

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Boskovic General Contractors,	:	
	:	
Relator,	:	No. 09AP-711
v.	:	(REGULAR CALENDAR)
Industrial Commission of Ohio and Christopher M. Johnson,	:	
	:	
Respondents.	:	

D E C I S I O N

Rendered on June 8, 2010

Consolo O'Brien LLC, Terence K. O'Brien, and Sherri Neiding McComas, for relator.

Richard Cordray, Attorney General, and Andrew J. Alatis, for respondent Industrial Commission of Ohio.

Bentoff & Duber Co., LPA, and Glen Richardson, for respondent Christopher M. Johnson.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

SADLER, J.

{¶1} Relator, Boskovic General Contractors ("relator"), filed an original action seeking a writ of mandamus ordering respondent, Industrial Commission of Ohio

("commission"), to: (1) vacate its order refusing to exercise continuing jurisdiction, and (2) exercise continuing jurisdiction to address whether relator was claimant's employer at the time of the injury suffered by respondent, Christopher M. Johnson ("claimant").

{¶2} Pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth Appellate District, this matter was referred to a magistrate, who issued a decision including findings of fact and conclusions of law, a copy of which is attached to this decision. In the decision, the magistrate recommended that this court deny the requested writ because relator has not demonstrated that the commission abused its discretion when it refused to exercise its continuing jurisdiction. Relator filed objections to the magistrate's decision, and the commission filed a memorandum contra those objections.

{¶3} This case has a somewhat unusual procedural history. Relevant to this decision, on June 12, 2007, the Bureau of Workers' Compensation ("BWC") issued a new order regarding an allowance of claimant's claims arising from injuries he suffered on June 28, 2006. The order granted temporary total disability compensation from June 29, 2006. This order identified relator as claimant's employer, was mailed to relator, and indicated that the employer had 14 days from the receipt of the order to file an appeal. Relator does not deny receiving this order, and has not objected to the magistrate's factual finding that it did receive this order. Relator did not file an appeal from this determination by BWC.

{¶4} On October 12, 2007, BWC issued another order which allowed claimant's claim for additional conditions. This order also identified relator as the employer. Relator filed an appeal asserting that the "[e]mployer is appealing the additional allowance of the claim" and seeking to have "this claim not be further allowed." During

the hearing on the appeal, it was discovered that the hearing notice had been sent to Bobby Bacham and not to relator. Due to these notice issues, the matter was referred back to the BWC for further review and determination of the appropriate employer, and for proper notice to be given to the employer. In a note dated March 13, 2008, BWC noted that the June 12, 2007 order had identified relator as the employer, and that the order had not been appealed.

{¶5} On April 15, 2008, relator filed a motion requesting the commission to continue its jurisdiction, pursuant to R.C. 4123.52, and asserting a mistake of fact or law occurred when the BWC issued its June 12, 2007 order identifying relator as the employer. The motion was heard by a staff hearing officer ("SHO") on October 29, 2008, and was denied. The SHO noted that:

Employer's request filed 4-15-08 that the Ohio Industrial Commission invoke continuing jurisdiction to allow Boskovic General Contractors an opportunity to prove it is not the employer in this claim is denied. Employer was provided with the 6-12-07 BWC Administrator's order which named Boskovic General Contractors as the employer in the claim. No appeal was taken to that order. Facts as to whether claimant had an employee/employer relationship with a third party sub-contractor Ray Cruz were known and available at the time the order was issued. Still, no appeal was filed at the time so that the employee/employer relationship among the parties could have been addressed. A motion is not a substitute for an appeal. Whether claimant was under the control of an additional party other than the general contractor, Boskovic General Contractors, is a question of fact which should have been raised by appeal to the BWC order. BWC's determination 6-12-07 which named Boskovic General Contractors as the employer in the claim remains in effect.

On February 3, 2009, the commission denied relator's motion to reconsider.

{¶6} Mandamus will not issue when there is a plain and adequate remedy in the ordinary course of the law. R.C. 2731.05. Here, relator seeks to challenge the June 12, 2007 order that found relator to be claimant's employer at the time he was injured. When this determination was made, relator had available to it an adequate remedy at law by way of filing a timely appeal of the June 12, 2007 order, but relator did not file such an appeal. A failure to pursue an adequate administrative remedy bars mandamus relief. *State ex rel. Buckley v. Indus. Comm.*, 100 Ohio St.3d 68, 2003-Ohio-5072, citing *State ex rel. Reeves v. Indus. Comm.* (1990), 53 Ohio St.3d 212.

