[Cite as *State ex rel. Crisp v. Indus. Comm.*, 2012-Ohio-2077.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Sheileah Crisp,	:	
Relator,	:	
v.	:	No. 10AP-438
Industrial Commission of Ohio and Cedar Fair LP,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on May 10, 2012

Harris & Burgin, L.P.A., and *Jeffrey W. Harris*, for relator.

Michael DeWine, Attorney General, and *Derrick L. Knapp*, for respondent Industrial Commission of Ohio.

Brouse McDowell, and *Linda L. Stepan*, for respondent Cedar Fair LP.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

CONNOR, J.

{¶ 1} Relator, Sheileah Crisp ("relator"), filed this mandamus action to challenge an order of respondent, Industrial Commission of Ohio ("commission"), exercising continuing jurisdiction and vacating an order that granted a motion of respondent, Cedar Fair LP ("Cedar Fair"), to terminate temporary total disability ("TTD") compensation based upon relator's refusal of a good faith offer of suitable alternate employment.

{¶ 2} The matter was referred to a magistrate pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The parties stipulated the pertinent evidence and filed merit briefs. The magistrate rendered a decision which is appended hereto. In the appended decision, the magistrate issued findings of fact and conclusions of law before recommending that we grant relator's request for a writ of mandamus. This recommendation resulted from two observations made by the magistrate. First, he observed that the staff hearing officer ("SHO") treated relator's "residence" under Ohio Adm.Code 4123-3-32(A)(6) in a manner akin to the concept of "domicile." Second, he observed that the SHO's analysis focused on relator's residence as of the date of the job offer. The magistrate then found that the commission's exercise of continuing jurisdiction was based upon a legitimate disagreement as to evidentiary interpretation. Thus, the magistrate concluded that no clear mistake of fact supported the exercise of continuing jurisdiction. Therefore, according to the magistrate, the exercise of continuing jurisdiction amounted to an abuse of discretion.

{¶ 3} Cedar Fair and the commission have separately filed timely objections to the magistrate's decision. Relator has filed memoranda in response. The matter therefore presents to this court for a full, independent review.

{¶ 4} Because no party has objected to the magistrate's findings of fact, we adopt those findings as our own. In its two objections, the commission argues: (1) the magistrate erred in suggesting that the commission had to question the evidence relied upon by the SHO, and (2) the magistrate erred in concluding that the decisions of the SHO and commission simply presented a legitimate disagreement as to evidentiary interpretation. Cedar Fair's single objection mirrors the commission's second. In response, relator argues that we should adopt the magistrate's decision because the exercise of continuing jurisdiction was either based upon a legitimate disagreement as to evidentiary interpretation or was based upon a clear mistake of law, which was not cited as the reason for exercising continuing jurisdiction. Either way, relator argues that the commission improperly exercised continuing jurisdiction.

{¶ 5} While the appended decision sets forth a detailed recitation of the facts of this matter, a brief description might help frame the backdrop of this dispute. Cedar Fair hired relator as a professional ice skater at Kings Island amusement park near Cincinnati,

Ohio. As a professional ice skater, relator's profession frequently took her across the country to perform for various employers for limited periods of time. Between each engagement, relator returned to her home in California to search for more work and continue training. Consistent with this routine, relator's employment with Cedar Fair was for a limited duration and was to last from May 25 through August 25, 2007. Relator sustained injuries on July 26, 2007, and consequently, an industrial claim was allowed for "right ankle sprain/strain; tibial tendonitis." Relator began receiving TTD compensation thereafter.

{¶ 6} On May 28, 2008, relator was released with restrictions permitting her to perform a sit down job. On June 10, 2008, Cedar Fair offered relator a job as a cash control teller at Kings Island. The duties of this job undisputedly fell within relator's physical capabilities. Nevertheless, relator refused the offer. As a result, Cedar Fair filed a motion to terminate TTD compensation based upon her refusal. The matter was heard by a district hearing officer ("DHO"), who granted Cedar Fair's motion. The matter then presented to an SHO, who vacated the DHO's order and denied Cedar Fair's motion. Another SHO refused Cedar Fair's administrative appeal, which prompted Cedar Fair to file a motion for reconsideration. The commission scheduled the matter for a hearing to determine whether to exercise continuing jurisdiction and whether to terminate TTD compensation. The hearing was transcribed and is a part of our record.

{¶ 7} Ultimately, the commission found a clear mistake of fact in the SHO's order and chose to exercise continuing jurisdiction. Specifically, the commission concluded that the SHO "mistakenly found that the Injured Worker's residence was in California when the Injured Worker was living in the greater Cincinnati area at the time the Employer offered the Injured Worker a light duty job within her restrictions." Stipulated evidence, at 1. At issue, therefore, is whether the commission abused its discretion in exercising continuing jurisdiction.

