and participate in physical therapy. Dr. Tuffuor also noted his range of motion findings for relator's neck. These findings were outside the normal range. Dr. Tuffuor opined that the July 20, 2007 accident was directly responsible for the following diagnoses of ICD codes "847.0 and 847.9" which refer to sprains and strains of the neck and of unspecified parts of the back.

{¶21} 14. The BWC referred the matter to the commission for consideration.

{¶22} 15. In an ex parte order mailed May 27, 2009, the commission dismissed relator's motion because the issue of the allowance was still pending in the common pleas court.

{¶23} 16. On May 30, 2009, relator re-filed her motion and included the same documentation.

{¶24} 17. The BWC referred the matter to the commission for consideration and the matter was set for hearing.

{¶25} 18. The matter was heard before an SHO on January 7, 2010. The SHO denied relator's motion as follows:

> Staff Hearing Officer denies the Injured Worker's C-86 filed 05/30/2009, requesting that the issue of allowance be re-adjudicated due to a new medical report having been obtained, from the physician of record. The issue of allowance has already been adjudicated administratively with all administrative levels appropriately exhausted. The Injured Worker then filed an appeal to the Court of Common Pleas, which has been adjudicated by the court, in favor of the Employer. The Injured Worker has not produced evidence of an appeal from that decision having been filed for review at this hearing. Staff Hearing Officer finds no basis for granting a request to rehear the issue of allowance that has been heard as required, administratively, on the merits.

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

Conclusions of Law:

{¶27} Relator argues that the commission abused its discretion by refusing to consider her subsequent FROI and by failing to invoke its continuing jurisdiction.

{¶28} The commission argues that it did not abuse its discretion by failing to exercise its continuing jurisdiction because relator did not demonstrate that the medical evidence she submitted concerning her neck and back injuries was newly discovered and could not have been discovered at the time her first FROI was considered. The commission and GCRTA further assert that res judicata applies and that, based on the

journal entry of the common pleas court granting summary judgment in favor of GCRTA, it has been determined that relator did not sustain a compensable injury following the July 20, 2007 accident.

{¶29} It is this magistrate's decision that the commission did abuse its discretion. Relator originally asserted that she sustained injuries to both her neck and back; however, relator failed to prevent sufficient medical evidence to support her claim and her further appeal to common pleas court was unsuccessful.

{¶30} Pursuant to R.C. 4123.84, an employee who sustains an injury during the course of their employment must file their claim for compensation or benefits for the specific part or parts of the body injured within two years after the date of the injury. Further, the claim must be made in writing. See also Ohio Adm.Code 4123-3-05(A). The purpose of R.C. 4123.84 is to provide prompt notice to the BWC and self-insured employers of claims and potential claims from injured workers. See *Arline v. Ohio Bur. of Workers' Comp.* (Sept. 26, 2000), 10th Dist. No. 00AP-312.

{¶31} In her FROI, relator asserted that she sustained an injury to both her neck and back. The commission determined that relator did not support her claim with sufficient medical evidence and her claim for injuries to her neck and back was disallowed. Relator appealed; however, summary judgment was granted in favor of GCRTA and relator's claim was disallowed. As such, it has been determined that relator failed to meet her burden of proving that she sustained a work-related injury to her neck and her lower back as a direct result of the July 20, 2007 accident. Once a competent tribunal enters a final judgment on the merits of a claim, res judicata

precludes the re-litigation of a point of law or fact that was at issue in the former action between the same parties. *State ex rel. Kroger Co. v. Indus. Comm.* (1998), 80 Ohio St.3d 649. Res judicata applies not only to those claims and defenses actually litigated in the first case, but any claim which may have been properly adjudicated. Id.

