

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Robert L. Sheppard,	:	
Relator,	:	
v.	:	No. 11AP-553
Industrial Commission of Ohio	:	(REGULAR CALENDAR)
and Shelly & Sands, Inc.,	:	
Respondents.	:	

D E C I S I O N

Rendered on September 20, 2012

Philip J. Fulton Law Office, and Chelsea J. Fulton, for relator.

Michael DeWine, Attorney General, and Gerald H. Waterman, for respondent Industrial Commission of Ohio.

Hanna, Campbell & Powell, LLP, and Lori A. Whitten, for respondent Shelly & Sands, Inc.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

BROWN, P.J.

{¶ 1} Relator, Robert L. Sheppard ("claimant"), 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 that granted the request for reconsideration filed by respondent Shelly & Sands, Inc. ("employer") and ultimately denied claimant's application for permanent total disability ("PTD") compensation and order the commission to reinstate the order which granted claimant PTD compensation.

{¶ 2} This matter was referred to a court-appointed magistrate pursuant to Civ.R. 53(C) and Loc.R. 13(M) of the Tenth District Court of Appeals. The magistrate issued the appended decision, including findings of fact and conclusions of law, and recommended that this court deny claimant's request for a writ of mandamus. Claimant has filed objections to the magistrate's decision.

{¶ 3} Claimant presents two objections. Claimant argues in his first objection that the magistrate erred when she failed to explain why the failure of the staff hearing officer ("SHO") to mention the employer's argument about an alleged intervening injury constituted a mistake of law justifying continuing jurisdiction. Claimant contends that there is no legal authority that directs hearing officers to address an intervening-injury argument in the opinion; rather, case law provides that the commission need only cite evidence in support of its decision.

{¶ 4} We find claimant's arguments unpersuasive, albeit for a different reason than that expressed by the magistrate. Although we agree with the general principle that the commission is required only to cite evidence in support of the order, the commission's concern here was that the SHO failed to give any indication whatsoever that he even considered the employer's "critical" argument regarding the intervening injury. This court has before found that an SHO's failure to address an issue raised by an employer constitutes a mistake of law sufficient for the commission to invoke continuing jurisdiction. *See State ex rel. Mackey v. Ohio Dept. of Edn.*, 10th Dist. No. 09AP-966, 2010-Ohio-3522, ¶ 8, citing *State ex rel. Hayes v. Indus. Comm.*, 10th Dist. No. 01AP-1087, 2002-Ohio-3675 (concluding it was an abuse of discretion for an SHO to fail to address an issue when the employer had presented the issue; the commission did not abuse its discretion by invoking its continuing jurisdiction to address the issue). Furthermore, we cannot simply assume that the SHO rejected the intervening-injury argument based upon his failure to address it. *See id.* at ¶ 7-8 (rejecting claimant's contention that, by not addressing the employer's argument, the SHO "obviously" rejected the argument). Therefore, in this case, we find the commission properly exercised continuing jurisdiction on the basis that the SHO's failure to address the employer's critical argument regarding the alleged intervening injury constituted a mistake of law. For this reason, we find claimant's first objection is without merit.

{¶ 5} Claimant argues in his second objection that the magistrate erred when she concluded that the commission could re-weigh evidence and deny relator's PTD application after finding that there was no intervening injury. Claimant contends that, having found there was no intervening injury, the commission should have ended its reconsideration analysis instead of analyzing wholly different medical evidence than that originally relied upon by the SHO. Claimant also asserts he was given no notice that the commission would question and reject the evidence originally relied upon by the SHO; namely, the report of Dr. Richard Ward. Claimant argues that the commission improperly re-weighed the evidence, relied upon different evidence, and considered vocational factors, something the SHO did not do because the SHO granted PTD based upon medical factors.

{¶ 6} However, in *State ex rel. Sears Roebuck & Co. v. Indus. Comm.*, 1 Ohio App.3d 132, 133 (10th Dist.1981), this court discussed the broad scope of the commission's review upon reconsideration:

When reconsideration is requested, the Industrial Commission has jurisdiction to reconsider and modify any aspect of the order from which reconsideration is sought. There is no statutory limitation to the jurisdiction of the Industrial Commission to modify any aspect of the award from which a timely motion for reconsideration is made, nor does any rule of the Industrial Commission so limit its discretion. The Industrial Commission, by virtue of a timely motion for reconsideration, retains discretion to modify or correct any part of the award and not just an aspect of the award designated by the applicant.

