[Cite as *State ex rel. Walter v. Indus. Comm.*, 2009-Ohio-5974.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Allen Walter,	:	
Relator,	:	
v.	:	No. 09AP-225
Industrial Commission of Ohio and Kevin Leach Custom Carpentry,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on November 12, 2009

Harris & Burgin, L.P.A., and *Jeffrey W. Harris*, for relator.

Richard Cordray, Attorney General, and *John R. Smart*, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

BROWN, J.

{¶1} Relator, Allen Walter, 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 that denied relator's permanent total disability ("PTD") application, and ordering the commission to either grant him PTD compensation pursuant

to *State ex rel. Gay v. Mihm*, 68 Ohio St.3d 315, 1994-Ohio-296, or issue a new order demonstrating the commission's consideration of relator's vocational rehabilitation efforts.

{¶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, which is appended to this decision, including findings of fact and conclusions of law, and recommended that this court deny relator's request for a writ of mandamus. Relator has filed objections to the magistrate's decision.

{¶3} Relator's first objection argues that the trial court did not comply with *State ex rel. Wilson v. Indus. Comm.* (1997), 80 Ohio St.3d 250, when it issued an order that failed to discuss relator's efforts at vocational rehabilitation in determining whether he is capable of sustained remunerative employment. Relator asserts that the commission's failure to make even one reference to his vocational rehabilitation efforts constitutes an abuse of discretion per *Wilson*. Relator contends *Wilson* requires that any vocational rehabilitation efforts made by an injured worker "must" be considered by the commission in its determination of permanent total disability. Relator argues that *Wilson* places vocational rehabilitation efforts on equal status with consideration of age, education, and work history. In support of this contention, relator cites the portion of *Wilson* in which the court stated, "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." Id. at 253-54.

{¶4} We disagree with relator's reading of *Wilson*. The above quoted passage from *Wilson* does not indicate that the vocational rehabilitation efforts made by an injured worker "must" be considered. The passage merely forewarns claimants that courts may

look at rehabilitation efforts and should not assume rehabilitation efforts will not be considered by the court. We can find no authority to support relator's interpretation of *Wilson*, and relator cites none. This court has before interpreted *Wilson* as holding that a claimant's failure to undergo rehabilitation or retraining "can be" a factor for the commission's consideration in a PTD adjudication. See, e.g., *State ex rel. Kay v. Indus. Comm.*, 10th Dist. No. 08AP-31, 2009-Ohio-326, ¶36 (the Supreme Court of Ohio has repeatedly held that a claimant's failure to undergo rehabilitation or retraining "can be" a factor for the commission's consideration in a PTD adjudication); *State ex rel. Felty v. Gen. Motors*, 10th Dist. No. 08AP-156, 2008-Ohio-5694, ¶25 (it is undisputed that the commission "can" demand accountability of claimants who, despite time and medical ability to do so, never tried to further their education or learn new skills); *State ex rel. McGill v. Clark Bros. Felt Co., Inc.*, 10th Dist. No. 07AP-138, 2007-Ohio-5014, ¶24 (failure to undergo retraining "can" be a factor); *State ex rel. Slater v. Indus. Comm.*, 10th Dist. No. 06AP-1137, 2007-Ohio-4413, ¶27 (failure to undergo retraining "can" be a factor). The Supreme Court has also reiterated that the claimant's failure to undergo rehabilitation "can be" a factor in considering PTD. See *State ex rel. Paraskevopoulos v. Indus. Comm.* (1998), 83 Ohio St.3d 189, 193 (stating that a claimant's failure to make reasonable efforts to enhance his/her rehabilitation re-employment potential "can be" a factor in a PTD determination). We fail to find any authority for the proposition that a court or the commission must consider such factor or necessarily reference evidence of such in its decision. Therefore, this argument is without merit.

