[Cite as *State ex rel. Gilbraith v. Indus. Comm.*, 2012-Ohio-4497.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

[State of Ohio ex rel.] Terry L. Gilbraith,	:	
Relator,	:	
v.	:	No. 11AP-662
Industrial Commission of Ohio and AutoZone, Inc.,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on September 28, 2012

Agee, Clymer, Mitchell & Laret, and *C. Russell Canestraro*, for relator.

Michael DeWine, Attorney General, and *Elise Porter*, for respondent Industrial Commission of Ohio.

Crabbe, Brown & James, LLP, and *John C. Albert*, for respondent AutoZone, Inc.

IN MANDAMUS
ON OBJECTIONS TO MAGISTRATE'S DECISION

BROWN, P.J.

{¶ 1} Relator, Terry L. Gilbraith, has filed an original action requesting that this court issue a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to "definitively and clearly state that its previous orders, finding that Relator's May 10, 2008 intervening injury which broke the chain of causation to his

original injury, has foreclosed Relator from receiving any future benefits, and that his right to participate in State of Ohio Workers' Compensation Fund has been terminated."

{¶ 2} This matter was referred to a magistrate of this court pursuant to Civ.R. 53(C) and Loc.R. 13(M) of the Tenth District Court of Appeals. The magistrate issued the appended decision, including findings of fact and conclusions of law, recommending that this court deny relator's request for a writ of mandamus.

{¶ 3} In the decision, the magistrate determined that the commission's orders specifically made clear that, while relator's intervening injury precluded benefits for the period from May 12, 2008 through August 20, 2008, such intervening injury did not foreclose relator from future benefits provided he establish that his disability or new medical conditions from which he was suffering are due to the work-related injury. Relator has filed objections to the magistrate's decision, arguing that the magistrate erred in (1) failing to hold that, once the causal connection to the original injury is terminated, there is no longer any proximate cause, and (2) failing to find that the commission is able to substantially change prior holdings without invoking continuing jurisdiction.

{¶ 4} Although the magistrate addressed the merits of relator's petition, we initially consider employer, AutoZone, Inc.'s argument that relator has an adequate remedy at law. Specifically, AutoZone argues that the stipulated record indicates that relator currently has an appeal, pursuant to R.C. 4123.512, pending in the Court of Common Pleas of Jackson County, Ohio, in which relator seeks a jury trial on the issue of whether he should be entitled to receive benefits under the Workers' Compensation Fund. AutoZone argues that, if relator is successful in the trial court action, he clearly has an adequate remedy at law and, therefore, the current mandamus action is inappropriate.

{¶ 5} Under Ohio law, in order to be entitled to a writ of mandamus, "a relator must carry the burden of establishing that he or she has a clear legal right to the relief sought, that the respondent has a clear legal duty to perform the requested act, and that the relator has no plain and adequate remedy in the ordinary course of law." *State ex rel. Van Gundy v. Indus. Comm.*, 111 Ohio St.3d 395, 2006-Ohio-5854, ¶ 13.

{¶ 6} As noted under the magistrate's findings of fact, relator sustained a work-related injury in 2003 while working for AutoZone. Relator returned to work and sustained a non-work-related injury while working in his yard. Relator filed a request for

temporary total disability compensation for the period from May 12 through August 20, 2008, but the commission denied his request.

{¶ 7} Relator then filed an appeal with the Court of Common Pleas for Jackson County. Relator voluntarily dismissed the common pleas action, but refiled the complaint on December 29, 2009. AutoZone filed a motion to dismiss, arguing that the issues raised by relator did not involve a right to participate issue, but rather an extent of disability issue. By decision and order filed April 5, 2010, the trial court denied AutoZone's motion to dismiss and remanded the matter to the commission for clarification "of the issue of the effect of Plaintiff's 2008 injury on his right to participate in the Workers' Compensation Fund for this previous injury."

