[Cite as *State ex rel. Allied Sys. Holdings, Inc., v. Donders*, 2012-Ohio-5855.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Allied Systems Holdings, Inc.,	:	
Relator,	:	
v.	:	No. 11AP-960
Joseph L. Donders, Honeywell International, Inc., and Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on December 11, 2012

Scott, Scriven & Wahoff, LLP, William J. Wahoff, *Richard Goldberg*, and *Nelva J. Smith*, for relator.

Agee, Clymer, Mitchell & Laret, *Katherine E. Ivan*, *Eric B. Cameron, Robert M. Robinson,* and *C. Russell Canestraro,* for respondent Joseph L. Donders.

Reminger Co., L.P.A., *Mick L. Proxmire,* and *Melvin Davis* for respondent Honeywell International, Inc.

Michael DeWine, Attorney General, and *Cheryl J. Nester*, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO MAGISTRATE'S DECISION

SADLER, J.

{¶ 1} Relator, Allied Systems Holdings, Inc., commenced this original action requesting a writ of mandamus ordering respondent Industrial Commission of Ohio

("commission") to vacate its order exercising R.C. 4123.52 continuing jurisdiction over a 1999 claim involving one of relator's employees, Joseph L. Donders ("claimant"), and granting the motion of respondent Honeywell International, Inc. ("Honeywell") to establish relator as the proper employer responsible for claimant's claim.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} This matter was referred to a court-appointed magistrate 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. Therein, the magistrate concluded: (1) the commission did not abuse its discretion by exercising its continuing jurisdiction and granting Honeywell's motion to designate relator as the proper employer in claimant's claim; and (2) the commission did not abuse its discretion by finding the doctrine of laches inapplicable to this matter. Accordingly, the magistrate determined that this court should deny relator's request for a writ of mandamus.

II. OBJECTIONS

{¶ 3} Relator has filed the following six objections to the magistrate's decision:

> **OBJECTION NO. 1:**
>
> THE MAGISTRATE INCORRECTLY STATED IN FINDING OF FACT NO. 5 THAT IT IS UNDISPUTED RUSSELL FIGURES, A CLAIMS ADJUSTER FOR RELATOR'S (THEN) THIRD PARTY ADMINISTRATOR, LISTED THE POLICY NUMBER FOR ALLIED SIGNAL, INC. ON THE FROI-1 FORM FOR CLAIMANT DONDERS' MAY 1999 WORK INJURY WITH RELATOR.
>
> **OBJECTION NO. 2:**
>
> THE MAGISTRATE ERRED TO STATE THAT THE INDUSTRIAL COMMISSION PROVIDED AN EXPLANATION WITHIN ITS SEPTEMBER 12, 2011 ORDER TO SUPPORT ITS EXERCISE OF CONTINUING JURISDICTION AS TO HOW HONEYWELL INTERNATIONAL, INC.'S FILING OF ITS MOTION TO ESTABLISH THE PROPER EMPLOYER MORE THAN ELEVEN YEARS AFTER THE ASSIGNMENT OF CLAIMAINT DONDERS' 1999 WORKERS' COMPENSATION CLAIM WAS WITHIN A REASONABLE PERIOD OF TIME.

OBJECTION NO. 3:

THE MAGISTRATE ERRED TO FIND THAT, GIVEN THE SPECIFIC FACTS OF THIS CASE, THE INDUSTRIAL COMMISSION'S EXERCISE OF ITS CONTINUING JURISDICTION WITHIN A TEN-YEAR TIME FRAME OVER HONEYWELL INTERNATIONAL, INC.'S MOTION TO ESTABLISH PROPER EMPLOYER WAS "NOT UNREASONABLE."

OBJECTION NO. 4:

THE MAGISTRATE APPLIED THE WRONG LEGAL STANDARD IN ADDRESSING WHETHER THE INDUSTRIAL COMMISSION ABUSED ITS DISCRETION IN REFUSING TO APPLY THE DOCTRINE OF LACHES TO HONEYWELL INTERNATIONAL, INC.'S FILING OF ITS MOTION FOR PROPER EMPLOYER.

OBJECTION NO. 5:

EVEN IF THE INDUSTRIAL COMMISSION HAD CONTINUING JURISDICTION TO ACT ON HONEYWELL INTERNATIONAL, INC.'S MOTION TO ESTABLISH PROPER EMPLOYER, THE DOCTRINE OF LACHES BARRED HONEYWELL INTERNATIONAL, INC. FROM PURSUING ITS MOTION TO ESTABLISH PROPER EMPLOYER IN CLAIM NO. 99-563014.

OBJECTION NO. 6:

THE MAGISTATE ERRED TO FIND THAT RELATOR HAD NOT DEMONSTRATED THAT IT HAD SUFFERED MATERIAL PREJUDICE AS A RESULT OF HONEYWELL INTERNATIONAL, INC.'S UNEXPLAINED FAILURE TO OBJECT TO THE BWC'S ASSIGNMENT OF CLAIM NO. 99-563014 WITHIN A REASONABLE TIMEFRAME.

