[Cite as *State ex rel. Coastal Pet Prods., Inc. v. Indus. Comm.*, 2015-Ohio-502.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Coastal Pet Products, Inc.,	:	
Relator,	:	
v.	:	No. 14AP-176
Industrial Commission of Ohio and Halle Siembieda,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on February 10, 2015

Darrell N. Markijohn, Esq., LLC, and *Darrell N. Markijohn,* for relator.

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

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

SADLER, J.

{¶ 1} Relator, Coastal Pet Products, Inc., commenced this original action requesting a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order granting a motion to exercise continuing jurisdiction over the claim submitted on behalf of respondent Halle Siembieda ("claimant") and to issue a new order denying the motion.

{¶ 2} Pursuant to Civ.R. 53 and Loc.R. 13(M) of the Tenth District Court of Appeals, this matter was referred to a magistrate who issued a decision, including findings of fact and conclusions of law, which is appended hereto. The magistrate concluded that

the commission did not abuse its discretion when it exercised continuing jurisdiction over claim No. 09-853349 and vacated the order of the District Hearing Officer ("DHO") disallowing the claim. Accordingly, the magistrate recommended that this court deny the request for a writ of mandamus.

I. FACTS AND PROCEDURAL HISTORY

{¶ 3} Relator does not object to the magistrate's findings of fact. An independent review of those findings by this court reveals no error, and we adopt the magistrate's findings of fact as our own. For purposes of discussion, however, we provide a brief summary of the relevant facts.

{¶ 4} At all times relevant, relator employed claimant as a machine operator in relator's nylon department. On September 15, 2009, claimant submitted a signed "Employee Incident Report," to relator's third-party administrator, CompManagement Inc. ("CompManagement"). In the report, claimant indicated that she had sustained a work-related injury in the previous week which resulted in her "[h]ands are going numb." In the space on the report where claimant was to indicate whether she intended to file a workers' compensation claim, she selected "Don't Know."

{¶ 5} CompManagement initiated a claim for benefits in the Ohio Bureau of Workers' Compensation ("BWC"), using BWC claim form FROI-1. A CompManagement employee prepared the form for electronic submission to BWC and signed her own name in the space provided for the "Injured worker signature." Although the FROI-1 also requested the name of the injured worker's health care provider and asked for "Treatment info.," those sections of the form were left blank. The claim was assigned claim No. 09-853349 by BWC.

{¶ 6} On November 6, 2009, CompManagement notified claimant that the application had been submitted to BWC and that relator had rejected her claim due to the lack of medical support. BWC subsequently referred claim No. 09-853349 to the commission for a determination whether the claim should be allowed or disallowed. The DHO subsequently issued an order on December 1, 2009 disallowing the claim due to the

lack of medical evidence connecting the injury to claimant's employment. Claimant did not appear at the hearing before the DHO and she did not appeal the order.[1]

{¶ 7} Thereafter, on October 20, 2010, claimant moved the commission, pursuant to R.C. 4123.52, to exercise continuing jurisdiction of claim No. 09-853349 and to vacate the order issued December 1, 2009. On December 7, 2010, the DHO issued an order granting the motion for continuing jurisdiction and vacating the prior order disallowing the claim. Relator filed an administrative appeal and, following an evidentiary hearing, the SHO issued an order vacating the DHO order of December 7, 2010, and denying respondent's motion.

{¶ 8} On July 12, 2011, a three-member panel heard claimant's appeal. The commission issued an order on July 12, 2011 vacating the SHO's order and granting respondent's October 20, 2010 motion to exercise continuing jurisdiction of claim No. 09-853349. In the exercise of its continuing jurisdiction, the commission vacated the December 1, 2009 DHO order disallowing the claim. In so doing, the commission determined that, pursuant to Ohio Adm.Code 4123-3-08(A)(2), BWC must dismiss an application for benefits when the FROI-1 is not signed by the injured worker. As a result of the commission's ruling, claim No. 09-853349 is neither allowed nor disallowed.

