

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Adena Medical Center, :

Relator, :

No. 15AP-1167

v. :

(REGULAR CALENDAR)

The Industrial Commission of Ohio et al., :

Respondents. :

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D E C I S I O N

Rendered on December 13, 2016

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**On brief:** *Sara L. Rose, LLC*, and *Sara L. Rose*, for relator.

**On brief:** *Michael DeWine*, Attorney General, and *Andrew J. Alatis*, for respondent Industrial Commission of Ohio.

**On brief:** *Philip J. Fulton Law Office*, and *Chelsea Fulton Rubin*, for respondent John Jennings.

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IN MANDAMUS  
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

BROWN, J.

{¶ 1} Relator, Adena Medical Center ("Adena"), 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 the claim allowance and payment of temporary total disability ("TTD") compensation to John Jennings ("claimant"), and ordering the commission to find that there was an intervening injury, and claimant is not entitled to the award of TTD compensation.

{¶ 2} This matter was referred to a court-appointed magistrate pursuant to Civ.R. 53 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, and recommended this court deny Adena's writ of mandamus. Adena has filed six objections.

{¶ 3} In its first objection, Adena argues that the magistrate might have erred in Findings of Fact 1 and 3, in which she quoted from claimant's July 24, 2014 statement to his dentist and implied that Adena had knowledge of the July 24, 2014 statement when it certified the claim on May 7, 2014, which would have been impossible. However, Adena fails to point to any finding of fact or conclusion of law that shows the magistrate improperly attributed to Adena knowledge of the July 24, 2014 statement to the time it certified the claim on May 7, 2014. Clearly, the magistrate did not indicate in Findings of Fact 1 and 3 that Adena had knowledge of the statements in the July 24, 2014 statement as of the time it certified the claim on May 7, 2014. Findings of Fact 1 and 3 merely seek to set forth the pertinent facts of the case by quoting claimant's statements to the dentist from the July 24, 2014 statement. Therefore, Adena's first objection is without merit and is overruled.

{¶ 4} Adena argues in its second objection that the magistrate erred as a matter of fact in finding in paragraph 35 of her decision that when the claim was certified, Adena had notice claimant recently had three teeth removed based on the May 5, 2014 note from Certified Nurse Practitioner ("CNP") Charles Adkins, when, in fact, CNP Adkins made no mention of tooth extractions in the May 5, 2014 note. We agree that the May 5, 2014 note from CNP Adkins does not indicate that claimant had teeth removed. However, the magistrate did correctly quote CNP Adkins' May 5, 2014 note in Findings of Fact 4. Although we modify the magistrate's decision to the extent that she made this incorrect conclusion of law in paragraph 35, this error fails to mandate that we reject the magistrate's ultimate conclusion, when viewed in light of the magistrate's other findings that the record sufficiently demonstrated Adena should have known of claimant's prior medical problems and such information was discoverable as of the time Adena certified the claim. Therefore, we sustain Adena's second objection but find the error harmless to the final determination.

{¶ 5} Adena argues in its third objection that the magistrate erred as a matter of fact when she found at paragraph 37 that Adena had notice of claimant's "recent" cancer

treatment, when his cancer treatment actually occurred in 2005. Whether cancer occurring in 2005 falls under the definition of the vague and relative term "recent" when compared to the 2014 certification is debatable. Nevertheless, the magistrate's point was that medical evidence regarding claimant's prior cancer was available to Adena at the time it certified claimant's claim and should have prompted it to investigate claimant's medical history further before certifying the claim. We can find no error in such finding, and we find Adena's third objection without merit and overrule it.

