[Cite as *State ex rel. Internatl. Truck & Engine Corp. v. Indus. Comm.*, 2009-Ohio-2399.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. International Truck and Engine Corporation,	:	
Relator,	:	
v.	:	No. 08AP-491
Industrial Commission of Ohio and Paulette M. Burchnell,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on May 21, 2009

Vorys, Sater, Seymour & Pease, LLP, and *Gina R. Russo,* for relator.

Richard Cordray, Attorney General, and *Joseph C. Mastrangelo,* for respondent Industrial Commission of Ohio.

Law Office of Stanley R. Jurus, and *Joseph R. Sutton,* for respondent Paulette M. Burchnell.

IN MANDAMUS
ON OBJECTION TO MAGISTRATE'S DECISION

BRYANT, J.

{¶1} Relator, International Truck and Engine Corporation, commenced this original action requesting a writ of mandamus that orders respondent Industrial Commission of Ohio to vacate its order awarding permanent total disability compensation to respondent, Paulette M. Burchnell, and to enter an order denying permanent total disability compensation.

I. Procedural History

{¶2} Pursuant to Civ.R. 53 and Section (M), Loc.R. 12 of the Tenth Appellate District, this matter was referred to a magistrate who issued a decision, including findings of fact and conclusions of law, which is appended to this decision. In his decision the magistrate concluded the commission did not abuse its discretion in determining (1) claimant's age of 64 years is a negative vocational factor, (2) claimant's work history is a negative factor that provided her with virtually no skills transferrable to sedentary work, and (3) claimant's industrial injuries and her age excuse her from participating in vocational rehabilitation. Accordingly, the magistrate determined the requested writ should be denied.

II. Objection

{¶3} Relator filed an objection to the magistrate's decision contending claimant failed to present evidence, and the commission failed to determine, whether claimant "properly sought and/or participated in vocational rehabilitation in the *five years* prior to filing" her permanent total disability application. (Emphasis sic. Objection, 2.) Relator initially contends claimant bears the burden to prove or explain why she failed to participate in vocational rehabilitation. Relator asserts the commission, instead of holding

relator to her burden of proof, "erroneously assumed the burden to explain how or why rehabilitation would have been futile." (Objection, 5.)

{¶4} According to R.C. 4123.58(D)(4), a claimant is not to be compensated with permanent total disability benefits when the claimant's inability to engage in sustained remunerative employment is due to the claimant's failure to engage in "educational or rehabilitative efforts to enhance the employee's employability, unless such efforts are determined to be in vain." The commission here determined claimant "would have been 60 or 61 when she would have stabilized [medically] from her last low back surgery on 11/06/2003. Thus[,] it is found that her age for all intents and purposes would have precluded her recently from successfully participating in any type of formal vocational retraining program." (Magistrate's Decision, ¶35.)

{¶5} "In assessing the claimant's vocational potential, the commission has broad discretion to evaluate and interpret the evidence." *State ex rel. Marcum v. Indus. Comm.,* 10th Dist. No. 02AP-633, 2003-Ohio-887, ¶41, citing *State ex rel. Ewart v. Indus. Comm.* (1996), 76 Ohio St.3d 139. Here, the commission had before it claimant's age and her medical history, including the recent low back surgery. Because the necessary facts were within the claimant's file, the commission could evaluate those facts and, within its discretion, determine claimant's age precluded a successful outcome from vocational rehabilitation. Indeed, the commission's conclusion, though not based upon it, is supported in the August 16, 2004 report of claimant's psychologist Lynn M. Farney, who in a report dated August 16, 2004 concluded claimant's age, physical, and psychological disability precluded successful vocational rehabilitation.

{¶6} Contending the magistrate erroneously relied upon *State ex rel. Quarto Mining Co. v. Foreman* (1997), 79 Ohio St.3d 78, relator suggests the most pertinent aspects of *Quarto Mining* were stated within the context of a nonmedical factor analysis. So, too, here the commission's comments about claimant's age and vocational retraining were offered in the context of an analysis of claimant's nonmedical factors. The fact remains that the Supreme Court of Ohio in *Quarto Mining* stated the commission has the prerogative "as exclusive evaluator of disability to conclude that, at age fifty-seven," the claimant's "age was a hindrance, not a help, to his retraining." Id. at 86. Similarly, here, the commission in its discretion could determine claimant's age of 60 or 61 was a hindrance, not a help, to her retraining. Although this court, in many of the cases relator cites, found no abuse of discretion where the commission concluded vocational rehabilitation was necessary, we likewise find no abuse of discretion here where the commission has determined vocational rehabilitation would be a vain act.

{¶7} For the foregoing reasons, relator's objection is overruled.

{¶8} Following independent review pursuant to Civ.R. 53, we find the magistrate has properly determined the pertinent facts and applied the salient law to them. Accordingly, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained in it. In accordance with the magistrate's decision, we deny the requested writ of mandamus.

