[Cite as *State ex rel. Sunesis Constr. v. Indus. Comm.*, 2012-Ohio-2323.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Sunesis Construction,	:	
Relator,	:	
v.	:	No. 11AP-449
Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
Respondent.	:	

D E C I S I O N

Rendered on May 24, 2012

Dunlevey, Mahan & Furry, Douglas S. Jenks and *Gary W. Auman,* for relator.

Michael DeWine, Attorney General, and *James A. Barnes,* for respondent.

IN PROHIBITION
ON OBJECTIONS TO MAGISTRATE'S DECISION

BRYANT, J.

{¶ 1} Relator, Sunesis Construction, commenced this original action requesting a writ of prohibition that orders respondent, Industrial Commission of Ohio, to desist from holding a so-called de novo hearing in executing this court's writ of mandamus issued in a prior original action.

I. Facts and Procedural History

{¶ 2} Pursuant to Civ.R. 53 and Section (M), Loc.R. 12 of the Tenth Appellate District, this matter was referred to a magistrate who issued the appended decision, including findings of fact and conclusions of law. The magistrate addressed whether relator is entitled to a writ to prohibit the Industrial Commission from conducting a de novo hearing in response to this court's judgment entry from a prior original action. In the prior action, this court vacated the commission's award for a violation of a specific safety requirement against relator and returned the matter to the commission "to enter an order that adjudicates the matter in a manner in accordance with law and consistent with the decision" the court issued, including compliance with the law as stated in *State ex rel. Noll v. Indus. Comm.*, 57 Ohio St.3d 203 (1991). (Magistrate's Decision ¶ 23.)

{¶ 3} In resolving relator's request for a writ of prohibition, the magistrate determined the commission had subject matter jurisdiction to hold the de novo hearing subject of relator's question for a writ of prohibition. Accordingly, the magistrate determined this court should deny the requested writ.

II. Objections

{¶ 4} Relator filed two objections to the magistrate's conclusions of law:

> Objection 1: The Industrial Commission has no subject matter jurisdiction because the second *de novo* VSSR hearing was not prescribed by statute or ordered by the Court.
>
> Objection 2: The Magistrate's Opinion could set a dangerous precedent.

Because relator's two objections are interrelated, we address them jointly. Together they assert the magistrate wrongly concluded the commission, within the scope of applicable law and this court's order returning the matter to the commission has jurisdiction to conduct a de novo hearing. Relator's objections are not well-taken.

{¶ 5} As the magistrate properly pointed out, the Industrial Commission has clear statutory jurisdiction to consider applications for awards relating to violation of a specific safety requirement. *See* R.C. 4121.35(B)(3). Moreover, the commission's decision to conduct a de novo hearing does not run afoul of the language in this court's decision or

entry in the prior mandamus action, as neither addressed whether a hearing would be part of the commission's reconsidering the application.

{¶ 6} Because it has jurisdiction, the commission, in the absence of statutory or administrative provisions to the contrary, arguably has discretion to determine whether to conduct a hearing on the application. The commission has posited at least a facially plausible reason for conducting a hearing, since the hearing officer who issued the original order subject of the prior mandamus action no longer is a commission employee. Even so, to the extent the commission commits procedural errors in conducting the de novo hearing, its actions do not deprive the commission of jurisdiction. Instead, any such errors may present grounds for a subsequent action to determine whether the commission abused its discretion. Because, however, the commission has jurisdiction to decide the application at issue, prohibition is inappropriate. *State ex rel. Eaton Corp. v. Lancaster*, 40 Ohio St.3d 404, 409 (1988).

{¶ 7} Accordingly, relator's two objections are overruled.

III. Disposition

{¶ 8} Following independent review pursuant to Civ.R. 53, we find the magistrate has properly determined the pertinent facts and applied the salient law to them. Accordingly, we adopt the magistrate's decision, including the findings of fact and conclusions of law. In accordance with the magistrate's decision, we deny the requested writ of prohibition.

Objections overruled;
writ denied.

KLATT and TYACK, JJ., concur.

