[Cite as *State ex rel. McElroy v. Indus. Comm.*, 2012-Ohio-2267.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Kenneth A. McElroy,	:	
Relator,	:	
v.	:	No. 11AP-391
Industrial Commission of Ohio and M P E Sales, Inc.,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on May 22, 2012

Cooper & Thomas, *David P. Thomas*, and *Gerald F. Cooper*, 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

FRENCH, J.

{¶ 1} Relator, Kenneth A. McElroy ("relator"), filed an original action, which asks this court to issue a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its order that terminated temporary total disability ("TTD") compensation, declared an overpayment of TTD compensation, and made a finding of fraud.

{¶ 2} This matter was referred to a magistrate pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate issued a decision, which includes findings of fact and conclusions of law and is appended to this decision, recommending that this court deny the requested writ. No objections were filed concerning the magistrate's findings of fact, and we adopt them as our own.

I. BACKGROUND

{¶ 3} As detailed in the magistrate's decision, relator suffered a work-related injury in 2004, and he began receiving TTD compensation. The Special Investigations Department of the Ohio Bureau of Workers' Compensation ("bureau") began an investigation in 2008 and issued an initial report in 2010. Based on that report, the bureau moved for termination of TTD compensation. Following a hearing, a district hearing officer ("DHO") granted the bureau's motion. Following a second hearing, a transcript of which is in the record, a staff hearing officer ("SHO") affirmed the DHO's order that terminated TTD compensation, declared an overpayment, and made a finding of fraud. On mandamus, as noted, relator asks us to order the commission to vacate its order. The magistrate recommended that we deny the requested writ.

II. RELATOR'S OBJECTIONS

{¶ 4} In his first objection, relator contends that the magistrate erred by not concluding that the commission erred by permitting evidence provided by his ex-wife, in violation of a spousal privilege. At the hearing before the SHO, relator's counsel argued that the interview with relator's ex-wife, Evelyn McElroy ("Evelyn"), violated the spousal privilege provided by statute and the rules of evidence. The results of the interview are part of the record in the form of a July 19, 2010 memorandum submitted by the bureau for consideration by the DHO and SHO. While Evelyn was listed as a witness before the DHO, relator contends that she did not testify before the DHO or the SHO. Before the SHO, however, the bureau's counsel referred to Evelyn's interview. *See* Tr. 42, 46, 47. In his order, the SHO denied relator's motion to dismiss the bureau's motion for termination, which was based in part on privilege.

{¶ 5} In his decision, the magistrate concluded that R.C. 4123.10 provides an exception in workers' compensation proceedings for the application of the testimonial

privilege ordinarily provided to spouses by R.C. 2317.02. We conclude, however, that we need not address that question in this case, and we decline to adopt the magistrate's conclusions concerning spousal privilege. Instead, we conclude that, even if we were to assume that a statutory spousal testimonial privilege applies in workers' compensation proceedings, application of that privilege would not require the granting of a writ of mandamus in this case.

{¶ 6} The evidence against relator was overwhelming. The initial investigative report included detailed statements by numerous witnesses concerning relator's business activities over several years. It included many cancelled checks made payable to relator or Evelyn for work performed. It also included time records from Evelyn's employer to contradict relator's statements that she performed the work, not him. Even if the two-page memorandum concerning Evelyn's generalized statements about work performed were excluded from consideration, the commission would have had more than some evidence to rely upon to terminate TTD compensation, declare an overpayment, and make a finding of fraud. Therefore, we overrule relator's first objection.

{¶ 7} In his second objection, relator contends that the magistrate erred by not addressing his argument concerning physician-patient privilege. Our review of relator's briefs submitted to the magistrate, however, reveals nothing more than passing references to physician-patient privilege. In his initial brief, relator argued that the bureau violated pre-hearing procedures, in part by "continu[ing] the discovery process without notice" and requesting a report from his psychologist. (Relator's brief at 9.) Relator repeated this assertion in his reply brief and clarified that his argument was "that the administrative proceedings cannot violate the spousal privilege or physician-patient privilege." (Relator's reply brief at 2.) Relator also questioned whether the bureau "can proceed with its investigation process without regard to the spousal privilege, the physician-patient privilege, the attorney-client privilege, the HIPPA [sic] rules and regulations?" (Relator's reply brief at 4.) Beyond these general statements, relator made no argument to the magistrate about physician-patient privilege or the manner in which it could arguably apply in this matter. Therefore, the magistrate did

not err by addressing relator's concerns about the discovery process without addressing the issue of physician-patient privilege. We overrule relator's second objection.

