

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Lisa Cowley,	:	
Relator,	:	
v.	:	No. 11AP-4
Industrial Commission of Ohio and Lutheran Home,	:	(REGULAR CALENDAR)
Respondents.	:	
	:	

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D E C I S I O N

Rendered on December 22, 2011

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*Bentoff & Duber Co., L.P.A., and Glen Richardson*, for relator.

*Michael DeWine*, Attorney General, and *Sandra E. Pinkerton*, for respondent Industrial Commission of Ohio.

*Jo Ann F. Wasil*; and *Wegman, Hessler & Vanderburg L.P.A.*, and *David R. Knowles*, for respondent Lutheran Home.

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IN MANDAMUS  
ON OBJECTIONS TO MAGISTRATE'S DECISION

KLATT, J.

{¶1} Relator, Lisa Cowley, commenced this original action in mandamus seeking an order compelling respondent, Industrial Commission of Ohio ("commission"), to vacate

its order exercising continuing jurisdiction over the allowance of her claim, disallowing her claim based on fraud, and further ordering recoupment to respondent, Lutheran Home, pursuant to R.C. 4123.511(K).

{¶2} Pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth District Court of Appeals, we referred this matter to a magistrate who issued a decision, including findings of fact and conclusions of law, which is appended hereto. The magistrate found that the commission did not abuse its discretion when it exercised continuing jurisdiction over relator's claim based upon fraud and new and changed circumstances, even though relator did not initiate the filing of her workers' compensation claim. The magistrate also found that the commission did not violate relator's due process rights when, in exercising continuing jurisdiction, it referred the matter to the staff hearing officer ("SHO") for a determination of fraud rather than refer the matter to the district hearing officer ("DHO") to determine whether to allow the claim. Lastly, the magistrate found that relator was not entitled to relief in mandamus because she has an adequate remedy at law—an R.C. 4123.512 appeal. Therefore, the magistrate has recommended that we deny relator's request for a writ of mandamus.

{¶3} Relator has filed objections to the magistrate's decision. Relator first argues that the magistrate should have found that the commission's determination of fraud was an abuse of discretion because relator did not initiate the filing of her claim. We disagree.

{¶4} Purposeful concealment of a material fact, when there is a duty to disclose, satisfies the first and second elements of fraud. We agree with the magistrate that the

commission did not abuse its discretion in finding fraud given relator's ongoing concealment of her preexisting shoulder conditions when she sought and received compensation and benefits for her shoulder-related claim. Given the nature of her claim, the commission did not abuse its discretion in finding that relator breached her duty to disclose her preexisting shoulder condition. Therefore, we overrule this objection.

{¶5} Relator next argues that her due process rights were violated because her claim was not heard by a DHO pursuant to R.C. 4123.511. Again, we disagree.

{¶6} The commission did not violate relator's due process rights when it exercised continuing jurisdiction and referred this matter to the SHO for a determination of fraud. Relator had reasonable notice of the issue and an ample opportunity to be heard. Relator appeared at the hearing before the SHO with counsel and testified. As noted by the magistrate, because the hearing before the SHO was pursuant to the commission's exercise of continuing jurisdiction over a claim that had been previously allowed, a hearing before the DHO pursuant to R.C. 4123.511 was not required. Relator's due process rights were not violated. Therefore, we overrule this objection.

{¶7} Lastly, as noted by the magistrate, relator is not entitled to relief in mandamus for the additional reason that she has an adequate remedy at law—an appeal pursuant to R.C. 4123.512.

{¶8} Following an independent review of this matter, we find that the magistrate has properly determined the facts and applied the appropriate law. Therefore, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law

contained therein. In accordance with the magistrate's decision, we deny relator's request for a writ of mandamus.

*Objections overruled;  
writ of mandamus denied.*

TYACK and DORRIAN, JJ., concur.

