

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State ex rel. Roy L. Smith, :
Relator, :
v. : No. 08AP-854
Industrial Commission of Ohio : (REGULAR CALENDAR)
and North Star Steel, :
Respondents. :
:

D E C I S I O N

Rendered on September 10, 2009

Heller, Maas, Moro & Magill Co., LPA, and Robert J. Foley,
for relator.

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

Dinsmore & Shohl, LLP, and Richard A. Hernandez, for
respondent North Star Steel.

IN MANDAMUS
ON OBJECTIONS TO MAGISTRATE'S DECISION

TYACK, J.

{¶1} Roy L. Smith filed this action in mandamus seeking a writ to compel the Industrial Commission of Ohio ("commission") to vacate its order exercising continuing

jurisdiction over the order of a staff hearing officer ("SHO") which awarded Smith permanent total disability ("PTD") compensation.

{¶2} In accord with Loc.R. 11, the case was referred to a magistrate of this court to conduct appropriate proceedings. The parties stipulated the pertinent evidence and filed briefs. The magistrate then issued a magistrate's decision containing detailed findings of fact and conclusions of law, which is appended to this decision. The magistrate's decision includes a recommendation that we grant the requested relief.

{¶3} Both the commission and North Star Steel, Smith's former employer, have filed objections to the magistrate's decision. Counsel for Smith has filed a memorandum in response. North Star Steel filed a memorandum in reply to the memorandum filed on Smith's behalf. The case is now before the court for a full, independent review.

{¶4} In 1993, Roy Smith was injured while working as a lathe operator. In addition to a number of contusions, he suffered lumbar spondylolisthesis, lumbar spinal stenosis, aggravation of pre-existing spinal stenosis at L3-4 and aggravation of pre-existing spinal stenosis at L4-5.

{¶5} Smith's treating physician, John J. Vargo, D.O., reported that Smith suffered from:

* * * Numbness from his low back distally, the right side is worse than the left. He has pain all the time, which is about 7-8/10 but if he walks a lot it will get worse. He cannot push a buggy. He cannot walk very far. He cannot bend over, stretch or climb a ladder. Also sitting seems to cause difficulties. He indicates he has no sex life whatsoever. "I have no life anymore." He indicates he stays at home and does nothing. He cannot push a sweeper. He cannot hold something in each hand and walk, the pain at the surgical site gets severe.

{¶6} Dr. Vargo continued:

The injured worker has significant deficit in range of motion in the lumbar spine with rather severe pain and rigidity. Further, both hips have discomfort and pain, mostly as a consequence of the problems found in the lumbar spine, but these cause significant deficit in range of motion. Based upon the American Medical Association Guide to the Evaluation of Permanent Impairment – Fifth Edition, the injured worker has a total 40% impairment of the whole person based upon the allowed conditions in this claim. However, the injured worker has effectively lost motion and function of his lumbar spine. He is unable to push, pull, lift or carry more than five pounds, he cannot sit or stand for any length of time and he also has considerable problems walking for any length of time. He cannot work around unprotected heights, he cannot work on unlevel surfaces. Due to the severity of problems in the low back, he cannot really reach over his head, he cannot bend at the waist. Due to the plate and screws, he should avoid specific changes of temperature such as extremes of hot or cold and he must be careful not to further aggravate his condition. * * *

{¶7} Dr. Vargo indicated:

In conclusion, based upon my examination, having reviewed the chart provided, having evaluated all allowed conditions in this claim, and based on the American Medical Association Guide to the Evaluation of Permanent Impairment – Fifth Edition, I find that this injured worker does have a forty percent (40%) impairment of the whole person which does bear a direct and causal relationship to the industrial injury. Furthermore, also having a direct and causal relationship to the industrial injury, the injured worker is unable to return to remunerative employment due to the rather severe restrictions placed upon him as a consequence of his industrial injury. The injured worker cannot push, pull, lift or carry more than five pounds, he is unable to climb, work around unprotected heights or work on unlevel surfaces, he cannot lift anything of any significant weight overhead as a consequence of his low back injury.

The injured worker is, therefore, in my medical opinion, totally and permanently disabled from returning to remunerative employment.

{¶8} Dr. Vargo could have stopped there, but he also stated:

* * * Further, the injured worker only has a GED with a 9th grade education which greatly limits the type of alternate employment that he could function in. Taking this all into account, it is my medical opinion, that within a degree of medical certainty, the injured worker is totally and permanently disabled from returning to remunerative employment. Further, it is highly unlikely that this condition will change.

