

{¶2} This matter was referred to a court-appointed magistrate pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate issued a decision, including findings of fact and conclusions of law, which is appended to this decision, and recommended that this court deny relator's request for a writ of mandamus.

{¶3} Relator does not delineate a specific objection, but essentially reargues the same points addressed in the magistrate's decision. Upon review, and for the reasons set forth in the magistrate's decision, we do not find relator's position to be well-taken.

{¶4} Following an independent review of the matter, we find that the magistrate has properly determined the facts and applied the appropriate law. Therefore, relator's objections to the magistrate's decision are overruled, and we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein. In accordance with the magistrate's decision, we deny the requested writ of mandamus.

*Objections overruled;
writ of mandamus denied.*

BRYANT and KLATT, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Anthony Alston,	:	
	:	
Relator,	:	
	:	
v.	:	No. 09AP-534
	:	
Interpak, Inc. and The Industrial	;	(REGULAR CALENDAR)
Commission of Ohio,	:	
	:	
Respondents.	:	
	:	

MAGISTRATE'S DECISION

Rendered on November 16, 2009

Dworken & Bernstein Co., L.P.A., Jonathan T. Stender and Jo A. Tatarko, for relator.

Stefanski & Associates LLC, and Janice T. O'Halloran, for respondent Interpak, Inc.

Richard Cordray, Attorney General, and Sandra E. Pinkerton, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶5} Relator, Anthony Alston, has filed this original action asking this court to issue a writ of mandamus ordering respondent Industrial Commission of Ohio

("commission") to vacate its order which denied him relief pursuant to R.C. 4123.522 and ordering the commission to grant him that relief.

Findings of Fact:

{¶6} 1. On November 9, 2006, a first report of an injury, occupational disease or death ("FROI-1") form was completed on relator's behalf asserting that he sustained a work-related injury on November 8, 2006. On that form, relator's address was listed as "135 Morse Ave[.,] Painesville[,] OH."

{¶7} 2. In a letter dated November 13, 2006, the Ohio Bureau of Workers' Compensation ("BWC") provided relator with information to help him in processing his claim.

{¶8} 3. On November 27, 2006, relator submitted a form to the BWC providing notice that he was changing his physician of record. On that form, relator listed his address as "135 Morse Ave[.,] Painesville[,] Oh."

{¶9} 4. On December 7, 2006, the BWC sent relator a letter requesting that he provide them information regarding the last date he worked. The address on that form was "135 MORSE AVE[.,] PAINESVILLE[,] OH."

{¶10} 5. In an order mailed December 11, 2006, the BWC notified relator that his claim had been disallowed for sprain lumbar region. That order was mailed to relator at "135 MORSE AVE[.,] PAINESVILLE[,] OH."

{¶11} 6. On December 27, 2006, relator's treating physician, John H. Paul, M.D., requested authorization for an MRI of the lumbar region and physical therapy. A representative from Interpak, Inc.'s ("employer") managed care organization ("MCO") notified relator's treating physician that the requested treatment was being denied for the

following reason: "Unable to process request. MCO does not have jurisdiction to process request as claim disallowed."

{¶12} 7. On June 4, 2007, relator filed a document with the BWC providing the name of his authorized representative. On that form, relator listed his address as "135 Morse Avenue[,] Painesville, OH."

{¶13} 8. On September 11, 2007, relator filed a second form notifying the BWC that he had a new authorized representative. On that form, relator listed his address as "135 MORSE AVE[.,] PAINESVILLE, OH."

{¶14} 9. Seven months later, on April 21, 2008, relator requested relief pursuant to R.C. 4123.522 on grounds that the BWC order mailed December 11, 2006 was sent to an incorrect address and asserting that he did not have knowledge that his claim had been disallowed.

{¶15} 10. That same day, April 21, 2008, relator filed a form notifying the BWC of a change of address. Relator listed "135 Morse Ave[.,] Painesville[,] Oh" as his old mailing address and "780 Derby Dr[.,] Painesville[,] Oh" as his new address.

{¶16} 11. The matter was heard before a staff hearing officer ("SHO") on July 9, 2008 and was denied. Specifically, the SHO stated:

It is found that a copy of the order of the Bureau of Workers' Compensation, dated 12/11/2006, was properly mailed to the correct address of the Injured Worker. Therefore, pursuant to O.R.C. 4123.522, the request for relief is denied. The order of the Bureau of Workers' Compensation remains in full force and effect.

{¶17} 12. Relator filed a notice of third level appeal/request for reconsideration to which he attached an affidavit, pertinent parts of which provide:

Affiant further states that he did not receive the BWC Order dated 12-11-06, which denied my claim for the condition of sprain lumbar region.

