

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Quest Diagnostics, :  
Incorporated, :  
Relator, :  
v. : No. 10AP-153  
The Industrial Commission of Ohio : (REGULAR CALENDAR)  
and Lynn M. Ciuppa, :  
Respondents. :

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D E C I S I O N

Rendered on January 13, 2011

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*Willacy, LoPresti & Marcovy, Aubrey B. Willacy, Timothy A. Marcovy, and Michael S. Lewis, for relator.*

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

*Kendis & Assoc. Co., L.P.A., and James D. Kendis, for respondent Lynn M. Ciuppa.*

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IN MANDAMUS  
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

SADLER, J.

{¶1} Relator, Quest Diagnostics, Incorporated, filed this original action seeking a writ of mandamus compelling respondent, Industrial Commission of Ohio ("commission"),

to vacate two orders: (1) the December 9, 2008 staff hearing officer ("SHO") order which denied relator's request that the commission exercise its continuing jurisdiction over the workers' compensation claim filed by respondent, Lynn M. Ciuppa ("claimant"), on grounds that claimant committed fraud pertaining to the initial allowance of her claim, and (2) the June 30, 2008 district hearing officer ("DHO") order which granted claimant's motion to additionally allow her claim for three additional medical conditions.

{¶2} Pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth District Court of Appeals, this matter was referred to a magistrate who issued a decision, including findings of fact and conclusions of law, which is appended hereto. The magistrate found that the commission did not abuse its discretion in finding that relator failed to meet its burden of proving fraud, and, as such, the commission did not abuse its discretion in refusing to invoke its continuing jurisdiction over the matter. The magistrate further found that the commission did not abuse its discretion in granting claimant's motion to allow additional conditions. In so finding, the magistrate determined that the commission did not violate relator's equal protection rights by permitting claimant to amend her claim without providing the necessary proof required to invoke the commission's continuing jurisdiction. Accordingly, the magistrate recommended that this court deny the requested writ.

{¶3} Relator has filed four objections to the magistrate's decision. The first objection pertains to the magistrate's findings of fact; the remaining three objections challenge the magistrate's conclusions of law.

{¶4} Relator's first objection argues that the magistrate's findings of fact are ambiguous as to whether the claimant answered relator's question regarding her pre-

existing injuries and conditions on its "Incident, Injury, Illness Investigation Report." Specifically, relator takes issue with the following three statements made by the magistrate: (1) "[a]ccording to the form, claimant respond[ed] that she had '[n]one' "; (2) "it appears that claimant did not personally fill out Quest's 'Incident, Injury, Illness Investigation Report' "; and (3) the "claimant did not prepare Quest's form." Relator contends that the foregoing statements suggest that the claimant may not have denied her pre-existing injury on the incident form. Relator maintains that this ambiguity constitutes a mistake of fact, as claimant testified that she answered the questions on the incident report and denied having any pre-existing injuries or conditions. Relator contends that the magistrate's factual error and/or ambiguity necessarily impacted her analysis of the issues and determination as to whether claimant committed fraud.

{¶5} Contrary to relator's contention, the magistrate's findings neither reflect factual errors nor create an ambiguity, as the findings accurately reflect the evidentiary record. Relator's incident form was completed by its human resources representative, as evidenced by the representative's signature as the supervisor completing the report. Claimant did not personally complete the incident report, nor did she sign it. Further, claimant provided no response to a question requesting a statement from the employee. Moreover, the magistrate specifically recognized in her decision that claimant admitted to responding in the negative to the question of whether she had a pre-existing injury or condition. Accordingly, there is no error or ambiguity in the magistrate's factual findings, and relator's first objection is overruled.

{¶6} Relator's second objection contends that the magistrate erred in considering evidence not specifically relied upon by the SHO. Specifically, relator takes

issue with the magistrate's assertion that the SHO relied upon and found claimant's testimony to be credible.

{¶7} The record in this matter establishes that claimant testified at a hearing on March 19, 2008 before SHO Nash. In her subsequent order, SHO Nash noted that claimant testified that she thought the question on relator's incident report referred to whether the symptoms she was experiencing as a result of her industrial injury existed prior to the date of that injury. SHO Nash specifically found claimant's testimony to be credible. The commission, however, subsequently vacated that order, and the matter was ultimately heard before SHO Burkhart on December 9, 2008. Claimant did not testify at the December 9, 2008 hearing. In the subsequent order, SHO Burkhart denied relator's request for continuing jurisdiction, finding that relator had not met its burden of proving that claimant had committed fraud. More particularly, SHO Burkhart found that claimant's negative response to the question on relator's incident report regarding any known pre-existing condition did not rise to the level of fraud required to vacate the initial allowance of her claim.

