[Cite as *State ex rel. Arnett v. Indus. Comm.*, 2012-Ohio-4903.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Daniel L. Arnett,	:	
Relator,	:	
v.	:	No. 11AP-238
Industrial Commission of Ohio and Mid-Ohio Mechanical, Inc.,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on October 23, 2012

Law Offices of Thomas Tootle Co., and *Thomas Tootle*, for relator.

Michael DeWine, Attorney General, *Andrew J. Alatis*, and *James A. Barnes*, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

CONNOR, J.

{¶ 1} Relator, Daniel L. Arnett ("relator"), has filed this original action requesting that this court issue a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its order exercising its continuing jurisdiction and ordering the commission to reinstate the staff hearing officer's ("SHO") order from the July 27, 2010 hearing in which it found relator was entitled to permanent total disability ("PTD") compensation.

{¶ 2} The court referred this matter 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, including findings of fact and conclusions of law, which is appended to this decision. Therein, the magistrate concluded the commission did not abuse its discretion by exercising its continuing jurisdiction, based upon its determination that a clear mistake of fact exists.[1] Consequently, the magistrate recommended denial of relator's request for a writ of mandamus.

{¶ 3} Specifically, the magistrate found the SHO made a clear mistake of fact in determining that relator "received an extensive amount of medical treatment" and "is on an extensive amount of medication to control the pain and alleviate the symptoms" because that determination is not supported by the evidence in the record. The magistrate also rejected relator's attempt to analogize this case to *State ex rel. Gobich v. Indus. Comm.*, 103 Ohio St.3d 585, 2004-Ohio-5990, and *State ex rel. Royal v. Indus. Comm.*, 95 Ohio St.3d 97 (2002), finding this case did not involve a legitimate disagreement as to evidentiary interpretation.

{¶ 4} In addition, the magistrate found relator's complaint asserting that the Bureau of Workers' Compensation ("BWC") was permitted to submit additional evidence to support its claim while relator was not given the same opportunity to be immaterial. The magistrate determined there was nothing in the record to indicate that the commission had relied upon the post-hearing documents submitted by the BWC and that the medical evidence in the record at the time of the SHO hearing demonstrated that the SHO's statement regarding extensive medical treatment and extensive medication was unsupported by the record and a clear mistake of fact. Furthermore, the magistrate found relator failed to submit an affidavit identifying any documents it wished to have this court consider, and therefore his arguments regarding Medicare and social security disability payments were irrelevant.

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[1] The commission also determined the exercise of continuing jurisdiction was proper because a clear mistake of law existed due to the SHO's failure to address the issues surrounding the nature of relator's retirement. The commission found the SHO failed to inquire into whether or not the termination of employment was the result of the natural progression of aging, *e.g.*, regular retirement following lengthy employment with the same employer, or whether it was due to unrelated health conditions, such as relator's high cholesterol and heart attack in 2000, or whether it was due to his industrial injury. However, relator has not challenged this particular determination, so we need not address it here.

{¶ 5} Relator filed objections to the magistrate's decision. The commission filed a memorandum opposing the objections. This cause is now before the court for a full review regarding relator's objections.

{¶ 6} Relator submits the following three objections:

> 1. THE MAGISTRATE'S DECISION – FINDING THAT A CLEAR MISTAKE OF FACT EXISTS TO SUPPORT THE INDUSTRIAL COMMISSION'S EXERCISE OF CONTINUING JURISDICTION – IS UNSUPPORTED BY THE EVIDENCE.
>
> [2.] THE MAGISTRATE'S DECISION – PERMITTING THE BWC TO RELY UPON NEWLY SUBMITTED EVIDENCE – IS A CLEAR MISTAKE OF LAW.
>
> [3.] THE MAGISTRATE'S DECISION – FINDING THAT RELATOR'S RECEIPT OF COMPENSATION AND MEDICAL BENEFITS THROUGH SOCIAL SECURITY DISABILITY AND MEDICARE IS IRRELEVANT – IS UNSUPPORTED BY THE EVIDENCE.

{¶ 7} Relator's first and second objections are interrelated, and therefore we shall address them together. In his first objection, relator argues there is not a mistake of fact to support the commission's exercise of continuing jurisdiction. Relator further argues even if there is a mistake of fact, it is not a *clear* mistake of fact, and it does not constitute grounds for exercising continuing jurisdiction. In his second objection, relator contends the magistrate committed a clear mistake of law by allowing the commission to rely upon the BWC's newly submitted evidence (the billing records) as a basis for granting continuing jurisdiction. We disagree with both objections.

{¶ 8} The evidence before the SHO, which included the PTD statement of facts and the various doctors' reports referencing relator's medical records, the treatment received by relator, and his employability, do not support the SHO's finding that relator received "an extensive amount of medical treatment through this claim" or that relator is "on an extensive amount of medication to control the pain and alleviate the symptoms."

{¶ 9} The claim at issue in this case is more than 20 years old. The aforementioned records indicate the total medical bills paid under this claim were less than $6,000 at the time of the SHO hearing. The records further indicate two diagnostic tests in the previous three years and no surgeries. In addition, these records contain very

few indications that relator received actual treatment beyond diagnostic testing during much of this claim, although more recently, it appears that some steroid injections were begun in the summer of 2009.