III. CONCLUSION

{¶ 8} Having conducted an independent review of this matter, and having overruled relator's objections, we adopt the magistrate's decision, including the findings of fact and conclusions of law contained in it, as our own, with the exception of the discussion of spousal privilege at paragraphs 38 through 41. Accordingly, we deny the requested writ.

Objections overruled;
writ of mandamus denied.

SADLER and DORRIAN, JJ., concur.

A P P E N D I X

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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Relator,	:	
v.	:	No. 11AP-391
Industrial Commission of Ohio and M P E Sales, Inc.,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on January 11, 2012

Cooper & Thomas, *David P. Thomas*, and *Gerald F. Cooper*, for relator.

Michael DeWine, Attorney General, and *Derrick L. Knapp*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶ 9} In this original action, relator, Kenneth A. McElroy, requests a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its order granting the March 2, 2010 motion of the Ohio Bureau of Workers' Compensation ("bureau") for termination of temporary total disability ("TTD")

compensation, for the declaration of an overpayment of TTD compensation, and for a finding that the compensation was fraudulently obtained.

Findings of Fact:

{¶ 10} 1. On August 30, 2004, relator sustained an industrial injury which was assigned claim No. 04-856558.

{¶ 11} 2. Following the industrial injury, the bureau began payments of TTD compensation in this state fund claim.

{¶ 12} 3. In early 2008, the bureau's special investigation unit ("SIU") began an investigation into relator's activities while he was receiving TTD compensation.

{¶ 13} 4. The SIU investigation was conducted by a special agent and a fraud analyst employed by the bureau.

{¶ 14} 5. On March 2, 2010, the special agent and fraud analyst signed a 20-page report of investigation that describes in detail the investigation.

{¶ 15} 6. On March 20, 2010, citing its investigative report, the bureau moved for termination of TTD compensation, for the declaration of an overpayment of TTD compensation from January 1, 2005 through August 7, 2008, and for a finding that the compensation was fraudulently obtained.

{¶ 16} 7. The bureau's motion was initially scheduled for hearing on April 9, 2010 before a district hearing officer ("DHO").

{¶ 17} 8. On March 25, 2010, the Cleveland hearing administrator held a pre-hearing conference at relator's request.

{¶ 18} 9. On March 27, 2010, the Cleveland hearing administrator mailed a compliance letter. Indicating that only relator's counsel was present at the conference, the compliance letter states:

> The issue(s) addressed at the pre-hearing conference were discovery.
>
> It is the finding of the Hearing Administrator that the following provision(s) have been decided upon:
>
> Counsel for the injured worker has indicated there are no further issues to be addressed at this time.
>
> Therefore, the [DHO] hearing on the issue of termination of temporary total disability, fraud and overpayment will go forward as scheduled on April 9, 2010.
>
> It is further the finding of the Hearing Administrator that the parties must adhere to the provisions of this compliance letter.

{¶ 19} 10. The hearing scheduled for April 9, 2010 was apparently continued to June 23, 2010. However, the June 23, 2010 hearing was continued by a DHO at relator's request. The DHO's June 23, 2010 order explains:

> The Injured Worker's Representative's request for a continuance presented at hearing is granted for the reason that extraordinary and unforeseeable circumstances exist to justify the request. Specifically, Injured Worker's Representative received additional evidentiary documents two days prior to hearing and is requesting additional time to review same, as not to prejudice Injured Worker.

{¶ 20} 11. On or about June 23, 2010, relator moved that the bureau's March 2, 2010 motion "be suspended until a second pre-hearing conference has been held." In his motion, relator asserted that the bureau had violated the March 25, 2010 compliance letter. In his memorandum in support of the motion, relator asserted:

> A prehearing conference was scheduled to determine whether any further discovery was required. The Administrator did not appear at the prehearing conference, but, nevertheless, is bound by the compliance letter dated March 25, 2010. Since that compliance letter the [bureau] has, on three occasions, continued its investigation and has amended its report on two occasions each of which was submitted just two days prior to the scheduled hearing dates.
>
> Counsel for the injured worker, at the hearing scheduled for June 23, 2010, requested and was granted a continuance by the [DHO] because of concerns that the late filing of evidentiary matter did not afford the injured worker due process with regard to responding to the new evidence.
>
> Since the most recent continuance by the [DHO], the [bureau], has continued to investigate the claim.