{¶9} North Star Steel picked up on Dr. Vargo's comments and asked the commission to overturn the SHO's finding that Smith was entitled to PTD compensation. North Star Steel argued that the doctor had based his opinion as to Smith's disability on occupational factors, not medical factors.

{¶10} The commission exercised continuing jurisdiction, finding ultimately that Smith's doctor had based his opinion about Smith's disability in part on Smith's limited educational background. In the appropriate case, such an exercise of continuing jurisdiction might be appropriate. This is not that case. Dr. Vargo clearly based his opinion on Smith's back problems, not Smith's lack of education. Our magistrate properly analyzed the evidence as to that issue. We adopt the magistrate's findings of fact contained in his magistrate's decision.

{¶11} The commission, in its objections, argue that our magistrate should not have addressed the continuing jurisdiction issue because counsel for Smith only argued that the commission reached the wrong evidentiary conclusions based on the evidence before it and did not argue that the commission was wrong to exercise continuing jurisdiction in the first place. The commission's objections are:

I. Where a Relator files a complaint in mandamus alleging only that the commission abused its discretion in denying PTD compensation, it is error for the magistrate to find the issue is whether the commission abused its discretion in separately deciding to exercise continuing jurisdiction.

II. Where a medical report contains both medical and nonmedical opinion, and a commission hearing officer does not make the effort to separate the nonmedical opinion, there are reasonable grounds for the commission to find the medical report is not "some evidence" upon which the commission can rely in awarding PTD compensation, and it is error for the magistrate to find otherwise.

{¶12} Addressing the second objection first, the SHO did need to separate the medical and nonmedical "opinion" because the comment about Smith's lack of education was an unnecessary aside—what we in the legal field call dictum. The comment was not the basis for Dr. Vargo finding Smith to be disabled. Therefore, the SHO did not make a "clear mistake of law" in relying on Dr. Vargo's report and opinion.

{¶13} The second objection of the commission is overruled.

{¶14} As to the issue of the pleading and argument before the magistrate, any defect in his decision is rendered moot by the opportunity of the parties to object. As counsel for the commission acknowledged, counsel for Smith could have submitted additional theories as to why the commission abused its discretion. Counsel for Smith is now arguing an abuse of discretion by the commission in the exercise of continuing jurisdiction after the SHO's grant of PTD compensation. The original notice pleading and procedural history of the case should have put all on notice that the commission's exercise of continuing jurisdiction would or should be an issue.

{¶15} The commission's first objection is overruled.

{¶16} North Star Steel's objections are:

I. The Magistrate Erred in Identifying the Issue Ripe For Mandamus.

II. The Magistrate Erred In Finding that the Industrial Commission Did Not Properly Invoke its Continuing Jurisdiction.

III. The Magistrate Erred In the Application of *Royal*.

IV. The Magistrate Erred In Finding That The Commission Had No Grounds For Finding That Dr. Vargo's Report Fails To Constitute "Some Evidence" Upon Which The Staff Hearing Officer Could Rely In Awarding Permanent Total Disability Compensation.

{¶17} In its first objection, North Star Steel asserts that counsel for Smith should have filed a separate mandamus action to contest the decision by the commission to exercise continuing jurisdiction. We disagree. The commission could well have reached or even been expected to reach the same conclusion as its SHO, making the issue regarding continuing jurisdiction moot. We do not wish to encourage unnecessary litigation. North Star Steel's first objection is overruled.

{¶18} We have earlier discussed the issue of the commission's invoking of continuing jurisdiction. For the reasons set forth above, we overrule North Star Steel's second objection.

{¶19} North Star Steel's third objection refers to the magistrate's mention of *State ex rel. Royal v. Indus. Comm.*, 95 Ohio St.3d 97, 2002-Ohio-1935. *Royal* stands for the proposition that one of the five requirements for continuing jurisdiction must be met for continuing jurisdiction to be exercised. The citation to the *Royal* case is not necessary to the magistrate's resolution of the issues. Therefore, the third objection is overruled.

{¶20} We agree with the magistrate that the commission had no grounds for refusing to consider Dr. Vargo's report to be some evidence in support of an award of PTD compensation. We, therefore, overrule North Star Steel's fourth objection.

{¶21} All six objections having been overruled, we adopt both the magistrate's findings of fact and conclusions of law, with the additional observations set forth in the decision. As a result, we issue a writ of mandamus compelling the commission to vacate its order of June 3, 2008, and compelling the commission to reinstate the SHO's order of March 31, 2008.