{¶5} Relator also asserts sub-arguments under his first objection. Relator first argues that the magistrate erred by finding that relator never received any services that

constituted vocational rehabilitation. Even though we have found the commission was not necessarily required to reference relator's rehabilitation efforts, we will briefly address this argument. The magistrate found that relator never actually received any vocational rehabilitative services. Relator maintains that he spent over a year pursuing and participating in vocational rehabilitation programs. Relator contends the magistrate incorrectly assumed that vocational rehabilitation is only comprised of job training or job searches and does not include preliminary steps, like meetings with vocational advisors, discussions of potential career paths, testing, and undergoing functional capacity evaluations. Relator asserts that he participated in these types of services, but the Bureau of Workers' Compensation's ("BWC") vocational rehabilitation program determined that participation in job searches or training would not be sufficient to return him to the workforce.

{¶6} We agree that there are certain situations in which a vocational rehabilitation program may determine that job training or education would be of no benefit or the claimant is physically unable to undergo training or education. It is also apparent that relator did have meetings and discussions with vocational rehabilitation services here. However, we fail to find anywhere in the record that specifically indicates that the BWC's vocational rehabilitation program determined it could not help relator return to the workforce and, thus, excused relator from undergoing training or education. The BWC closed relator's vocational rehabilitation file for "[l]ack of plan potential." It is wholly unclear from the record what this phrase means. Neither party cites any authority to support its interpretation of this phrase. Relator would suggest that "[l]ack of plan potential" means that vocational rehabilitation would be of no benefit to him, while the commission admits

that it does not know what it means. Adding to the mystery of whether this phrase conclusively determines that relator lacks the ability to undergo training and education is the fact that relator's file had been closed before while additional diagnostic testing was conducted and then reopened; thus, it is unclear whether the file could have been reopened again even after being closed for "[l]ack of plan potential." Furthermore, from the record, it is apparent that vocational rehabilitation services had been recommended, and there is nothing to illuminate why BWC would have believed relator was no longer capable of training and education. Nevertheless, as to relator's original argument that his meetings and discussions with vocational rehabilitation services constituted rehabilitation efforts even though he never eventually underwent training or education, such is immaterial, given our other findings.

{¶7} Relator also contends the magistrate erred when she created a justification for the commission's failure to discuss his vocational rehabilitation efforts that did not exist in the commission's order. Specifically, relator contends the magistrate endeavored to explain why the commission did not address his rehabilitation efforts by finding that the commission must have ignored those records because they were insufficient, which amounted to an improper weighing of the evidence. We disagree that the magistrate weighed any evidence or found it insufficient. The magistrate simply found there was no evidence that relator could not benefit from vocational rehabilitation and relator never received any rehabilitation services. The magistrate went on to find that, because this evidence did not contradict any of the commission's findings, the commission did not have to address the rehabilitation efforts evidence in its decision. By this finding, the magistrate was merely providing the reason why the commission was not required to

address the vocational rehabilitation efforts and did not engage in any weighing of the evidence. Thus, this argument is without merit. For the above reasons, relator's first objection is overruled.

{¶8} Relator argues in his second objection that the magistrate erred by finding the commission was not required to accept the finding by the BWC that vocational rehabilitation was not feasible. In this argument, relator relies upon his interpretation that the BWC's order closing his rehabilitation file based upon the "[l]ack of plan potential" meant that the BWC had determined that, despite its best efforts, it could not provide vocational rehabilitation services that would allow relator to return to work. Again, there is no evidence in the record as to what "[l]ack of plan potential" means, and we cannot on faith equate it with a conclusive finding that relator was permanently and totally disabled. Outside of this vague phrase, there is nothing in the record that indicates the BWC found that relator was not a feasible candidate for rehabilitation or that relator would be unable to obtain employment.

{¶9} Nevertheless, relator asserts that the BWC's finding that he was incapable of rehabilitation was binding upon the commission. As pointed out by the commission, even if "[l]ack of plan potential" meant relator was not capable of rehabilitation, the commission is not bound by any BWC determination. It has been held that the commission is the sole evaluator of the non-medical disability factors, and the commission may reject any or all vocational reports. See *State ex rel. Ewart v. Indus. Comm.*, 76 Ohio St.3d 139, 1996-Ohio-316. The commission is considered to be the expert on disability. *State ex rel. Jackson v. Indus. Comm.,* 79 Ohio St.3d 266, 1997-Ohio-152. To bind the commission to the evaluator's rehabilitation conclusions would

make the rehabilitation division, not the commission, the ultimate evaluator of disability, contrary to *State ex rel. Stephenson v. Indus. Comm.* (1987), 31 Ohio St.3d 167. *State ex rel. Singleton v. Indus. Comm.*, 71 Ohio St.3d 117, 1994-Ohio-188. Therefore, relator's second objection is overruled.