{¶ 21} 12. By letter to the hearing administrator dated July 27, 2010, the bureau's staff attorney answered relator's June 23, 2010 motion:

> The undersigned is in receipt of claimant's motion dated July 23, 2010 * * *. Please be advised that the [bureau] Administrator, by and through counsel, objects to claimant's request to have the Special Investigation Department's motion requesting an overpayment and fraud be suspended pending a second pre-hearing conference. Claimant's counsel cites to no statutory provision authorizing suspension of a motion or claim pending a pre-hearing conference. Furthermore, the compliance letter cited to by claimant's counsel does not in any way state that the [bureau] is prevented from obtaining further evidence for presentation at hearing. Additional evidence obtained by the [bureau] has been provided timely to claimant's counsel as it is obtained.
>
> It is worth noting that at the most recent DHO hearing of June 23, 2010, claimant, through counsel, stated that he is in the process of obtaining evidence which he wishes to present to the [commission] for consideration. To date, this evidence has not been provided to counsel for the [bureau]. It is curious that claimant represents to the [commission] that

> discovery has been completed yet he continues to compile evidence for submission to the [commission] on this matter.
>
> There have been multiple continuances in this claim. To prevent any further delays, counsel for the [bureau] Administrator formally objects to any further continuances of this matter.

{¶ 22} 13. On July 29, 2010, relator filed a reply to the staff attorney's letter:

> The purpose of the motion filed by the injured worker requesting a second pre-hearing conference is not filed for the purpose of delaying the proceedings. The purpose is clearly stated in the memorandum attached to the injured worker's motion. The [bureau], through its counsel and investigators, is not complying with the rules and regulations of the [commission], which are intended to create an orderly process for the hearing of disputed matters.
>
> The [bureau] counsel and/or investigators have requested a medical report from one of the injured worker's medical providers. This request was made without authorization, without [a commission] subpoena and without consent of opposing counsel. This action constitutes a clear violation of [commission] rules and a clear denial of due process. It is imperative that the [bureau] be instructed and required to comply with the rules of the [commission] regarding hearings and the obtaining and presentation of evidence.

{¶ 23} 14. The bureau's March 2, 2010 motion was rescheduled for an August 18, 2010 hearing before a DHO.

{¶ 24} 15. Earlier, on July 19, 2010, the SIU special agent and fraud analyst interviewed relator's former spouse, Evelyn McElroy, at her residence. The special agent and fraud analyst issued a two-page report of that interview, stating:

> The following are facts gained through the interview:
>
> - Evelyn explained that she was responsible for some of the repairs that were made at home. She couldn't say it was a 50/50 split between Ken and her because a lot of

> the repairs were too technical and complicated for her. She learned some things through the lawn mower repair shop they owned. She gave the example that she could take a carburetor apart but she couldn't diagnose the problem and fix it. Evelyn would help Ken lift items that Ken brought home to repair.
>
> - Evelyn explained about her involvement as a snowplower with Purgreen. She estimated that she and Ken shared the plowing in the following way, one year she might have done 20% and the next year she might have done 30% and the next 40%. 40% was the highest percent that she could recollect. She explained there were times that she would plow at night and drive straight to her job at Moldmasters where she worked fulltime. She could only plow so long until her back hurt.
>
> - Marlene is Ken's stepmother. She was capable of helping to clean the work area.
>
> - Ken and Evelyn's daughter is 11 years old.
>
> - Evelyn explained that they have a child and they needed more money. Evelyn said she did what she had to do to provide for her family. She stated she did not do anything wrong.

{¶ 25} 16. By letter dated August 5, 2010 addressed to relator's counsel, the bureau staff attorney submitted to relator the July 19, 2010 SIU report of the interview of Evelyn McElroy.

{¶ 26} 17. On August 18, 2010, the bureau's March 2, 2010 motion was heard by a DHO. The hearing was not recorded. Thereafter, on September 24, 2010, the DHO mailed an order granting the bureau's March 2, 2010 motion. Apparently, the parties agree that Evelyn McElroy did not testify at the August 18, 2010 hearing even though the DHO's order states that Evelyn McElroy appeared for the administrator.