{¶8} As relator notes in its objection, SHO Burkhart did not refer to claimant's testimony, did not cite claimant's testimony as evidence relied upon, and did not make a finding of credibility. Nonetheless, in concluding that the commission's December 9, 2008 determination was supported by "some evidence," the magistrate stated that the commission relied upon claimant's testimony and found such testimony to be credible. Relator contends that the magistrate's conclusion in this regard violates *State ex rel. Noll v. Indus. Comm.* (1991), 57 Ohio St.3d 203. In *Noll*, the Supreme Court of Ohio held that the commission must specify in its orders what evidence has been relied upon and briefly

explain the reasoning for its decision. *Id.* at syllabus. The *Noll* court further stated that a reviewing court will not "search the commission's file for 'some evidence' to support an order of the commission not otherwise specified as a basis for its decision." *Id.* at 204, quoting *State ex rel. Mitchell v. Robbins & Myers, Inc.* (1983), 6 Ohio St.3d 481, 483. According to relator, since claimant's testimony was not cited by SHO Burkhart as evidence upon which she relied, the magistrate could not rely upon it as "some evidence" to support the commission's order.

{¶9} While the magistrate may have improperly stated that SHO Burkhart relied upon claimant's testimony, we find that SHO Burkhart's order remains legally valid. As noted above, SHO Burkhart denied relator's request for continuing jurisdiction for a consideration of fraud on grounds that relator had not met its burden of proof in support of its request. SHO Burkhart opined that claimant's negative response to the question on relator's incident report regarding any known pre-existing condition did not rise to the level of fraud required to vacate the allowance of the initial claim.

{¶10} In this mandamus action, the issue of fraud is not before the court for a *de novo* review of the evidence. *State ex rel. Mobley v. Indus. Comm.*, 78 Ohio St.3d 579, 584, 1997-Ohio-181. Rather, this court's role is to determine from a review of the evidentiary record whether the commission's decision is legally sound. The commission, through SHO Burkhart, found that relator failed to prove fraud, and accordingly, refused relator's request that it exercise its continuing jurisdiction to vacate the initial allowance of the claim. The magistrate's inaccurate reference to SHO Nash's order does not invalidate SHO Burkhart's order. Finding that the December 9, 2008 order does not demonstrate an abuse of discretion or action contrary to law, relator's second objection is overruled.

{¶11} Relator's third objection takes issue with the magistrate's reference to certain Ohio Administrative Code provisions. Specifically, relator contends that the magistrate erroneously found that Ohio Adm.Code 4123-3-16(B) is the appropriate vehicle through which a claimant may move to add conditions to a claim, and also erroneously found that Ohio Adm.Code 4123-3-15(A)<sup>1</sup> requires the Bureau of Workers' Compensation ("BWC") to consider motions requesting additional allowances. According to relator, these two provisions do not provide the commission jurisdiction to amend the initial allowance of a claim absent full compliance with R.C. 4123.52.

{¶12} Relator's argument is presumably aimed at supporting its contention argued before the magistrate that it was denied equal protection of the law. To that end, relator claims that an employer seeking to vacate the allowance of a claim based upon an allegation of fraud is treated differently than an injured worker seeking an additional allowance in a claim. Relator argues that the commission violated its equal protection rights by permitting claimant to amend her claim to add an additional allowance without providing the requisite proof to invoke the commission's continuing jurisdiction.

{¶13} The continuing jurisdiction of the commission over a workers' compensation claim is found in R.C. 4123.52, which begins:

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.

{¶14} The commission's continuing jurisdiction under R.C. 4123.52 is not unlimited. There are five bases for invoking continuing jurisdiction: (1) new and changed

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<sup>1</sup> We note that the magistrate, by virtue of a clerical error, cites subsection (B).

circumstances; (2) fraud; (3) clear mistake of fact; (4) clear mistake of law; and (5) error by an inferior tribunal. *State ex rel. B & C Machine Co. v. Indus. Comm.*, 65 Ohio St.3d 538, 541, 1992-Ohio-3200. Any commission order seeking to exercise continuing jurisdiction must clearly state which of the five bases it is relying on. *State ex rel. Nicholls v. Indus. Comm.*, 81 Ohio St.3d 454, 459, 1998-Ohio-616. The reason for the exercise of continuing jurisdiction must be articulated contemporaneously with the exercise of continuing jurisdiction. *State ex rel. Royal v. Indus. Comm.*, 95 Ohio St.3d 97, 100, 2002-Ohio-1935.

