



R.C. 4123.522, from an order denying her claim, and ordering the commission to find she is entitled to such relief in order to appeal the disallowance of her claim.

{¶2} This matter was referred to a magistrate of this court pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate issued a decision which is appended to this decision, including findings of fact and conclusions of law, recommending that this court deny relator's request for a writ of mandamus. No objections have been filed to that decision.

{¶3} Finding no error of law or other defect on the face of the magistrate's decision, this court adopts the magistrate's decision as our own, including the findings of fact and conclusions of law. In accordance with the magistrate's recommendation, relator's requested writ of mandamus is denied.

*Writ of mandamus denied.*

KLATT and FRENCH, JJ., concur.

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## APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Sharon A. Ware,	:	
Relator,	:	
v.	:	No. 10AP-191
Industrial Commission of Ohio and Bridgeway, Inc.,	:	(REGULAR CALENDAR)
Respondents.	:	
	:	

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### MAGISTRATE'S DECISION

Rendered on January 24, 2011

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*Nager, Romaine & Schneiberg Co. L.P.A., Jerald A. Schneiberg and Christopher B. Ermisch*, for relator.

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

*Porter Wright Morris & Arthur, LLP, Fred J. Pompeani and Rebecca A. Kopp*, for respondent Bridgeway, Inc.

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### IN MANDAMUS

{¶4} Relator, Sharon A. Ware, 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 which denied her motion seeking relief pursuant to R.C.

4123.522 from the order which denied her claim and ordering the commission to find that she is entitled to that relief so she can appeal the disallowance.

Findings of Fact:

{¶5} 1. On April 6, 2007, relator filed a First Report of an Injury, Occupational Disease or Death ("FROI") form with the Ohio Bureau of Workers' Compensation ("BWC") indicating that she sustained a work-related injury on April 5, 2007.

{¶6} 2. Relator filed a second FROI which she signed on April 12, 2007. The second FROI contained more detail than the first FROI form did.

{¶7} 3. On both FROI forms, relator listed her address as:

1832 E 90TH ST  
CLEVELAND OH 44106-4853

{¶8} 4. In an order mailed April 23, 2007, the BWC allowed relator's claim for the following conditions:

847.0 SPRAIN OF NECK  
847.2 SPRAIN LUMBAR REGION  
844.9 SPRAIN OF KNEE & LEG NOS                      RIGHT

The BWC mailed this order to this same address:

1832 E 90TH ST  
CLEVELAND OH 44106-4853

{¶9} 5. Respondent Bridgeway, Inc. ("employer") appealed the order of the BWC allowing relator's claim asserting the following grounds: "Claimant had clocked out of work at the time of the injury, and the fall was not on company property."

{¶10} 6. On May 25, 2007, notice was mailed to the parties indicating the date of the hearing before a district hearing officer ("DHO"). This notice was mailed to relator at the following address:

1832 E 90th St  
Cleveland OH 44106-4853

{¶11} 7. The employer's appeal was heard before the DHO on June 13, 2007.

The DHO vacated the prior BWC order and denied relator's claim in its entirety, stating:

Claimant did not sustain an injury in the course of and arising out of employment.

District Hearing Officer finds claimant's slip and fall did not occur on the employer's property or property controlled by the employer. District Hearing Officer finds claimant slipped and fell in a private parking lot not on employer's premises or within zone of employment.

{¶12} 8. A copy of the DHO's order was mailed to relator at the following address:

1832 E 90th St  
Cleveland OH 44106-4853

{¶13} 9. Relator did not attend the hearing before the DHO and did not appeal the order.

{¶14} 10. On October 29, 2007, relator filed a notice of appeal indicating that she "was not able to attend hearing due to hospitalization." On that appeal, relator still listed her address as:

1832 E<sup>st</sup> 90th Apt #6  
Cleveland OH 44106

{¶15} 11. The commission construed relator's motion as one seeking relief pursuant to R.C. 4123.522.

{¶16} 12. Thereafter, relator obtained counsel and filed an injured worker authorized representative form. On that form, relator listed a different address:

6254 Scovill Rd. Apt. 3  
Cleveland, OH 44104

{¶17} 13. Relator's motion was heard before a staff hearing officer ("SHO") on February 27, 2008 and was denied as follows:

A copy of the notice of hearing for the hearing of the District Hearing Officer dated 6/13/2007 was properly mailed to the correct address of the injured worker.

Both relator and her counsel attended this hearing.

{¶18} 14. Thereafter, relator filed an affidavit which was construed as a motion for continuing jurisdiction pursuant to R.C. 4123.52. Relator provided the following relevant statements in her affidavit:

\* \* \* Affiant received Bureau of Workers' Compensation initial allowance order dated April 23, 2007, which allowed her workers compensation claim number 07-819436.

\* \* \* Affiant was admitted to Southpointe Hospital on or around April 24, 2007 due to a coma. Affiant was admitted to Southpointe Hospital for 15 days and then was transferred to St. Vincent Charity Hospital. She remained at St. Vincent Charity Hospital until or around June 8, 2007 or June 9, 2007.

\* \* \* On or around June 8, 2007 or June 9, 2007, affiant was transferred to Kindred Hospital in Cleveland for rehabilitation and was an in-patient for 2 weeks. Affiant was discharged June 24, 2007.

\* \* \* Affiant states that after she was discharged from Kindred Hospital, she was taken care of by her son and stayed at his residence from June 24, 2007 to present.

\* \* \* Affiant did not receive her mail from April 24, 2007 to around the middle of July 2007.

\* \* \* Affiant states that she did not receive a copy of the employer's appeal to the Bureau of Workers' Compensation initial allowance order, the notice of hearing for hearing scheduled June 13, 2007 or the District Hearing Officer Order mailed on June 15, 2007.

