[Cite as *State ex rel. KPGW Holding Co., L.L.C. v. Indus. Comm.*, 2012-Ohio-5035.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. KPGW Holding Company, LLC,	:	
Relator,	:	
v.	:	No. 11AP-407
Industrial Commission of Ohio and Janet Claytor,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on October 30, 2012

Habash & Reasoner LLC, and *Dennis H. Behm*, for relator.

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

Agee Clymer Mitchell & Laret, LLP, and *Katherine E. Ivan*, for respondent Janet Claytor.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

DORRIAN, J.

{¶ 1} Relator, KPGW Holding Company, LLC ("relator"), filed an original action seeking a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to reverse the order of its district hearing officer ("DHO") allowing the workers' compensation claim of respondent Janet Claytor ("claimant") for the condition of bilateral carpal tunnel syndrome or, in the alternative, to grant relator's motion for continuing jurisdiction over that claim.

{¶ 2} As detailed more fully in the magistrate's findings of fact, this case arises from two workers' compensation claims that claimant filed. Claimant filed the first claim in March 2009 and the second claim in October 2009. In May 2009, the commission disallowed claimant's first claim in its entirety, including her claim for carpal tunnel syndrome. There was no direct appeal from the DHO order disallowing the first claim. In January 2010, the commission allowed claimant's second claim for the condition of bilateral carpal tunnel syndrome. There was no direct appeal from the DHO order allowing the second claim. In April 2010, relator filed a motion requesting that the commission exercise continuing jurisdiction over the second claim. The commission denied relator's motion for continuing jurisdiction. Relator then filed the present mandamus action.

{¶ 3} This court referred the 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, which includes findings of fact and conclusions of law and is appended to this decision, recommending that this court deny the requested writ.

{¶ 4} Relator submitted objections to the magistrate's decision, but did not separately enumerate its objections. It appears that relator has two objections: first, that the magistrate erred by failing to address its constitutional claims related to notice and due process, and second, that the magistrate erred by failing to address its argument that claimant's second claim was barred by res judicata arising from the commission's denial of claimant's first claim. Because both of relator's objections deal with the magistrate's failure to rule on relator's substantive arguments, we will address them together.

{¶ 5} In order to be entitled to a writ of mandamus, a relator must establish a clear legal right to the relief sought, a clear legal duty on the part of the respondent to perform the requested act, and the lack of an adequate remedy in the ordinary course of law. *State ex rel. United Auto., Aerospace & Agricultural Implement Workers of Am. v. Bur. of Workers' Comp.*, 108 Ohio St.3d 432, 2006-Ohio-1327, ¶ 34; *State ex rel. Medcorp, Inc. v. Ryan*, 10th Dist. No. 06AP-1223, 2008-Ohio-2835, ¶ 8. Generally, a clear legal right exists where an administrative agency abuses its discretion by entering an order not supported by any evidence on the record; however, when the record contains some evidence to support the agency's finding, there has been no abuse of discretion and

mandamus will not lie. *See State ex rel. Brown v. Indus. Comm.*, 13 Ohio App.3d 178 (10th Dist.1983).

{¶ 6} The magistrate concluded that relator was not entitled to mandamus relief because it failed to appeal the DHO order granting claimant's second claim. Citing this court's prior decision in *State ex rel. Barko Ents., Inc. v. Indus. Comm.*, 10th Dist. No. 09AP-572, 2010-Ohio-5435, the magistrate concluded that a direct administrative appeal of the DHO order is an adequate administrative remedy and that relator could not eliminate the effect of its failure to take such an appeal by filing a motion for continuing jurisdiction. The magistrate reasoned that, because relator had an adequate remedy at law, this court could not grant a writ of mandamus ordering the commission to exercise continuing jurisdiction over claimant's second claim.