{¶ 10} As to the medication relator is using, the records indicate relator provided John M. Malinky, Ph.D., a psychologist, with a list of nine medications prescribed by his family doctor. However, the records do not reference the length of time these medications have been prescribed or the conditions for which these medications have been prescribed. Beyond any general knowledge regarding pharmaceutical uses, it is unknown whether these medications were prescribed for controlling the pain and alleviating the symptoms of the allowed conditions in the claim, or for some other purpose, such as for relator's other health conditions.[2] While the records do reveal that relator was recently placed on "Prednisone Paper" in 2008 due to a worsening of his neck and arm symptoms, that he took Vicoden on an as needed basis as well as Aleve, and that he had been prescribed an anti-depressant for two years, but he had not taken it since approximately 2006, this does not constitute "extensive" medication.

{¶ 11} We disagree with relator's contention that there is simply a legitimate disagreement as to the evidentiary interpretation of "extensive," and that any mistake of fact present here was not clear under the standards used in *Gobich* or *Royal.* Instead, based upon the evidence referenced above, the SHO's conclusion that relator's medical treatment was "extensive" and that he was on an "extensive" amount of medication to control his pain and symptoms, is not supported by the record and is a clear mistake of fact.

{¶ 12} The billing records, which were provided with the BWC's motion for reconsideration and after the SHO hearing, also provide additional support for the commission's rationale for exercising continuing jurisdiction. These records demonstrate that the total amount paid toward medical expenses for this injury, which occurred in 1990, was less than $8,000. The records also demonstrate there were no payments made in the claim for psychological treatment or psychotropic medication and that there was a gap in actual treatment (beyond diagnostic testing) on the claim between October 1997 and March 2009. Relator argues that these records should not be considered because

[2] The records indicate relator had high cholesterol and suffered a heart attack in 2000.

they were submitted post-hearing and because, from an equitable standpoint, he, unlike the BWC, was not permitted to submit additional evidence. Relator further argues allowing the BWC to rely upon this evidence is a clear mistake of law. We find this objection to be without merit.

{¶ 13} Although we do agree with relator's assertion that it is evident the commission did rely upon these records to support its decision (for example, see the reference to the total cost of the claim being less than $8,000), and therefore, we disagree with the magistrate's statement that there is nothing in the record to indicate the commission relied upon the documents presented by the BWC after the SHO hearing, we do not believe reliance upon said documents is a clear mistake of law. Nevertheless, even without consideration of this documentation, it is still readily apparent that very little medical costs were paid out in the claim. Furthermore, the fact that relator was not permitted to submit additional evidence on a different issue not related to the billing records, does not make the use of these records inequitable.

{¶ 14} Consequently, we overrule relator's first and second objections to the magistrate's decision.

{¶ 15} In his third objection, relator submits the magistrate erred in determining that his receipt of compensation and medical benefits through social security disability and Medicare is irrelevant. However, we agree with the magistrate's conclusion.

{¶ 16} While it is entirely possible (and maybe even quite likely) that relator did receive compensation and medical benefits via payment from social security disability and Medicare, and therefore the sparse history of payment through the claim is not indicative of relator's actual medical expenses and treatment, such an argument is irrelevant here because relator did not attempt to demonstrate that said compensation was actually received by using proper evidence, such as an affidavit attached to his Medicare and/or social security disability payment records, to support his assertion. As the magistrate indicated, relator did not make a record of any attempt to present Medicare records or social security disability records to the commission, nor did he attempt to present such evidence to this court. In fact, relator himself admits he did not attempt to submit such information. As a result, an unsubstantiated assertion that the true cost of relator's

medical claims are not reflected in the PTD statement of facts or the billing records, without more, is irrelevant here.

{¶ 17} Accordingly, we overrule relator's third objection.

{¶ 18} Therefore, following an independent review pursuant to Civ.R. 53, relator's objections to the magistrate's decision are overruled and we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein, but with the modification as noted above. In accordance with the magistrate's decision, we deny the requested writ of mandamus.

Objections overruled;
writ of mandamus denied.

SADLER and TYACK, JJ., concur.

A P P E N D I X

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Daniel L. Arnett,	:	
Relator,	:	
v.	:	No. 11AP-238
Industrial Commission of Ohio and Mid-Ohio Mechanical, Inc.,	:	(REGULAR CALENDAR)
Respondents.	:	

MAGISTRATE'S DECISION

Rendered on November 21, 2011

Law Offices of Thomas Tootle Co., and *Thomas Tootle*, for relator.

Michael DeWine, Attorney General, *Andrew J. Alatis*, and *James A. Barnes*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶ 19} Relator, Daniel L. Arnett, has filed this original action requesting that this court issue a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order wherein the commission exercised its continuing jurisdiction and ordering the commission to reinstate the order of the staff hearing officer ("SHO") from the hearing held July 27, 2010 which found that relator was entitled to an award of permanent total disability ("PTD") compensation.

Findings of Fact:

{¶ 20} 1. Relator has sustained two work-related injuries, the most significant one occurred in 1990. Relator's workers' compensation claims have been allowed for the following conditions:

> 90-55350: Sprain of left knee, leg & neck; C-7 radiculopathy and intervertebral foraminal encroachment C5-6 and C6-7; aggravation of pre-existing cervical spondylosis at C5-7; cervical degenerative disc disease at C5-7; major depression.
>
> 98-578916: Bilateral burn eye & adnexa.

{¶ 21} 2. On February 24, 2010, relator filed an application for PTD compensation. Relator submitted three medical reports in support of his application.