{¶ 27} 18. Apparently, at the August 18, 2010 hearing, relator, through counsel, orally moved for a dismissal of the bureau's March 2, 2010 motion. In that regard, the DHO's order explains:

> [DHO] preliminarily finds that Injured Worker's representative's oral motion to dismiss the [bureau's] motion filed 03/02/2010, is denied. The [DHO] finds no statutory authority or Administrative Code, in support of Injured Worker's representative's request for dismissal of the issues set for hearing.
>
> [DHO] further finds no legal authority or precedent which would prevent any party to this administrative proceeding from presenting additional evidence prior to hearing on the merits of the issue set before the [commission].

{¶ 28} 19. Relator administratively appealed the DHO's order of August 18, 2010.

{¶ 29} 20. On October 25, 2010, a staff hearing officer ("SHO") heard the administrative appeal. The hearing was recorded and transcribed for the record.

{¶ 30} 21. At the start of the October 25, 2010 hearing, the SHO asked counsel if there were any "procedural issues." In response, relator's counsel stated:

> I wanted to raise a couple arguments that I raised with the [DHO] hearing, which were not, I guess, received.
>
> Essentially, we feel that – well, the argument was raised at the last hearing that the Rules of Civil Procedure, the Rules of Evidence don't apply once you walk into the hearing room. We disagree with that.
>
> Specifically, I started talking about, at that time, there were some issues with respect to the evidence in the case.
>
> Initially, there was a hearing with Mr. Augusta and – for the evidence, a prehearing discovery conference, which was on March 25th of 2010. [Bureau] did not attend but I was there.

there was a – a prehearing discovery compliance letter dated 3/27, 2010 in the file.

The problem became, at that point, when we're talking about a discovery compliance, we're talking about the evidence in the case. We had a few hearings that were reset throughout the – the time frame of the summer, and essentially, in July of 2010, specifically on July 19th of 2010, after one of the reset hearings, the [bureau] investigators went and took statements from Evelyn McElroy, who was the spouse of the injured worker during all periods of time pertinent to the investigation. They took – they appeared at her home, they took a statement from her, subpoenaed her work records. At no time did – did the injured worker consent to that.

We then filed a C-86 motion for non-compliance with the hearing administrator, and that pre-discovery compliance letter was raised at the hearing, and I think, based upon the – the first paragraph, that the hearing officer Miss Pat Cirrus found no statutory authority or administrative code that our request should be granted.

We will submit to you the following, though. That the [bureau] is bound by the Rules of Evidence. We know that they're not a prosecutor, but I don't – it would be amazing to me to see a court of law overturn any of these rules. ORC 2317.02 details the privileged communications as is specifically set forth in the Ohio Rules of Evidence, and – and clearly there is a presumption that the type of investigation conducted by the [bureau] is outside of the Rules of Evidence. Clearly, any testimony given by Evelyn is privileged communication under the statute.

There's cases that I submitted to you, specifically the Merrill versus the Ward – William E. Ward case where – where you can see that, again – and it's not surprised that they – the Court upholds that the privileged communications can't be used as evidence.

How does that factor into this case even further? If you look at the file, you'll see before the prehearing conference, on March 2nd, the [bureau] submitted a 500-page plus investigative report, on March 2nd of 2010.

> Subsequently, they modified that and they – they submitted a second packet which contradicts the evidence in the first packet. That – that was filed, again, after this – this investigation continued with the evidence that's not admissible.
>
> So we have serious – we have serious evidentiary flaws in the case. We feel that there is no prima facie case that can be presented based upon these egregious misapplications of the Rules of Evidence.
>
> And so we'd ask that the [bureau's] C[-]86 [bureau] motion be dismissed as a matter of law.

{¶ 31} 22. Following the October 25, 2010 hearing, the SHO issued an order affirming the August 18, 2010 order of the DHO. That is, the SHO terminated TTD compensation, declared an overpayment of TTD compensation from January 1, 2005 through August 17, 2010, and found that the compensation was fraudulently obtained.[1]

{¶ 32} Initially, the SHO's order addresses the issues raised by relator at the outset of the hearing:

> [SHO] preliminarily finds that Injured Worker's representative's oral motion to dismiss the [bureau's] motion filed 03/02/2010, is denied. The [SHO] finds no statutory authority or Administrative Code, in support of Injured Worker's representative's request for dismissal of the issues set for hearing.
>
> Injured Worker's counsel raised a procedure issue that due to [civil] rules of evidence, the privilege of a husband/wife communicate [sic] prevents one spouse from testifying negatively against the other. Further, that any negative evidence should be excluded as poisioned fruit. The [SHO] notes that [relator's counsel] has no standing to argue for this privilege as it is the spouse who must raise the privilege. The spouse, Ms. McElroy, did not testify at this hearing as

[1] Although the bureau's March 2, 2010 motion sought a declaration of an overpayment through August 7, 2008, the SHO declared an overpayment through August 17, 2008. That discrepancy is not at issue here.