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**A P P E N D I X**

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TENTH APPELLATE DISTRICT

State ex rel. Lisa Cowley,	:	
	:	
Relator,	:	
	:	
v.	:	No. 11AP-4
	:	
Industrial Commission of Ohio	:	(REGULAR CALENDAR)
and Lutheran Home,	:	
	:	
Respondents.	:	
	:	

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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 August 29, 2011

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*Bentoff & Duber Co., L.P.A., and Glen Richardson, for relator.*

*Michael DeWine, Attorney General, and Sandra E. Pinkerton, for respondent Industrial Commission of Ohio.*

*Jo Ann F. Wasil; and Wegman, Hessler & Vanderburg L.P.A., and David R. Knowles, for respondent Lutheran Home.*

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IN MANDAMUS

{¶9} Relator, Lisa Cowley, has filed this mandamus action requesting that this court issue a writ of mandamus ordering respondent Industrial Commission of Ohio

("commission") to vacate its order exercising the commission's continuing jurisdiction over the allowance of her claim on grounds that relator's right to participate had been fraudulently obtained and disallowing the claim and further ordering recoupment to respondent Lutheran Home ("Lutheran Home") pursuant to R.C. 4123.511(K).

Findings of Fact:

{¶10} 1. Relator testified she was hired by Lutheran Home on July 12, 2004 as a nurse's aide.

{¶11} 2. Relator sustained a work-related injury on September 1, 2004 and her workers' compensation claim, No. 04-870623, was allowed for "rotator cuff strain."

{¶12} 3. A First Report of an Injury, Occupational Disease or Death ("FROI") form was completed by Lutheran Home on November 2, 2004. Relator did not complete or sign the form.

{¶13} 4. Relator sustained the injury to her right rotator cuff when she was giving a resident a shower and the resident lost her balance and pulled on relator's arm. Relator tried to stop the resident from falling.

{¶14} 5. Relator was referred to Robert J. deSwart, M.D., of Orthopedic Associates, Inc., and was initially seen on September 2, 2004. At the initial visit, Dr. deSwart asked relator if she had any prior problems with her shoulder and she told him she did not have any prior problems. Between September 2, 2004 and September 13, 2006, the time relator treated with Dr. deSwart, relator never told Dr. deSwart about any previous problems with her right shoulder.

{¶15} 6. Relator received temporary total disability compensation beginning September 8, 2004.

{¶16} 7. Relator also saw Irwin M. Mandel, M.D., an associate of Dr. deSwart and admitted she did not tell him of any prior shoulder problems.

{¶17} 8. Relator had an MRI of the right shoulder on September 27, 2004. The radiologist, Joseph A. Schoenberger, M.D., stated his impression as follows:

Chronic tendinopathy of the supraspinatus tendon with possible myotendinous injury to the supraspinatus muscle itself. No definite acute rotator cuff tear, however.

Note is also made of considerable acromioclavicular joint arthrosis, with joint hypertrophy and fluid in the joint.

{¶18} 9. On November 29, 2004, Dr. deSwart recommended surgery to repair a labral tear and his notes discuss an intent to receive approval from the Ohio Bureau of Workers' Compensation for payment.

{¶19} 10. On December 15, 2004, relator was examined by Paul C. Martin, M.D., for an independent medical examination. She denied any previous problems or injuries to the right shoulder. Dr. Martin determined, as follows:

Review of Ms. Cowley's records reveal that after having undergone an MRI study evaluation with contrast, she was identified as having a problem with the anterior portion of the labrum which I believe does correlate with her reported ongoing difficulties and clinical findings from the September 1, 2004 work injury. As such, and because she has failed to experience any significant benefit from the previously provided physical therapy and cortisone injections, the recommended arthroscopic procedure by Dr. deSwart would be considered medically indicated and appropriate under this claim.

Based upon Ms. Cowley's history and records provided, it would appear her inability to return to her former position of employment without restriction since September 1, 2004 would be medically appropriate. However, it is my opinion Ms. Cowley is currently physically capable of working in a modified work environment where she would work in a position with minimal usage of her right arm and avoidance of activities requiring right arm usage at or about shoulder level.

{¶20} 11. Relator underwent surgery at Fairview Hospital on January 14, 2005 consisting of "[r]ight arthroscopic evaluation, repair of superior labrum anterior-posterior lesion, and a mini-open acromioplasty."

{¶21} 12. On October 18, 2005, relator underwent an "[a]rthroscopic evaluation of the right shoulder, repair of SLAP lesion, exploration, subacromial space, with a limited bursectomy and resection of the distal clavicle."

{¶22} 13. On February 10, 2006, relator underwent a "[d]iagnostic right shoulder arthroscopy, limited synovectomy, with biceps tenotomy."

{¶23} 14. An MRI on May 17, 2006 showed:

At C3-4 there is a combination of disc and spur laterally on the right which causes mild right neural foraminal stenosis.

At C5-6 there is focal disc herniation laterally on the right within the neural foramen which causes mild neural foraminal stenosis. No other focal disc herniation is evident. No significant disc bulging is seen. There is no evidence of canal stenosis.