{¶ 22} 3. Relator submitted the June 26, 2009 report of Nancy Renneker, M.D. Dr. Renneker summarized the medical records which she reviewed:

> A review of available medical records showed the following: (1) on 01-27-1992, Daniel Arnett had cervical spine x-rays which demonstrated C4-5, C5-6 and C6-7 moderate spondylosis with posterior spurring and bilateral C5-6 and bilateral C6-7 recess stenosis[.] (2) On 5-8-1992, Daniel Arnett had a cervical spine MRI scan which demonstrated C5-6 and C6-7 disc protrusion with spondylitic changes. Of note, this same cervical spine MRI scan was read by neurosurgeon, Dr. Mavian as demonstrating C4 through C7 spondylosis and central spinal stenosis[.] (3) [O]n 12-9-2000, cervical spine x-rays were obtained which demonstrated prominent C4 through C7 osteophytes[.] (4) [O]n 11-13-2000, Daniel Arnett was seen for the first time for his ongoing neck complaints by physical medicine specialist/pain management specialist, Dr. Higgins, D.O. On this date, Dr. Higgins performed cervical spine and bilateral upper extremity electrodiagnostic testing (EMG) which demonstrated left C6 and left C7 radiculopathy[.] (5) [O]n 12-9-2000, a follow up cervical spine MRI scan was obtained which demonstrated C4-5 stenosis due to osteophyte formation, C5-6 borderline stenosis, foraminal narrowing at all cervical levels due to degenerative changes[.] (6) On 5-24-2001, Daniel Arnett was seen for a consultation/follow up appointment with Dr. Higgins. At that time, Dr. Higgins recommended cervical epidural steroid injections or selective nerve root blocks[.] (7) [O]n 4-17-2002, Daniel Arnett had a normal unenhanced and enhanced brain MRI scan.

> [Eight] [O]n 8-28-2008, Daniel Arnett had a follow up MRI scan which demonstrated C2-3, C3-4, C4-5, C5-6 and C6-7 disc bulges, C4-7 cervical spondylosis and C4-C7 neuroforaminal narrowing/stenosis[.] (9) [O]n 9-18-2008, Daniel Arnett was seen for a second opinion by neurosurgeon, Dr. David Yashon, MD. Dr. Yashon reviewed Mr. Arnett's most recent cervical spine scan i.e. cervical spine MRI scan of 8-28-08 and he also performed an exam with Dr. Ya[sh]on's diagnostic impression listed as follows: C4-7 disc bulges, C4-7 degenerative disc disease and C4 through C7 central canal stenosis. Dr. Yashon recommended ongoing medical treatment and should David Arnett's symptoms and exam findings worsen, a cervical laminectomy would be considered[.] (10) [O]n 12-1-2008, at a follow up appointment with Dr. Higgins, Daniel Arnett was placed on a Prednisone Paper due to a worsening of his neck and bilateral arm symptoms. Dr. Higgins stated that he was going to hold off on any additional spinal procedures at [sic] Daniel Arnett was taking Plavix.

Dr. Renneker indicated that relator informed her of future proposed treatment:

> Daniel Arnett reports that his current doctor of record for this claim is Dr. Higgins, D.O. Daniel Arnett reports that Dr. Higgins is planning on doing a cervical epidural steroid injection within the following one to two weeks with Daniel Arnett reporting that his next follow up appointment with Dr. Higgins is within one week. Daniel Arnett currently takes Vicoden on an as needed basis.

Dr. Renneker also noted the following relevant medical history:

> Daniel Arnett's past medical is remarkable for: (1) [A] motor vehicle accident on 7-29-2000 with Daniel Arnett reporting that after that motor vehicle accident the [sic] began treatment for ongoing low back and right leg pain. Daniel Arnett has had medical treatment of his ongoing low back complaints and a review of available medical records showed a diagnosis of multi-level lumbar disc disease, L5-S1 disc displacement/disc protrusion and right L5 radiculopathy by exam and electrodiagnostic testing[.] (2) [H]istory of myocardial infarction and Daniel Arnett is status post LAD cardiac stint placement on 3-8-2006. Daniel Arnett last worked in 2000 with Mr. Arnett reporting that he was no longer able to work with Daniel Arnett reporting that at the time when he last worked that if he did any looking up he would not [sic] dizziness and paresthesia down his left arm

> and increasing left arm weakness. Of note, Daniel Arnett reports that he believes that he did have x-rays of his left knee at the time of this injury which was negative for fracture. Daniel Arnett reports that over time he has noted increasing left knee symptoms.

After providing her physical findings upon examination, Dr. Renneker stated that relator had the following permanent job restrictions related to his allowed conditions:

> * * * (1) [N]o overhead work and Daniel Arnett is unable to do desk work as Daniel Arnett is unable to look down at a desktop or tabletop for a computer/laptop for no more than a 5 minute interval and he would be able to do this 5 minute interval only once every 30 minutes (2) [N]o pushing or pulling with either arm and Daniel Arnett is unable to use his left (dominant) arm for any tasks and (3) [N]o use of right arm above horizontal and (4) Daniel Arnett is able to occasionally lift at waist height in his right hand a 5 lb. object and Mr. Arnett is able to carry this object a distance of no more than 10 to 15 yards on a level surface only. As such, Daniel Arnett is unable to [do] sedentary work. * * *

Ultimately, Dr. Renneker concluded as follows:

> * * * In summary, it is my medical opinion that Daniel Arnett is permanently and totally disabled from performing sustained remunerative employment due to residual impairments related to his work injury of 6-4-1990 (Claim No. 90-55350).