{¶ 6} Adena argues in its fourth objection that the magistrate erred as a matter of fact and law in concluding that additional investigation by Adena would have timely led to the discovery that claimant's jaw fracture was caused by dental surgery and osteoradionecrosis ("ORN"). Adena claims there is nothing it could have discovered with further investigation that would have led it to deny the claim within the 30 days it had to make the initial claim determination. Although for this proposition Adena cites Ohio Adm.Code 4123-19-03(K)(10), which requires the employer to inform the claimant and the Ohio Bureau of Workers' Compensation within 30 days from the filing of the claim as to what conditions it has recognized or denied, that code section clearly permits the employer to deny the claim within 30 days, in which case the disputed application is referred to the commission for a hearing pursuant to Ohio Adm.Code 4123-3-09(B)(4). Thus, if it desired to investigate the claim more thoroughly than the 30-day limit allowed, it could have simply denied the claim. Instead, Adena apparently chose to "believe[ ]" its "long-time" employee's allegation that he thought he broke his jaw when he walked into the partially closed door at work. (Adena's objections at 11-12.) Although we, of course, agree that Adena could not have discovered medical records that were not in existence before the expiration of the 30-day deadline, it could have denied certification of the claim in order to secure other available records that were in existence, even those records Adena claims were withheld by a medical provider. Although we also agree that ORN was not diagnosed until July 28, 2014, and, thus, there was no evidence available regarding such at the time of the certification, Adena could have investigated the medical information contained in the May 5, 2014 record from CNP Adkins that explained claimant's history of cancer, the chewing incident when he felt pain and heard a crack, his use of pain medications, and his history of right lower jaw biopsy two weeks prior to the injury. These medical issues, which all involved the same general anatomic areas as claimant's fractured

mandible, should have prompted Adena to deny the claim while it investigated claimant's medical history.

{¶ 7} Under this objection, Adena also asserts that the magistrate erred when it found *State ex rel. Cowley v. Indus. Comm.*, 10th Dist. No. 11AP-4, 2011-Ohio-6663, and *State ex rel. Smegal v. Indus. Comm.*, 90 Ohio St.3d 264 (2000), are distinguishable from the present case. Although Adena claims the magistrate erred in distinguishing these cases by requiring evidence of fraud in the present case, and Adena has never alleged fraud or intentional misrepresentation, we find the magistrate did not require Adena to show fraud. The magistrate simply found that these cases largely hinged on the claimants' fraud and misrepresentation, and, thus, because there was no evidence of fraud here, their holdings, in that respect, were not relevant to the present case. For these reasons, we find the magistrate did not err in distinguishing *Cowley* and *Smegal* from the present case, and we find claimant's fourth objection without merit and overrule it.

{¶ 8} Adena argues in its fifth objection that the magistrate erred as a matter of law in failing to find that the incident involving claimant's chewing of a potato chip ("chip incident") was an intervening injury. Adena first asserts that the magistrate's acknowledgement in paragraph 39 of her decision that CNP Adkins' May 5, 2014 note listed the chip incident is irrelevant because the note did not explain that the incidents with the door and the chip were days apart. However, the import of the magistrate's finding that the note listed the chip incident is that CNP Adkins was aware of the chip incident but did not find it to be the cause of the mandible fracture, and the commission could have relied on such in finding that the chip incident was not an intervening injury.

{¶ 9} Adena next asserts that the magistrate erred when she found at paragraph 39 of her decision that CNP Adkins indicated in his May 5, 2014 office note that there was a causal relationship between the condition and the door incident when the office note does not, in fact, indicate a causal relationship between the fracture and door incident. Although we agree that such finding is not explicit, it is implicit in the note that CNP Adkins accepted claimant's belief that the door incident caused the fracture, given the report listed the date of injury as April 29, 2014, and the description of the injury as the door incident. There is nowhere in the May 5, 2014 note that CNP Adkins hints that the cause of the mandible fracture was anything other than the door incident claimant described, and CNP Adkins clearly did not give any indication that he believed the chip

incident caused the fracture. In sum, although CNP Adkins' May 5, 2014 note indicated the chip incident caused pain and a cracking sound, we agree with the commission that there was simply no persuasive medical evidence or medical opinions in the record to support the view that the chip incident was an intervening cause of the fracture. Therefore, we find Adena's fifth objection without merit and overrule it.

{¶ 10} Adena argues in its sixth objection that the magistrate erred as a matter of law in finding that claimant was entitled to TTD compensation. Adena contends that TTD can never be based, even in part, on non-allowed conditions, and several doctors found that claimant's fracture was due to ORN of the mandible. However, the mere presence of non-allowed conditions does not automatically bar compensation. *State ex rel. Waddle v. Indus. Comm.*, 67 Ohio St.3d 452, 455 (1993). Even if claimant did suffer from ORN, there was some evidence in the record to support the commission's determination that claimant was unable to return to his employment due to a mandible fracture caused by running into the partially closed door.

{¶ 11} Adena also argues that the MEDCO-14s relied on by the commission all state that claimant was capable of light-duty work, and CNP Adkins never indicated claimant needed to stop all work activity and retire due to the fracture. In fact, CNP Adkins indicated two weeks after claimant retired that he could still work restricted duty. Adena claims the only evidence in the record from all sources was that claimant could work restricted duty as of the date he retired.

