

law. The magistrate's decision includes a recommendation that we not issue the requested writ.

{¶ 3} The history of this claim or set of claims is fully described in the magistrate's decision. Young and her counsel have been caught in the middle of an ongoing dispute over when an injured worker who has been denied the right to participate in the workers' compensation system in Ohio should file an appeal in a court of common pleas and when the injured worker should pursue a special writ, usually in the Tenth District Court of Appeals.

{¶ 4} Counsel for Young chose to pursue an appeal to common pleas court. The common pleas court found that the issue was the right to participate and the appeal was appropriate. The employer and BWC disagreed and pursued a further appeal to the Sixth District Court of Appeals which reversed the trial court and indicated that Young and her counsel should have pursued an action in mandamus. Our magistrate has indicated her belief that the Sixth District Court of Appeals was just plain wrong, despite the Sixth District's clear reliance on the words of the Supreme Court of Ohio in *State ex rel. Liposchak v. Indus. Comm.*, 90 Ohio St.3d 276 (2000). The Sixth District's interpretation of *Liposchak* means that some right to participate cases are to be appealed to common pleas court and some are not.

{¶ 5} While our magistrate's handling of the issues would be correct and appropriate in most cases involving the right to participate, under the unique facts of this case, the only remedy available to Young and her counsel is a special writ. Her pursuit of the usual remedy has been refused by the Sixth District Court of Appeals. That refusal has not been overturned by the Supreme Court of Ohio. Given that litigation history, she has no remedy at law except via a special writ, specifically a writ of mandamus.

{¶ 6} Our magistrate has not addressed the other issues in this case, so therefore the case must be returned to the magistrate to address the remaining issues.

{¶ 7} The objections on behalf of Kathy Young are sustained.

*Objections sustained; case returned
to magistrate to address remaining issues.*

BROWN, J., concurs.
LUPER SCHUSTER, J., concurs in judgment only.

A P P E N D I X

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

The State ex rel. Kathy S. Young,	:	
Relator,	:	
v.	:	No. 16AP-706
The Industrial Commission of Ohio, et al.,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on July 28, 2017

Steven G. Thomakos, for relator.

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

Eastman & Smith LTD., *Mark A. Shaw*, and *Melissa A. Ebel*, for respondent Craig Transportation Co.

IN MANDAMUS

{¶ 8} Relator, Kathy S. Young, has filed this original action requesting this court issue a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to grant her the right to participate in the Ohio Bureau of Workers' Compensation ("BWC") system for an injury she sustained in the state of Illinois arising from her employment with respondent, Craig Transportation, Co. ("Craig"), and for which she already received compensation and medical expense payments under the Indiana workers' compensation system.

Findings of Fact:

{¶ 9} 1. In March 2012, relator was employed by Craig as a long-distance truck driver.

{¶ 10} 2. At the time she was hired, relator signed a document, which provided in pertinent part:

Any injury or W/C claim arising out of an incident occurring in the state of Ohio, during my course of employment, shall be filed with the Ohio BWC. Any claim arising from an incident outside the state of Ohio, during my course of employment, shall be filed with our W/C company for all other states, providing All States coverage from our base in Indiana * * *. In this event Indiana Benefits will apply based on our worksite in Indiana.

{¶ 11} 3. On July 18, 2012, relator was injured when a large tote fell from the back of her trailer and hit her on the head. At the time, relator was in the state of Illinois.

{¶ 12} 4. Relator's claim was processed by Midwestern Insurance Alliance, Craig's out-of-state workers' compensation insurer, and was assigned a file number under the Indiana workers' compensation system.

{¶ 13} 5. On August 7, 2012, relator and Craig executed Indiana Form 1043 entitled "Agreement to Compensation of Employee & Employer."

{¶ 14} 6. Pursuant to the terms of this agreement, relator's claim was recognized as a "cervical strain, head laceration." Further, the agreement provided for the payment of temporary total disability ("TTD") compensation in the amount of \$494.30 per week.