> she did at the [DHO] hearing but did provide written communications and oral communications with the [bureau's SIU]. [SHO] notes at no time was there a claim of privilege and therefore it was effectively waived. Even if it was not waived, there is no legal authority to exclude the evidence. The [SHO] finds no other basis to dismiss the evidence secured by the [bureau's SIU].
>
> [SHO] further finds no legal authority or precedent which would prevent any party to this administrative proceeding from presenting additional evidence prior to hearing on the merits of the issue set before the [commission].

{¶ 33} 23. Relator administratively appealed the SHO's order of October 25, 2010.

{¶ 34} 24. The commission refused to hear relator's administrative appeal from the SHO's order of October 25, 2010.

{¶ 35} 25. On April 25, 2011, relator, Kenneth A. McElroy, filed this mandamus action.

Conclusions of Law:

{¶ 36} Two issues are presented: (1) did the commission abuse its discretion in refusing to eliminate from evidentiary consideration the evidence obtained from the SIU interview of relator's former spouse, Evelyn McElroy, and (2) did the commission abuse its discretion in permitting the bureau to submit additional evidence from its ongoing investigation following the issuance of the March 25, 2010 compliance letter indicating that "discovery" was an issue addressed at the conference.

{¶ 37} Finding no abuse of discretion, it is the magistrate's decision that this court deny relator's request for a writ of mandamus, as more fully explained below.

{¶ 38} At the center of the first issue is R.C. 4123.10, which provides:

> The industrial commission shall not be bound by the usual common law or statutory rules of evidence or by any technical or formal rules of procedure, other than as provided in sections 4123.01 to 4123.94, inclusive, of the Revised Code, but may make an investigation in such manner as in its judgment is best calculated to ascertain the substantial rights of the parties and to carry out justly the spirit of such sections.

R.C. 2317.02 provides:

> The following persons shall not testify in certain respects:
>
> * * *
>
> (D) Husband or wife, concerning any communication made by one to the other, or an act done by either in the presence of the other, during coverture, unless the communication was made, or act done, in the known presence or hearing of a third person competent to be a witness; and such rule is the same if the marital relation has ceased to exist.

Evid.R. 601 provides:

> Every person is competent to be a witness except:
>
> * * *
>
> (B) A spouse testifying against the other spouse charged with a crime except when either of the following applies:
>
> (1) a crime against the testifying spouse or a child of either spouse is charged;
>
> (2) the testifying spouse elects to testify.

{¶ 39} Citing R.C. 2317.02(D) and Evid.R. 601(B), relator contends that the commission abused its discretion in refusing to eliminate from evidentiary consideration

the evidence obtained from the SIU interview of relator's former spouse, Evelyn McElroy. The magistrate disagrees.

{¶ 40} *State ex rel. Roberts v. Indus. Comm.* (1984), 10 Ohio St.3d 1, 4-5, is controlling. In that case, Charles G. Roberts was industrially injured in the course and scope of his employment with Mobile Industrial Services of Ohio, Inc. ("Mobile"). On the date of injury in 1977, Roberts lost consciousness and fell into a solvent while cleaning a tank car. Roberts' application for a violation of a specific safety requirement award was denied by the commission and he therefore filed a mandamus action. In that action, Roberts challenged the evidentiary sufficiency of an affidavit executed by Daniel Conkey, a Mobile representative. Roberts argued that the commission erred in considering the Conkey affidavit. Rejecting Roberts' argument, the court explains:

> An affidavit of Daniel Conkey, the employer's representative, details that appellant was trained in tank car cleaning and concomitant safety procedures, including the ventilation of a tank car before and during the cleaning procedure. Moreover, the record demonstrates that ventilation equipment was available, as was a water blaster, neither of which was utilized by appellant. The investigative report also contains photographic exhibits of the safety equipment at the job-site, instruction procedures for tank car cleaning, invoices demonstrating Mobile's purchase of related safety equipment, and the work order for the tank car appellant was cleaning.
>
> * * *
>
> Appellant next argues that the commission erred in considering the affidavit of Daniel Conkey, submitted on behalf of Mobile. In his affidavit, Conkey first states that he was not a witness to appellant's injury. He then recites company policy regarding safety procedures to be employed when cleaning railroad tank cars, and that appellant received extensive training in this area and should have been using a

> water blaster and the proper ventilating equipment when cleaning the interior walls of the car.
>
> Specifically, appellant contends that Conkey's affidavit should not have been considered by the commission based on Evid.R. 602 and 801(C) which involve, respectively, witnesses testifying on matters about which they have no personal knowledge, and hearsay. Essentially, appellant seeks to have this court apply technical rules of evidence to proceedings conducted before the commission. Appellant's contention, however, does not reflect the law applicable to workers' compensation proceedings in Ohio.
>
> * * *
>
> By its unequivocal terms, R.C. 4123.10 grants the commission considerable discretion regarding the evidence which it considers, thus negating appellant's argument that Conkey's affidavit was improperly considered, assuming, *arguendo*, the applicability of Evid.R. 602 and 801(C). Moreover, this court has previously recognized that by virtue of R.C. 4123.10, the commission is vested with the authority to admit and consider materials of a quasi-evidentiary nature.

{¶ 41} As can be readily inferred from the *Roberts* case, the commission is not bound by R.C. 2317.02(D) regarding privileged communications and Evid.R. 601(B) regarding the competency of a spouse's testimony. See *State ex rel. Precision Thermo-Components, Inc. v. Indus. Comm.*, 10th Dist. No. 09AP-965, 2011-Ohio-1333.

{¶ 42} Turning to the second issue, Ohio Adm.Code Chapter 4121-3 sets forth the commission's rules regarding claims procedures. Thereunder, Ohio Adm.Code 4121-3-09 is captioned "Conduct of hearings before the commission and its staff and district hearing officers."

{¶ 43} Ohio Adm.Code 4121-3-09(A) is captioned "Proof and discovery." Thereunder, Ohio Adm.Code 4121-3-09(A)(1)(a) provides:

> The parties or their representatives shall provide to each other, as soon as available and prior to hearing, a copy of the evidence the parties intend to submit at a commission proceeding.

Also, Ohio Adm.Code 4121-3-09(A)(2) provides:

> The free pre-hearing exchange of information relevant to a claim is encouraged to facilitate thorough and adequate preparation for commission proceedings. If a dispute arises between the parties regarding the exchange of information, the hearing administrator, pursuant to paragraph (B) of this rule may conduct a pre-hearing conference to consider the dispute. At the conclusion of the pre-hearing conference, the hearing administrator may issue a compliance letter, which becomes part of the claim file and which shall be adhered to by the parties.

{¶ 44} Citing Ohio Adm.Code 4121-3-09(A)(1)(a) and (2), relator contends that the bureau disobeyed the March 25, 2010 compliance letter by continuing its investigation beyond the date of the March 25, 2010 pre-hearing conference and, thus, the commission abused its discretion in permitting the bureau to submit evidence it acquired through its investigation after the March 25, 2010 pre-hearing conference. The magistrate disagrees.

{¶ 45} Again, the March 25, 2010 compliance letter states:

> The issue(s) addressed at the pre-hearing conference were discovery.
>
> It is the finding of the Hearing Administrator that the following provision(s) have been decided upon:
>
> Counsel for the injured worker has indicated there are no further issues to be addressed at this time.
>
> Therefore, the [DHO] hearing on the issue of termination of temporary total disability, fraud and overpayment will go forward as scheduled on April 9, 2010.

> It is further the finding of the Hearing Administrator that the parties must adhere to the provisions of this compliance letter.

{¶ 46} Contrary to relator's suggestion, the compliance letter, by its terms, does not purport to order the bureau to cease its investigation nor does it purport to limit the duty of any party to provide to the opposing party a copy of any evidence obtained by the party subsequent to the pre-hearing conference. Here, relator in effect invites this court to read into the compliance letter something that is not there. This court must decline the invitation.

{¶ 47} Accordingly, for all the above reasons, it is the magistrate's decision that this court deny relator's request for a writ of mandamus.

/s/ Kenneth W. Macke
KENNETH W. MACKE
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).