[Cite as *State ex rel. Tisher v. Indus. Comm.* , 2009-Ohio-6194.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Karin A. Tisher,	:	
Relator,	:	
v.	:	No. 09AP-59
Industrial Commission of Ohio and Kmart Corporation,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on November 24, 2009

Urban Co., L.P.A., and *Anthony P. Christine*, for relator.

Richard Cordray, Attorney General, and *Andrew J. Alatis*, for respondent Industrial Commission of Ohio.

Taft Stettinius & Hollister LLP, Timothy L. Zix and *Meredith L. Ullman*, for respondent Kmart Corporation.

IN MANDAMUS
ON OBJECTIONS TO MAGISTRATE'S DECISION

TYACK, J.

{¶1} Karin A. Tisher filed this action in mandamus, seeking a writ to compel the Industrial Commission of Ohio ("commission") to vacate its orders terminating her wage

loss compensation as of June 23, 2008 and further to compel the commission to enter an order denying Kmart Corporation's ("Kmart") motion to terminate the compensation.

{¶2} In accord with Loc.R. 12, the case was referred to a magistrate to conduct appropriate proceedings. The parties stipulated the pertinent evidence and filed briefs. The magistrate then issued a magistrate's decision which contains detailed findings of fact and conclusions of law, which is appended to this decision. The magistrate's decision includes a recommendation that we deny the requested relief.

{¶3} Counsel for Tisher has filed objections to the magistrate's decision. Counsel for the commission has filed a memorandum in response. Counsel for Kmart Corporation has filed a memorandum in response. The case is now before the court for a full independent review.

{¶4} Tisher was exposed to fumes generated by a wax stripper being used at Kmart. She felt she was suffering breathing problems and other problems. She filed a workers' compensation claim which was resisted by Kmart, a self-insured employer. Ultimately, the claim was recognized for "hyper-reactive airway disease and induced asthma-industrial."

{¶5} Tisher received temporary total disability ("TTD") compensation until her condition was found to have reached maximum medical improvement ("MMI"). She then applied for and was paid R.C. 4123.56(B) wage loss compensation.

{¶6} Kmart filed a motion seeking to terminate the wage loss compensation, arguing that Tisher could return to her former position of employment. A district hearing

officer agreed. Two staff hearing officers also agreed and a majority of the commission voted not to provide additional review.

{¶7} The first issue, both before the commission and before us, is whether the medical report upon which the hearing officer relied could constitute some evidence to justify terminating the wage loss compensation.

{¶8} The report in question was generated by Ira J. Ungar, M.D., who examined Tisher at Kmart's request. Dr. Ungar included in his report the following comment:

> Ms. Tisher was exposed to a commercial wax stripper, which is used on a daily basis in 1,000s of businesses around the country. If this wax stripper truly represented a significant lung irritant, it could not be on the market. Ms. Tisher may, indeed, have some unique sensitivity to fumes, although she states she does not use any special household chemicals in her own home.

The comment has no basis in medical fact, as demonstrated by the significant number of products sold for years although the products contained asbestos. If this comment had any impact on the decision of the hearing officers, the hearing officers were wrong to be influenced.

{¶9} Dr. Ungar also reported that between December 2003 and 2004, pulmonary function tests and a methacholine challenge test were performed revealing no evidence of hyperactive airway disease. Dr. Ungar reported that this, in itself, should suggest that Tisher's ongoing complaints were completely unrelated to her exposure to the fumes from the wax stripper.

{¶10} However, the reports of Adi A. Gerblich, M.D., indicated that residual symptomology existed, namely a mild obstructive ventilatory defect which was reported as potentially secondary to fume exposure.

{¶11} Further, Dr. Ungar repeatedly refers to a single allowed condition, apparently hyperactive airway disease. He makes no mention in the body of his report of the second condition, "induced asthma—industrial." He even criticized the medication Tisher takes, including a common asthma treatment. Dr. Ungar addressed the issues of wage loss by reporting:

> There have been no documented physical exam findings, or findings on objective diagnostic tests that would suggest that even considering the allowed condition in this claim that Ms. Tisher would not be capable of return to work at her previous level of employment without restrictions, if she so chooses. * * *.