{¶ 4} In its first objection, relator challenges finding of fact No. 5, wherein the magistrate states that: "It is also undisputed that 20003261-2, the policy number Mr. Figures listed on claimant's FROI-1, is actually the correct policy number for Allied Signal, Inc. ("Allied Signal") and that Honeywell is the parent company of Allied Signal." (Appendix at ¶ 24.) Relator argues that the magistrate erred by finding that it is

"undisputed" that it was Mr. Figures who listed the incorrect policy number on the FROI-1 form. Relator maintains that the stipulated evidence does not definitively establish that Mr. Figures provided the incorrect policy number on the FROI-1 form. The commission responds that relator misconstrues the magistrate's finding, arguing that it simply states that all parties agreed that the policy number listed on the FROI-1 form was for that of Allied Signal. Because the stipulated evidence does not definitively establish the source of the policy number error on the FROI-1 form, and because the magistrate's finding arguably can be read as interpreted by relator, we sustain relator's first objection and delete the reference to Mr. Figures in finding of fact No. 5.

{¶ 5} Relator's second and third objections are interrelated and thus will be considered jointly. In these objections, relator challenges the magistrate's conclusion that the commission did not abuse its discretion by exercising continuing jurisdiction to assign relator as the proper employer in claimant's claim.

{¶ 6} 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." "The commission's power to reconsider a previous decision derives from its general grant of continuing jurisdiction under R.C. 4123.52." *State ex rel. Gobich v. Indus. Comm.*, 103 Ohio St.3d 585, 2004-Ohio-5990, ¶ 14. The commission's exercise of continuing jurisdiction is subject to abuse-of-discretion review. *See State ex rel. Akron Paint & Varnish, Inc. v. Gullotta,* 131 Ohio St.3d 231, 2012-Ohio-542. An abuse of discretion occurs when a decision is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore,* 5 Ohio St.3d 217, 219 (1983).

{¶ 7} Continuing jurisdiction has both substantive and time restrictions. Substantively, "[c]ontinuing jurisdiction can be invoked only where one of these preconditions exists: (1) new or changed circumstances, (2) fraud, (3) clear mistake of fact, (4) clear mistake of law, or (5) error by an inferior tribunal." *Gobich* at ¶ 15. As to timeliness, the Supreme Court of Ohio has stated, "[a]ssuming *arguendo* that one of the preliminary conditions for continuing jurisdiction exists, the commission abuses its discretion when it fails to exercise its continuing jurisdiction within a reasonable time.

* * * Reasonableness depends on the circumstances of each case." *State ex rel. Gordon v. Indus. Comm.*, 63 Ohio St.3d 469, 471 (1992).

{¶ 8} Relator does not dispute that one of the preliminary conditions for continuing jurisdiction—a clear mistake of fact—exists in this case. Indeed, relator concedes that the claimant was at all relevant times its employee and that Honeywell was mistakenly identified as the employer responsible for the claimant's 1999 claim. However, relator argues that even where a clear mistake of fact exists, the commission must exercise its continuing jurisdiction within a reasonable time, and that the commission did not do so here. Relator contends that the commission's decision does not comply with *State ex rel. Noll v. Indus. Comm.*, 57 Ohio St.3d 203 (1991), because the commission did not adequately explain why its exercise of continuing jurisdiction was made within a reasonable time. Relator also contends the commission abused its discretion by exercising its continuing jurisdiction in this matter.

{¶ 9} Contrary to relator's first contention, the commission did not justify its invocation of continuing jurisdiction solely on the substantive ground that a mistake of fact occurred. Rather, the record in this case establishes that the commission adequately explained why its exercise of continuing jurisdiction was made within a reasonable time. The commission expressly rejected relator's argument that continuing jurisdiction was precluded by the length of time Honeywell failed to discover the error. In so doing, the commission pointed out that Supreme Court of Ohio cases addressing the commission's continuing jurisdiction do not specify a precise time period beyond which invocation of continuing jurisdiction is clearly barred; rather, those cases establish only that invocation must be within a "reasonable" period of time. In addressing the reasonableness of the timing, the commission's district hearing officer noted that relator initially certified the claim in 1999 and failed in its duty over the next ten years to properly manage and monitor the claim. The commission's staff hearing officer determined that the ten-year delay was not unreasonable because records pertaining to the claim are likely available through Honeywell's third-party administrator, and relator would be at no more of a disadvantage than the claimant in re-addressing issues related to claimant's claim. Because the commission adequately explained why its exercise of continuing jurisdiction was made within a reasonable time, its decision complies with *Noll*.

{¶ 10} We further disagree with relator's second argument, that due to the ten-year delay between the misidentification of Honeywell as the employer and Honeywell's motion to reassign the claim to relator, the commission's exercise of continuing jurisdiction was unreasonable and an abuse of discretion. The factual circumstances of this case place the commission's decision within the range of its discretion. It is undisputed that relator is the claimant's employer and that Honeywell has no legal responsibility for claimant's claim. It is further undisputed that the claim was mistakenly assigned to Honeywell through no fault of Honeywell. Thus, as the commission noted, there is no legal basis upon which to continue the erroneous designation of Honeywell as the employer. Further, relator bears at least partial responsibility for the ten-year delay, as it clearly failed to monitor the claim it certified at its inception. Finally, the commission's exercise of continuing jurisdiction is not unreasonable here because records relevant to the claimant may be available through Honeywell's third-party administrator, and relator is at no more of a disadvantage than the claimant in re-addressing issues related to claimant's claim.