{¶ 8} The Ohio Bureau of Workers' Compensation referred the matter to the commission for clarification, and a hearing was conducted before a district hearing officer ("DHO") on September 23, 2010. The DHO issued an order denying disability for the period of May 12 through August 20, 2008, but noted that "this finding does not bar the Injured Worker from requesting temporary total [disability] compensation from 08/21/2008 fo[r]ward." By order dated October 26, 2010, the SHO affirmed the DHO's order, stating in part: "[F]or future issues a determination must be made as to whether medical treatment or disability is due to the allowed conditions in the 02/12/2003 industrial injury or the intervening injury that occurred on 05/10/2008. This determination may be made on any issue in the future regarding disability or medical treatment and other issues in the claim." By findings mailed April 1, 2011, the commission refused to exercise its continuing jurisdiction and refused relator's request for reconsideration.

{¶ 9} On April 22, 2011, relator filed a notice of appeal, pursuant to R.C. 4123.512, as well as a complaint with jury demand, in the Jackson County Court of Common Pleas. In his complaint, relator alleged that the commission "has made a specific finding of there being an intervening injury that breaks the causal connection in this claim. Therefore this matter is no longer a mere extent of disability issue, but rather a right to participate." Relator therefore requested that he be "allowed to continue to participate in the Workers' Compensation Fund." AutoZone filed a motion to dismiss, pursuant to Civ.R. 12(B)(1), for

lack of jurisdiction. On August 8, 2011, relator filed a motion in opposition to AutoZone's motion to dismiss.

{¶ 10} On August 5, 2011, relator filed his mandamus action with this court. In his complaint in mandamus, relator alleges, as he did in his complaint with the Jackson County Court of Common Pleas, that the commission "has made a specific finding of there being an intervening injury that breaks the causal connection in this claim. Therefore this matter is no longer a mere extent of disability issue, but rather an issue of the right to participate." As noted above, relator's complaint in mandamus requests this court to issue a writ ordering the commission to state that its previous orders have foreclosed relator from receiving any future benefits and that his right to participate in the Workers' Compensation Fund has been terminated.

{¶ 11} A review of the stipulated record thus indicates that relator has appealed to the Jackson County Court of Common Pleas the same order that is the subject of this mandamus action, and relator seeks essentially the same relief in this court as he seeks in the Jackson County case. We agree with AutoZone that, if relator is successful through his complaint in the Jackson County Court of Common Pleas, in which he has invoked the jurisdiction of that court to determine whether he has a right to participate in the Workers' Compensation Fund, he has an adequate remedy at law. We would also note that if relator is not satisfied with the results obtained in the Jackson County Court of Common Pleas, he can pursue further remedy by way of appeal.

{¶ 12} Based upon the foregoing, we adopt the findings of fact issued by the magistrate, but we modify the conclusions of law in accordance with our determination that relator's request for a writ of mandamus should be denied because he has an adequate remedy at law. Accordingly, relator's objections are rendered moot, and the requested writ of mandamus is denied.

Objections moot;
writ of mandamus denied.

KLATT and FRENCH, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

[State of Ohio ex rel.] Terry L. Gilbraith,	:	
Relator,	:	
v.	:	No. 11AP-662
Industrial Commission of Ohio and AutoZone, Inc.	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on March 29, 2012

Agee, Clymer, Mitchell & Laret, and *C. Russell Canestraro*, for relator.

Michael DeWine, Attorney General, and *Elise Porter*, for respondent Industrial Commission of Ohio.

Crabbe, Brown & James, LLP, and *John C. Albert*, for respondent AutoZone, Inc.

IN MANDAMUS

{¶ 13} Relator, Terry L. Gilbraith, has filed this original action requesting that this court issue a writ of mandamus "compelling Respondent, Industrial Commission of Ohio, to definitively and clearly state that its previous orders, finding that Relator's May 10, 2008 intervening injury which broke the chain of causation to his original injury, has foreclosed Relator from receiving any future benefits, and that his right to participate in the State of Ohio Workers' Compensation Fund has been terminated."

