[Cite as *State ex rel. Stevens v. Indus. Comm.*, 2012-Ohio-4408.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Sophia Stevens,	:	
Relator,	:	
v.	:	No. 10AP-1147
Industrial Commission of Ohio et al.,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on September 27, 2012

Portman, Foley & Flint, LLP, and *Frederic A. Portman*, for relator.

Michael DeWine, Attorney General, and *John R. Smart*, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTION TO THE MAGISTRATE'S DECISION

FRENCH, J.

{¶ 1} Relator, Sophia Stevens ("relator"), filed an original action seeking a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its order denying relator's application for permanent total disability ("PTD") compensation and to enter an order granting her application.

{¶ 2} Relator was injured in a work-related accident on May 20, 1979, and a claim was allowed for certain physical conditions. On October 8, 2009, relator filed an application for PTD compensation. The application was heard before a staff hearing officer ("SHO"), who granted the claim. Upon request from the Administrator of the Bureau of Workers' Compensation ("administrator") for reconsideration, the commission

vacated the SHO's order. After reviewing the evidence and arguments, the commission denied relator's application for PTD compensation.

{¶ 3} Relator filed a complaint in mandamus in this court, and the matter was referred to a magistrate pursuant to Civ.R. 53(C) and Loc.R. 13(M) of the Tenth District Court of Appeals. The magistrate issued a decision, which includes findings of fact and conclusions of law and is appended to this decision, recommending that this court grant the requested writ.

{¶ 4} The commission submitted the following objection to the magistrate's decision:

> Objection to Conclusion of Law #1: The magistrate erred by interpreting Ohio Adm.Code 4121-3-34(D)(1)(d), to require the commission to address the issue of voluntary removal from the workforce only if raised by the employer or the Bureau of Workers' Compensation; and not requiring the issue to be addressed if raised at hearing by any party.

{¶ 5} The commission has not objected to the magistrate's findings of fact, and we adopt them as our own. As detailed in the magistrate's decision, following an unrecorded hearing, the SHO granted relator's PTD application. The administrator moved the full commission to reconsider the order because the SHO had failed to consider the issue of voluntary abandonment. The full commission then scheduled a hearing "to determine whether the alleged mistake of law as noted herein is sufficient for the Industrial Commission to invoke its continuing jurisdiction." Following that hearing, the commission issued an order that stated the following: "Specifically, the Staff Hearing Officer's order failed to address the issue of whether the Injured Worker voluntarily abandoned the job market, *which was raised by the Administrator at hearing*. The issue of abandonment is an affirmative defense that should have been addressed. Therefore, the Commission exercises continuing jurisdiction * * * in order to correct this error." (Emphasis added.) The commission thereafter considered the question of voluntary abandonment and determined that relator had not abandoned her employment. Nevertheless, the commission went on to determine that relator was not entitled to PTD.

{¶ 6} Relator's complaint for mandamus alleged that "there is no evidence in the record that shows that the issue of abandonment was raised by the Bureau of Workers' Compensation in the hearing before the Staff Hearing Officer and therefore the Industrial

Commission's invocation of continuing jurisdiction was illegal and a gross abuse of discretion." In its answer, the commission denied the allegation.

{¶ 7} To be entitled to the requested extraordinary relief in mandamus, relator had to establish a clear legal right to the requested relief, a corresponding clear legal duty on the part of the commission, and the lack of an adequate remedy in the ordinary course of the law. *State ex rel. Waters v. Spaeth*, 131 Ohio St.3d 55, 2012-Ohio-69, ¶ 6. The burden on relator is a heavy one. As the Supreme Court of Ohio recently explained, the standard of proof in mandamus cases is proof by clear and convincing evidence. *State ex rel. Doner v. Zody*, 130 Ohio St.3d 446, 2011-Ohio-6117, ¶ 55. In such a case, a relator must submit facts and produce proof that is plain, clear, and convincing before we may grant a writ. *State ex rel. Pressley v. Indus. Comm.*, 11 Ohio St.2d 141, 161 (1967). The elements required for mandamus relief reflect this heightened standard in two ways—by requiring "a 'clear' legal right to the requested extraordinary relief and a corresponding 'clear' legal duty on the part of the respondents to provide it." *Doner* at ¶ 56.

{¶ 8} Relator has not met the heightened burden required for mandamus relief. She presented no evidence, let alone clear and convincing evidence, to prove a clear legal right or duty arising from the commission's alleged failure to raise the issue of voluntary abandonment before the SHO. Instead, relator relied on the absence of evidence in the stipulated record before us to argue there was no evidence to support the commission's factual finding that the issue was raised, thus shifting the burden to the respondents to prove that the issue was raised and, therefore, that relator has no right to the relief.

{¶ 9} This court addressed a similar issue in *State ex rel. Ormet Corp. v. Indus. Comm.*, 10th Dist. No. 87AP-1187 (Sept. 26, 1989), in which the relator alleged that its due process rights were violated when the commission denied it an opportunity to rebut a medical report. The relator did not file a transcript of the hearing at which the alleged error occurred. In denying a writ of mandamus, this court stated:

> Relator is correct that the Industrial Commission claim file does not indicate exactly what transpired at the August 25, 1987 hearing. But in so contending, relator forgets who has the burden of proof in an original action in mandamus to show both that the Industrial Commission abused its discretion and that there is a clear legal right to the requested relief. That burden is upon relator. If there be a

> deficiency in the evidence, it is because the relator failed in its burden of proof and its burden of presenting evidence.

