

[Cite as *State ex rel. Washington-Bass v. Setla L.L.C.*, 2010-Ohio-5151.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State ex rel. Theresa Washington-Bass, :
Relator, :
v. : No. 09AP-343
Setla LLC and Industrial : (REGULAR CALENDAR)
Commission of Ohio, :
Respondents. :

D E C I S I O N

Rendered on October 21, 2010

Barkan Neff Handelman Meizlish, L.L.P., and Rebecca J. Todora, for relator.

Michael Soto, for respondent Setla LLC.

Richard Cordray, Attorney General, and *Joseph C. Mastrangelo*, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

CONNOR, J.

{¶1} Relator, Theresa Washington-Bass ("relator"), has filed this original action seeking a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its order exercising continuing jurisdiction under R.C. 4123.52, whereby it vacated an order of a staff hearing officer ("SHO") who had awarded

temporary total disability ("TTD") compensation, and to enter an order denying continuing jurisdiction and reinstating the SHO's award of TTD compensation.

{¶2} The court referred this matter to a magistrate pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate issued a decision, including findings of fact and conclusions of law, which is appended to this decision. Therein, the magistrate concluded the commission acted properly in its exercise of continuing jurisdiction as there was a clear mistake of law, rather than a difference in evidentiary interpretation, and the commission's order clearly articulated that mistake. Therefore, the magistrate recommended that this court deny relator's request for a writ of mandamus.

{¶3} Relator filed objections to the magistrate's decision. Respondent, Setla LLC ("respondent"), filed a memorandum opposing the objections. This cause is now before the court for a full review.

{¶4} In her objections, relator presents many of the same arguments previously raised before and addressed by the magistrate. With respect to the commission's exercise of continuing jurisdiction, relator argues that the commission abused its discretion by exercising continuing jurisdiction and by vacating the SHO's award of TTD compensation. Specifically, relator contends: (1) the magistrate erred in concluding a mistake of law occurred and in concluding the commission was not required to cite a misapplication of law in order to properly invoke continuing jurisdiction. Relator argues the commission failed to cite to any law in either its interlocutory order or its December 2008 decision; (2) the magistrate improperly relied upon *State ex rel. Bradley v. Indus. Comm.*, 77 Ohio St.3d 239, 1997-Ohio-48, and *State ex rel. Waddle v. Indus. Comm.*

(1993), 67 Ohio St.3d 452, with respect to the finding that nonallowed conditions contributed to relator's TTD, since relator does not actually have the nonallowed conditions. Relator contends this shifts the burden of proof and requires her to prove that a condition she did not have did not contribute to her disability status; and (3) the magistrate erred in finding the SHO did not have "some evidence" to rely upon in the July 2008 decision. Relator argues this is simply a disagreement on evidentiary interpretation, which is inconsistent with *State ex rel. Royal v. Indus. Comm.*, 95 Ohio St.3d 97, 2002-Ohio-1935.

{¶5} Regarding relator's first objection, we find the magistrate properly determined a mistake of law occurred, that the commission properly identified that misapplication of the law, and that the exercise of continuing jurisdiction was proper. The commission's interlocutory order clearly indicates the basis for the reconsideration request, which is the allegation that the medical evidence relied upon by the SHO in awarding TTD included conditions not allowed in the claim. Although the order did not cite to a specific case (i.e.: *Waddle* and/or *Bradley*), which stands for the proposition that a nonallowed condition cannot be used to advance or defeat a claim for compensation, we agree that this is not fatal. This proposition is fundamental to the practice of workers' compensation and is well-recognized by those practicing in this field. Clearly, even without citation to a particular case, relator should have been able to prepare a meaningful defense in response to respondent's assertion that continuing jurisdiction was warranted in these circumstances. Thus, we agree with the magistrate's conclusion that the order satisfies the requirements set forth in *State ex rel. Gobich v. Indus. Comm.*, 103 Ohio St.3d 585, 2004-Ohio-5990.

{¶6} With respect to relator's second objection, we find this objection to be without merit. Dr. Rodway specifically identified relator's elbow fracture (a nonallowed condition) as a disabling condition and all but one of Dr. Rodway's C-84s based disability, at least in part, upon this condition. In addition, the office notes upon which the C-84s are based all include nonallowed conditions and are inconsistent with the C-84s. As the magistrate found, all three C-84s which were before the SHO indicate that the nonallowed elbow fracture was used to advance the TTD claim, in violation of *Waddle*. Furthermore, there is no indication on the C-84s that an allowed condition is independently causing the TTD condition. Relator has not proven that an allowed condition has caused her disability.

{¶7} Finally, regarding relator's third objection, the magistrate's finding that there was not "some evidence" upon which to rely is not a disagreement on evidentiary interpretation, which would be inconsistent with *Royal*. The initial C-84s provide no evidence of TTD because those disability certifications are based in part upon a nonallowed condition. Thus, there is no indication an allowed condition independently caused TTD. Additionally, the commission was also able to review two additional C-84s not before the SHO in order to make its determination. The commission was within its discretion to find that the only C-84 which did not reference a nonallowed condition could not be relied upon, due to a conflict with the clinic notes, which referenced another nonallowed condition.