Objection overruled;
writ denied.

FRENCH, P.J., and TYACK, J., concur.

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APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. International Truck and Engine Corporation,	:	
Relator,	:	
v.	:	No. 08AP-491
Industrial Commission of Ohio and Paulette M. Burchnell,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on February 10, 2009

Vorys, Sater, Seymour & Pease, LLP, and *Gina R. Russo*, for relator.

Richard Cordray, Attorney General, and *Joseph C. Mastrangelo*, for respondent Industrial Commission of Ohio.

Law Office of Stanley R. Jurus, and *Joseph R. Sutton*, for respondent Paulette M. Burchnell.

IN MANDAMUS

{¶9} In this original action, relator, International Truck and Engine Corporation ("ITEC" or "relator"), requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order awarding permanent total disability ("PTD") compensation to respondent Paulette M. Burchnell, and to enter an order denying PTD compensation.

Findings of Fact:

{¶10} 1. Paulette M. Burchnell ("claimant") has five industrial claims arising out of her employment with ITEC.

{¶11} Her April 9, 2001 injury (claim No. 01-815196) is allowed for: "Right wrist tendonitis; right epicondylitis; right shoulder tendonitis; bilateral carpal tunnel syndrome."

{¶12} Her June 25, 1998 injury (claim No. 98-461869) is allowed for: "Right elbow contusion; head contusion; contusion/sprain right hip; contusion/sprain right knee; contusion/sprain right elbow."

{¶13} Her June 3, 1997 injury (claim No. 97-463701) is allowed for: "Acute lumbosacral strain with sciatica; disc herniation L4-5; dysthymia; generalized anxiety disorder."

{¶14} Her June 6, 1989 injury (claim No. L11911-22) is allowed for: "Acute strain left shoulder – girdle muscle."

{¶15} Her October 14, 1986 injury (claim No. OD32583-22) is allowed for: "Bilateral epicondylitis both elbows."

{¶16} 2. In claim No. 97-463701, claimant had several surgeries. On November 30, 1998, claimant underwent "Microlumbar diskectomy, L4-5 on the right."

On November 6, 2003, claimant underwent "Anterior lumbar interbody fusion, L4-5, L5-S1."

{¶17} 3. In claim No. OD32583-22, claimant underwent surgery in May 1992.

{¶18} 4. The record contains a C-84 report from psychologist Lynn M. Farney dated August 16, 2004. In the C-84, Farney certified a period of temporary total disability ("TTD") from March 4, 2004 to an estimated return-to-work date of December 30, 2004.

{¶19} The C-84 form poses the following query: "Is the injured worker a candidate for vocational rehabilitation services focusing on return to work?" In response to the query, Farney checked the "No" box, and explained: "Age and physical and psychological disability precludes successful vocational rehabilitation."

{¶20} 5. On October 18, 2006, claimant filed an application for PTD compensation. In support, claimant submitted a report, dated September 28, 2006, from Patricia Southworth, M.D., stating:

> Paulette Burchnell is under my care for a severe low back injury sustained at work on June 3, 1997 with multiple re-injuries at work. Paulette's claim is also allowed for Neurotic Depression and Generalized Anxiety Disorder. Paulette is limited in all of her activities of daily living as a direct result of her work-related injury. She has severe depression and has been denied treatment for the depression and sleep. Paulette can do things for short periods of time with pain medication but then the next day her activity is severely limited. It is my medical opinion, based upon a reasonable degree of medical certainty, that Paulette Burchnell is permanently and totally disabled as a direct result of her work-related injury for the allowed conditions. * * *

{¶21} 6. Under the "Education" section of the application form, claimant indicates she is a high school graduate. She indicates she has received special training to be a

keypunch operator and that she started employment with ITEC in the year 1971 as a keypunch operator.

{¶22} Among other information sought, the application form poses three questions: (1) "Can you read?" (2) "Can you write?" and (3) "Can you do basic math?" Given a choice of "yes," "no," and "not well," claimant selected the "yes" response for all three queries.

{¶23} The application form asks the applicant to provide information regarding work history. Claimant indicated that she was employed as an "Assembler" beginning April 5, 1971.

{¶24} The application form also asks the applicant to state the last date of employment. Claimant gave October 3, 2001 as the date she last worked.

{¶25} 7. On March 6, 2007, at the commission's request, claimant was examined by James T. Lutz, M.D. Thereafter, Dr. Lutz issued a five-page narrative report in which he opined that claimant "warrants a 51% whole person impairment."

{¶26} 8. On March 6, 2007, Dr. Lutz completed a physical strength rating form. He marked the form to indicate claimant is able to perform "Sedentary Work." Under "Further limitations," Dr. Lutz wrote: "No overhead work and no repetitive use of either upper extremity."