{¶ 10} This court went on to state that, "relator could have requested an admission as to what transpired in this regard, filed an affidavit with respect to what transpired, or taken a deposition of someone who was present as to what transpired at the hearing." The relator's failure to take these actions, however, left a record that was silent on the critical question of what transpired at the hearing. "When confronted with a silent record," this court said, "a reviewing court will ordinarily presume that the proceedings were conducted in a proper manner rather than in an improper manner. Thus, we will not presume that the Industrial Commission affirmatively denied relator an opportunity to present further evidence * * *."

{¶ 11} Similarly here, while our record reflects a finding by the commission, after a hearing, that the issue of voluntary abandonment was raised before the SHO, our record does not indicate exactly what transpired before the SHO or the full commission because we have no transcript of either hearing. Nor does our record reflect any steps taken by relator to complete the record in any other ways. A silent record does not change the applicable burdens under the facts of this case, however. The relator, not the respondent, bears the burden to prove entitlement to mandamus relief, and a relator may not avoid that burden simply by noting the absence of a transcript. Just as this court concluded in *Ormet*, we conclude here that, if there is a deficiency in the record, it is because relator failed in her burden of proof. Having failed to meet her burden, she is not entitled to relief in mandamus on the question of continuing jurisdiction, and we sustain the commission's objection to the magistrate's decision.

{¶ 12} In conclusion, we adopt the magistrate's findings of fact as our own, but we decline to adopt the magistrate's conclusions of law. We deny relator's request for a writ of mandamus on the question of continuing jurisdiction. We return the matter to the magistrate to determine whether relator has met her burden to prove that the commission abused its discretion by denying PTD.

Objection sustained;
cause remanded.

SADLER and DORRIAN, JJ., concur.

DORRIAN, J., concurring

{¶ 13} I agree with the majority that, under the circumstances presented here, relator has failed to meet the burden of proof to establish that she is entitled to mandamus relief. However, I write this concurrence to express concern with the apparent lack of evidence supporting the commission's exercise of continuing jurisdiction over relator's claim.

{¶ 14} The commission granted the administrator's request for reconsideration of the SHO's order based on its conclusion that the SHO committed a clear mistake of law by failing to address in the order the issue of whether relator voluntarily abandoned the workforce. The commission then concluded that relator had not voluntarily abandoned her employment, and, relying on different medical reports than those the SHO relied on, concluded that relator was not entitled to PTD compensation. In his decision, the magistrate concluded that the commission had no basis for exercising continuing jurisdiction over the SHO's order because there was no evidence upon which the commission could conclude that the SHO committed a clear mistake of law by failing to address the issue of voluntary abandonment. After reviewing the record before this court, I conclude that it contains no cognizable evidence to support the commission's conclusion that the SHO committed a clear mistake of law in his decision.

{¶ 15} "The commission's power to reconsider a previous decision derives from its general grant of continuing jurisdiction under R.C. 4123.52." *State ex rel. Gobich v. Indus. Comm.*, 103 Ohio St.3d 585, 2004-Ohio-5990, ¶ 14. However, "[c]ontinuing 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, or (5) error by an inferior tribunal." *Id.* The commission's exercise of continuing jurisdiction is subject to abuse-of-discretion review. *See State ex rel. Akron Paint & Varnish, Inc. v. Gullotta*, 131 Ohio St.3d 231, 2012-Ohio-542, ¶ 18 (holding that the commission abused its discretion by exercising continuing jurisdiction and ordering temporary total disability compensation where the claimant presented no evidence of a loss of wages); *State ex rel. Crisp v. Indus. Comm.*, 10th Dist. No. 10AP-438, 2012-Ohio-2077, ¶ 21 (holding that the commission abused its discretion by exercising continuing jurisdiction). An abuse of discretion occurs when a decision is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶ 16} Voluntary abandonment is an affirmative defense, and burden of proof falls on the employer or the administrator. *State ex rel. Black v. Indus. Comm.*, 10th Dist. No. 10AP-1168, 2012-Ohio-2589, ¶ 18; *State ex rel. S. Rosenthal Co., Inc. v. Indus. Comm.*, 10th Dist. No. 03AP-113, 2004-Ohio-549, ¶ 7. We have previously held that, where the parties discuss and present evidence regarding voluntary abandonment to an SHO, the SHO commits an error of law by failing to decide the issue. *State ex rel. Mackey v. Dept. of Edn.*, 10th Dist. No. 09AP-966, 2010-Ohio-3522, ¶ 8.

{¶ 17} It appears likely that, with respect to the proceedings before the SHO, the commission considered the same record that has been presented to this court. That record contains no cognizable evidence that the issue of voluntary abandonment was raised at the hearing before the SHO. There is no transcript or other recording of the hearing; therefore, there is no direct evidence of the issues that were raised at the hearing. The commission conceded the lack of direct evidence that the issue of voluntary abandonment was raised before the SHO in its brief in support of its objection to the magistrate's decision:

> There is no evidence the [administrator] raised the issue. And there is no evidence that [relator] raised the issue. And there is no evidence that the SHO raised the issue.

(Memorandum in Support of Objections at 5.)

{¶ 18} Despite this lack of direct evidence, the commission found that the issue of voluntary abandonment had been raised and that the SHO committed a clear mistake of law by failing to address the issue. However, there is a presumption of regularity that attaches to commission proceedings, including proceedings before an SHO. *See State ex rel. Keebler Co. v. Indus. Comm.*, 10th Dist. No. 11AP-267, 2012-Ohio-2402, ¶ 12. As noted above, an SHO commits an error of law by failing to decide the issue of voluntary abandonment when the parties have discussed and presented evidence regarding that issue. *Mackey* at ¶ 8. Because there was no direct evidence of the issues raised before the SHO, the commission appears to have disregarded the presumption of regularity in concluding that the issue of voluntary abandonment was raised and that the SHO simply failed to properly perform his duties by addressing the issue in his decision.