{¶ 7} In *Hayes*, we relied upon the above passage from *Sears Roebuck* and reaffirmed that it is clear that once the commission's continuing jurisdiction is invoked in an order articulated with specific reasons therefore, the commission is vested with the authority to address any issues pertaining to the order in question. *See Hayes*. That would include the authority of the commission to vacate the underlying order. *Id.*, citing *State ex rel Riter v. Indus. Comm.*, 91 Ohio St.3d 89 (2001). For these reasons, we find claimant's second objection is without merit.

{¶ 8} After an examination of the magistrate's decision, an independent review of the record pursuant to Civ.R. 53, and due consideration of the claimant's objections, we

overrule the objections and adopt the magistrate's findings of fact and conclusions of law, except as modified to the extent noted above with regard to the basis for exercising continuing jurisdiction. Claimant's writ of mandamus is denied.

Objections overruled and writ of mandamus denied.

BRYANT and DORRIAN, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Robert L. Sheppard,	:	
Relator,	:	
v.	:	No. 11AP-553
Industrial Commission of Ohio	:	(REGULAR CALENDAR)
and Shelly & Sands Inc.,	:	
Respondents.	:	

MAGISTRATE'S DECISION

Rendered on May 24, 2012

Philip J. Fulton Law Office, and Chelsea J. Fulton, for relator.

Michael DeWine, Attorney General, and Gerald H. Waterman, for respondent Industrial Commission of Ohio.

Hanna, Campbell & Powell, LLP, and Lori A. Whitten, for respondent Shelly & Sands Inc.

IN MANDAMUS

{¶ 9} Relator, Robert L. Sheppard, 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 in which the commission granted the request for reconsideration filed by the respondent Shelly & Sands Inc. ("employer") and ultimately

denied relator's application for permanent total disability ("PTD") compensation and ordering the commission to reinstate the order which granted relator PTD compensation.

Findings of Fact:

{¶ 10} 1. Relator sustained a work-related injury on October 9, 1997, and his workers' compensation claim has been allowed for the following conditions: "Lumbosacral sprain; herniated disc L5-S1."

{¶ 11} 2. Relator last worked in 2000, at which time he was 53 years of age.

{¶ 12} 3. Relator's medical treatment for his allowed condition has been conservative and relator has not undergone any surgery.

{¶ 13} 4. It is undisputed that relator suffers from degenerative disc disease, a non-allowed condition. Further, follow-up MRIs indicated that the herniation at L5-S1 had resolved.

{¶ 14} 5. It is also undisputed that relator re-injured his back in February 2002 after falling off a truck. Relator was treated under the veteran's administration system and received epidural steroid injections.

{¶ 15} 6. On March 5, 2010, relator filed his application for PTD compensation. At the time, relator was 62 years of age, was receiving disability benefits other than Social Security, indicated that he did not graduate from high school and did not receive his GED and he had only finished the ninth grade. Relator indicated that he could read and write, but not well and that he could perform basic math. Relator also indicated that he had not participated in any rehabilitation efforts.

{¶ 16} 7. Richard M. Ward, M.D., completed two medical reports, both dated December 22, 2009. One report was apparently submitted in support of an application relator filed seeking an increase in his percentage of permanent partial disability. Dr. Ward concluded that relator had a 26 percent permanent partial impairment due to the allowed conditions in his claim.

{¶ 17} 8. The second report of Dr. Ward, also dated December 22, 2009, was submitted in support of relator's PTD application. Relator informed Dr. Ward that he had no subsequent injury to his back following the 1997 work-related injury. Dr. Ward provided his physical findings upon examination, and concluded:

Based upon the specific allowances for the injury that occurred as described on 10-09-1997 and my physical findings, it is my opinion that he cannot return to sustain[ed] remunerative employment. There really is no combination of sit, stand, walk option that would add up to a normal 8 hour work day for him. He also has severe postural limitations and limitations on his ability to lift and carry and he cannot use his legs to operate foot controls. He incidentally has mentioned that he has only a ninth grade education and all of his work has been heavy. I did fill out a Physical Capacity Evaluation to the best of my ability, again, taking into account the specific allowances for the injury that occurred on 10-09-1997 and my physical findings.