{¶15} As noted by the magistrate, however, a claimant's request seeking the allowance of new conditions in a claim is not the same as a request seeking invocation of the commission's continuing jurisdiction in order to vacate a prior order based upon one of the foregoing five circumstances. Unless the claim has expired by operation of law, the commission has jurisdiction to consider issues not previously addressed. As noted by the magistrate, Ohio Adm.Code 4123-3-16(B) provides that a motion is the appropriate vehicle "to secure allowance of a disability or condition *not previously considered in a claim.*" (Emphasis added.)

{¶16} Ohio Adm.Code 4123-3-15(A) concerns requests for subsequent action in a claim that has been inactive for a period of 13 months. Ohio Adm.Code 4123-3-15(A)(1)(c) provides that BWC must consider requests for subsequent action in a claim where a claimant seeks to secure the allowance of a condition not previously considered. Relator takes issue with the magistrate's mention of this latter code section, arguing that the regulation does not apply to the instant matter because the claim was not inactive for 13 months. Regardless, relator's arguments are without merit. Seeking allowance of a

new and different medical condition *not previously considered* is not akin to seeking a "modification or change *with respect to former findings or orders*" as stated in R.C. 4123.52. (Emphasis added.)

{¶17} The commission's jurisdiction over a claim to adjudicate a new medical condition is presumed in its order and need not be expressly stated. In contrast, pursuant to *Nicholls*, if the commission were to have granted relator's request to vacate the original claim allowance, the commission would have had to explain its justification for doing so. However, the commission's adjudication of claimant's request for an additional allowance need not include the justification for doing so, as the commission still has jurisdiction over the claim by operation of R.C. 4123.52 and, as long as the claim is still open, the commission may make determinations on matters "not previously addressed" without explaining how it has the authority to do so. Accordingly, relator's third objection is overruled.

{¶18} Relator's fourth and final objection challenges the magistrate's conclusion that relator "has an administrative remedy by way of an appeal to an SHO" from the DHO's allowance of the additional medical conditions sought by claimant. The magistrate properly concluded that mandamus relief is premature since relator seeks relief from an order that has not reached finality on its merits. The DHO's June 30, 2008 order remains subject to relator's pending administrative appeal under R.C. 4123.511(C) and (D), and has yet to be adjudicated by an SHO. From that decision, further appeals will be available to relator under both R.C. 4123.511(E) and 4123.512, should the SHO uphold the DHO's decision allowing the additional conditions. R.C. 2731.05 provides that the extraordinary writ of mandamus is not available if the relator has another adequate legal

remedy. Appeals under R.C. 4123.511 and/or 4123.512 provide such a remedy, foreclosing this court's ability to issue a writ of mandamus vacating the DHO's June 30, 2008 order. Accordingly, relator's fourth objection is overruled.

{¶19} Upon review of the magistrate's decision, an independent review of the record, and due consideration of relator's objections, we find that the magistrate has properly determined the pertinent facts and applied the appropriate law to those facts, with the following exceptions: (1) the magistrate's finding of fact in paragraph 18, *infra*, erroneously refers to the "March 19, 2008" SHO order, while the SHO order was, in fact, issued on March 21, 2008, following the March 19, 2008 hearing; (2) the magistrate's reference to Ohio Adm.Code 4123-3-15(B) on page 15 contains a typographical error, in that the pertinent regulation is, in fact, Ohio Adm.Code 4123-3-15(A); and (3) the magistrate erroneously stated on page 15 that SHO Burkhart relied upon claimant's testimony, and that such reliance constituted some evidence to support the commission's decision. Thus, we modify the magistrate's decision to correct these errors and adopt the balance of the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein.

{¶20} Accordingly, we deny the requested writ of mandamus.

*Writ of mandamus denied.*

KLATT and CONNOR, JJ., concur.

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**A P P E N D I X**

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Quest Diagnostics, Incorporated,	:	
	:	
Relator,	:	
	:	
v.	:	No. 10AP-153
	:	
The Industrial Commission of Ohio and Lynn M. Ciuppa,	:	(REGULAR CALENDAR)
	:	
Respondents.	:	

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

Rendered on September 30, 2010

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*Willacy, LoPresti & Marcovy, Aubrey B. Willacy, Timothy A. Marcovy and Michael S. Lewis, for relator.*

*Richard Cordray, Attorney General, and Gerald H. Waterman, for respondent Industrial Commission of Ohio.*

*Kendis & Assoc. Co., L.P.A., and James D. Kendis, for respondent Lynn M. Ciuppa.*

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IN MANDAMUS

{¶21} Relator, Quest Diagnostics, Incorporated ("Quest"), has filed this original action requesting that this court issue a writ of mandamus ordering respondent