{¶ 19} Although the commission concluded that the issue of voluntary abandonment had been raised before the SHO, it did not specify the basis for this

conclusion. In its brief before this court, the commission argues that statements contained in the administrator's request for reconsideration and relator's memorandum in opposition constitute "clear evidence" that voluntary abandonment was raised at the hearing. In the request for reconsideration, the administrator argued that relator testified about two brief periods of employment that occurred after she sustained her injuries and that she testified that she voluntarily quit both jobs. The request for reconsideration does not claim that the administrator asserted the affirmative defense of voluntary abandonment but only that relator testified that she voluntarily quit both jobs due to anxiety. The request for reconsideration suggests that there was some testimony regarding relator's subsequent work history, but it does not establish that either party raised the issue of voluntary abandonment of the workforce. Similarly, in her memorandum in opposition to reconsideration, relator argued that the SHO conducted a thorough hearing and was obviously satisfied that she had not voluntarily abandoned the workforce. However, "factual statements made in briefs that are unsupported by the record are not evidence." *Citibank (South Dakota), N.A. v. Kessler*, 10th Dist. No. 03AP-580, 2004-Ohio-1899, ¶ 13. *See also Bank One, Columbus, N.A. v. O'Brien*, 10th Dist. No. 91AP-166 (Dec. 31, 1991) ("The briefs and memoranda of the parties are not evidence."). Thus, neither the request for reconsideration nor relator's memorandum in opposition would constitute cognizable evidence to support the commission's conclusion that the issue of voluntary abandonment had been raised.

{¶ 20} Without a transcript of the hearing before the SHO or a more complete explanation of the commission's decision to exercise continuing jurisdiction, it is unclear what, if any, evidence in the record supported the commission's conclusion that voluntary abandonment had been raised at the hearing. As the Supreme Court of Ohio has observed, " 'the propriety of continuing jurisdiction cannot be evaluated if the commission does not reveal, *in a meaningful way*, why it was exercised.' " (Emphasis added.) *State ex rel. Royal v. Indus. Comm.*, 95 Ohio St.3d 97, 2002-Ohio-1935, quoting *State ex rel. Foster v. Indus. Comm.*, 85 Ohio St.3d 320, 322 (1999). In cases such as this, where the record is incomplete, the commission should ensure that it has clearly and thoroughly explained its basis for exercising continuing jurisdiction.

A P P E N D I X

IN THE COURT OF APPEALS OF OHIO

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

Rendered on January 20, 2012

Portman, Foley & Flint, LLP, and Frederic A. Portman, for relator.

Michael DeWine, Attorney General, and *John R. Smart*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶ 21} In this original action, relator, Sophia Stevens, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order denying her permanent total disability ("PTD") compensation by the exercise of R.C. 4123.52 continuing jurisdiction over the March 29, 2010 order of its staff hearing officer ("SHO") that had awarded PTD compensation, and to enter an order reinstating the SHO's order.

Findings of Fact:

{¶ 22} 1. On May 20, 1979, relator sustained an industrial injury while employed as a nursing assistant at a nursing home operated by a state-fund employer.

{¶ 23} 2. The industrial claim (No. 79-38946) is allowed for:

> Cervical and lumbar strain; phlebitis in right arm and right hand; dyspepsia and; gastritis; esohagitis and aggravation of hiatal hernia; right shoulder strain/sprain, right elbow and forearm strain/sprain, right wrist strain/sprain, closed fracture of the right middle finger; impingement syndrome right shoulder and degenerative spondylosis of the lumbar spine.

{¶ 24} 3. By letter dated October 14, 1983, a rehabilitation consultant of the commission's rehabilitation division informed relator:

> The Rehabilitation Division is closing your case. In our last report from your physician he does not give a good prognosis of your returning to work. You have completed Columbus Center and other modalities without improvement and this is confirmed on the physician's report to the division. Since a vocational goal cannot be established for you at this time in light of this information, we have decided to close your case effective October 14, 1983.

{¶ 25} 4. By letter dated October 16, 1989, another rehabilitation consultant of the commission's rehabilitation division informed relator:

> * * * [Y]our rehabilitation file was closed effective October 5, 1989 per our conversation on that date in which you stated you were only seeking pain control and felt incapable of sustained remunerative employment.
>
> As discussed, we encourage you to contact your physician and the Bureau of Workers' Compensation for approval of involvement with a pain management program.

{¶ 26} 5. On July 24, 1991, a supervisory employee of the Ohio Bureau of Workers' Compensation ("bureau") signed a document stating as justification for "closure" that relator "failed to respond to our efforts to contact her" regarding rehabilitation services.

{¶ 27} 6. On December 30, 1991, that same bureau employee signed a document listing October 9, 1991 as the "date of referral" and December 27, 1991 as the date of file closure. Under "justification for closure," the document states "claimant has failed to keep scheduled appointments."

{¶ 28} 7. On October 8, 2009, relator filed an application for PTD compensation. In support, relator submitted a report dated June 9, 2008 from treating physician Charles B. May, D.O.:

> As you know, this office continues to treat Sophia Stevens for an injury sustained at work on 05/20/1979. For the sake of saving space, I have enclosed a copy of the BWC print out of Ms. Stevens' claim allowances which I am sure you also possess. I have been the physician of record for Ms. Stevens for many years. I have treated her in this office for more than 21 years and treated her at a previous office for a prolonged period of time prior to that. Her last examination in this office was on 06/02/2008. Based upon past and current evaluations of Ms. Stevens, and based upon the allowed conditions on her claim, it is my medical opinion that Ms. Sophia Stevens is permanently and totally disabled from any form of substantial gainful employment as a direct and proximate result of the allowed conditions in this claim.