\* \* \* Affiant requests that she be allowed a hearing on the issue of allowance regarding her workers' compensation claim number 07-819436.

{¶19} 15. Relator's motion was heard before an SHO on August 13, 2008 and was denied as follows:

The claimant's request for relief pursuant to ORC 4123.52 is denied as the issues raised are the issues argued at the 2-27-08 hearing. The claimant is arguing that the order contains mistakes of fact and of law. Proper relief to the 2-27-08 order on that theory would be a reconsideration of the 2-27-08 order to the Industrial Commission.

The SHO referred relator's request to the commission.

{¶20} 16. The commission denied relator's request for reconsideration in an order mailed October 22, 2009.

{¶21} 17. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶22} In this mandamus action, relator asserts that she presented sufficient evidence to overcome the presumption that she received a copy of the order following the hearing before the DHO on June 13, 2007. As such, relator asserts that the commission abused its discretion by not accepting her evidence as sufficient proof to overcome the presumption and establish that she did not receive her copy.

{¶23} The magistrate finds that relator has not demonstrated that the commission abused its discretion when it determined that relator's evidence was not sufficient to overcome the presumption that she had received a copy of the DHO's order and denying her relief pursuant to R.C. 4123.522.

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

{¶25} R.C. 4123.522 provides that the employee, employer, and their respective representatives are entitled to written notice of any hearing, determination, order, award, or decision. Delivery of the notice to the address of the person or their representative is prima facie evidence of receipt of the notice. Pursuant to R.C. 4123.522, a rebuttable presumption exists, sometimes referred to as the "mailbox rule" that, once a notice is mailed, it is presumed to be delivered in due course. *Weiss v. Ferro Corp.* (1989), 44 Ohio St.3d 178.

{¶26} In order to rebut the presumption, relator was required to demonstrate: (1) that the failure to receive the notice was due to circumstances beyond relator's control, (2) the failure of notice was not due to relator's fault or neglect, and (3) relator did not have prior actual knowledge of the information contained in the notice. *State ex rel. LTV Steel*



*Co. v. Indus. Comm.* (2000), 88 Ohio St.3d 284, 286. The burden is upon relator to present sufficient evidence to rebut the presumption or the commission will properly deny relief. *State ex rel. Williams v. Indus. Comm.*, 10th Dist. No. 05AP-468, 2006-Ohio-3959.

{¶27} In *State ex rel. Tisdale v. Cherry Hill Mgt., Inc.* (2000), 88 Ohio St.3d 423, 425, the Supreme Court of Ohio noted that "R.C. 4123.522 is a narrow statute designed to remedy a *single* specific problem—a party's failure to receive notice of a commission decision." (Emphasis sic.)

{¶28} Relator failed to submit any evidence at the February 27, 2008 hearing. While she and her attorney did attend the hearing, there is no transcript to review. As such, the commission did not abuse its discretion when the SHO concluded that she had failed to meet her burden of proof.

{¶29} The affidavit contained in the stipulation of evidence was not filed until *after* the hearing before the SHO. The February 27, 2008 SHO's order is considered a final order. Pursuant to R.C. 4123.52, the commission has continuing jurisdiction to reconsider final orders under certain circumstances: (1) new and changed circumstances such as newly discovered evidence; (2) evidence of fraud; (3) a clear mistake of fact or law; or (4) an error which renders the order defective.

{¶30} Relator's affidavit does not meet the above criteria. It is not newly discovered evidence, nor is it evidence of fraud; it does not demonstrate a clear mistake of fact or law or other error rendering the SHO's order defective. As such, the commission did not abuse its discretion when it denied her request for reconsideration.

{¶31} Even if the affidavit would have been timely submitted, the commission was not required to find it sufficient to overcome the presumption and grant her relief pursuant

to R.C. 4123.522. In *State ex rel. Nerlinger v. AJR Entcs., Inc.*, 116 Ohio St.3d 314, 2007-Ohio-6438, the Supreme Court of Ohio addressed this issue as it pertains to a motion for relief under R.C. 4123.522. In that case, John P. Nerlinger did not attend the hearing at which his claim was denied for lack of medical evidence corroborating his alleged injury.

{¶32} Nerlinger sought relief under R.C. 4123.522 and submitted an affidavit claiming he did not receive the commission's order and that this failure was through no fault of his own. An SHO denied Nerlinger's motion finding that both the notice and the order had been properly mailed to the correct address.

{¶33} Nerlinger filed a mandamus action in this court. The magistrate recommended that a writ be issued. The magistrate believed the commission's order was defective because it did not address the credibility of Nerlinger's affidavit. This court did not adopt the report and held that the commission was not required to explain why it had found a particular piece of evidence unpersuasive.

{¶34} Nerlinger filed an appeal as of right. The Supreme Court of Ohio affirmed the judgment of this court stating:

As we explained in *State ex rel. Cherryhill Mgt. Inc. v. Indus. Comm.*, 116 Ohio St.3d 27, 2007-Ohio-5508, 876 N.E.2d 525, the commission is exclusively responsible for evaluating the weight and credibility of the evidence and need not explain why an affidavit is unpersuasive. \* \* \*

Id. at ¶7.

{¶35} In the present case, relator's affidavit never was properly presented as evidence in the first instance. And, even if it had been, as the *Nerlinger* court makes clear, the commission would not have been required to find it persuasive, nor would the commission have been required to explain its reasoning.

{¶36} Finding that the commission did not abuse its discretion in finding that relator failed to overcome the presumption and in denying her request for reconsideration, it is this magistrate's decision that 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).