Industrial Commission of Ohio ("commission") to vacate two orders: (1) the December 9, 2008 staff hearing officer ("SHO") order which denied Quest's request to exercise its continuing jurisdiction based upon allegations of fraud concerning respondent Lynn M. Ciuppa ("claimant") and the initial allowance of her claim, and (2) the June 30, 2008 district hearing officer ("DHO") order which granted claimant's motion to additionally allow her claim for certain conditions. Quest argues that, because of fraud, claimant's claim should not be allowed for any conditions and argues further that it was denied equal protection under the law when the commission entertained claimant's motion for additional claim allowances yet denied Quest's motion asking the commission to exercise its continuing jurisdiction due to claimant's fraud.

Findings of Fact:

{¶22} 1. Claimant was hired by Quest on March 19, 2007.

{¶23} 2. According to claimant, she sustained an injury at work on May 24, 2007 when she was "[m]oving files folders into boxes then from boxes into desk drawers."

{¶24} 3. Claimant sought treatment at South Pointe Hospital on May 25, 2007 complaining that she had injured her left shoulder.

{¶25} 4. That same day, May 25, 2007, claimant completed a "First Report of an Injury, Occupational Disease or Death" ("FROI") form indicating that the following body parts were affected: "Left upper arm & left upper back."

{¶26} 5. Also on that same day, Quest's "Incident, Injury, Illness Investigation Report" was completed and signed by a representative for Quest. Claimant did not sign

this form. Within that report, claimant was asked to indicate whether or not she had any pre-existing condition or injury. According to the form, claimant responded that she had "[n]one."

{¶27} 6. In an order mailed June 4, 2007, the Ohio Bureau of Workers' Compensation ("BWC") allowed claimant's claim for sprain left shoulder/arm NOS with diagnosis code 840.9.

{¶28} 7. On June 15, 2007, claimant signed a change of physician notice which she then filed with the BWC. Claimant sought to change her physician from Theresa White, M.D., who treated her at South Pointe Hospital to Gerald Gittinger, D.C., a physician with whom she had treated in the past.

{¶29} 8. Claimant began treating with Dr. Gittinger for this condition on June 15, 2007 and his progress notes through July 18, 2007 are contained in the stipulation of evidence.

{¶30} 9. It is undisputed that Quest did not challenge the allowance of claimant's claim.

{¶31} 10. Apparently, a medical dispute arose in August 2007 and Quest requested that claimant sign a medical release.

{¶32} 11. According to the affidavit of Malinda L. Weyrick, the Environmental Health and Safety Manager for Quest, the medical records released revealed that claimant had previously received treatment for complaints of pain in her neck and shoulder prior to the date claimant alleged she sustained a workplace injury. Weyrick avers that, if she would have known that claimant had prior problems with her left shoulder, Quest would have challenged the original allowance.

{¶33} 12. In a letter dated October 2, 2007, orthopedic surgeon Robert Mark Fumich, M.D., opined that claimant's claim should be additionally allowed for "impingement syndrome, bursitis, and scapulothoracic myofascitis." Dr. Fumich opined that there was a direct causal relationship between these diagnoses and the original May 24, 2007 injury. A hearing would subsequently be heard before a DHO on June 30, 2008 and claimant's claim would be additionally allowed for "left shoulder impingement syndrome and bursitis; and scapulothoracic myofascitis" based on the reports of Dr. Fumich.<sup>2</sup>

{¶34} 13. On November 13, 2007, Quest filed a C-86 motion with the commission seeking the following:

Pursuant to R.C. §§4123.52 and 4123.01(C)(2) and (4), the employer requests that the BWC's order mailed June 4, 2007, allowing this claim for sprain of the left shoulder be vacated on the ground of fraud; claimant having represented to her employer at the inception of this claim that she had no prior injury or condition in her left shoulder when, in fact, such representation was false.

{¶35} The motion was based on the medical records which Quest had obtained as well as claimant's response that she had no pre-existing condition or injury.