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APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Sunesis Construction,	:	
Relator,	:	
v.	:	No. 11AP-449
Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
Respondent.	:	

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

Rendered on February 21, 2012

Dunlevey, Mahan & Furry, Douglas S. Jenks and *Gary W. Auman*, for relator.

Michael DeWine, Attorney General, and *James A. Barnes*, for respondent.

IN PROHIBITION

{¶ 9} In this original action, relator, Sunesis Construction ("Sunesis" or "relator"), requests a writ of prohibition ordering respondent, Industrial Commission of Ohio ("commission"), to desist from holding a so-called de novo hearing in its execution of this court's writ of mandamus issued in a prior original action.

Findings of Fact:

{¶ 10} 1. On July 31, 2005, Timothy Roark ("decedent") was killed in a trench while working for relator.

{¶ 11} 2. The Ohio Bureau of Workers' Compensation ("bureau") allowed the death claim (No. 05-849445) and also awarded benefits to decedent's dependent children.

{¶ 12} 3. On January 29, 2007, on behalf of decedent and his dependents, an application was filed for an additional award for violations of specific safety requirements ("VSSR").

{¶ 13} 4. The VSSR application prompted an investigation by the bureau's Safety Violations Investigation Unit ("SVIU").

{¶ 14} 5. In the year 2006, Lowell Roark, the administrator of decedent's estate, filed an intentional tort action in Butler County Court of Common Pleas. That action generated multiple deposition transcripts.

{¶ 15} 6. The SVIU investigator obtained copies of the deposition transcripts from the intentional tort action.

{¶ 16} 7. On July 11, 2007, the SVIU investigator issued his report of investigation. The deposition transcripts were made exhibits to the report.

{¶ 17} 8. Following a June 10, 2008 hearing, a staff hearing officer ("SHO"), issued an order finding that relator had violated six specific safety rules pertaining to trenches and excavations.

{¶ 18} 9. Relator moved for rehearing under Ohio Adm.Code 4123-3-20(E).

{¶ 19} 10. On November 21, 2008, another SHO mailed an order denying relator's motion for rehearing.

{¶ 20} 11. On December 5, 2008, relator moved for so-called reconsideration. On January 8, 2009, the three-member commission mailed an order denying reconsideration.

{¶ 21} 12. On April 29, 2009, Sunesis filed in this court a mandamus action that was assigned case No. 09AP-423. The action was assigned to a magistrate.

{¶ 22} 13. On May 12, 2010, the magistrate issued his magistrate's decision containing findings of fact and conclusions of law. The last paragraph of the magistrate's decision states:

> Accordingly, it is the magistrate's decision that this court issue a writ of mandamus ordering respondent Industrial Commission of Ohio to vacate its order granting the VSSR award, and, in a manner consistent with this magistrate's decision, enter a new order either granting or denying a VSSR award.

{¶ 23} 14. On September 21, 2010, this court issued its decision. On the same day, this court issued its judgment entry in case No. 09AP-423:

> For the reasons stated in the decision of this court rendered herein on September 21, 2010, the objections to the decision of the magistrate are overruled, the decision of the magistrate is approved and adopted by the court as its own, and it is the judgment and order of this court that a writ of mandamus ordering the commission to vacate its order granting the VSSR application and to enter an order that adjudicates the matter in a manner in accordance with law and consistent with the decision.

{¶ 24} 15. On December 16, 2010, an SHO mailed an order:

> Pursuant to the Judgment Entry of the Tenth Appellate District Court of Appeals, dated 09/21/2010, which was filed with the Industrial Commission on 12/07/2010, for the case of State ex rel. Sunesis Construction v. Industrial Commission and Timothy Roark, Deceased, et al, assigned Case No. 09AP0423, it is found that the requested Writ of Mandamus has been granted.
>
> Therefore, in accordance with the Writ, it is ordered that the order of the Staff Hearing Officer from the hearing of 06/10/2008, order mailed 09/17/2008[,] and the Staff Hearing Officer Rehearing denial order mailed 11/21/2008, are vacated.
>
> The claim is to be set for a de novo hearing before a Staff Hearing Officer on the issue of the IC-9 Application for Additional Award for VSSR-Fatal, filed 01/29/2007.
>
> The Staff Hearing Officer is to issue an order on the merits of the IC-9 Application and which complies with State ex rel. Noll v. Industrial Commission (1991), 57 Ohio St.3d 203. The Staff Hearing Officer is to apply the reasoning in the Tenth Appellate District Court of Appeals decision dated 09/21/2010.
>
> The Staff Hearing Officer order will be subject to the usual rights of Administrative Rehearing in accordance with the provisions of Ohio Administrative Code 4121-3-20 (C).