{¶ 29} 8. On September 21, 2009, Dr. May authored a similar report indicating that relator was last examined at Dr. May's office on July 8, 2009.

{¶ 30} 9. The PTD application form asks the applicant to provide information regarding work history. On the form, relator listed three jobs she has held. Relator was employed as a nurse assistant from January to May 1979 at her job of injury. Relator was employed as sales person at a card shop from February 1981 to April 1981. She was employed as an associate at a department store from November 1994 to December 1994.

{¶ 31} 10. On December 21, 2009, at the commission's request, relator was examined by Ronald J. Bloomfield, M.D., for some of the allowed conditions of her claim. In his three-page narrative report, Dr. Bloomfield wrote:

> Allowed Condition: I was asked to evaluate Mrs. Stevens for phlebitis in the right arm and right hand, dyspepsia, gastritis, esophagitis, aggravation of hiatal hernia.
>
> * * *
>
> I have only evaluated her for the previously mentioned phlebitis and gastrointestinal conditions.
>
> Discussion: After examining Sophia L. Stevens, it is my medical opinion she has reached maximum medical improvement with regard to all of the specified allowed conditions for which I am evaluating her. Based on the *AMA Guides, 5th Edition*, table 6-3, page 121, I find a 12% impairment for all of her currently allowed gastrointestinal conditions. Regarding the phlebitis of the right upper extremity there is a 0% impairment.
>
> In regards to the sum total of all of her allowed gastrointestinal conditions, she has a 12% impairment. She has gained weight with gastrointestinal disease, which is not consistent with organic disease. She has no nutritional deficiency, no signs on physical examination and discontinued NSAID medications involved with causing most of her upper gastrointestinal symptoms.
>
> There are absolutely no restrictions on her in the workplace regarding the conditions for which I have evaluated her.
>
> In conclusion, it is my medical opinion she has reached maximum medical improvement in regards to all of the allowed conditions for which I have evaluated her. There is a 12% impairment as a sum total of all of these conditions and none of these conditions would interfere with her in any way, shape or form to perform work.

{¶ 32} 11. On December 29, 2009, at the commission's request, relator was examined by James B. Hoover, M.D., for other allowed conditions in her claim. In his four-page narrative report, Dr. Hoover wrote:

ASSESSMENTS:

79-38946 05/20/1979 CERVICAL AND LUMBAR STRAIN; RIGHT SHOULDER STRAIN/SPRAIN, RIGHT ELBOW AND FOREARM STRAIN/SPRAIN, RIGHT WRIST STRAIN/SPRAIN, CLOSED FRACTURE OF THE RIGHT MIDDLE FINGER; IMPINGEMENT SYNDROME RIGHT SHOULDER AND DEGENERATIVE SPONDYLOSIS OF THE LUMBAR SPINE.

* * *

OPINION:

[One] Has the Injured Worker reached maximum medical improvement with regard to each specified condition?

She has reached [maximum medical improvement] for all the allowed conditions in the claim.

[Two] Based on the AMA Guides, 5th Edition, please provide the estimated percentage of whole person impairment arising from each of the allowed conditions. Please indicate if there is no impairment for a given allowance:

Cervical strain: Per Table 15-5, DRE Category I or 5% whole person impairment.

Phlebitis right arm and hand: Per Table 16-7, she would be a Class I or 0% impairment for this.

Right shoulder strain/sprain and impingement syndrome right shoulder: All though [sic] there is some reduction of motion, this is not due to the impingement syndrome, but rather the glenohumaral arthritis it is also symmetric to the uninvolved side, in my opinion would not be due to the allowed conditions in the claim. Thus, Section 16-4 would not apply. Note there is applicable impairment in Section 16-7. Thus, for this it is 0%.

Right elbow and forearm strain: Per Section 16-4, there is no loss of motion by impairment rating.

Right wrist strain/sprain: Per Section 16-4, there is no loss of motion by impairment rating.

> Closed fracture right middle finger: Per Section 16-4, there is no loss of motion by impairment rating.
>
> Lumber strain and degenerative spondylosis of the lumbar spine: Per Table 15-3, DRE Category II or 5% whole person impairment, she would get 5 more percent for pain, for 8% whole person impairment.
>
> Using the AMA Guidelines, 5th Edition, these combine to a 13% whole person impairment. That is the final impairment rating.

{¶ 33} 12. On a physical strength rating form dated December 29, 2009, Dr. Hoover indicated by his mark that relator is capable of "sedentary work."

{¶ 34} 13. On March 29, 2010, the PTD application was heard by an SHO. The hearing was not recorded. Following the hearing, the SHO mailed an order on March 31, 2010 awarding PTD compensation starting June 9, 2008. The order indicates that relator appeared at the hearing with counsel. The order also indicates that a "Ms. Meyer" appeared for the administrator.

{¶ 35} 14. The SHO's order of March 29, 2010 explains the PTD award:

> Permanent and total disability compensation is awarded form [sic] 06/09/2008 for the reason that on that date Dr. Charles May rendered his opinion that the Injured Worker was permanently unable to perform any form of substantial gainful employed as a direct result of the allowed conditions in this claim.
>
> * * *
>
> Based upon the reports of Dr. Charles May (06/09/2008 and 09/21/2009), it is found that the Injured Worker is unable to perform any sustained remunerative employment solely as a result of the medical impairment caused by the allowed condition(s). Therefore, pursuant to State ex rel. Speelman v. Indus. Comm. (1992), 73 Ohio App.3d 757, it is not necessary to discuss or analyze the Injured Worker's non-medical disability factors.