{¶36} 14. In response to Quest's assertion that a pre-existing condition either contributed to claimant's injury or whether the described symptoms were related to the pre-existing condition, Dr. Gittinger prepared a report. In that report, dated November 30, 2007, Dr. Gittinger opined that no pre-existing condition contributed to

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<sup>2</sup> Quest would appeal this order allowing claimant's claim for additional conditions and a hearing would be scheduled before an SHO. However, at Quest's request, this hearing was cancelled pending the commission's determination of the continuing jurisdiction issue.

claimant's injury and there was no relationship between her present symptoms on June 15, 2007 and the symptoms she experienced in the past. Dr. Gittinger provided further:

\* \* \* Although my records indicate a history of left rotator cuff syndrome in November of 1999 and in March of 2004, there is considerable time between those events and that of the current work injury date. I am aware of her complaint of left side neck and trapezius pain on March 7, 2007 with the findings of left rhomboid, teres and infraspinatus musculature tenderness, however evaluation of Mrs. Ciuppa on June 15, 2007 indicated a subjective complaint of pain over the left posterior lateral shoulder as well as anterior upper left pectoralis region. Also evaluation of the work related injury on June 15, 2007 demonstrated both tenderness over the left coricoid process region (anterior shoulder) as well as pain in the shoulder directly related to end range shoulder forward flexion and resisted muscle testing in this position. As to the positive RA factor, it is more typical that an individual will suffer from multiple joint symptoms as a result of rheumatoid arthritis whereas the current shoulder injury is a localized event.

{¶37} 15. The record also contains a January 2, 2008 report of Steven B. Sorin, M.D., who examined claimant concerning whether she had rheumatoid arthritis. He noted that claimant had a long history of neck and upper back pain and that she had experienced aching extending down into the scapulae and upper arms. Dr. Sorin ultimately concluded that, in his opinion, claimant was not suffering from rheumatoid arthritis.

{¶38} 16. Quest's motion was heard before an SHO on March 19, 2008. The SHO summarized Quest's argument as follows:

The Staff Hearing Officer finds that the employer had requested that the 06/04/2007 order of the Administrator be vacated on the basis of fraud. The employer alleges that the injured worker committed fraud when completing the employer's "Incident, Injury, Illness Investigation Report". In answer to a question as to whether she had a pre-existing

condition or injury the injured worker replied in the negative. The employer now asserts that this was fraudulent activity as the injured worker had been under medical treatment earlier in 2007 and in prior years for a variety of upper body complaints that encompassed the left shoulder. The employer states that, but for the injured worker's failure to reveal this medical history, it would have contested the issue of allowance of the claim. \* \* \*

{¶39} Thereafter, the SHO concluded that Quest had not proven that claimant acted with the intent to defraud either Quest or the BWC. The SHO concluded:

The injured worker testified that she thought the question referred to whether the symptoms she was experiencing as a result of the alleged injury existed prior to the date of the alleged injury. In the absence of any showing of other fraudulent behavior the Staff Hearing Officer finds this testimony to be credible. \* \* \*

{¶40} 17. Quest filed an appeal which the commission treated as a motion for reconsideration. In an order mailed June 5, 2008, the commission denied Quest's motion for reconsideration.

{¶41} 18. Subsequently, in an order mailed July 10, 2008, the commission vacated the March 19, 2008 SHO's order because Quest's motion should have been heard before a DHO and not an SHO.

{¶42} 19. Quest's motion was heard this time by a DHO on October 29, 2008. At that time, Quest requested a continuance so that the DHO could issue a subpoena requiring claimant to be present. (Claimant had already testified at the March 19, 2008 hearing before the SHO, but did not appear for this subsequent hearing.) Thereafter, the DHO denied Quest's request to continue the matter. The DHO denied Quest's request to exercise continuing jurisdiction based on Quest's assertions that claimant had committed fraud:

The employer alleges that since the injured worker indicated that she did not have any pre-existing problems to this area of the body on an internal company incident report, fraud should be found, the Bureau of Workers' Compensation order dated 06/04/2007 should be vacated, and the allowance of the claim should be overturned. A review of Dr. Gittinger's office notes and records, however, make only brief mention of the injured worker's left shoulder complaints in November, 1999, and then once again in March, 2004. These office notes that pre-date this allowed work injury of 05/24/2007 are rather lengthy with over sixty specific date entries. While there is a mention of cervical, trapezius, and scapular pain, there are less than five entries with the shoulder mentioned (and limited to the month of November, 1999 and the month of March, 2004).

The injured worker's actions relative to the employer incident form do not meet some of the elements of Industrial Commission Hearing Officer Manual Memorandum S.2. The District Hearing Officer finds that the injured worker's lack of acknowledging the previous shoulder complaints on this form has not been shown to be "with the intent of misleading another into relying upon it," nor does it seem reasonable to think it reaches the level of "utter disregard and recklessness as to whether it is true or false that knowledge may be inferred."

