[Cite as *State ex rel. Henegar v. Trinity Home Builders, Inc.*, 2013-Ohio-3339.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Michael Henegar,	:	
Relator,	:	No. 12AP-947
v.	:	(REGULAR CALENDAR)
Trinity Home Builders, Inc. and Industrial Commission of Ohio,	:	
Respondents.	:	

D E C I S I O N

Rendered on July 30, 2013

Michael J. Muldoon, for relator.

Michael DeWine, Attorney General, and *Kevin J. Reis*, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

TYACK, J.

{¶ 1} Michael Henegar filed this action in mandamus, seeking a writ to overturn the order of the Industrial Commission of Ohio ("commission") finding him to have engaged in fraud when he received temporary total disability ("TTD") payments while employed.

{¶ 2} In accord with Loc.R. 13(M) of the Tenth District Court of Appeals, the case was referred to a magistrate to conduct appropriate proceedings. The parties stipulated the pertinent evidence and filed briefs. The magistrate then issued a magistrate's decision, appended hereto, which contains detailed findings of fact and conclusions of

law. The magistrate's decision includes a recommendation that we deny the request for a writ of mandamus.

{¶ 3} Counsel for Michael Henegar has filed objections to the magistrate's decision. Counsel for the commission has filed a memorandum in response. The case is now before the court for a full, independent review.

{¶ 4} The Special Investigation Unit ("SIU") of the Ohio Bureau of Workers' Compensation ("BWC") received an allegation that Henegar was working while receiving TTD compensation. Upon investigating, the SIU received records indicating that as early as mid-January 2011, Henegar went to work for Kroger as a part-time cashier. Upon being interviewed, Henegar lied to SIU about when he returned to work, claiming that he had not started working again until March 7, 2011.

{¶ 5} Henegar also lied to a physician who was conducting an independent medical examination ("IME") and to a physician who was conducting a psychological examination.

{¶ 6} Henegar argued that his statement to SIU was just an innocent mistake. The fact that he supposedly made a similar "innocent mistake" during the IME and psychological examination resulted in his credibility being suspect when the issue was heard before a district hearing officer ("DHO").

{¶ 7} On administrative appeal, a staff hearing officer ("SHO") agreed with the DHO that Henegar had been overpaid TTD compensation, but disagreed with the DHO's conclusion that fraud occurred.

{¶ 8} On further administrative appeal, the commission agreed with the findings of the DHO and reinstated the fraud finding. In addressing the merits of the appeal, the commission found it could exercise continuing jurisdiction because a clear mistake of fact found by the SHO resulted in a faulty analysis of the pertinent law. The issue of the exercise of continuing jurisdiction was the primary issue before our magistrate.

{¶ 9} Two SHOs had reviewed the fraud issue and no fraud had been found. The commission decided to hear the case based upon an allegation that the SHOs' decisions included "a clear mistake of law." In fact, the SHOs applied the correct law, but made a mistake as to the facts which demonstrated Henegar's intent to deceive the BWC. Counsel

for Henegar argues that continuing jurisdiction could not be exercised, so the decisions of the SHOs should stand.

{¶ 10} A finding of fraud is a finding which frequently involves both issues of law and issues of fact. However, the critical issue in Henegar's case was whether he simply made a series of mistakes when he returned to work in mid-January 2011 and then gave inaccurate information about his return to work on at least three occasions. Intent is a factual issue. Although we may have decided differently than the SHOs on its factual finding that Henegar did not intent to deceive the BWC, the decision was and is a factual finding in Henegar's case, not a clear mistake of law. The commission could not review the intent finding via continuing jurisdiction.

{¶ 11} The objections are sustained. We adopt the findings of fact in the magistrate's decision, but not the conclusions of law. We substitute our legal analysis set forth above and grant a writ of mandamus returning this case to the commission to enter a finding that it cannot exercise continuing jurisdiction in this case based upon an allegation by the BWC of a clear mistake of fact.

Objections sustained;
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 ex rel. Michael Henegar,	:	
Relator,	:	No. 12AP-947
v.	:	(REGULAR CALENDAR)
Trinity Home Builders, Inc. and Industrial Commission of Ohio,	:	
Respondents.	:	

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

Rendered on April 17, 2013

Michael J. Muldoon, for relator.