{¶ 11} For the foregoing reasons, relator's second and third objections are overruled.

{¶ 12} As relator's fourth, fifth, and sixth objections are interrelated, we will address them together. In these objections, relator challenges the magistrate's conclusion that the commission did not abuse its discretion by failing to apply the doctrine of laches to preclude Honeywell from pursuing its motion to establish relator as the proper employer.

{¶ 13} Laches is an omission to assert a right for an unreasonable and unexplained length of time under circumstances prejudicial to the adverse party. *Baughman v. State Farm Mut. Auto. Ins. Co.,* 160 Ohio App.3d 642, 2005-Ohio-1948, ¶ 10 (9th Dist.). Laches is lodged principally in equity jurisprudence. *Bank One Trust Co., N.A. v. LaCour,* 131 Ohio App.3d 48, 54 (10th Dist.1999). To succeed in asserting the doctrine of laches, the proponent must establish: (1) an unreasonable delay or lapse of time in asserting a right; (2) the absence of an excuse for such delay; (3) knowledge, actual or constructive, of the injury or wrong; and (4) prejudice to the party asserting laches. *State ex rel. Cater v. N. Olmsted,* 69 Ohio St.3d 315, 325 (1994). Accordingly, a delay in

asserting a right does not of itself constitute laches. *Smith v. Smith,* 168 Ohio St. 447 (1959), paragraph three of the syllabus. Instead, the proponent must demonstrate that it has been materially prejudiced by the unreasonable and unexplained delay of the entity asserting the claim. *Connin v. Bailey*, 15 Ohio St.3d 34, 35-36 (1984).

{¶ 14} Relator first asserts the magistrate improperly applied an abuse-of-discretion standard in addressing the commission's failure to apply the doctrine of laches. While relator broadly asserts that the Supreme Court of Ohio has not applied an abuse-of-discretion standard in laches cases, it cites no authority in support of this assertion. Our research has uncovered at least one case where the Supreme Court applied an abuse-of-discretion standard in a laches case. *See State ex rel. Choices for South-Western City Schools v. Anthony,* 108 Ohio St.3d 1, 2005-Ohio-5362, ¶ 27 ("Nor did the board of elections abuse its discretion by refusing to deny the protest against the petition based on laches."). Moreover, this court has consistently applied an abuse-of-discretion standard in laches cases, including at least one case involving the Industrial Commission. *See State ex rel. B & C Machine Co. v. Indus. Comm.,* 10th Dist. No. 90AP-624 (Nov. 26, 1991) ("Relator has not demonstrated an abuse of discretion on the part of the respondent Industrial Commission in failing to apply laches."). *See also State v. Harding,* 10th Dist. No. 10AP-370, 2011-Ohio-557, ¶ 9 ("[A] trial court's resolution on the issue of laches will not be reversed absent an abuse of discretion."); *Olentangy Condominium Assn. v. Lusk,* 10th Dist. No. 09AP-568, 2010-Ohio-1023, ¶ 31 ("[A]n appellate court will only reverse a trial court's decision regarding the application of laches if the trial court abuses its discretion.").

{¶ 15} Having determined that the magistrate applied the proper legal standard, we now turn to relator's substantive argument—that the magistrate improperly concluded that the commission did not abuse its discretion by failing to apply the doctrine of laches to preclude Honeywell from pursuing its motion to establish relator as the proper employer.

{¶ 16} Seemingly acknowledging that the elements of laches are set forth in the conjunctive and that to prevail it must establish material prejudice, relator contends it has been materially prejudiced by two claims decisions for which it did not receive notice: (1) the allowance of an additional condition and (2) the award of permanent partial

disability ("PPD") compensation. However, as both the commission and magistrate observed, the lack of notice entitles relator to challenge those orders pursuant to R.C. 4123.522. Further, relator's contention that its ability to relitigate these issues is diminished due to staleness of the record is also without merit. The stipulation of evidence contains the medical reports upon which the commission relied to allow the additional claim and award PPD compensation. Further, any other records pertaining to these claims decisions likely exist with Honeywell's third-party administrator, and relator is at no more disadvantage than claimant in re-addressing these issues. Having failed to establish material prejudice, relator's laches claim fails.

{¶ 17} For the foregoing reasons, we overrule relator's fourth, fifth, and sixth objections.

III. CONCLUSION

{¶ 18} Following independent review pursuant to Civ.R. 53, we sustain relator's first objection and overrule relator's remaining five objections. With the modification of the magistrate's finding of fact No. 5 as noted in ¶ 4 of this decision, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein. In accordance with the magistrate's decision, we deny the requested writ of mandamus.

Objections sustained in part and overruled in part; writ of mandamus denied.

BROWN, P.J., and CONNOR, J., concur.

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APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Allied Systems Holdings, Inc.,	:	
Relator,	:	
v.	:	No. 11AP-960
Joseph L. Donders, Honeywell International, Inc., and Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on June 20, 2012

Scott, Scriven & Wahoff, LLP, William J. Wahoff, *Richard Goldberg*, and *Nelva J. Smith*, for relator.

Agee, Clymer, Mitchell & Laret, *Katherine E. Ivan*, *Eric B. Cameron, Robert M. Robinson,* and *C. Russell Canestraro,* for respondent *Joseph L. Donders*.