Most importantly, however, the District Hearing Officer finds that there is no "justifiable reliance upon the representation or concealment" as required by Industrial Commission Hearing Officer Manual Memorandum S.2. The employer had an opportunity to assess this incident as it had notice of the incident approximately ten days prior to the issuance of the Bureau of Workers' Compensation order of 06/04/2007. (See incident report dated 05/25/2007.) When the Bureau of Workers' Compensation issued an allowance order on 06/04/2007, the employer chose not to appeal it. The employer had every opportunity to appeal this claim and seek medical evidence that was in existence at the time of the filing of this claim. The office notes of Dr. Gittinger from 1999 and up to 05/24/2007 were obviously in existence at the time of the filing of this claim. The office notes of Dr. Gittinger from 1999 and up to 05/24/2007 [were] obviously in

existence and available to the employer upon a request that is within its rights pursuant to the Ohio Revised Code and the Ohio Administrative Code. However, the employer chose to have the claim remain allowed after the issuance of the Bureau of Workers' Compensation order. There is no justifiable reliance, for purposes of the fraud analysis, if this evidence was available at the time of the initial allowance of the claim but the employer chose not [to] review these records.

For these reasons, the District Hearing Officer finds that a prima facie case for fraud has not been established, continuing jurisdiction pursuant to O.R.C. 4123.52 cannot be exercised by the Industrial Commission, and the Bureau of Workers' Compensation order dated 06/04/2007 initially allowing the claim remains in full force and effect. The employer's request is denied.

The District Hearing Officer has reviewed and considered all evidence prior to rendering this decision. This order is based on the 06/04/2007 Bureau of Workers' Compensation order, the office notes of Dr. Gittinger, Hearing Officer Manual Memorandum S.2, and Industrial Commission of Ohio written policies.

{¶43} 20. Quest appealed and the matter was heard before an SHO on December 9, 2008. The SHO modified the prior DHO's order and denied Quest's request for continuing jurisdiction as follows:

Staff Hearing Officer denies the employer's request for continuing jurisdiction to be exercised, based on a finding of Fraud, and for the issue of the allowance of this claim to be set for a District Hearing Officer hearing. Staff Hearing Officer finds that, the employer has not met its burden of proof in support of these requests. Staff Hearing Officer finds that, the claimant's negative response to the question on the Incident Report, relative to any known pre-existing condition, does not rise to the level required for a finding of Fraud and for a vacating of all prior orders in the claim to occur. Therefore, the requests in the employer's motion are denied.

{¶44} 21. Quest's appeal was refused by order of the commission mailed January 9, 2009.

{¶45} 22. Thereafter, Quest filed the instant mandamus action in this court.

Conclusions of Law:

{¶46} Quest raises two issues for this court's consideration: (1) whether the commission abused its discretion by denying Quest's motion asking the commission to exercise its continuing jurisdiction because all the evidence in the record establishes that claimant had a pre-existing left shoulder condition which she concealed from Quest, and (2) whether Quest was denied equal protection under the law because, in Quest's opinion, the commission granted claimant's August 8, 2007 motion to "amend the condition initially allowed in the claim" without asking the commission to "invoke its authority to exercise its continuing jurisdiction." (Quest's brief, at 20.)

{¶47} For the reasons that follow, it is this magistrate's decision that the commission did not abuse its discretion in denying Quest's request that the commission exercise its continuing jurisdiction and that the commission did not violate Quest's equal protection rights when it granted claimant's motion to additionally allow her claim for certain conditions.

{¶48} Quest's first argument is that the commission abused its discretion when it refused to exercise its continuing jurisdiction and vacate the original allowance of claimant's claim on grounds that claimant committed fraud in obtaining the original allowance. In essence, Quest argues that, but for the fact that claimant fraudulently failed to disclose her pre-existing condition, Quest would have challenged the original allowance of her claim and the claim never would have been allowed in the first

instance. Quest asserts that it presented sufficient evidence to prove fraud and the commission abused its discretion by failing to find fraud, exercise its continuing jurisdiction, and disallowing claimant's claim in its entirety.

{¶49} In an order mailed June 4, 2007, the BWC allowed claimant's claim for a sprain of the left shoulder and arm. That order provides further as follows: "Ohio law requires that BWC allow the injured worker or employer 14 days from the receipt of this order to file an appeal."

{¶50} Quest does not deny that it received a copy of the BWC's order. Further, Quest admits that it did not file an appeal from this original allowance. Because of that failure, the only avenue available to Quest thereafter was a motion asking the commission to exercise its continuing jurisdiction.

{¶51} 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. \* \* \*

{¶52} In support of its argument, Quest alleged that claimant had committed fraud in procuring the original allowance. Specifically, Quest asserted that claimant intentionally concealed the fact that she had shoulder problems before she was injured at work and further that she and Dr. Gittinger colluded to further conceal that fact.