Findings of Fact:

{¶ 14} 1. Relator sustained a work-related injury on February 12, 2003, and his workers' compensation claim has been allowed for the following conditions:

> LUMBAR SPRAIN; AGGRAVATION OF PRE-EXITING HERNIATED NUCLEUS PULPOSUS L4-L5.

{¶ 15} 2. Relator began receiving chiropractor care from Dr. Stephen Craig Kincaid, D.C. Relator continued to receive chiropractic care over the years. Relator has received conservative care including a series of epidural injections.

{¶ 16} 3. In a report dated July 10, 2008, Seth H. Vogelstein, D.O. examined relator and provided the following description of relator's treatment after his work-related injury:

> The medical file indicates that Mr. Gilbraith has a long history of chronic low back pain dating back into the 1990s. Dr. Otis' note of 05/28/03 indicates that he had been receiving chiropractic treatments for about the last 10 years. He was involved in an industrial injury on 02/11/03 at which point he continued to follow with his chiropractor, Dr. Kincaid, who has provided the majority of his care for this 2003 injury. For this couple of years following the injury he was also seen by doctors Otis and Mavian where he did receive some epidurals. He has not had any surgery in regard to this injury. He did have MRIs performed in 2003 and 2004 and they did demonstrate evidence of disc herniations at L5-S1. He claims that he never had an MRI prior to this injury.
>
> After the injury in 2003 he states that he did miss about seven months of work and he eventually did return to his normal duties. He has continued to perform his normal work activities over the years without any restrictions or limitations.

{¶ 17} 4. It is undisputed that relator sustained a non-work-related injury to his back on May 10, 2008, five years after the work-related injury. Dr. Vogelstein related the following description of relator's condition and treatment following this non-work-related injury:

> The injured worker relates that on Sunday, 05/10/08 he was working in the backyard with his wife. He states that he was beginning to do some shoveling and, as he pushed down on

> the top of the shovel with his right foot, he felt a stabbing pain in his lower back. He states that he was seen at a local ER the following day, where he was treated with IM pain medication. He states that he was diagnosed with a low back sprain. He was started on pain medication and a muscle relaxant. He states that by the following day he had difficulty walking and did seek out additional care with his chiropractor, but also states that he was not having any pain in his legs. Since that time he has continued to see Dr. Kincaid about two or three times per week and Dr. Kincaid did take him off work immediately after this incident occurred. He states that he has remained off work since that time. He describes the treatment has consisted of the use of a roller bed, electrical stimulation and chiropractic manipulation. He believes that Dr. Kincaid now wants to place him into physical therapy.
>
> Again, he does remain off work at this point. Mr. Gilbraith states that he does continue to have pain throughout his lower back with radiation of this pain into both of his buttocks. He describes this as a stabbing and throbbing sensation. He describes that the pain varies in degree, depending on the level of his activity. He states on average it is at 5-6/10 and at worst at 8-9/10. He states that he cannot sit or stand for long and he has been doing a lot of walking. Again, he indicates that he has been off work since the 05/10/08 injury.

{¶ 18} 5. On May 19, 2008, Dr. Kincaid certified that relator was temporarily totally disabled beginning May 12, 2008, two days after the non-work-related injury. Dr. Kincaid listed the following conditions as the conditions which were preventing him from returning to work at that time:

> Lumbar sprain and aggravation of pre-existing herniated disc L5-S1

{¶ 19} 6. As indicated previously, relator was examined Dr. Vogelstein who was asked to answer four questions. Those questions as well as Dr. Vogelstein's responses thereto provide as follows:

> [One] Are the current objective findings a direct result of the industrial injury of 02/11/03?
>
> Mr. Gilbraith is apparently an individual who has been experiencing rather significant chronic low back pain since the early 1990s. He has been receiving chiropractic care since the

early 1990s and this did continue when he was injured in 2003. In my medical opinion, it would be inappropriate to relate every aspect of his current lumbar complaints solely to this 2003 injury, especially when one takes into account his long history of chronic low back pain. Additionally, it does appear that the incident on 05/10/08, does meet the criteria for an intervening injury. Mr. Gilbraith was working in a full time capacity and had been for many years. He was receiving some supportive chiropractic care. On Sunday on 05/10/08 he states that he developed such severe pain and he had difficulty standing or ambulating. He was seen at a local ER and described that he was diagnosed with a low back sprain. It does appear that he developed an intervening lumbar strain at that time as a result of his shoveling activity on 05/10/08. In my medical opinion his complaints and physical findings at that point in May of 2008 are no longer a direct result of the 02/11/03 industrial injury[.]

[Two] Has Mr. Gilbraith sustained a worsening of symptoms directly related to the allowed conditions in the claim?

No. It is my medical opinion that he did sustain a new injury on 05/10/08, based upon his complaints and the physical findings at the ER the following day. In my medical opinion his recent complaints are unrelated to the 2003 injury.

[Three] Has the claimant reached maximum medical improvement for the allowed conditions in this claim?

In my medical opinion Mr. Gilbraith has been at MMI as far as his 2003 injury is concerned, for years. In my medical opinion the incident on 05/10/08 did not affect his MMI status.

[Four] Is Mr. Gilbraith capable of full duty work? If not, please discuss necessary work restrictions, if any, resulting from the allowed conditions, taking into consideration your opinion of the requested addition allowance.

Mr. Gilbraith indicates that he has been off work at this point since 05/10/08. It is my medical 0pinion that his need for time off work is not a result of the allowed conditions in this 2003 claim. Therefore, in my medical opinion he does not require any restrictions or limitations as a result of the allowed conditions in the 02/11/03 industrial claim.

{¶ 20} 7. Relator's motion requesting temporary total disability ("TTD") compensation was heard before a district hearing officer ("DHO") on July 23, 2008. The DHO determined that relator had failed to meet his burden of proving that he was disabled as a result of the allowed conditions and denied the request, stating:

> The District Hearing Officer finds that the claimant failed to meet his burden of proving by the preponderance of the evidence that he was temporarily and totally disabled due to the allowed conditions in this claim (which are lumbar sprain and aggravation of pre-existing HNP at L4-5).
>
> The C-84 reports (signed by Dr. Kincaid on 05/19/2008 and 06/25/2008) do not certify the claimant as being disabled due to the disc condition at L4-5. Instead, Dr. Kincaid refers to the presence of a non-allowed herniated disc at L5-S1 (and not to any herniated disc at L4-5) in section 8 of both of his C-84 reports.
>
> The District Hearing Officer also relies upon the 07/10/2008 report of Dr. Vogelstein in ordering that the requested payment of temporary total disability compensation be denied. Dr. Vogelstein notes an incident occurring on 05/10/2008 when the claimant was "working in the back yard with his wife" and "he was beginning to do some shoveling and, as he pushed down on the top of the shovel with his right foot, he felt a stabbing pain in his lower back." The District Hearing Officer finds that this incident is an intervening injury. The period of requested temporary total disability subsequent to this intervening injury, therefore, is not causally-related to the allowed conditions.
>
> All evidence submitted by the claimant was reviewed and evaluated but not found to be sufficiently persuasive evidence demonstrating that the claimant's requested period of temporary total disability is related to <u>allowed</u> conditions in this claim.