{¶8} Following an independent review pursuant to Civ.R. 53, we find the magistrate has properly determined the pertinent facts and applied the appropriate law. Therefore, relator's objections to the magistrate's decision are overruled and we adopt the

magistrate's decision as our own, including the findings of fact and conclusions of law contained therein. In accordance with the magistrate's decision, we deny the requested writ of mandamus.

Objections overruled; writ denied

FRENCH and McGRATH, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Theresa Washington-Bass,	:	
	:	
Relator,	:	
v.	:	No. 09AP-343
Setla LLC and Industrial	:	(REGULAR CALENDAR)
Commission of Ohio,	:	
	:	
Respondents.	:	
	:	

MAGISTRATE'S DECISION

Rendered on October 28, 2009

Barkan Neff Handelman Meizlish, L.L.P., and Rebecca J. Todora, for relator.

Michael Soto, for respondent Setla LLC.

Richard Cordray, Attorney General, and *Joseph C. Mastrangelo*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶9} In this original action, relator, Theresa Washington-Bass, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order exercising R.C. 4123.52 continuing jurisdiction to vacate an order of a staff

hearing officer ("SHO") awarding temporary total disability ("TTD") compensation, and to enter an order that denies continuing jurisdiction and reinstates the SHO's award of TTD compensation.

Findings of Fact:

{¶10} 1. On April 11, 2008, relator sustained an industrial injury when she slipped and fell to the floor while employed at a fast food restaurant operated by respondent Setla LLC, dba Rally's Hamburgers ("employer"). Setla LLC is a state-fund employer.

{¶11} 2. On the date of injury, relator presented to the emergency room at The Ohio State University Medical Center ("OSU Medical Center"). The emergency room visit generated two reports, one from attending physician Michael R. Dick, M.D., and the other from radiologist Dr. Marcella Dardani.

{¶12} 3. Dr. Dick wrote:

The patient is a 41-year-old female who fell at work injuring her left arm. She presents now with left arm pain.

* * *

She was given Ibuprofen, Lortab, and an ice pack. Radiographs were obtained which show the forearm is unremarkable; however, radiology notes that she has a joint effusion at the elbow. To my reading, she has a radial head fracture. This is nondisplaced.

FINAL IMPRESSION

Probable radial head fracture.

{¶13} 4. Dr. Dardani wrote:

IMPRESSION: Joint effusion without an equivocal acute fracture along the lateral margin of the radial head. In addition there are degenerative changes about the radial head and probable prior trauma involving the capitellum. * * *

{¶14} 5. On April 16, 2008, relator was initially examined by Nancy V. Rodway, M.D., at the OSU Medical Center. In a handwritten note, Dr. Rodway listed four diagnoses and their corresponding ICD-9 codes: "813.05," "920.0," "922.31" and "842.0."

{¶15} 6. On April 16, 2008, Dr. Rodway completed a C-84 certifying TTD from April 11, 2008 to an estimated return-to-work date of June 1, 2008. The C-84 form asks the physician to "[l]ist ICD-9 Codes with narrative diagnosis(es) for allowed conditions being treated which prevent return to work." In response, Dr. Rodway listed ICD-9 codes "813.05," "920.0," "922.31" and "842.0." The C-84 form also asks the examining physician to describe the objective and subjective clinical findings that are the basis for his/her recommendation. In response, Dr. Rodway wrote: "See Clinic Notes."

{¶16} 7. On April 17, 2008, relator filed an application for workers' compensation benefits on a form captioned "First Report of an Injury, Occupational Disease or Death" (FROI-1).

{¶17} 8. On April 24, 2008, the Ohio Bureau of Workers' Compensation ("bureau") mailed an order stating:

Walking from bathroom to front and slipped and hit the floor.
Hit back of head, left arm and back.

The claim is ALLOWED for the following medical condition(s):

Code	Description	Body Location	Part of Body
922.31	CONTUSION OF BACK		THORACIC
813.05	FX RADIUS HEAD-CLOSED	LEFT	
842.00	SPRAIN OF WRIST NOS	LEFT	
920	CONTUSION		SCALP (HEAD)

This decision is based on:

Medical documentation dated 4-11-08 and 4-16-08 that is on file.

* * *

BWC grants temporary total disability (TT) payments from 04/12/2008. Payments will continue based on medical evidence.

(Emphasis sic.)

{¶18} 9. On April 30, 2008, relator returned to Dr. Rodway for a follow-up. Dr.

Rodway reported:

SUBJECTIVE

* * * She states that she has pain and numbness into her left fourth and fifth fingers. She also complains of pain in her mid back. She states the pain in her mid back is "where I hit my back." She has been doing her home exercises as I recommended. She has approximately 15 Vicodin left. She states her employer has no light duty, and the woman at Careworks called her to state that I should keep her off duty.

OBJECTIVE

Physical exam: * * * Patient comes in with her left arm in a sling. She has a palpable left rhomboid spasm. She has persistent swelling over the lateral epicondyle and positive Tinel's for ulnar neuropathy. She can extend her elbow fully but only with some pain. She has ulnar weakness to palpation. Her pincher grasp is poor. Provocative tests for radial nerve neuropathy are intact. Provocative tests for median neuropathy are intact. The wrist has full range of motion but does have some persistent pain in the dorsum.

ASSESSMENT

[One] Thoracic strain with rhomboid sprain.
[Two] Left elbow fracture with ulnar neuropathy.
[Three] Left wrist sprain.