The conclusion was "mild right lateral neural foraminal stenosis at C3-4 and C5-6 as detailed above." (Emphasis omitted.)

{¶24} 15. On August 22, 2006, relator was examined by Peter Evans, M.D., Ph.D., by referral from Dr. deSwart. Dr. Evans recommended that relator have a consultation with a neurologist. His report also noted that he reviewed an MRI taken January 2004. When asked, relator denied any prior problems with her shoulder. Dr. Evans' report notes that relator told him the January 2004 MRI had been necessary to rule out any problems following a motor vehicle accident. Dr. Evans noted the MRI showed some "significant supraspinatus tendinopathy in January of 2004 and some abnormality up at the anterior biceps labral anchor. This is consistent with the surgery she ended up having after her work-related injury."

{¶25} 16. On August 25, 2006, Dr. deSwart completed a Physician's Report of Work Ability (MEDCO-14) form and indicated that relator could return to work on August 28, 2006. Dr. deSwart's notes indicate relator returned to work in August 2006.

{¶26} 17. Relator filed a C-86 motion on December 12, 2007 requesting that the claim be additionally allowed for "reflex sympathetic dystrophy of the right upper extremity." Relator also requested a TENS<sup>1</sup> unit be approved.

{¶27} 18. Relator was again examined by Dr. Martin for another independent medical examination on February 19, 2007. Dr. Martin found that, based upon her reported symptoms and objective clinical findings, relator did not present with clinical evidence consistent with a diagnosis of reflex sympathetic dystrophy. As such, he

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<sup>1</sup>While relator's motion actually indicates that she wanted a "TNS" unit, it appears that this is a typographical error and it is understood that the request was actually for a TENS unit.

recommended that "the requested stellate ganglion blocks would not be considered medically indicated or necessary under this claim."

{¶28} 19. After a hearing on April 14, 2008, a district hearing officer ("DHO") disallowed the claim for reflex sympathetic dystrophy, right upper extremity, because the DHO found there was "insufficient explanation as to how the diagnosis of reflex sympathetic dystrophy is made in light of the various factors that are required by the Guide to the Evaluation of Permanent Impairment literature presented in the claim file." Accordingly, the DHO also denied relator's request for treatment.

{¶29} 20. Relator appealed and a hearing was held before a staff hearing officer ("SHO") on June 6, 2008. The SHO vacated the DHO's order. The SHO denied the request for the condition reflex sympathetic dystrophy, right upper extremity. The SHO found "[t]he array of complaints, however, do not appear to be adequately documented, clinically and objectively, to support the requested diagnosis." However, the SHO did grant the C-9 request for the rental of the TENS unit because relator's ongoing complaints of pain and discomfort were adequately documented to support such a request.

{¶30} 21. Relator filed a notice of appeal with the Cuyahoga County Court of Common Pleas, pursuant to R.C. 4123.511 following the commission's determination that her claim should not be allowed for the additional condition.

{¶31} 22. During discovery, relator answered interrogatories and indicated she did not recall any treatment to her right shoulder prior to the September 1, 2004 work-related injury, denied she had a pre-existing right shoulder injury, and denied she had an

MRI of her right shoulder in January 2004. However, relator did answer in her interrogatories that an MRI, CT scan, and x-ray of her right shoulder were performed at Elyria Memorial Hospital ("EMH") in approximately 2006. Lutheran Home obtained the medical records from the hospital, which were actually records from 1993 and 2003-2004, not 2006, as identified in the interrogatories.

{¶32} 23. Dr. Martin reviewed the EMH records and the records of the treating physicians from those time periods and issued an addendum to his report on January 2, 2009. In his addendum, Dr. Martin explained that relator denied any previous problems when he initially evaluated her. Also in his addendum, Dr. Martin stated his medical opinion, as follows:

After having been provided these additional medical records, it is my medical opinion no medical expert is able to state with a reasonable degree of medical certainty that the allowed conditions are causally related to the reported mechanism of injury from September 1, 2004, as there is medical evidence these conditions pre-existed the September 1, 2004, work incident.