To reiterate, based upon all of the above and a reasonable medical probability, it is my opinion that he is incapable of returning to sustained remunerative employment and for this reason, should be awarded permanent total disability.

{¶ 18} 9. Relator was also examined by Thomas N. Markham, M.D. In his April 15, 2010 report, Dr. Markham noted that, approximately 10 years ago, relator had been informed that he had degenerating back disease. Thereafter, Dr. Markham provided his physical findings upon examination and concluded as follows:

On 10/09/1997, while lifting a painting machine onto a pickup truck, Mr. Sheppard experienced a pop in the midline of his back at the L5 level. Six days later, he sought chiropractic treatment for persistent back pain with some extension into the posterolateral right thigh. A MRI of his lumbar spine on 10/20/1997 showed degenerative changes at the L1-L2 level and a central disc herniation at L5-S1 without encroachment on the neural roots. In addition, no evidence of central or lateral neural canal stenosis was identified. For the next three years he had extensive chiropractic treatment that provided a short-term improvement but no lasting relief. In 2002 or 2003, he had a new injury to his back when he fell off a truck. Repeat MRIs of the lumbar spine in August 2002 and April 2004 showed extensive degenerative changes over the entire lumbar spine. The previously noted central disc herniation at L5-S1 had resolved. A small bulge was noted at that level on the MRI in April 2004. Comparison of the MRIs of August 2002 and April 2004 showed very little change. His only current treatment is medication, which is provided by the Veterans Administration Hospital.

* * *

In my medical opinion, Mr. Sheppard's condition is the result of chronic degenerative disease of the lumbar spine. There are no residual effects of the injury which occurred in 1997. This included a past identification of a central disc herniation at L5-S1 that on subsequent MRIs has been shown to have resolved. The lumbosacral sprain is a soft tissue injury that will normally resolve within 6-8 weeks with treatment. Mr. Sheppard has received extensive chiropractic treatment, as well as pain medication, more than necessary to resolve a soft tissue sprain.

Dr. Markham opined that relator was capable of performing light-duty work.

{¶ 19} 10. The record also contains the June 1, 2010 report of Charles Lowrey, M.D. After providing his physical findings upon examination, Dr. Lowrey opined that relator's allowed conditions had reached maximum medical improvement ("MMI"), assessed a 13 percent whole person impairment, and concluded that relator was capable of performing sedentary work with lifting restrictions of 10 pounds, and he noted that relator would require the use of gait support in the workplace, such as a cane, and would be limited to no climbing or crawling.

{¶ 20} 11. An employability assessment, dated July 18, 2010, was prepared by Beal D. Lowe, Ph.D. Assuming that he was limited to sedentary employment, Dr. Lowe concluded that, as a result of his educational abilities and his prior jobs, relator lacked the ability to perform any sedentary retail or clerical occupation and lacked the capacity to remediate any of the deficiencies which currently precludes sedentary employment.

{¶ 21} 12. An employability analysis, dated August 3, 2010, was prepared by Caroline Wolfe, M.Ed. Based upon medical evidence that relator was capable of performing in the sedentary strength range, Wolfe determined relator could find an unskilled entry-level position in another line of work.

{¶ 22} 13. Relator's application was heard before a staff hearing officer ("SHO") on September 7, 2010. The SHO awarded relator PTD compensation based solely upon the report of Dr. Ward, stating:

The Injured Worker was born on 10/01/1947 (currently 62 years old) and completed only the 8th grade in school. He quit school during the middle of his 9th grade year. He stated

that he could not read or write very well or do basic math very well. His employment history includes working as a heavy equipment operator and as a truck driver for many years. This work would be considered medium to very physically demanding employment.

The Injured Worker was involved in an industrial accident on 10/09/1997 while working as a heavy equipment operator. He was lifting a painting machine into the back of a truck when he injured his low back. The claim was allowed for the conditions of "LUMBOSACRAL SPRAIN and HERNIATED DISC L5-S1". He has received an extensive amount of medical treatment for his low back condition but this does not include any record of surgery performed on the low back. He has received injection therapy and an extensive amount of medication for the low back condition and is only able to ambulate with the use of a cane as a helpful device.