{¶ 7} After conducting an independent review of the record, we agree with the magistrate's conclusion that mandamus relief in this case is barred by relator's failure to pursue an adequate administrative remedy by appealing the DHO order granting claimant's second claim. In addition to our decision in *Barko*, this court has ruled similarly in several prior cases. *See State ex rel. Evans v. Indus. Comm.*, 10th Dist. No. 10AP-700, 2011-Ohio-5763, ¶ 8; *State ex rel. Borchert v. Greenbriar Health Care Ctr.*, 10th Dist. No. 06AP-88, 2007-Ohio-940, ¶ 7; *State ex rel. Bowman v. Indus. Comm.*, 10th Dist. No. 90AP-637 (Oct. 3, 1991). We note that there may be potential scenarios where it may be appropriate for a court to grant mandamus relief following the denial of a motion for continuing jurisdiction even where a party failed to appeal a prior order, such as when the request for continuing jurisdiction is based on new or changed circumstances. *See State ex rel. Reeves v. Indus. Comm.*, 53 Ohio St.3d 212, 213 (1990) (stating that "[a]n available administrative remedy precludes mandamus" and noting that the appellant could have, but did not, appeal a DHO order terminating her disability compensation, but also stressing that the case was distinguishable from one where a new period of disability was being alleged pursuant to the commission's continuing jurisdiction). However, those are not the facts presented in this case, and we conclude that relator's request for mandamus is barred by its failure to appeal the prior order. Had relator taken a direct appeal from the DHO order allowing claimant's second claim, it would have had an opportunity to raise the same argument that formed the basis for its

motion for continuing jurisdiction—i.e., that denial of claimant's first claim constituted res judicata precluding the commission from granting claimant's second claim.

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

{¶ 9} Following an independent review of the record, we find that the magistrate has properly determined the facts and applied the appropriate legal standard. Therefore, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law. In accordance with the magistrate's decision, we deny relator's requested writ of mandamus.

Objections overruled; writ denied.

BROWN, P.J., and FRENCH, J., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. KPGW Holding Company, LLC,	:	
Relator,	:	
v.	:	No. 11AP-407
Industrial Commission of Ohio and Janet Claytor,	:	(REGULAR CALENDAR)
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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 23, 2012

Habash & Reasoner LLC, and *Dennis H. Behm*, for relator.

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

Agee Clymer Mitchell & Laret, LLP, and *Katherine E. Ivan*, for respondent Janet Claytor.

IN MANDAMUS

{¶ 10} In this original action, relator, KPGW Holding Company, LLC ("relator" or "KPGW"), requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate the December 8, 2010 order of its staff hearing officer ("SHO") that denied relator's April 20, 2010 motion for the exercise of continuing jurisdiction, and to enter an order that exercises continuing jurisdiction over the

January 13, 2010 order of its district hearing officer ("DHO") that allowed industrial claim No. 09-853905 for "bilateral carpal tunnel syndrome."

Findings of Fact:

{¶ 11} 1. On March 25, 2009, respondent Janet Claytor ("claimant") filed a claim for workers' compensation benefits on a form captioned "First Report of an Injury, Occupational Disease or Death" ("FROI-1") and provided by the Ohio Bureau of Workers' Compensation ("bureau"). The FROI-1 was assigned claim No. 09-813260.

{¶ 12} 2. The FROI-1 is divided into three sections. The first section is to be completed and signed by the claimant. The second section is to be completed and signed by the healthcare provider. The third section is to be completed by the employer and is to include a certification or rejection of the claim.

{¶ 13} 3. Earlier, on January 27, 2009, claimant was examined by John Wellman, M.D. In a two-page narrative report, Dr. Wellman listed November 11, 2008 as the "[d]ate of injury." Dr. Wellman's report states in part:

> **Chief Complaint**: Ms. Claytor is here for evaluation of her right wrist. She has a history of "moderate carpal tunnel" of her left wrist, "severe carpal tunnel of her right hand," which was diagnosed about 2004. She has a history of seeing her family physician and orthopedist Dr. Ghany. She has had cortisone injections in the past somewhere between 2004 and 2006. She states, "I need something done for the right." She complains of swelling of the right wrist, constant numbness of the fingers 1-4, difficulty sleeping. Pain and numbness wake her up. * * *
>
> * * *
>
> **Objective Evaluation**: Does demonstrate in her right upper extremity positive Phalen's and Tinel's with significantly reduced range of motion and weakness of gripping and grasping. The left hand and wrist are essentially negative. There is a negative Phalen's, equivocal Tinel's.
> * * *
>
> **Assessment**: Moderately severe right carpal tunnel syndrome.
>
> **Discussion**: This entity has been present and recognized and seen in the medical community since 2004. She presents