{¶33} When asked if he believed if any of the three surgeries (January 14, 2005; October 15, 2005<sup>2</sup>; February 10, 2006) were causally related to the September 1, 2004 injury or were they the result of pre-existing conditions, Dr. Martin responded in his addendum, as follows:

The recently provided medical records reveal Ms. Cowley as having symptoms and clinical findings prior to September 1, 2004, for the same conditions for which the three surgeries

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<sup>2</sup>Dr. Martin's addendum report references October 15, 2005 as the date of the second surgery, but the correct date is October 18, 2005.

were performed. This is further noted in the August 22, 2006 orthopedic consultation note from Dr. Evans.

With these newly provided medical records, the weight of the current available medical evidence supports these surgeries were done for conditions which pre-existed the September 1, 2004, work incident.

{¶34} 24. On February 13, 2009, relator filed a notice of voluntary dismissal of her appeal from the denial of the additional allowance in the Cuyahoga County Court of Common Pleas and, on February 20, 2009, the court dismissed the case without prejudice.

{¶35} 25. On February 20, 2009, Lutheran Home filed a C-86 motion requesting that the commission exercise its continuing jurisdiction on the basis that relator's right to participate had been fraudulently obtained and/or on the basis of new and changed circumstances.

{¶36} 26. An SHO held a hearing on September 22, 2009, and at the hearing relator admitted that she did not disclose her prior right shoulder problems to Lutheran Home or the doctors. During the hearing, the human resources director at Lutheran Home discussed that relator told her she had fabricated pain in her right shoulder in order to obtain an MRI to gain a bowling sponsorship. Relator confirmed that she did so.

{¶37} 27. The SHO granted Lutheran Home's motion finding that relator's right to participate had been fraudulently obtained. The SHO also determined the following:

\* \* \* New and changed circumstances of recently obtained evidence supports the disallowance of this claim. Injured Worker concealed and falsified her prior medical history concerning her right shoulder with the intent to secure

allowance of her claim. Medical records and documents of fraud were revealed in relation to discovery conducted in the court appeal of the denial of an additional allowance request in Lisa Cowlet [sic] v. Lutheran Home et al., Cuyahoga County Common Pleas Court Case No. CV-08-664236.

Staff Hearing Officer orders disallowance of the claim and recoupment under Ohio Revised Code 4123.511(K) for all medical payments and compensation due to fraud. Injured Worker had withheld the facts of her significant pre-existing shoulder treatment and the fact that she had the MRI study, 1-16-2004, pre-dating this claim.

Elements of fraud are met in that Injured Worker's concealment (failure to disclose prior treatment, testing, and positive assertions as to no prior shoulder problems) and misrepresentations as to prior shoulder injury are completely material [to] the transaction at hand. She made the misrepresentations or concealed the prior condition, treatment, and testing with knowledge of falsity or with utter disregard and recklessness not only to her employer, but to treating physicians as well. The record discloses that these were not isolated, occasional mis-statements, but continued on an ongoing, multiple basis.

The employer relied on Injured Worker's history as reported and reflected in her then-treating physician's medical records, and certified the claim. Had the history been accurately reported to employer and her physicians, employer would not have readily certified the claim and would have attempted to secure records before making that determination. There was justifiable reliance by the employer on the records and events as reported and employer had no reason to suspect otherwise until the complete record was finally revealed and disclosed during the subsequent court proceeding regarding the additional allowance. Injured Workers' assertions regarding no prior injury or treatment to the shoulder were finally revealed to be completely untrue; she had even failed to disclose MRI testing to the shoulder in January, 2004.

{¶38} 28. Relator appealed the SHO's order to the commission.

{¶39} 29. The commission construed the appeal as a request for reconsideration and denied it in an order mailed January 8, 2010.

{¶40} 30. Thereafter, relator appealed the denial of her claim to the Cuyahoga County Court of Common Pleas.

{¶41} 31. The commission has attached to its brief a copy of a motion filed in the Cuyahoga County Court of Common Pleas on November 5, 2010, to stay the proceedings pending the outcome of this mandamus action. The commission asserts that relator filed an appeal from the finding of fraud and that action is now stayed.

{¶42} 32. Relator filed the instant mandamus action on January 4, 2011 and an amended complaint on January 10, 2011.

Conclusions of Law:

{¶43} 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* (1983), 6 Ohio St.3d 28. 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.* (1986), 26 Ohio St.3d 76. 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.* (1987), 29 Ohio St.3d 56. Furthermore, questions of credibility and the weight to be given to the evidence are clearly within the discretion of the commission as fact finder. *State ex rel. Teece v. Indus. Comm.* (1981), 68 Ohio St.2d 165.