{¶12} Again, the report references a single allowed condition only. Also, the report disregards the fact that when she was injured, Tisher was employed doing clerical work in the transportation department at Kmart. Her job basically involved computer work. After she was injured, Kmart transferred her to a position as a case packer, which was significantly more physically demanding. Dr. Ungar does not indicate whether Tisher was capable of returning to the clerical position or was now capable of handling the position of case packer for the first time.

{¶13} This vagueness in Dr. Ungar's report led to the first staff hearing officer's ("SHO") finding that Tisher was medically able to return to her former position of employment without restrictions. The SHO did not identify which position of employment.

Nothing in the record before us indicates that Kmart ever offered Tisher the option of returning to the clerical position.

{¶14} In short, Dr. Ungar's report is not sufficiently clear and reliable so as to constitute some evidence that Tisher can perform the physically demanding work assigned to her after her injury.

{¶15} We therefore sustain the objections to the magistrate's decision. We adopt the findings of fact in the magistrate's decision, but not the conclusions of law. We grant a writ of mandamus compelling the commission to vacate its order terminating wage loss compensation for Tisher and compelling the commission to conduct further proceedings without relying on the report of Dr. Ungar to determine her entitlement to the compensation.

Objections sustained;
writ of mandamus granted.

KLINE, J., concurs.
SADLER, J., dissents.

KLINE, J., of the Fourth Appellate District, sitting by assignment in the Tenth Appellate District.

_____

SADLER, J., dissenting.

{¶16} For the following reasons, I respectfully dissent.

{¶17} Though Dr. Ungar's report contains several inappropriate statements, including the comment reprinted in paragraph eight of the majority opinion, I agree with the magistrate's conclusion that the report constitutes some evidence to support the commission's termination of relator's wage loss.

{¶18} At the outset of his report, Dr. Ungar recognized both of relator's allowed conditions. Dr. Ungar clearly recognizes both allowed conditions in the claim and recognizes that the mechanism of injury was exposure to irritants. Outlining all of the allowed conditions at the outset of a report substantiates the physician's awareness of what the claimant's recognized conditions were. *State ex rel. Middlesworth v. Regal Ware, Inc*., 93 Ohio St.3d 214, 216, 2001-Ohio-1331. It is true that Dr. Ungar characterizes the chemicals to which relator was exposed as "nontoxic"[1] but he also acknowledges that "Ms. Tisher may, indeed, have some unique sensitivity to fumes." Id. at 3. Dr. Ungar does not reject the notion that relator's allowed conditions were causally related to a workplace exposure.

{¶19} Dr. Ungar also listed all of the medical records that he had reviewed and specified the findings in each that related to relator's allowed conditions. He then detailed his own findings upon his physical examination of relator. He reprinted the questions that had been posed to him, and provided his answers to each.

{¶20} The first question was, "Do you feel claimant's current complaints are a direct and proximate result of the 06/21/03 industrial incident or due to other non-related factors?" This question specifically solicited Dr. Ungar's opinion as to whether relator's current symptoms were causally related to her industrial injury. Dr. Ungar answered the question by referring to diagnostic testing performed during previous examinations, which "reveal[ed] no evidence of hyperactive airway disease." (Ungar Report at 3.) Based on the results of that testing, which he was bound to accept, Dr. Ungar opined, "that ongoing complaints at this time are completely unrelated to the occupational incident reported and

[1] Id. at 4.

are related to other factors, which are unclear at this time." Id. As the magistrate observed, an examining physician is not required to find an impairment related to the allowed conditions in the claim, or that an allowed condition persists. *Middlesworth* at 216 ("[An examining physician is] not required to merely parrot the allowed conditions as his medical findings. It [is his] duty to report his actual clinical findings.").