{¶ 8} Under R.C. 4123.52, the commission can exercise continuing jurisdiction and modify its orders when justified. According to case law, the commission is justified when at least one of five preconditions exists: "(1) new and changed circumstances, (2) fraud, (3) clear mistake of fact, (4) clear mistake of law, or (5) error by an inferior tribunal." *State ex rel. Gobich v. Indus. Comm.*, 103 Ohio St.3d 585, 2004-Ohio-5990,

¶ 14, citing *State ex rel. Nicholls v. Indus. Comm.*, 81 Ohio St.3d 454, 459 (1998). "The presence of one of these prerequisites must be clearly articulated in any commission order seeking to exercise reconsideration jurisdiction." *Id.* at ¶ 15, citing *State ex rel. Foster v. Indus. Comm.*, 85 Ohio St.3d 320 (1999). This means that the prerequisite must be both identified and explained. *Id.*

{¶ 9} R.C. 4123.56 provides that payment of TTD compensation "shall not be made * * * when work within the physical capabilities of the employee is made available by the employer or another employer." Therefore, an employee becomes TTD ineligible upon refusing an employer's good faith job offer for suitable employment within a reasonable proximity to the employee's residence. *See* Ohio Adm.Code 4123-3-32(A)(6); *see also State ex rel. Ellis Super Valu, Inc. v. Indus. Comm.*, 115 Ohio St.3d 224, 2007-Ohio-4920, ¶ 11, citing R.C. 4123.56(A); and *State ex rel. Sebring v. Indus. Comm.*, 123 Ohio St.3d 241, 2009-Ohio-5258, ¶ 27. "Suitable employment" is work "within the employee's physical capabilities." Ohio Adm.Code 4123-3-32(A)(3). Whether a job is offered in "good faith" is a factual issue for the commission to determine. *See Ellis Super Valu* at ¶ 13. Neither of these issues is disputed herein.[1] Rather, this matter regards whether the cash control teller job at Kings Island was within a reasonable proximity to relator's residence.

{¶ 10} A magistrate of this court previously outlined the competing principles underlying the reasonable proximity to residence requirement of Ohio Adm.Code 4121-3-32(A)(6). *See State ex rel. Sebring v. Indus. Comm.*, 10th Dist. No. 07AP-679, 2008-Ohio-3625, affirmed by, 123 Ohio St.3d 241, 2009-Ohio-5258. On one side, an employer should be prevented from forcing an injured worker to change her residence as a condition of further employment. On the other side, however, an injured worker should be prevented from changing her residence in order to eliminate an employer's ability to offer alternate suitable employment. These principles rest on the presumption that a residence is established and undisputed. In the instant matter, however, relator's residence is the focus of this dispute. Moreover, the term "residence" is undefined in the

[1] While the issue of good faith was once disputed, it is not the subject of any arguments before us.

context of an employer's suitable alternate employment defense to the payment of TTD compensation.

{¶ 11} Ambiguity exists when a term or provision has more than one reasonable interpretation. *See Safeco Ins. Co. of Am. v. White*, 122 Ohio St.3d 562, 2009-Ohio-3718, ¶ 49. It is well-settled that the term "residence" has different meanings in different contexts. *See Prouse, Dash & Crouch, LLP v. DiMarco*, 116 Ohio St.3d 167, 2007-Ohio-5753.

{¶ 12} In *DiMarco*, the court addressed the issue of whether a trial court had personal jurisdiction over a defendant. To answer this question, the court analyzed whether the defendant was an Ohio resident and noted the different uses of the term throughout the Ohio Revised Code. According to *DiMarco*, the Ohio legislature deliberately left the term undefined based upon its many varied uses. Nevertheless, one consistent theme manifested itself: "The case law, statutes, and rules are in accord that the intention of a person is a significant factor in determining where he or she legally resides." *Id*. at ¶ 10.

{¶ 13} The concept of residency was the primary issue presented in *In re Estate of Andrew Anderson*, 7th Dist. No. 05 MO 14, 2007-Ohio-1107. In that matter, the court noted:

> Residency is not the same as domicile. *State ex rel. Lee v. Trumbull County Probate Court*, 83 Ohio St.3d 369, 373, 1998-Ohio-51. Domicile connotes a, "fixed, permanent home to which one intends to return and from which one has no present purpose to depart." *In re Guardianship of Fisher*, 91 Ohio App.3d 212, 215, (1993), citing *Hager v. Hager*, 79 Ohio App.3d 239, 244, (1992). An individual can only have one domicile, and he or she does not have to be physically present at his or her domicile in order to keep the same. *Fisher* at 215.
>
> However, one can have more than one residence. A residence has been defined as a "place of dwelling," and it requires, "the actual physical presence at some abode coupled with an intent to remain at that place for some period of time. * * * Thus, the term 'residence' connotes an element of permanency rather than a location where one simply visits for a period of time." *Id.*

Id. at ¶ 20-21.