{¶44} For the reasons that follow, it is this magistrate's decision that this court should deny relator's request for a writ of mandamus.

{¶45} Relator argues that there are three issues that need to be addressed: (1) whether the commission abused its discretion when it exercised its continuing jurisdiction based upon findings of fraud and new and changed circumstances; (2) whether the commission could exercise its continuing jurisdiction pursuant to R.C. 4123.52 on the basis of fraud when relator did not initiate the filing of her workers' compensation claim; and (3) whether the commission abused its discretion in denying relator's claim when she never had the opportunity to argue her case on the merits as provided in R.C. 4123.511, thereby denying her due process.

{¶46} The commission invoked its continuing jurisdiction pursuant to R.C. 4123.52. R.C. 4123.52 provides that, "[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." Such continuing jurisdiction is not unlimited. There are five bases for invoking continuing jurisdiction: (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. B & C Machine Co. v. Indus.*

*Comm.*, 65 Ohio St.3d 538, 541, 1992-Ohio-75. Any commission order seeking to exercise continuing jurisdiction is required to clearly state which of the five bases it is relying upon. *State ex rel. Nicholls v. Indus. Comm.*, 81 Ohio St.3d 454, 459, 1998-Ohio-616. The reason for the exercise of continuing jurisdiction must be articulated contemporaneously with such exercise of jurisdiction. *State ex rel. Royal v. Indus. Comm.*, 95 Ohio St.3d 97, 100, 2002-Ohio-1935.

{¶47} In this case, the commission stated it was exercising its continuing jurisdiction on grounds that relator had obtained her right to participate fraudulently and that the recently obtained evidence constituted new and changed circumstances. The commission determined that relator's concealment and falsification of her prior medical history demonstrated an intent to secure allowance of her claim. The commission found that relator committed fraud by concealing her prior shoulder injury both to Lutheran Home as well as to the treating physicians, and these misstatements continued multiple times over her treatment period. This concealment resulted in justifiable reliance by Lutheran Home in certifying the claim. Thus, the commission found relator's fraud injured Lutheran Home and ordered disallowance of the claim and recoupment for the medical payments and compensation due to fraud.

{¶48} An administrative finding of fraud will only be found if the prima facie elements of civil fraud are established. In *Burr v. Stark Cty. Bd. of Commrs.* (1986), 23 Ohio St.3d 69, at paragraph two of the syllabus, the Supreme Court of Ohio set forth six elements of civil fraud, as follows:

(a) a representation or, where there is a duty to disclose, concealment of a fact, (b) which is material to the transaction at hand, (c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, (d) with the intent of misleading another into relying upon it, (e) justifiable reliance upon the representation or concealment, and (f) a resulting injury proximately caused by the reliance.

{¶49} Relator admitted that she had concealed her prior injury from Lutheran Home and her physicians for years. When Dr. Martin reviewed the additional medical records, he issued an addendum to his report and found that no medical expert could state with a reasonable degree of medical certainty that the allowed conditions are causally related to the September 1, 2004 injury because the medical evidence demonstrates that these conditions pre-existed the work injury. He also determined that the three surgeries were performed for conditions which pre-existed the work injury. Given that evidence, the commission did not abuse its discretion in exercising its continuing jurisdiction on grounds that relator had committed fraud.

{¶50} Relator also argues that the commission abused its discretion in exercising its continuing jurisdiction on grounds of new and changed circumstances. The commission found that the "new" medical records constituted new and changed circumstances. Relator argues that medical records that predate the work injury did not constitute new and changed circumstances.

{¶51} Newly acquired evidence does not constitute new and changed circumstances when that evidence could have been obtained by due diligence prior to the date of the hearing determining the matter. *State ex rel. Washington v. Indus. Comm.*,

112 Ohio St.3d 86, 2006-Ohio-6505, and *State ex rel. Frank W. Schaefer, Inc. v. Indus. Comm.* (1998), 84 Ohio St.3d 248. However, in this case, relator's medical records that predate the work injury would not have been discovered with due diligence because relator concealed the prior injury and committed fraud. Lutheran Home had no indication that there was a prior injury because of relator's fraud. Thus, the medical records may constitute new and changed circumstances under these facts and the commission did not abuse its discretion in exercising its continuing jurisdiction on the basis of new and changed circumstances.