{¶ 23} 4. Relator also submitted a report from John M. Malinky, Ph.D., who evaluated him for his allowed psychological condition on August 18, 2009. As part of the background history, Dr. Malinky noted that relator last worked in 2000 after a 33-year history as an iron worker. Dr. Malinky noted further that relator had no surgeries due to the allowed conditions, but had received physical therapy from a chiropractor. Relator informed Dr. Malinky that he continues to see Dr. Higgins who gives him shots in the neck. Thereafter, relator provided Dr. Malinky with a list of medications he was currently taking. That list contains nine separate drugs, the majority of which are designed to help control relator's heart condition. Apparently, relator had a heart attack in 2000, has high cholesterol, and asthma. Dr. Malinky noted that relator's affect was congruent with his depressed mood, his gait was slow, speech was slow and hesitant, had difficulties sleeping,

had feelings of helplessness, hopelessness, and worthlessness, reported no pleasurable activities, had a low energy level, reported crying spells and suicidal thoughts, but had no plan or intent to kill himself. Ultimately, Dr. Malinky opined that relator was permanently and totally impaired from all sustained remunerative employment as a result of the allowed depressive disorder.

{¶ 24} 5. Relator also submitted the October 20, 2009 report of his treating physician, Brian E. Higgins, D.O. That report simply stated:

> Daniel Arnett is a patient I have been seeing for his industrial injury. Despite conservative treatment he still continues to have discomfort that incapacitates him from full time employment. I do believe, based on the allowed conditions in his claim of cervical spondylosis, cervical degenerative disc disease, cervical radiculopathy and cervical syndrome, that Mr. Arnett is permanently and totally disabled from gainful employment.

{¶ 25} 6. Relator was examined by Robin G. Stanko, M.D. In his April 22, 2010 report, Dr. Stanko reviewed the medical evidence as follows:

> Medical records indicate that an MRI done on 5/8/92 showed disc protrusions at C5-6 and C6-7. He was evaluated by a neurosurgeon, Dr. Mavian, on 8/27/92. Mr. Arnett has not had surgery to his neck. An EMG on 9/4/92 of the left upper extremity showed evidence of a C7 radiculopathy and demonstrated 1+ positive waves in the triceps and cervical paraspinals. X-rays of the cervical spine on 4/1/94 showed mild spondylosis. He did have cervical epidural steroid injections for the neck. An MRI of the cervical spine on 9/28/08 showed multiple levels of degenerative disc disease C4 through C7 and moderate central canal stenosis. An MRI of the cervical spine on 4/1/10 demonstrated central stenosis most prominent at C4-5. An evaluation of his eyes by an ophthalmologist, John Burns, M.D. on 5/7/01, had noted full recovery of his burns about his eyes.

{¶ 26} After providing his physical findings upon examination, Dr. Stanko opined that relator had no impairment with regard to the 1998 claim which was allowed for bilateral burn and adnexa. After noting that relator had not had surgery for his knee, Dr. Stanko opined that relator had an eight percent whole person impairment for that particular claim allowance. Further, after noting that relator had not had surgery for his neck, Dr. Stanko opined that relator had an 18 percent whole person impairment for those

conditions. Ultimately, Dr. Stanko opined that relator had a 25 percent whole person impairment and that he could perform activity at sedentary work levels, lifting up to 10 pounds with limited bending and twisting activity.

{¶ 27} 7. Relator was also examined by Earl F. Greer Jr., Ed.D. In his April 22, 2010 report, at the time of the examination, relator reported that he was not currently involved in any psychological/psychiatric treatment nor had he ever been involved in such treatment and he did not wish to be involved in psychological/psychiatric treatment. Relator also indicated that he was not on any psychotropic medications. Dr. Greer also noted that relator informed him that he had no industrial accident related surgeries, but that he did have a heart attack in 2000. Dr. Greer concluded that relator suffered from a major depressive disorder, he had reached maximum medical improvement, and that relator had a Class II impairment of 15 percent. Dr. Greer recommended psychological intervention. Ultimately, Dr. Greer concluded that relator's emotional impairment would not prevent him from working and further, that work would be expected to be therapeutic; however, he noted that motivation would be a significant factor.

{¶ 28} 8. An employability assessment was prepared by Beal D. Lowe, Ph.D. In his June 16, 2010 report, which was signed June 30, 2010, Dr. Lowe concluded:

> In summary, this assessment finds that even if Mr. Arnett were found to possess residual physical ability for Sedentary work, he lacks demonstrated Aptitudes, Temperaments, and Stress Tolerances necessary for that work and that his psychological condition creates major barriers to successful adjustment to any new occupation. At age 64, Mr. Arnett is found to lack capacity for rehabilitation in order to perform any Sedentary retail or clerical occupations.

{¶ 29} 9. Relator's application for PTD compensation was heard before an SHO on July 27, 2010. In discussing the injuries relator sustained in the 1990 claim, the SHO noted:

> The Injured Worker was involved in his first industrial accident on 06/04/1990 while working as an iron worker. He fell into a hole while he was holding a piece of plywood. He suffered a severe injury to his cervical area as well as some other parts of his body. The claim was allowed for the conditions "sprain of left knee, leg, and neck; C-7 radiculopathy and intervertebral foraminal encroachment C5-6 and C6-7; aggravation of pre-existing cervical

> spondylosis at C5-7; and cervical degenerative disc disease at C5-7." *He has received an extensive amount of medical treatment through this claim primarily for the very severe degenerative conditions developed in his neck area. He is on an extensive amount of medication to control the pain and alleviate the symptoms.* The claim was amended in 2003 to include a psychological condition of "major depression." He indicated that he is required to take psychiatric medication as prescribed by his attending physician to control his depression. He continues to the present time with conservative medical care.