Reminger Co., L.P.A., *Mick L. Proxmire,* and *Melvin Davis* for respondent Honeywell International, Inc.

Michael DeWine, Attorney General, and *Cheryl J. Nester*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶ 19} Relator, Allied Systems Holdings, Inc., 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 over a 1999 claim involving an employee of relator, Joseph L. Donders ("claimant"), and which granted the motion of respondent Honeywell International, Inc. ("Honeywell") to establish that relator was the proper employer responsible for claimant's claim.

Findings of Fact:

{¶ 20} 1. On May 1, 1999, claimant sustained a work-related injury while employed with relator.

{¶ 21} 2. Russell G. Figures, a claims adjustor for relator's third-party administrator, signed an FROI-1 form certifying claimant's claim for "right shoulder bursitis."

{¶ 22} 3. On the FROI-1 form signed by Mr. Figures, relator's policy number was incorrectly listed as 20003261-2.

{¶ 23} 4. It is undisputed that policy number 20003261-2 is not the correct policy number for relator; instead 20005124-0 (tab 4) is the correct policy number for relator.

{¶ 24} 5. It is also undisputed that 20003261-2, the policy number Mr. Figures listed on claimant's FROI-1, is actually the correct policy number for Allied Signal, Inc. ("Allied Signal") and that Honeywell is the parent company of Allied Signal.

{¶ 25} 6. This claim was assigned claim No. 99-563014 and, as stated previously, was originally allowed for right shoulder bursitis.

{¶ 26} 7. Because the wrong policy number had been provided, notices would not be sent to either relator or its third-party administrator; instead, notices were sent to Allied Signal, Honeywell, and its third-party administrator, Zurich U.S.

{¶ 27} 8. Relator sustained a second injury while employed with relator on October 25, 2000.

{¶ 28} 9. Mr. Figures also certified this claim for the following conditions: "Neck Contusion[;] upper back/shoulder contusion." This claim was assigned claim number 00-813222.

{¶ 29} 10. This 2000 claim would later be certified to include "lumbar sprain."

{¶ 30} 11. Claimant filed a motion to have the 1999 claim allowed for an additional shoulder condition.

{¶ 31} 12. It is undisputed that relator did not receive notice of the hearing; instead, Honeywell did.

{¶ 32} 13. Following a hearing before a district hearing officer ("DHO") claimant's 1999 claim was additionally allowed for "Glenohumeral Joint Arthritis Right."

{¶ 33} 14. Claimant also filed an application for the determination of the percentage of permanent partial disability ("PPD") in the 1999 claim.

{¶ 34} 15. It is undisputed that relator did not receive notice of this hearing; instead, Honeywell did.

{¶ 35} 16. Following a hearing before a DHO, claimant was granted an 11 percent PPD award in the 1999 claim.

{¶ 36} 17. Claimant filed an application for an increase in the PPD award in the 1999 claim.

{¶ 37} 18. Again, relator did not receive notice of this hearing; instead, Honeywell did.

{¶ 38} 19. Following a hearing, claimant was granted a 2 percent increase.

{¶ 39} 20. In 2010, claimant filed a motion with Honeywell seeking approval for treatment in the 1999 claim and also filed a self-insured complaint against Honeywell for failure to approve treatment.

{¶ 40} 21. In December 2010, Honeywell filed a motion asking the commission to exercise its continuing jurisdiction to establish the proper employer in the 1999 claim. With its motion, Honeywell submitted documentation which established that claimant had never been employed by Honeywell and demonstrating that relator was the proper employer. Again, this fact has never been disputed.

{¶ 41} 22. Honeywell's motion was heard before a DHO on March 8, 2011.

{¶ 42} 23. The DHO granted Honeywell's request and determined that it was appropriate for the commission to exercise its continuing jurisdiction based upon the clear mistake of fact, namely, the wrong employer had been identified. While relator never challenged the fact that it was, indeed, the proper employer, relator argued that Honeywell's delay in filing the motion was unreasonable and the doctrine of laches applied; because Honeywell failed to assert its right for an unreasonable amount of time, the motion should be denied. The DHO rejected this argument stating:

> The correct Self-Insuring Employer, Allied System Holdings, Inc., objects to Honeywell International's request for a change in Self-Insuring Employer arguing that the request is barred by the Doctrine of Laches. This argument is rejected.
>
> Laches is the omission to assert a right for an unreasonable and unexplained length of time under circumstances materially prejudicial to the adverse party. In this claim, Allied System Holdings, Inc., has failed to demonstrate material prejudice. Allied System Holdings, Inc., argues that the additional allowance of glenohumeral joint arthritis on 01/02/2002 constitutes the required material prejudice. This is simply not correct. Allied System Holdings, Inc., did not have notice of the 01/02/2002 hearing and the order may be challenged under R.C. 4123.522. Furthermore, Allied System Holdings, Inc., certified this claim and was under a duty to properly administer it as a Self-Insuring Employer. This would almost certainly include periodic checks on the claim status. Any prejudice affecting an adverse party must be material. The prejudicial effect of the foregoing additional allowance cannot, under these circumstances, be so characterized.
>
> Allied System Holdings, Inc., is now the correct Self-Insuring Employer for all further purposes in this claim.