{¶27} 9. On March 12, 2007, at the commission's request, claimant was examined by psychologist Donald J. Tosi, Ph.D. In his narrative report, Dr. Tosi concludes: "The Injured Worker is able to return to work. She has no limitations from a psychological standpoint."

{¶28} 10. On March 22, 2007, Dr. Tosi completed an occupational activity assessment form. Dr. Tosi marked the form to indicate: "This injured worker has no work limitations."

{¶29} 11. In further support of her PTD application, claimant submitted a vocational report dated April 25, 2007 from Molly S. Williams, a vocational consultant. In her report, Williams states:

> * * * [T]he claimant's customary past relevant work as an Assembler, as normally performed within the national economy, Assembler, Motor Vehicle (automobile manufacturing industry) 806, 684-010, is classified as an unskilled job.
>
> * * *
>
> * * * [S]ince the claimant's customary past relevant work as an Assembler, in the truck assembly industry, was of an unskilled nature, the claimant is considered to have no transferability skill(s).

{¶30} 12. Relator submitted a vocational report dated May 11, 2007 from Craig Johnston, Ph.D., who is a vocational consultant. In his report, Dr. Johnston states:

> The following is his [sic] work history based on the information provided and utilizing the Dictionary of Occupational Titles guidelines:
>
> | D.O.T. Code | Occupational Title | Skill Level | Strength |
> |---|---|---|---|
> | 806.684-010 | Assembler, Motor Vehicle | Unskilled | Medium |
> | 203.582-054 | Data Entry Operator | Semiskilled | Sedentary |

{¶31} 13. On November 28, 2007, claimant's PTD application was heard by a staff hearing officer ("SHO"). The hearing was recorded and transcribed for the record.

During the hearing, the following exchange occurred between the hearing officer and claimant's counsel:

> HEARING OFFICER: Has there been any temporary total paid in these claims recently?
>
> * * *
>
> [Claimant's counsel]: * * * [S]he was totally - - awarded temporary total disability from October 4th of 2001 through January 6th of 2005. So we've got a little bit over, I guess, a three year period there where she was awarded temporary total after her last date of work.
>
> Most of that was for the physical allowances, recovery from the surgery. However, there was about a four month period of temporary total based on the psychiatric condition and Dr. Farley and then to your point about treatments, the temporary total was terminated based on a review from Dr. Clary who said that she had reached MMI and no further psychotherapy would be appropriate, so that's when the temporary total stopped.

{¶32} 14. During the hearing, the following exchange occurred between relator's counsel and claimant:

> [Claimant]: I didn't retire in 2001. I retired in April of 2007.
> [Relator's counsel]: Of 2007, okay. I'm sorry. You're right. You stopped working in October of 2001?
>
> [Claimant]: That's when I got hurt.
>
> [Relator's counsel]: Okay. You retired in April of 2007, six years later?
>
> [Claimant]: Yes.
>
> * * *
>
> [Relator's counsel]: Okay. You have not participated in any vocational rehabilitation programs; correct?

[Claimant]: No.

[Relator's counsel]: Since 2001 when you stopped working, have you looked for any other types of employment?

[Claimant]: I haven't been able to.

[Relator's counsel]: Okay. Have you looked for any light-duty positions or anything that you could do that did not require physical exertion?

[Claimant]: I can't see where there's anything out there that I can do. I can't stand, I can't sit, I can't walk.

* * *

[Relator's counsel]: Have you ever worked on a computer?

[Claimant]: No.

[Relator's counsel]: Have you ever done any sort of data entry or anything with some sort of computer or electronic equipment?

[Claimant]: No. I have never used a computer.

[Relator's counsel]: What kind of equipment were you using when you were a key punch operator?

[Claimant]: Just a key punch. That was it.

[Relator's counsel]: When you were working as an assembler for International, how many different positions within the plant or departments did you work?

[Claimant]: How many positions?

[Relator's counsel]: Or departments or different areas of the plant.

[Claimant]: In thirty years?

[Relator's counsel]: Yes. If you can guess for us. Not guess, but if you could estimate.

[Claimant]: How many departments have they got? How many positions have they got?

[Relator's counsel]: Are you telling us that you've worked in pretty much all of them?

[Claimant]: In a lot of them, not every one of them, but, you know, I went from assembler to - - I've done some stocking. That's about it. Whatever they told me to do, that's what I did.

[Relator's counsel]: Besides assembler and stock positions, did you ever hold any other positions with International?

[Claimant]: Like what?

[Relator's counsel]: I'm not sure. Did you hold any other positions that you can recall?

[Claimant's counsel]: She testified that she was a key punch operator.

* * *

[Relator's counsel]: Other than the key punch operator and the assembler and in stock?

[Claimant]: No.

[Relator's counsel]: As an assembler though, just focusing on the assembler, each time you went to a different area, did you learn how to operate different machinery?