PLAN

I spoke with Bobbie at Careworks regarding the light duty. She reassured me that there would be light duty available. Therefore, I returned the patient to light duty tomorrow. This light duty involves no use of the left arm. I wrote for an

additional 20 tablets of Vicodin as well as Flexeril 10 mg to be taken at night. I will see her again in three weeks. I completed a C-9 for occupational therapy with iontophoresis to help with the swelling that is surrounding her left lateral epicondyle and, I hope, to help with the ulnar neuropathy.

{¶19} 10. On May 6, 2008, relator was examined by Ryan D. Klinefelter, M.D.,

who wrote:

I did review x-rays done previously of the left elbow. She did have an elbow effusion, questionable acute injury. I did repeat x-rays of her elbow as well as x-rays of her wrist done today. I did not see any evidence of fracture in the left wrist. I do not think she had an acute fracture of her elbow but it appears that she has some old radiocapitellar degenerative changes.

IMPRESSION

Left elbow and wrist sprain. I think that the elbow sprain is in the setting of some chronic radiocapitellar degenerative changes which she was previously asymptomatic. I would think these would improve with time. I did fit her with a wrist splint. * * *

IMPRESSION

Left elbow and wrist sprain. X-rays do not show an acute fracture but * * * some degenerative * * * changes [in the] radiocapitellar joint [where] she was previously asymptomatic. * * *

{¶20} 11. On May 21, 2008, relator returned to Dr. Rodway for a re-evaluation.

Dr. Rodway reported, in pertinent part:

She states that she is working practically full duty. Her restrictions involve no use of her left arm, but she states that she is doing cleaning, bagging and cashiering. She states her left arm is her dominant arm and it has been very difficult. She states that Ultram has been helping with the pain. She continues to complain of numbness and pain in her left fourth and fifth fingers. She saw Dr. Klinefelter who felt that she may not have had a fracture and that she does have an effusion.

PHYSICAL EXAM

* * *

She has a vague trigger point in the left parascapular area. Her upper extremity DTRs are intact. She has positive provocative tests for ulnar neuropathy. Her medial and radial nerves are intact. The patient has full range of motion. She has less swelling of the left elbow. The Tinel at the left elbow is positive.

ASSESSMENT

[One] Left elbow question fracture.

[Two] Left ulnar neuropathy – posttraumatic.

[Three] Left wrist sprain.

{¶21} 12. On June 12, 2008, relator returned to Dr. Rodway, who wrote:

* * * She is working light duty. She is working as a cashier at Rally's. * * *

PHYSICAL EXAMINATION

* * *

Patient has full range of motion of her elbow and some pain over the lateral epicondyle. She has positive provocative signs for lateral epicondylitis. Her Tinel and Phalen are negative, but ulnar provocative tests are positive. Radial provocative tests are negative. She has pain in the midpoint of the dorsum of her wrist. Her pinc[h]er grasp is somewhat better. Her grip strength is unchanged.

ASSESSMENT

[One] Left elbow fracture – better.

[Two] Left ulnar neuropathy – post traumatic, worse.

[Three] Left wrist sprain – unchanged.

PLAN

I am going to take the patient off work again because of the worsening ulnar neuropathy as well as her persistent weakness and pain. I do want her to get into occupational therapy. * * *

{¶22} 13. On June 12, 2008, Dr. Rodway completed a C-84 certifying TTD from June 13, 2008 through an estimated return-to-work date of July 21, 2008. The C-84 form asked the physician to "[l]ist ICD-9 Codes with narrative diagnosis(es) for allowed conditions being treated which prevent return to work." In response, Dr. Rodway listed ICD-9 codes "813.05," "920," "922.31" and "842.00."

{¶23} The C-84 form also asked the physician to describe the objective and subjective clinical findings that are the basis for the physician's recommendation regarding disability. In response, Dr. Rodway wrote: "See Clinic Notes."

{¶24} 14. On July 10, 2008, relator returned to Dr. Rodway, who wrote, in pertinent part:

She continues to complain of pain in her left elbow, left wrist and left shoulder. * * * She specifically complains of pain which is in her left fourth and fifth fingers. * * * She is left-hand dominant. She complains of her left shoulder dislocating at times, "It pops out." She states her husband has to push it back in.

PHYSICAL EXAM

* * *

The patient has full range of motion of her elbow but does have pain over the proximal radius. She has weak ulnar provocation. The Tinel and Phalen are negative. She has a positive Tinel at the wrist on the ulnar aspect. Her pincher grasp was weak but it is in a let-go fashion. She has pain to palpation over the entirety of her shoulder. Her crossover is painful, and she has difficulty with the Apley scratch test. She can internally rotate to the left L5 at left SI. Her empty can test is negative and her push-off is weak.

ASSESSMENT

Left elbow contusion with possible ulnar radiculopathy.

{¶25} 15. On July 10, 2008, Dr. Rodway completed a C-84 certifying TTD from July 2, 2008 through an estimated return-to-work date of September 22, 2008. On the form, Dr. Rodway again listed ICD-9 codes "813.05," "920," "922.31" and "842.00." Dr. Rodway again wrote: "See Clinic Notes."