(Emphasis added.) Ultimately, the SHO relied upon the reports of Drs. Renneker, Malinky, and Higgins and found that relator was permanently and totally disabled.

{¶ 30} 10. The administrator ("administrator") of the Ohio Bureau of Workers' Compensation ("BWC") appealed the SHO order granting relator compensation arguing that the order contained a clear mistake of fact, specifically the following:

> * * * The order that grants PTD is based on mistakes of fact including statements as: "He has received an extensive amount of medical treatment through this claim primarily for the very severe [de]generative conditions developed in his neck area. He is on an extensive amount of medication to control the pain and alleviate the symptoms.... He indicated that he is required to take psychiatric medication as prescribed by his attending physician to control his depression." Obviously these factors were considered when deciding to grant the application for PTD. * * *
>
> The billing and treatment records in the 90-55350 show that the injured worker did not take any time off work due to the injury. * * * The record contains very little treatment in the claim. The majority of provider visits were for evaluations on applications for an additional condition, C-92 and C-92A. The records show that the additional allowance for major depression was granted in 2003 however, the billing records show no psychological treatment or psychotropic medication has ever been paid in the claim * * *. The only psychological records in the file and bills paid in the claim for psychological examinations were for the purpose of examining on the additional allowance request or in order to evaluate the percentage of permanent disability for C-92, C-92A and PTD application purposes. Dr. Greer's 4/22/2010 exam, requested to evaluate for major depression for PTD states "(t)he injured worker reported not currently being

> involved in psychological/psychiatric treatment, or on any psychotropic medications. He reported never having been involved in psychological/psychiatric treatment and having no interest in being involved in psychological/psychiatric treatment." The billing records in the claim support this statement. The billing records show no payment for medication in the claim. The records only support the payment for TENS unit supplies for approximately 8 months in 2009 and 2010. The 1990 claim shows a gap in physical treatment from 10/1997- 03/2009. * * *
>
> * * * The records do not show any inquiry as to whether the termination of employment is the natural progression of aging, regular retirement and a lengthy period of employment with the same employer. The case law is clear that PTD is not intended to compensate a worker for natural aging ([*State ex rel. Yancey v. Columbus Maintenance & Serv. Co.*, 10th Dist. No. 04AP-1357, 2005-Ohio-5325]) or for voluntary retirement (*State ex rel*[.] *Baker v. Industrial Commission of Ohio* (1994) 69 Ohio St.3d 202). * * *

{¶ 31} 11. In an interlocutory order mailed September 21, 2010, the commission treated the administrator's motion as one asking the commission to exercise its continuing jurisdiction and granted that request. The commission provided the following reasons:

> Specifically, it is alleged that the Staff Hearing Officer's finding of extensive treatment and extensive medication under claim 90-55350 are erroneous inasmuch as the Injured Worker received no physical treatment from 10/1997 to 3/2009, and less than $5000 has been paid in medical costs. No payment for medication has been made over the life of this 20-year-old claim and no temporary total disability compensation has been paid. It is further alleged that the Injured Worker voluntarily left the work force in 2000 for reasons other than his industrial injury. Furthermore, the Staff Hearing Officer stated that the Injured Worker testified; however, it was not noted on the face of the order that the Injured Worker attended the hearing.

{¶ 32} 12. Following a hearing on October 19, 2010, the commission determined that there was indeed a clear mistake of fact in the SHO's order and, for the following reasons, vacated that order:

> 10/26/2010 – After further review and discussion, it is the finding of the Industrial Commission that the Administrator has met her burden of proving that the Staff Hearing Officer order, issued 07/30/2010, contains a clear mistake of fact and a clear mistake of law of such character that remedial action would clearly follow. Specifically, the Staff Hearing Officer erred in finding the Injured Worker had "received an extensive amount of medical treatment through this claim...is on an extensive amount of medication to control the pain and alleviate the symptoms...is required to take psychiatric medication as prescribed by his attending physician to control his depression." The Staff Hearing Officer apportioned the entire award of permanent total disability compensation to claim number 90-55350. A review of the medical evidence on file in claim number 90-55350, at the time the IC-2 Application was filed on 02/24/2010, reveals no lost time, no payment of bills for psychological/psychiatric treatment, and no bills for medication paid for any of the allowed conditions in this claim. The records fail to demonstrate any medical treatment for the allowed physical conditions from October of 1997 through March of 2009. At the time the IC-2 was filed on 02/24/2010, the total cost of claim number 90-55350 was less than $8,000.00 which included the cost of multiple Bureau of Workers' Compensation medical examinations. Furthermore, the Commission finds the Staff Hearing Officer made a mistake of law by failing to address the issues surrounding the nature of the Injured Worker's retirement in 2000. Therefore, the Commission exercises continuing jurisdiction pursuant 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 these errors.

Thereafter, the commission relied on the reports of Drs. Stanko and Greer and, after considering the non-disability factors, found that relator was able to engage in some sustained remunerative employment and denied his application for PTD compensation.[3]

{¶ 33} 13. Thereafter, relator filed the instant mandamus action in this court.

[3] Relator challenges the commission's exercise of continuing jurisdiction; therefore, that part of the order denying PTD compensation is not before this court.