> The Staff Hearing Officer finds that the Injured Worker has reached maximum medical improvement for all of the allowed conditions based upon the reports of Dr. Hoover (12/29/2009, 01/12/2010, and 01/28/2010) and Dr. Bloomfield (12/21/2009).

{¶ 36} 15. On April 13, 2010, the bureau moved for reconsideration of the SHO's order of March 29, 2010. A brief in support of reconsideration was submitted by Leslie Meyer, the bureau's "assistant legal counsel." In the brief, Ms. Meyer asserts:

> It is the Administrator's position that the SHO erred in grant[ing] Ms. Stevens['] application, as proper attention was not given to OAC 4121-3-34(D)(1)(d), which provides:
>
> If, after hearing, the adjudicator finds that the injured worker voluntarily removed himself from the work force, the injured worker shall be found not to be permanently and totally disabled. If evidence of voluntary removal or retirement is brought into issue, the adjudicator shall consider evidence that is submitted of the injured worker's medical condition at or near the time of removal/retirement.
>
> The IC2 application spells out Ms. Stevens efforts to return to work. After her injury in May, 1979, she made two attempts to work again. For two months in early 1981 Ms. Stevens worked at a card shop. For one month in late 1994, she worked at a department store. Ms. Stevens testified that she developed anxiety working with the cash registers at each location and therefore voluntarily quit employment. It should be noted that this claim has no psychological allowances, especially an allowance for anxiety. Ms. Stevens did not testify that her allowed conditions prohibited her return to work efforts and there is no evidence in the claim which would indicate such a prohibition.
>
> Ms. Stevens was approved for vocational rehabilitation on multiple occasions, the latest being 1991. Ms. Stevens was medically capable of participating in rehabilitation efforts in order to return to work, as she was released by her [physician of record] to do so. However, she never completed vocational rehabilitation, and her efforts to return to work over a 30 year span, totaled 3 months of work.
>
> The evidence is clear that Ms. Stevens voluntarily abandoned the work force, and for that reason she is not an appropriate

> candidate for PTD benefits. The Administrator requests reconsideration of the SHO order granting said benefits. With proper application of the OAC, the IC2 application should be denied.

{¶ 37} 16. On or about April 16, 2010, relator's counsel, who had been present at the March 29, 2010 hearing, responded to the bureau's motion for reconsideration by authoring a written memorandum contra:

> The Administrator, argues that OAC 4121-3-34(D)(1)(d) for the proposition that when a claimant voluntarily removes himself from the workforce or retires PTD cannot be awarded.
>
> First, claimant did not voluntarily remove herself from the workplace. Her injuries prevented her return to the type of work she was performing at the time of the accident, i.e. physically assisting patients residing in a nursing home.
>
> In addition, claimant did attempt to work in a department store. However, cash registers made her anxious. She never testified that she suffered from "anxiety" or "depression". She was afraid of cash registers and concerned that she would not operate them correctly. Thus the Administrator's argument that a clinical case of "anxiety" and/or "depression", non-allowed conditions, prohibited her return to the workforce is without merit and has no basis in fact. This argument invites the use of the term "red herring". Even more objectionable is that counsel for the Administrator was at the hearing and never raised any issue regarding non-allowed psychological conditions.
>
> The Staff Hearing Officer thoroughly questioned claimant on these matters. He conducted an exhaustive hearing that took almost an hour. Obviously he was satisfied that claimant did not voluntarily leave the workforce or suffered [sic] from non-allowed psychological conditions that prevented working.
>
> Testimony and evidence at hearing shows that claimant's attending physician first recommended vocational rehabilitation but changed his mind and requested a program of "pain management" in which claimant participated.
>
> Claimant's limited education (10th grade) and injuries prevented her return to the workplace.

> Counsel for the Administrator had the opportunity but failed to question claimant at the hearing.

{¶ 38} 17. On May 21, 2010, the three-member commission, on a two-to-one vote, mailed an interlocutory order stating:

> It is the finding of the Industrial Commission that the BWC has presented evidence of sufficient probative value to warrant adjudication of the request for reconsideration regarding the alleged presence of a clear mistake of law of such character that remedial action would clearly follow.
>
> Specifically, it is alleged that the Staff Hearing Officer did not address the Administrator's assertion that the Injured Worker voluntarily abandoned all employment.
>
> Based on these findings, the Industrial Commission directs that the BWC's request for reconsideration, filed 04/13/2010, is to be set for hearing to determine whether the alleged mistake of law as noted herein is sufficient for the Industrial Commission to invoke its continuing jurisdiction.
>
> In the interest 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 Adm.Code 4121-3-09.

{¶ 39} 18. On the date of the mailing of the interlocutory order, the three-member commission was composed of chairperson Gary M. DiCegelio, commissioner Jodie M. Taylor, and commissioner Kevin R. Abrams. Commissioner Taylor voted "no" as to the interlocutory order.

{¶ 40} Following a July 15, 2010 hearing, the commission mailed an order on October 14, 2010 that vacates the SHO's order of March 29, 2010. The July 15, 2010 commission order determines that the SHO's order contains a clear mistake of law because the SHO failed to address the issue of a voluntary abandonment of the job market. The commission's order goes on to find, however, that relator did not voluntarily abandon her employment. It then determines that relator is able to perform sustained remunerative employment.