{¶ 15} 7. Relator's medical bills were paid and she received \$7,343.42 in TTD compensation until October 30, 2012, at which time she returned to work for Craig. The document terminating her TTD compensation was signed by relator and by a representative from Craig.

{¶ 16} 8. It appears that relator experienced an episode of vertigo while backing her semi-truck up to a loading dock in Ohio in January 2013. At that time, the vice president of safety, maintenance, and compliance for Craig informed her that there was no basis to reopen her Indiana claim. It does not appear that relator pursued the matter further.

{¶ 17} 9. In January 2013, relator filed a FROI-1 in Ohio based on the injuries she sustained in July 2012.

{¶ 18} 10. In an order issued February 8, 2013, the administrator for the BWC denied her claim.

{¶ 19} 11. Relator appealed and the matter was heard before a district hearing officer ("DHO") on March 12, 2013. The DHO vacated the order of the administrator and determined that Ohio had jurisdiction over relator's workers' compensation claim. Specifically, the DHO made the following findings: (1) relator is and was a resident of the state of Ohio; (2) relator completed her application for employment and filled out her employment paperwork in Ohio; (3) her new employee orientation and driver's examination took place in Ohio; (4) she is dispatched from Ohio; and (5) Ohio taxes are deducted from her paychecks. Based on these findings, the DHO first found that relator established sufficient contacts with the state of Ohio to allow Ohio to exert jurisdiction over her claim despite the fact that her injury occurred in Illinois.

{¶ 20} Thereafter, the DHO recognized that relator had filed a claim for the same accident in the state of Indiana, and that compensation and medical benefits had been paid to her as a result. However, the DHO concluded that the filing of the claim in Indiana did not preclude relator from participating in the Ohio workers' compensation fund because there was no evidence that Craig complied with the requirements set forth in R.C. 4123.54(H)(1) regarding the election of coverage in a state other than Ohio. Specifically, the DHO found there was no evidence that the agreement relator signed when she was hired was filed with the BWC within ten days of its execution. Based on this finding, the DHO concluded that Craig failed to establish that relator's claim may properly be excluded from consideration as an Ohio claim pursuant to an agreement properly executed and filed in compliance with R.C. 4123.54(H)(1). The DHO also found that any amount of compensation awarded to relator under the Indiana claim would be credited to the amount of any award of compensation of benefits which would be paid to her under the Ohio workers' compensation system.

{¶ 21} The DHO allowed relator's claim for the following conditions: "concussion with brief coma, cervical sprain/strain and open wound of the head," and concluded that

TTD compensation would be paid to relator from February 13 through March 12, 2013 and continuing based on the submission of appropriate evidence.

{¶ 22} 12. Craig appealed and the matter was heard before a staff hearing officer ("SHO") on April 22, 2013. The SHO vacated the prior DHO order finding that R.C. 4123.542 barred relator's claim in Ohio. Specifically, the SHO stated:

Ohio Revised Code 4123.542 states "an employee or the employee's dependents who received a decision on the merits of a claim for compensation or benefits under the Workers' Compensation laws of another state shall not file a claim for compensation and benefits under this chapter ... of the Revised Code for the same injury, occupational disease, or death." This statute also defines the term "decision on the merits" as "a decision determined or adjudicated for compensability of a claim and not on jurisdictional grounds."

In this instance, the Injured Worker filed a claim in Indiana and that claim was accepted by the Employer in Indiana before she filed this claim in Ohio. The Staff Hearing Officer finds that the acceptance of the Indiana claim by the Employer constitutes a "decision on the merits" as the Employer had determined the compensability of the claim in the Injured Worker's favor. Accordingly, the Staff Hearing Officer finds that the Injured Worker's Ohio claim is barred by Ohio Revised Code 4123.542.

{¶ 23} 13. Relator's further appeal was refused by order of the commission mailed May 18, 2013.

{¶ 24} 14. Relator filed an appeal in the Wood County Court of Common Pleas.