{¶ 21} 8. Relator appealed and the matter was heard before a staff hearing officer ("SHO") on August 20, 2008. The SHO affirmed the prior DHO's order denying the TTD compensation, stating:

> It is the order of the Staff Hearing Officer that temporary total compensation is denied from 05/12/2008 to the date of this hearing. The Staff Hearing Officer finds that the C-84

> applications list conditions not allowed in this claim. Consequently, the medical evidence does not document the allowed conditions independently render the injured worker temporary totally disabled.
>
> It is the further order that the injured worker sustained an intervening injury on 05/10/2008 that broke the chain of causation to the original injury in this claim. This decision is based on the 07/10/2008 report of Dr. Vogelstein. Dr. Vogelstein clearly states the injured worker sustained an intervening injury as the result of the shoveling event on 05/10/2008. The Staff Hearing Officer further notes the injured worker went to the emergency room on 05/10/2008, sought treatment with the chiropractor on 05/12/2008, and the chiropractor certified disability again beginning 05/12/2008. The Staff Hearing Officer finds this evidence supports the finding of an intervening injury.
>
> The injured worker's counsel requested no decision be made on the issue of intervening injury. However, the Staff Hearing Officer finds that an intervening injury is a valid defense to the payment of temporary total compensation and, as such, must be addressed by the hearing officer. The parties were on notice that the issue would be before the Staff Hearing Officer as the District Hearing Officer addressed the issue in his order, and the parties argued the issue at hearing.

{¶ 22} 9. Relator's further appeal was refused by order of the commission mailed September 6, 2008.

{¶ 23} 10. Thereafter, on November 7, 2008, relator filed an appeal pursuant to R.C. 4123.512 in the civil division of the Court of Common Pleas for Jackson County, Ohio. Relator argued that, because the commission determined that the May 10, 2008 injury was an intervening injury, relator was precluded from receiving any further benefits, therefore making this a right to participate issue.

{¶ 24} 11. On December 30, 2008, relator voluntarily dismissed without prejudice the common pleas court action.

{¶ 25} 12. Thereafter, relator filed a C-86 motion asking for the payment of certain bills on October 7, 2009.[1]

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[1] This motion and documents relator submitted concerning this motion are not included in the stipulation of evidence.

{¶ 26} 13. Relator's motion for the payment of bills was heard before a DHO on November 3, 2009, and was denied. The DHO provided the following explanation:

> The Injured Worker's motion seeking payment of a large number of chiropractic bills from Dr. Kincaid is denied. The District Hearing Officer finds that the Injured Worker has failed to satisfy his burden of proving that these treatments were reasonably necessary and appropriate care for the allowed conditions in the claim.
>
> By orders of 08/20/2008 and 06/03/2009, separate Staff Hearing Officers have held that the event of 05/10/2008 was an intervening injury which broke the chain of causation to the original injury in this claim. The Injured Worker has submitted no evidence that the treatments for which payment is sought are based upon any new and changed circumstances. Consequently, the medical evidence submitted by the Injured Worker does not adequately document that the bills are for treatments which are in any way different from treatments and compensation which has previously been denied. While Dr. Kincaid does certify that the treatments were for the Injured Worker's lumbar sprain and herniated nucleus pulposus and L4-5, the conditions allowed in the claim, there has not been an adequate demonstration that they do not arise out of the previously found intervening incident, rather than the 2003 industrial injury. Consequently, all of these bills are found not properly payable.

{¶ 27} 14. Relator's appeal was heard by an SHO on December 9, 2009. The SHO affirmed the prior DHO's order denying the motion for the reasons specified in the November 3, 2009 DHO's order.

{¶ 28} 15. Relator's further appeal was refused by order of the commission mailed December 31, 2009.

{¶ 29} 16. Thereafter, on December 29, 2009, relator refiled the previously dismissed complaint in the Jackson County, Ohio, court.

{¶ 30} 17. On January 19, 2010, the employer and respondent herein, AutoZone, Inc. ("AutoZone") filed a motion to dismiss relator's complaint for lack of subject-matter jurisdiction. AutoZone's argument was that relator's appeal, based on R.C.

4123.512, was inappropriate because the issues he raised did not concern a right to participate issue, but raised instead an extent of disability issue.