{¶ 43} 24. Relator appealed and the matter was heard before a staff hearing officer ("SHO") on June 1, 2011.

{¶ 44} 25. The SHO affirmed the prior DHO's order, exercised continuing jurisdiction, and determined that relator was the proper employer. Relator again argued that Honeywell's delay of ten years was unreasonable and that it would be difficult to obtain medical records from that ten-year period. In making this argument, counsel for relator stressed the following points:

> The representative for Allied System Holdings, Mr. Goldberg, argued at length today that applicable case law precludes application of continuing jurisdiction. He argues that these cases state that the ability of the Industrial Commission to apply continuing jurisdiction is not without limit and that in the case Sub Judice the 9 – 10 year period which has elapsed is simply too great to permit the exercise of continuing jurisdiction. He further argues that to do so would be to place an unsustainable burden on his client

> because of the staleness of the record (i.e. difficulty in obtaining records from long ago).
>
> The Staff Hearing Officer agrees with Mr. Goldberg's position regarding the time limits in applying continuing jurisdiction. Unfortunately, none of the cases cited to by Mr. Goldberg specify a precise time frame beyond which invocation of continuing jurisdiction would be clearly barred. Instead, the cases talk about a "reasonable" period of time. The Staff Hearing Officer further acknowledges that ten years is in fact a long time and might even be an unreasonable period of time were it not for the fact that records relevant to the claimant are obtainable through Honeywell's TPA which was administering the claim in error over that period of time.
>
> Furthermore, even if such records are not easily obtainable, Allied System Holdings would be no more prejudiced in this regard than the Injured Worker in attempting to obtain records from the remote past because of the circumstances presented here today. Given this situation, the Staff Hearing Officer concludes that it is not unreasonable to invoke continuing jurisdiction.
>
> Mr. Goldberg also argues that Laches should preclude reversion of the claim and risk to his client. As noted by the District Hearing Officer, Laches is the omission to assert a right for an unreasonable and unexplained length of time under circumstances materially prejudicial to the adverse party. Mr. Goldberg argues that because Honeywell paid treatment, compensation and attended hearings over the course of ten years under this claim that their failure to ascertain the error which brings us here today describes a case of Laches which should preclude granting Honeywell's request for relief. He further argues that his client would be materially prejudiced because an additional condition (glenohumeral joint arthritis) was granted on 01/02/2002 and in light of the remoteness of that development Allied System Holdings would once again be faced with a stale record in trying to defend itself.

The SHO rejected relator's arguments, stating:

> The Staff Hearing Officer again rejects this argument finding that many of these records in all likelihood exist with Honeywell's TPA and that even if they don't, the Employer

> (Allied System Holdings) is no more at a disadvantage than Claimant will be because of these circumstances. Furthermore, as noted by the District Hearing Officer, because Allied System Holdings did not receive notice of the hearing on 01/02/2002 at which the additional allowance was granted, that order may be challenged pursuant to 4123.522. The ability to obtain such relief would procedurally place Allied System Holdings in the same position now as would have been the case in the first place had the Bureau not erred.
>
> Although Allied Signal (Honeywell) arguably should have been able to discover the error (not of their doing) which perpetuated over ten years, Allied System Holdings was, in the first instance, in the best position to discover this error since at the claim's inception, Allied System Holdings was identified as the correct Employer and had received and sent correspondence within that claim for several years before the Bureau error occurred. Allied System Holdings, as a Self-Insured Employer, stands in the place of the Bureau with a duty to maintain and monitor their own claim files. Their failure to do so is conspicuous.
>
> Because Allied System Holdings has .522 relief available and is no more at a disadvantage than the claimant in readdressing the issue of additional allowance the SHO agrees with the DHO in finding that there is no material prejudice against Mr. Goldberg's client and the argument of [L]aches must therefore fail.

{¶ 45} 26. Relator again appealed and the matter was heard before the commission on August 4, 2011.

{¶ 46} 27. The commission affirmed the previous orders, exercised its continuing jurisdiction and corrected the name of the employer to reflect that relator was the proper employer. Specifically, the commission stated:

> The Injured Worker sustained a right shoulder work injury on 05/01/1999 while in the employ of Allied System Holdings, Inc. The claim was certified by Russell Figures, Claims Adjuster for Haul Risk Management Services, Inc., the Third Party Administrator (TPA) for Allied System Holdings, Inc. The Injured Worker continued in the employ of Allied System Holdings, Inc. and sustained a subsequent injury on 10/25/2000 that was also certified by Russell

Figures. Mr. Figures certified claim number 99-563014 for "right shoulder bursitis" and claim number 00-813222 for "neck contusion, upper back & shoulder contusion, and lumbar sprain." Michael Lefkowitz, M.D., treated the Injured Worker in both claims.

In hindsight, it appears Mr. Figures provided an incorrect policy number on the FROI-1, First Report of an Injury/Occupational Disease, regarding the 05/01/1999 injury. As a result, the BWC incorrectly identified the employer for claim number 99-563014 as Allied Signal, Inc. Subsequent Notices of Hearing and Orders were issued to Allied Signal, Inc./Honeywell International, Inc. The parties agree that Allied Signal Inc./Honeywell International, Inc. was not the correct employer and was in no way associated with the Injured Worker or his claims. Allied Signal, Inc./Honeywell International, Inc. discovered this error following the Injured Worker's filing of a self-insuring complaint on 10/08/2010 and filed the motion for continuing jurisdiction on 12/21/2010.