{¶10} After an examination of the magistrate's decision, an independent review of the evidence, pursuant to Civ.R. 53, and due consideration of relator's objections, we overrule relator's objections. Accordingly, we adopt the magistrate's decision as our own with regard to the findings of fact and conclusions of law, and we deny relator's request for a writ of mandamus.

Objections overruled; writ of mandamus denied.

SADLER and TYACK, JJ., concur.

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APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Allen Walter,	:	
Relator,	:	
v.	:	No. 09AP-225
Industrial Commission of Ohio and Kevin Leach Custom Carpentry,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on July 29, 2009

Harris & Burgin, L.P.A., and *Jeffrey W. Harris*, for relator.

Richard Cordray, Attorney General, and *Rema A. Ina*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶11} Relator, Allen Walter, 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 his application for permanent total disability ("PTD") compensation and ordering the commission to either grant him PTD compensation pursuant to *State ex rel. Gay v. Mihm* (1994), 68 Ohio St.3d 315, or issue a

new order demonstrating the commission's consideration of relator's vocational rehabilitation efforts.

Findings of Fact:

{¶12} 1. Relator sustained a work-related injury on March 15, 2006 and his claim has been allowed for the following conditions: "abrasion bilateral elbow; fracture lumbar vertebra; fracture T11-12; kyphosis T12-L1; sprain left shoulder/arm."

{¶13} 2. Relator received temporary total disability ("TTD") compensation through March 31, 2008.

{¶14} 3. Relator filed his application for PTD compensation on April 2, 2008. In support, relator submitted the March 6, 2008 office note of his treating physician, Michael T. Rohmiller, M.D., who opined that, in the event relator's efforts at work hardening and vocational rehabilitation are unsuccessful, relator would be permanently disabled and unable to work in any capacity.

{¶15} 4. The record also contains the March 7, 2008 report of Douglas C. Gula, D.O., who opined that relator's allowed conditions had reached maximum medical improvement ("MMI"), that he was unable to return to his former position of employment, but was able to perform sedentary to light-duty work and possibly medium-duty work depending on the activities required. Dr. Gula indicated relator should lift less than 25 pounds, push and pull less than 50 pounds, and lift or carry less than 20 pounds. Dr. Gula also stated that relator would need to alternate between sitting, standing, and walking and that he should be careful with repetitive bending.

{¶16} 5. The record contains the September 17, 2007 report of Roger V. Meyer, M.D., who opined that relator's allowed conditions had reached MMI, he was unable to

return to his former position of employment, but that he could perform sedentary to light-duty work.

{¶17} 6. The record also contains the November 15, 2007 report of Judith M. Wachendorf, M.D., who also opined that relator was capable of returning to work in a sedentary to light-duty capacity.

{¶18} 7. Relator was examined by James T. Lutz, M.D. on May 13, 2008. Dr. Lutz concluded that relator's allowed conditions had reached MMI, assessed a 24 percent whole person impairment and concluded that relator was capable of performing at a sedentary work level.

{¶19} 8. The record also contains a significant amount of vocational evidence. An initial assessment interview was performed on April 25, 2007. At that time, it was recommended that relator check with his physician of record ("POR") to see whether or not Dr. Rohmiller supported relator's participation in vocational rehabilitation services. On April 30, 2007, Dr. Rohmiller indicated that he wanted a functional capacity evaluation ("FCE") completed before he decided whether relator could participate in vocational rehabilitation services.

{¶20} 9. On May 16, 2007, relator's vocational rehabilitation file was closed after relator was seen by a nurse practitioner who indicated that relator would be a good candidate for epidural steroid injections to control his continued low back pain. Ultimately, relator decided not to have the injections, but was referred for neurological consultation. As such, the FCE and the vocational evaluation were cancelled and relator's file was closed.