[Claimant]: Yes.

[Relator's counsel]: Okay. And each time were you trained on that machinery?

[Claimant]: Yes.

[Relator's counsel]: Did you have a supervisor?

[Claimant]: Well, there was a supervisor, but the supervisors didn't train.

[Relator's counsel]: You were trained by maybe a colleague?

[Claimant]: Yes.

[Relator's counsel]: Did you ever train any other employees?

[Claimant]: Yes.

[Relator's counsel]: About how many employees if you could estimate?

[Claimant]: I have no idea.

[Relator's counsel]: Did you yourself ever supervise any employees?

[Claimant]: No.

[Relator's counsel]: Now, when you did that educational program, that was completed with Springfield Technical School; correct?

[Claimant]: Yes.

[Relator's counsel]: That was to learn how to be a key punch operator?

[Claimant]: Yes.

[Relator's counsel]: How long was that program?

[Claimant]: About three months.

[Relator's counsel]: What did that program consist of?

[Claimant]: Just training, teaching how to use the key punch.
[Relator's counsel]: Okay. And you successfully completed that program?

[Claimant]: Yes.

> [Relator's counsel]: Did you receive some sort of certificate or degree?
>
> [Claimant]: Yes.

{¶33} 15. At the conclusion of the hearing, relator's counsel argued:

> I would submit to you that based upon the Claimant's past work history which has demonstrated that she's able to be trained, she can train other people, she can work with other people, she's able to learn new instructions on different types of machinery, she's able to read, write, do basic math, she reads the newspaper, she's able to train horses in the past, she's capable of at least a sedentary entry level position as suggested by Mr. [sic] Johnson.

{¶34} 16. At the conclusion of the hearing, claimant's counsel argued:

> Finally, with respect to the rehabilitation issue, like I said, the employer contested work hardening, but Dr. Southworth and Dr. [sic] Farley when they had done their C-84s, they both indicated they didn't feel that Ms. Burchnell was a candidate for vocational rehabilitation.
>
> If you look at Farley's C-84 from August of '04, she specifically said that the Claimant's age and physical and psychiatric disability would preclude vocational rehabilitation.
> * * *

{¶35} 17. Following the November 28, 2007 hearing, the SHO issued an order awarding PTD compensation beginning September 28, 2006, the date of Dr. Southworth's report. The SHO's order states:

> The Injured Worker is 64 years old, has a High School educeation [sic], and a work history as a key punch operator, and an assembler in a truck manufacturing plant. She last performed any work on 10/03/2001 when she sustained an exacerbation of her low back injury claim. She has undergone two major low back surgeries, the last occurring on 11/06/2003, which was a fusion procedure. She is right hand dominant. She ambulates with the assistance of a cane.

> Commission orthopedic specialist Dr. Lutz has indicated that the Injured [W]orker has a significant 51 percent impairment based on all of the allowed physical conditions on her claims, and that she would be restricted to performing sedentary work, with no overhead use and no repetitive use of the upper extremities. Commission psychological specialist [Dr.] Tosi has indicated that the Injured Worker has a 19 percent impairment related to the allowed psychological conditions, and that these conditions would not prevent a return to the former position of employment, or otherwise prevent the Injured Worker from performing sustained remunerative employment. Based on the conclusions of Drs. Lutz and Tosi it is found that the Injured Worker has the residual functional capacity to perform sedentary employment, with no overhead use and no repetitive use of the upper extremities.
>
> The Injured [W]orker's current age of 64 is found to be a negative vocational factor. Also, she would have been 60 or 61 when she would have stabilized medially [sic] from her last low back surgery on 11/06/2003. Thus[,] it is found that her age for all intents and purposes would have precluded her recently from successfully participating in any type of formal vocational retraining program. Her High School education is found to be a positive vocational factor, and she indicated on her application and also at hearing that she can read, write, and do basic math. Her work history is viewed as a negative vocational factor, as it consisted almost exclusively as a truck manufacturing plant assembler, which is a medium strength position, which would have provided her with virtually no skills which would be transferable to sedentary work. Her work as a key punch operator is found to be irrelevant, as it occurred approximately 30 years ago, and such work is no longer in existence. [H]er very narrow work experience, all in the same line of work, coupled with her now advancing age, supports a finding that the Injured Worker's non-medical disability factors are not of any positive benefit to her in regard to her ability to obtain and perform any type of sedentary employment. Furthermore, given the fact that her residual functional capacity is actually less than a full range of sedentary work, the Staff Hearing Officer finds that her negative non-medical disability factors

> essentially preclude her from being able to return to sustained remunerative employment.
>
> Therefore, based on the conclusions of Drs. Lutz and Tosi regarding the Injured [W]orker's residual functional capacity, and the above analysis of the Injured Worker's non-medical disability factors, it is found that the Injured Worker is permanently precluded from returning to any type of sustained remunerative employment.
>
> * * *
>
> The start date is based on the report of Dr. Southworth of 09/28/2006.