Michael DeWine, Attorney General, and *Kevin J. Reis*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶ 12} Relator, Michael Henegar, 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 finding that he was overpaid temporary total disability ("TTD") compensation and he engaged in fraud, and ordering the commission to reinstate the order of its staff hearing officer ("SHO") who found an over payment because relator was employed while receiving TTD compensation but found that fraud had not been established.

Findings of Fact:

{¶ 13} 1. Relator sustained a work-related injury on November 16, 2001 and his workers' compensation claim has been allowed for the following conditions:

> Sprain lumbar; herniated disc L5-S1; anxiety disorder with features of depression; post laminectomy syndrome lumbar.

{¶ 14} 2. Relator underwent a laminectomy at L5-S1 in 2003; a lumbar laminectomy and interbody fusion at L5-S1 in February 2009; removal of hardware and an exploration of the fusion mass with findings of pseudoarthrosis at the L5-S1 level and a repeat posterolateral fusion without instrumentation at the L5-S1 level in July 2010.

{¶ 15} 3. Relator received TTD compensation for significant periods of time between 2001 through 2010.

{¶ 16} 4. The Special Investigations Unit ("SIU") of the Ohio Bureau of Workers' Compensation ("BWC") opened an investigation of relator after receiving an allegation from a BWC Claims Service Specialist ("CSS") that relator was working while receiving TTD compensation. According to documentation contained within the SIU's report of investigation dated June 13, 2011 and accompanying records, the following timeline emerges: (a) On March 4, 2011, the CSS reviewed the February 23, 2011 office notes from relator's treating physician Larry T. Todd, Jr., D.O., indicating that relator had been back into the workforce; (b) that same day, March 4, 2011, the CSS called relator at his home and left a message for him to return the call; (c) on March 10, 2011 the CSS called relator at home; however, there was no answer and the CSS was unable to leave a message at home or on relator's cell phone; (d) that same day, March 10, 2011, a letter was sent to relator informing him that the BWC needed his return to work date; and (e) on March 11, 2011, relator called and informed the BWC that he had returned-to-work part-time as a cashier at Kroger beginning March 7, 2011.

{¶ 17} 5. As part of the investigation, the SIU gathered the following information concerning relator's work schedule at Kroger:

Pay date	**Total Hours**	**Total Gross Earnings**
1/28/11	20.42	$153.16
2/4/11	24.96	$187.20
2/11/11	59.62	$507.87

2/18/11	94.46	$606.36
2/25/11	106.40	$673.55
3/4/11	126.64	$787.38
3/11/11	96.86	$625.50
3/18/11	105.68	$669.47

{¶ 18} 6. A review of the medical records from the evaluations performed after relator began working at Kroger reveals the following: (a) David A. Garcia, D.O., conducted an independent medical examination of relator. In his January 24, 2011 report, Dr. Garcia noted that relator informed him that he had last worked in May 2008. (b) Paul A. Deardorff, Ph.D., conducted a psychological evaluation of relator. In his February 3, 2011 report, Dr. Deardorff noted that relator informed him that he last worked in February 2008.

{¶ 19} 7. On August 3, 2011, the BWC filed a motion asking the commission to exercise its continuing jurisdiction over relator's receipt of TTD compensation and asking the commission to find that relator was overpaid TTD compensation and to make a finding of fraud. In addition to the evidence already indicated, the BWC submitted the following: 19 C-84 forms signed by relator which included language that relator understood he was not permitted to work while receiving TTD compensation; 3 TTD entitlement letters which contained language informing relator that he was not entitled to receive TTD compensation if he returned to any type of work, including part-time work; 44 warrants endorsed by relator containing language indicating that he was not entitled to compensation if he was working. Further, the SIU report contains the following summary of facts which were gathered during the June 8, 2011 interview of relator by a BWC fraud analyst:

> On June 8, 2011, Miller and Fraud Analyst Jenny Holden (Holden) interviewed HENEGAR * * *.
>
> - HENEGAR confirmed that he had returned to work for Turkey Hill/Krogers [sic].
> - HENEGAR confirmed his conversation with the CSS on 3/14/11 was documented correctly.
> - HENEGAR confirmed he informed the CSS he returned to work on or about 3/7/11.
> - HENEGAR stated he had only worked one or two (no more than two) weeks prior to talking to the CSS on 3/14/11.