{¶ 12} However, as the magistrate found, the pertinent issue for a TTD determination is whether there existed some evidence in the record to support a finding that claimant was unable to return to his former position of employment due to the allowed condition. CNP Adkins' MEDCO-14s indicated that claimant was unable to return to his former position of employment but could return to work with restrictions, and later indicated that the condition causing TTD was the right mandible fracture. In his long letter explaining why he was retiring, claimant explained that it was due to his right mandible fracture caused by his work-related injury. Although some of the treatments he indicated in the letter may have been for a non-allowed condition—specifically his ORN, as Adena suggests—he also indicated he could no longer work due to pain, various dental, medical, and surgical appointments, travel time, and stress. The commission determined that this letter demonstrated that claimant's resignation was involuntary and based on the

injury of record. The commission also cited claimant's testimony that he tried to work light duty but Adena indicated it could not put him on light-duty work at the same time he had a claim. This evidence constitutes some evidence to support the commission's determination that claimant's departure from work was involuntary and caused by his allowed condition. For these reasons, we find Adena's sixth objection without merit and overrule it.

{¶ 13} Accordingly, after an examination of the magistrate's decision, an independent review of the record pursuant to Civ.R. 53, and due consideration of Adena's objections, we overrule Adena's first, third, fourth, fifth, and sixth objections; we sustain Adena's second objection, and we modify the magistrate's decision in accord with our determination of that objection; we adopt the magistrate's findings of facts, with the exception noted with respect to Adena's second objection; and we adopt the magistrate's conclusions of law. Adena's request for a writ of mandamus is denied.

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

SADLER and BRUNNER, JJ., concur.

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**APPENDIX**

**IN THE COURT OF APPEALS OF OHIO**

**TENTH APPELLATE DISTRICT**

The State ex rel. Adena Medical Center,	:	
Relator,	:	
v.	:	No. 15AP-1167
The Industrial Commission of Ohio	:	(REGULAR CALENDAR)
and	:	
John Jennings,	:	
Respondents.	:	

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**MAGISTRATE'S DECISION**

Rendered on August 17, 2016

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*Sara L. Rose, LLC, and Sara L. Rose, for relator.*

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

*Philip J. Fulton Law Office, and Chelsea Fulton Rubin, for*  
respondent John Jennings.

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**IN MANDAMUS**

{¶ 14} Relator, Adena Medical Center, 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 the claim allowance and payment of temporary total disability ("TTD") compensation to John Jennings ("claimant"), and ordering the commission to find that

there was an intervening injury, and claimant is not entitled to the award of TTD compensation.

Findings of Fact:

{¶ 15} 1. Claimant had been employed by relator for approximately 42 years when, on April 29, 2014, in his own words:

I "slammed" into the edge of a door and hit my jaw in the location of my surgery. The curtain was pulled and the door had drifted halfway open. My head was turned while talking with a patient and I pulled the curtain back and hit the edge of the door (pretty hard). It left a red mark on my face and was fairly painful. This was [sic] incident was witnessed by 2 of my co-workers. At the time, I didn't give this accident much thought since my jaw usually was hurting at that time of the day. This is when we believe the initial fracture occurred.

{¶ 16} 2. Claimant did not seek medical attention that day.

{¶ 17} 3. A few days later, the following occurred:

On Thursday 5/1/14, while at the ballpark I was "NIBBLING" on a single potato chip (because I did not want to jab my sore gum with the sharp, edge of the chip) and that's when the jaw SNAPPED... My friend was about 3 feet away and heard this and he stated "did you just break a tooth"? I told him that I didn't think it was a tooth that had broken.

(Emphasis sic.)

{¶ 18} 4. On May 5, 2014, claimant sought treatment with Adena Occupational Health and was seen by Charles Adkins, CNP. The office notes from that visit provide, in pertinent part:

Subjective: The patient reports today for occupational health evaluation on April 29, 2014. He reports they moved a curtain and hit the left side of his face on the edge of the door which caused an abrasion to the right cheek. Two weeks earlier the patient had a biopsy of the right lower jaw. While chewing on his jaw, he felt a sharp pain, heard a crack. He thought that he had maybe had fractured it, and he did follow up [with] Dr. John Patterson, oral surgeon, who did take an x-ray and it does show a fracture of the mandible. He is due for having his jaw wired shut tomorrow. Rating his pain at a 6/10. He does take the Percocet for pain control.