{¶ 25} 16. By letter dated December 30, 2010, relator, through counsel, submitted form IC-12 captioned "Notice of Appeal." On the form, relator indicated that relator was appealing the SHO's order of December 16, 2010. Relator also submitted a memorandum in support of its "appeal" of the SHO's order of December 16, 2010. In its memorandum, relator asserted:

> Sunesis objects to the Industrial Commission's decision to grant Roark another VSSR hearing. The Court did not remand the VSSR application for another hearing. The Court only ordered the Industrial Commission to issue a new order in compliance with the law as stated in *Noll v. Industrial Commission*.

{¶ 26} 17. By letter dated April 14, 2011, the commission's legal counsel informed relator's counsel:

> This letter is in reply to the "Notice of Appeal" and objection filed with the Commission, on or about December 30, 2010, from the order of the Staff Hearing Officer mailed on December 16, 2010. The Commission requested that I reply to the employer's objection.
>
> The portion of the December 16, 2010 order of the Staff Hearing Officer that directed that the matter be set for a de novo hearing before a Staff Hearing Officer on the issue of the IC-9 Application for Additional Award for VSSR-Fatal, filed 01/29/2007, is not a final order of the Industrial Commission that is subject to administrative appeal or reconsideration.
>
> Instead, the portion of the December 16, 2010 order of the Staff Hearing Officer that directed that the matter be set for a de novo hearing before a Staff Hearing Officer on the issue of the IC-9 Application for Additional Award for VSSR-Fatal, filed 01/29/2007, is interlocutory in nature.
>
> There are a number of court decisions issued over the years that addressed challenges to the Commission's custom and longstanding administrative practice of scheduling a new hearing on a contested claims matter when a claim is remanded to the Industrial Commission, when a limited writ is issued by the Franklin County Court of Appeals, in the absence of express language in the court's judgment entry and decision that the Commission issue an order without holding a new hearing. Examples of those court decisions include

> *Dayton Walther Corp. v. Indus. Comm.*, (1994) 71 Ohio St.3d 105, *State ex rel. Ohio Building Restoration, Inc. v. Indus. Comm.*, (1992) 64 Ohio St.3d 188, and *State ex rel. Hart v. Beverage Transportation*, (1995) 73 Ohio St.3d 353.
>
> It is also noted in this particular claim that the Staff Hearing Officer, who held the hearing on June 10, 2008 and issued the order resulting from the June 10, 2008 hearing, is no longer an employee of the Industrial Commission.
>
> Therefore, the employer's "Notice of Appeal" (objection) filed on December 30, 2010, is denied.

{¶ 27} 18. By letter dated April 25, 2011, Senesis' counsel responded to the April 14, 2011 letter from the commission's legal counsel. In the three-page letter, Senesis' counsel asked that the commission "reconsider its decision to schedule a *de novo* hearing on the claimant Roark VSSR application."

{¶ 28} 19. On May 17, 2011, relator filed the instant prohibition action.

{¶ 29} 20. The SHO assigned to rehear the VSSR application issued notice of a pre-hearing conference for July 14, 2011.

{¶ 30} 21. By letter dated June 29, 2011, Senesis' counsel requested that the pre-hearing conference be canceled:

> This letter is to respectfully request that the conference be canceled and held in abeyance until the Tenth District Court of Appeals issues a decision on the employer's Petition for Writ of Prohibition. If the Petition is granted, there will be no new hearing on the VSSR matter and this would also dispense with the need for a Pre-hearing Conference. Therefore, the employer requests that the Conference be canceled and the VSSR matter be held in abeyance until the court matter is resolved.

(Emphasis sic.)

{¶ 31} 22. On July 14, 2011, the pre-hearing conference was held.