> - HENEGAR stated he had only received 24 hours of pay when he spoke to the CSS on 3/14/11, which is what prompted her to inform him he may be eligible for wage loss compensation.
> - HENEGAR's response to Dr. Todd's office note dated 2/23/11 indicating that HENEGAR had returned to work, was that he had to [sic] spoken to Dr. Todd about returning to work, but was in limbo waiting for the background check to be completed.
> - HENEGAR stated he completed the employment application long before he actually started working. The time lapse was due to the background check being delayed.
> - HENEGAR stated he had been hired to work part-time, but had in fact worked 10, 12, even 16 hours per day.
> - HENEGAR stated he didn't realize he started working in January and still thought he began in March.
> - HENEGAR thought maybe he had had a conversation prior to 3/14/11 with the CSS regarding his return to work, and that was why he said he had only been working a week or so.
> - HENEGAR stated he didn't "intentionally do this" and "didn't mean to" [create an overpayment].

{¶ 20} 8. After he returned to work at Kroger, relator began experiencing an increase in symptoms and filed a new motion seeking an award of TTD compensation.

{¶ 21} 9. The BWC's motion asking that an overpayment be declared and that a finding of fraud be made, as well as relator's motion for TTD compensation, were heard before a district hearing officer ("DHO") on September 22, 2011. The DHO found that relator had indeed been overpaid TTD compensation and further made a finding of fraud. Relator made the same argument he makes here, that he mistakenly reported the wrong date he returned to work but that he did not intentionally deceive the BWC. In finding otherwise, the DHO stated:

> According to the payroll records at Attachment 1, the Injured Worker returned to work on 01/17/2011. Based on the claim note dated 03/14/2011, the Injured Worker reported at that time he had returned to work as of 03/07/2011. Based on this, the District Hearing Officer concludes the Injured Worker, on 03/14/2011, concealed the fact that he had been working since 01/17/2011.
>
> * * *

The Injured Worker had a medical examination with Dr. Garcia on 01/18/2011. According to the report of this examination, the Injured Worker stated he had not worked since May 2008 and he denied performing any work activities during a typical day. The Injured Worker also had an examination with Dr. Deardorff on 02/03/2011. This examination report records the Injured Worker stating he last worked in February 2008. Based on the above-mentioned payroll records, the Injured Worker had returned to work at the time of both examinations. Based on these examination reports, the District Hearing Officer concludes the Injured Worker was knowingly concealing his return to work, or that at the least knowledge of his concealment could be inferred based on the discrepancy in the dates between his return to work and when he reported he last worked.

A matter discussed at hearing and referenced in the 06/08/2011 Memorandum of Interview (MOI) is whether the Injured Worker intentionally concealed his employment. The Injured Worker repeatedly stated in the MOI that he did not intentionally conceal his return to work to continue to be paid benefits, and he repeated that assertion at hearing. Considering the issue of intent, the District Hearing Officer first notes from the 10/04/2010 report of Dr. Todd that, at that time, the Injured Worker was contemplating a return to work. What the Injured Worker did not affirmatively tell either Dr. Todd or the Bureau of Workers' Compensation was that he actually had completed his Turkey Hill/Kroger job application on 10/01/2010. Additionally, in reviewing the claim notes in file from 01/18/2011 through 03/14/2011, the first time the Injured Worker himself called the Bureau of Workers' Compensation to inform it of a return to work was 03/14/2011. The Bureau only became aware of a potential return to work on 03/04/2011, when it received a copy of the 02/23/2011 report from Dr. Todd wherein the Injured Worker reported his return to the workforce. Even then, when the Injured Worker called, he reported a return to work date of 03/07/2011, not 01/17/2011.