II. LEGAL STANDARD

{¶ 9} Pursuant to R.C. 4123.52(A), "[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. Continuing jurisdiction has both substantive and time restrictions. *State ex rel. Allied Sys. Holdings, Inc. v. Donders*, 10th Dist. No. 11AP-960, 2012-Ohio-5855. Substantively, "[c]ontinuing jurisdiction can be invoked only where one of these preconditions exists: (1) new and changed circumstances, (2) fraud, (3) clear mistake of fact, (4) clear mistake of law, or (5) error by an inferior tribunal."

[1] BWC disallowed a second claim (No. 10-818150) arising out of a similar injury allegedly sustained by claimant in March 2010. However, claimant dismissed her administrative appeal in that claim and has taken no further action thereon.

Gobich at ¶ 14. 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." (Emphasic sic.) *State ex rel. Gordon v. Indus. Comm.*, 63 Ohio St.3d 469, 471 (1992).

{¶ 10} 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).

III. OBJECTIONS

{¶ 11} Relator objects to the magistrate's conclusions of law as follows:

> [I.] The Magistrate misinterpreted the statute and regulations pertaining to claim procedures.
>
> [II.] The Magistrate failed to address Relator's argument that this case is governed by this Court's decision in *Daniel[] v. Williams*, [10th Dist. No. 10AP-797,] 2011-Ohio-1941.

IV. DISCUSSION

A. First Objection

{¶ 12} The legal issue before the commission was whether the FROI-1 submitted by CompManagement on October 27, 2009, which did not bear the signature of claimant, constituted an application for benefits within the meaning of R.C. 4123.511(A) and Ohio Adm.Code 4123-3-08(A)(2). The magistrate concluded that the commission did not abuse its discretion when it determined that the unsigned FROI-1 was not an application for benefits.

{¶ 13} In relator's first objection, relator contends that the magistrate misinterpreted the governing law by failing to consider whether the "Employee Incident Report" signed by claimant on September 15, 2009, evidenced her intention to proceed with a claim for benefits despite the fact that she did not sign the FROI-1. Our review of the magistrate's decision reveals that the magistrate considered and rejected relator's argument.

{¶ 14} Ohio Adm.Code 4123-3-08(A)(2) states: "The FROI-1 for applying for payment from a self-insuring employer shall be completed, *signed by the employee*, and returned to the self-insuring employer. *In situations where there is no prescribed form, a notice in writing shall be given in a manner sufficient to inform that a claim for benefits is being presented*." (Emphasis added.) The magistrate found that the DHO committed a clear mistake of both law and fact by failing to acknowledge that claimant had not signed the FROI-1 and to recognize the legal significance of the absence of her signature. The magistrate further found that the DHO committed a clear mistake of fact by failing to weigh the evidence of claimant's intent and make a factual finding on this "key preliminary issue." (Magistrate's Decision, 13.) The magistrate then concluded that the commission did not abuse its discretion when it weighed the evidence of claimant's intent, including the signed employee incident report, and found that respondent "did not consent to [relator's] filing of the FROI-1." (Magistrate's Decision, 13.)

{¶ 15} In short, we find that the magistrate correctly interpreted the relevant law and clearly considered and rejected relator's argument regarding claimant's intent. And, for the reasons set forth in the magistrate's decision, we overrule relator's first objection.

B. Second Objection

{¶ 16} In relator's second objection, relator claims that our prior decision in *Daniel v. Williams*, 10th Dist. No. 10AP-797, 2011-Ohio-1941, controls the outcome of this case. We disagree.

{¶ 17} In *Daniel*, an unidentified third party filed a claim for workers' compensation benefits on the claimant's behalf, but without the claimant's knowledge. The claimant subsequently received notice of the BWC order disallowing the claim, but failed to file an administrative appeal within the required 14-day time period. The DHO dismissed the claimant's appeal as untimely filed and the SHO affirmed. The common pleas court subsequently dismissed the claimant's complaint, brought pursuant to R.C. 4123.512, due to the claimant's failure to exhaust administrative remedies. *Id.* at ¶ 6. The issue for this court in the appeal was whether the claimant's lack of knowledge that a claim had been filed on his behalf excused his failure to timely appeal the BWC's initial denial of benefits. In *Daniel*, we stated that "[p]ursuant to the doctrine of failure to exhaust administrative remedies, *a party seeking court action in an administrative*

matter must first exhaust the available avenues of administrative relief through administrative appeal." (Emphasis added; internal citations and quotes omitted.) *Id*. at ¶ 15. Applying the doctrine to the facts of the case, we determined that a claimant's lack of awareness that a claim had been filed in his name "does not alter the trial court's jurisdiction, which is lacking if an appeal is not timely taken from the underlying administrative decision." *Id*. at ¶ 23.