{¶ 31} 18. Relator filed a motion opposing AutoZone's motion to dismiss on January 27, 2010. Relator argued that "[t]he current orders do not clearly determine whether or not all future treatment and compensation will be denied. As written, the court cannot clearly determine whether the appeal relates to the right to participate or extent of disability."

{¶ 32} 19. AutoZone filed a reply memorandum

{¶ 33} 20. In a decision and order filed April 5, 2010, the trial court overruled AutoZone's motion to dismiss and remanded the matter to the commission for clarification. *Gilbraith v. AutoZone, Inc.*, Jackson C.P. No. 09WC0021 (Apr. 5, 2010). Specifically, the court's decision and entry provided:

> Upon review, the Court finds the decision of the Staff Hearing Officer is unclear as to the effect on the 2003 allowance. The Staff Hearing Officer's finding that both the 2003 and 2008 injuries were to the same area of Plaintiff's back but that Plaintiff failed to establish a connection requires clarification.
>
> It is therefore Ordered that Defendant's motion to dismiss is overruled and this matter shall be remanded to Ohio Bureau of Workers' Compensation for clarification of the issue of the effect of Plaintiff's 2008 injury on his right to participate in the Workers' Compensation Fund for this previous injury.

{¶ 34} 21. The Ohio Bureau of Workers' Compensation ("BWC") referred the matter to the commission for clarification and a hearing was held before a DHO on September 23, 2010. After providing a brief a history, the DHO stated:

> Based upon the order of the court, the District Hearing Officer clarifies the issue of temporary total compensation as follows. The Injured Worker's request for temporary total compensation for the period 05/12/2008 through 08/20/2008 (date of the Staff Hearing Officer order) is specifically denied. The District Hearing Officer finds that the Injured Worker has not met his burden of proving that this disability for the period at issue is causally related to the allowed conditions in the claim. The District Hearing Officer notes that the C-84 Requests of Dr. Kincaid dated 05/19/2008 and 06/25/2008 specifically list the condition

> "herniated disc at L5-S1" which is a non-allowed condition in the claim. Therefore, the District Hearing Officer finds that the Injured Worker's disability is not related to the allowed conditions in the claim.
>
> As noted above the District Hearing Officer order of 07/23/2008 and the Staff Hearing Officer order of 08/20/2008 denied the Injured Worker's request for temporary total compensation in part because of a finding that the Injured Worker sustained an intervening injury on 05/10/2008. *The District Hearing Officer finds that the intervening injury of 05/10/2008 breaks the causal connection between the Injured Worker's disability and the allowed conditions in the claim only for the period at issue which is from 05/12/2008 through 08/20/2008 (date of Staff Hearing Officer order). However, this finding does not bar the Injured Worker from requesting temporary total compensation from 08/21/2008 fo[r]ward. A request for temporary total compensation from 08/21/2008 fo[r]ward must be considered on the merits since circumstances may exist in the future which may render the Injured Worker temporarily and totally disabled due to the allowed conditions in the claim. The issue of the intervening injury may be a valid defense to any future request for temporary total compensation.*
>
> (Emphasis added.)

{¶ 35} 22. Relator's appeal was heard before an SHO on October 26, 2010. The SHO affirmed the prior DHO's order stating:

> It is the finding of the Staff Hearing Officer that the Injured Worker sustained an intervening injury on 05/10/2008 while he was working in his back yard shovelling dirt. This injury did not occur in the course of and arising out of his employment. The disability almost immediately following this intervening injury was due to the intervening injury of 05/10/2008. Therefore *the request for temporary total disability compensation from 05/12/2008 through 08/20/2008 is denied in that the disability was not due to the allowed conditions in this industrial claim.*
>
> However, for future issues a determination must be made as to whether medical treatment or disability is due to the allowed conditions in the 02/12/2003 industrial injury or the intervening injury that occurred on 05/10/2008. This

> determination may be made on any issue in the future regarding disability or medical treatment and other issues in the claim.

(Emphasis added.)

{¶ 36} 23. Relator's appeal was refused by order of the commission mailed November 17, 2010.