{¶ 14} With respect to the registration requirements for sex offenders, courts have held that the common and ordinary meaning of the term "residence" is: "the place where one actually lives." *State v. Sommerfield*, 3d Dist. No. 14-07-09, 2007-Ohio-6427, ¶ 14; *see also State v. Curtis*, 8th Dist. No. 89412, 2008-Ohio-916, ¶ 18. Black's Law Dictionary contains four definitions of the term, while one corresponds with the common and ordinary meaning by providing: "The place where one actually lives, as distinguished from a domicile." *Black's Law Dictionary* 1423 (9th Ed.2009). This definition further distinguishes "residence" from "domicile" by providing: "Residence [usually] just means bodily presence as an inhabitant in a given place; domicile [usually] requires bodily presence plus an intention to make the place one's home. A person thus may have more than one residence at a time but only one domicile. Sometimes, though, the two terms are used synonymously."

{¶ 15} As is clear, ambiguity certainly exists with respect to the term "residence." In most contexts, an individual's intent is relevant in determining her "residence," while in others, it apparently is not. We believe this ambiguity caused the dispute that remains before us. Indeed, the SHO held one interpretation of the term "residence," while the commission may have held another. Without specifically defining the term, the SHO considered relator's intent before concluding that her residence was in California. Conversely, the commission may have treated the term differently. It cited physical therapy reports dated a month after the June 10, 2008 job offer. It referenced a letter dated a week after the job offer, in which relator's counsel notified the Bureau of Workers' Compensation of relator's change of address to Covington, Kentucky. Finally, the commission cited a statement made by relator's counsel during the February 26, 2009 hearing, where he indicated that relator changed her residence to California on September 3, 2008. The commission then concluded that relator was living in Cincinnati, Ohio at the time of the job offer.

{¶ 16} The magistrate concluded that the exercise of continuing jurisdiction constituted an abuse of discretion in these circumstances. In its objections, Cedar Fair acknowledges that the commission never defined the term "residence." Perhaps this is attributable to the fact that Cedar Fair never offered a definition of the term in its motion for reconsideration. Moreover, Cedar Fair concedes that it never offered a definition of

the term to our magistrate. Nevertheless, in its objections, Cedar Fair now states that the definition is essential to the disposition of this matter. Further, it simply states that it is axiomatic that the term refers to the place where someone is living. Finally, it states: "It is settled that 'residence' is the place where one actually lives." Cedar Fair's objections, at 1. It is unclear how this is settled because Cedar Fair fails to cite an authority of any kind.

{¶ 17} In the commission's objections, it never offers a definition of the term "residence." However, it states that a person can have only one domicile but can have multiple residences.

{¶ 18} In our view, a determination on the issue of "residence" under Ohio Adm.Code 4121-3-32(A)(6) cannot be made without considering the intent of the injured worker. *See DiMarco* at ¶ 10. Indeed, some degree of permanency is implied when an individual accepts a job. *See In re Anderson* at ¶ 21. Therefore, a "residence" under Ohio Adm.Code 4121-3-32(A)(6) is the place where the injured worker lives and intends to remain for some period of time. Thus, in the context of the reasonable proximity requirement, the offered job must be within reasonable proximity to where an injured worker lives and intends to remain for some period of time. We believe this workable definition affords latitude to the commission to balance the interests of injured workers and their employers.

{¶ 19} Again, we believe the SHO considered relator's intent in determining that her "residence" was in California for purposes of Ohio Adm.Code 4121-3-32(A)(6). Based upon the commission's order, however, it is unclear whether the commission engaged in a similar analysis.

{¶ 20} "[T]he propriety of continuing jurisdiction cannot be evaluated if an administrative commission does not reveal, in a meaningful way, why it was exercised." *State ex rel. Royal v. Indus. Comm.*, 95 Ohio St.3d 97 (2002), citing *Nicholls*; *see also Foster*. Failing to provide such an explanation inhibits judicial review. *State ex rel. Snyder v. Indus. Comm.*, 10th Dist. No. 10AP-587 (Sept. 22, 2011), citing, *State ex rel. Goodwin v. Indus. Comm.*, 10th Dist. No. 01AP-1361, 2002-Ohio-3618.

{¶ 21} While the specific analysis performed by the commission is unclear, what is clear is that the commission either disagreed with the SHO's analysis of relator's intent, which would have amounted to a legitimate disagreement as to evidentiary interpretation,

or it failed to consider her intent in conducting its analysis. Either way, the commission abused its discretion in exercising continuing jurisdiction.

{¶ 22} After an examination of the magistrate's decision, as well as an independent review of the record, we conclude that the magistrate has sufficiently discussed and determined the issues presented herein. We therefore overrule the objections to the magistrate's decision filed on behalf of Cedar Fair and the commission. Accordingly, we adopt the appended decision as our own with the added clarification set forth herein. As a result, we grant relator's request for a writ of mandamus.

Objections overruled;
writ of mandamus granted.

SADLER and DORRIAN, JJ., concur.