Conclusions of Law:

{¶ 34} In arguing that the commission abused its discretion by exercising its continuing jurisdiction, relator makes three arguments. First, relator argues that the evidence, in the form of billing records, submitted by the BWC did not constitute newly discovered evidence and that the commission abused its discretion by considering it. Second, relator argues that if indeed the SHO made a mistake of fact, it was not a clear mistake of fact. Relator argues that legitimate disagreements over the interpretation of medical evidence do not constitute clear error and further argues that the commission's reference to "lost time" is immaterial inasmuch as relator received more money by accepting Social Security Disability Benefits than he would if he would have pursued a lost time claim. And third, relator argues that because he submitted his medical bills to Medicare instead of the BWC, he did actually receive extensive treatment.

{¶ 35} The magistrate disagrees with relator's arguments. First, a review of the medical reports and the statement of facts prepared for the hearing reveals that relator did not receive extensive medical treatment for the 1990 claim. As such, with or without the BWC's extra documentation, a clear mistake of fact did indeed exist. Second, this was not a legitimate disagreement over the interpretation of evidence. Specifically, there is no evidence in the record that relator received extensive medical treatment for his 1990 claim. Further, relator's receipt of Social Security Disability Benefits has nothing to do with the commission's statement that the record reveals no lost time. The record is clear that relator did not receive temporary total disability ("TTD") compensation after he was injured in 1990. Relator last worked in 2000 and began receiving Social Security Disability Benefits in 2001. In the ten-year period between the date of injury and the last date he worked, he did not miss any time from work. And third, relator argues that it is common for patients and providers to process medical bills through Medicare instead of through workers' compensation claims because Medicare is more likely to pay. If this is indeed true, relator could have presented them here with an affidavit verifying that these are the records in question and/or statements from Medicare. While the record is clear that relator attempted to submit something as evidence, relator has not made a record indicating what that evidence was.

{¶ 36} Accordingly, it is the magistrate's decision that this court deny relator's request for a writ of mandamus as more fully explained below.

{¶ 37} In order for this court to issue a writ of mandamus as a remedy from a determination of the commission, relator must show a clear legal right to the relief sought and that the commission has a clear legal duty to provide such relief. *State ex rel. Pressley v. Indus. Comm.* (1967), 11 Ohio St.2d 141. A clear legal right to a writ of mandamus exists where the relator shows that the commission abused its discretion by entering an order which is not supported by any evidence in the record. *State ex rel. Elliott v. Indus. Comm.* (1986), 26 Ohio St.3d 76. On the other hand, where the record contains some evidence to support the commission's findings, there has been no abuse of discretion and mandamus is not appropriate. *State ex rel. Lewis v. Diamond Foundry Co.* (1987), 29 Ohio St.3d 56. Furthermore, questions of credibility and the weight to be given evidence are clearly within the discretion of the commission as fact finder. *State ex rel. Teece v. Indus. Comm.* (1981), 68 Ohio St.2d 165.

{¶ 38} The relevant inquiry in a determination of permanent total disability is claimant's ability to do any sustained remunerative employment. *State ex rel. Domjancic v. Indus. Comm.* (1994), 69 Ohio St.3d 693. Generally, in making this determination, the commission must consider not only medical impairments but, also, the claimant's age, education, work record and other relevant nonmedical factors. *State ex rel. Stephenson v. Indus. Comm.* (1987), 31 Ohio St.3d 167. Thus, a claimant's medical capacity to work is not dispositive if the claimant's nonmedical factors foreclose employability. *State ex rel. Gay v. Mihm* (1994), 68 Ohio St.3d 315. The commission must also specify in its order what evidence has been relied upon and briefly explain the reasoning for its decision. *State ex rel. Noll v. Indus. Comm.* (1991), 57 Ohio St.3d 203.

{¶ 39} Relator's first and second arguments overlap and will be addressed together. Relator contends that the commission abused its discretion when it determined that there was a clear mistake of fact and further, relator argues that any mistake of fact that actually exists did not constitute grounds for the commission exercising continuing jurisdiction.

{¶ 40} Pursuant to R.C. 4123.52, "[t]he jurisdiction of the industrial commission and the authority of the administrator of workers' compensation over each case is

continuing, and the commission may make such modification or change with respect to former findings or orders with respect thereto, as, in its opinion is justified." In *State ex rel. B & C Machine Co. v. Indus. Comm.* (1992), 65 Ohio St.3d 538, 541-542, the court examined the judicially-carved circumstances under which continuing jurisdiction may be exercised, and stated as follows:

> R.C. 4123.52 contains a broad grant of authority. However, we are aware that the commission's continuing jurisdiction is not unlimited. See, *e.g., State ex rel. Gatlin v. Yellow Freight System, Inc.* (1985), 18 Ohio St.3d 246 * * * (commission has inherent power to reconsider its order for a reasonable period of time absent statutory or administrative restrictions); *State ex rel. Cuyahoga Hts. Bd. of Edn. v. Johnston* (1979), 58 Ohio St.2d 132 * * * (just cause for modification of a prior order includes new and changed conditions); *State ex rel. Weimer v. Indus. Comm.* (1980), 62 Ohio St.2d 159 * * * (continuing jurisdiction exists when prior order is clearly a mistake of fact); *State ex rel. Kilgore v. Indus. Comm.* (1930), 123 Ohio St. 164 * * * (commission has continuing jurisdiction in cases involving fraud); *State ex rel. Manns v. Indus. Comm.* (1988), 39 Ohio St.3d 188 * * * (an error by an inferior tribunal is a sufficient reason to invoke continuing jurisdiction); and *State ex rel. Saunders v. Metal Container Corp.* (1990), 52 Ohio St.3d 85 * * * (mistake must be "sufficient to invoke the continuing jurisdiction provisions of R.C. 4123.52"). Today, we expand the list set forth above and hold that the Industrial Commission has the authority pursuant to R.C. 4123.52 to modify a prior order that is clearly a mistake of law. * * *

{¶ 41} If the commission determines that it has continuing jurisdiction to revisit an issue, its order must state in a clear and meaningful fashion, the basis upon which continuing jurisdiction is being invoked. *State ex rel. Nicholls v. Indus. Comm.* (1998), 81 Ohio St.3d 454.