{¶ 37} 24. Relator filed a request for reconsideration and asked for a third-level hearing

{¶ 38} 25. In an interlocutory order mailed January 13, 2011, the commission referred the matter for a hearing after finding:

> It is the finding of the Industrial Commission that the Injured Worker has presented evidence of sufficient probative value to warrant adjudication of the request for reconsideration regarding the alleged presence of an error by the subordinate hearing officer in the findings issued on 10/28/2010, which renders the order defective.
>
> Specifically, it is alleged that the Staff Hearing Officer order fails to clarify the effect of the 2008 intervening injury, as directed by the Court of Common Pleas.
>
> The order issued 11/17/2010 is vacated, set aside and held for naught.
>
> Based on these findings, the Industrial Commission directs that the Injured Worker's request for reconsideration, filed 12/03/2010, is to be set for hearing to determine whether the alleged error by subordinate hearing officer as noted herein is sufficient for the Industrial Commission to invoke its continuing jurisdiction.

{¶ 39} 26. Following a hearing on February 8, 2011, the commission determined that relator had failed to meet his burden of proving that sufficient grounds existed to justify the commission's exercise of its continuing jurisdiction and refused his request for reconsideration.

{¶ 40} 27. On April 22, 2011, relator filed an appeal pursuant to R.C. 4123.512 in the civil division of the Court of Common Pleas of Jackson County, Ohio

continuing to argue that the commission's orders forever denied the right to participate regarding this claim.

{¶ 41} 28. AutoZone has filed another motion to dismiss relator's appeal, again arguing that the trial court lacks subject-matter jurisdiction.

{¶ 42} 29. On August 8, 2011, relator filed a memorandum opposing AutoZone's motion to dismiss and asking the trial court to place this action on the court's inactive docket.

{¶ 43} 30. On August 22, 2011, AutoZone filed a reply further supporting its motion to dismiss and the BWC filed a response supporting AutoZone's motion to dismiss.

{¶ 44} 31. Concurrently, on August 5, 2011, relator filed this mandamus action asking this court to order the commission to definitively and clearly state those previous orders finding that the May 10, 2008 non-work-related injury was an intervening injury and forever foreclosed relator from receiving any future benefits and affecting his right to participate in the workers' compensation system.32. The matter has been set for hearing before the magistrate.

Conclusions of Law:

{¶ 45} Relator argues that "the Industrial Commission has found on **four occasions** that the causal connection has been broken in Mr. Gilbraith's claim. *(Stip at 12, 27, 29 and 63).* As in [*Greenwalt v. Am. Std., Inc.*, 131 Ohio App.3d (7th Dist.1998)], this break in the causal connection forecloses Mr. Gilbraith from receiving any further benefits under the claim he filed for the original work related accident." (Relator's brief, at 8.) Relator also attaches *Lindamood v. Residence Inn*, 2nd Dist. No. 15763 (Nov. 22, 1996), decided in the Court of Appeals of Ohio, Second District, Montgomery County, where a claimant attempted to reactivate her claim after sustaining an intervening injury to the same body part for which her original claim had been allowed and the commission held that the intervening incident was the sole cause of her current medical problems.

{¶ 46} In the cases cited by relator, Lloyd D. Greenwalt and Peggy Lindamood had workers' compensation claims allowed for certain conditions caused by work-related injuries. Both claimants sustained non-work-related injuries at some time following their work-related injuries. Both claimants sought additional compensation in

their claims arguing that their current disability resulted from the allowed conditions caused by their work-related injury.

{¶ 47} In both cases, the commission determined that the non-work-related injuries were intervening injuries which broke the causal connection between their current disability and their work-related injuries. Both claimants filed actions in common pleas courts under R.C. 4123.512 arguing that the commission's orders affected their right to participate in the workers' compensation system. In both cases, the common pleas courts determined that the issue raised was not a right to participate issue and that the court lacked subject-matter jurisdiction.