{¶52} Relator also argues that she did not complete the FROI and did not file the claim, thus she did not commit fraud. She argues that this case is similar to *State ex rel. Quest Diagnostics, Inc. v. Indus. Comm.*, 10th Dist. No. 10AP-153, 2011-Ohio-78, where the employer alleged fraud because the claimant and her physician did not reveal a pre-existing injury. This court found the commission did not abuse its discretion in finding that the claimant did not commit fraud. The fraud in *Quest* was alleged to have been in procuring the original allowance. The commission found no fraud because the claimant did not complete or sign the employer's incident report and based upon the claimant's testimony, the commission found she did not have the intent to defraud the employer, but, rather, misunderstood the question she had answered. The claimant's medical records also did not indicate a clear correlation between her prior injury and the work-related injury.

{¶53} In the present case, the commission found that relator's ongoing concealment of the prior injury over the course of two years of treatment for specific and significant conditions was part of the fraud, not just the initial paperwork. In addition, the medical evidence did demonstrate that the surgeries were performed for conditions which predated the injury and the medical experts could not state which injury caused the allowed condition. Thus, *Quest* is distinguishable from the facts of this case.

{¶54} Relator's final argument is that since she had the initial hearing before an SHO and was denied reconsideration, she was denied the opportunity to argue her claim at every level outlined in R.C. 4123.511 and thus, was denied due process. Relator argues that she should have had a hearing before a DHO. The magistrate disagrees.

{¶55} The commission referred Lutheran Home's motion to an SHO docket because the claim had already been allowed by Lutheran Home and acknowledged by subsequent commission orders. Relator had received medical treatment as well as a period of temporary total disability compensation. While relator argues that the matter should have been set before a DHO based on her argument that this was really an R.C. 4123.511 "allowance of a claim" issue, it was not. The issue was whether or not the commission should exercise its continuing jurisdiction, and determine whether or not a claim which had *already been allowed*, had been procured by fraud. Relator had notice, appeared with counsel, and testified. Relator's rights were protected.

{¶56} The commission argues that relator has a legal remedy pursuant to R.C. 4123.512. A writ of mandamus cannot issue when a plain and adequate remedy in the ordinary course of the law exists. R.C. 2731.05; *Berger*. The commission is correct.

{¶57} The Supreme Court of Ohio specifically stated the following in *Felty v. AT&T Technologies, Inc.*, 65 Ohio St.3d 234, 1992-Ohio-60, paragraph two of the syllabus:

Once the right of participation for a specific condition is determined by the Industrial Commission, no subsequent rulings, except a ruling that terminates the right to participate, are appealable pursuant to R.C. 4123.519. (*Afrates v. Lorain* [1992], 63 Ohio St.3d 22, 584 N.E.2d 1175, followed.)

{¶58} The court reiterated this in *Benton v. Hamilton Cty. Educational Serv. Ctr.*, 123 Ohio St.3d 347, 2009-Ohio-4969. *Benton* involved the situation where an employer sought to appeal to the common pleas court after the commission denied its motion to find that the claimant's claim had been procured by fraud. The Supreme Court determined that the commission's refusal to find fraud did not disturb the effect of the initial order granting Benton's right to participate. Thus, the employer could not appeal the matter. However, if the commission would have found fraud, then Benton could appeal. Specifically, the *Benton* court stated:

\* \* \* If evidence of fraud had been found and Benton's right to participate had been terminated, Benton would have had a right to appeal. ("a ruling that terminates the right to participate [is] appealable pursuant to R.C. 4123.519 [current R.C. 4123.512. See 145 Ohio Laws, Part II, 2990]."  
*Felty*, 65 Ohio St.3d 234, 602 N.#. 2d 1141, paragraph two of the syllabus.) \* \* \*

Id. at ¶13.

{¶59} As in *Benton*, relator has the right to appeal because her "right to participate ha[s] been terminated." *Id.*

{¶60} In conclusion, the commission did not abuse its discretion by exercising it continuing jurisdiction on the basis of fraud and new and changed circumstances and did not deny relator her due process rights by referring the matter to an SHO. Further, relator has a legal remedy pursuant to R.C. 4123.512 and a writ of mandamus cannot issue when a plain and adequate remedy in the ordinary course of the law exists.

{¶61} Based on the foregoing, it is this magistrate's decision that relator has not demonstrated that the commission abused its discretion and this court should deny her request for a writ of mandamus.

/s/Stephanie Bisca Brooks  
STEPHANIE BISCA BROOKS  
MAGISTRATE

#### **NOTICE TO THE PARTIES**

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).