{¶36} 18. On January 24, 2008, the three-member commission mailed an order denying relator's motion for reconsideration of the SHO's order of November 28, 2007.

{¶37} 19. On June 9, 2008, relator, International Truck and Engine Corporation, filed this mandamus action.

Conclusions of Law:

{¶38} For its threshold medical determination, the commission, through its SHO, relied upon the reports of Drs. Lutz and Tosi to support its finding that the allowed conditions of the industrial claims medically permit sedentary employment with no overhead use and no repetitive use of the upper extremities, which is said to be claimant's "residual functional capacity." See Ohio Adm.Code 4121-3-34(B)(4) for a definition of "residual functional capacity."

{¶39} Relator does not here challenge the reports of Drs. Lutz and Tosi, nor does relator challenge the commission's determination of claimant's residual functional capacity. However, relator does challenge the commission's analysis of the nonmedical factors.

{¶40} Three issues are presented: (1) whether the commission abused its discretion in finding that claimant's age of 64 years is a negative vocational factor; (2) whether the commission abused its discretion in finding that claimant's work history is a negative vocational factor and that her work history has provided her with virtually no skills transferable to sedentary work; and (3) whether the commission abused its discretion in finding that claimant was excused by her industrial injuries and her age from participation in vocational rehabilitation.

{¶41} The magistrate finds: (1) the commission did not abuse its discretion in finding that claimant's age of 64 years is a negative vocational factor; (2) the commission did not abuse its discretion in finding that claimant's work history is a negative factor and that her work history has provided her with virtually no skills transferable to sedentary work; and (3) the commission did not abuse its discretion in finding that claimant was excused by her industrial injuries and her age from participation in vocational rehabilitation.

{¶42} Turning to the first issue, Ohio Adm.Code 4121-3-34 sets forth the commission's rules applicable to adjudication of PTD applications.

{¶43} Ohio Adm.Code 4121-3-34(B) sets forth definitions applicable to the adjudication of PTD applications.

{¶44} Ohio Adm.Code 4121-3-34(B)(3) is captioned "Vocational factors."

{¶45} Ohio Adm.Code 4121-3-34(B)(3)(a) provides the following definition:

> "Age" shall be determined at time of the adjudication of the application for permanent and total disability. In general, age refers to one's chronological age and the extent to which

> one's age affects the ability to adapt to a new work situation and to do work in competition with others.

{¶46} Ohio Adm.Code 4121-3-34(D) provides the commission's guidelines for adjudication of PTD applications.

{¶47} Ohio Adm.Code 4121-3-34(D)(1)(g) provides:

> If, after hearing, the adjudicator determines that there is appropriate evidence which indicates the injured worker's age is the sole cause or primary obstacle which serves as a significant impediment to reemployment, permanent total disability compensation shall be denied. However, a decision based upon age must always involve a case-by-case analysis. The injured worker's age should also be considered in conjunction with other relevant and appropriate aspects of the injured worker's nonmedical profile.

{¶48} Ohio Adm.Code 4121-3-34(D)(2)(b) provides:

> If, after hearing, the adjudicator finds that the injured worker, based on the medical impairment resulting from the allowed conditions is unable to return to the former position of employment but may be able to engage in sustained remunerative employment, the non-medical factors shall be considered by the adjudicator.
>
> The non-medical factors that are to be reviewed are the injured worker's age, education, work record, and all other factors, such as physical, psychological, and sociological, that are contained within the record that might be important to the determination as to whether the injured worker may return to the job market by using past employment skills or those skills which may be reasonably developed. (Vocational factors are defined in paragraph (B) of this rule).

{¶49} In *State ex rel. Speelman v. Indus. Comm.* (1992), 73 Ohio App.3d 757, 763, this court stated:

> The non-medical factors include those that may, in certain instances, be held to constitute causation for the person being unable to engage in substantially remunerative

> employment despite the medical disability from the allowed condition(s). For example, claimant may be disabled at age fifty-five from returning to the former position of employment but, at that time, be capable of obtaining sustained remunerative employment within the medically limiting capabilities that the claimant has, after considering all non-medical factors, including age. Ten or fifteen years may elapse with the physical condition remaining approximately the same. At that time, the age factor may be combined with the disability to disqualify claimant from any sustained remunerative employment. In that event, the Industrial Commission should have the discretion to find that the sole causal factor is the increase in age rather than the allowed disability.