{¶ 18} In the present case, claimant makes no argument that her failure to appeal the DHO order was the result of a lack of notice. Moreover, the jurisdiction of the court of common pleas is not an issue raised in this action. Consequently, our prior decision in *Daniel* is inapplicable. Furthermore, to the extent that relator contends that claimant's failure to administratively appeal the DHO's December 1, 2009 order precluded the commission from exercising its continuing jurisdiction over claim No. 09-853349, we find no support for such an argument either in the language of R.C. 4123.52 or the case law. Accordingly, relator's second objection is overruled.

V. CONCLUSION

{¶ 19} 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 of mandamus denied.

DORRIAN and T. BRYANT, JJ., concur.

T. BRYANT, J., retired, formerly of the Third Appellate District, assigned to active duty under authority of the Ohio Constitution, Article IV, Section 6(C).

A P P E N D I X

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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 October 23, 2014

Darrell N. Markijohn, Esq., LLC, and *Darrell N. Markijohn*, for relator.

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

IN MANDAMUS

{¶ 20} In this original action, relator, Coastal Pet Products, Inc. ("Coastal" or "relator") requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its July 12, 2011 order that grants the October 20, 2010 motion of respondent Halle Siembieda for the exercise of continuing jurisdiction over the December 1, 2009 order of the district hearing officer ("DHO") that disallowed or denied the industrial claim (No. 09-853349), and to enter an order denying the October 20, 2010 motion for the exercise of continuing jurisdiction.

Findings of Fact:

{¶ 21} 1. On September 15, 2009, Siembieda completed a Coastal form captioned: "Employee Incident Report."

{¶ 22} Above Siembieda's signature is the following pre-printed language:

> The information above is accurate to the best of my knowledge and I, the above named injured worker, understand that I am allowing any persons or facility that attends, treats or examines me to release all medical, psychological, and/or psychiatric information that is related to my workers' compensation claim.
>
> The information will be available to the Ohio Bureau of Workers' Compensation (BWC), the Ohio Industrial Commission (IC), Coastal Pet Products, Inc., my employer, CompManagement Inc., my employer's Third Party Administrator (TPA) representative, and CompManagement Health Systems my employer's medical management facility.
>
> I also understand that a copy of the medical information will be available to me, my legal representative of record, or my physician of record, upon request to the BWC, the employer or provider.

{¶ 23} Above the pre-printed language, the form poses many pre-printed questions. Essentially, in responding to the form, Siembieda indicated that she injured both hands during the previous week, i.e., September 8 to 11, 2009. She was employed in the nylon department where she operated a "Hole Mach[ine]."

{¶ 24} Aside the query "Nature of present Injury," in the space provided, Siembieda wrote: "Hands are going numb." She further stated: "[I]n the A.M. when I wake up[,] hands are numb."

{¶ 25} Aside the query "Will a Workers' Compensation Claim be Filed," and given the choice of marking one of three boxes, Siembieda marked the "Don't Know" box.

{¶ 26} Aside the query "Have you had any previous injury to this part of the body," Siembieda wrote: "Same thing last year in leather."

{¶ 27} Aside the query "Describe Previous Injury," Siembieda wrote: "Never went to [doctor changed departments]."

{¶ 28} Aside the query "Previous Injury Work Related," Siembieda circled the word "Yes."

{¶ 29} 3. On October 27, 2009, Emily Taylor, a claims examiner for CompManagement Inc. ("CompManagement"), relator's third-party administrator for workers' compensation, completed and electronically filed a form provided by the Ohio Bureau of Workers' Compensation ("bureau") captioned: "First Report of an Injury, Occupational Disease or Death." The form is also identified as the "FROI-1."