{¶26} 16. Earlier, following a June 6, 2008 hearing, a district hearing officer ("DHO") issued an order that vacates the April 24, 2008 bureau order. The DHO's order was not mailed until June 24, 2008. The DHO allowed the claim for "contusion of the left elbow," but disallowed the claim for "contusion of scalp," "fracture of the left radius head" and "sprain of the left wrist." The DHO also awarded TTD compensation for the closed period from April 12 through May 1, 2008, noting that relator returned to work on May 2, 2008. The DHO relied upon Dr. Rodway's April 16, 2008 C-84.

{¶27} 17. Both relator and the employer administratively appealed the DHO's order of June 6, 2008.

{¶28} 18. Following a July 28, 2008 hearing, an SHO issued an order, mailed July 31, 2008, that vacates the DHO's order of June 6, 2008. The SHO's order of July 28, 2008 allows the claim for "contusion left elbow, contusion scalp, thoracic contusion, and left wrist sprain."

In awarding TTD compensation, the SHO's order explains:

Relying upon the C-84 forms on file from Dr. Rodway, the Staff Hearing Officer awards temporary total disability compensation from 04/12/2008 to 05/01/2008 and from 06/13/2008 to today's date, 07/28/2008. Ms. Washington-Bass returned to work on 05/02/2008 but Dr. Rodway subsequently took her back off work beginning 06/13/2008.

{¶29} 19. On August 22, 2008, another SHO mailed an order refusing the employer's administrative appeal from the SHO's order of July 28, 2008.

{¶30} 20. On August 27, 2008, relator returned to Dr. Rodway, who wrote:

PHYSICAL EXAM

* * *

The patient has weakness ulnar provocation. Pincher grasp is intact. She has full range of motion of the elbow and the wrist but she has pain to palpation of the wrist. The Tinel and Phalen are negative.

ASSESSMENT

Left elbow contusion with clinical ulnar neuropathy—now an allowed claim.

{¶31} 21. On September 7, 2008, the employer moved for reconsideration. In its memorandum in support of its motion, the employer challenged the claim allowances and the TTD award based upon alleged mistakes of law and fact contained in the SHO's order of July 28, 2008. With respect to the TTD award, the employer's memorandum argued:

Mistake of Law and Fact No. 2: The SHO awarded TTC even though every certification of disability completed by Dr. Rodway bases Claimant's alleged temporary total disability in part on a nonallowed condition – an alleged left elbow fracture (ICD 813.05). See C-84s, * * * attached. * * * Under Ohio law, Claimant must demonstrate by competent medical evidence she is temporarily and totally disabled solely due to conditions recognized in her claim; she cannot combine allowed and nonallowed conditions to support payment of TTC. See, e.g., State ex rel. Bradley v. Indus. Comm. (1997), 77 Ohio St.3d 239. Dr. Rodway's office notes further demonstrate she is relating Claimant's alleged disability to nonallowed conditions, including "left ulnar neuropathy – post-traumatic, worse" and "possible ulnar radiculopathy.["] See Dr. Rodway[s] June 12, 2008 and July 10, 2008 office notes[.] * * * There is no evidence by Dr. Rodway or any other physician supporting disability independent of the nonallowed conditions appearing in the office notes and C-84s. The SHO's award of TTC is in violation of Ohio law and constitutes and [sic] abuse of discretion.

(Emphasis sic.)

{¶32} 22. The employer's September 7, 2008 motion and memorandum contained a certificate of service indicating that it was served upon relator's attorney.

{¶33} 23. On October 8, 2008, the three-member commission mailed an interlocutory order, stating:

The Employer's request for reconsideration, filed 09/07/2008, from the Staff Hearing Officer order issued 07/31/2008, is referred to the Commission Level Hearings Section to be docketed before Members of the Industrial Commission. The issues to be heard are:

[One] The Employer's request for the Industrial Commission to invoke its continuing jurisdiction pursuant to Ohio Revised Code 4123.52, and

[Two] Issue:

[One] Continuing Jurisdiction Pursuant To R.C. 4123.52

[Two] Injury Or Occupational Disease Allowance

It is the finding of the Industrial Commission that the Employer has presented evidence of sufficient probative value to warrant adjudication of the request for reconsideration regarding the alleged presence of a clear mistake of fact in the order from which reconsideration is sought, and a clear mistake of law of such character that remedial action would clearly follow.

Specifically, it is alleged that the medical evidence relied on by the Staff Hearing Officer to pay temporary total included conditions not allowed in the claim. It is further alleged that the office notes of the physician of record indicate that temporary total is for a condition not allowed in the claim.

The order issued 08/22/2008 (refusal order) is vacated, set aside and held for naught.

Based on these findings, the Industrial Commission directs that the Employer's request for reconsideration, filed 09/07/2008, is to be set for hearing to determine if the alleged mistake of law/mistake of fact as noted herein are sufficient for the Industrial Commission to invoke its continuing jurisdiction.

In the interests of administrative economy and for the convenience of the parties, after the hearing on the question of continuing jurisdiction, the Industrial Commission will take the matter under advisement and proceed to hear the merits of the underlying issue(s). The Industrial Commission will thereafter issue an order on the matter of continuing jurisdiction under Ohio Revised Code 4123.52. If authority to invoke continuing jurisdiction is found, the Industrial Commission will address the merits of the underlying issue(s).

This order is issued pursuant to State ex rel. Nicholls v. Indus. Comm. [(1998)] 81 Ohio St.3d 454, State ex rel. Foster v. Indus. Comm. (1999) 85 Ohio St.3d 320, and in accordance with Ohio Administrative Code 4121-3-09.