{¶ 42} In the present case, the commission cited the following reasons for exercising its continuing jurisdiction in the interlocutory order mailed September 21, 2010. The commission stated:

> Specifically, it is alleged that the Staff Hearing Officer's finding of extensive treatment and extensive medication under claim 90-55350 are erroneous inasmuch as the Injured Worker received no physical treatment from 10/1997 to 3/2009, and less than $5000 has been paid in medical

> costs. No payment for medication has been made over the life of this 20-year-old claim and no temporary total disability compensation has been paid. It is further alleged that the Injured Worker voluntarily left the work force in 2000 for reasons other than his industrial injury. Furthermore, the Staff Hearing Officer stated that the Injured Worker testified; however, it was not noted on the face of the order that the Injured Worker attended the hearing.

{¶ 43} As an initial matter, the commission's explanation satisfies the requirements of *Nicholls*. Relator's argument is that the reason provided was an abuse of discretion.

{¶ 44} In the SHO's order granting relator's application for PTD compensation, the SHO specifically stated:

> ** * * He has received an extensive amount of medical treatment through this claim primarily for the very severe degenerative conditions developed in his neck area. He is on an extensive amount of medication to control the pain and alleviate the symptoms. * * **

(Emphasis added.)

{¶ 45} Contrary to the above findings, there is no evidence in the record that relator received an "*extensive amount of medical treatment*" or that he is on an "*extensive amount of medication to control the pain and alleviate the symptoms*."

{¶ 46} In order to determine whether or not the SHO's statement is actually supported by the record, the magistrate has reviewed all the medical reports and finds that there are few references to treatment. Instead, the majority of references are for diagnostic testing. Out of ten references to records received by Dr. Renneker, only one of those records relates to treatment (a prescription for Prednisone) while the remaining nine records relate to diagnostic testing. None of the medical reports Dr. Malinky reviewed pertained to treatment. Apparently, relator informed Dr. Malinky that he received steroid injections from Dr. Higgins; however, relator did not provide any records to establish this. Relator did provide Dr. Malinky with a list of ten different medications he was taking; however, five of those medications are prescribed for heart conditions, one is prescribed for anxiety, one is prescribed for lung disease, one is an anti-inflammatory drug, and one is prescribed for pain. As such, out of the ten medications, only three might

be prescribed to treat the allowed conditions. Dr. Higgins' report does not discuss treatment and his office notes are not in the stipulated evidence. Dr. Stanko noted that relator had not had surgery on his neck. Of the eight records Dr. Stanko reviewed, only one pertained to treatment (epidural injections for his neck) while the remaining pertained to diagnostic testing. Dr. Greer noted that relator informed him that he had no surgeries related to the allowed conditions, he was not involved in any psychological treatment, and was not taking any psychotropic medications. In his application for PTD compensation, relator indicated that his only surgeries involved his goiter/thyroid and heart. Finally, the statement of facts prepared for the PTD hearing lists only diagnostic testing and that approximately $6,000 has been paid for medical care.

{¶ 47} A review of the record demonstrates that there is no evidence that relator had a significant amount of medical treatment or that he was taking an extensive amount of medication to control his pain and alleviate the symptoms. Where there is no evidence to support a finding, there is a clear mistake of fact. The magistrate finds that this does indeed constitute a clear mistake of fact and finds that the commission did not abuse its discretion by exercising its continuing jurisdiction.

{¶ 48} Further, to the extent that relator argues that the BWC was permitted to submit additional evidence to support its claim while he was not, is immaterial. First, there is nothing in the record to indicate that the commission relied on the documents the BWC presented. Second, a review of the medical evidence reveals that the SHO incorrectly stated that relator had received extensive medical treatment and that he was on extensive medication. And third, if relator did indeed attempt to submit new evidence, he could have submitted an affidavit identifying those documents for this court to consider. Relator has presented no such evidence.

{¶ 49} Moving specifically to relator's argument that if there was a mistake of fact, it was inconsequential, relator cites *State ex rel. Gobich v. Indus. Comm.*, 103 Ohio St.3d 585, 2004-Ohio-5990, and *State ex rel. Royal v. Indus. Comm.*, 95 Ohio St.3d 97, 2002-Ohio-1935, in support of his argument. In citing *Gobich*, relator contends that in reality, there is a legitimate disagreement as to evidentiary interpretation which does not establish that an error was clear. The magistrate disagrees with relator's interpretation of the case law and its application to the facts of his case.

{¶ 50} In *Gobich*, John F. Gobich submitted an application for PTD compensation which was granted. Thereafter, the BWC moved for reconsideration; however, its motion contained no new information. The commission's order exercising its continuing jurisdiction to reconsider the case stated:

> "It is the finding of the Industrial Commission that the order of the Staff Hearing Officer is based on clear mistakes of law of such character that remedial action would clearly follow; therefore, the exercise of continuing jurisdiction is appropriate in this case. In granting the injured worker's application for permanent total disability, the Staff Hearing Officer failed to consider the fact that the injured worker was working immediately prior to, and after, the hearing on 01/22/1998."