{¶ 30} Taylor completed the FROI-1 after reviewing the employee incident report completed by Siembieda on September 15, 2009. On the FROI-1, Taylor indicated that Siembieda was an operator in the nylon department and that an injury occurred on September 8, 2009. Taylor described the injury as "Bilateral Hand Numbness." The FROI-1 provides a space for "Injured worker signature." In the space provided, Siembieda did not sign. Instead, the following words appear: "Emily Taylor ET (Electronic Signature)."

{¶ 31} A section of the FROI-1 captioned "Treatment info.," asks for the name of the healthcare provider and his diagnosis. It also provides space for the healthcare provider's signature. However, that section was left completely blank.

{¶ 32} The bottom portion of the FROI-1 requests "Employer info." and provides a box for employer certification of the claim and a box for employer rejection of the claim. Both boxes are unmarked. However, Taylor did mark the box indicating "Employer is self-insuring."

{¶ 33} The FROI-1 filed electronically by Taylor on October 27, 2009 was assigned claim No. 09-853349.

{¶ 34} 4. By letter dated October 29, 2009, the bureau informed Siembieda that her industrial claim No. 09-853349 was being referred to the commission "for consideration of the FROI filed by the employer on 10/27/2009." She was informed that her employer had rejected the claim and that she would be notified of the hearing to be scheduled on the allowance issue.

{¶ 35} 5. By letter dated November 6, 2009, CompManagement informed Siembieda that a FROI-1 had been filed with the bureau and that the employer had denied the claim for "[l]ack of medical to support allowance." The letter also informed

Siembieda that she would receive notification of the hearing on "the determination of allowance of your application." Siembieda was advised she could call Emily Taylor with any questions.

{¶ 36} 6. Earlier, by letter dated September 30, 2009 to Siembieda's attending physician Kusum Singh, M.D., CompManagement requested "all office notes/medical records for this patient." With the letter, CompManagement submitted to Dr. Singh bureau form C-101 captioned: "Authorization to Release Medical Information." The form C-101 was executed by Siembieda on September 30, 2009.

{¶ 37} 7. The C-101 form contains the following pre-printed language:

> I understand I am authorizing the release of this information to the following: the Ohio Bureau of Workers' Compensation (BWC), the Industrial Commission of Ohio (IC), the above-named employer, the employer's managed care organization (MCO) or qualified health plan (QHP) and any authorized representatives.
>
> I understand this information is being released to the above-referenced persons and/or entities for use in administering my workers' compensation claim.

{¶ 38} 8. On November 4, 2009, the Akron Hearing Administrator, at the request of CompManagement, issued a subpoena to Dr. Singh for production of medical records regarding treatment of Siembieda's hands and wrists.

{¶ 39} 9. On November 16, 2009, in response to the subpoena, Dr. Singh produced the requested medical records.

{¶ 40} 10. Notice of hearing was mailed to Siembieda informing of a hearing on December 1, 2009 on the issue of "[i]njury [o]r [o]ccupational [d]isease [a]llowance."

{¶ 41} 11. On December 1, 2009, pursuant to the notice, a DHO heard the issue of the claim allowance. The employer's representative appeared at the hearing, but neither Siembieda nor her representative appeared.

{¶ 42} 12. On December 3, 2009, the DHO mailed an order disallowing industrial claim No. 09-853349. The DHO's order explains:

> It is the ordered [sic] that the FROI-1 First Report of An Injury, filed 10/27/2009 is denied.

> It is the finding of this Hearing Officer that the Injured Worker has failed to establish by a preponderance of the evidence that she sustained an injury in the course of and arising out of her employment with the Employer of record in this claim.
>
> It is ordered that this claim is **DISALLOWED**.
>
> This order is based on the lack of a compensable diagnosis having been causally related to a compensable mechanism of injury by a medical provider.

(Emphasis sic.)

{¶ 43} 13. On March 30, 2010, Siembieda again completed the Coastal form captioned: "Employee Incident Report."

{¶ 44} On the form, Siembieda indicated that an incident occurred during March 2010 when her "hands went numb & couldn't grip [with right] hand." She indicated that she reported the incident to her supervisor on March 25, 2010 when she called off work.

{¶ 45} In response to the pre-printed query: "Will a Workers' Compensation Claim Be Filed," Siembieda marked the "Yes" box.