A P P E N D I X

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Sheileah Crisp,	:	
Relator,	:	
v.	:	No. 10AP-438
Industrial Commission of Ohio and Cedar Fair LP,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on April 18, 2011

Harris & Burgin, L.P.A., and *Jeffrey W. Harris*, for relator.

Michael DeWine, Attorney General, and *Derrick Knapp*, for respondent Industrial Commission of Ohio.

Brouse McDowell, and *Linda L. Stepan*, for respondent Cedar Fair LP.

IN MANDAMUS

{¶ 23} In this original action, relator, Sheileah Crisp, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its February 26, 2009 order that vacates a September 3, 2008 order of its staff hearing officer ("SHO") on continuing jurisdiction grounds and that terminates temporary total disability ("TTD") compensation effective June 18, 2008 on grounds that relator refused

an offer of suitable employment, and to enter an order that reinstates the September 3, 2008 SHO order.

Findings of Fact:

{¶ 24} 1. Relator is a professional ice skater who entered into a contract with respondent Cedar Fair LP ("Cedar Fair") to perform at Kings Island near Cincinnati, Ohio, for a three-month period from May 25 to August 25, 2007.

{¶ 25} 2. On July 26, 2007, relator injured her right ankle while skating at a show at Kings Island. Her industrial claim (No. 07-853778) is allowed for "right ankle sprain/strain; tibial tendinitis."

{¶ 26} 3. Relator began receiving TTD compensation from Cedar Fair, a self-insured employer under Ohio's workers' compensation laws.

{¶ 27} 4. Relator came under the care of orthopedic surgeon Timothy E. Kremchek, M.D., whose office is located in the Cincinnati area.

{¶ 28} 5. On January 20, 2008, Dr. Kremchek performed arthroscopy on relator's right ankle.

{¶ 29} 6. On July 17, 2008, relator saw Dr. Kremchek on follow-up. The office visit generated the following report:

> * * * She is here for follow-up. She's really just not getting anywhere[.] She's had some ongoing pain, most of this is localized along the medial portal site[.] She feels that she improves, but she just can't get over the hump, that something's just not right[.] * * *
>
> At this point, she has been in therapy. We've adjusted this and changed her to aquatic therapy to take the stress off and strengthen it[.] She's really just kind of at a stand still here, that aquatic therapy just is not helping her get over that hump[.] * * *
>
> * * *
>
> Impression[:] The patient may possibly have some kind of internal derangement to her ankle, possibly a stress reaction, stress fracture, possibly a loose body, joint synovitis, we are unsure at this point. This is all status an arthroscopy that took place in January of 2008[.]

> Plan[:] We would like to do a MRI of this ankle, because she has not improved and at this point she is not able to return to work[.] This is coming up on a year since the date [of] the injury[.] We really think that this is something that needs to be further evaluated more in-depth so that we can treat her in the appropriate manner, make sure we're not missing something, so that she can get back to her regular occupation and back to her regular life[.] We've tried all these other non-operative measures and she's really just not getting better, so we think this needs to be looked at with an MRI[.]

{¶ 30} 7. Earlier, on May 28, 2008, Dr. Kremchek indicated by marking a box on a form that relator "[m]ay return to limited duty." In his own hand, Dr. Kremchek wrote "sit down job only."

{¶ 31} 8. On June 10, 2008, Cedar Fair Manager Leslie Stalker reached relator by telephone. During the conversation, Stalker informed relator that she would be receiving a letter within the next two days offering her a position as a "cash control teller" and that Stalker wished to review the offer with her.

{¶ 32} 9. Following the June 10, 2008 telephone call, Stalker drafted the following e-mail:

> * * * I told her that we had received a release from Dr. Kremchek and I was happy to report we could meet the conditions of the release and we were calling to offer her a job. * * * She then asked what the release from Dr. Kremchek was and told me I should talk to her lawyer. I explained that we were within our rights to offer her a position and told her it was a Cash Control Teller position. I got through the first 2 job functions before she informed me that I could "offer whatever I wanted" but this "wasn't happening". She said she was a "professional skater" and that she did not work in cash control. She "understood that I was doing my job" but that we needed to talk to her lawyer. Then she hung up.
>
> * * *
>
> While I was typing this email, Sheileah called back to ask where the letter was being sent. I read her the address that I had for her and she said that I could mail it there but that she was not in California, she was in Ohio. She then asked if a copy would be sent to her lawyer and I confirmed that it would. She asked if anyone could sign for the letter, and I

> explained that the post office will usually look for someone at the delivery address to sign. I asked if there was a better address and she said she did not have a mailbox. Then, she said to go ahead and "send it to her here." The address she gave me was: * * * Covington, KY 41011. I will send a regular mail and certified mail copy of the letter to that address as well.