(Emphasis sic.)

{¶34} 24. On October 24, 2008, Dr. Rodway wrote to relator's counsel:

I am in receipt of your letter dated October 15, 2008, regarding the injured worker listed above. You specifically asked if I support her temporary total disability for her industrial injury of April 11, 2008. Apparently, her temporary total disability was disallowed because there were non-allowed conditions listed on her C-84[.] You request if I feel Ms. Washington was temporarily totally disabled regardless of whether there was an elbow fracture or ulnar neuropathy involved[.] It is my medical opinion, within a reasonable degree of medical certainty [sic], that Theresa Washington-Bass was temporarily disabled for the allowed condition of contusion to left elbow[.] Ms[.] Washington-Bass is left-handed[.] I maintained her on light duty until the light duty not only interfered with the treatment of her elbow, but also increased her pain. Due to the severity of her pain, she was wearing a sling of her left upper extremity at work to help control the pain. Unfortunately, the use of a sling is contraindicated for prolonged periods of time[.] Therefore, I chose to take her off work due to her persistent weakness and pain[.] In addition, elbow fractures are generally treated the same as elbow contusions, so the differentiation between a fracture and a contusion is relatively insignificant[.] Finally, the ulnar neuropathy did little to affect my decision because of the remainder of this argument[.]

The ulnar neuropathy predominately affects her left fifth finger, which is a less significant digit in the workplace.

In addition, you asked why my initial records noted an elbow fracture[.] She advised me that she was told in the emergency setting that she had an elbow fracture[.] At that time, I was relying on the emergency report dated April 11, 2008, from the Ohio State University Emergency Room[.] The final impression was, "Probable radial head fracture."

{¶35} 25. Earlier, on October 8, 2008, relator returned to Dr. Rodway, who wrote:

PHYSICAL EXAMINATION

* * *

The patient has weakness of both hands and ulnar provocation. There is a bit of a let-go phenomenon. With pincher grasp she is a let-go phenomenon bilaterally. She does have a positive Tinel's at the left elbow. There are no real positive provocative test or lateral epicondylitis or medial epicondylitis. Her pincher grasp is weak bilaterally.

ASSESSMENT

Left elbow contusion with ulnar neuropathy, now an allowed claim -- question symptom magnification.

{¶36} 26. On October 8, 2008, Dr. Rodway completed a C-84 on which she certified TTD from October 8, 2008 through an estimated return-to-work date of November 30, 2008. On the form, Dr. Rodway again listed ICD-9 codes "813.05," "920," "922.31" and "842.00." She also wrote: "See Clinic Notes."

{¶37} 27. On December 8, 2008, relator returned to Dr. Rodway, who wrote: "Left elbow contusion with ulnar neuropathy. Question symptom magnification."

{¶38} 28. On December 8, 2008, Dr. Rodway completed a C-84 certifying TTD compensation. Again, the C-84 form asks the physician to "[l]ist ICD-9 Codes with narrative diagnosis(es) for allowed conditions being treated which prevent return to work." In response, Dr. Rodway wrote solely: "923.11," which is the code for contusion of elbow.

{¶39} 29. Following a December 16, 2008 hearing, the three-member commission mailed an order on January 10, 2009, typed December 30, 2008, that exercises continuing jurisdiction over the SHO's order of July 28, 2008:

* * * [I]t is the finding of the Industrial Commission that the Employer has met its burden of proving that the Staff Hearing Officer order, issued 07/31/2008, contains a clear mistake of law of such character that remedial action would clearly follow. Specifically, in awarding temporary total disability compensation, the Staff Hearing Officer improperly relied on medical evidence that included consideration of conditions not allowed in the claim. Therefore, the Commission exercises continuing jurisdiction pursuant to R.C. 4123.52 and State ex rel. Nicholls v. Indus. Comm. (1998), 81 Ohio St.3d 454, State ex rel. Foster v. Indus. Comm. (1999), 85 Ohio St.3d 320, and State ex rel. Gobich v. Indus. Comm. (2004), 103 Ohio St.3d 585, in order to correct his error. The Employer's request for reconsideration, filed 09/07/2008, is granted and the Staff Hearing Officer order, issued 07/31/2008, is modified to the following extent.

Notwithstanding the granting of the Employer's request for reconsideration, filed 09/07/2008, the Injured Worker's FROI-1 application, filed 04/17/2008, is granted to the extent of this order.

The Commission finds that the Injured Worker sustained an injury on 04/11/2008 in the course of and arising out of her employment as a crew member at a fast food restaurant when she slipped and fell, hitting the floor.

The Commission ALLOWS the claim for CONTUSION LEFT ELBOW; CONTUSION SCALP; THORACIC CONTUSION; LEFT WRIST SPRAIN, based on the emergency room report from the Ohio State University Medical Center, dated 04/11/2008, the treatment records from Nancy Rodway, M.D., dated 04/16/2008 and 04/30/2008, Dr Rodway's response report, dated 09/08/2008, and the Injured Worker's testimony at hearing regarding the slip and fall that occurred on 04/11/2008. The cited evidence further supports a finding that the conditions specified above are the direct result of the 04/11/2008 industrial injury.

The Commission denies the request for temporary total disability compensation for the closed periods from 04/12/2008 through 05/01/2008, and from 06/13/2008 through 07/28/2008. The Commission finds that there is insufficient persuasive medical evidence to support a finding that the allowed conditions of the claim independently caused temporary total disability over the two specified periods.