{¶ 25} 15. The parties each filed motions for summary judgment, which came before the court on June 16, 2014. The court granted relator's motion for summary judgment finding that the approval of the Indiana Industrial Board of Compensation Agreement signed by relator and Craig did not constitute a decision on the merits for purposes of R.C. 4123.542, that relator was not prohibited from filing an Ohio workers' compensation claim relating to the July 18, 2012 injury in Illinois, and allowed her claim for " "concussion, cervical sprain/strain and open wound to the head."

{¶ 26} 16. Craig and the BWC appealed the decision of the common pleas court to the Sixth District Court of Appeals and relator filed a cross-appeal.

{¶ 27} 17. In a decision and judgment entered March 31, 2016, the appellate court found, in pertinent part, that "because it is undisputed that Young's injuries arose out of the course of her employment, her 'right to participate' is not an issue in this case. Instead, the relevant question is whether the court of common pleas had jurisdiction to consider the commission's denial of Young's appeal after the SHO denied her the right to participate in Ohio's state insurance fund." The court cited *State ex rel. Liposchak v. Indus. Comm.*, 90 Ohio St.3d 276 (2000) in support, stating:

[T]he Ohio Supreme Court held that the only right-to-participate question that is appealable to the court of common pleas is "whether an employee's injury, disease, or death occurred in the course of and arising out of his or her employment." *Liposchak* at 279. Therefore, once a claimant establishes the threshold issue of his or her right to participate in the fund it is the commission, and not the court of common pleas, that has jurisdiction to establish the extent of the disability.

* * *

[S]ince Young's right to participate in the fund was not at issue, the trial court did not have jurisdiction to hear an appeal from the commission's refusal to reconsider Young's claim pursuant to R.C. 4123.512.

Young v. Craig Transp. Co., 6th Dist. No. WD-14-068, 2016-Ohio-1401, ¶ 25-26.

{¶ 28} 18. In footnote number one of the court's decision, the court indicated that the proper remedy was for relator to challenge the commission's decision through a mandamus action and not through an appeal.

{¶ 29} 19. Relator filed a motion to certify a conflict and/or request for reconsideration in the appellate court arguing that the court should have found that *State ex rel. Alhamarshah v. Indus. Comm.*, 142 Ohio St.3d 524, 2015-Ohio-1357, applied.

{¶ 30} 20. The Wood County Appellate Court disagreed, stating:

Unlike the scenario in *Alhamarshah*, the issues on appeal to the Wood County Court of Common Pleas in this case did not involve Young's initial "right-to-participate" in a workers' compensation fund, but rather focused on: (1) whether she waived her right to benefits from the state of Ohio's fund when she agreed to receive payments from Midwestern Insurance Alliance ("MIA") on behalf of the Indiana

Workers' Compensation Board, and (2) whether her claim should be expanded to include the diagnosis of "concussion with brief coma." Accordingly, we considered whether the trial court had jurisdiction to consider the issues of waiver and expansion of Young's claim, and concluded that the only proper method by which Young could challenge the commission's decisions on those issues was through an original action in mandamus, and not through an appeal.

In making our determination, we relied on [*State ex rel. Liposchak v. Indus. Comm.*, 90 Ohio St.3d 276 (2000)], in which the Ohio Supreme Court held that the only right-to-participate question that is appealable to the court of common pleas is whether an employee's injury, disease, or death occurred in the course of and arising out of his or her employment. Once the claimant establishes that threshold issue it is the commission, and not the court of common pleas, that has the jurisdiction and the responsibility to establish both the extent of the disability and how much, if any, the system must pay. *Id.* at 280. (Citation omitted.)

{¶ 31} 21. The Supreme Court of Ohio declined to accept jurisdiction of relator's appeal.

{¶ 32} 22. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶ 33} 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).

{¶ 34} The magistrate finds that the Supreme Court of Ohio's decision in *Alhamarshah* applies, and because relator had an adequate remedy at law by way of her appeal to the Wood County Court of Common Pleas and the Sixth District Court of Appeals, mandamus is not appropriate.