Considering the above, even though he had been periodically completing C-84 forms with the above-noted warning language since December 2002, the Injured Worker did not tell the Bureau of Workers' Compensation that he had applied for work or in fact had begun working until nearly two months after his return to work. He told two examining physicians that he had not been working recently when, in

> fact, he had been working recently. Based on the above, the District Hearing Officer is unsure whether the Injured Worker would have even notified the Bureau on 03/14/2011 of his return to work had a letter dated 03/10/2011 not been sent by the Bureau to the Injured Worker. This letter stated: "I have been trying to reach you by phone. I just need to know the date that you return to work. Please contact me at the phone number below." Consequently, after full consideration the District Hearing Officer concludes that the Injured Worker intended to conceal the fact of his employment from the Bureau of Workers' Compensation.

{¶ 22} 10. The DHO found that relator had been overpaid TTD compensation for the closed period of January 17 through March 6, 2011, and, in finding fraud, determined that the amount was to be recouped pursuant to the fraud provisions of R.C. 4123.511(K).

{¶ 23} The DHO also determined that relator had again become temporarily and totally disabled and awarded a new period of TTD compensation beginning July 26, 2011 and continuing.

{¶ 24} 11. Relator appealed and the matter was heard before an SHO on November 3, 2011. The SHO agreed with the DHO's finding that relator had been overpaid TTD compensation from January 17 through March 6, 2011; however, the SHO determined that fraud had not been established. In reaching that legal conclusion, the SHO stated, in relevant part:

> The 10/11/2010 and 10/26/2010 Bureau of Workers' Compensation claims examiner records note the anticipation of progression in physical therapy to a part time job and note a possible return to where his wife works, which the parties indicated at hearing was in fact where he returned to work in January 2011. The fact the Bureau of Workers' Compensation was put on notice of the injured worker's intent to return to work before the fact is found to indicate a lack of intent to deceive the Bureau of Workers' Compensation about the injured worker's work status.
>
> The Bureau of Workers' Compensation claims examiner record of 03/04/2011 indicates this is the date the claims examiner saw Dr. Todd's 02/23/2011 report and became aware that the injured worker was working. **The 03/10/2011 claims examiner record indicates the claims examiner tried to call the injured worker but**

was unable to get through and unable to leave a message on an answering machine or on his cell phone. The 03/14/2011 claims examiner record indicates the injured worker called on 03/11/2011 and left a message for a return call and then he called again on 03/14/2011 and stated he had returned to work at Krogers [sic] on 03/07/2011. This evidence indicates the injured worker told the Bureau of Workers' Compensation claims examiner that he had returned to work before the claims examiner indicated she was already aware he had returned to work. The fact he reported his return to work before he became aware that the Bureau of Worker's [sic] Compensation already knew he had returned to work is found to indicate a lack of intent to defraud for a person attempting to defraud would not be expected to state he was working if he thought the Bureau of Workers' Compensation was not yet aware of the fact.

Further, the fact the injured worker told Dr. Todd on 02/23/2011 that he was working is found to indicate a lack of intent to defraud as one intending to hide the fact he was working would not normally be expected to tell his physician that he was working.

Finally, Dr. Friday, the injured worker's treating psychologist, testified that the injured worker had ongoing pain and psychiatric conditions the Doctor felt interfered with the injured worker's judgment and memory of details and he did not believe the injured worker was a deceitful person. Dr. Friday's opinion appears to be at least somewhat supported by Dr. Deardorf[f]'s (02/03/2011) opinion that the injured worker's short term memory was only adequate and his attention and concentration skills were not strong. Dr. Friday's opinion also seems to be supported by the 05/06/2011 Bureau of Workers' Compensation claims examiner record that notes a conference call with Dr. Friday and the injured worker where the injured worker is noted to be crying and rambling in the background and then crying and rambling when talking to the claims examiner. Also, the 10/28/2010 claims examiner record notes the injured worker's failure to get a C-84 report from his new attending physician Dr. Todd, while the 11/08/2010 record notes the C-84 was received but the injured worker failed to fill out his portion of the form and the 11/17/2010 record indicates the

> injured worker then fil[l]ed out his portion of the C-84 and returned it but failed to answer question number 5. In light of the fact the injured worker had completed approximately 19 C-84 reports before this according to the Bureau of Workers' Compensation SIU Investigation report, he would have been well aware of what should be filled out. Despite this he had trouble properly completing the C-84 form in November of 2011. This is found to support Dr. Friday's statement as to the injured worker's memory and concentration problems and the injured worker's statements that he has memory problems and was confused as to the actual return to work date and did not intend to deceive the Bureau of Workers' Compensation as to his work status.