The Commission finds that on her C-84 reports dated 04/16/2008, 06/12/2008, 07/10/2008, and 10/08/2008, Dr. Rodway certifies temporary total disability based in part on the condition of fracture of the left radius head, a condition not allowed in the claim. In addition, in the "objective/subjective findings" section on each of the specified C-84 reports, Dr. Rodway makes an express reference to her clinic notes, rather than providing any findings on the reports themselves. The Commission finds that in her 04/16/2008 note, Dr. Rodway references the non-allowed fracture condition; in her 06/12/2008 note, she references the non-allowed fracture condition, as well as a non-allowed left ulnar neuropathy condition; and in her notes dated 07/10/2008 and 10/08/2008, she references the non-allowed ulnar neuropathy condition. While it is true that Dr. Rodway's most recent C-84 report, dated 12/08/2008, certifies disability as resulting solely from the allowed left elbow contusion condition, the C-84 again references clinic notes, with the accompanying note of the same date again referencing the non-allowed ulnar neuropathy condition. As such, the Commission finds that based on the cited C-84 reports and accompanying clinic notes, non-allowed conditions contributed to the Injured Worker's status of being temporarily and totally disabled over the closed periods from 04/12/2008 through 05/01/2008 and from 06/13/2008 through 07/28/2008. Therefore, the Commission denies the request for temporary total disability compensation for the specified closed periods for lack of persuasive evidence to support a finding that the allowed conditions alone caused total disability over the two periods.

The Commission further finds, however, that this order does not preclude consideration of the payment of temporary total disability compensation should additional conditions become recognized in the claim.

(Emphasis sic.)

{¶40} 30. On April 3, 2009, relator, Theresa Washington-Bass, filed this mandamus action.

Conclusions of Law:

{¶41} In this action, relator challenges the commission's exercise of continuing jurisdiction. In that regard, three issues are presented: (1) whether the SHO's order of July 28, 2008 presents a clear mistake of law with respect to the TTD award, as the commission determined; (2) whether the commission's interlocutory order clearly articulates the clear mistake of law that is the prerequisite for the commission's exercise of continuing jurisdiction; and (3) whether the commission's finding of a clear mistake of law is, in actuality, a difference in evidentiary interpretation between the commission and its SHO.

{¶42} The magistrate finds: (1) the SHO's order of July 28, 2008 presents a clear mistake of law with respect to the TTD award; (2) the commission's interlocutory order clearly articulates the clear mistake of law that is the prerequisite for the commission's exercise of continuing jurisdiction; and (3) the commission's finding of a clear mistake of law is not, in actuality, a difference in evidentiary interpretation between the commission and its SHO.

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

{¶44} Turning to the first issue, in the seminal case of *State ex rel. Waddle v. Indus. Comm.* (1993), 67 Ohio St.3d 452, the court held that nonallowed medical conditions cannot be used to advance or defeat a claim for compensation. Later, in *State ex rel. Bradley v. Indus. Comm.* (1997), 77 Ohio St.3d 239, 242, citing its decision in

Waddle, the court stated that the mere presence of a nonallowed condition in a claim does not itself destroy the compensability of the claim, but the claimant must meet her burden of showing that an allowed condition independently caused the disability.

{¶45} The SHO's order of July 28, 2008 states reliance upon "the C-84 forms on file from Dr. Rodway" without specifying the dates of the C-84s relied upon. However, as of the hearing date, only three C-84s had been completed by Dr. Rodway. Those C-84s were completed on April 16, June 12 and July 10, 2008. On all three of the C-84s, Dr. Rodway lists ICD-9 code 813.05 as among the allowed conditions being treated which prevent return to work. As noted earlier, ICD-9 code 813.05 denotes a closed fracture of the radial head. Moreover, in all three C-84s, Dr. Rodway wrote "[s]ee [c]linic [n]otes" in response to the query as to the objective and subjective clinical findings that support her TTD certification.

{¶46} On their face, all three of the C-84s clearly indicate that the nonallowed fracture condition was used to advance the claim for TTD compensation in violation of *Waddle*. Moreover, there is no indication on the C-84s that any allowed condition is independently causing TTD.

{¶47} A review of Dr. Rodway's clinical notes corresponding to each C-84 does not in any way cure the problem presented by the C-84s themselves—that the nonallowed fracture condition is being used to advance the TTD claim. In fact, the clinical notes raise additional questions as to whether other nonallowed conditions may be contributing to disability.

{¶48} It should be acknowledged that, initially, the bureau did allow the claim for "813.05 FX Radius Head – Closed" but that claim allowance was eliminated by the DHO's order of June 6, 2008 and the SHO's order of July 28, 2008.

{¶49} It is unfortunate that, at least prior to the June 24, 2008 mailing of the DHO's order deleting 813.05 as a claim allowance, Dr. Rodway could not have known that 813.05 was no longer recognized in the claim. However, such scenario cannot alter the undisputed fact that three C-84s relied upon by the SHO's order of July 28, 2008 present a nonallowed condition as a contributing cause of TTD.

{¶50} Given the above analysis, it is clear that the C-84s dated April 16, June 12 and July 10, 2008 upon which the SHO relied cannot constitute the some evidence supporting the TTD award because those C-84s violate the principles set forth in *Waddle* and *Bradley*. Accordingly, the SHO's order of July 28, 2008 contains a clear mistake of law.