*Objections overruled;
Writ of mandamus granted.*

McGRATH and CONNOR, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Roy L. Smith,	:	
	:	
Relator,	:	
	:	
v.	:	No. 08AP-854
	:	
Industrial Commission of Ohio	:	(REGULAR CALENDAR)
and North Star Steel,	:	
	:	
Respondents.	:	
	:	

MAGISTRATE'S DECISION

Rendered on May 14, 2009

Heller, Maas, Moro & Magill Co., LPA, and Robert J. Foley,
for relator.

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

Dinsmore & Shohl, LLP, and Richard A. Hernandez, for
respondent North Star Steel.

IN MANDAMUS

{¶22} In this original action, relator, Roy L. Smith, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order exercising continuing jurisdiction over a staff hearing officer's order that awarded relator

permanent total disability ("PTD") compensation, and to enter an order reinstating the staff hearing officer's order.

Findings of Fact:

{¶23} 1. On November 29, 1993, relator sustained an industrial injury while employed as a lathe operator for respondent North Star Steel ("employer"), a self-insured employer under Ohio's workers' compensation laws. The industrial claim (No. L247077-22) is allowed for "contusion of hip, back, buttock, interscapular region; lumbar spondylolisthesis; lumbar spinal stenosis; aggravation of pre-existing spinal stenosis L3-4; aggravation of pre-existing spinal stenosis L4-5."

{¶24} 2. On December 7, 2005, relator filed an application for PTD compensation. The application was withdrawn in June 2006 and then re-filed on January 6, 2007.

{¶25} 3. In support of his initial application, relator submitted a report dated September 21, 2005 from John J. Vargo, D.O., who examined relator on September 21, 2005. The six-page narrative report states in part:

HISTORY

The injured worker states that while employed by Northstar Steel, as a lathe operator, he was involved in an industrial injury on 29 November 1993.

The injured worker states that he was going down metal steps next to a conveyer line. The steps were very steep and complaints had been made about them in the past. He took his eyes off of the steps and missed a step and came down on his buttocks. He got up and it felt like something let go in his back. His legs went numb and went out from underneath him. He was taken to Northside Hospital Emergency Room where xrays were taken. He was diagnosed as having a contusion of his hip. He was treated and subsequently

released. He indicates he was off work for about two weeks and then did return to work. Over time his back and hips got worse. He had pain in the back, which was worse. He also developed numbness from his waist distal to his feet. In June or July of 1996 he saw Dr. Brodell. Xrays were taken once again in the upright position. Then in December of 1996 he was seen by Dr. Kalfas at the Cleveland Clinic Foundation who performed a decompression and fusion with plate and screws. Postoperatively he indicates he had no improvement. He had rehab, including aquatics and land, with no improvement. He had nerve blocks, epidurals, all once again with no improvement. He has had multiple CT's, myelograms and MRI's. He indicates that it just continues to get worse.

* * *

Chief Complaint: Numbness from his low back distally, the right side is worse than the left. He has pain all the time, which is about 7-8/10 but if he walks a lot it will get worse. He cannot push a buggy. He cannot walk very far. He cannot bend over, stretch or climb a ladder. Also sitting seems to cause difficulties. He indicates he has no sex life whatsoever. "I have no life anymore." He indicates he stays at home and does nothing. He cannot push a sweeper. He cannot hold something in each hand and walk, the pain at the surgical site gets severe.

Education: He has a 9th grade education and in 1993 he did get his GED. He indicates he is a veteran and was in Vietnam.

* * *

DISCUSSION

The injured worker has significant deficit in range of motion in the lumbar spine with rather severe pain and rigidity. Further, both hips have discomfort and pain, mostly as a consequence of the problems found in the lumbar spine, but these cause significant deficit in range of motion. Based upon the American Medical Association Guide to the Evaluation of Permanent Impairment – Fifth Edition, the injured worker has a total 40% impairment of the whole person based upon the allowed conditions in this claim.

However, the injured worker has effectively lost motion and function of his lumbar spine. He is unable to push, pull, lift or carry more than five pounds, he cannot sit or stand for any length of time and he also has considerable problems walking for any length of time. He cannot work around unprotected heights, he cannot work on unlevel surfaces. Due to the severity of problems in the low back, he cannot really reach over his head, he cannot bend at the waist. Due to the plate and screws, he should avoid specific changes of temperature such as extremes of hot or cold and he must be careful not to further aggravate his condition. Further, the injured worker only has a GED with a 9th grade education which greatly limits the type of alternate employment that he could function in. Taking this all into account, it is my medical opinion, that within a degree of medical certainty, the injured worker is totally and permanently disabled from returning to remunerative employment. Further, it is highly unlikely that this condition will change.