{¶32} The application of R.C. 4123.52 requires the same result. Pursuant to R.C. 4123.52, "[t]he jurisdiction of the industrial commission and the authority of the administrator of workers' compensation over each case is continuing, and the commission may make such modification or change with respect to former findings or orders with respect thereto, as, in its opinion is justified." In *State ex rel. B & C Machine Co. v. Indus. Comm.* (1992), 65 Ohio St.3d 538, 541-542, the court examined the judicially-carved circumstances under which continuing jurisdiction may be exercised, and stated as follows:

> R.C. 4123.52 contains a broad grant of authority. However, we are aware that the commission's continuing jurisdiction is not unlimited. See, *e.g., State ex rel. Gatlin v. Yellow Freight System, Inc.* (1985), 18 Ohio St.3d 246, 18 OBR 302, 480 N.E.2d 487 (commission has inherent power to reconsider its order for a reasonable period of time absent statutory or administrative restrictions); *State ex rel. Cuyahoga Hts. Bd. of Edn. v. Johnston* (1979), 58 Ohio St.2d 132, 12 O.O.3d 128, 388 N.E.2d 1383 (just cause for modification of a prior order includes new and changed conditions); *State ex rel. Weimer v. Indus. Comm.* (1980), 62 Ohio St.2d 159, 16 O.O.3d 174, 404 N.E.2d 149 (continuing jurisdiction exists when prior order is clearly a mistake of fact); *State ex rel. Kilgore v. Indus. Comm.* (1930), 123 Ohio St. 164, 9 Ohio Law Abs. 62, 174 N.E. 345 (commission has continuing jurisdiction in cases involving fraud); *State ex rel. Manns v. Indus. Comm.* (1988), 39 Ohio St.3d 188, 529 N.E.2d 1379 (an error by an inferior tribunal is a sufficient reason to invoke continuing jurisdiction); and *State ex rel. Saunders v. Metal Container Corp.* (1990), 52 Ohio St.3d 85, 86, 556

> N.E.2d 168, 170 (mistake must be "sufficient to invoke the continuing jurisdiction provisions of R.C. 4123.52"). Today, we expand the list set forth above and hold that the Industrial Commission has the authority pursuant to R.C. 4123.52 to modify a prior order that is clearly a mistake of law. * * *

{¶33} The commission argues that relator failed to demonstrate new and changed circumstances that would warrant the exercise of its continuing jurisdiction. Newly acquired evidence does not constitute new and changed circumstances when that evidence could have been obtained by due diligence prior to the date of the hearing determining the matter. *State ex rel. Washington v. Indus. Comm*., 112 Ohio St.3d 86, 2006-Ohio-6505, and *State ex rel. Frank W. Schaefer, Inc. v. Indus. Comm*. (1998), 84 Ohio St.3d 248.

{¶34} In support of her later FROI, relator attached the April 4, 2009 report of Dr. Tuffuor. Relator did not explain why this medical evidence concerning her neck and low back sprains could not have been discovered with due diligence before the common pleas court granted GCRTA's motion for summary judgment. As the record indicates, Dr. Tuffuor first saw relator in July 2007, shortly after she was injured. There simply is no explanation provided by relator for her failure to procure a report from Dr. Tuffuor earlier. Further, relator could have voluntarily dismissed her R.C. 4123.52 appeal pursuant to Civ.R. 41(A) before the common pleas court ruled on GCRTA's motion for summary judgment. Relator would then have had one year to re-file the action pursuant to R.C. 2305.19. Because relator has failed to establish that new and changed circumstances existed, it is this magistrate's decision that the commission did not abuse its discretion by refusing to exercise its continuing jurisdiction to consider whether or not

relator sustained neck and back sprains as a result of the July 20, 2007 accident. The denial of her claim for alleged injuries to her neck and back has been fully adjudicated and res judicata applies.

{¶35} As such, it is this magistrate's decision that the commission did not abuse its discretion in finding that res judicata applied and this court should deny relator's request for a writ of mandamus.

/s/Stephanie Bisca Brooks
STEPHANIE BISCA BROOKS
MAGISTRATE

NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).