{¶ 35} In *Alhamarshah*, Mustafa Alhamarshah alleged that he sustained a work-related injury while working as a laborer for Mohamed Salem, d.b.a. Ballmohd, L.L.C. ("Salem"). The BWC allowed the claim against Salem as the employer and ordered the payment of medical benefits and temporary total disability compensation. The order

informed the parties that the decision would become final unless a written appeal was received within 14 days and further advised the parties to contact "Jolene M" at the BWC's Columbus Service Office with any questions. *Id.* at ¶ 4.

{¶ 36} With the help of a friend, Salem telephoned Jolene about filing an appeal. Salem asserted that there was no employer-employee relationship. The documents faxed to the BWC failed to include the claim number or the date of the order being appealed. Upon receipt, the words "construe as appeal" were hand-written on the cover page and forwarded to the appeals section of the commission. *Id.* at ¶ 5.

{¶ 37} Ultimately, the commission concluded that Salem's appeal substantially complied with the requirements of R.C. 4123.511(F), and further found that there was no evidence that Alhamarshah had been prejudiced by any omission in the notice of appeal. The commission then disallowed the claim on the merits, finding that Alhamarshah was not an employee of Salem and the commission affirmed that order.

{¶ 38} Alhamarshah appealed to the Franklin County Court of Common Pleas pursuant to R.C. 4123.512, and filed a complaint for a writ of mandamus in the Tenth District Court of Appeals alleging that the commission's order determining that Salem's administrative appeal was valid was an abuse of discretion and contrary to law. Ultimately, the Supreme Court determined that Alhamarshah was not entitled to relief in mandamus because he had an adequate remedy in the ordinary course of law by way of appeal under R.C. 4123.512, stating:

Once the commission has issued a final order determining the claimant's entitlement to participate in the workers' compensation fund, any party may appeal the order, except for decisions as to the extent of disability, to the court of common pleas pursuant to R.C. 4123.512. R.C. 4123.511(E) and 4123.512(A); *State ex rel. Liposchak v. Indus. Comm.*, 90 Ohio St.3d 276, 278-279, 2000 Ohio 73, 737 N.E.2d 519 (2000). This court has held that decisions determining an employee's right to participate in the workers' compensation system because of a specific injury or occupational disease are appealable to the court of common pleas. *Felty v. AT & T Technologies, Inc.*, 65 Ohio St.3d 234, 1992 Ohio 60, 602 N.E.2d 1141 (1992), paragraph one of the syllabus; *Afrates v. Lorain*, 63 Ohio St.3d 22, 26, 584 N.E.2d 1175 (1992).

The lack of an adequate remedy in the ordinary course of the law is a necessary prerequisite for relief in mandamus. *State*

ex rel. Consolidation Coal Co. v. Industrial Comm., 18 Ohio St.3d 281, 284, 18 Ohio B. 333, 480 N.E.2d 807 (1985), citing *State ex rel. Sibarco Corp. v. Berea*, 7 Ohio St.2d 85, 88, 218 N.E.2d 428 (1966). When the relator has a plain and adequate remedy at law by way of appeal, courts lack authority to exercise jurisdictional discretion and must deny the writ, regardless of whether the relator used the remedy. *Id.*; *State ex rel. Davet v. Sutula*, 8th Dist. Cuyahoga No. 96548, 2011-Ohio-2803, 2011 WL 2409641, ¶ 10. This is a threshold question that we must consider even when the court of appeals has not addressed the issue. *State ex rel. Woodbury v. Spittler*, 40 Ohio St.2d 1, 3, 318 N.E.2d 165 (1974).

In this case, the commission decided that the documentation submitted on behalf of the purported employer substantially complied with the statutory requirements for a notice of an appeal of the bureau's initial order. This decision conferred jurisdiction on the commission to proceed to consider the merits of the purported employer's appeal. The commission's exercise of jurisdiction resulted in a decision denying the claimant's right to participate in the workers' compensation system. Consequently, the decision allowing the appeal to proceed was essential to the ultimate determination that denied the claimant's participation in the workers' compensation system. As such, the commission's decision to accept the appeal as valid was appealable pursuant to R.C. 4123.512. See *Consolidation Coal Co.* at 284-285, 480 N.E.2d 807.