> now with a date of injury of November 11, 2008. This is obviously an occupational disease, not an occupational injury and will need to be certified or accepted by the employer as a legitimate Workers' Comp claim before we can proceed.
>
> **Plan**: * * * She is placed on restrictions: May return to work on January 27, 2009. She is to limit the use of the right hand and arm, must wear her right wrist splint to minimize repetitive activities[.] * * *

{¶ 14} 4. On January 27, 2009, claimant completed and signed the first section of the FROI-1 that was filed March 25, 2009, as earlier noted. Two dates are listed in the space requiring a "Date of injury/disease." Those dates are November 11, 2008 and January 27, 2009. The FROI-1 asks the claimant to give a "Description of accident" in the space provided. That space is left blank.

{¶ 15} 5. On January 28, 2009, Dr. Wellman completed and signed the section of the FROI-1 that was filed March 25, 2009. For the diagnosis, Dr. Wellman wrote "354.0 – Right Carpal Tunnel Syndrome."

{¶ 16} 6. Apparently, KPGW refused to certify the industrial claim.

{¶ 17} 7. On April 13, 2009, the bureau mailed an order denying the allowance of claim No. 09-813260. The order indicates that the claim is disallowed for bilateral carpal tunnel syndrome and for left deQuervain tenosynovitis. The bureau's order states:

> The application for workers' compensation benefits was not filed within two years of the disease.
> This decision is based on:
>
> Office note dated 7-8-2005 and EMG Report of 8-30-2006 indicate that the injured worker has been treated for these conditions prior to the two-year statute of limitations.

{¶ 18} 8. Claimant administratively appealed the bureau's order of April 13, 2009.

{¶ 19} 9. Following a May 12, 2009 hearing, a DHO issued an order that disallows the industrial claim in its entirety. The DHO's order explains:

> This claim was disallowed by the Bureau of Workers' Compensation based upon statute of limitations. District Hearing Officer disagrees with that decision for two reasons. However, the second reason why this claim is not barred by

the statute of limitations is also the reason why it would be denied on the merits.

First, Ms. Claytor alleges carpal tunnel syndrome. The Bureau of Workers' Compensation treated this as an occupational disease claim, and denied it because she was first diagnosed with this condition in 2004. However, even assuming that this was an occupational disease claim, Ms. Claytor testified that she was never told this diagnosis until 2009. Moreover, the first medical opinion that her carpal tunnel syndrome was related to work did not come until the FROI-1 was filled out on 01/28/2009. She did not miss any work due to this condition until 02/24/2009. The claim was filed one month later, on 03/25/2009. Therefore, if this truly were an occupational disease claim, the statute of limitations would not have expired under White v. Mayfield [(1998), 37 Ohio St.3d 11].

Second, based on Ms. Claytor's testimony and the medical evidence in file, it is quite clear that she is NOT requesting that this be allowed as an occupational disease. Instead, she acknowledges that she had pre-existing problems, and alleges that these were made worse when she fell onto her hands at work on 09/15/2008. Therefore, this is not an occupational disease claim at all, but an acute injury claim. The alleged date of injury was 09/15/2008. Since the claim was filed on 03/25/2009, it was well within the two year statute of limitations.
However, the fact that this is an injury claim instead of an occupational disease claim, raises two separate merits problems for Ms. Claytor.

First, Ms. Claytor must prove that she had a substantial aggravation of the pre-existing condition. An EMG done two years prior to her fall showed severe carpal tunnel syndrome. No EMG was taken after she fell. There is no medical report on file that opines that her pre-existing condition was aggravated by the fall on 09/15/2008. Ms. Claytor failed to meet her burden of proving that her fall on 09/15/2008 substantially aggravated her pre-existing carpal tunnel syndrome, rather than being an exacerbation, flare-up, or non-substantial aggravation of her long-standing problems.

Second, when Ms. Claytor fell on 09/15/2008, the plant where she worked was owned by a different company. The Employer she chose to file this claim against did not become

> the owner until 09/29/2008. Unlike an occupational disease claim in which last injurious exposure would allow a claim to be brought against this Employer, an injury claim must be brought against the entity that actually employed Ms. Claytor on the date she alleges that she fell, 09/15/2008. Therefore, Ms. Claytor failed to meet her burden of proving that she was an employee of the named Employer on the date she was allegedly hurt.