{¶ 33} 10. By a letter dated June 10, 2008 from Stalker, relator was informed:

> We have been advised by Dr. Kremchek that you are able to return to work with restrictions per attached light duty release dated 5/28/08. The following position is available:
>
> Job Title: Cash Control Teller
> Job Duties: accurate and efficient cash handling, data entry, count and audit money, see attached description for additional information[.]
> Wage Rate: $7.50/hr
>
> This position is within your physician's restrictions of "**sit down job only**". You will not be required to perform any job duties that are outside of the restrictions written by Dr. Kremchek.
>
> You are being placed on the schedule to return to work as of **Wednesday[,] June 18, 2008, at 9:00 AM EDT** and you are to report to Human Resources: Marie Tiesl; schedule will be up to 40 hours per week, Wednesday – Thursday 9:00AM – 5:00PM, and Friday – Sunday 5:00PM – 12:00AM. Days off will be Monday and Tuesday.
>
> You may be eligible for Working Wage Loss benefits while working this position. * * *

(Emphases sic.)

{¶ 34} 11. On June 16, 2008, Dr. Kremchek reviewed the job offer and indicated that relator is physically able to perform the job.

{¶ 35} 12. Earlier, on June 13, 2008, Cedar Fair moved to terminate TTD compensation.

{¶ 36} 13. By letter dated June 18, 2008, relator's counsel informed Cedar Fair's third-party administrator of relator's "new address," located in Covington, Kentucky.

{¶ 37} 14. Following a July 14, 2008 hearing, a district hearing officer ("DHO") issued an order granting Cedar Fair's motion to terminate TTD compensation.

{¶ 38} 15. Relator administratively appealed the DHO's order of July 14, 2008.

{¶ 39} 16. The record contains relator's affidavit executed January 8, 2008:

> [One] On July 26, 2007, I was injured during the course of my employment with Cedar Fair. A claim arising from that injury has been assigned the claim number 07-853778.
>
> [Two] My employment with Cedar Fair was designated by contract to last from May 25, 2007 through August 25, 2007.
>
> [Three] I did not intend to cease working at the end of my contract with Cedar Fair. Rather, I intended to begin work for another employer once my contract with Cedar Fair ended.
>
> [Four] In fact, I actively sought jobs for the period immediately after my contract with Cedar Fair ended. I contacted numerous employers in my field. I was even offered one job, which I intended to take, but was ultimately unable to accept as the contract began before my contract with Cedar Fair ended.
>
> [Five] Unfortunately, I suffered an injury during the course of my employment with Cedar Fair that has prevented me from performing my normal work as an ice skater. If not for that injury, I would have obtained and performed under a contract which would have begun shortly after my tenure with Cedar Fair ended. It is only due to my injury that I was unable to work after my contract with Cedar Fair ended.
>
> [Six] It is important to understand that my profession generally involves contracts similar to that which I performed under for Cedar Fair. Because these contracts are for limited time periods, I was always trying to obtain work that would cover the time after any contract I worked under would end.
>
> [Seven] Without question, I had no intent to cease working at the end of my employment with Cedar Fair. I was already searching for my next job while I was employed with Cedar Fair, and I would have continued to do so until I found a job.

{¶ 40} 17. The record contains a statement from Ada Minevich dated January 24, 2008:

> I, Ada Minevich am a renowned Olympic and World Figure Skating Coach who has trained Sheileah Crisp through her Amateur and current Professional career.
>
> In 2007 from the end of January through mid April, Sheileah Crisp was here in Burbank, Ca at Pickwick Ice Arena training on and off ice weekly. While training under my supervision she rented a room from the Foster family in Windsor Hills, Ca.
>
> Once accomplishing our goals on conditioning, muscle memory and jumps for her upcoming Professional Season, Sheileah left to continue training on her own in both Florida and Kentucky.

{¶ 41} 18. Following a September 3, 2008 hearing, an SHO mailed an order on September 10, 2008 that vacates the DHO order of July 14, 2008 and denies Cedar Fair's motion to terminate TTD compensation. The SHO's order explains:

> The employer's motion requesting that ongoing temporary total disability compensation be terminated effective 06/13/2008 for the reason that the injured worker refused a light-duty job offer within her physical restrictions is denied.
>
> The Staff Hearing Officer finds that the injured worker is a professional ice skater. The injured worker signed a contract to skate for the employer for the closed period of 05/25/2007 to 08/25/2007. On 07/26/2007, the injured worker sustained an injury to her right ankle while skating for the employer.
>
> It has previously been found by Staff Hearing Officer order dated 01/29/2008 that, but for the industrial accident of 07/26/2007, the injured worker would have continued to work as a professional ice skater.
>
> Accordingly, the injured worker was awarded temporary total disability compensation through the date of the Staff Hearing Officer hearing and continuing.
>
> By letter dated 06/10/2008, the employer made the injured worker a light-duty job offer that falls within the restrictions

provided by Dr. Kremchek, the injured worker's treating physician.

The injured worker chose not to accept this light-duty position.

At issue is whether the employer's light-duty job offer constitutes a good faith job offer.

OAC 4121-3-32(A)(6) defines a light-duty job offer as a proposal, made in good faith, of suitable employment within a reasonable proximity of the injured worker's residence.