Objective: Data today reveals a blood pressure high of 178/110, pulse of 100, respiratory rate of 20. The patient is alert and oriented. On exam, the patient is resting quietly. On the right side of his jaw, he has a very large hematoma noted with limited opening and closing of the mouth due to the severe swelling that he has there. X-rays reveal a right mandible fracture. The patient is able to talk but it does take him some time to voice his words due to the restriction of the jaw line.

Assessment: Will be a right mandible fracture.

Plan: We will take him off of work. He will follow up tomorrow with Dr. Patterson for surgery. I will see him back in 10 days for re-evaluation. Hopefully at that time the swelling has gone down in hopes that we may be able to get him back to doing some light duty type of work. The patient was agreeable to our plan of care. He left here stable, in no acute distress.

{¶ 19} 5. Claimant prepared a First Report of Injury ("FROI-1") and relator, a self-insured employer, certified the claim as medical only for the condition of right mandible fracture. Relator also requested that claimant submit relevant medical records.

{¶ 20} 6. In a letter dated September 7, 2014, claimant informed relator that he was retiring after 42 years of service in order to focus on healing. Specifically, that letter provides, in pertinent part:

I am retiring early from Adena Regional Medical Center at the age of 61 after 42 years of loyal service. \* \* \* I plan to use this retirement time to aid in my treatment, recovery, and potential major jaw surgery. I do not believe that this can be accomplished without severing my employment. I am not eligible for Social Security for a year and I'm unable to seek further employment due to my health considerations from the accident referenced above. Although this will provide a financial hardship and loss of secondary insurance benefits, I feel that it is imperative for me to focus on my health.

I feel that from the time of my accident that I was not treated with the respect and concern that my injury deserved. I was issued a Workers' Compensation claim number and was assigned an occupational health CNP by Adena. I was off work for 2 weeks and had seen the CNP two times. \* \* \* I was to report to work on Tuesday on light duty and restrictions. \* \* \* I was still on pain medication for my injury and knew that the pain level and other side effects I was experiencing

as well as the fact that my jaw was wired shut, working full time would be nearly impossible. \* \* \*

I was told that they would place me on a restricted work schedule so that I would have limited communication. I was unable to speak clearly and when I spoke for more than a few sentences at a time, I would incur extreme numbness and pain. I was also told that I was released to work up to 8 hours per day; however, I would only be paid for the hours I was able to work. If I was unable to work a full day, that would not be a problem. I would be able to take Paid Time Off or no pay for anything short of 40 hours per week. I never received any funds from Worker's Compensation after the initial two weeks even though I was never able to work a full day. I averaged 20 hours per week. I had many medical appointments during this time as well as needing the additional rest to mitigate the pain and discomfort I was in. Things went downhill from there. I had a wire in my jaw break over a weekend and was in severe pain. I had to wait until Monday afternoon to have the repair completed and therefore I was unable to work that day. I was told by my supervisor that a doctor's excuse would be required. This was contrary to what I had been told at the onset of being required to return to work.

\* \* \* I already had complications due to being a 10 year oral cancer survivor (difficulty swallowing, severely decreased saliva, and required esophageal stretching every 10 to 12 weeks). I suppose that because I worked through a lot of my cancer treatment, they felt I could do so with this even with the side effects that I was having due to the wiring and failure to heal. I was wired shut 13 WEEKS 5 DAYS. I was never able to work full time during this time...I did not have the strength for it.

Again, to reiterate, I am retiring to focus on my recovery. I am starting a minimum of 40 daily hyperbaric treatments which will last 2 1/2 hours each day as well as continued weekly dental, surgical and medical appointments. In addition these appointments and treatment are all in Columbus which is an hour away from my employer. The travel time will make it difficult to working [sic] in this situation. The added stress of this as well as disenchantment and disheartenment with my employer's lack of empathy does not aid in my healing process. I feel that in my best interests, I needed to retire earlier than I intended. My health is too important. I have survived too much (stage 4 throat cancer in which I was given less than a 20% survival)

to let this get me. I know that one does not heal well during stress.

(Emphasis sic.)