{¶ 41} 19. The July 15, 2010 commission order explains:

> * * * [I]t is the finding of the Industrial Commission that the Administrator has met her burden of proving that the Staff Hearing Officer order, issued 03/31/2010, contains a clear mistake of law of such character that remedial action would clearly follow. Specifically, the Staff Hearing Officer's order failed to address the issue of whether the Injured Worker voluntarily abandoned the job market, which was raised by the Administrator at hearing. The issue of abandonment is an affirmative defense that should have been addressed. 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., 103 Ohio St.3d 585, 2004-Ohio-5990, in order to correct this error.
>
> The Administrator's request for reconsideration, filed 04/13/2010, is granted. It is further ordered that the Staff Hearing Officer order, issued 03/31/2010, is vacated.
>
> After reviewing all of the evidence, considering the testimony of the Injurer Worker and arguments presented at the hearing, it is the order of the Commission that the Injured Worker's Application for Permanent Total Disability, filed 10/28/2009, is denied.
>
> It is the finding of the Commission that the Injured Worker retains the residual physical and intellectual capacities to engage in sustained remunerative employment. In finding that the Injured Worker is not permanently and totally disabled, the Commission relies upon the medical reports of

James Hoover, M.D., dated 12/29/2009 and Ronald Bloomfield, M.D., dated 12/21/2009.

On 05/20/1979, the Injured Worker sustained an injury when she slipped and fell due to liquid on the floor. The claim is allowed for cervical strain; lumbar strain; phlebitis in right arm and right hand; dyspepsia; gastritis; esophagitis; aggravation of hiatal hernia; right shoulder strain/sprain; right elbow and forearm strain/sprain; right wrist strain/sprain; closed fracture of the right middle finger; impingement syndrome right shoulder; degenerative spondylosis of the lumbar spine; low grade glenohumeral arthropathy, right shoulder. Medical treatment for the allowed conditions has been conservative, limited to pain medications and injections. The Injured Worker testified that she treats with Charles May, D.O., approximately four times a year.

The Injured Worker is a 67 year old female who dropped out of high school in the tenth grade; however, she obtained her GED through Urbana College. The Injured Worker has the ability to read, write and perform basic math. There is evidence that the Injured Worker also obtained vocational skills training to become a certified nurse's aide.

A review of the Injured Worker's employment history documents her entering the work force at age 36 for four months as a nursing assistant, re-entering the work force at age 38 for four months as a sales person, and again at age 51 for one month as a sales assistant. Thereafter, there is no evidence of any additional work experience.

At hearing, the Administrator argued the Injured Worker voluntarily abandoned her employment in 1994, after leaving her employment as a sales associate. The Injured Worker testified at hearing that she left her employment because she was not able to stand for long periods of time and that she had some anxiety using the cash register. The Commission finds Injured Worker's testimony credible. Thus, the Commission finds the Injured Worker did not voluntarily abandon her employment.

On 12/29/2009, Dr. Hoover examined the Injured Worker on behalf of the Commission to determine whether the Injured Worker retains the physical capacity to engage in sustained remunerative employment based upon her musculoskeletal conditions. As a result of his examination, Dr. Hoover found

the Injured Worker to have 13 percent whole person impairment based upon the allowed conditions. Dr. Hoover also noted in his report the non-work related conditions of uterine cancer, congestive heart failure and lung disease.

On 12/21/2009, Dr. Bloomfield examined the Injured Worker on behalf of the Industrial Commission for the allowed gastrointestinal conditions and phlebitis in right arm and hand. He noted that the Injured Worker's phlebitis had resolved twenty years ago. Dr. Bloomfield indicated that the Injured Worker was no longer taking NSAID medication, which caused most of her upper gastrointestinal symptoms. As a result of his evaluation, Dr. Bloomfield found the Injured Worker to have a 12 percent impairment, and found she was capable of returning to work with no restrictions.

Based upon the medical opinions of Dr. Hoover and Dr. Bloomfield, the Commission finds that the Injured Worker has the ability to engage in unskilled sedentary employment such as, but not limited to, jobs of telemarketer and sit down parking lot cashier, for example, those located at airports and hospitals.

The Commission notes that the Injured Worker's age is a neutral to negative factor with respect to securing employment; however, age by itself is not a reason to find someone permanently and totally disabled. The Injured Worker's education is a positive factor, because she obtained her GED and a nurse's aide certificate, which is indicative of her ability to read, write and perform basic math.

The Commission notes that the Injured Worker does not have an extensive employment history; however, the Commission finds that the Injured Worker's lack of employment experience was a lifestyle choice and not due to the industrial injury. The record reflects that the Injured Worker's total employment history amounts to less than one year of work her entire life. She would enter the workforce and work for three weeks to one month at a time and then leave the workforce. The last time the Injured Worker entered the workforce was in 1994. At age 51, the Injured Worker worked for one month as a retail sales clerk. Thereafter, the Injured Worker did not seek further employment that was within her physical restrictions.

The Commission notes that even though the Injured Worker has limited work experience, she has demonstrated the ability

> to interview, and complete job applications and was previously able to obtain employment positions when she decided to enter into the workforce.
>
> Finally, the Commission notes that there is no evidence in the file of any effort by Injured Worker at rehabilitation or any other employment enhancing activity since her last job in 1994. Pursuant to State ex rel. Cunningham v. Indus. Comm. (2001), 91 Ohio St.3d 261, State ex rel. Bowling v. National Can Corp. (1996), 77 Ohio St.3d 148, it is not unreasonable to expect an injured worker to participate in return-to-work efforts to the best of his or her abilities, or to take the initiative to improve reemployment potential. While extenuating circum-stances can excuse an injured worker's participation in re-education or retraining efforts, injured workers should no longer assume that a participatory role or lack thereof will go unscrutinized.
>
> The Commission finds that permanent total disability compensation is a "compensation of last resort," to be awarded only after failure of all reasonable efforts to return to sustained remunerative employment. State ex rel. Wilson v. Indus. Comm. (1997), 80 Ohio St.3d 250.
>
> Based upon the reasons set forth in this order, the application for permanent total disability is denied.