{¶21} 10. Another initial assessment interview was conducted on August 29, 2007. At that time, relator refused to sign the vocational rehabilitation agreement so that he could consider his options. According to the August 29, 2007 summary, relator's POR wanted relator to receive a TENS unit and a lumbar corset before beginning with job search services. In conclusion, it was indicated that, if relator signed the vocational rehabilitation agreement, he would be provided a vocational evaluation pre-plan, and placed in an Individual Vocational Rehabilitation Plan ("IVRP") for Job Search Skills Training ("JSST") and Job Search, Job Development/Placement Services ("JSJD/PS") and his targeted job goal would be determined.

{¶22} 11. In a September 28, 2007 memo, it was indicated that relator signed the vocational rehabilitation agreement on September 14, 2007 and, at that time, the case manager attempted to schedule the vocational evaluation. However, because relator was out of town for several weeks, the vocational evaluation was eventually scheduled for October 2, 2007. An extension of relator's pre-plan services for an additional week through October 14, 2007 followed by relator's placement in job search services was approved. The case manager recommended that, following the vocational evaluation, a determination of targeted job goals and the implementation of the original vocational rehabilitation plan to include JSST three times a week for three weeks followed by a JSJD/PS three times a week for four weeks was indicated.

{¶23} 12. On October 10, 2007, relator's POR was again contacted regarding relator's participation in rehabilitation services. Relator's POR approved the IVRP. On October 16, 2007, the case manager was advised that relator did not sign the IVRP, but that he would return with the document at the next scheduled meeting on October 23,

2007. On October 22, 2007, a conference call was coordinated with relator. At that time, the case manager was advised that relator had filed a C-86 motion seeking to add the additional conditions of "fracture, dorsal vetebra, tear L-4-5 and kyphosis" to his claim. As such, relator's rehabilitation file was placed in Medical Interrupt for two weeks from October 24 through November 6, 2007. On November 9, 2007, it was determined that relator's file would be placed on an additional two weeks of Medical Interrupt status through November 22, 2007.

{¶24} 13. On November 6, 2007, Dr. Rohmiller indicated that relator was capable of participating in the vocational rehabilitation services. However, when the Ohio Bureau of Workers' Compensation ("BWC") received a C-9 from relator's POR requesting an EMG, it was recommended that relator's vocational rehabilitation file be closed due to non-feasibility while additional diagnostic testing was conducted. Relator's file was closed effective November 20, 2007.

{¶25} 14. On January 24, 2008, Dr. Rohmiller completed a C-9 seeking vocational rehabilitation and job search for relator.

{¶26} 15. Relator saw Dr. Rohmiller on March 6, 2008 and his office note provides the following information:

> Mr. Walter returns today in follow-up. Apparently, since I last saw him, there have been some holdups with his attorney trying to get some other items amended to his claim, so he did not go through vocational rehab, a job search, or any sort of work conditioning.

{¶27} Dr. Rohmiller remained supportive of relator's vocational rehabilitation efforts.

{¶28} 16. On March 10, 2008, relator's case manager e-mailed the disability management coordinator:

> I met with Mr. Walter and his POR on 3-6-08. Mr. Walter reviewed the 10-07 voc eval while in the waiting room and agreed with employment goals of assembly operator and sorter 1 & 2. Labor market information for assembly operator has 11% change in status from 2004 to 2014 with an annual number of 500 openings in Ohio and a 3% change with 310 annual openings in Indiana. Labor market information for sorter 1 & 2 has an average number of 700 openings due to growth in Ohio and 420 in Indiana. Additionally, Mr. Walter wanted carpenter assistant added to his job goal stating he had several contacts in this field and hoped one of these contacts would accommodate him.
>
> Dr. Rohmiller did not think that a factory job is realistic for Mr. Walter. It should be noted however that he is supportive of Mr. Walter attempting to RTW in one of these jobs. Dr. Rohmiller suggested Mr. Walter return to work part time. Dr. Rohmiller updated Mr. Walter's medco 14 to part time work only with restrictions set forth by 2007 FCE. Dr. Rohmiller is aware of Mr. Walter's application for SSDI. The POR continues to recommend work conditioning followed by job placement and job search. He does not believe that Mr. Walter will realistically return to work but wanted it understood that he is supportive of Mr. Walter's intentions and therefore his continued participation in voc rehab.
>
> Mr. Walter continues to report pain and states his pain medication is no longer effective. He also reports difficulty sleeping. Dr. Rohmiller referred him to the doctor who is prescribing the medication.
>
> Dr. Rohmiller stated that he would dictate his report and have it out to me later that day, but I have not yet received it. At this point I have some concerns about feasibility. Mr. Walter reports that he wants to RTW and therefore has Dr. Rohmiller's continued support. I have recommendations for work conditioning and three job goals. What are your thought[s] regarding plan development?