{¶ 46} 14. On April 23, 2010, Emily Taylor again completed and electronically filed a FROI-1 after reviewing the Employee Incident Report completed by Siembieda on March 30, 2010.

{¶ 47} On the April 23, 2010 FROI-1, Taylor indicated that March 3, 2010 is the injury date and that the injury is "Bilateral Hand Numbness."

{¶ 48} The FROI-1 provides space for "Injured worker signature." The space provided is left blank.

{¶ 49} The section of the FROI-1 captioned "Treatment Info." asks for the name of the healthcare provider and his diagnosis. That section is left blank with the exception of a marked box indicating that Siembieda will not miss eight or more days of work.

{¶ 50} 15. The FROI-1 electronically filed by Taylor on April 23, 2010 was assigned claim No. 10-818150.

{¶ 51} 16. Notice of hearing was issued by the commission informing Siembieda of a hearing to be held on June 29, 2010 before a DHO in claim No. 10-818150.

{¶ 52} 17. On June 29, 2010, the FROI-1 was heard by a DHO on the allowance of the claim. Following the hearing, the DHO issued an order indicating that no one appeared for Siembieda. However, relator's counsel appeared.

{¶ 53} The DHO dismissed the claim, explaining:

> The District Hearing Officer dismisses the FROI-1, First Report of Injury, Occupational Disease or Death, filed on 04/23/2010 as it is not signed by the Injured Worker and she did not attend today's hearing. Consequently, there is no way to tell if she wishes to pursue this claim.

{¶ 54} 18. Siembieda, through counsel, administratively appealed the DHO's order of June 29, 2010.

{¶ 55} 19. Following an August 16, 2010 hearing, a staff hearing officer ("SHO") issued an order dismissing the appeal at the request of Siembieda's counsel. The SHO explained:

> It is the order of the Staff Hearing Officer that the Injured Worker's IC-12 Notice of Appeal filed on 07/21/2010 is dismissed pursuant to the oral request of Injured Worker's counsel withdrawing the same.
>
> Therefore, the District Hearing Officer order dated 07/29/2010 that dismissed the Injured Worker's FROI-1 application remains in full force and effect.

{¶ 56} 20. On October 20, 2010, Siembieda moved the commission for the exercise of its continuing jurisdiction over the DHO's order of December 1, 2009 in claim No. 09-853349. Siembieda's motion explained:

> The injured worker did not complete the FROI nor did she sign the FROI. The FROI was apparently completed by the employer's representative and signed by the employer's representative.

{¶ 57} 21. Following a December 7, 2010 hearing, a DHO issued an order granting Siembieda's October 20, 2010 motion. The DHO's order explains:

> It is the finding of this Hearing Officer that pursuant to Ohio Revised Code Section 4123.52 based on a mistake of law the FROI-1 First Report of Injury filed 10/27/2009 is dismissed. This action is taken as a result of the FROI-1 application never having been signed by the Injured Worker an[d] as she testified at today's hearing she had no intent of pursuing an

> application for an injury which occurred on or about 09/08/2009. The Industrial Commission order dated 12/01/2009 is vacated based on the above mistake of law. This mistake is based on the lack of the requisite signature and Hearing Officer [Memo S6].

{¶ 58} 22. Relator administratively appealed the DHO's order of December 7, 2010.

{¶ 59} 23. On March 4, 2011, an SHO heard relator's administrative appeal from the DHO's order of December 7, 2010. The hearing was recorded and transcribed for the record.

{¶ 60} 24. Following the March 4, 2011 hearing, the SHO issued an order that vacates the DHO's order of December 7, 2010 and denies Siembieda's October 20, 2010 motion for the exercise of continuing jurisdiction.

{¶ 61} 25. Siembieda administratively appealed the SHO's order of March 4, 2011 to the three-member commission.

{¶ 62} 26. On April 14, 2011, the commission notified the parties that the commission accepts the appeal for hearing.

{¶ 63} 27. Following a July 12, 2011 hearing before the three-member commission, the commission mailed an order on August 25, 2011 that vacates the SHO's order of March 4, 2011 and grants Siembieda's October 20, 2010 motion for the exercise of continuing jurisdiction over the DHO's order of December 1, 2009.