CONCLUSION

In conclusion, based upon my examination, having reviewed the chart provided, having evaluated all allowed conditions in this claim, and based on the American Medical Association Guide to the Evaluation of Permanent Impairment – Fifth Edition, I find that this injured worker does have a forty percent (40%) impairment of the whole person which does bear a direct and causal relationship to the industrial injury. Furthermore, also having a direct and causal relationship to the industrial injury, the injured worker is unable to return to remunerative employment due to the rather severe restrictions placed upon him as a consequence of his industrial injury. The injured worker cannot push, pull, lift or carry more than five pounds, he is unable to climb, work around unprotected heights or work on unlevel surfaces, he cannot lift anything of any significant weight overhead as a consequence of his low back injury.

The injured worker is, therefore, in my medical opinion, totally and permanently disabled from returning to remunerative employment.

{¶26} 4. On January 30, 2006, at the employer's request, relator was examined by Oscar F. Sterle, M.D., who issued a nine-page narrative report dated February 8, 2006. In his report, Dr. Sterle opined:

In the context of evidence-based medicine, the claimant can return to light-duty work with occasional lifting of no more than twenty pounds and frequent lifting up to ten pounds. He should alternate between sitting and standing based upon comfort and should avoid aggravating activities such as bending, twisting, prolonged walking, or standing. These restrictions should be permanent.

{¶27} 5. On March 20, 2006, at the commission's request, relator was examined by Jess G. Bond, M.D., who issued a three-page narrative report in which he opined that the industrial injury results in a 25 percent whole person impairment.

{¶28} 6. On March 20, 2006, Dr. Bond completed a physical strength rating form on which he indicated by his mark that relator is capable of sedentary work.

{¶29} 7. The employer requested a vocational report from Paula Zinsmeister who is a rehabilitation counselor. On April 24, 2006, Zinsmeister issued a three-page narrative report in which she opined:

Mr. Smith does have a GED. He states that he is able to read, write and do basic math. His work history consists of a skilled occupation as a lathe operator which he indicated that he learned on the job.

According to the 2/8/06 report of Oscar Sterle, M.D., Mr. Smith is able to return to work at the "Light" exertional level with alternate sit/stand and avoidance of bending, twisting, prolonged walking or standing. Jess G. Bond, M.D. is in agreement that he is able to return to employment in a report of 3/21/06, but at the "Sedentary" exertional level[.]

A transferable skill analysis indicates that there are several occupational titles to which Mr. Smith's Worker Trait Profile compares given his work history and physical restrictions.

These occupations include assembler, traffic clerk, machine tender, machine operator, cashier, bench worker, lens inserter, contact clerk and yard clerk.

Positions that were identified within a 50 mile radius of the Youngstown area that appear to be within his physical capacity are noted * * *. He has also demonstrated the ability to learn on the job in the past.

It is the opinion of this licensed, board certified Rehabilitation Counselor that Mr. Smith is able to perform occupations in the national economy. * * *

{¶30} 8. On February 12, 2007, following the re-filing of the PTD application, relator was examined, at the employer's request, by Richard N. Kepple, M.D., who issued a four-page narrative report in which he opined:

Although Mr. Smith was exaggerating and embellishing his condition during the examination, there is no question that he has a compromised lumbar spine and that the degree of compromise significantly restricts his ability to work. Observation of his capabilities outside the examination room, however, were more indicative of his actual status. In my opinion, Mr. Smith is capable of sedentary work that is upper extremity oriented and does not involve lifting, carrying, pushing or pulling more than 15 pounds. He should not be required to bend, stoop, crouch or climb ladders. Alternating between sitting and standing for comfort would be appropriate.

Observation of Mr. Smith indicated to this evaluator that he is capable of sustained remunerative employment, and is not permanently and totally disabled.