(Emphasis sic.)

{¶ 20} 10. The May 12, 2009 DHO's order was not administratively appealed.

{¶ 21} 11. By letter to the bureau dated July 2, 2009, claimant's counsel advised:

> Please be advised that we now represent Ms[.] Claytor in the above-referenced BWC claim. Enclosed is an R-2 card for filing[.] Upon speaking with Ms[.] Claytor, I now have the authority to WITHDRAW the First Report of Injury alleging a September 15, 2008 work-related incident. We are withdrawing the claim in its entirety. * * *

(Emphasis sic.)

{¶ 22} 12. On July 23, 2009, claimant was examined, at her own request, by Charles B. May, D.O. In his two-page narrative report dated September 7, 2009, Dr. May states:

> As you know, I did have a chance to examine Janet Claytor in my office on 07/23/2009 in regards to bilateral wrist pain, bilateral hand paresthesias, and bilateral elbow pain[.] Ms[.] Claytor does have a rather long and complicated work history[.]
>
> I have had the opportunity to review medical records dating back to 2005[.]
>
> Ms[.] Claytor apparently worked in a warehouse from 1998 to 2002[.] From 2002 to 2006, she apparently had [an] office position involving repetitive use of both upper extremities on a keyboard[.] In 2005, she became symptomatic and was diagnosed with bilateral de Quervain tendonitis and bilateral carpal tunnel syndrome. This diagnosis was confirmed by Dr[.] Ghany and by electrodiagnostic studies. The EMG was performed on 08/30/2006[.] Ms[.] Claytor was treated with injections for the bilateral de Quervain tendonitis and treated with oral

> nonsteriodal anti-inflammatory agents and splinting for her bilateral carpal tunnel syndrome[.]
>
> In late 2008, Ms[.] Claytor changed jobs back to a warehouse type of position and thus stopped the repetitive typing and keying that she had performed[.] In fact, her carpal tunnel symptoms abated and remained so until late summer or early fall of 2008 when she began to experience pain and paresthesias in both hands[.] This is again while she was working in the warehouse[.] She also describes an "injury" on or about 09/15/2008 when she fell on both hands to the ground but states that she was experiencing pain and paresthesias in her wrists and both hands prior to that date[.] She was evaluated by Dr[.] Wellman at Adena Occupational Health on 01/27/2009 and was sent for an EMG and nerve conduction studies of both upper extremities and carpal tunnel syndrome was again diagnosed bilaterally by way of EMG performed on 07/21/2009[.]
>
> When I examined Ms[.] Claytor in the office on 07/23/2009, she did have subjective complaints consistent with bilateral carpal tunnel syndrome[.] She did not have any specific complaints or physical findings at that time consistent with bilateral de Quervain tendonitis[.]
>
> It was my medical opinion at that time that Ms[.] Claytor was suffering from bilateral carpal tunnel syndrome[.] After reviewing Ms[.] Claytor's affidavit of work history and symptomatology starting from 2005 to the present, it is my medical opinion that Janet Claytor developed bilateral de Quervain tendonitis as well as bilateral carpal tunnel syndrome as a direct and proximate result of repetitive use of both upper extremities from her job requiring repetitive typing and keying at work[.]

{¶ 23} 13. On October 29, 2009, claimant filed another FROI-1 that was assigned claim No. 09-853905. On the form, claimant listed July 29, 2009 as the "Date of Injury/Disease." Under "Description of Accident," claimant wrote:

> Trip on rock, fell, hands hit jack stand fell to ground, cut kneecap problems with both hands and elbows, hurting and swelling up.

{¶ 24} 14. Apparently, relator refused to certify the FROI-1 filed October 29, 2009.

{¶ 25} 15. Earlier, on October 27, 2009, claimant's counsel sent a letter to the bureau stating:

> Claimant, through her attorney, respectfully request[s] that her BWC claim be recognized for the conditions of bi-lateral carpal tunnel syndrome and bi-lateral DeQuervains tendonitis based on the enclosed medical evidence, and more specifically, the EMG results of 7/29/09 [sic], and the report of Dr[.] Charles May dated 7/7/09[sic][.]
>
> Although Ms[.] Claytor originally began experiencing symptoms as early as 2005, those symptoms abated and then returned, based on repetitive work activity performed at PPG Industries[.] The[r]e has been no official connection to work activity until at the earliest, 1/27/09, the initial appointment with Dr[.] Wellman[.]