{¶ 64} Thus, the commission's order vacates the DHO's order of December 1, 2009 that disallowed claim No. 09-853349, and the FROI-1 filed October 27, 2009 is dismissed. The commission's order of July 12, 2011 explains:

> Pursuant to the Employer's rules requiring an employee complete an "Employee Incident Report" for injuries, the Injured Worker completed and signed an Employee Incident Report on 09/15/2009. The Injured Worker reported that her hands were numb when she woke in the morning, and even experienced "the same thing last year," never saw a doctor, and had changed departments. Also, on the report, in response to the question "Will a Workers' Compensation Claim be filed?," the Injured Worker marked the box labeled, "Don't Know."

On 10/27/2009, Emily Taylor, a representative of the Employer's Third Party Administrator (TPA), electronically completed a FROI-1, First Report of an Injury, Occupational Disease or Death, and then signed her name in the Injured Workers' signature block. The FROI-1 was filed with the Bureau of Worker's Compensation (BWC) on 10/27/2009. On 11/06/2009, a letter from Employer's TPA, with Emily Taylor's contact information, was generated to the Injured Worker, informing her that the signed FROI-1 was denied by the Employer for the reason that there as a "lack of medical to support allowance." The Injured Worker persuasively testified at hearing that she spoke with the employer and the TPA and notified them that she did not wish to file a workers' compensation claim. She further testified that she told the TPA that she did not sign the FROI-1 that was filed 10/27/2009 with the BWC. The BWC referred the FROI-1 to the Industrial Commission for hearing. On 12/03/2009, a District Hearing Officer order was issued disallowing the FROI-1 filed 10/27/2009. The Injured Worker did not appear at the hearing, and no appeal was filed.

A second Employee Incident Report was filled out by the Injured Worker on 03/30/2010. The Injured Worker stated that her "hands went numb and couldn't grip with right hand." She stated that she was using the hole punch and her hands got sore again, and that she woke up again with numb hands and could not grip anything. Significantly, on this report, in response to the question "Will a Workers' Compensation Claim be Filed?," the Injured Worker marked the box labeled, "Yes."

The Injured Worker now requests continuing jurisdiction be exercised to vacate the District Hearing Officer order, dated 12/03/2009, due to a clear mistake of fact in the order, and a clear mistake of law of such character that remedial action would clearly follow.

It is the finding of the Commission that exercising continuing jurisdiction is proper in this case due to a clear mistake of fact in the order, and a clear mistake of law of such character that remedial action would clearly follow. The Commission finds the District Hearing Officer order, dated 12/03/2009, failed to note that the FROI-1 was not signed by the Injured Worker, but was only signed by Ms. Taylor, a representative of the Employer, and the same person who denied the claim by letter dated 11/06/2009. The Commission finds the Injured Worker's testimony to be

> persuasive that she told the Employer and TPA that she did not desire to file a claim at that time, which is bolstered by her indication on the 09/15/2009 employee Incident Report that she did not know if she would be filing a workers' compensation claim. Further, Ohio Adm.Code 4123-3-08(A)(2) mandates that a FROI-1 "shall be completed, **signed by the employee,** and returned to the self-insuring employer. (emphasis added)" In this case, the Injured Worker never signed the FROI-1 filed 10/27/2009.

{¶ 65} Hearing Officer Manual Memo S6 states:

> Motions, Applications, and Appeals Not Filed by a Party in Interest
>
> The Industrial Commission may exercise continuing jurisdiction over any motion, application, or appeal which has been signed by a party in interest. The term "party in interest" is expressly limited to the claimant, his/her representative, the employer, the employer's representative, and the Administrator.
>
> Any motion, application, or appeal which is signed by a person or entity other than those enumerat[ed] above, **shall be dismissed.** (Emphasis added.)
>
> Therefore, based on the cited clear mistake of fact and clear mistake of law, the Commission exercises continuing jurisdiction pursuant to R.C 4123.52, 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, 2004-Ohio-5990, in order to correct this error.
>
> The Commission orders the District Hearing Officer order, issued 12/03/2009, vacated. Further, the Commission orders the FROI-1, filed 10/27/2009, dismissed, as said application was not signed by Ms. Siembieda.
>
> The claim is neither allowed, nor disallowed.