Alhamarshah at ¶ 10-12.

{¶ 39} Later, in *State ex rel. Johnson v. OSU Cancer Research Hosp.*, 10th Dist. No. 14AP-430, 2015-Ohio-3249, this court addressed the applicability of the recent Supreme Court decision in *Alhamarshah*. Eleanorene Johnson suffered an industrial injury in 2010 and her claim was allowed for the following physical condition: sprain lumbosacral. On August 23, 2013, Johnson filed a C-86 motion requesting that her claim be additionally allowed for the following psychological condition: major depression, single episode, non-psychotic, severe. A DHO disallowed Johnson's request. The matter came before an SHO on October 18, 2013. The SHO granted Johnson's request and additionally allowed her claim to include the requested psychological condition. OSU attempted to appeal the SHO's order, but the commission refused the appeal.

{¶ 40} OSU then filed a request for reconsideration with the commission. On January 9, 2014, the commission issued an order vacating the SHO's order and setting the matter for a hearing. The commission concluded that the SHO's order contained a clear mistake of law, as it failed to find that the requested psychological condition was causally related to the allowed physical condition. The commission accordingly granted OSU's request for reconsideration, and denied Johnson's request for the additional allowance.

{¶ 41} Johnson filed a mandamus action in this court asserting that the commission abused its discretion when it granted OSU's request for reconsideration and asked that the commission be ordered to reinstate the SHO's order which allowed her claim for the psychological condition.

{¶ 42} OSU argued that this court did not have jurisdiction to hear the matter asserting that it was a right to participate action and that Johnson had an adequate remedy at law. As OSU asserted, if this court found the commission abused its discretion when it determined the SHO's order contained a clear mistake of law, Johnson's claim would be additionally allowed for a psychological condition and OSU would have to challenge that allowance in common pleas court.

{¶ 43} This court's magistrate found this court did have jurisdiction finding that the commission's determination that it had continuing jurisdiction was reviewable here in mandamus and could not be challenged elsewhere. Thereafter, the magistrate found that the commission did not abuse its discretion when it exercised its continuing jurisdiction.

{¶ 44} OSU filed an objection to the magistrate's decision and argued that, pursuant to the Supreme Court's recent decision in *Alhamarshah*, this court should find that mandamus relief was inappropriate because Johnson had an adequate remedy at law. Finding that the commission's decision to exercise its continuing jurisdiction resulted in a decision which denied Johnson the right to participate in the workers' compensation system, this court found that the commission's decision was "essential to the ultimate determination that denied [Johnson's] participation in the workers' compensation system," and mandamus relief was inappropriate as Johnson had an adequate remedy in the ordinary course of law by way of an appeal under R.C. 4123.512. *Johnson* at ¶ 12, citing *Alhamarshah*.

{¶ 45} More recently, this court addressed the implication of *State ex rel. Saunders v. Metal Container Corp.*, 52 Ohio St.3d 85 (1990) after *Alhamarshah*. In *State ex rel. Black v. CVS Pharmacy*, 10th Dist. No. 15AP-120, 2015-Ohio-4868, Sharon Black sought a writ of mandamus ordering the commission to vacate its order exercising its continuing jurisdiction and finding that her claim should not be allowed for disc herniation at T12-L1 when she had already filed a notice of appeal from the disallowance of other conditions pursuant to R.C. 4123.512, and ordering the commission to reinstate its order allowing her claim for disc herniation at T12-L1. The magistrate issued a decision applying *Alhamarshah* and finding that Black had an adequate remedy at law by way of an appeal to the common pleas court. Black filed an objection arguing that mandamus was the appropriate remedy citing *Saunders*. Black argued that, because she had already appealed the disallowance of other claims to the common pleas court, the commission did not have jurisdiction to invoke its continuing jurisdiction to deny her claim for other conditions.