{¶29} That same day, the disability management coordinator responded and indicated that she would like to read Dr. Rohmiller's office notes before determining whether or not vocational rehabilitation services should continue to be offered.

{¶30} 17. Thereafter, on March 17, 2008, relator's vocational rehabilitation file was closed for "[l]ack of plan potential."

{¶31} 18. Relator's application for PTD compensation was heard before a staff hearing officer ("SHO") on October 3, 2008 and was denied. The SHO relied on the reports of Drs. Gula, Meyer and Lutz and concluded that relator's allowed conditions had reached MMI. The SHO relied on that same medical evidence, as well as the report of Dr. Wachendorf, and concluded that relator retained the functional capacity to perform sustained remunerative employment. Thereafter, the SHO considered the nonmedical disability factors. Specifically, the SHO found that relator's age of 56 years was a mild barrier to reemployment. Further, the SHO noted that relator had a ninth grade education, could read, write, and perform basic math. The SHO concluded that relator's education was limited. Although indicating that a limited education could constitute a barrier to re-employment, the SHO concluded that the fact that relator had obtained and performed skilled employment as a carpenter for 38 years compensated for his limited education. As such, the SHO concluded that relator's education history was neither a positive nor negative vocational asset. Lastly, with regard to relator's employment, the SHO stated:

> * * * At hearing, the injured worker testified that he has acquired the skill to build houses from start to finish. Further, the injured worker testified that he has previously supervised two to four people, understands building diagrams and schematics and can read blue prints and utility diagrams.

> Importantly, the injured worker's work history demonstrates that the injured worker has the ability to learn, from on the job or short term training, how to perform each of these tasks.
>
> Accordingly, the Staff Hearing Officer finds that the injured worker has the transferable skills, such as the ability to learn from on the job or short term training, supervise coworkers and read and understand blueprints and building schematics, necessary to perform sustained remunerative employment.
>
> Therefore, the Staff Hearing Officer finds that the injured worker's work history constitutes a positive vocational asset which enhances the injured worker's ability to gain re-employment.

{¶32} The SHO concluded that when relator's nonmedical disability factors were considered in conjunction with his impairment, relator retained the functional capacity to perform sustained remunerative employment and was not permanently and totally disabled.

{¶33} 19. Relator sought reconsideration arguing that, inasmuch as the BWC found him incapable of retraining, the SHO should have concluded that he was permanently and totally disabled.

{¶34} 20. In an order mailed January 22, 2009, relator's request for reconsideration was denied.

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

Conclusions of Law:

{¶36} 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.

{¶37} The relevant inquiry in a determination of permanent total disability is the claimant's ability to do any sustained remunerative employment. *State ex rel. Domjancic v. Indus. Comm.* (1994), 69 Ohio St.3d 693. Generally, in making this determination, the commission must consider not only medical impairments, but also the claimant's age, education, work record and other relevant nonmedical factors. *State ex rel. Stephenson v. Indus. Comm.* (1987), 31 Ohio St.3d 167. Thus, a claimant's medical capacity to work is not dispositive if the claimant's nonmedical factors foreclose employability. *State ex rel. Gay v. Mihm* (1994), 68 Ohio St.3d 315. The commission must also specify in its order what evidence has been relied upon and briefly explain the reasoning for its decision. *State ex rel. Noll v. Indus. Comm*. (1991), 57 Ohio St.3d 203.

{¶38} For the reasons that follow, it is this magistrate's conclusion that this court should deny relator's request for a writ of mandamus.