{¶7} In its objections, relator argues that the commission's decision does not comply with *State ex rel. Noll v. Indus. Comm.* (1991), 57 Ohio St.3d 203, because the commission did not adequately explain why its exercise of continuing jurisdiction would not be appropriate based on relator's claim that a mistake of law or fact had occurred. Initially, we note that it does not appear that relator argued *Noll* before the magistrate. Furthermore, we conclude that the commission did adequately explain its reasoning for declining to exercise continuing jurisdiction based on relator's failure to file an appeal from the order identifying relator as the employer.

{¶8} Having conducted an independent review of the record in this matter, relator's objections are overruled, and we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein. Accordingly, we deny the requested writ of mandamus.

Objections overruled; writ of mandamus denied.

BRYANT and CONNOR, 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. Boskovic	:	
General Contractors,	:	
	:	
Relator,	:	
	:	
v.	:	No. 09AP-711
	:	
Industrial Commission of Ohio	:	(REGULAR CALENDAR)
and Christopher M. Johnson,	:	
	:	
Respondents.	:	

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

Rendered on January 20, 2010

Consolo O'Brien LLC, Terence K. O'Brien and Sherri Neiding McComas, for relator.

Richard Cordray, Attorney General, Andrew J. Alatis, for respondent Industrial Commission of Ohio.

Bentoff & Duber Co., LPA, and Glen Richardson, for respondent Christopher M. Johnson.

IN MANDAMUS

{¶9} Relator, Boskovic General Contractors ("relator" or "Boskovic"), has filed this original action requesting that this court issue a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order refusing to

exercise continuing jurisdiction and ordering the commission to exercise its continuing jurisdiction and address the issue of whether Boskovic is or is not the correct employer.

Findings of Fact:

{¶10} 1. On June 28, 2006, respondent Christopher M. Johnson ("claimant" or "Johnson") sustained an injury in the course of his employment.

{¶11} 2. Two first report of an injury, occupational disease or death ("FROI-1") forms were filed relating to the June 28, 2006 injury of Johnson.

{¶12} 3. One FROI-1 was typed and listed Johnson's employer as "Bobby Bacham" ("Bacham"). The other FROI-1 is handwritten and was signed by Johnson on June 30, 2006. That form lists two employers: "Best Roofing & Remodeling" and "Boskovic Construction Co."

{¶13} 4. In an order mailed August 1, 2006, the Ohio Bureau of Workers' Compensation ("BWC") allowed Johnson's claim for the following conditions: "sprain of wrist NOS left," "fracture calcaneus-close left," "sprain of neck," and "sprain lumbar region." Bacham was listed as the employer on this order.

{¶14} 5. In an order mailed August 10, 2006, the BWC issued a new order replacing the August 1, 2006 order in order to modify the period of compensation.

{¶15} 6. On February 6, 2007, Bacham filed a motion indicating that Johnson had never worked for him, did not know who he was and asked that his risk be credited.

{¶16} 7. A memorandum dated February 21, 2007 was filed indicating that Johnson had called and said his "employer's name is Raymond D. Cruz" and that the "company went by the name Best Roofing and Remodeling."

{¶17} 8. Bacham's motion was heard before a district hearing officer ("DHO") on March 6, 2007. The DHO granted the request for the commission to exercise its continuing jurisdiction under R.C. 4123.52 on grounds that a clear mistake of fact existed since the order was issued against the wrong employer.

{¶18} 9. The record contains several pages of BWC notes beginning in March and going through November 2007. These notes include summaries of phone calls, file reviews, managed care organization ("MCO") notes, and staffing minutes. In March 2007, a call was placed to Johnson regarding contractor questions. Johnson indicated that Cruz gave instructions, they all met at Cruz's house and followed him to his job site, they were not required to have any training, the jobs were integrated as all of them worked together, he was a full-time hourly employee, occasionally did side jobs, used his own hand tools, made services available to the public, and Cruz could fire him at will. A phone call was also placed to Cruz regarding the work situation. Cruz indicated that Johnson used his own tools, only worked for him occasionally, was not hourly full time on the day in question, the owner of the job supplied the ladder, the owner was Boskovic, Boskovic paid everyone at the job site, and he, Cruz, only recommended people if additional workers were needed. An MCO note from April 2007 indicates that the employer of record is no longer in business and that the BWC was still investigating under whose risk the claim should have been filed. Johnson called on June 6, 2007 and apparently indicated that he worked for Cruz at Best Roofing and Remodeling. Staffing minutes from July 2007 indicated that the claim had been assigned a dummy risk because the employer could not be found and that the risk had been assigned to Boskovic.