{¶21} The second question posed was "Is current treatment related to the 06/21/03 injury or [is the claimant] being treated for an injury that occurred on or about September 20, 2006?" Dr. Ungar was being specifically asked about whether relator's current treatment regimen related to her industrial injury. Dr. Ungar "note[s] that Singulair is a medication used to control airway irritation on the basis of allergens and is not for the treatment of hyperactive airway disease in general. Therefore, I do not believe that the use of Singulair since 2003 can, in any way, be supported by the allowed conditions in this claim." Id. at 4. Dr. Ungar also notes that relator's other medication, Advair, "reduces airway inflammation" and stated that "one would consider it to be an acceptable treatment at the time of the incident, but as long as Ms. Tisher is not exposed to similar irritants, she should not require ongoing use of this medication. Therefore, ongoing use of this medication Advair, appears to be for some unrelated medical problem and not the occupational incident of this claim." Id. Dr. Ungar explains the purposes of relator's current medications and opines that, due to their nature and the way that they work, they cannot be *currently* related to her allowed conditions.

{¶22} The third question posed to Dr. Ungar was "Is claimant's current medication usage necessary and appropriate as directly related to the 06/21/03 industrial injury and

allowed conditions of this claim?" Id. Dr. Ungar opines, "Based on the above rationale, I can find no support for the use of either medication on an ongoing basis as related to a nontoxic fume exposure occurring nearly five years previously." By opining on the purpose and function of relator's medications, and as to whether they are being used to treat her allowed conditions, Dr. Ungar is answering the precise questions that were posed to him.

{¶23} Finally, in answer to the question posed, regarding wage loss, Dr. Ungar opines that the physical exam findings and objective test results indicate that relator can "return to work at her previous level of employment without restrictions." Id. at 4. With respect to which job Dr. Ungar refers when he says "previous level of employment," I note that Dr. Ungar previously noted that the last job relator held with Kmart Corporation was case packer, and he states that, during his examination of relator, he asked her about her ability to do her job as a case packer. Id. at 2.

{¶24} In light of all of the foregoing detail in Dr. Ungar's report, I disagree with the majority's characterization of the report as "not sufficiently clear and reliable." Ante, ¶14. Instead, I agree with the magistrate's conclusion that Dr. Ungar accepted relator's allowed conditions, the mechanism of injury, and all of the objective findings in other physicians' previous physical examinations; and he answered each question asked of him and provided detailed explanations for his conclusions. For these reasons, I believe that Dr. Ungar's report is some evidence to support the commission's order, and I would deny the requested writ of mandamus. Because the majority has concluded otherwise, I respectfully dissent.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Karin A. Tisher,	:	
Relator,	:	
v.	:	No. 09AP-59
Industrial Commission of Ohio and Kmart Corporation,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on August 27, 2009

Urban Co., L.P.A., and *Anthony P. Christine*, for relator.

Richard Cordray, Attorney General, and *Andrew J. Alatis*, for respondent Industrial Commission of Ohio.

Taft Stettinius & Hollister LLP, Timothy L. Zix and *Meredith L. Ullman*, for respondent Kmart Corporation.

IN MANDAMUS

{¶25} In this original action, relator, Karin A. Tisher, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order terminating the payment of R.C. 4123.56(B) wage loss compensation

as of June 23, 2008, and to enter an order denying the employer's motion to terminate said compensation.

Findings of Fact:

{¶26} 1. On August 15, 2003, relator filed an application for workers' compensation ("FROI-1"). On the application, relator alleged that on June 21, 2003, she "was exposed to toxic fumes from wax stripper while at work." On June 21, 2003, relator was employed by respondent Kmart Corporation as a clerk at the Kmart Distribution Center. Kmart, as a self-insured employer, refused to certify the industrial claim (No. 03-845462).