{¶50} In *State ex rel. DeZarn v. Indus. Comm.* (1996), 74 Ohio St.3d 461, 462-463, relying upon a report from Dr. Woolf, the commission denied PTD compensation with the following explanation:

> "The claimant is 71 years old and has a work history as a construction worker, logger and heavy equipment operator. Commission Specialist, Dr. Woolf, has indicated that the claimant has a 27% permanent partial impairment from the allowed conditions in the claim. He further indicated that the true limitation [*sic*] factor on his ability to work was time and the natural progression of aging. Given the relatively small percentage of impairment assigned by Dr. Woolf, the claimant's age is the primary obstacle in his returning to work. It is found that the disability resulting from the allowed conditions of the claim do[es] not permanently preclude a return to any form of sustained remunerative employment."

{¶51} Quoting the above passage from *Speelman*, the *DeZarn* court states:

> *Speelman* makes an outstanding point. Permanent total disability compensation was never intended to compensate a claimant for simply growing old. Therefore, the commission must indeed have the discretion to attribute a claimant's inability to work to age alone and deny compensation where the evidence supports such a conclusion.

> In this case, Dr. Woolf's report is "some evidence" supporting such a finding. Dr. Woolf specifically attributed claimant's inability to work to "time and the natural progression of aging." The commission's denial of permanent total disability compensation was not, therefore, an abuse of discretion.

Id. at 463-464.

{¶52} In *State ex rel. Moss v. Indus. Comm.*, 75 Ohio St.3d 414, 416-417, 1996-Ohio-306, the commission denied PTD compensation to Lillian G. Moss who was 78 years old at the time of her PTD hearing. In upholding the commission's decision, the *Moss* court explained the age factor:

> * * * [W]e recognize the significant impediment that claimant's age presents to her reemployment. Workers' compensation benefits, however, were never intended to compensate claimants for simply growing old.
>
> Age must instead be considered on a case-by-case basis. To effectively do so, the commission must deem any presumptions about age rebuttable. Equally important, age must never be viewed in isolation. A college degree, for example, can do much to ameliorate the effects of advanced age.
>
> [*State ex rel. Pass v. C.S.T. Extraction Co.* (1995), 74 Ohio St.3d 373], *DeZarn* and [*State ex rel. Bryant v. Indus. Comm.* (1996), 74 Ohio St.3d 458] support these propositions. Collectively, these cases establish that there is not an age-ever-at which reemployment is held to be a virtual impossibility as a matter of law. Certainly, it would be remiss to ignore the limitations that age can place on efforts to secure other employment. However, limitation should never automatically translate into prohibition.
>
> Each claimant is different, with different levels of motivation, initiative and resourcefulness. The claimant in *Bryant* is an excellent example of a claimant who was motivated to work well beyond retirement age and was resourceful enough to

> find a job that valued the experience that his advanced age brought.
>
> This underscores the commission's responsibility to affirmatively address the age factor. It is not enough for the commission to just acknowledge claimant's age. It must discuss age in conjunction with the other aspects of the claimant's individual profile that may lessen or magnify age's effects.

{¶53} According to relator, the commission abused its discretion in finding that claimant's age of 64 years is a negative vocational factor. By citing to *DeZarn*, relator seems to initially suggest that the commission found that claimant's age alone rendered her permanently and totally disabled. This suggestion lacks merit.

{¶54} Clearly, the commission did not determine that age alone renders claimant permanently and totally disabled. Nor does any of the relied upon medical evidence even suggest that age alone renders claimant permanently and totally disabled. The commission did not view age in isolation of the other nonmedical factors. Rather, age was considered by the commission in light of its impact on the other nonmedical factors as well as the allowed conditions of the claim.

{¶55} Relator cites to mandamus cases in which the commission appropriately denied PTD compensation to claimants who were much older than the instant claimant. Clearly, those cases do not compel the conclusion that relator seeks here—that it was an abuse of discretion for the commission to find that claimant's age of 64 years is a negative factor.

{¶56} Relator further argues that the commission characterized claimant's "now advancing age" without any medical evidence to support the finding. (Relator's brief, at

8.) This argument misconstrues the very definition of age. Contrary to relator's suggestion, age is not an individualized medical condition that requires medical evidence for its determination. Ohio Adm.Code 4121-3-34(B)(3)(a) makes clear that "age refers to one's chronological age." Moreover, age is to be determined "at time of the adjudication" of the PTD application. Clearly, the determination of the claimant's age at the time of the adjudication requires no medical evidence to support it.

{¶57} As the *Moss* court explains, age should be discussed by the commission in conjunction with the other aspects of the claimant's individual profile that may lessen or magnify ages' effects.

{¶58} Here, the commission weighed the age factor in light of claimant's high school education which was considered to be a positive factor, and her work history which was considered to be a negative vocational factor. It was well within the commission's discretion to determine that the claimant's age of 64 years negatively impacts her reemployment potential given her education and work history.

{¶59} In short, the commission did not abuse it discretion in determining that claimant's age was a negative vocational factor.

{¶60} Turning to the second issue, Ohio Adm.Code 4121-3-34(B)(3)(c)(iv) provides:

> "Transferability of skills" are skills which can be used in other work activities. Transferability will depend upon the similarity of occupational work activities that have been performed by the injured worker. Skills which an individual has obtained through working at past relevant work may qualify individuals for some other type of employment.