{¶ 21} 7. On March 25, 2015, relator filed a motion asking the commission to exercise its continuing jurisdiction and reconsider the allowance of claimant's claim. Specifically, relator asserted that it had newly discovered evidence that claimant's fracture occurred a few days after he had two teeth extracted and/or relator requested that the "chip incident" on May 1, 2014 be declared an intervening injury. Ultimately, relator would argue that the jaw fracture was actually a result of the fact that claimant had developed osteoradionecrosis ("ORN") of his jaw due to the radiation treatment he had received for neck cancer several years earlier. Relator argued that it could not have known of the ORN when the claim was certified because claimant was not diagnosed with that condition until several months after he hit his jaw at work. Relator also argued that claimant was not entitled to the award of TTD compensation because that his retirement was voluntary and not involuntary.

{¶ 22} 8. A hearing was held before a district hearing officer ("DHO") on May 7, 2015. The DHO denied relator's request finding insufficient evidence to support the exercise of continuing jurisdiction. First, the DHO noted that there was no allegation of fraud, a clear mistake of law, or an error by an inferior tribunal and, further, the DHO found that there were no new and changed circumstances. Although relator asserted that it had newly discovered evidence, the DHO was not persuaded that the evidence could not have been discovered prior to relator certifying the claim. Further, the DHO concluded that there was no clear mistake of fact, stating:

In sum, the District Hearing Officer finds no basis to assert continuing jurisdiction. The Self-Insuring Employer had an opportunity to investigate this claim and obtain readily available medical documentation prior to certification and it did not do so. The District Hearing Officer is not persuaded the results of a post-certification investigation into the circumstances surrounding a claim are sufficient, in and of themselves, to justify the exercise of continuing jurisdiction when the information obtained as a result of the investigation could have been easily acquired prior to certification. As such, there is no basis present to exercise continuing jurisdiction and vacate the allowance of this claim.

The District Hearing Officer also notes the employer's motion requests that a "chip incident" on or about 05/01/2014 be declared an intervening injury. However, as there is no basis to exercise continuing jurisdiction and as the certification of this claim was for a fracture occurring on 04/29/2014, the District Hearing Officer is not persuaded an intervening injury can be found to have occurred on 05/01/2014. The injury that gave rise to this claim occurred a mere two days prior to that date, and no medical evidence is noted suggesting a resolution of the allowed fracture occurred in the two day period of time. Therefore, the District Hearing Officer finds no basis to determine there was any intervening injury.

Finally, while the District Hearing Officer notes there is a resignation letter in file from the Injured Worker dated 09/07/2014, said resignation is based on the injury of record in this claim. As such, said resignation is involuntary and does not preclude the payment of temporary total disability compensation. Based on the Medco-14 Physician's Report of Work Ability forms dated 09/03/2014 and 10/01/2014 payment of temporary total disability compensation as requested by the Injured Worker is supported from 09/20/2014 through 04/01/2015. Payment of temporary total disability compensation is supported from 04/02/2015 through 04/14/2015 on submission of sufficient evidence of temporary and total disability for that period. Based on the Medco-14 dated 04/15/2015, the Injured Worker was released to return to work without restrictions as of that date.

{¶ 23} 9. Relator appealed and the matter was heard before a staff hearing officer ("SHO") on August 4, 2015. The SHO denied relator's request that the commission exercise its continuing jurisdiction over the claim allowance, denied relator's request to declare the chip incident was an intervening injury, but found there was insufficient medical evidence to support the closed period of TTD compensation. Although rather long, the SHO's order and explanation is succinct:

By way of history, the claim was allowed for an 04/29/2014 date of injury. The Injured Worker had worked for Adena Health System since 1972. The Injured Worker was in a room with the curtain drawn and as the Injured Worker ran into a door striking his right jaw on the door. The Injured Worker was treated at Adena Occupational Health. The Certified Nurse Practitioner Charles Adkins diagnosed the Injured Worker with a right mandible fracture ICD 802.2. The FROI-

1 First Report of an Injury, Occupational Disease or Death application was completed by Nurse Adkins. Certified Nurse Practitioner Adkins diagnosed the Injured Worker with a right mandible fracture and causally related it to an industrial injury.

On 05/07/2014, approximately eight days after the alleged industrial injury, Ms. Whitten, the Employer's HR support specialist, certified the FROI-1 Application. Also on 05/07/2014, the Self-Insuring Employer requested the Injured Worker sign a medical release in order to obtain the Injured Worker's medical records.