{¶ 46} In discussing the applicability of *Saunders* following the Supreme Court's decision in *Alhamarshah*, this court stated:

In *Saunders*, the commission's district hearing officer ("DHO") issued an order allowing a condition described as "back." At the time, R.C. 4121.36(B) required the order allowing a condition to contain a "description of the part of the body and nature of the disability recognized in the claim." The commission subsequently attempted to correct the error by amending the part of the body affected from "back" to "lumbosacral" and "lumbar spine."

The Supreme Court noted that a statutorily defective allowance, such as the one issued by the DHO, constituted a "mistake," which permitted the commission, pursuant to R.C. 4123.52, to invoke its continuing jurisdiction to correct. It held, however, that the commission could have simply amended the allowed condition to reflect "back sprain," but, instead, the commission went too far in narrowing the named body part from "back" to "lumbosacral" and "lumbar spine." The Supreme Court held that, although the commission was permitted to invoke continuing jurisdiction to correct the mistake, the continuing jurisdiction did not allow the extent of the correction attempted here.

Relevant here, the Supreme Court in *Saunders* also held that mandamus was the proper remedy to address the commission's improper extension of continuing jurisdiction. The Supreme Court noted that "[t]he relevant question here is not one of appellee's right to participate * * * for a 'back' injury but is instead whether a mistake sufficient to invoke the continuing jurisdiction provisions of R.C. 4123.52 existed. We find the latter question to be the proper subject matter for a writ of mandamus." *Id.* at 86.

Relator suggests that *Saunders* controls. We disagree. The question before us now is not whether a mistake sufficient to invoke the continuing jurisdiction provisions of R.C. 4123.52 existed. The crux of relator's argument here, however, is that the institution of an appeal of the disallowance of other claims, pursuant to R.C. 4123.519, deprived the commission of jurisdiction to even consider whether there was a mistake sufficient to invoke its continuing jurisdiction, pursuant to R.C. 4123.52, regarding the disc herniation at T12-L1 claim. The issue here is a precursor to the issue of whether a mistake existed sufficient to invoke the continuing jurisdiction provisions of R.C. 4123.52.

Relator argues that the magistrate's reliance on *Alhamarshah* is misplaced. In *Alhamarshah*, the commission accepted documentation from the employer and determined that it substantially complied with the statutory requirements for a notice of an appeal of the BWC's initial allowance of a claim. The Supreme Court of Ohio noted that "[t]his decision conferred jurisdiction on the commission to proceed to consider the merits of the purported employer's appeal" and that such exercise of jurisdiction "resulted in a decision denying the claimant's right to participate in the worker's compensation system." The Supreme Court held that "[c]onsequently, the decision allowing the appeal to proceed was essential to the ultimate determination that denied the claimant's participation in the worker's compensation system. As such, the commission's decision to accept the appeal as valid was appealable pursuant to R.C. 4123.512." (Emphasis added.) *Id.* at ¶ 10-12.

Likewise, here, the commission's decision to proceed, while the appeal of other disallowed claims was pending in the common pleas court, was essential to the ultimate determination that denied relator's participation in the workers' compensation system for the disc herniation at T12-L1.

Black at ¶ 4-8.

{¶ 47} In the present case, the commission's determination that relator was not entitled to participate in the Ohio workers' compensation system because the acceptance of the Indiana claim by Craig constituted a "decision on the merits," was "essential to the ultimate determination that denied the claimant's participation in the workers' compensation system."

{¶ 48} An appeal pursuant to R.C. 4123.512 was the proper avenue for relator to challenge that determination. Relator had an adequate remedy at law which she pursued. The fact that the Sixth Appellate District mistakenly determined that mandamus was the proper remedy for relator to pursue and the Ohio Supreme Court declined to accept jurisdiction of relator's appeal, does not change the fact that this is a right to participate case and a writ of mandamus cannot provide relator with any relief. As such, 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).