Affiant further states that he was not represented by counsel at that time.

Affiant further states that he resided at 135 Morris Avenue, which is his parents address, up until late October of 2006.

Affiant further states that in late October of 2006 he moved to 780 Derby Drive, Painesville, Ohio 44077, and had not had a chance to update his address when he was injured on November 8, 2006.

Affiant further states that no one at his parent's residence, 135 Morris Avenue, advised him that he received correspondence from the BWC and consequently he in fact did not receive the 12-11-2006 order.

Affiant further states that had he known that his claim had been disallowed for a sprain lumber [sic], he would have appealed the order.

Affiant further states that he subsequently became aware that his claim had become disallowed when my POR advised me that treatment was being denied. I then retained counsel.

{¶18} 13. In an order mailed October 8, 2008, relator's request for reconsideration was denied.

{¶19} 14. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

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

{¶21} For the reasons that follow, this magistrate finds that relator failed to meet his burden of proving that the commission abused its discretion in denying him relief pursuant to R.C. 4123.522.

{¶22} 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. R.C. 4123.522 provides relief to any person who fails to receive notice. The person must demonstrate not only that they failed to receive notice, but that the failure was due to causes beyond the control and without the fault or neglect of such person or their representative and that such person or their representative did not have actual knowledge of the import of the information contained in the notice. Delivery of the notice to the address of the person or their representative is prima facie evidence of receipt of the notice.

{¶23} The stipulated evidence indicates that relator gave his address as "135 Morse Ave[.], Painesville[.], OH" in the following circumstances **prior** to the BWC's order disallowing his claim: (1) the FROI-1 completed November 9, 2006, and (2) the notice of change of physician form prepared November 27, 2006. Relator continued to list his address as "135 Morse Ave[.], Painesville[.], OH" on the following occasions **following** the mailing of the BWC order disallowing his claim: (1) the notice of authorized representative form completed June 4, 2007, and (2) the second notice of authorized representative form signed September 11, 2007.

{¶24} As noted previously, the BWC order disallowing relator's claim was mailed to the "135 MORSE AVE[.], PAINESVILLE[.], OH" address on December 11, 2006. On two occasions, relator continued to use that address with correspondence he sent to the

BWC. It was not until April 21, 2008 that relator sought relief pursuant to R.C. 4123.522 arguing that he did not receive the order denying the allowance of his claim. Ultimately, relator submitted an affidavit in support of his request for relief. The following statements contained in that affidavit are particularly relevant: (1) he resided at "135 Morris Avenue, which is his parents address, up until late October of 2006"; (2) in late October 2006, he moved to "780 Derby Drive, Painesville, Ohio 44077, and had not had a chance to update his address when he was injured on November 8, 2006"; (3) "no one at his parent's residence, 135 Morris Avenue, advised him that he received correspondence from the BWC and consequently he in fact did not receive the 12-11-2006 order"; (4) "had he known that his claim had been disabled for a sprain lumber [sic], he would have appealed the order"; and (5) "he subsequently became aware that his claim had become disallowed when my POR advised me that treatment was being denied. I then retained counsel." According to his affidavit, relator did not reside on Morse Avenue on the date of his injury. In spite of this, relator used the Morse Avenue address at the hospital and it was included on his FROI-1 form and later on his notice that he was changing physicians. Relator provided no explanation for his use of the Morse Avenue address on these documents in spite of the fact he did not reside there at that time. Also, as noted in the findings of fact, relator's physician of record sought authorization for an MRI and physical therapy on December 27, 2006. According to the documents in the stipulated record, the employer's MCO sent notice to relator's physician of record that they were unable to process the request because the claim had been disallowed on January 26, 2007. As such, pursuant to his own affidavit, relator knew that his claim had been disallowed in January 2007.

{¶25} Relator did not contact the BWC until April 21, 2008—some 15 months after he allegedly received notice that his claim had been disallowed (pursuant to his affidavit). Relator failed to provide any explanation for this 15-month delay from the time he asserts he actually had notice that his claim had been disallowed. While it may very well be true that relator did not receive notice that his claim had been disallowed, the magistrate finds that the commission did not abuse its discretion in finding that relator was not entitled to relief pursuant to R.C. 4123.522. Relator has failed to present any evidence that the failure was due to cause beyond the control and without the fault or neglect of him or that he did not have actual knowledge of the import of the information contained in the notice. As such, the magistrate finds that the commission did not abuse its discretion in finding that relator did not meet his burden of proof.

{¶26} Based on the foregoing, it is this magistrate's decision that relator has not demonstrated that the commission abused its discretion in denying him relief pursuant to R.C. 4123.522 and relator's request for a writ of mandamus should be denied.

/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).