{¶27} 2. On September 15, 2003, at Kmart's request, relator was examined by Satish Mahna, M.D., who reported:

> HISTORY AS STATED BY PATIENT:
>
> Ms. Tisher, who is a right hand dominant female and is working at present, states that they were using wax stripper and the fumes were getting too strong. She asked her supervisor to provide a fan but it was not made available. She then called her manager who did not respond for about an hour and a half. By then, she had developed headache, nausea, and "little bit of shortness of breath". She could not concentrate on the computer screen and "was loosing [sic] concentration". Her chest felt heavy.
>
> * * *
>
> REVIEW OF MEDICAL RECORDS:
>
> * * *
> Notes dated 07-25-2003 from Dr. Altawil are reviewed. Diagnosis was hyperactive airway disease and mild intermittent industrial induced asthma was made. As per these notes, Ms. Tisher was exposed to fumes on 06/21/2003 after stripping the floor and since then, she has

> had shortness of breath mainly with exertion, and very minimal amount of mainly dry cough. As per these notes, she had a similar episode one year ago when floor was stripped but overall, the symptoms did not last long and were milder than this time.
>
> DISCUSSION:
>
> * * *
>
> * * * [I]t would appear that Ms. Tisher has nonoccupational allergies (asthma). Given the facts that she sought no treatment for about three weeks following this incident and, by history, felt better within two days without treatment, would point against any significant insult to the airways.
>
> OPINION:
>
> * * * I am of the opinion that Ms. Tisher has nonoccupational asthma (allergies).
>
> * * * I am of the opinion that she could not have sustained hyper-reactive airway disease from the alleged exposure.
>
> * * *
>
> Ms. Tisher has 0% impairment of the whole person at this point given her symptoms and objective findings.
>
> * * *
>
> * * * The treatment rendered appears appropriate for her nonoccupational condition.

{¶28} 3. Following an October 30, 2003 hearing, a district hearing officer ("DHO") issued an order allowing the claim for "hyper-reactive airway disease and induced asthma-industrial." The order states reliance upon the "C-30 of Dr. Altawil dated 09/17/03."

{¶29} 4. Apparently, the DHO's order of October 30, 2003 was not administratively appealed.

{¶30} 5. Following an October 18, 2004 hearing, a staff hearing officer ("SHO") awarded temporary total disability ("TTD") compensation from June 17, 2004 through August 30, 2004 and to continue upon submission of medical evidence.

{¶31} 6. Apparently, TTD compensation was paid by the self-insured employer until June 14, 2005 when it was determined that the industrial injury had reached maximum medical improvement ("MMI").

{¶32} 7. On June 27, 2006, relator moved for R.C. 4123.56(B) wage loss compensation.

{¶33} 8. Following a December 13, 2006 hearing, a DHO issued an order awarding relator so-called working wage loss compensation beginning January 5, 2006, the date she returned to work at a part-time position with another employer.

{¶34} 9. Kmart administratively appealed the December 13, 2006 DHO's order.

{¶35} 10. Following a March 12, 2007 hearing, an SHO affirmed the DHO's order of December 13, 2006.

{¶36} 11. Earlier, on January 17, 2007, relator was examined, at Kmart's request, by Adi A. Gerblich, M.D. In the three-page narrative report, Dr. Gerblich wrote:

> Pulmonary function tests showed mild obstructive ventilatory defect. The response of FEF25-75 and FEF75 to broncho-dilators is suggestive of underlying hyperactive airway disease. * * *
>
> * * *
> Impression: 1. COPD – mild.
> 2. Hyperactive airway – by clinical criteria, mild

> Discussion: claimant has not changed from a clinical stand point. Based on her clinical story she has an underlying hyperactive airway disease, which is mild in nature. This is supported by the infrequent usage of albuterol and lack of visits to medical facilities. It sounds from her complaints that cold and exercise challenge cause different symptoms than vapors. A cold air or an exercise challenge may be more helpful to delineate the extent of the bronchial reactivity under these conditions. From a clinical standpoint she has obtained maximal benefit from her medication regiment [sic] and her hyperactive airway disease is under adequate control.