(Emphasis sic.)

{¶ 66} 28. On March 4, 2014, relator, Coastal Pet Products, Inc., filed this mandamus action.

Conclusions of Law:

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

Continuing Jurisdiction

{¶ 68} 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.

{¶ 69} Siembieda's failure to administratively appeal the DHO's order of December 1, 2009 did not bar the commission's exercise of continuing jurisdiction over the DHO's order. *State ex rel. Scott v. Ohio Bur. of Workers' Comp.*, 73 Ohio St.3d 202 (1995). This is so even though the December 1, 2009 order of the DHO disallowing the industrial claim became a final commission order by virtue of Siembieda's failure to exercise the administrative remedy of an appeal of the DHO's order of December 1, 2009. *KPGW Holding Co., L.L.C. v. Indus. Comm.*, 10th Dist. No. 11AP-407, 2012-Ohio-5035.

The Statute and Regulations Pertaining to Claim Procedures

{¶ 70} R.C. 4123.511(A) provides in part:

> If the bureau receives from a person other than the claimant written or facsimile information or information communicated verbally over the telephone indicating that an injury or occupational disease has occurred or been contracted which may be compensable under this chapter, the bureau shall notify the employee and the employer of the information. If the information is provided verbally over the telephone, the person providing the information shall provide written verification of the information to the bureau according to division (E) of section 4123.84 of the Revised Code. The receipt of the information in writing or facsimile, or if initially by telephone, the subsequent written verification, and the notice by the bureau shall be considered an application for compensation under section 4123.84 or 4123.85 of the Revised Code, provided that the conditions of division (E) of section 4123.84 of the Revised Code apply to information provided verbally over the telephone.

{¶ 71} Ohio Adm.Code 4123-3-08 is captioned "Preparation and filing of applications for compensation and/or benefits." It provides:

> (A) Preparation and execution of forms.
>
> (1) The "First Report of Injury" form (FROI-1) for applying for payment from the state insurance fund due to an injury, occupational disease, or death shall be completed by the employee. The employee shall sign the FROI-1 at the points designated on the form.
>
> (2) The FROI-1 for applying for payment from a self-insuring employer shall be completed, signed by the employee, and returned to the self-insuring employer. In situations where there is no prescribed form, a notice in writing shall be given in a manner sufficient to inform that a claim for benefits is being presented.
>
> * * *
>
> (4) In the event the injured or disabled employee is unable to complete the first report of injury by reason of physical or mental disability, the report may be completed and filed by the employee's spouse, next friend, the guardian of the employee, or the employee's employer.
>
> * * *
>
> (6) It shall be the duty of every employer to assist injured or disabled employees in the preparation and submission of reports for compensation and/or benefits.

{¶ 72} While paragraph (A)(2) provides that the FROI-1 shall be completed and signed by the employee before returning to the self-insured employer, paragraph (A)(4) provides the only exception to the rule that the employee must complete and sign the FROI-1. That is, paragraph (A)(4) provides that the FROI-1 may be completed and filed by the employee's spouse, next friend, the guardian of the employee, or the employee's employer in the event the injured or disabled employee is unable to complete the FROI-1 by reason of physical or mental disability.

{¶ 73} Contrary to relator's suggestion here, the rule does not grant the privilege to complete and file a FROI-1 on behalf of an injured worker to anyone under any circumstance. Unless there is evidence on which the commission relies that the injured

worker is unable to complete the FROI-1 "by reason of physical or mental disability," the commission is not authorized under the rule to accept the FROI-1 that was completed and filed by someone other than the injured worker.

Ohio Adm.Code 4123-3-16(B)

{¶ 74} Ohio Adm.Code 4123-3-16 is captioned "Motions."

{¶ 75} Ohio Adm.Code 4123-3-16(B) provides:

> A motion may be submitted by the employee or the employer to seek a determination by the bureau or the commission on any matter not otherwise provided for in this chapter. It is appropriate to file a motion in order to secure allowance of a disability or condition not previously considered in a claim. A motion shall not be used as a substitute for an untimely appeal.