{¶53} An administrative finding of fraud will only be found if the prima facie elements of civil fraud are established. In *Burr v. Stark Cty. Bd. of Commrs.* (1986), 23 Ohio St.3d 69, the Ohio Supreme Court set forth the six elements of civil fraud: (1) a representation or, where there is a duty to disclose, concealment of fact; (2) which is material to the transaction at hand; (3) made falsely, with the knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred; (4) with intent of misleading another into relying upon it; (5) justifiable reliance upon the representation or concealment; and (6) a resulting injury proximately caused by the reliance.

{¶54} In support of its argument, Quest points to medical documents reflecting claimant's treatment prior to the date of injury. Specifically, Quest references treatment records from Dr. Gittinger from November 5, 1999 through March 7, 2007 wherein claimant complained of pain or other difficulties. Reviewing those records, the magistrate notes the following: on November 5, 1999, claimant had left superior medial trapezius pain predominantly on extension type movements of the neck, and pain that extended to the lateral shoulder but without significant brachial or forearm pain or numbness. At that time, Dr. Gittinger made the following diagnoses:

847.0 ACUTE LEFT CERVICAL STRAIN  
726.10 LEFT ROTATOR CUFF SYNDROME  
756.1 CONGENITAL C4C5 POSTERIOR JOINT FUSION

Dr. Gittinger continued to note cervical symptoms as well as shoulder symptoms which he described as mild left shoulder discomfort in his office note dated December 3, 1999.

{¶55} In the August 10, 2001 office note, Dr Gittinger noted that claimant complained of acute right side cervical/trapezius pain with no upper extremity radicular symptoms. Dr. Gittinger diagnosed the following conditions:

847.0 ACUTE CERVICAL STRAIN/SPRAIN  
780.9 CERVICAL KINESALGIA

Dr. Gittinger continued to treat claimant for left side cervical/trapezius tightness and pain and, in July 2002, added the following additional diagnosis:

847.1 ACUTE UPPER THORACIC STRAIN/SPRAIN

Dr. Gittinger also noted cervico-thoracic junction pain through August 2002.

{¶56} In the September 10, 2003 office note, Dr Gittinger noted that claimant presented with acute exacerbation of left side cervical/trapezius pain. Dr. Gittinger

continued to treat claimant for this cervico-thoracic junction pain as well as upper trapezius pain through March 19, 2004. Dr. Gittinger did note that claimant's attempts to put her left arm to her lower back caused tightness and pain along the superior scapular border and that she had marked tenderness of the left infraspinatus teres as well as left scapular pain.

{¶57} Dr. Gittinger saw claimant again on March 17, 2006. At that time, claimant presented with increasing cervical/trapezius tightness and acute left side lumbosacral spine pain with tingling paresthesia into the left thigh and buttock. On March 29, 2006, Dr. Gittinger diagnosed the following:

846.0 ACUTE LUMBOSACRAL STRAIN/SPRAIN  
724.4 MILD LEFT LUMBAR NEURALGIA

Dr. Gittinger treated claimant for these conditions for approximately one month.

{¶58} Dr. Gittinger saw claimant on March 7, 2007 for complaints of moderate to marked left side cervical/trapezius symptoms she had been experiencing for the past several weeks. Dr. Gittinger again noted cervico-thoracic junction pain as well as bilateral mid-upper cervical, bilateral acromioclavicular, and bilateral teres and mid thoracic region pain in his records through March 16, 2007.

{¶59} Quest also points to some records from Viera Bernat, M.D. from March 16, 2007. Quest notes that, at this time, claimant complained of "muscle pain neck, all over the back" and bilateral shoulder and bilateral upper extremity pain with shoulder movements (interior/exterior rotation) abduction, but not full arm.<sup>3</sup> Quest asserts that

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<sup>3</sup> During this same office visit, claimant also complained of nausea, belching, vomiting, night sweats, hot flashes, headaches, foot pain and sinusitis.

these medical documents conclusively prove that claimant had a pre-existing shoulder condition which she intentionally concealed from Quest. (There is no evidence indicating that Dr. Bernat was asked for her opinion concerning whether there was a relationship between her complaints at this visit and those following her alleged work injury.) As noted previously, Quest also argues that Dr. Gittinger colluded with claimant as follows:

\* \* \* Dr. Gittinger facilitated Claimant's prior deception – i.e., the concealment of pre-existing injuries – by commencing a separate, new office treatment record upon her care which he then supplied to the BWC; thus concealing from all concerned the prior care which he had given to Claimant for the same problems over the eight year period November 15, 1999 through March 16, 2007. \* \* \*

(Quest's brief, at 4; emphases sic.)