This Employer of record is a Self-Insuring Employer. The Self-Insuring Employer certified the claim and also requested a medical release from the Injured Worker on the same day. The Self-Insuring Employer did not obtain the Injured Worker's medical records prior to their certification of the industrial claim.

After obtaining some medical records from some of the Injured Worker's physicians, the Employer received information regarding the Injured Worker's prior history of cancer treatment and radiation treatments. The employer also became aware that the Injured Worker had three teeth/molers extracted approximately two weeks prior to the industrial injury.

The employer now requests the Commission exercise continuing jurisdiction due to discovery of information relative to the Injured Worker's prior medical treatment and past medical records, which refer to the Injured Worker's cancer treatments and prior tooth extractions.

The Employer also requests the Commission exercise continuing jurisdiction due to an alleged intervening injury on 05/01/2015 [sic]. The Self-Insuring Employer alleges that on 05/01/2014 the Injured Worker bit down on a potato chip and heard a snap in his jaw. The Hearing Officer fails to find sufficient medical evidence that the 05/01/2015 [sic] act of biting down on a potato chip caused a fracture to the Injured Worker's right mandible. The Hearing Officer finds no medical evidence to support this allegation.

The Hearing Officer fails to find a sufficient basis to find continuing Jurisdiction.

The Employer's representative argued that there was an error by an inferior tribunal when the Self-Insuring Employer's HR support specialist, Ms. Whitten, certified this claim. The Self-Insuring Employer accepted this claim. The Self-Insuring Employer and/or the Employer's claim specialist is not a tribunal. Therefore, the Hearing Officer does not find an error by an inferior tribunal.

The Employer's representative alleged that the Self-Insuring Employer made a mistake of fact as they were unaware of the Injured Workers' [sic] prior medical history. The Hearing Officer is not persuaded by this position. The Self-Insuring Employer made no efforts to obtain the Injured Worker's medical records prior to certification of this claim. The Staff Hearing Officer relies upon the fact that the Self-Insuring Employer certified the claim on the exact same date that the Employer requested a medical release from the Injured Worker. The Self-Insuring Employer did not seek to obtain medical records prior to certifying the claim.

The Employer's representative also requests an exercise of continuing jurisdiction due to newly discovered evidence. The Self-Insuring Employer did not demonstrate new and changed circumstances. The medical records were available however the Employer did not seek to procure those medical records prior to certifying the claim. The medical records were requested after the Self-Insuring Employer certified this claim.

Therefore, the Hearing Officer finds no basis to exercise continuing jurisdiction.

The Employer argues that the Injured Worker bit on a potato chip on 05/01/2014 and that this was an intervening injury.

The Hearing Officer fails to find sufficient evidence that the act of biting on a potato chip on 05/01/2014 resulted in a fracture of the Injured Worker's right mandible and was an intervening injury. The Hearing Officer finds no medical evidence to support this allegation of a 05/01/2015 [sic] intervening injury.

The C-84 Request for Temporary Total Compensation, filed 02/14/2015, requesting payment of temporary total compensation from 09/20/2014 through 04/14/2015, closed period, as the Injured Worker was released to return to work on 04/15/2015, is denied.

The Hearing Officer fails to find sufficient competent medical evidence to support the requested period of temporary total disability compensation from 09/20/2014 through 04/14/2015, closed period.

The Medco-14 Physician's Report of Work Ability on file were completed by Certified Nurse Practitioner Charles Adkins. CNP Adkins examined and treated the Injured Worker and then certified temporary total compensation. Pursuant to the Hearing Officer Manual, evidence of disability from a Certified Nurse Practitioner is insufficient competent medical evidence to award temporary total compensation. Although some Medco-14s have Bruce Elliston, M.D.[s] signature on some of the forms, there is no evidence that Dr. Elliston evaluated the Injured Worker or was even aware of the Injured Worker's treatment and findings.

The Hearing Officer fails to find sufficient competent medical evidence to support payment of temporary total compensation for the closed period of 09/20/2014 through 04/14/2015.

The Injured Worker testified at hearing that he retired from his Employer after almost 42 years of employment. The Injured Worker retired on 09/19/2014. The Injured Worker testified that he retired on 09/19/2014 after the Employer told him that he could not receive short term disability [and] have a workers' compensation claim at the same time. The Injured Worker testified that he attempted to work light duty but the Employer indicated that they could not put him on light duty work at the same time he had a claim. Based upon the Injured Worker's testimony at hearing, the Hearing Officer finds the Injured Worker's 09/19/2014 retirement was involuntary.