{¶51} As earlier noted, citing *Bradley*, the employer moved the commission for reconsideration of the SHO's TTD award. The employer pointed out, and correctly so, that "every certification of disability completed by Dr. Rodway bases Claimant's alleged temporary total disability in part on a nonallowed condition." (Emphasis omitted.) The employer also alleged that Dr. Rodway's office notes demonstrate that nonallowed conditions were used to support the C-84 certifications.

{¶52} The employer's motion for reconsideration prompted the commission to issue an interlocutory order giving notice that the commission would determine whether to exercise continuing jurisdiction.

{¶53} The commission's issuance of its interlocutory order brings us to the second issue in which relator alleges that the commission failed to follow judicial prerequisites to the exercise of its continuing jurisdiction.

{¶54} Continuing jurisdiction is not unlimited. Its prerequisites are: (1) new and changed circumstances; (2) fraud; (3) clear mistake of fact; (4) clear mistake of law; and (5) error by an inferior tribunal. *State ex rel. Gobich v. Indus. Comm.*, 103 Ohio St.3d 585, 2004-Ohio-5990; *State ex rel. Royal v. Indus. Comm.* (2002), 95 Ohio St.3d 97; *State ex rel. Foster v. Indus. Comm.* (1999), 85 Ohio St.3d 320; and *State ex rel. Nicholls v. Indus. Comm.* (1998), 81 Ohio St.3d 454.

In *Gobich*, at ¶15, the court states:

The presence of one of these prerequisites must be clearly articulated in any commission order seeking to exercise reconsideration jurisdiction. *Nicholls*; *State ex rel. Foster v. Indus. Comm.* (1999), 85 Ohio St.3d 320, 707 N.E.2d 1122. This means that the prerequisite must be both identified and explained. *Id.* It is not enough to say, for example, that there has been a clear error of law. The order must also state what that error is. *Nicholls*, 81 Ohio St.3d at 459, 692 N.E.2d 188; *Foster*, 85 Ohio St.3d at 322, 707 N.E.2d 1122. This ensures that the party opposing reconsideration can prepare a meaningful defense to the assertion that continuing jurisdiction is warranted. *Royal*, 95 Ohio St.3d at 100, 766 N.E.2d 135. It also permits a reviewing court to determine whether continuing jurisdiction was properly invoked. *Id.* at 99-100, 766 N.E.2d 135.

{¶55} In *Gobich*, the court held that the commission had improperly exercised continuing jurisdiction when it vacated an SHO's order awarding PTD compensation by pronouncing that the SHO's order is based upon "clear mistakes of law." In *Gobich*, the bureau had moved for a commission reconsideration of the SHO's order.

{¶56} In *Gobich*, at ¶17-18, the court found that the bureau's complaint with the SHO's award of permanent total disability was an evidentiary one:

* * * [T]he bureau produced evidence that it believed established a capacity for sustained remunerative employment, and the SHO found otherwise. *Royal*, however, has specifically stated that a legitimate disagreement as to evidentiary interpretation does not mean that one of them was mistaken and does not, at a minimum, establish that an error was *clear*. *Id.*, 95 Ohio St.3d at 100, 766 N.E.2d 135.

It is also unclear whether the reason for continuing jurisdiction is a mistake of law or a mistake of fact. While the commission claimed the former, it cited no misapplication of the law. To the contrary, it referred only to an omission of fact. *Royal*, moreover, has categorized evidentiary disputes as factual. This is significant because *Nicholls*, *Foster*, and *Royal* are uncompromising in their demand that the basis for continuing jurisdiction be clearly articulated. The Commission's current justification is ambiguous.

{¶57} In *Royal*, following the commission's award of PTD compensation, the employer moved for reconsideration. The commission granted reconsideration "based on the possibility of an error in the previous Industrial Commission order." Following a bifurcated hearing that addressed both the propriety of reconsideration and the merits of the permanent total disability claim, two identically dated orders emerged from those proceedings. The first order affirmed the grant of reconsideration based on the presence of a mistake of law or fact. The order identified the mistakes as (1) the SHO's misrepresentation of a particular vocational report and (2) the absence of an analysis of nonmedical disability factors.

{¶58} Holding that the commission improperly invoked its continuing jurisdiction, the *Royal* court explains:

Identification of error *after* reconsideration does allow a reviewing court to adjudicate the propriety of the

commission's invocation of continuing jurisdiction. It does little to help the party opposing the motion since it comes too late to allow a meaningful challenge to reconsideration at the administrative level.

Id. at 100. (Emphasis sic.)

{¶59} The *Royal* court found further fault with the commission's exercise of continuing jurisdiction:

The reliance on "mistake of fact" is equally untenable. When the initial PTD order and disputed reports are read closely, the perceived error is not so much mistake as a difference in evidentiary interpretation.

Id.

{¶60} Recently, in *State ex rel. Internatl. Truck and Engine Corp. v. Indus. Comm.*, 119 Ohio St.3d 402, 404, 2008-Ohio-4494, ¶16, the court noted that the case law renders an informal invocation of continuing jurisdiction impossible. "The reason for the exercise of continuing jurisdiction must be articulated contemporaneously with the exercise of continuing jurisdiction, not belatedly." "An incomplete continuing jurisdiction order cannot be rehabilitated by a subsequent order." Id.