{¶61} Ohio Adm.Code 4121-3-34(B)(3)(c)(v) provides:

> "Previous work experience" is to include the injured worker's usual occupation, other past occupations, and the skills and abilities acquired through past employment which demonstrate the type of work the injured worker may be able to perform. Evidence may show that an injured worker has the training or past work experience which enables the injured worker to engage in sustained remunerative employment in another occupation. The relevance and transferability of previous work skills are to be addressed by the adjudicator.

{¶62} The SHO's order of November 28, 2007 states in part:

> * * * Her work history is viewed as a negative vocational factor, as it consisted almost exclusively as a truck manufacturing plant assembler, which is a medium strength position, which would have provided her with virtually no skills which would be transferable to sedentary work. Her work as a key punch operator is found to be irrelevant, as it occurred approximately 30 years ago, and such work is no longer in existence. * * *

{¶63} As previously noted, relator contends that the commission's finding that the work history is a negative vocational factor and that claimant has no transferable skills is an abuse of discretion. The magistrate disagrees.

{¶64} The commission is the expert on the vocational factors. *State ex rel. Jackson v. Indus. Comm.* (1997), 79 Ohio St.3d 266, 271. The commission may credit offered vocational evidence, but expert opinion is not critical or even necessary. Id.

{¶65} Thus, analysis begins here with the observation that the SHO's order does not state reliance upon any of the vocational reports of record or any of the opinions expressed therein. That is, the commission, through its hearing officer, relied in large part upon its own vocational expertise. It was well within the commission's discretion to do so. Id.

{¶66} Relator points out that claimant "had several different assembly positions at International, requiring on-the-job training on different machinery and equipment, and, on occasion, training others." According to relator, "[s]uch on-the-job training, even in semi or unskilled jobs, creates transferable skills." (Relator's brief, at 9.)

{¶67} Relator's assertion that claimant's job experience at ITEC created transferable skills does not make it so. Relator does cite two mandamus cases from this court to support its assertion, but those cases do not at all support the assertion. At best, those cases simply indicate that the commission has the discretion and expertise in determining such matters. The two cases cited are *State ex rel. Tackett v. Ohio Bur. of Workers' Comp.*, Franklin App. No. 05AP-1354, 2007-Ohio-931, and *State ex rel. Williamson v. Indus. Comm.*, Franklin App. No. 06AP-624, 2007-Ohio-2939.

{¶68} Clearly, the transferability of skills analysis was within the commission's discretion. Moreover, even relator's own expert, Dr. Johnston, indicates in his report that the "Assembler Motor Vehicle" job was unskilled. If the job was unskilled, as relator's expert indicates, it is difficult to see how claimant could have developed job skills transferable to other employments.

{¶69} Moreover, it was within the commission's discretion to determine that the job experience as a key punch operator is irrelevant because it occurred approximately 30 years ago, and such work no longer exists. See *State ex rel. Mobley v. Indus. Comm.* (1997), 78 Ohio St.3d 579 (the commission's inference regarding the claimant's 30 year old sales experience in a locomotive firm was within the commission's discretion); *State ex rel. Miller v. Indus. Comm.* (1996), 76 Ohio St.3d 590 (cited by the *Mobley* court).

{¶70} In furtherance of its argument, relator states: "Ms. Burchnell was clearly able to learn new skills through on-the-job training, including, the ability to operate complicated machinery and equipment and train others [sic] employees." (Relator's brief, at 9.)

{¶71} This argument does not actually suggest transferability of skills under Ohio Adm.Code 4121-3-34(B)(3)(c)(iv). However, it does suggest that claimant demonstrated an ability to learn how to run machinery through on-the-job training.

{¶72} In any event, that claimant had the intellectual ability to adapt to new machinery at ITEC does not create transferability of skills to sedentary employment, as relator seems to suggest.

{¶73} Obviously, claimant's high school education indicates an ability to complete the course work and, thus, denotes some intellectual ability. The commission clearly considered this factor and found that claimant's high school education was a positive factor. It was not an abuse of discretion for the commission to fail to point out that claimant's work experience also demonstrates some intellectual ability.

{¶74} The third issue, as previously noted, is whether the commission abused its discretion in finding that claimant was excused by her industrial injuries and her age from participation in vocational rehabilitation. As the commission explained in its order:

> The Injured [W]orker's current age of 64 is found to be a negative vocational factor. Also, she would have been 60 or 61 when she would have stabilized medially [sic] from her last low back surgery on 11/06/2003. Thus[,] it is found that her age for all intents and purposes would have precluded her recently from successfully participating in any type of formal vocational retraining program. * * *

{¶75} *State ex rel. Quarto Mining Co. v. Foreman* (1997), 79 Ohio St.3d 78, is instructive, if not dispositive.