{¶ 24} 10. In an order mailed August 26, 2015, both relator's and claimant's appeals were refused.

{¶ 25} 11. On August 28, 2015, an SHO mailed an exparte order which vacated the prior SHO order and indicated that claimant's appeal would be addressed in a future commission order.

{¶ 26} 12. The matter was heard before the commission on October 6, 2015. The commission refused to assert continuing jurisdiction to overturn relator's certification of claimant's claim finding insufficient persuasive evidence of a mistake of fact, mistake of

law, or error by an inferior tribunal to establish continuing jurisdiction. The commission further found insufficient persuasive evidence of new and changed circumstances, which by due diligence, relator could not have discovered. The commission also found insufficient persuasive evidence that claimant sustained an intervening injury when his jaw snapped while eating a potato chip and found that the award of TTD compensation from September 20, 2014 through April 14, 2015 was appropriate, and further rejected relator's argument that claimant was not entitled to TTD compensation due to his retirement and awarded compensation for the closed period September 20, 2014 through April 1, 2015, and that TTD compensation for the period April 2 through April 14, 2015 may be considered upon submission of medical evidence.

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

Conclusions of Law:

{¶ 28} 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).

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

{¶ 30} Relator argues that the commission abused its discretion when it declined to exercise its continuing jurisdiction. Relator argues that there was new medical evidence that was not readily discoverable, that the commission should have found an intervening



injury, and that the commission should have denied the request for TTD compensation based upon a finding that claimant's departure from the workforce was voluntary.

{¶ 31} For the reasons that follow, the magistrate finds that the commission did not abuse its discretion in finding that relator failed to present new evidence which could not have been discoverable, in determining that the "chip incident" was not an intervening injury, and in finding that claimant's departure from the workforce was involuntary.

{¶ 32} Pursuant to R.C. 4123.52, "[t]he jurisdiction of the industrial commission and the authority of the administrator of workers' compensation over each case is continuing, and the commission may make such modification or change with respect to former findings or orders with respect thereto, as, in its opinion is justified." In *State ex rel. B & C Machine Co. v. Indus. Comm.*, 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.

{¶ 33} In making its argument that it presented newly discovered evidence to support the commission's exercise of continuing jurisdiction, relator relies on the decisions in *State ex rel. Cowley v. Indus. Comm.*, 10th Dist. No. 11AP-4, 2011-Ohio-6663, and *State ex rel. Smegal v. Indus. Comm.*, 90 Ohio St.3d 264 (2000). For the reasons that follow, the magistrate finds these cases are distinguishable.

{¶ 34} In *Cowley*, the commission exercised its continuing jurisdiction based on findings of new and changed circumstances, as well as fraud. In that case, Lisa Cowley had only worked for the employer of record for approximately two months before she was injured. Cowley denied having any prior shoulder problems and her employer certified the claim. Thereafter, the employer discovered that Cowley had injured her shoulder previously and did not disclose that information to her employer or to the doctors who examined her. The commission determined that Cowley's right to participate had been fraudulently obtained and disallowed the claim.

{¶ 35} In the present case, the May 5, 2014 medical note from claimant's first visit put relator on notice of claimant's prior medical problems, including the cancer and the removal of teeth, as well as the incident involving chewing the potato chip. Without further investigation, relator chose to certify the claim. Because claimant had been employed by relator for 42 years, it is difficult to imagine that relator had no knowledge of his prior medical history, especially considering that he had undergone surgeries prior to the date of injury, and had likely missed a significant amount of work as a result. Further, there is no allegation of fraud here.

{¶ 36} In *Smegal*, the Supreme Court of Ohio determined that the payment of wage loss compensation by a self-insured employer did not preclude the commission from terminating that compensation, even where the self-insured employer had paid the compensation after the date. Peggy Smegal was receiving wage loss compensation. Her employer filed a motion to terminate her wage loss compensation based on a doctor's report indicating she could work full time. At the hearing, Smegal testified about the work she had been doing. The commission determined Smegal had voluntarily limited her hours and her lack of earnings was not attributed to any restrictions.