{¶ 32} 23. On July 16, 2011, the SHO mailed a "Post Pre-hearing Conference Letter." The letter provides that the hearing on the merits of the VSSR application is scheduled for October 6, 2011. The letter further notes that Senesis "has requested a record hearing and will provide a court reporter and submit a transcript of the hearing to

the claim file." The order also notes that the parties have not requested the issuance of subpoenas.

{¶ 33} 24. The hearing before an SHO was held on October 6, 2011 as scheduled and pursuant to notice.

{¶ 34} 25. Following the October 6, 2011 hearing, the SHO mailed an order on December 15, 2011 that grants the VSSR application in part and denies it in part.

Conclusions of Law:

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

{¶ 36} A writ of prohibition is an extraordinary judicial writ issuing out of a court of superior jurisdiction and directed to an inferior tribunal commanding it to cease abusing or usurping judicial functions. *State ex rel. Tubbs Jones v. Suster*, 84 Ohio St.3d 70 (1988).

{¶ 37} In order for a writ of prohibition to issue, the relator must establish that the court official or tribunal against whom it is sought must be about to exercise judicial or quasi-judicial power; the exercise of power must amount to an unauthorized usurpation of judicial power; and refusal of the writ would result in an injury for which there is no adequate remedy. *State ex rel. Eaton Corp. v. Lancaster*, 40 Ohio St.3d 404, 409 (1988).

{¶ 38} Prohibition tests and determines " 'solely and only' " the subject-matter jurisdiction of the inferior tribunal. *Eaton*, quoting *State ex rel. Staton v. Common Pleas Court*, 5 Ohio St.2d 17, 21 (1965). Where the tribunal has such jurisdiction, prohibition is not available to prevent or correct an erroneous decision. *Eaton*, citing *State ex rel. Winnefeld v. Common Pleas Court*, 159 Ohio St. 225 (1953). Moreover, a writ of prohibition will not issue absent a "patent and unambiguous" lack of jurisdiction. *State ex rel. Goldstein v. Christiansen*, 70 Ohio St.3d 232, 234 (1994).

{¶ 39} Here, relator's focus is upon the language of this court's writ of mandamus, *i.e.*, judgment entry of September 21, 2010, which commands the commission "to vacate its order granting the VSSR application and to enter an order that adjudicates the matter in a manner in accordance with law and consistent with the decision."

{¶ 40} According to relator, the command of this court's writ provides no authority to the commission to conduct a de novo hearing that would provide the parties an opportunity to submit new evidence or even new arguments in support of their respective positions. According to relator, the commission must simply enter a new order that adjudicates the matter based upon the evidence and arguments that had already been submitted prior to or at the time of the commission's order that must be vacated.

{¶ 41} Regardless of the propriety of the commission's decision to conduct a de novo hearing to carry out the command of this court's writ, the commission undisputedly has subject-matter jurisdiction to conduct hearings in order to adjudicate VSSR applications. Under R.C. 4121.35(B)(3), commission SHOs have original jurisdiction to hear and decide VSSR applications.

{¶ 42} Where the tribunal has at least the basic statutory jurisdiction to act, a writ of prohibition is inappropriate. This principle was followed in *Eaton*, 40 Ohio St.3d 404.

{¶ 43} Under challenge in *Eaton*, was the commission's long-standing policy of continuing temporary total disability compensation, despite evidence of permanency, where the claimant had applied for permanent total disability compensation and appeared to meet the permanent total disability criteria. Finding the policy to be both substantively and procedurally invalid, the court, nevertheless, refused to issue a writ of prohibition because, under R.C. 4123.56 and 4123.58, the commission clearly had subject-matter jurisdiction over total disability determinations. However, the *Eaton* court did issue a writ of mandamus aimed at correcting the commission's invalid policy.

{¶ 44} *Eaton* compels a similar result here with respect to relator's request for a writ of prohibition. Because the commission has the basic statutory jurisdiction to hold a hearing to carry out this court's writ of mandamus, prohibition is inappropriate.

{¶ 45} Accordingly, it is the magistrate's decision that this court deny relator's request for a writ of prohibition.

/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).