{¶ 26} The parties agree that claimant's counsel was referring to Dr. May's report of September 7, 2009. Also, the EMG results are dated July 21, 2009, as found in the stipulation of evidence.

{¶ 27} 16. On November 23, 2009, the bureau mailed an order that disallows the industrial claim (No. 09-853905) filed October 29, 2009. The bureau order explains:

> First Report of Injury and injured worker's statement during initial contact give an injury description and date of injury of 7-29-2009. The injured worker has been off work on disability since 7-23-2009 (six days prior to injury). She therefore was not working on 7-29-2009 and could not have sustained the injury and resulting injuries as described.

{¶ 28} 17. Claimant administratively appealed the bureau's November 23, 2009 order.

{¶ 29} 18. Following a January 13, 2010 hearing, a DHO issued an order that vacates the bureau's November 23, 2009 order and allows the industrial claim for "bilateral carpal tunnel syndrome." The DHO's order explains:

> It is the order of the District Hearing Officer that the FROI-1 First Report of an Injury filed 10/29/2009 is granted to the extent of this order.
>
> The claim is ALLOWED for BILATERAL CARPAL TUNNEL SYNDROME. The District Hearing Officer finds that the Injured Worker was injured in the course of and arising out

> of her employment. Specifically, her repetitive job duties of typing in 2005 and 2006 and then in later years, repetitive lifting. The District Hearing Officer relies on the EMG/NCV which confirms the diagnosis, the office notes from Dr. Wellman and the 09/07/2009 report of Dr. May.
>
> Because Dr. Wellman's and Dr. May's additional diagnoses are conflicting (DeQuervains' tendonitis vs. lateral epicondylitis), neither of those conditions are allowed or disallowed at this time.

(Emphasis sic.)

{¶ 30} 19. The DHO's order of January 13, 2010 was not administratively appealed.

{¶ 31} 20. On April 20, 2010, relator moved the commission for the exercise of continuing jurisdiction over the January 13, 2010 DHO's order that relator admittedly failed to appeal.

{¶ 32} 21. Following an October 27, 2010 hearing, a DHO issued an order denying relator's April 20, 2010 motion. The DHO's order of October 27, 2010 explains:

> It is the order of the District Hearing Officer that the C-86 Motion, filed by Employer on 04/20/2010, is denied.
>
> The Industrial Commission and its hearing officers have powers of continuing jurisdiction to modify or vacate prior decisions. However, these powers are not unlimited. The grounds for continuing jurisdiction are as follows: new and changed circumstances, fraud, clear mistake of fact, clear mistake of law, or error of an inferior tribunal. In this case, the District Hearing Officer finds that the Employer has not met its burden of proving sufficient grounds for the District Hearing Officer to exercise continuing jurisdiction over the order of the District Hearing Officer from a hearing held on 01/13/2010.
>
> By way of brief history, the District Hearing Officer order of 05/12/2009 denied the Injured Worker's claim as against KPGW Holding Company, LLC ("KPGW") for carpal tunnel syndrome. Based on the evidence in the claim file and the Injured Worker's testimony, the District Hearing Officer found that "it is quite clear that she is NOT requesting that this be allowed as an occupational disease." (Emphasis sic.) The District Hearing Officer indicated that the Injured

Worker had pre-existing problems that were made worse when she fell onto her hands at work on 09/15/2008. However, the District Hearing Officer denied the claim based on the Injured Worker's failure to meet her burden of proof. The District Hearing Officer listed several reasons why he denied the claim, one of which was that the Injured Worker actually did not work for KPGW at the time of the alleged injury on 09/15/2008 since KPGW did not buy the company from PPG Industries, Inc. ("PPG") until 09/29/2008. PPG was not invited to participate in the hearing held on 05/12/[2]009 via a Notice of Hearing. The Employer, KPGW, appealed the District Hearing Officer order; however, the Employer subsequently withdrew its appeal. Therefore, the order of the District Hearing Officer dated 05/12/2009, which denied an injury claim for date of injury 09/15/2008 as against KPGW, became a final order on the merits.