{¶ 37} To support its argument here, relator points to that portion of the *Smegal* decision dealing with the reliance of the self-insured employer on information provided from Smegal. However, in the present case, there is no evidence in the record that would

establish that claimant had misrepresented any information about his condition or the incident involving the potato chip. Relator had medical evidence which discussed both the recent cancer treatment and the chip incident at the time it certified claimant's claim. Based upon that evidence, relator could have investigated further, but chose not to. As such, the magistrate rejects this argument.

{¶ 38} Relator also contends that the commission abused its discretion by failing to find an intervening injury. In order for the commission to find an intervening injury, there must be medical evidence to support a finding that a new injury severed the causal connection and that new injury became the intervening cause of the resulting disability.

{¶ 39} In the present case, the commission relied on claimant's own description of the events of April 29 and May 1, 2014. The May 5, 2014 treatment note lists both the incident that occurred on April 29, 2014, as well as the chip incident which occurred on May 1, 2014. CNP Adkins diagnosed relator as having a right mandible fracture and indicated that there was a causal relationship between the condition and the incident that occurred on April 29, 2014.

{¶ 40} In support of its argument, relator submitted a report indicating that claimant's jaw fracture was actually a result of the pre-existing condition of ORN combined with the surgical removal of some of claimant's teeth. However, as the sole evaluator of the weight of the medical evidence presented, the commission determined that claimant did not sustain an intervening injury on May 1, 2014 when he bit into a potato chip. Relator is encouraging this court to reweigh the evidence and substitute its decision for that of the commission. However, questions of credibility and the weight to be given evidence are clearly within the commission's discretion. *See Teece*. Further, it is immaterial whether other evidence, even if greater in quality and/or quantity, supports a decision contrary to the commission's. *State ex rel. Pass v. C.S.T. Extraction Co.*, 74 Ohio St.3d 373 (1996). The magistrate finds that the commission did not abuse its discretion when it determined that the chip incident was not an intervening injury.

{¶ 41} Relator's last argument is that the commission should have found that relator's departure from the workforce was voluntary, i.e., that his departure was not related to the allowed condition in the claim. Relator argues that claimant's disability is due to non-allowed conditions. For the reasons that follow, the magistrate disagrees.

{¶ 42} In finding that his departure from the workforce was involuntary, the commission relied on medical evidence stating that claimant's disability was due to his allowed condition. In awarding claimant TTD compensation, the commission relied on Medco-14s signed by CNP Adkins and Dr. Elliston. Relator argues that those Medco-14s are internally inconsistent because, on the first page, CNP Adkins indicates that claimant could return to work with restrictions, yet, on the second page, CNP Adkins indicates that claimant's mandible fracture was totally disabling. The magistrate finds that relator is misconstruing the evidence provided on the Medco-14s.

{¶ 43} On the first page, both CNP Adkins and Dr. Elliston indicated that claimant was not able to return to his former position of employment, but that he could return to available and appropriate work with restrictions. On the second page of the Medco-14, both CNP Adkins and Dr. Elliston were asked to indicate what was the condition causing TTD (the inability to return to the former position of employment), and they both indicated right mandible fracture. Those two portions of the Medco-14s are not inconsistent. Both CNP Adkins and Dr. Elliston opined that relator could not return to his former position of employment due to the allowed condition in the claim. That constitutes some evidence to support the finding that claimant was entitled to TTD compensation. Although it is clear that claimant has other conditions which may or may not also be disabling, those other conditions can neither advance nor defeat a request for compensation. *State ex rel. Waddle v. Indus. Comm.*, 67 Ohio St.3d 452 (1993). The question is whether or not there is medical evidence in the record to support a finding that claimant was unable to return to his former position of employment due to the allowed condition in the claim. The commission cited that evidence here, and there was no abuse of discretion.

{¶ 44} Further, claimant wrote a long and detailed letter explaining why he was retiring after 42 years of service. In that letter, claimant was very clear that the right mandible fracture, the allowed condition in his claim, was the reason he felt it necessary to leave the workforce at this time. Relator is again asking this court to reweigh the evidence and find that the commission abused its discretion; however, that is not the duty of this court. Finding that there is some evidence in the record to support the commission's determination that claimant's departure from the workforce was due to the

allowed condition in his claim and was therefore involuntary, the magistrate finds that relator has not demonstrated that the commission abused its discretion.

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

/S/ MAGISTRATE  
STEPHANIE BISCA

### **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).