{¶19} 10. In an order mailed June 12, 2007, the BWC again identified the allowed conditions, indicated that temporary total disability ("TTD") compensation was payable beginning June 29, 2006, and indicated that the employer had 14 days from the receipt of this order to file an appeal. The order was sent to Boskovic.

{¶20} 11. In spite of the fact that Boskovic did receive a copy of the order, no appeal was filed.

{¶21} 12. In another order mailed October 12, 2007, the BWC additionally allowed Johnson's claim for the following conditions: "DJD-degen joint dis left foot" and "malunion of fracture left."

{¶22} 13. On November 2, 2007, Boskovic filed an appeal from the October 12, 2007 order. In that appeal, Boskovic indicated that the BWC order had been received on October 18, 2007. The reason given for the appeal was: "Employer is appealing the additional allowance of the claim," and Boskovic indicated that he wanted the order changed so that "this claim not be further allowed."

{¶23} 14. Boskovic's appeal was heard before a DHO on November 28, 2007. At that time, it was discovered that notice for the hearing had not been sent to Boskovic. Instead, notice had been sent to Bacham. The DHO noted that Boskovic had been noticed on all previous rulings and referred the matter back to the BWC for a review and determination of the appropriate employer and so that notice could be sent to the correct employer.

{¶24} 15. In a note dated March 13, 2008, the BWC noted that "6/12/07, BWC issued an order allowing claim with employer Boskovic General Contractors. That order was not appealed."

{¶25} 16. On April 15, 2008, Boskovic filed a motion with the commission requesting the following:

Now comes Boskovic General Contractors, and request that the Industrial Commission exercise its continuing jurisdiction under Ohio Revised Code ¶4123.52 since there was a clear mistake of fact and/or law as well as an error by an inferior tribunal when the BWC issued its allowance order on June 12, 2007.

{¶26} 17. Boskovic's motion was heard before a staff hearing officer ("SHO") on October 29, 2008. The SHO denied Boskovic's motion as follows:

Employer's request filed 4-15-08 that the Ohio Industrial Commission invoke continuing jurisdiction to allow Boskovic General Contractors an opportunity to prove it is not the employer in this claim is denied. Employer was provided with the 6-12-07 BWC Administrator's order which named Boskovic General Contractors as the employer in the claim. No appeal was taken to that order. Facts as to whether claimant had an employee/employer relationship with a third party sub-contractor Ray Cruz were known and available at the time the order was issued. Still, no appeal was filed at the time so that the employee/employer relationship among the parties could have been addressed. A motion is not a substitute for an appeal. Whether claimant was under the control of an additional party other than the general contractor, Boskovic General Contractors, is a question of fact which should have been raised by appeal to the BWC order. BWC's determination 6-12-07 which named Boskovic General Contractors as the employer in the claim remains in effect.

{¶27} 18. Boskovic filed a request for reconsideration; however, that request was denied by order of the commission mailed February 3, 2009.

{¶28} 19. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

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

{¶30} Boskovic contends that the commission abused its discretion by failing to invoke its continuing jurisdiction to correct its orders since Boskovic is not the correct employer to whom the risk should be charged. Because the commission had invoked continuing jurisdiction when Bacham requested it on grounds that Bacham was not the correct employer, Boskovic contends that it is clearly an abuse of discretion to refuse to invoke continuing jurisdiction when Boskovic is in the same position in which Bacham was previously. For the reasons that follow, this magistrate disagrees.

{¶31} Pursuant to R.C. 4123.52, "[t]he jurisdiction of the industrial commission and the authority of the administrator of workers' compensation over each case is continuing, and the commission may make such modification or change with respect to

former findings or orders with respect thereto, as, in its opinion is justified." In *State ex rel. B & C Machine Co. v. Indus. Comm.* (1992), 65 Ohio St.3d 538, 541-542, the court examined the judicially-carved circumstances under which continuing jurisdiction may be exercised, and stated as follows:

R.C. 4123.52 contains a broad grant of authority. However, we are aware that the commission's continuing jurisdiction is not unlimited. See, e.g., *State ex rel. Gatlin v. Yellow Freight System, Inc.* (1985), 18 Ohio St.3d 246, 18 OBR 302, 480 N.E.2d 487 (commission has inherent power to reconsider its order for a reasonable period of time absent statutory or administrative restrictions); *State ex rel. Cuyahoga Hts. Bd. of Edn. v. Johnston* (1979), 58 Ohio St.2d 132, 12 O.O.3d 128, 388 N.E.2d 1383 (just cause for modification of a prior order includes new and changed conditions); *State ex rel. Weimer v. Indus. Comm.* (1980), 62 Ohio St.2d 159, 16 O.O.3d 174, 404 N.E.2d 149 (continuing jurisdiction exists when prior order is clearly a mistake of fact); *State ex rel. Kilgore v. Indus. Comm.* (1930), 123 Ohio St. 164, 9 Ohio Law Abs. 62, 174 N.E. 345 (commission has continuing jurisdiction in cases involving fraud); *State ex rel. Manns v. Indus. Comm.* (1988), 39 Ohio St.3d 188, 529 N.E.2d 1379 (an error by an inferior tribunal is a sufficient reason to invoke continuing jurisdiction); and *State ex rel. Saunders v. Metal Container Corp.* (1990), 52 Ohio St.3d 85, 86, 556 N.E.2d 168, 170 (mistake must be "sufficient to invoke the continuing jurisdiction provisions of R.C. 4123.52"). Today, we expand the list set forth above and hold that the Industrial Commission has the authority pursuant to R.C. 4123.52 to modify a prior order that is clearly a mistake of law. * * *

{¶32} In making its argument, Boskovic argues that a clear mistake of fact exists in the present case: Boskovic is not the employer to whom this risk should be charged. As such, Boskovic contends the commission abused its discretion. However, as R.C. 4123.52 makes clear, the commission's continuing jurisdiction is not unlimited and the commission has inherent power to reconsider its orders for a reasonable period of time absent statutory or administrative restrictions.

{¶33} In the present case, Boskovic never argues that it did not receive the BWC's June 12, 2007 order allowing Johnson's claim and listing Boskovic as the employer. By comparison, there is no indication in the record to indicate that Bacham had received a copy of the August 10, 2006 BWC order allowing the claim and listing Bacham as the employer. Having received a copy of the June 12, 2007 order, Boskovic could have appealed; however, Boskovic failed to do so.

{¶34} It was not until after Boskovic received the October 12, 2007 BWC order additionally allowing Johnson's claim for certain conditions that Boskovic intervened in Johnson's workers' compensation claim. However, in its appeal of the October 12, 2007 BWC order, Boskovic never indicates that it is the wrong employer. Instead, the reason for Boskovic's appeal was to appeal the additional allowance of the claim and Boskovic sought that the claim not be further allowed. Nothing in Boskovic's appeal at that time would indicate that it was asserting that it was not the proper employer.

{¶35} Because notice for the hearing on its appeal was not sent to Boskovic, the matter was referred back to the BWC where, on March 13, 2008, the BWC indicated that Boskovic had been notified that Johnson's claim had been allowed and Boskovic had failed to appeal from that notice.

{¶36} It was not until April 15, 2008 that Boskovic asserted that a clear mistake of fact had occurred and that Boskovic had been listed as the employer when it should not have been. At that time, Boskovic asked the commission to exercise its continuing jurisdiction over the June 12, 2007 order.

{¶37} In denying Boskovic's motion, the SHO specifically noted that Boskovic had received a copy of the June 12, 2007 order allowing Johnson's claim. The SHO

noted that Boskovic had failed to file an appeal from that order and that, at this time, Boskovic could not substitute this motion for the appeal that should have been filed. As the SHO noted, if Boskovic would have filed an appeal from the June 12, 2007 order, the employer issue could have been addressed. As the SHO also noted, Boskovic had information indicating that Cruz may have been the employer in June 2007 and yet Boskovic did not pursue the matter.

{¶38} There is no requirement that the commission exercise its continuing jurisdiction. Further, a motion asking the commission to exercise its continuing jurisdiction is not a substitute for an appeal when a party had the opportunity to appeal. As stated previously, Boskovic has never indicated that it did not receive a copy of the June 12, 2007 BWC order. For whatever reason, Boskovic did not appeal from that order and the magistrate finds that the commission did not abuse its discretion in holding Boskovic's failure to file an appeal against it when denying Boskovic's motion asking the commission to invoke its continuing jurisdiction.

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

/s/ Stephanie Bisca Brooks

STEPHANIE BISCA BROOKS
MAGISTRATE

NOTICE TO THE PARTIES

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