Thereafter, the Injured Worker filed another workers' compensation claim. Counsel for the Injured Worker submitted an affidavit of the Injured Worker, dated 07/20/2009, which indicated that she developed bilateral carpal tunnel syndrome and bilateral deQuervain's tendonitis "related to her repetitive work duties at PPG Industries (now KPGW as of 9/28/08)." KPGW was listed as the Employer and was sent the Notice of Hearing for the District Hearing Officer hearing held on 01/13/2010. Mr. Willard attended the hearing on behalf of KPGW. Mr. Willard is an attorney. It is not known whether Mr. Willard acted in the capacity of any attorney or a third-party administrator representative at the hearing on 01/13/2010. In any event, as the result of the hearing held on 01/13/2010, the District Hearing Officer allowed the claim as an occupational disease for bilateral carpal tunnel syndrome as against KPGW as the result of her "repetitive job duties of typing in 2005 and 2006 and then in later years, repetitive lifting." There was no appeal filed from this order by any party. Therefore, the 01/13/2010 District Hearing Officer order became a final order. It is from the 01/13/2010 District Hearing Officer order that the Employer seeks continuing jurisdiction relief.

At the hearing before this District Hearing Officer, Employer's counsel argued his bases for the District Hearing Officer to exercise continuing jurisdiction. First, counsel argued, the District Hearing Officer in her order of

01/13/2010, did not have authority to convert the claim into an occupational disease, carpal tunnel syndrome claim. The District Hearing Officer rejects this argument for the simple fact that the 07/20/2009 Injured Worker affidavit filed in support of the claim for workers' compensation benefits clearly indicates that the Injured Worker was alleging bilateral carpal tunnel syndrome as the result of her repetitive job duties.

Counsel for the Employer argued secondly that the prior District Hearing Officer order of 05/12/2009 was not referenced by the District Hearing Officer in her order of 01/13/2010. This contention is accurate. However, a hearing officer is not required to reference prior orders, and the District Hearing Officer's failure to reference the District Hearing Officer order [of] 05/12/2009 does not give rise to continuing jurisdiction, especially since the District Hearing Officer order of 05/12/2009 denied the prior claim as an injury claim, and the District Hearing Officer on 01/13/2010 allowed a new occupational disease claim. Therefore, counsel's second argument is rejected.

Third, counsel argued that it was a clear mistake for the District Hearing Officer to rely on the 09/07/2010 report of Dr. May in her order because the Injured Worker performed typing and keying only for PPG, not KPGW, and Dr. May causally related the bilateral carpal tunnel syndrome to "her job requiring repetitive typing and keying at work." The District Hearing Officer finds that this too is accurate. However, the District Hearing Officer in her order of 01/13/2010 also specifically relied, in relevant part, on Dr. Wellman's office notes, which make it clear that Dr. Wellman was aware of the Injured Worker's job duties for both employers. In addition, Dr. Wellman indicates in his 02/24/2009 office note that the carpal tunnel syndrome resulted from "repetitive stress syndrome activities which classify this claim for all the diagnoses as an occupational illness claim." Prior to that, Dr. Wellman in his 01/27/2009 note indicated in relevant part, "This is obviously an occupational disease, not an occupational injury and will need to be certified or accepted by the employer as a legitimate Workers' Comp claim before we can proceed." Therefore, the District Hearing Officer finds that the 01/13/2010 District Hearing Officer order is supported by some evidence. Accordingly, Employer's counsel's third basis for continuing jurisdiction is without merit.

Fourth, Employer's counsel argued that the 05/12/2009 decision of the District Hearing Officer, which disallowed an injury claim for carpal tunnel syndrome, barred through res judicata the District Hearing Officer in her order of 01/13/2010 from allowing bilateral carpal tunnel syndrome as an occupational disease. This argument also has no merit. Res judicata requires identity of issues. This District Hearing Officer is unwilling to stretch the denial of a industrial injury claim, which resulted from the Injured Worker falling onto her hands at work on 09/15/2008, into a complete bar for a subsequent occupational disease claim resulting from repetitive job duties. Equally as important is the fact that the fall on 09/15/2008 occurred while in the employ of PPG, not this Employer, KPGW, which is part of the rationale used by the District Hearing Officer in his order of 05/12/2009 to deny the earlier injury claim. Therefore, it does not even logically, let alone *legally*, follow that a decision on the merits indicating that an injury did *not* occur while in the employ of the named Employer should bar litigation of an occupational disease that *did* occur in the course of and arising out of employment with the Employer. As such, this too violates the identity of issues principle.