{¶76} In *Quarto Mining*, the commission awarded Glen Foreman PTD compensation. In 1972, Foreman was injured in a roof cave-in in an underground mine while working as a roof bolter for the mining company ("employer"). Foreman sustained serious injuries including the fracture of his distal right tibia and fibula and the dislocation of his right ankle. One year after his industrial accident, his attempt at returning to his former position of employment was unsuccessful. He eventually became a dispatcher for the mining company, but in 1984 suffered a myocardial infarction and never returned to work.

{¶77} In December 1985, Foreman filed an application for PTD compensation which was denied. Thereafter, in January 1989, he filed another application which was also denied. On his third application filed in August 1992, the commission awarded PTD compensation.

{¶78} In a lengthy order, the commission stated:

> "Furthermore, Mr. Foreman's advancing age [57 years] and G.E.D. educational level do not serve as vocational assets in his attempt to acquire new and specialized vocational skills. Specifically, it is determined that Mr. Foreman's age and education indicate that he lacks the useful remaining industrial life, educational ability, and above average intellectual capacity in order for him to acquire the skills necessary for him to obtain a new vocation of a sit-down sedentary nature. * * *"

Id. at 79-80.

{¶79} Subsequently, the employer filed a mandamus action which was ultimately decided in the Supreme Court of Ohio.

{¶80} The *Quarto Mining* court addressed two issues. The first issue was whether the employer waived a retirement issue by not raising it administratively. The second issue was whether the cause should be remanded for further consideration on the basis that the medical reports upon which the commission relied do not constitute some evidence of PTD or the commission failed to adequately explain and/or apply the claimant's nonmedical disability factors.

{¶81} As for the first issue, the *Quarto Mining* court wrote:

> * * * The claimant's burden is to persuade the commission that there is a proximate causal relationship between his work-connected injuries and disability, and to produce medical evidence to this effect. * * * The claimant's burden in this regard does not extend so far as to require him to raise, and then eliminate, other possible causes of his disability. This is not a case in which the cause remains unexplained, as in slip-and-fall cases. Here, the claimant has produced direct medical evidence linking his disability with the injuries allowed in the claim. This evidence is sufficient to establish a prima facie causal connection. The burden should then properly fall upon the employer to raise and produce evidence on its claim that other circumstances independent of the claimant's allowed conditions caused him to abandon the job market.

Id. at 83-84.

{¶82} As for the second issue, the *Quarto Mining* court said:

> * * * It is entirely within the commission's prerogative as exclusive evaluator of disability to conclude that, at age fifty-seven, claimant was old, not young, and that his age was a hindrance, not a help, to his retraining. Thus, the very fact of claimant's advancing age may serve to support the granting

> of an application for PTD compensation after an initial denial.
> * * *

Id. at 86.

{¶83} Here, relator points out that the Supreme Court of Ohio has repeatedly held that a "certain accountability" be demanded of the claimant as to any effort to enhance reemployment prospects. *State ex rel. Bowling v. Natl. Can Corp.* (1996), 77 Ohio St.3d 148, 153.

{¶84} In *State ex rel. B.F. Goodrich Co. v. Indus. Comm.* (1995), 73 Ohio St.3d 525, 529, the court stated:

> The commission does not, nor should it, have the authority to force a claimant to participate in rehabilitation services. However, we are disturbed by the prospect that claimant may have simply decided to forego retraining opportunities that could enhance re-employment opportunities. An award of permanent total disability compensation should be reserved for the most severely disabled workers and should be allowed only when there is no possibility for re-employment.

{¶85} In *State ex rel. Wilson v. Indus. Comm.* (1997), 80 Ohio St.3d 250, 253-254, the court states:

> We view permanent total disability compensation as compensation of last resort, to be awarded only when all reasonable avenues of accomplishing a return to sustained remunerative employment have failed. As such, it is not unreasonable to expect a claimant to participate in return-to-work efforts to the best of his or her abilities or to take the initiative to improve reemployment potential. While extenuating circumstances can excuse a claimant's nonparticipation in reeducation or retraining efforts, claimants should no longer assume that a participatory role, or lack thereof, will go unscrutinized.

{¶86} Clearly, it was within the commission's discretion to determine that at age 60 or 61 when claimant would have stabilized medically from her last low back surgery, she was precluded from successfully participating in any type of formal vocational retraining. *Quarto Mining*.

{¶87} Thus, the commission did hold claimant accountable for her admitted failure to participate in any vocational retraining following her November 6, 2003 low back surgery, but the commission found that any such participation would have been unsuccessful. This was a decision within the sound discretion of the commission. Id.

{¶88} Relator further suggests that the commission improperly shifted the burden of proof in rendering its determination. Relator's suggestion lacks merit. Id.

{¶89} 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).