{¶37} 12. On April 5, 2008, at Kmart's request, relator was examined by Ira J. Ungar, M.D. In his five-page narrative report, Dr. Ungar stated:

> Allowed Conditions: HYPERACTIVE AIRWAY DISEASE AND INDUCED ASTHMA-INDUSTRIAL
>
> * * *
>
> HISTORY OF INJURY: The claim was reported in the course of work duties on June 21, 2003 for K Mart. Apparently a floor was being cleaned using a wax stripper. Ms. Tisher brings with her today a list of the included ingredients from that wax stripper. After several hours, she reported nausea, shortness of breath, and nose and throat irritation. * * *
>
> * * *
>
> CHIEF COMPLAINT/SYMPTOMS: At this time, Ms. Tisher reports continued airway symptoms, worse with cold, exercise, and all fumes. When questioned about her ability to do her job as a case packer, Ms. Tisher states she does not believe she can do that, it was too high of a level of manual labor, and she gets short of breath. Ms. Tisher continues to report use of Advil, Singulair, and occasional Albuterol.
>
> * * *
>
> MEDICAL RECORDS REVIEWED:

* * *

► Evaluation, Dr. Gerblich, dated 08/11/04 – "Based on pulmonary function test, no evidence for asthma though the history and circumstances are suggestive underlying hyper-active airway disease consideration; however, methacholine challenge test will have to be performed."

* * *

► Methacholine Challenge Test, dated 01/12/06-Impression: Negative methacholine challenge, no bronchodilator was given.

* * *

CONCLUSION/DISCUSSION: Based on the above history and physical, review of available medical records, the following conclusions are rendered with a reasonable degree of medical certainty. * * *

* * *

Ms. Tisher was exposed to a commercial wax stripper, which is used on a daily basis in 1,000s of businesses around the country. If this wax stripper truly represented a significant lung irritant, it could not be on the market. Ms. Tisher may, indeed, have some unique sensitivity to fumes, although she states she does not use any special household chemicals in her own home.

Objective diagnostic testing including both pulmonary function test and methacholine challenge test reveal no evidence of hyperactive airway disease. This, in itself, should suggest that ongoing complaints at this time are completely unrelated to the occupational incident reported and are related to other factors, which are unclear at this time.

* * *

Ms. Tisher is receiving no ongoing treatment at this time other than use of continued medications including Advair and Singulair. It should be noted that Singulair is a

> medication used to control airway irritation on the basis of allergens and is not for the treatment of hyperactive airway disease in general. Therefore, I do not believe that the use of Singulair since 2003 can, in any way, be supported by the allowed conditions in this claim and the occupational incident that occurred on the basis of exposure to fumes. This is on the basis of the mechanism that this drug works within the respiratory system.
>
> With respect to the use of Advair, as this reduces airway inflammation, one would consider it to be an acceptable treatment at the time of the incident, but as long as Ms. Tisher is not exposed to similar irritants, she should not require ongoing use of this medication. Therefore, ongoing use of this medication Advair, appears to be for some unrelated medical problem and not the occupational incident of this claim.
>
> * * *
>
> Based on the above rationale, I can find no support for the use of either medication on an ongoing basis as related to a nontoxic fume exposure occurring nearly five years previously. On the basis of additionally normal objective diagnostic tests in the form of pulmonary function testing and methacholine challenge test, current use of medication appears to be for some underlying medical condition unrelated to the occupational incident of this claim.
>
> * * *
>
> There have been no documented physical exam findings, or findings on objective diagnostic tests that would suggest that even considering the allowed condition in this claim that Ms. Tisher would not be capable of return to work at her previous level of employment without restrictions, if she so chooses. Her decision not to perform that work appears to be on the basis of her lack of motivation or some other medical issue and not the minimal incident of this claim, in the face of normal diagnostic testing.

(Emphasis sic.)

{¶38} 13. On May 16, 2008, citing Dr. Ungar's report, Kmart moved for termination of wage loss compensation.

{¶39} 14. Following a June 23, 2008 hearing, a DHO issued an order terminating wage loss compensation as of the hearing date. The DHO's order explains:

> The District Hearing Officer finds that the injured worker is medically capable of returning to work at her former position of employment without restrictions.
>
> The District Hearing Officer relied on the medical report of Ira Ungar, MD, dated 4/5/08. Dr. Ungar states that the injured worker has no ongoing documented physical exam findings and the injured worker can return to work to her former position of employment without restrictions.
>
> The District Hearing Officer found the report of Dr. Ungar persuasive based upon the office note of Dr. Altawil, dated 5/6/08. As discusse[d] previously, Dr. Altawil indicates that overall the injured worker feels good with no shortness of breath or coughing of weasing [sic] episodes. Further, the injured worker feels fine.
>
> The District Hearing Officer finds that the injured worker has not submitted sufficient medical proof, supplimental [sic] medical reports, regarding the ongoing status of her medical restrictions. The only document the District Hearing Officer found was the office note, dated 5/6/08, previously discussed above.
>
> The District Hearing Officer notes that pursuant to O.A.C. 4125-1-01(D), the injured worker is solely responsible for and bears the burden of producing evidence regarding her entitlement to wage loss compensation, and unless the injured worker meets this burden, wage loss compensation shall be denied.

{¶40} 15. Relator administratively appealed the DHO's order of June 23, 2008.

{¶41} 16. Following a September 3, 2008 hearing, an SHO issued an order affirming the DHO's order. The SHO's order explains:

> Wage loss compensation is terminated as of 6/23/2008, the date of the District Hearing Officer hearing.
>
> The Staff Hearing Officer finds that the Injured Worker is medically able to return to her former position of employment without restrictions.
>
> This portion of the decision is * * * based on Dr. Ungar's 4/5/2008 report, which indicated that the Injured Worker can return to work at her former position of employment without restrictions.

{¶42} 17. On September 20, 2008, another SHO mailed an order refusing relator's administrative appeal from the SHO's order of September 3, 2008.

{¶43} 18. Relator moved for reconsideration of the SHO's order of September 20, 2008.

{¶44} 19. On October 31, 2008, the three-member commission, voting two to one, denied reconsideration.

{¶45} 20. On January 20, 2009, relator, Karin A. Tisher, filed this mandamus action.

Conclusions of Law:

{¶46} The issue is whether Dr. Ungar's report constitutes some evidence upon which the commission can rely to support its finding that relator is medically able to return to her former position of employment, and is, thus, no longer entitled to receipt of wage loss compensation.

{¶47} Finding that Dr. Ungar's report does constitute some evidence upon which the commission can and did rely, it is the magistrate's decision that this court deny relator's request for a writ of mandamus, as more fully explained below.

{¶48} A medical inability to secure comparably paying work is a prerequisite to obtaining wage loss compensation. *State ex rel. Chora v. Indus. Comm.* (1996), 74 Ohio St.3d 238, 241. Because a claimant's former position of employment is obviously comparably paying work, a full release to return to the former position of employment negates any assertion that the claimant's inability to earn at the pre-injury rate is medically precipitated. Id.

{¶49} It is well settled that an examining physician must accept the allowed conditions of the claim in order to render an opinion or report on the extent of disability that will constitute some evidence upon which the commission can rely. However, acceptance of the allowed conditions does not compel the examining physician to find an impairment related to those conditions nor does it even compel the examining physician to find that an allowed condition still exists. This legal proposition was extensively discussed and applied in *State ex rel. Middlesworth v. Regal Ware, Inc.*, 93 Ohio St.3d 214, 215-16, 2001-Ohio-1331, wherein the court states:

> This controversy centers on Dr. Demeter's conclusion that "[a]t the present time I find no evidence to support the claim of interstitial pulmonary fibrosis with bilateral apical lung disease." The court of appeals interpreted this language as the doctor's refusal to accept the claim's allowed conditions. We disagree. Instead, we find our opinion in *State ex rel. Domjancic v. Indus. Comm.* (1994), 69 Ohio St.3d 693, 635 N.E.2d 372, to be dispositive.
>
> In *Domjancic*, an examining physician noted "[n]o evidence of a herniated disc L4-5 on the right"—the claim's allowed condition. That claimant, in turn, offered the very argument that Middlesworth presents. In rejecting that position, the *Domjancic* court concluded that "Dr. Gonzalez's report, at the outset, outlines *all* allowed conditions, substantiating his awareness of what the claimant's recognized conditions