Fifth, counsel for the Employer argued that the District Hearing Officer did not follow Hearing Officer Manual Policy Memo K1, which requires express denial or grant language of an issue being requested. The District Hearing Officer stated at the bottom of her order of 01/13/2010 that deQuervain's tendonitis and lateral epicondylitis were neither allowed nor disallowed due to conflicting evidence. While the District Hearing Officer agrees with Employer's counsel that this violates Memo K1, the District Hearing Officer finds that the Employer or its counsel could have appealed the District Hearing Officer order of 01/13/2010 and argued this position to a Staff Hearing Officer to cure the Memo K1 error, and also argued all of the positions described above to a Staff Hearing Officer. To the contrary, the Employer sat on its rights and did not exhaust its administrative remedies by not appealing the District Hearing Officer order of 01/13/2010. A motion for continuing jurisdiction is not a replacement for a timely filed appeal. Finally, while the District Hearing Officer recognizes that Commission orders have no precedential [sic] effect, the significant distinguishing fact about the 11/09/2009 Commission decision in claim 08-883141 submitted for the District

> Hearing Officer's consideration is that the Employer in that case actually appealed the Staff Hearing Officer order that did not address all issues presented and addressed by the District Hearing Officer, which was in violation of Memo K1. Accordingly, Employer's counsel's fifth basis for continuing jurisdiction is rejected.
>
> For all the reasons discussed above, the Employer's C-86 Motion, requesting the Industrial Commission to exercise continuing jurisdiction, is denied. The District Hearing Officer order of 01/13/2010 shall remain in full force and effect.

(Emphasis sic.)

{¶ 33} 22. Relator administratively appealed the DHO's order of October 27, 2010.

{¶ 34} 23. Following a December 8, 2010 hearing, an SHO issued an order that affirms the DHO's order of October 27, 2010. The SHO's order explains:

> The matter at issue this date was raised by the Employer's C-86 Motion filed 04/20/2010, asking for the exercise of continuing jurisdiction with reference to a District Hearing [O]fficer order of 01/13/2010, which had allowed this claim for "bilateral carpal tunnel syndrome." That order dated 01/13/2010 was not appealed.
>
> In requesting the exercise of continuing jurisdiction to revisit the issue of allowance, the Employer raises numerous points. First, it is found to not be a basis for exercising continuing jurisdiction for the reason that other relevant claims were not shown as being reference claims. There has been some confusion in this matter, regarding exactly when the alleged conditions arose, and what gave rise to those conditions. However, the proper way to correct alleged deficiencies in an order on this basis is to appeal the order.
>
> Next, it is alleged that the questions of allowance of carpal tunnel syndrome and of DeQuervain's tenosynovitis are Res Judicata per the District Hearing Officer order dated 05/12/2009 in claim number 09-813260. However, in that order the District Hearing Officer order specified that he was addressing a specific incident occurring on 09/15/2008, when the Injured Worker stepped on a rock and fell, falling forward and landing on her hands and striking her right knee. He went on to discuss aspects of aggravation and substantial aggravation, as those arguments relate to a

> specific incident occurring in the presence of pre-existing problems. The District Hearing Officer on 05/12/2009 addressed causation by way of a specific incident, whereas the District Hearing Officer on 01/13/2010 addressed causation by way of a repetitive job duties rationale. It is found that there is not the requisite identify [sic] of issues to support the assertion of Res Judicata.
>
> A basis for continuing jurisdiction is also alleged in that the District Hearing Officer on 01/13/2010 specifically indicated that she was not ruling on diagnoses mentioned in some of the medical evidence, because there was conflicting evidence. A District Hearing Officer should address all conditions asserted on the FROI-1. If that is not done, the way to correct that error is by way of appeal. It is further asserted that it was a mistake of law for the District Hearing Officer to proceed to consider an occupational disease condition when the FROI-1 appears to refer to a specific incident. There is no evidence that this argument was raised at the District Hearing Officer hearing on 01/13/2010, and once again, that order was not appealed. Notices of Hearing do routinely indicate that, for allowance of claim issues, the issue to be decided is "Injury or Occupational Disease Allowance." Lastly, there is an alleged mistake of fact in relying on Dr. May to support the allowance of the claim, when there may have been some question as far as when the activities and job duties he cited had actually occurred. One complicating factor herein has been that the Employer changed corporate forms and risk numbers on or about 09/29/2008 when Pittsburgh Glass Works was bought out by KPGW Holding Company. This assertion was not raised on appeal, and is not now a basis to re-open the allowance question in this claim.
>
> As the points raised by the Employer have been considered by the District Hearing Officer and by this Hearing Officer, and rejected, it is therefore ordered that the Employer's request that the Commission exercise continuing jurisdiction over the issue of allowance in this claim is denied. The District Hearing Officer order of 01/13/2010 remains in full force and effect.