It is the order of the Commission that Allied Signal, Inc./Honeywell International, Inc.'s request for the Commission to assert continuing jurisdiction is granted. The clerical error, which wrongly designated Allied Signal, Inc./Honeywell International, Inc. as the employer, justifies the invocation of continuing jurisdiction. Accordingly, the Commission finds the correct employer for claim number 99-563014 is Allied System Holdings, Inc.

The Commission rejects Allied System Holdings, Inc.'s argument that continuing jurisdiction is precluded by the length of time Allied Signal, Inc./Honeywell International, Inc. failed to discover the error. Continuing jurisdiction must be asserted within a reasonable period of time, which is dependent upon the circumstances of each case. State ex rel. Gordon v. Indus. Comm. (1992), 63 Ohio St.3d 469. Continuing jurisdiction is reasonable herein as it is undisputed that Allied Signal, Inc./Honeywell International, Inc. is not the correct employer. There is no legal basis to continue this erroneous designation.

The Commission further rejects Allied System Holdings, Inc.'s defense of [L]aches. Specifically, the Commission finds insufficient persuasive evidence that Allied Signal, Inc./Honeywell International, Inc.'s failure to discover the

> error and seek correction resulted in material prejudice to Allied System Holdings, Inc. Allies System Holdings, Inc. may seek relief to relitigate the hearings that occurred during the course of the claim without its knowledge. And while the medical record may be stale, nonetheless, Allied System Holdings, Inc. has access to the medical records submitted to the claim, as well as the medical records it obtained through its administration of claim number 00-813222. As previously noted above, the claims share a common allowance and the Injured Worker sought treatment with the same physician for both.

{¶ 47} 28. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶ 48} In this mandamus action, relator makes the following two arguments: (1) the commission abused its discretion by exercising continuing jurisdiction over Honeywell's motion to establish relator as the proper employer based on Honeywell's failure to object to being named the employer within a reasonable time, and (2) even if the commission had continuing jurisdiction to consider Honeywell's motion, the doctrine of laches barred Honeywell from pursuing its motion because relator demonstrated that it had suffered material prejudice as a result of Honeywell's failure to object within a reasonable period of time.

{¶ 49} As will hereinafter be explained, the magistrate finds that: (1) the commission had continuing jurisdiction over Honeywell's motion to establish relator as the proper employer, and (2) the doctrine of laches did not bar Honeywell from pursuing its motion because relator did not demonstrate any material harm.

{¶ 50} The Supreme Court of Ohio has set forth three requirements which must be met in establishing a right to a writ of mandamus: (1) that relator has a clear legal right to the relief prayed for; (2) that respondent is under a clear legal duty to perform the act requested; and (3) that relator has no plain and adequate remedy in the ordinary course of the law. *State ex rel. Berger v. McMonagle*, 6 Ohio St.3d 28 (1983).

{¶ 51} Pursuant to R.C. 4123.52, "The 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., 65 Ohio St.3d 538, 541-42 (1992), 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, 18 OBR 302, 480 N.E.2d 487 (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, 12 O.O.3d 128, 388 N.E.2d 1383 (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, 16 O.O.3d 174, 404 N.E.2d 149 (continuing jurisdiction exists when prior order is clearly a mistake of fact); *State ex rel. Kilgore v. Indus. Comm.* (1930), 123 Ohio St. 164, 9 Ohio Law Abs. 62, 174 N.E. 345 (commission has continuing jurisdiction in cases involving fraud); *State ex rel. Manns v. Indus. Comm.* (1988), 39 Ohio St.3d 188, 529 N.E.2d 1379 (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, 86, 556 N.E.2d 168, 170 (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.

{¶ 52} As an initial matter, there are certain facts which are not in dispute: (1) relator is the proper employer; (2) claimant never worked for Honeywell; (3) relator's claims adjustor, Mr. Figures, apparently mislabeled the original FROI-1 form with the incorrect risk number (neither claimant nor Honeywell are responsible for this mislabeling); (4) because relator's claims adjustor provided the incorrect risk number, future notices were not sent to relator; (5) Allied Signal, for which Honeywell is the parent corporation, was misidentified as the employer responsible for the claim; (6) approximately one year after the 1999 injury, claimant sustained a second work-related injury while working for relator; (7) for approximately the next ten years, neither relator nor Honeywell discovered that the wrong employer had been identified as responsible for

claimant's claim; and (8) Honeywell has not asked to be reimbursed for the compensation paid in the 1999 claim and the commission has not ordered relator to reimburse Honeywell for the amount of compensation Honeywell has already paid in the 1999 claim.

{¶ 53} It is undisputed that the commission has discretion to reconsider its prior orders if certain prerequisites are met. In the present case, there is no dispute that there was a clear mistake of fact: the wrong employer had been identified as responsible for claimant's 1999 claim. This is undisputed. Because approximately ten years had passed since Honeywell was originally misidentified as the employer, relator asserts that it was unreasonable for the commission to exercise its continuing jurisdiction in spite of the fact that relator acknowledges there was a clear mistake of fact. For the reasons that follow, this magistrate disagrees.