{¶ 48} Both Greenwalt and Lindamood appealed and ultimately the appellate courts determined that the commission's orders reached the rights of the claimants to participate in the workers' compensation system and were appealable to the common pleas court.

{¶ 49} Lindamood had asked the appellate court to adopt as a rule that "whenever the Commission finds an 'intervening incident or injury' the right to future benefits is permanently terminated." *Lindamood* at 5. The court refused to adopt such a rule and stated:

> The nature of the intervening injury or incident may be of such a character that it would have no effect on possible future benefits for a pre-existing claim. Or it might have that effect, depending upon the facts. We simply do not know the facts in this case to make a decision at this time. In reconsidering this matter, the Commission should explain the nature of the intervening incident and, if possible, determine whether or not it cuts off future benefits from the pre-existing claim. Only then can a court meaningfully address the issue of its jurisdiction for an appeal from that decision. The second injury may "intervene" only to the extent that it simply adds to the claimant's medical problems, or it may in fact supersede the original injury and thus terminate future benefits from it.

Id. Thereafter, just as here, the court remanded the matter to the commission to clarify its position.

{¶ 50} In this case, the earlier orders appeared to foreclose relator from participating in the workers' compensation system for the allowed conditions in his claim.

Those earlier orders resemble the orders challenged by Greenwalt and Lindamood. Because of the potential ambiguity, the commission was ordered to clarify its position by indicating whether or not this intervening injury permanently foreclosed relator from receiving benefits due to the allowed conditions in the future. In *Lindamood*, the commission was also ordered to clarify the ambiguity. Here, the commission responded that the intervening injury did *not* permanently foreclose relator from receiving benefits in the future. Both orders specifically address whether or not relator can receive benefits relating to the conditions allowed in his claim as a result of the work-related injuries provided he submit evidence demonstrating that any future symptoms or disability is directly caused by allowed conditions. Specifically, in the September 23, 2010 order, the DHO stated:

> The District Hearing Officer finds that the intervening injury of 05/10/2008 breaks the causal connection between the Injured Worker's disability and the allowed conditions in the claim only for the period at issue which is from 05/12/2008 through 08/20/2008 (date of Staff Hearing Officer order). However, this finding does not bar the Injured Worker from requesting temporary total compensation from 08/21/2008 fo[r]ward. A request for temporary total compensation from 08/21/2008 fo[r]ward must be considered on the merits since circumstances may exist in the future which may render the Injured Worker temporarily and totally disabled due to the allowed conditions in the claim. The issue of the intervening injury may be a valid defense to any future request for temporary total compensation.

(Emphasis added.)

{¶ 51} Further, in the October 26, 2010 order, the SHO stated:

> [T]he request for temporary total disability compensation from 05/12/2008 through 08/20/2008 is denied in that the disability was not due to the allowed conditions in this industrial claim.
>
> However, for future issues a determination must be made as to whether medical treatment or disability is due to the allowed conditions in the 02/12/2003 industrial injury or the intervening injury that occurred on 05/10/2008. This determination may be made on any issue in the future

> regarding disability or medical treatment and other issues in the claim.

(Emphasis added.)

{¶ 52} As the above language provides, the commission determined that relator's current period of disability was not due to the allowed conditions in his claim, but was instead due to the medical conditions occasioned by the non-work-related injury. The commission determined that the non-work-related injury broke the causal connection between relator's current disability and work-related injury. However, the commission specifically found that any future requests for benefits would be considered on the merits because relator could, in the future, establish that his disability or new medical conditions from which he was suffering were in fact due to the work-related injury.

{¶ 53} Based upon the finding that the commission's orders specifically explained that relator may be entitled to receive benefits due to the allowed conditions in his work-related claim in the future, relator has not demonstrated that the commission's orders have terminated his right to participate in the workers' compensation system. Instead, those orders address the extent of disability and are not appealable pursuant R.C. 4123.512. As such, 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).