In the case at hand, the employer offered the injured worker a cashier's job at their Kings Island facility in Mason, Ohio.

The Hearing officer finds that the employer's job offer does not satisfy the provisions of OAC 4121-3-32 for the reason that said job offer is not within a reasonable proximity of the injured worker's residence.

Expressly, the Staff Hearing Officer finds that the injured worker's primary residence is in Desert Hot Springs, California. In arriving at this finding, the Staff Hearing Officer specifically relies on the injured worker's testimony at hearing, the statement of Ms. Ada Minevich dated 01/24/2008 and the fact that the employer sent a certified copy of the light-duty job offer to the injured worker's California address.
At hearing, the injured worker testified that, as a professional skater, she accepts employment contracts for set periods of time with various employers nationally. The injured worker indicated that each employment contract is of a limited duration and she moves from state to state in order to find employment. The injured worker further stated that between jobs, she resides and trains in California.

Significantly, this fact is corroborated by the statement of Ms. Ada Minevich dated 01/24/2008. Ms. Minevich indicates that the injured worker trained with her in California during the period of January of 2007 through April of 2007, immediately before the injured worker moved to Kentucky in order to perform for the employer of record.

Further, the injured worker testified that she has maintained a Covington, Kentucky address in order to receive mailings

> from the Bureau of Workers' Compensation and her attorney. The injured worker also testified that she flew in from California to attend today's hearing. Additionally, the injured worker testified that, upon the expiration of her employment contract with the employer of record on 08/25/2007, she would have moved to a different state in order to continue working as a professional ice skater.
>
> Therefore, the employer's motion, filed 06/13/2008, is denied.
>
> All evidence on file was reviewed.
>
> This order is based on the Staff Hearing Officer order dated 01/29/2008, the statement of Ms. Ada Minevich dated 01/24/2008, the injured worker's testimony, the injured worker's affidavit dated 01/08/2008 and OAC 4121-3-32(A)(6).

{¶ 42} 19. By letter dated September 22, 2008, relator's counsel informed Cedar Fair's counsel:

> Our office has received the notice of the [independent medical examination] scheduled for October 10, 2008 in Columbus, Ohio.
>
> Please note that Ms. Crisp has moved back to California and her current address is * * * Desert Hot Springs, CA 92240. Therefore, we are asking that you either reschedule the examination with a doctor in California or advise if the Employer is willing to reimburse for travel expenses for the claimant to attend the IME as scheduled[.]
>
> Please advise ASAP as to whether [the] examination is going to be rescheduled or if the employer is willing to pay for the travel expenses for Ms. Crisp to attend the IME.

{¶ 43} 20. Cedar Fair administratively appealed the SHO order of September 3, 2008.

{¶ 44} 21. On October 4, 2008, another SHO mailed an order refusing Cedar Fair's administrative appeal.

{¶ 45} 22. On October 24, 2008, Cedar Fair moved for reconsideration. Cedar Fair alleged that the SHO's order of September 3, 2008 contains a clear mistake of law, a clear mistake of fact, and an error by a subordinate hearing officer.

{¶ 46} 23. On January 8, 2009, the three-member commission mailed an interlocutory order:

> 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, a clear mistake of law of such character that remedial action would clearly follow, and an error by the subordinate hearing officer in the order issued 09/10/2008 which renders the order defective.
>
> Specifically, it is alleged that in denying the request to terminate temporary total, the Staff Hearing Officer mistakenly found that the Injured Worker's residence was in California when all evidence on file indicates that the Injured Worker was living in the greater Cincinnati area at the time the job offer was made. It is further alleged that the Staff Hearing Officer order is in violation of State ex rel. Sebring v. Alro Steel 2008 WL 2809165 (Ohio App. 10 Distr.), 2008-Ohio-3625, and that the Staff Hearing Officer's conclusion is therefore a mistake of law.
>
> The order issued 10/04/2008 is vacated, set aside and held for naught.
>
> Based on these findings, the Industrial Commission directs that the Employer's request for reconsideration, filed 10/24/2008, is to be set for hearing to determine if the alleged mistakes of fact and law and error by the subordinate hearing officer as noted herein are sufficient for the Industrial Commission to invoke its continuing jurisdiction.
>
> In the interest 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 R.C. 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 Admin. Code 4121-3-09.