{¶ 54} In *State ex rel. Gordon v. Indus. Comm.*, 63 Ohio St.3d 469 (1992), the court stated that the commission may be found to have abused its discretion where it fails to exercise continuing jurisdiction within a reasonable period of time. In that particular case, the Ohio Bureau of Workers' Compensation ("BWC"), failed to appeal a commission order setting an overpayment amount not once, but twice, and then filed a motion to vacate the order approximately four years after its issuance. Further, the claimant was in the process of repaying a certain amount of temporary total disability ("TTD") compensation which the commission determined had been overpaid to him. The BWC requested the commission exercise its continuing jurisdiction in an effort to increase the amount of compensation the claimant would have to repay. The court noted that the record contained at least six different calculations concerning the overpayment and found that the BWC could not demonstrate a clear mistake of fact. Further, the court pointed out that the BWC had failed to appeal from two separate orders determining the overpayment and that the four-year delay was unreasonable.

{¶ 55} A review of *Gordon* demonstrates the principle that commission's exercise of its continuing jurisdiction and its authority to determine what is a reasonable period of time is dependent on the particular facts. When the court considered that the BWC already had two opportunities to challenge the amount of the overpayment and that the BWC had at least six different calculations concerning the overpayment, the court found that the commission's decision to exercise its continuing jurisdiction in that case was

improper for two reasons. First, the court found that the BWC could not demonstrate a clear mistake of fact. As such, the BWC was unable to pass the first hurdle for the commission's exercise of its continuing jurisdiction. Second, finding that the BWC actually had notice and information earlier and had failed to appeal two times previously, the court found that this four-year period was unreasonable.

{¶ 56} In a similar case, *State ex rel. Smith v. Indus. Comm.*, 98 Ohio St.3d 16, 2002-Ohio-7035, the court also found that the commission had failed to timely exercise its continuing jurisdiction. In *Smith*, the claimant notified the BWC that he had potentially been overpaid TTD compensation because he had worked while receiving that compensation prior to an award of permanent total disability ("PTD") compensation. Ultimately, the commission determined that all TTD and PTD compensation paid after June 1, 1992 had been overpaid, made a finding of fraud, and terminated further payments of PTD compensation.

{¶ 57} The Supreme Court of Ohio ultimately granted a writ of mandamus in the claimant's favor. The court did find that a clear mistake of law was present: receipt of both wages and total disability compensation for the same period is contrary to law. However, the court concluded that continuing jurisdiction still must be exercised within a reasonable time and that reasonableness must be judged on a case-by-case basis.

{¶ 58} In *Smith*, six years passed between the time the claimant notified the BWC of the overpayment before any action was taken by either the BWC or the commission. Thereafter, four years passed between the granting of the PTD award to the claimant and the commission's renewed interest in the claimant's eligibility for that compensation. Given the evidence in the file before the PTD hearing and contemporaneous with the receipt of TTD compensation, the court concluded that the exercise of continuing jurisdiction was not timely.

{¶ 59} In *State ex rel. Zingales v. Indus. Comm.*, 10th Dist. No. 08AP-643, 2009-Ohio-1860, this court concluded that the commission did not abuse its discretion even though seven years had lapsed between the determination of the claimant's average weekly wage ("AWW") and the BWC's motion for recalculation. In *Zingales*, at ¶ 14, in 2000, the BWC set the claimant's AWW compensation at $694.75 based on wage information he submitted. Specifically, the claimant had submitted copies of his federal

income tax returns for 1997 and 1998 which showed his gross income, business expenses, and net profit. All compensation paid to the claimant had been based upon this determination.

{¶ 60} In January 2008, the BWC filed a motion requesting the commission invoke its continuing jurisdiction to modify and reduce the claimant's AWW based on a clear mistake of law: pursuant to *State ex rel. McDulin v. Indus. Comm.*, 89 Ohio St.3d 390 (2000), the claimant's gross earnings, including business expenses, had been improperly utilized to calculate his AWW when instead, the claimant's net earnings should have been utilized to determine his AWW. The commission exercised its continuing jurisdiction, recalculated the claimant's AWW and declared that the overpayment be effective January 28, 2008, the date the BWC filed its motion. While acknowledging that that claimant had received a windfall, the commission found it to be an undue burden on the claimant to declare an overpayment for the entire period.

{¶ 61} In upholding the commission's determination, this court first noted that a clear mistake of law did, in fact, exist. Further, this court found that the factual circumstances placed the commission's decision within the range of its discretion. The BWC sought to have claimant's AWW recalculated approximately seven years after the commission granted claimant's request for PTD compensation. Further, this court noted that the mistake of law resulted in a windfall to claimant. Further, this court noted that the commission declared that the overpayment would be effective as of January 28, 2008, the date the BWC filed its motion. And finally, claimant was not being asked to repay an overpayment stretching back several years; instead, the commission confined the overpayment to a period of approximately two months.

{¶ 62} As R.C. 4123.52 provides, for a reasonable period of time the commission has jurisdiction and authority to make modifications or changes with respect to its former findings or orders as, in its opinion, is justified. This court reviews the commission's order under the abuse of discretion standard. An abuse of discretion connotes more than just an error of law; it implies an attitude which is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217 (1983). Reasonableness depends on the circumstances of each case. *See Gordon*.