{¶ 76} Citing the provision in Ohio Adm.Code 4123-3-16(B) that "[a] motion shall not be used as a substitute for an untimely appeal," relator contends that the provision bars the commission's exercise of continuing jurisdiction over the DHO's order of December 1, 2009 because Siembieda failed to appeal the DHO's order. Relator is incorrect.

{¶ 77} Clearly, Ohio Adm.Code 4123-3-16(B), a rule that makes no mention of the commission's continuing jurisdiction under R.C. 4123.52, cannot be interpreted as barring the motion for the exercise of continuing jurisdiction at issue here. *Scott*.

Commission's Determination that the DHO's Order of December 1, 2009 Contains a Clear Mistake of Fact and a Clear Mistake of Law

{¶ 78} Contrary to what relator suggests, the commission did not determine that the DHO's order of December 1, 2009 contains a clear mistake of fact and a clear mistake of law simply because Siembieda did not sign the FROI-1.

{¶ 79} The commission's order of July 12, 2011 states:

> The Commission finds the District Hearing Officer order, dated 12/03/2009, failed to note that the FROI-1 was not signed by the Injured Worker, but was only signed by Ms. Taylor, a representative of the Employer, and the same person who denied the claim by letter dated 11/06/2009. The Commission finds the Injured Worker's testimony to be persuasive that she told the Employer and TPA that she did not desire to file a claim at that time, which is bolstered by her indication on the 09/15/2009 employee Incident Report

> that she did not know if she would be filing a workers' compensation claim. Further, Ohio Adm.Code 4123-3-08(A)(2) mandates that a FROI-1 "shall be completed, **signed by the employee,** and returned to the self-insuring employer. (emphasis added)" In this case, the Injured Worker never signed the FROI-1 filed 10/27/2009.

(Emphasis sic.)

{¶ 80} After finding that the DHO's order of December 1, 2009 fails to note that the FROI-1 was not signed by Siembieda, the commission then determined that Siembieda did not desire to file a claim at that time. Thus, part of the clear mistake of fact and clear mistake of law in the DHO's order of December 1, 2009 is the DHO's failure to inquire whether Siembieda consented to Coastal's filing of the FROI-1. The DHO failed to address the key preliminary issue before him, i.e., whether the unsigned FROI-1 indicated that Siembieda did not consent to her employer's filing of the FROI-1.

{¶ 81} Implicit in the commission's order is the notion that the FROI-1 unsigned by the injured worker can be accepted if there is evidence on which the commission relies to support a determination that the injured worker consents to the filing.

{¶ 82} The commission clearly articulated the evidence relied on and its reasoning in concluding that the DHO's order of December 1, 2009 cannot stand under the exercise of continuing jurisdiction because there was a clear mistake of fact and a clear mistake of law in the DHO's order.

The Commission's Weighing of the Evidence in Determining that Siembieda Did Not Consent to the Filing of the FROI-1

{¶ 83} Citing *Gobich,* relator contends the commission inappropriately reweighed the evidence that was before the DHO on "the question of Siembieda's intent." (Relator's Brief, 19.)

{¶ 84} Pointing to the evidence before the DHO pertaining to whether Siembieda consented to the filing of the FROI-1, relator asserts "[t]he only thing that is clear from this set of facts, is that it was very unclear of what the Claimant's intent really was." (Relator's Brief, 18.)

{¶ 85} Relator incorrectly assumes that the DHO's order of December 1, 2009 actually weighed the evidence regarding Siembieda's intent to go forward with the filing of the FROI-1. Clearly, the DHO's order never reached the question of Siembieda's

intent to file the claim or Siembieda's consent to the filing of the claim. Rather, the DHO's order of December 1, 2009 inappropriately assumes that the filing of the FROI-1 was authorized by Siembieda and then adjudicates the question of whether there was sufficient medical evidence to support an industrial claim. The DHO's order of December 1, 2009 disallows the unauthorized FROI-1 on grounds that there is a lack of medical evidence to support the FROI-1.

{¶ 86} Therefore, relator's reliance on *Gobich* is misplaced. The commission did not reweigh the evidence before the DHO, but, instead, weighed the evidence regarding Siembieda's intent that the DHO failed to address.

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

/S/ MAGISTRATE
KENNETH W. MACKE

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).