(Emphasis added.)

{¶ 25} 12. The BWC's appeal was refused by order of the commission mailed December 1, 2011.

{¶ 26} 13. Thereafter, the BWC filed a request for reconsideration asking the commission to exercise its continuing jurisdiction asserting that the SHO failed to address the most blatant evidence of intent: (a) the fact that relator told Drs. Garcia and Deardorff that he had last worked in 2008; (b) the fact that, when relator was interviewed by the BWC's fraud analyst, he continued to report the wrong date he returned to work until finally forced to acknowledge it; and (c) the SHO mistakenly indicated that relator notified the BWC he had returned to work before relator was aware that the BWC knew he had returned to work. On this last point, the BWC stated as follows in its memorandum in support:

> [I]n the first full paragraph at page 2 of the SHO's decision, the SHO mistakenly determines that Mr. Henegar reported his return to work to the CSS prior to the CSS being aware that he had returned to work. In making this conclusion, the SHO relies on a March 14, 2011 CSS note wherein the CSS documents a conversation that Mr. Henegar indeed did return to work, but indicated he returned to work with Kroger only a week prior on March 7, 2011. However, what precipitated Mr. Henegar's eventual report of a return to work was the CSS's discovery of Dr. Todd's February 23, 2011 report on March 4, 2011. Only after the CSS's discovery of Dr. Todd's report and phone inquiries, including a voicemail message left for him as well as Dr. Todd on March 4, 2011

> regarding work activity, did Mr. Henegar admit to working, albeit an admission involving a start date with Kroger weeks beyond his actual start date. Thus, contrary to the SHO's conclusion, Mr. Henegar did not report a return to work to the CSS prior to the CSS's knowledge of a return to work.

{¶ 27} 14. The matter was heard before the commission on March 20, 2012 at which time the commission granted the BWC's motion for reconsideration, stating:

> After further review and discussion, it is the finding of the Industrial Commission that the Administrator has met his burden of proving that the Staff Hearing Officer order, issued 11/09/2011, contains a clear mistake of law of such character that remedial action would clearly follow.
>
> Specifically, the Staff Hearing Officer made a clear mistake of law by failing to find that the Injured Worker committed fraud and intended to deceive the Administrator as to his return to work status. There is a clear mistake of law regarding intent. There is a flawed evaluation of facts resulting in an incorrect legal determination. The Injured Worker worked a large number of hours, received multiple paychecks, and knew he was working. Therefore, the Commission exercises continuing jurisdiction pursuant to R.C. 4123.52 and State ex rel. Nicholls v. Indus. Comm., 81 Ohio St.3d 454, 692 N.E.2d 188 (1998), State ex rel. Foster v. Indus. Comm., 85 Ohio St.3d 320, 707 N.E.2d 1122 (1999), and State ex rel. Gobich v. Indus. Comm., 103 Ohio St.3d 585, 2004-Ohio-5990, 817 N.E.2d 398, in order to correct this error.

{¶ 28} 15. Thereafter, the commission also found that relator had been overpaid TTD compensation and agreed with the findings and conclusions of the DHO that relator had committed fraud. With regard to the issue of intent (the only issue challenged in this mandamus action), the commission's order states:

> The Commission finds the concealment was made with knowledge of its falsity and with such utter disregard and recklessness that knowledge may be inferred. The Injured Worker was examined by Larry Todd, D.O., on 10/02/2010. In Dr. Todd's report of that examination, he noted the Injured Worker expressed his intent to return to work where his wife works. Dr. Todd supported a return to part-time work after the Injured Worker had completed at least three