{¶31} 9. Following a March 31, 2008 hearing, a staff hearing officer ("SHO") issued an order awarding PTD compensation beginning September 21, 2005 based exclusively upon Dr. Vargo's report. The SHO's order, mailed April 3, 2008, explains:

In determining this extent of disability issue, the Staff Hearing Officer relies upon the above medical report of Dr. Vargo. Therein, Dr. Vargo opines that Claimant does not

possess the residual functional capacity to engage in any sustained remunerative employment. Dr. Vargo places significant physical restrictions on this Claimant. He states in his report as follows:

However, the Injured Worker has effectively lost motion and function of his lumbar spine. He is unable to push, pull, lift, or carry more than five pounds, he cannot sit or stand for any length of time and he also has considerable problems walking for any length of time. Due to the severity of problems in the low back, he cannot really reach over his head, and he cannot bend at the waist. Due to the plate and screws, he should avoid specific changes of temperature such as extremes of hot or cold and he must be careful not to further aggravate his condition.

Given Dr. Vargo's restrictions, the Staff Hearing Officer finds that Claimant does not have the retained functional capacity to perform even sedentary work.

{¶32} 10. Citing *State ex rel. Shields v. Indus. Comm.* (1996), 74 Ohio St.3d 264, the employer moved the commission for reconsideration of the SHO's order mailed April 3, 2008. The employer claimed that Dr. Vargo improperly considered nonmedical factors in rendering his opinion that relator is permanently and totally disabled by the industrial injury. The employer asserted that the SHO's order was "a clear mistake of fact and a clear mistake of law."

{¶33} 11. Following a June 3, 2008 hearing, the three-member commission unanimously joined in the following order mailed July 10, 2008:

* * * [I]t is the finding of the Industrial Commission that the Employer has met its burden of proving that the Staff Hearing Officer order, issued 04/05/2008 [sic], contains a clear mistake of law of such character that remedial action would clearly follow. Specifically, the Staff Hearing Officer relied upon a medical report from John J. Vargo, M.D., dated 09/21/2005, that considers non-medical disability factors. In this report, Dr. Vargo stated, "Further, the injured worker only has a GED with a 9th grade education which greatly

limits the type of alternate employment that he could function in." Therefore, the Commission exercises continuing jurisdiction pursuant to R.C. 4123.52 and State ex rel. Nicholls v. Indus. Comm. (1998), 81 Ohio St.3d 454, State ex rel. Foster v. Indus. Comm. (1999), 85 Ohio St.3d 320, and State ex rel. Gobich v. Indus. Comm. (2004), 103 Ohio St.3d 585, in order to correct this error. The Employer's request for reconsideration, filed 04/21/2008, is granted and the Staff Hearing Officer order, issued 04/05/2008 [sic], is vacated.

{¶34} With one member dissenting, the commission also issued the following order:

The Commission finds that the Injured Worker is not permanently and totally disabled and is able to perform sustained remunerative employment when considering both medical and non-medical disability factors. Therefore, the Injured Worker's Application for Permanent Total Disability compensation, filed 01/05/2007, is denied.

The Injured Worker was injured at work on 11/29/1993 when he was descending metal stairs, missed a step, and fell on his buttocks. He underwent lumbar surgery in 1996, and last worked in 2001. He has worked as a steel laborer, a road maintenance worker, a construction worker, in-home remodeler, for an above-ground pool company, and for a pipe manufacturer. The Injured Worker completed ninth (9th) grade and obtained a GED. He is presently 55 years old and has been receiving Social Security disability benefits at the rate of \$908.00 per month since 10/17/2003.

The Injured Worker was examined on 02/08/2006, by Oscar F. Sterle, M.D., on behalf of the Employer, who stated that, "the claimant did not give a full effort during the range of motion and there was evidence of pain-behavior." He further stated that, "In the context of evidence-based medicine, the claimant can return to light-duty work with occasional lifting of no more than twenty pounds and frequent lifting up to ten pounds. He should alternate between sitting and standing, based upon comfort and should avoid aggravating activities such as bending, twisting, prolonged walking, or standing. These restrictions should be permanent."

The Injured Worker was examined on 03/20/2006, by Jess G. Bond, M.D., on behalf of the Commission, who found that the Injured Worker had reached maximum medical improvement and was capable of sedentary work.

The Injured Worker was examined on 02/12/2007, by Richard N. Kepple, M.D., also on behalf of the Employer, who stated that, "It was quite evident to this evaluator that Mr. Smith was exaggerating and embellishing his condition to convince me he is disabled...In my opinion, Mr. Smith is capable of sedentary work that is upper extremity oriented and does not involve lifting, carrying, pushing or pulling more than 15 pounds. He should not be required to bend, stoop, crouch or climb ladders. Alternating between sitting and standing for comfort would be appropriate."