{¶ 35} 24. On February 4, 2011, another SHO mailed an order refusing relator's administrative appeal from the SHO's order of December 8, 2010.

{¶ 36} 25. On March 22, 2011, the three-member commission issued an order denying relator's request for reconsideration.

{¶ 37} 26. On May 3, 2011, relator, KPGW Holding Company, LLC, filed this mandamus action.

Conclusions of Law:

{¶ 38} This action is barred by a plain and adequate remedy at law that relator failed to pursue. Thus, it is the magistrate's decision that this court deny relator's request for a writ of mandamus, as more fully explained below.

{¶ 39} Mandamus will not lie where the relator has a plain and adequate remedy at law. *State ex rel. Berger v. McMonagle* (1983), 6 Ohio St.3d 28. The failure to pursue an adequate administrative remedy bars mandamus. *State ex rel. Reeves v. Indus. Comm.* (1990), 53 Ohio St.3d 212.

{¶ 40} Relator had a statutory right under R.C. 4123.511(C) to appeal the January 13, 2010 DHO's order to an SHO. The statutory right to appeal the January 13, 2010 DHO's order constitutes an adequate administrative remedy that bars this mandamus action if it was not pursued. Id.

{¶ 41} Notwithstanding its failure to pursue the adequate administrative remedy, relator moved the commission to exercise its continuing jurisdiction over the DHO's order of January 13, 2010.

{¶ 42} Continuing jurisdiction is not unlimited. Its prerequisites are: (1) new and changed circumstances; (2) fraud; (3) clear mistake of fact; (4) clear mistake of law; and (5) error by an inferior tribunal. *State ex rel. Gobich v. Indus. Comm.*, 103 Ohio St.3d 585, 2004-Ohio-5990; *State ex rel. Royal v. Indus. Comm.* (2002), 95 Ohio St.3d 97; *State ex rel. Foster v. Indus. Comm.* (1999), 85 Ohio St.3d 320; and *State ex rel. Nicholls v. Indus. Comm.* (1998), 81 Ohio St.3d 454.

{¶ 43} While relator's failure to appeal the DHO's order of January 13, 2010 did not prohibit the commission from exercising its continuing jurisdiction, *State ex rel. Scott v. Ohio Bur. of Workers' Comp.*, 73 Ohio St.3d 202, 1995-Ohio-132, it does prohibit this court from issuing a writ of mandamus.

{¶ 44} Speaking through its magistrate, this court, in *State ex rel. Barko Ents., Inc. v. Indus. Comm.*, 10th Dist. No. 09AP-572, 2010-Ohio-5435, ¶29, stated:

> Relator cannot eliminate the effect of its failure to administratively appeal the bureau's order by subsequently filing a motion for the exercise of continuing jurisdiction. Whether the commission rightly or wrongly determined not to exercise continuing jurisdiction is not an issue before this court because relator failed to administratively appeal the bureau's order.

{¶ 45} This court's statement in *Barko* is equally applicable here. That is, relator cannot eliminate the effect of its failure to administratively appeal the DHO's order of January 13, 2010 (that relator seeks to vacate) by subsequently filing a motion for the exercise of continuing jurisdiction. Whether or not the doctrine of res judicata should have barred the commission from allowing industrial claim No. 09-853905 is not an issue before this court because relator failed to administratively appeal the DHO's order.

{¶ 46} Accordingly, for all the above reasons, it is the magistrate's decision that this court deny relator's request for a writ of mandamus.

/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).