{¶ 47} 24. On February 26, 2009, the three-member commission heard the request for reconsideration as well as the merits of Cedar Fair's motion to terminate TTD compensation. The hearing was recorded and transcribed for the record. In an order mailed May 21, 2009, the commission states:

> 02/26/2009 – After further review and discussion, it is the finding of the Industrial Commission that the Employer has met its burden of proving that the Staff Hearing Officer order, issued 09/10/2008, contains a clear mistake of fact. Specifically, the Staff Hearing Officer mistakenly found that the Injured Worker's residence was in California when the Injured Worker was living in the greater Cincinnati area at the time the Employer offered the Injured Worker a light duty job within her restrictions. The Commission relies upon the 07/07/2008 – 07/22/2008 physical therapy reports from Nova Care, the 06/18/2008 letter from Injured Worker's counsel, Harris & Burgin, which informed the Bureau of Workers' Compensation of the Injured Worker's change of address to Covington, Kentucky, and Injured Worker's counsel, Mr. Harris' statement at hearing today that the Injured Worker did not change her residence to California until after the Staff Hearing Officer hearing on 09/03/2008 to conclude that the Injured Worker's address at the time of the light duty job offer was in fact located in the Cincinnati area. 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 this error. The Employer's request for recon-sideration, filed 10/24/2008, is granted. The Employer's appeal, filed 09/29/2008, from the Staff Hearing Officer order issued 09/10/2008 is granted to the extent of this order. It is further ordered that the Staff Hearing Officer order issued 09/10/2008 is vacated.

> The Employer's C-86 motion, filed 06/13/2008, is granted and temporary total disability compensation is terminated as of 06/18/2008, the date that the Injured Worker's light duty job of "Cash Control Teller" was to commence. The Commission finds that the Cash Control Teller position offered by the Employer complied with the Injured Workers' physical restrictions as verified by her treating physician, Timothy Kremchek's approval dated 06/16/2008. Furthermore, although the offer initially was made verbally, it was subsequently made in writing. Injured Worker conceded at the Staff Hearing Officer hearing of 09/03/2008 and at today's hearing that she received the written job offer. Based upon these facts, the Commission concludes that the Cash Control Teller position was a good faith job offer within the Injured Worker's physical restrictions. The Commission finds that the Injured Worker refused, and by her testimony today, continues to refuse this good faith job offer. The Injured Worker testified that she is a professional ice skater which is not a job but a profession, and further, the light duty job offer by the Employer was demeaning. Therefore, temporary total disability compensation is properly denied as of 06/18/2008, the date that the light duty job was to begin.

{¶ 48} 25. The transcript of the February 26, 2009 hearing contains the following statement from relator's counsel, Mr. Harris:

> * * * But I'd like to point out briefly why the change of address was filed for the reason that it was.
>
> Ms. Crisp's main residence is in California. She spends a certain amount of time in Cincinnati as she'll explain in a second. The primary reason that we actually filed the change of residence is that because there's a new policy that you guys at the Industrial Commission have had for a couple years which makes it such that if somebody's residence is out of state, that hearing has to be in Columbus unless the employer signs off on that.
>
> Now, Ms. Crisp has a place where she can stay in Cincinnati. The employer's in Cincinnati, her attorney's in Cincinnati, her doctor's in Cincinnati. Obviously it is much more convenient for her to have hearings in Cincinnati than to have them in Columbus where she has to get a hotel, et cetera. So for convenience, since she had a residence there, a

> play [sic] where she could stay, we used that. And she, at times, we used that as an address.

(Tr. 9-10.)

{¶ 49} 26. On May 10, 2010, relator, Sheileah Crisp, filed this mandamus action.

Conclusions of Law:

{¶ 50} It is the magistrate's decision that this court issue a writ of mandamus, as more fully explained below.

{¶ 51} R.C. 4123.56(A) provides that payment of TTD compensation shall not be made for the period "when work within the physical capabilities of the employee is made available by the employer or another employer."

{¶ 52} Supplementing the statute, Ohio Adm.Code 4121-3-32 provides:

> (A) * * * The following definitions shall be applicable to this rule:
>
> * * *
>
> (3) "Suitable employment" means work which is within the employee's physical capabilities.
>
> * * *
>
> (6) "Job offer" means a proposal, made in good faith, of suitable employment within a reasonable proximity of the injured worker's residence. If the injured worker refuses an oral job offer and the employer intends to initiate proceedings to terminate temporary total disability compensation, the employer must give the injured worker a written job offer at least forty-eight hours prior to initiating proceedings. If the employer files a motion with the industrial commission to terminate payment of compensation, a copy of the written offer must accompany the employer's initial filing.
>
> (B)
>
> * * *
>
> (2) Except as provided in paragraph (B)(1) of this rule, temporary total disability compensation may be terminated after a hearing as follows:

> * * *
>
> (d) Upon the finding of a district hearing officer that the employee has received a written job offer of suitable employment.

{¶ 53} Some preliminary observations seem to be in order.

{¶ 54} While Ohio Adm.Code 4121-3-32(A)(6) requires that the job offer propose suitable employment within a reasonable proximity of the injured worker's residence, the word "residence" remains undefined. Here, relator's residence was the key issue and focus of the administrative proceedings.