The narrative medical report from Dr. Richard Ward (Board Certified Orthopedic Surgeon) dated 12/22/2009 stated that the Injured Worker was incapable of returning to any sustained remunerative employment and should be awarded permanent and total disability.

It is the finding of the Staff Hearing Officer that the narrative medical report from Dr. Richard Ward is relied upon in granting permanent and total disability compensation. It is the finding that the Injured Worker is permanently and totally disabled on a medical basis alone without considering the various disability factors. Therefore, the various disability factors will not be considered in this order.

{¶ 23} 14. The employer filed a request for reconsideration arguing the following: (a) it is unclear which December 22, 2009 report of Dr. Ward the SHO relied on and those two reports are equivocal; (b) the SHO's indication that relator received extensive medical treatment was erroneous; (c) the SHO failed to discuss relator's argument that the intervening injury in February 2002 was the cause of relator's disability; and (d) that the SHO failed to address any of the vocational factors.

{¶ 24} 15. In an interlocutory order mailed November 4, 2010, the commission decided to set relator's request for reconsideration for a hearing to determine whether or not it should invoke its continuing jurisdiction. That order provides:

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 findings issued on 09/09/2010 [mailed], which renders the order defective.

Specifically, it is alleged that the Staff Hearing Officer mistakenly found "extensive" medical treatment and medication in the claim, when total medical costs only slightly exceed \$5000, no treatment has been paid for since 2002, and treatment was specifically denied in 2005 and 2007. It is further alleged that the Staff Hearing Officer failed to address the Employer's critical argument that the Injured Worker's disability results from an intervening injury in 2002. It is further alleged that the Staff Hearing Officer made a clear mistake of law by failing to indicate whether all of the relevant evidence had been reviewed and considered.

Sua sponte, it is arguable that the Staff Hearing Officer made a clear mistake of law by rendering factual findings regarding the Injured Worker's vocational factors without analyzing them, and limiting his decision to grant permanent total disability benefits based solely upon the medical report of Dr. Ward. It is unclear as to whether the Staff Hearing Officer considered the vocational factors in his decision.

Based on these findings, the Industrial Commission directs that the Employer's request for reconsideration, filed 09/24/2010, is to be set for hearing to determine whether the alleged mistakes of fact and law; and an error by a 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. 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.

{¶ 25} 16. Following a hearing, the commission determined that relator's request for reconsideration should be granted and the September 7, 2010 (hearing) SHO order was vacated. Specifically, the commission determined that the SHO failed to address the employer's critical argument that relator's disability resulted from the intervening injury in February 2002.

{¶ 26} 17. Thereafter, the commission addressed the issue of the intervening injury and ultimately concluded that that February 2002 injury did not break the causal connection between any current disability and the allowed conditions in relator's claim. The commission then addressed the merits, whether or not relator should be awarded PTD compensation. The commission relied on the report of Dr. Lowrey and concluded that relator was capable of performing sedentary work with the use of a cane in the workplace and given restrictions of no climbing or crawling. Thereafter, the commission addressed the non-medical disability factors:

The Injured Worker is a 63 year old male with an 8th grade education. While the Injured Worker stated on his IC-2 that he completed the 9th grade, the Injured Worker testified persuasively that he started, but never completed, the 9th grade because of family obligations. He stated he cannot read or write very well, but he can do basic math. His work history involved driving trucks and operating heavy equipment, including a period as a self-employed truck driver. The Injured Worker stopped working in 2002 and took an early retirement in 2004. He was a Flight Engineer during his two years in the military.

Caroline Wolfe, M.Ed., CRC, CEAS, Rehabilitation Counselor, conducted an employability analysis at the request of the Employer. Although limited by the lack of a GED, she notes the Injured Worker was able to achieve a Skilled level of vocational preparation as a heavy equipment operator, and that he was a Flight Engineer in the military. She states that his age would be a barrier to seeking employment. She concludes by finding that the Injured Worker's work experience is limited to truck driving and heavy equipment operation, and he was self-employed;

nevertheless, he could work in an unskilled entry level position in another line of work.