{¶60} At the hearing on March 19, 2008, claimant was asked about her prior complaints of pain and why she would indicate that she had no pre-existing condition.

In response thereto, claimant responded:

\* \* \* Well, first of all, just to go back yes, I've always had a problem with my neck. I've always had a problem with my shoulder blade. All of this area. I do not know medically how everything runs together.

Did I ever have a problem - - when I complained to Quest after moving the files and falling, I could not move this arm at all.

Have I ever had a problem moving that arm before? No, never.

Have I ever had pain running down my arm before? No, never.

If you put your hand right here (indicating) and I move my arm, you can literally hear it click. Have I ever had a problem with this part of my arm before? No, I have not.

\* \* \*

\* \* \* [W]hen they asked me if I had a problem with my left shoulder before ever I said no. I never considered my shoulder blade, my shoulder as moving my arm. It would hurt here (indicating) without moving my arm or doing anything, previous problems was this area.

\* \* \*

\* \* \* Never did I ever have a problem with pain running down my arm prior to the accident.

(Tr. 14-16.)

{¶61} As noted in the findings of fact, the commission found claimant's testimony to be credible. Further, it appears that claimant did not personally fill out Quest's "Incident, Injury, Illness Investigation Report." The magistrate notes that on the FROI which was signed by claimant, every time the number seven appears it is written as a European seven with a line through it. By comparison, on Quest's form, none of the sevens are European sevens. Further, Quest's document indicates that it was prepared by someone in the human resources department and was signed by that person, but was never signed by claimant.

{¶62} Based on claimant's testimony, the commission found that Quest had not met its burden of proving that claimant had the intent to defraud either Quest or the BWC. 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. The commission relied on claimant's testimony and that, in and of

itself, constitutes "some evidence" to support the commission's determination that Quest did not meet its burden of proof. Further, a review of the medical records and the fact that claimant did not prepare Quest's form, this magistrate cannot say that the commission abused its discretion in finding that Quest failed to meet its burden of proving fraud and, as such, the commission did not abuse its discretion when it refused to invoke its continuing jurisdiction over this action.

{¶63} Relator also asserts that the commission violated its equal protection rights by permitting claimant to amend her claim without providing the necessary proof required to invoke the commission's continuing jurisdiction. The magistrate finds that there is no merit to this argument.

{¶64} Ohio Adm.Code 4123-3-16(B) provides in pertinent part:

\* \* \* It is appropriate to file a motion in order to secure allowance of a disability or condition not previously considered in a claim. In no event should a motion be used as a substitute for an appeal, an application to reactivate a claim, an application for the determination of the percentage of permanent partial disability, or an application to increase an award of percentage of permanent partial disability.

{¶65} Ohio Adm.Code 4123-3-15(B) provides in pertinent part:

(1) The bureau shall consider a request for subsequent action in a claim in the following situations:

\* \* \*

(c) Where the claimant seeks to secure the allowance of a disability or condition not previously considered[.]

{¶66} Pursuant to the above quoted provisions, it was appropriate for claimant to file a motion when she sought the allowance of additional conditions in her claim and the BWC must consider such motions. Once filed, all claimants bear the same burden

they bore when originally seeking the allowance of their claim. Specifically, the burden of proof is upon claimants to prove a compensable work-related injury. Further, unlike Quest's assertions, claimant's C-86 motion did not seek to "amend the condition initially allowed in the claim." Seeking additional allowances in a claim is not treated the same as a motion asking the commission to exercise its continuing jurisdiction because it is not the same.

{¶67} Quest has simply mischaracterized the motion seeking the allowance of additional conditions and has characterized it as a modification or change with respect to former findings or orders. In the present case, Quest failed to appeal the original allowance of claimant's claim. Because of that failure, Quest later filed a motion asking the commission to invoke its continuing jurisdiction on grounds that claimant had committed fraud. The commission found that Quest failed to meet its burden of proof and the original allowance of claimant's claim remained intact. Quest's motion asking the commission to invoke its continuing jurisdiction and claimant's motion seeking the allowance of new conditions in her claim are not the same and are not treated the same. Quest's equal protection argument lacks merit.

{¶68} Lastly, Quest's argument that the DHO's order additionally allowing certain conditions should be vacated lacks merit. As stated previously, Quest was not denied equal protection when the DHO considered the motion and Quest has an administrative remedy by way of an appeal to an SHO.

{¶69} Based on the foregoing, it is this magistrate's decision that Quest has not demonstrated that the commission abused its discretion by refusing to invoke its continuing jurisdiction or that the commission abused its discretion by granting

claimant's motion to allow additional conditions. For those reasons, this court should deny Quest'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).