> weeks of physical therapy. In an MCO note of 10/11/2010, it was noted that the Injured Worker told the provider he planned to return to work part-time for the employer where the Injured Worker's wife is a manager. The Injured Worker's wife worked for Turkey Hill/Kroger. What the Injured Worker had failed to tell Dr. Todd or the provider was that he had completed his job application on 10/01/2010.
>
> The Injured Worker returned to work with Turkey Hill/Kroger on 01/17/2011. The next day the Injured Worker had an independent medical examination at the request of the Bureau of Workers' Compensation with David Garcia, D.O. At that time, the Injured Worker told Dr. Garcia he had not worked since May 2008, even though he had actually worked the day before the examination. A review of the Bureau of Workers' Compensation claim notes from 01/18/2011 through 03/14/2011 shows the first time the Injured Worker called the Bureau of Workers' Compensation to inform it that he had returned to work was on 03/14/2011. The Injured Worker contacted the Bureau of Workers' Compensation on that date in response to a letter, dated 03/10/2011, that stated the Injured Worker needed to call and report the date he returned to work. The Bureau of Workers' Compensation became aware the Injured Worker had returned to work based on Dr. Todd's office notes of 02/23/2011. When the Injured Worker called to report his return to work date, he told the Claims Service Specialist he returned to work on 03/07/2011, not 01/17/2011.
>
> The Commission finds the Injured Worker knew he had returned to work on 01/17/2011 when he told Dr. Garcia he had not worked since May 2008. The Injured Worker also knew he had returned to work prior to 03/07/2011 when he talked to the Claims Service Specialist on 03/14/2011. The Commission finds the concealment of his return to work was done with knowledge of its falsity and with such utter disregard and recklessness that knowledge is inferred.

{¶ 29} 16. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶ 30} Although not well articulated by either party, the issue in this case is whether or not the commission abused its discretion by exercising its continuing jurisdiction when it granted the BWC's motion for reconsideration of the SHO's order.

For the reasons that follow, the magistrate finds that the commission did not abuse its discretion.

{¶ 31} The Supreme Court of Ohio has set forth three requirements which must be met in establishing a right to a writ of mandamus: (1) that relator has a clear legal right to the relief prayed for; (2) that respondent is under a clear legal duty to perform the act requested; and (3) that relator has no plain and adequate remedy in the ordinary course of the law. *State ex rel. Berger v. McMonagle*, 6 Ohio St.3d 28 (1983).

{¶ 32} 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).

{¶ 33} 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.

{¶ 34} Relator contends that none of the above five enumerated grounds existed and that there was no clear mistake of law as the commission stated.

{¶ 35} In reply, the commission maintains that the SHO's order misapplied the relevant facts, resulting in a clear mistake of law.

{¶ 36} Relator specifically cites the Ohio Supreme Court's decision in *State ex rel. Gobich v. Indus. Comm.*, 103 Ohio St.3d 585, 2004-Ohio-5990, in support of his argument. In that case, John F. Gobich applied for and was granted permanent total disability ("PTD") compensation following a hearing before an SHO. The BWC moved for reconsideration, and the commission determined that it did have continuing jurisdiction, stating as follows:

> It is the finding of the Industrial Commission that the order of the Staff Hearing Officer is based on clear mistakes of law of such character that remedial action would clearly follow; therefore, the exercise of continuing jurisdiction is appropriate in this case. 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 ¶ 11.

{¶ 37} In finding that the commission's order did not clearly articulate one of the prerequisites for exercising continuing jurisdiction, the court stated:

> 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, 692 N.E.2d 188 (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.*, 95 Ohio St.3d 97 (2002)]. It also permits a reviewing court to determine whether continuing jurisdiction was properly invoked. *Id.* at 99-100, 766 N.E.2d 135.
>
> In this controversy, the commission rested its exercise of continuing jurisdiction on "*clear mistakes* of law of such character that remedial action would *clearly* follow * * *. [T]he Staff Hearing Officer failed to consider the *fact* that the injured worker was working immediately prior to, and after, the [PTD] hearing on 01/22/1998." (Emphasis added.)
>
> Two questions arise from this reasoning: (1) Was there a mistake? (2) If so, was it clear? On close examination, it appears that, regardless of how the bureau tried to characterize it, its complaint with the SHO's order was really an evidentiary one: the 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.
>
> Ambiguity also plagues the commission's reference to *mistakes* of law. Only one error is listed, unless the commission considers the SHO's failure to discuss work performed in early 1997 and early 1998 as a separate error. Such a characterization seems misleading and further muddies the commission's order.
>
> The commission's description of the perceived error as one in which "remedial action would clearly follow" invites scrutiny as well. As noted above, evidentiary disagreements rarely establish an error as "clear." Moreover, from a legal standpoint, the SHO's analytical foundation is actually more sound than the bureau or commission's, which further undermines an assertion of clear error. Unlike the bureau and commission, the SHO recognized that it is not the capacity for remunerative employment that bars a PTD award. It is the capacity for *sustained* remunerative employment. *State ex rel. Stephenson v. Indus. Comm.* (1987), 31 Ohio St.3d 167, 170, 31 OBR 369, 509 N.E.2d 946. Here, the SHO concluded that the asserted activities were so isolated and brief that they did not establish an ability to work on a sustained, ongoing basis. And, contrary to the commission's assertion otherwise, it does not follow that consideration of claimant's activities in the weeks before his PTD hearing would have clearly compelled a different result. Claimant received a $206.24 check from Caudill six weeks before his January 1998 PTD hearing. There is evidence that, during January 1998, claimant worked four hours. The following month—still prior to receiving the order granting PTD—he worked 17. This is comparable to the hours and remuneration considered by the SHO for 1996 and 1997 and rejected as insufficient to establish a capacity for sustained work.

Id. at ¶ 15-20.

{¶ 38} The court determined that the BWC's real complaint was an evidentiary one and, citing *State ex rel. Royal v. Indus. Comm.*, 95 Ohio St.3d 97 (2002), the court reiterated that legitimate disagreements as to evidentiary interpretation do not constitute a mistake of fact and further do not establish that an error was clear.

{¶ 39} In the present case, the magistrate finds that the BWC was not arguing that the evidence should have been interpreted in a certain way; instead, the BWC was asserting that the SHO omitted key facts. Specifically, the SHO did not discuss the fact that relator had told two examining physicians that he last worked in 2008 when, in fact, he had begun working in January 2011, and the SHO mistakenly stated that relator returned a phone call to the BWC and reported that he had returned to work without knowing that the BWC already knew he had returned to work. The magistrate finds that these facts are critical to a determination of the issue in this case.

{¶ 40} The SHO did commit a clear mistake of fact when the SHO determined that relator reported the fact he was working before he was aware that the BWC knew he was working. All of the evidence clearly establishes that relator returned a phone call to the BWC only after a message was left on his home phone on March 4, 2011, and he received a letter asking him to call to discuss when he had returned work. Further, as the facts demonstrate, when relator did call the BWC he did not say he returned to work in January; instead, he indicated that he returned to work in March. The magistrate finds that this was a clear mistake of fact.

{¶ 41} Further, in finding that the BWC had not established fraud, the SHO specifically addressed relator's memory issues and concluded that he had in fact been confused when he reported that he returned to work in March instead of January. By failing to address the fact that relator had also recently told two examining physicians that he had last worked in 2008 when he had, in fact, returned to work in January 2011, the SHO's reasoning that relator was under pressure and confused is not so clear.

{¶ 42} Unlike the situation in *Gobich*, the present case does contain a clear mistake of fact which led to a faulty analysis of the law. Given the SHO's rationale, it cannot be said that, had the SHO accurately noted the facts, that the same result would have been reached. As such, although the commission characterized it as a clear mistake of law instead of a clear mistake of fact, the magistrate finds that, based on the BWC's request for reconsideration, relator was well aware of the issue being raised. As such, the court's concerns identified in *Gobich*, *Royal*, *Nicholls*, and *Foster* do not exist here.

{¶ 43} Based on the forgoing, it is this magistrate's decision that relator has not demonstrated the commission abused its discretion in exercising its continuing

jurisdiction and in finding that the BWC had demonstrated fraud and this court should deny relator's request for a writ of mandamus.

/S/ MAGISTRATE
STEPHANIE BISCA BROOKS

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).