The Injured Worker is 63 years old, which is approaching retirement age. The Commission finds, however, that the Injured Worker's age is a neutral factor, but not a barrier to employment in a sedentary capacity. The Commission further finds that age alone is not sufficient to determine an Injured Worker's eligibility for permanent total disability compensation. The Commission specifically notes that the Injured Worker was able to obtain and maintain skilled employment as a heavy equipment operator and was self-employed as a truck driver. Although he has no transferable skills based on his work history, as noted, he was able to maintain long term skilled employment as a heavy equipment operator and a self-employed truck driver.

Finally, the Commission notes that there is no evidence in the file of any effort by Injured Worker to seek rehabilitation or any other employment enhancing activity since he last worked in 2002. Pursuant to State ex rel. Cunningham v. Indus. Comm. (2001), 91 Ohio St.3d 261, State ex rel. Bowling v. National Can Corp. (1996), 77 Ohio St.3d 148, it is not unreasonable to expect an injured worker to participate in return-to-work efforts to the best of his or her abilities, or to take the initiative to improve reemployment potential. While extenuating circumstances can excuse an injured worker's participation in re-education or retraining efforts, injured workers should no longer assume that a participatory role or lack thereof will go unscrutinized. The Commission finds no extenuating factors to excuse the Injured Worker's failure to pursue vocational rehabilitation or other re-education or retraining efforts.

The Commission finds that permanent total disability compensation is a "compensation of last resort," to be awarded only after failure of all reasonable efforts to return to sustained remunerative employment. State ex rel. Wilson v. Indus. Comm. (1997), 80 Ohio St.3d 250.

Based on the above vocational factors, the Commission finds that the Injured Worker is capable of performing unskilled entry-level sedentary work. Unskilled entry-level work usually requires only a brief period of instruction or demonstration to perform. The Injured Worker has demonstrated that he has the ability to learn and maintain

skilled employment; therefore, he has the ability to learn unskilled work. The Commission concludes that the Injured Worker is capable of engaging in sustained remunerative employment. Consequently, the application for permanent total disability compensation, filed 03/05/2010, is denied.

{¶ 27} 18. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶ 28} In this mandamus action, relator contends that the commission abused its discretion as follows: (1) the commission failed to articulate a basis for exercising its continuing jurisdiction; (2) there was no clear mistake of fact or law in the September 7, 2010 SHO order; and (3) even if the commission had a legitimate reason to exercise its continuing jurisdiction, the commission only had authority to consider the reason articulated for exercising continuing jurisdiction.

{¶ 29} The magistrate finds that the commission did not abuse its discretion in exercising its continuing jurisdiction. First, the commission articulated a basis for exercising continuing jurisdiction; second, the September 7, 2010 SHO order did contain a clear mistake of law; and third, having vacated the prior SHO order, the commission had authority to consider whether or not to grant relator's application for PTD compensation.

{¶ 30} 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.*, 11 Ohio St.2d 141 (1967). 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.*, 26 Ohio St.3d 76 (1986). 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.*, 29 Ohio St.3d 56 (1987). 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.*, 68 Ohio St.2d 165 (1981).

{¶ 31} The relevant inquiry in a determination of permanent total disability is claimant's ability to do any sustained remunerative employment. *State ex rel. Domjancic v. Indus. Comm.*, 69 Ohio St.3d 693 (1994). Generally, in making this determination, the commission must consider not only medical impairments but also the claimant's age, education, work record and other relevant non-medical factors. *State ex rel. Stephenson v. Indus. Comm.*, 31 Ohio St.3d 167 (1987). Thus, a claimant's medical capacity to work is not dispositive if the claimant's non-medical factors foreclose employability. *State ex rel. Gay v. Mihm*, 68 Ohio St.3d 315 (1994). The commission must also specify in its order what evidence has been relied upon and briefly explain the reasoning for its decision. *State ex rel. Noll v. Indus. Comm.*, 57 Ohio St.3d 203 (1991).

{¶ 32} Pursuant to R.C. 4123.52, "The 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.*, 65 Ohio St.3d 538, 541-42 (1992), 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.