{¶39} Relator's entire focus is on his assertion that, in spite of the fact that he actively pursued and participated in vocational rehabilitation, the BWC ultimately

concluded that vocational retraining was not feasible. Because the BWC closed his rehabilitation file, relator contends that the commission, in reviewing that evidence, should have likewise concluded that he was not capable of being retrained for other employment and was permanently and totally disabled.

{¶40} As indicated in the findings of fact, relator did engage in vocational rehabilitation services through the BWC and an IVRP was prepared in order to help him become reemployed. That plan was to include job search training and other services. Because Dr. Rohmiller wanted relator to undergo an FCE, relator's file was closed in May 2007.

{¶41} His rehabilitation file was reopened in August 2007; however, several delays followed. First, relator refused to sign the vocational rehabilitation agreement. Then, Dr. Rohmiller wanted relator to obtain a TENS unit and a lumbar corset before he began job search services. Relator was out of town for several weeks and eventually signed the vocational evaluation agreement on September 14, 2007. At relator's request, his vocational evaluation was then scheduled for October 2, 2007. Thereafter, on October 24, 2007, an IVRP was prepared for relator. The plan included JSST three times a week for three weeks (10/17/07 – 11/4/07) followed by JSJD/PS three times a week for four weeks (10/29/07 – 11/25/07) which would include 15 weekly face-to-face contacts with employers and the payment of living maintenance through November 25, 2007. However, before relator began engaging in any of the services, the BWC was informed that relator was seeking to have his claim allowed for additional conditions. As such, his rehabilitation file was placed in Medical Interrupt status for two weeks from October 24 through November 6, 2007. Medical Interrupt was continued for another two weeks,

through November 22, 2007. Because Dr. Rohmiller then sought additional diagnostic testing, relator's rehabilitation file was again closed on November 20, 2007.

{¶42} Relator's next efforts at vocational rehabilitation began on January 24, 2008, when Dr. Rohmiller submitted a C-9 requesting vocational rehabilitation and job search services. Thereafter, in an office note dated March 6, 2008, Dr. Rohmiller confirmed that relator had yet to go through with any vocational rehabilitation, job search, or any sort of work conditioning. Dr. Rohmiller opined that if these services were unsuccessful, then relator was permanently and totally disabled. Ultimately, relator's file was closed for the last time on March 17, 2008 due to a lack of plan potential.

{¶43} While relator did initiate contact with the BWC for vocational rehabilitation, for various reasons, he never actually engaged in any of the recommended services. As such, in closing his vocational rehabilitation file, the BWC never made a finding that relator was not a feasible candidate for rehabilitation, nor did the BWC make a finding that relator would be unable to secure any employment.

{¶44} As above indicated, the vocational evidence submitted by relator does not support a finding that the BWC determined that he was not a candidate for vocational rehabilitation. Even if it had, the commission would not have been bound to accept the findings of the BWC because the commission is the ultimate evaluator of the nonmedical disability factors.

{¶45} Relator asserts that, pursuant to *State ex rel. Wilson v. Indus. Comm.* (1997), 80 Ohio St.3d 250, and the cases which followed, the commission must consider and address his efforts at vocational rehabilitation. Because the evidence establishes that he pursued every avenue available to him between April 2007 and March 2008,

relator asserts that the commission was required to address this evidence and explain the rationale for finding instead that he benefit from short-term training.

{¶46} As stated previously, none of the vocational evidence relator submitted establishes that he cannot actually benefit from participating in vocational rehabilitation. Relator never actually received any services. The commission does not have to explain why this evidence was insufficient since it did not contradict the commission's own conclusions.

{¶47} Having disposed of relator's argument, the magistrate notes that relator does not challenge the commission's analysis of the nonmedical disability factors; instead, he challenges the commission's ultimate finding in light of his alleged inability to be retrained. In the present case, the commission found that relator's age of 56 was not a barrier to reemployment and that his work history outweighed his limited education. The magistrate finds that the commission's determination does not constitute an abuse of discretion and further that the commission adequately explained its reasoning. As such, relator has not demonstrated that the commission abused its discretion.

{¶48} Based on the foregoing, it is this magistrate's conclusion that relator has not demonstrated that the commission abused its discretion in denying him PTD compensation and his 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).

[Cite as *State ex rel. Walter v. Indus. Comm.*, 2009-Ohio-5974.]