{¶ 42} 20. The commission's order indicates that DiCegelio voted "no" and that Taylor voted "yes."

{¶ 43} 21. Abrams, who was absent from the July 15, 2010 hearing, also voted for the order. In an addendum to the order, Abrams explains:

> On 08/10/2010, I discussed this matter with Regina Miller who was present at the 07/15/2010 hearing. Staff Hearing Officer Regina Miller summarized the testimony, evidence and arguments presented at hearing. After this discussion and a review of all of the evidence contained with the claim file, I vote to grant Administrator's reconsideration, filed 04-13-2010. I vote to vacate the Staff Hearing Officer's order, issued 03/31/2010. I vote to deny the Injured Worker's application for permanent and total disability, filed 10/08/2009.

{¶ 44} 22. On December 10, 2010, relator, Sophia Stevens, filed this mandamus action.

Conclusions of Law:

{¶ 45} The main issue is whether the commission had continuing jurisdiction over the SHO's order of March 29, 2010. Finding that the commission did not have continuing jurisdiction over the SHO's order, it is the magistrate's decision that this court issue a writ of mandamus, as more fully explained below.

{¶ 46} By statute, SHOs are granted original jurisdiction to hear and decide applications for PTD awards. R.C. 4121.34(B)(1). There is no right to administratively appeal a decision of an SHO awarding PTD compensation. R.C. 4123.511(D) and (E). See Industrial Commission Resolution No. R05-1-02 (effective September 1, 2005) and No. R95-1-03 (effective March 21, 1995).

{¶ 47} Thus, the SHO's order of March 29, 2010 was a final commission order as of the time of its issuance.

{¶ 48} The commission's power to reconsider a previous decision derives from its general grant of continuing jurisdiction under R.C. 4123.52. *State ex rel. Gobich v. Indus. Comm.*, 103 Ohio St.3d 585, 2004-Ohio-5990 ¶14. This authority is not unlimited. Its prerequisites are: (1) new and changed circumstances; (2) fraud; (3) clear mistake of fact; (4) clear mistake of law; or (5) error by an inferior tribunal. Id.

{¶ 49} Here, clear mistake of law was the prerequisite for the exercise of continuing jurisdiction that the commission articulated in its interlocutory order mailed May 21, 2010. Specifically, the clear mistake of law identified in the interlocutory order was the alleged failure of the SHO to address the issue of a voluntary abandonment of employment.

{¶ 50} Ohio Adm.Code 4121-3-34 sets forth the commission's rules for the adjudication of PTD applications.

{¶ 51} Ohio Adm.Code 4121-3-34(D) sets forth the commission's guidelines for the adjudication of PTD applications.

{¶ 52} Thereunder, Ohio Adm.Code 4121-3-34(D)(1)(d) provides:

> If, after hearing, the adjudicator finds that the injured worker voluntarily removed himself from the work force, the injured worker shall be found not to be permanently and totally disabled. If evidence of voluntary removal or retirement is brought into issue, the adjudicator shall consider evidence that is submitted of the injured worker's medical condition at or near the time of removal/retirement.

{¶ 53} Certainly, an SHO adjudicating a PTD application commits a clear mistake of law if the SHO fails to address voluntary workforce removal when such issue is raised by a party to the PTD proceeding. However, where the issue is not timely raised, there cannot be a clear mistake of law. That is the situation here. The issue of a voluntary workforce removal was not timely raised by the bureau with the SHO who heard the PTD application on March 29, 2010. At least, there is no evidence in the record before this court that the bureau raised the issue of voluntary workforce removal with the SHO.

{¶ 54} *State ex rel. Quarto Mining Co. v. Foreman*, 79 Ohio St.3d 78, 1997-Ohio-71 is controlling.

{¶ 55} In *Quarto Mining*, the employer brought a mandamus action to challenge the commission's award of PTD compensation. The commission did not address a retirement issue that was suggested on the record but was never pursued administratively by the employer. In mandamus, the employer argued that "the issue raises itself by virtue of being manifest in the record." Id. at 81. The *Quarto Mining* court rejected the employer's position and refused to address the retirement issue, explaining:

"Ordinarily, reviewing courts do not consider questions not presented to the court whose judgment is sought to be reversed." *Goldberg v. Indus. Comm.* (1936), 131 Ohio St. 399, 404, 6 O.O. 108, 110, 3 N.E.2d 364, 367. See, also, *State ex rel. Moore v. Indus. Comm.* (1943), 141 Ohio St. 241, 25 O.O. 362, 46 N.E.2d 767, paragraph three of the syllabus; *State ex rel. Gibson* (1988), 39 Ohio St.3d 319, 320, 530 N.E.2d 916, 917 (rule that issues not previously raised are waived is applicable in an appeal from a denial of a writ of mandamus). Nor do appellate courts have to consider an error which the complaining party "could have called, but did not call, to the trial court's attention at a time when such error could have been avoided or corrected by the trial court." *State v. Williams* (1977), 51 Ohio St.2d 112, 117, 5 O.O.3d 98, 101, 364 N.E.2d 1364, 1367.

These rules are deeply embedded in a just regard to the fair administration of justice. They are designed to afford the opposing party a meaningful opportunity to respond to issues or errors that may affect or vitiate his or her cause. Thus, they do not permit a party to sit idly by until he or she loses on one ground only to avail himself or herself of another on appeal. In addition, they protect the role of the courts and the dignity of the proceedings before them by imposing upon counsel the duty to exercise diligence in his or her own cause and to aid the court rather than silently mislead it into the commission of error. *Id.*, 51 Ohio St.2d at 117, 5 O.O.3d at 101, 364 N.E.2d at 1367. See, also, *State v. Driscoll* (1922), 106 Ohio St. 33, 38-39, 138 N.E. 376, 378.