{¶ 33} Concerning the above conditions under which the commission may exercise its power to reconsider a previous decision, the Supreme Court of Ohio has explained:

The presence of one of these prerequisites must be clearly articulated in any commission order seeking to exercise reconsideration jurisdiction. [*State ex rel. Nicholls v. Indus. Comm.*, 81 Ohio St.3d 454 (1998)]; *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* 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. [*State ex rel. Royal v. Indus. Comm.*, (2002)], 95 Ohio St.3d [97] 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.

State ex rel. Gobich v. Indus. Comm., 103 Ohio St.3d 585, 2004-Ohio-5990, ¶ 15 ("*Gobich I*").

{¶ 34} Relator contends that the commission failed to articulate a basis for exercising its continuing jurisdiction. Relator points out that, in the interlocutory order, the commission identified possible problems with the SHO's order, but never actually found that one existed. Because no specific reason was given, relator argues that the commission abused its discretion by setting the issue for hearing. The magistrate disagrees.

{¶ 35} Relator has not presented any case law to support his argument that the commission is not permitted to consider whether sufficient grounds exist for exercising continuing jurisdiction. And, in fact, this is the manner in which the commission handles these matters. First, the commission determines whether the requesting party has demonstrated a valid reason why the commission should consider exercising its

continuing jurisdiction. Then the commission holds a hearing and either grants or denies the request.

{¶ 36} In *State ex rel. Gobich v. Indus. Comm.*, 10th Dist. No. 03AP-99, 2003-Ohio-7035 ("*Gobich II*"), the commission had awarded PTD compensation to the claimant, John F. Gobich, in 1998. In 2002, the Ohio Bureau of Workers' Compensation filed a motion asking the commission to exercise its continuing jurisdiction, terminate the claimant's PTD compensation, declare an overpayment, and to declare fraud. In an interlocutory order, the commission set the matter for hearing, stating:

"It is the finding of the Industrial Commission that the Administrator has presented evidence of sufficient probative value to warrant adjudication of the request for reconsideration regarding the alleged presence of a clear mistake of law of such character that remedial action would clearly follow.

"Specifically, it is alleged that the injured worker was working and receiving pay for periods when he had been declared to be permanently and totally disabled.

"Based on these findings, the Industrial Commission directs that the Administrator's request for reconsideration filed 05/23/2002 is to be set for hearing to determine if the alleged clear mistake of law as noted herein is 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. 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."

Gobich II at ¶ 45-48.

{¶ 37} The commission held a hearing and concluded the SHO's order was based on a clear mistake of law:

In granting the injured worker's application for permanent total disability, the Staff Hearing Officer failed to consider the fact that the injured worker was working immediately prior to, and after, the hearing on 01/22/1998.

Id. at ¶ 52.

{¶ 38} The commission granted the BWC's motion, terminated Gobich's PTD compensation, found an overpayment, and declared fraud.

{¶ 39} Gobich filed a mandamus action which this court denied after finding that the interlocutory order identified the clear mistake of law—that the claimant had been working.

{¶ 40} On appeal, the Supreme Court of Ohio granted a writ of mandamus. The court identified the two questions that arise when a clear mistake of law or fact is alleged: "(1) Was there a mistake? (2) If so, was it clear?" *Gobich I* at ¶ 17.

{¶ 41} The court concluded that there was no mistake of law; instead, if anything, there was a mistake of fact. However, the court found that there was no clear mistake of fact—there was a legitimate disagreement as to evidentiary interpretation which does not mean that one interpretation is mistaken and certainly did not establish a clear error. Citing *State ex rel. Royal v. Indus. Comm.*, 95 Ohio St.3d 97 (2002).

{¶ 42} Recently, in *State ex rel. Washington-Bass v. Setla LLC*, 10th Dist. No. 09AP-343, 2010-Ohio-5151, this court had the opportunity to consider whether or not an interlocutory commission order satisfied the test under *Gobich I*. The claimant, Theresa Washington-Bass, was awarded temporary total disability compensation. The employer moved for reconsideration based on mistakes of fact and law, including the argument that the medical evidence upon which the commission had relied was based, in part, on non-allowed conditions. The commission's interlocutory order stated, in part:

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.

* * *

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).

(Emphasis sic.) *Id.* at ¶ 33.