{¶ 63} As the above cases demonstrate, after the commission finds that specific grounds for exercising continuing jurisdiction do exist, the commission has wide latitude to determine whether or not the exercise of its continuing jurisdiction is exercised within a reasonable time period. Whether or not that time period is reasonable depends on the specific facts of each individual case.

{¶ 64} Here, a clear mistake of fact does exist: the wrong employer had been identified as responsible for claimant's 1999 claim. Thereafter, when addressing the reasonableness of the timing, the commission did provide an explanation. First, the commission determined that both relator and Honeywell had failed to properly monitor the claim and, as a result, Honeywell had paid certain compensation to claimant. Second, the commission noted that, pursuant to R.C. 4123.522, relator could challenge the allowance of the new condition and the awards of PPD compensation. The commission also noted that it would be equally difficult for relator and claimant to obtain the medical documents at issue and that certain documents should be available from Honeywell's third-party administrator. Further, the commission stressed that relator is the proper employer. It is relator, not Honeywell, that is responsible for paying any future benefits or compensation.

{¶ 65} Given the above findings and considering that Honeywell has, in essence, accepted its share of responsibility by not asking that the monies Honeywell paid be refunded, the magistrate finds, that given the specific facts of this case, the ten-year time frame was not unreasonable

{¶ 66} Considering that it is undisputed that Honeywell is not the proper employer, the magistrate agrees with the commission's statement that "[t]here is no legal basis to continue this erroneous designation." In the present case, the commission determined that it was not unreasonable in this situation for the commission to exercise its continuing jurisdiction and correct this error. If the error had not been corrected, it is conceivable that claimant may have ultimately needed surgery for the allowed conditions in the 1999 claim and that he would have been entitled to a period of TTD compensation following the surgery. If the commission had not corrected the error, what purpose would be served if Honeywell was required to pay for the surgery and compensation at some

future date? Although relator's counsel states that Honeywell should continue to shoulder this financial burden, that situation would itself be unreasonable.

{¶ 67} In the present case, only two events have occurred for which relator did not receive notice: (1) claimant's claim was additionally allowed for "Glenohumeral Joint Arthritis Right" and (2) claimant was awarded a 13 percent PPD award. R.C. 4123.522 provides relator with the opportunity to have those issues reheard by the commission. To the extent that relator argues that the medical records would be difficult to obtain, the magistrate notes that the reports upon which the commission relied to grant the motion for an additional condition and the awards of PPD compensation are contained in the stipulation of evidence. Relator does have a remedy—relator can challenge the orders which allow the additional conditions and awarded the PPD compensation.

{¶ 68} Relator's first argument, that the commission abused its discretion by exercising its continuing jurisdiction, is not well-taken.

{¶ 69} Relator's second argument focuses on *State ex rel. Case v. Indus. Comm.*, 28 Ohio St.3d 383 (1986). The court stated as follows with regard to the applicability of laches in a particular case:

> The doctrine of laches is based upon the maxim *vigilantibus non dormientibus jura subveniunt* (the laws aid the vigilant, and not those who slumber on their rights). In our unanimous opinion in *Connin v. Bailey* (1984), 15 Ohio St.3d 34, 35, we set forth the applicable law as follows:
>
> " 'Laches is an omission to assert a right for an unreasonable and unexplained length of time, under circumstances prejudicial to the adverse party. It signifies delay independent of limitations in statutes. It is lodged principally in equity jurisprudence.' "
>
> In order to invoke the doctrine, the following must be established:
>
> "Delay in asserting a right does not of itself constitute laches, and in order to successfully invoke the equitable doctrine of laches it must be shown that the person for whose benefit the doctrine will operate has been materially prejudiced by the delay of the person asserting his claim." *Smith v. Smith* (1959), 168 Ohio St. 447 [7 O.O.2d 276], paragraph three of the syllabus, approved and followed in *Connin, supra*, at 35-

> 36. Accord *Kinney v. Mathias* (1984), 10 Ohio St.3d 72. The longstanding purpose of the doctrine is that a court will not aid in enforcing " ' * * * stale demands, where the party has slept upon his rights, or acquiesced for a great length of time. * * * ' " *Piatt v. Vattier* (1835), 34 U.S. 405, 416. Justice Story, who delivered the opinion of the court in *Vattier,* explained that " '[n]othing can call forth this court into activity but conscience, good faith and reasonable diligence. Where these are wanting, the court is passive and does nothing; laches and neglect are always discountenanced; and therefore from the beginning of this jurisdiction there was always a limitation of suit in this court.' * * * "

Id. at 416-417.

{¶ 70} As noted previously, the commission indicated that both relator and Honeywell failed to pay close enough attention to have caught this error at an earlier date. Why should Honeywell continue to pay the claims of a person who never was their employee? Why shouldn't relator pay the claims of a person who was their employee? Further, relator has not demonstrated that it is materially prejudiced by this result. The granting of this motion was the only logical result and the magistrate finds that the commission did not abuse its discretion in refusing to apply the doctrine of laches here.

{¶ 71} Based on the foregoing, it is this magistrate's decision that relator has not demonstrated that the commission abused its discretion by exercising its continuing jurisdiction and granting Honeywell's motion to designate relator as the proper employer in claimant's claim, 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).