{¶ 55} Neither the commission in its orders nor the parties here have offered a definition of "residence." However, it appears to the magistrate that the SHO assumed that residence is a concept akin to domicile, a concept that was succinctly defined by the court in *City of East Cleveland v. Landingham* (1994), 97 Ohio App.3d 385, 389-90:

> It is a fundamental principle of law that every individual must have a domicile somewhere, and that an individual cannot have more than one domicile at the same time. * * *
>
> **DEFINITION OF DOMICILE**
>
> Domicile has been defined as a place where a person lives, or has his home, a place where an individual has his true, fixed, permanent home and principal residence established, a place to which the individual intends to return whenever he is absent, and from which he has no present intent to move. * * * "Domicile implies a nexus between person and place of such permanence as to control the creation of legal relations and responsibilities of the utmost significance." * * *
>
> **ACQUISITION OF DOMICILE**
>
> We have stated above that every person must have a domicile somewhere. * * * It is also a well-established rule of law that no one loses his old domicile until a new one is acquired. * * * Thus, abandonment of one's domicile is effected only when a person chooses a new domicile, establishes actual residence in the place chosen and shows a clear intent that it be the principal and permanent residence.
>
> In summary, Ohio law on the acquisition of domicile requires two essential elements, which are usually expressed

> in Latin as *factum* and *animus,* or residence and intention to remain. * * * While the law remains that a person retains the old domicile until a new one is shown to be acquired by the concurrence of fact and intent, no one acquires a new domicile or loses the old one by the mere fact that he intends to move elsewhere and prepares to do so or that he is physically in a new location without any intent to remain there. * * * Even after the formation of the requisite intent to domicile in a new location, a person remains a domiciliary of the old location until he actually arrives at the new location and acquires a dwelling place. * * *

{¶ 56} The magistrate shall not endeavor to define the word "residence" as used at Ohio Adm.Code 4121-3-32(A)(6), nor does this magistrate necessarily conclude that "residence" is akin to or synonymous with the concept of domicile. The magistrate simply points out here that, although undefined, the SHO seems to have assumed that the word "residence," as found at Ohio Adm.Code 4123-3-32(A)(6), is akin to the concept of domicile.

{¶ 57} Another observation is in order.

{¶ 58} While Ohio Adm.Code 4121-3-32(A)(6) requires that the job offer propose suitable employment within a reasonable proximity of the injured worker's residence, assuming that the location of an injured worker's residence can change after an industrial injury, the rule fails to specify the relevant date or time frame for the determination of the injured worker's residence. Here, the commission and its hearing officers, as well as the parties, assume that the relevant date for the determination of residence is the date of the job offer even if, as here, the job offer is made some 11 months after the injury date.

{¶ 59} Here, for purposes of this action only, the magistrate shall accept the proposition that it is the date of the job offer that controls the determination of the injured worker's residence.

{¶ 60} 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.*, 95 Ohio St.3d 97, 2002-Ohio-1935; *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.

{¶ 61} 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.

{¶ 62} In *Gobich,* 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.

Id. at ¶17-18. (Emphasis sic.)

{¶ 63} In *Royal,* a case upon which the *Gobich* court relied, the court, in addressing the meaning of a clear mistake of fact, emphasized that "a legitimate disagreement as to the evidentiary interpretation does not mean that one of the interpretations is wrong." Id. at 100.

{¶ 64} Here, relator points out that the commission "did not call the evidence relied upon by the SHO into question, but merely cited alternative evidence as compelling." (Relator's brief, at 5.) Respondents do not directly respond to relator's point.

{¶ 65} Cedar Fair asserts in its brief that "[i]t is absurd to suggest that [relator's] residence at the time of the job offer is open to interpretation." But the so-called absurdity is left largely unexplained.

{¶ 66} Both respondents Cedar Fair and the commission point to the following exchange between Cedar Fair's counsel and relator during cross-examination at the February 26, 2009 hearing:

> [Cedar Fair's counsel] Ms. Crisp, would you please tell us where you were living on June 10th, 2008?
>
> [Relator] June 10th, 2008. I was probably in Cincinnati.
>
> [Cedar Fair's counsel] Okay. You were living in Cincinnati at that time. On June 18th, 2008 where were you living?
>
> [Relator] I was probably still in Cincinnati. * * *

(Tr. 24-25.)

{¶ 67} Both respondents suggest that the above-quoted testimony is dispositive as to the determination of relator's "residence." Clearly, the testimony is not dispositive unless "residence" is defined simply as the place where someone is living at any point in time.

{¶ 68} In the magistrate's view, relator's point is well-taken. The commission's order of February 26, 2009 does not call into question any of the evidence relied upon by the SHO.

{¶ 69} This magistrate must conclude that the decisions of the SHO and commission simply present a legitimate disagreement as to evidentiary interpretation. Thus, the commission failed to find a clear mistake of fact in the SHO's order.

{¶ 70} Given the above analysis, the magistrate concludes that the three-member commission abused its discretion by exercising its continuing jurisdiction based upon a clear mistake of fact.

{¶ 71} Accordingly, it is the magistrate's decision that this court issue a writ of mandamus ordering the commission to vacate its February 26, 2009 order that improperly exercises continuing jurisdiction, and to enter an order that reinstates the SHO's order of September 3, 2008.

/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).