{¶ 43} Following the hearing, the commission exercised its continuing jurisdiction, stating:

[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, 692 N.E.2d 188, *State ex rel. Foster v. Indus. Comm.* (1999), 85 Ohio St.3d 320, 707 N.E.2d 1122, and *State ex rel. Gobich v. Indus. Comm.*

(2004), 103 Ohio St.3d 585, 817 N.E.2d 398, 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.

Id. at ¶ 39.

{¶ 44} The claimant filed a mandamus action in this court; however, this court denied the request after finding that the commission's orders satisfied *Gobich I*. Specifically, this court stated:

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., [*State ex rel. Waddle v. Indus. Comm.*, 67 Ohio St.3d 452 (1993)] and/or [*State ex rel. Bradley v. Indus. Comm.*, 77 Ohio St.3d 239 (1997)]), 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, 817 N.E.2d 398, 2004-Ohio-5990.

Id. at ¶ 5.

{¶ 45} Returning to the present case, the commission's interlocutory order did cite the failure of the SHO to address the employer's argument that relator's disability resulted from an intervening injury which had occurred in 2002. The employer included copies of commission orders denying relator's requests for treatment and payment of bills. These requests were specifically denied on grounds that the treatment was *not* related to the

allowed conditions in the claim, but to degenerative changes which followed an intervening injury in 2002.

{¶ 46} As this court stated in *Washington-Bass*, non-allowed conditions cannot advance or defeat an application. *State ex rel. Waddle v. Indus. Comm.*, 67 Ohio St.3d 452 (1993); *State ex rel. Bradley v. Indus. Comm.*, 77 Ohio St.3d 239 (1997). The employer presented evidence which clearly raised this issue and, even though the commission ultimately determined that the employer failed to present sufficient evidence that relator's PTD application was based, in part, on non-allowed conditions/problems relator suffered in 2002, the magistrate finds that the commission's order satisfied the requirements of the law.

{¶ 47} Relator's final argument is that, even if the commission did properly exercise its continuing jurisdiction, the commission was authorized to address the issue stated and nothing else. Relator contends that the commission was required to accept the SHO's determination as to the credibility of the medical evidence and, having found that the employer's issue was decided in relator's favor, the commission was required to uphold the SHO's granting of PTD compensation.

{¶ 48} The interlocutory order mailed November 4, 2010 apprised the parties that "[i]f authority to invoke continuing jurisdiction is found, the Industrial Commission will address the merits of the underlying issue." Relator was on notice that the commission might grant the employer's motion for reconsideration and, if the commission did, it would address the merits of the underlying action. The underlying action concerned whether or not relator was entitled to an award of PTD compensation. Both relator and his attorney were present and, given that they were informed that the commission would address the underlying merits if the commission exercised its continuing jurisdiction, relator had notice.

{¶ 49} The commission had vacated the prior SHO's order. Relator's argument that *res judicata* applied and that the commission was required to reinstate the SHO's order awarding PTD compensation is not supported by any case law. Instead, case law supports a finding to the contrary:

When reconsideration is requested, the Industrial Commission has jurisdiction to reconsider and modify any

aspect of the order from which reconsideration is sought. There is no statutory limitation to the jurisdiction of the Industrial Commission to modify any aspect of the award from which a timely motion for reconsideration is made, nor does any rule of the Industrial Commission so limit its discretion. The Industrial Commission, by virtue of a timely motion for reconsideration, retains discretion to modify or correct any part of the award and not just an aspect of the award designated by the applicant.

Based on the foregoing, it is clear that once the commission's continuing jurisdiction is invoked in an order articulated with specific reasons therefore, the commission is vested with the authority to address any issues pertaining to the order in question. That would include the authority of the commission to vacate the underlying order as occurred in *State ex rel. Riter v. Indus. Comm.* (2001), 91 Ohio St.3d 89, 742 N.E.2d 615.

State ex rel. Hayes v. Indus. Comm., 10th Dist. No. 01AP-1087, 2002-Ohio-3675, quoting *State ex rel. Sears, Roebuck & Co. v. Indus. Comm.*, 1 Ohio App.3d 132, 133 (10th Dist.1981).

{¶ 50} Based on the foregoing, it is this magistrate's decision that relator has not demonstrated that the commission abused its discretion by exercising its continuing jurisdiction and thereafter denying his application for PTD compensation, 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).