> were. That the doctor, upon examination, found no evidence of a herniated disc, does not amount to a repudiation of the allowance. As the referee insightfully stated:
>
> " 'Dr. Gonzalez was not required to merely parrot the allowed conditions as his medical findings. It was Dr. Gonzalez's duty to report his actual clinical findings. Obviously, the doctrines of *res judicata* and *collateral estoppel* do not apply to limit what a doctor may find during his examination.' " (Emphasis *sic*.) *Id*. at 695-696, 635 N.E.2d at 375.
>
> Obviously, Dr. Demeter knew that a pulmonary condition was at issue. He referred to "interstitial lung disease" three times in his report. "Interstitial fibrosis" and "interstitial infiltrates" are also mentioned, and again, the allowance is quoted verbatim in his report. However, according to Dr. Demeter, the condition no longer existed. This is not a situation where the doctor acknowledged the condition's existence but refused to accept the commission's prior determination of industrial causal relationship. In this case, it is immaterial whether Dr. Demeter believed that the claim was correctly or incorrectly allowed years ago. What matters is how the condition was affecting claimant's ability to work *at the time of the examination*, and Dr. Demeter found no impact. Accordingly, the commission, as the sole evaluator of evidentiary weight and credibility, did not abuse its discretion in citing Dr. Demeter's report as "some evidence" of a capacity for sustained remunerative employment. *State ex rel. Burley v. Coil Packing, Inc.* (1987), 31 Ohio St.3d 18, 31 OBR 70, 508 N.E.2d 936.

(Emphasis sic.)

{¶50} According to relator, Dr. Ungar's report indicates that Dr. Ungar failed to accept the allowed conditions when he allegedly "questioned the mechanism of the injury." (Relator's brief, at 5.)

{¶51} In support of this argument, relator quotes from Dr. Ungar's report:

> Ms. Tisher was exposed to a commercial wax stripper, which is used on a daily basis in 1,000s of businesses around the country. If this wax stripper truly represented a significant

> lung irritant, it could not be on the market. Ms. Tisher may, indeed, have some unique sensitivity to fumes, although she states she does not use any special household chemicals in her own home.
>
> According to relator:
>
> * * * [Dr. Ungar] is not bashful in indicating that he does not feel that the wax stripper that originally caused the problem in 2003 could have caused any type of lung irritant. As he points out, it is used everywhere. So, how could this wax stripper cause this Injured Worker an irritation to her lungs, which was eventually allowed by the Industrial Commission for hyperactive airway disease and induced asthma-industrial? He is further of the opinion that anything that is on the market in the United States is safe to be used and should not cause any type of medical problem to any individual because, if it would cause any type of problem, it would not be on the market.

(Relator's brief, at 5.)

{¶52} Relator's argument is unpersuasive. Dr. Ungar does not say that the wax stripper could not have caused symptomalogy on the date that the industrial injury is recognized. In fact, Dr. Ungar acknowledges that relator "may, indeed, have some unique sensitivity to fumes."

{¶53} Contrary to relator's allegations here, Dr. Ungar does not question the mechanism of injury nor does he question that relator experienced symptomalogy as a result of the wax stripping event of June 21, 2003. Relator's argument lacks merit.

{¶54} Citing Dr. Gerblich's January 17, 2007 report stating that "pulmonary function tests showed mild obstructive ventilatory defect," relator asserts that Dr. Ungar "is incorrect when he states that pulmonary function tests were negative." (Relator's brief, at 6.) Relator is incorrect.

{¶55} Dr. Ungar did not state that a pulmonary function test was "negative." However, Dr. Ungar did say that a pulmonary function test reveals "no evidence of hyperactive airway disease." Contrary to relator's assertion, there is no evidence that Dr. Ungar was incorrect in his review of a pulmonary function test.

{¶56} Relator further claims that Dr. Ungar performed a "psychological profile" when he states "[h]er decision not to perform that work appears to be on the basis of her lack of motivation or some other medical issue and not the minimal incident of this claim."

{¶57} That Dr. Ungar offered that lack of motivation or even nonallowed medical conditions may explain relator's employment status does not in any way detract from the viability of his medical opinion that the allowed condition of the claim does not prevent relator from returning to her former position of employment.

{¶58} 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).