The employer, however, essentially seeks a dispensation or relaxation of these rules in proceedings before the commission. However, there is nothing about the purpose of workers' compensation legislation or the character of the proceedings before the commission that would justify such action. As Professor Larson *82 explains, "evidentiary and procedural rules usually have an irreducible hard core of necessary function that cannot be dispensed with in any orderly investigation of the merits of a case." 2B Larson, Workmen's Compensation Law (1996) 15-4, Section 77A.10. Thus, "when the rule whose relaxation is in question is more than a merely formal requirement and touches substantial rights of fair play, the relaxation is no more justified on a compensation appeal than on any other. *Such a rule is that forbidding the raising on appeal of an issue that has not been raised below* * * *." (Emphasis added.) *Id.* at 15-101, 15-103, Section 77A.83. (The term "below" is used broadly by

Professor Larson to include issues not raised at the administrative level. *Id.* at 15-103 to 15-116, fn. 46, Section 77A.83.)

In a well-reasoned decision, the California appellate court in *Bohn v. Watson* (1954), 130 Cal.App.2d 24, 37, 278 P.2d 454, 462, applied these rules to proceedings before the Real Estate Commissioner of Los Angeles County. The court refused to consider an issue not raised administratively, despite the fact that the lower court, upon an action for a writ of mandate, considered the issue. The court held that the issue was not properly injected into the claim by virtue of the lower court's consideration. In so holding, the court aptly explained:

"It was never contemplated that a party to an administrative hearing should withhold any defense then available to him or make only a perfunctory or 'skeleton' showing in the hearing and thereafter obtain an unlimited trial *de novo,* on expanded issues, in the reviewing court. * * * The rule compelling a party to present all legitimate issues before the administrative tribunal is required in order to preserve the integrity of the proceedings before that body and to endow them with a dignity beyond that of a mere shadow-play. Had [appellant] desired to avail herself of the asserted bar of limitations, she should have done so in the administrative forum, where the commissioner could have prepared his case, alert to the need of resisting this defense, and the hearing officer might have made appropriate findings thereon." (Citations omitted.) See, also, *Foster v. Bozeman City Comm.* (1980), 189 Mont. 64, 68, 614 P.2d 1082, 1074 ("The facts do not permit us to extricate [relator] from the situation he helped to create."); *Shakin v. Bd. of Med. Examiners* (1967), 254 Cal.App.2d 102, 111, 62 Cal.Rptr. 274, 282; *Harris v. Alcoholic Beverage Control Appeals Bd.* (1961), 197 Cal.App.2d 182, 187, 17 Cal.Rptr. 167, 170-171.

To do as the employer suggests would not only deny the claimant a meaningful opportunity to respond, but would also conflict with the court's directive that "[the commission] is not to be regarded as an adversary of the claimant as in other litigation." *Miles v. Elec. Auto-Lite Co.* (1938), 133 Ohio St. 613, 616, 11 O.O. 339, 341, 15 N.E.2d 532, 534. It would also open the door to forcing an already overworked commission to comb the files of every PTD case in search of *83 issues that could potentially be raised by both sides at the hearing table. In addition, it would waste judicial and administrative resources by permitting a party to secure another bite at the

> PTD apple based upon the commission's failure to consider an issue or correct an error upon which the party remained silent.

Id. at 81-83.

{¶ 56} Here, in the absence of a transcript, the only "evidence" of what transpired at the March 29, 2010 hearing may be gleaned from the bureau's brief in support of its motion for reconsideration and the claimant's memorandum contra. As earlier noted, the author of the bureau's brief, Ms. Meyer, and the author of the relator's memorandum contra, were present at the hearing.

{¶ 57} Significantly, in her brief, Ms. Meyer does not actually assert that she raised at the hearing the issue of a voluntary workforce removal. Rather, she asserts that "the evidence is clear that Ms. Stevens voluntarily abandoned the workforce."

{¶ 58} The memorandum contra authored and signed by relator's counsel is also helpful to understanding what occurred at the hearing. Significantly, relator's counsel asserts in the memorandum contra:

> The Staff Hearing Officer thoroughly questioned claimant on these matters. He conducted an exhaustive hearing that took almost an hour. Obviously he was satisfied that claimant did not voluntarily leave the workforce or suffered [sic] from non-allowed psychological conditions that prevent working.
>
> * * *
>
> Counsel for the Administrator had the opportunity but failed to question claimant at the hearing.

{¶ 59} At best, the bureau's brief and relator's memorandum contra indicate that the SHO himself may have questioned relator on matters that may have related to a possible voluntary workforce abandonment. Apparently, the bureau's counsel did not question relator at the hearing.

{¶ 60} Even if it can be said that the SHO sua sponte questioned relator on matters that were probative of a voluntary workforce removal, the SHO was under no duty to address voluntary workforce removal in the absence of that issue being raised by the bureau as an affirmative defense to the PTD application. *Quarto Mining*, supra.

{¶ 61} Based upon the foregoing analysis, there is no evidence upon which the commission could conclude that the SHO's order contained a clear mistake of law for allegedly failing to address an issue of voluntary workforce abandonment. Thus, the commission had no basis upon which to exercise continuing jurisdiction over the SHO's order of March 29, 2010.

{¶ 62} Accordingly, it is the magistrate's decision that this court issue a writ of mandamus ordering the commission to vacate its July 15, 2010 order that denies relator's application for PTD compensation, and to enter an order that reinstates the SHO's order of March 29, 2010.

/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).