{¶61} Here, it is the commission's interlocutory order that is the "commission order seeking to exercise reconsideration jurisdiction," to use the words of *Gobich*, at ¶15. Under *Gobich*, the presence of one of the prerequisites for the exercise of continuing jurisdiction must be clearly articulated in the commission's interlocutory order. This means that the prerequisite, namely a clear mistake of law, must be both identified and explained. It is not enough for the interlocutory order to say, for example, that there has been a clear error of law. The order must also state what the error is so that the party

opposing reconsideration can prepare a meaningful defense to the assertion that continuing jurisdiction is warranted. *Gobich*.

{¶62} In her challenge to the commission's exercise of continuing jurisdiction, relator ignores the commission's interlocutory order and exclusively focuses on the commission's December 16, 2008 order that was typed December 30, 2008. (See repeated references to "the December 30, 2008 order" at pages 7, 9, 11, and 13 of relator's brief.) According to relator, the December 30, 2008 order "failed to clearly identify any misapplication of law." (Relator's brief, at 7.) According to relator, the December 30, 2008 order, "fails to reference a single legal authority" supporting a clear mistake of law, and thus the *Gobich* requirements have not been met. (Relator's brief, at 8.) Relator's arguments lack merit.

{¶63} Notwithstanding that relator fails to challenge the commission's interlocutory order, analysis here must begin with that order under the case law relied upon by relator.

{¶64} Again, the interlocutory order states:

It is the finding of the Industrial Commission that the Employer has presented evidence of sufficient probative value to warrant adjudication of the request for reconsideration regarding the alleged presence of a clear mistake of fact in the order from which reconsideration is sought, and a clear mistake of law of such character that remedial action would clearly follow.

Specifically, it is alleged that the medical evidence relied on by the Staff Hearing Officer to pay temporary total included conditions not allowed in the claim. It is further alleged that the office notes of the physician of record indicate that temporary total is for a condition not allowed in the claim.

{¶65} Concededly, the interlocutory order provides no citation to authority to support the legal proposition implied in the order that a nonallowed condition cannot be

used to advance or defeat a claim for compensation. In the view of the magistrate, the absence of citation to legal authority to support the legal proposition underpinning the alleged clear mistake of law is not fatal to the order. The legal proposition set forth in *Waddle* and *Bradley* is fundamental to the practice of workers' compensation and is, thus, well known by those who practice workers' compensation.

{¶66} Moreover, in the memorandum in support of reconsideration, the employer cited to *Bradley*. Under the circumstances here, it is difficult to conceive how the failure of the interlocutory order to cite to *Waddle* or *Bradley* would in any way detract from the ability of the opposing party to prepare a meaningful defense to the assertion that continuing jurisdiction is warranted. Accordingly, the magistrate finds that the interlocutory order satisfies the judicial requirements set forth in *Gobich*.

{¶67} As earlier noted, the third issue is whether the commission's finding of a clear mistake of law is, in actuality, a difference in evidentiary interpretation between the commission and its SHO.

{¶68} According to relator, "the commission reached a different conclusion based on evaluation of the same medical evidence." (Relator's brief, at 13.) In the magistrate's view, relator is less than clear as to how relator can conclude that the commission's finding of a clear mistake of law is, in actuality, a difference in evidentiary interpretation.

{¶69} To begin, it should be obvious that this magistrate's determination that the three C-84s fail to constitute some evidence upon which the SHO can rely did not involve evidentiary interpretation or a weighing of that evidence. That magistrate's determination is premised upon application of the law to undisputed facts of record. By the same token, evidentiary interpretation was not involved in the commission's determination that the C-

84s provide no evidence of TTD because the disability certifications are premised in part upon a nonallowed condition. Thus, relator's claim to a difference in evidentiary interpretation rings hollow.

{¶70} Moreover, it can be noted that the commission had before it additional evidence that was not before the SHO. The evidence was not the same, as relator seems to suggest.

{¶71} After the commission appropriately determined to exercise its continuing jurisdiction over the SHO's order, it was faced with two of Dr. Rodway's C-84s (dated October 8 and December 8, 2008) that were not before the SHO. The October 8, 2008 C-84 suffers the same infirmity as Dr. Rodway's prior C-84s, i.e., reliance upon a nonallowed condition. However, the December 8, 2008 C-84 certified TTD solely upon a condition identified as "923.11" which is the ICD-9 code for an elbow contusion.

{¶72} Although the December 8, 2008 C-84, by itself, does not present a nonallowed condition issue under *Waddle* or *Bradley*, the commission, nevertheless, refused to accept it because Dr. Rodway's clinic notes conflict with the C-84 certification. Clearly, the commission was well within its fact-finding discretion to determine that the December 8, 2008 C-84 should not be relied upon. See *State ex rel. Genuine Parts Co. v. Indus. Comm.*, 160 Ohio App.3d 99, 2005-Ohio-1447. As the commission explains in its order, the accompanying notes of the same date reference the nonallowed ulnar neuropathy condition.

{¶73} Thus, based upon the above analysis, the magistrate concludes that the commission's finding of a clear mistake of law is not, in actuality, a difference in evidentiary interpretation between the commission and the SHO.

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

/s/ Kenneth W. Macke

KENNETH W. MACKE
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).