Id. at ¶11. Thereafter, the commission terminated the payment of Gobich's PTD compensation, declared an overpayment, and issued a declaration of fraud.

{¶ 51} Gobich filed a mandamus complaint in this court alleging that the commission had abused its discretion in reconsidering the earlier SHO's order. This court disagreed and denied the writ. Thereafter, Gobich's appeal was heard before the Supreme Court of Ohio. The *Gobich* court stated:

> Two questions arise from this reasoning: (1) Was there a mistake? (2) If so, was it clear? On close examination, it appears that, regardless of how the bureau tried to characterize it, its complaint with the SHO's order was really an evidentiary one: the bureau produced evidence that it believed established a capacity for sustained remunerative employment, and the SHO found otherwise. *Royal*, however, has specifically stated that a legitimate disagreement as to evidentiary interpretation does not mean that one of them was mistaken and does not, at a minimum, establish that an error was *clear*. Id., 95 Ohio St.3d at 100, 766 N.E.2d 135.

Id. at 17. (Emphasis sic.)

{¶ 52} The facts of *Gobich* are not analogous to the facts presented here. In *Gobich*, the court found that the commission's order was ambiguous. Further, the court determined that, in reality, it was an evidentiary issue. The BWC believed that the SHO did not properly consider the fact that Gobich had been working prior to the PTD hearing as evidence that he was capable of performing some sustained remunerative employment. However, a review of the record indicated that the SHO did consider the fact that relator

had been working prior to the PTD hearing. As the court noted, the SHO concluded that those activities were isolated and brief and did not establish an ability to work on a sustained ongoing basis.

{¶ 53} In the present case, we do not have a legitimate disagreement as to evidentiary interpretation. Instead, the SHO indicated that relator had received extensive treatment and was on extensive medications; however, a review of the evidence presented at the hearing indicated that relator had not received extensive treatment and was not on an extensive amount of medication. There was no legitimate disagreement and *Gobich* does not apply here.

{¶ 54} Relator also cites *Royal*; however, the facts of that case are not analogous either. In *Royal*, Gerald Royal had been granted PTD compensation. The employer filed a motion for reconsideration and the commission granted it. The commission listed the following reasons for exercising its continuing jurisdiction:

> * * * It identified the mistakes as (1) the SHO's misrepresentation of a particular vocational report and (2) the absence of an analysis of nonmedical disability factors.

Id. at 98. Thereafter, the commission considered the matter and in a two-to-one decision, denied relator's application for PTD compensation.

{¶ 55} *Royal* filed a mandamus action in this court, and this court granted a writ of mandamus finding that the language was too vague and that the possibility of an error did not constitute appropriate grounds for exercising continuing jurisdiction.

{¶ 56} The employer filed a mandamus action in the Supreme Court of Ohio. The Supreme Court agreed with this court indicating that the mere possibility of an error is not a proper ground upon which to exercise continuing jurisdiction. The Supreme Court pointed to both *Nicholls* and *State ex rel. Foster v. Indus. Comm.*, 85 Ohio St.3d 320, 1999-Ohio-461, and stated that "a reference to the *possibility* of *unspecified* error was meaningless and prevented both effective rebuttal and judicial review." *Royal* at 99. (Emphasis sic.) Further, the court stated that the commission could not identify the error after exercising continuing jurisdiction because the party opposing the motion cannot challenge the reconsideration in a meaningful way.

{¶ 57} As stated previously, this was not a disagreement as to the interpretation of evidence. Further, the commission clearly identified the reason it was exercising continuing jurisdiction in a meaningful way. As relator states in his brief, he attempted to present evidence that he did receive medical treatment from Medicare, but that he did not submit those bills through his workers' compensation claim. As relator states, "[i]t is certainly not uncommon for providers to pursue Medicare for payment of work related medical expenses. Not only are providers more familiar with Medicare, but it is also much easier and less time consuming to obtain prior authorization through Medicare than it is through BWC." (Relator's brief at 11.)

{¶ 58} The magistrate has no way to determine whether or not relator's contention is true. Further, the magistrate is unable to review the evidence which relator contends he presented after the commission exercised its continuing jurisdiction because relator has not presented those copies with an affidavit. The magistrate can only assume that relator attempted to present evidence that he had received medical treatment for his allowed conditions during the relevant time period. As the commission stated later in its order denying PTD compensation, that evidence was not timely filed and relator failed to seek permission to file them late. While relator argues that the BWC presented untimely evidence proving that the BWC had not made extensive payments to relator over the years, there is no evidence in the record that the commission relied on the BWC's documents. The commission's stated reason for exercising its continuing jurisdiction focused solely on the lack of evidence in the record and that this constituted a clear mistake of fact.

{¶ 59} Relator has not challenged the commission's ultimate denial of his application for PTD compensation; therefore, it is not an issue before the magistrate for consideration.

{¶ 60} Based on the foregoing, it is this magistrate's decision that relator has not demonstrated that the commission abused its discretion in exercising its continuing jurisdiction and this court should deny relator's request for a writ of mandamus.

/s/ *Stephanie Bisca Brooks*
STEPHANIE BISCA BROOKS
MAGISTRATE

NOTICE TO THE PARTIES

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