The reports of Dr. Sterle and Dr. Kepple are very similar in their findings, although written almost a year apart. When considering those reports with the report of Dr. Bond, the Commission finds that on a strictly medical basis the Injured Worker is capable of sedentary-light work. That finding now must be considered in conjunction with the non-medical disability factors.

A vocational assessment, dated 04/24/2006, was prepared by Paula Zinsmeister, Rehabilitation Counselor. She stated, "It is the opinion of this licensed, board certified Rehabilitation Counselor, that Mr. Smith is able to perform occupations in the national economy."

Ms. Zinsmeister noted that, regarding the Injured Worker's ninth grade education, the Injured Worker himself stated on the permanent total disability application form that he can read, write, and perform basic math. The Injured Worker's level of education is sufficient to allow him to obtain or be retrained for basic entry-level sedentary to light work.

After considering the Injured Worker's varied work history together with the physical restrictions and conducting a transferable skills analysis, Ms. Zinsmeister identified several occupational titles for jobs the Injured Worker could perform. "These occupations include assembler, traffic clerk, machine tender, machine operator, cashier, benchworker, lens inserter, contact clerk and yard clerk." The Commission finds that the Injured Worker's work history is varied enough

that there are a variety of jobs he could obtain within his physical restrictions.

The Commission finds that the Injured Worker's age of 55 is considered a neutral factor, and does not prevent him from obtaining employment if he is motivated.

In summary, considering both medical and non-medical disability factors, the Commission finds that the Injured Worker is not permanently and totally disabled and is able to engage in sustained remunerative employment within his physical limitations.

{¶35} 12. On September 29, 2008, relator, Roy L. Smith, filed this mandamus action.

Conclusions of Law:

{¶36} The issue is whether the commission properly invoked continuing jurisdiction over the SHO's March 31, 2008 order awarding PTD compensation. Finding that the commission did not properly exercise its continuing jurisdiction, it is the magistrate's decision that this court issue a writ of mandamus, as more fully explained below.

{¶37} By statute, staff hearing officers are granted original jurisdiction to hear and decide applications for permanent and total disability awards. R.C. 4121.34(B)(1). There is no right to administratively appeal a decision of an SHO awarding PTD compensation. R.C. 4123.511(D) and (E). See Industrial Commission Resolution R05-1-02 (effective September 1, 2005) and R95-1-03 (effective March 21, 1995). Thus, the SHO's order of March 31, 2008 was a final commission order as of the time of its issuance.

{¶38} The commission's power to reconsider a previous decision derives from its general grant of continuing jurisdiction under R.C. 4123.52. *State ex rel. Gobich v. Indus. Comm.*, 103 Ohio St.3d 585, 2004-Ohio-5990 at ¶14. This authority is not unlimited. Its prerequisites are: (1) new and changed circumstances; (2) fraud; (3) clear mistake of fact; (4) clear mistake of law; or (5) error by an inferior tribunal. *Id.*

{¶39} Continuing jurisdiction cannot be invoked under the guise of mistake of fact or law when the perceived mistake is in actuality a difference in evidentiary interpretation between the commission and its hearing officer. *State ex rel. Royal v. Indus. Comm.*, 95 Ohio St.3d 97, 100, 2002-Ohio-1935. "[A] legitimate disagreement as to the evidentiary interpretation does not mean that one of the interpretations is wrong." *Id.*

{¶40} Because there is a legitimate disagreement between the commission and its SHO over the evidentiary interpretation to be given to Dr. Vargo's report, the magistrate finds that the commission did not have grounds for the exercise of continuing jurisdiction.

{¶41} In *State ex rel. DaimlerChrysler v. Bilbao*, 10th Dist. No. 04AP-861, 2005-Ohio-2802 at ¶4, this court had occasion to succinctly summarize the law applicable to this action:

It is well-settled that, when a medical expert expresses a disability opinion based on non-medical factors, such as education and employment history, that opinion is disqualified from evidentiary consideration. *State ex rel. Ohio State Univ. v. Allen*, Franklin App. No. 03AP-823, 2004-Ohio-3839, at ¶ 18, citing *State ex rel. Shields v. Indus. Comm.* (1996), 74 Ohio St.3d 264, 268, 658 N.E.2d 296, and *State ex rel. Catholic Diocese of Cleveland v. Indus. Comm.* (1994), 69 Ohio St.3d 560, 634 N.E.2d 1012. "However,

where the doctor's medical and vocational commentaries can be separated, the commission may simply disregard a physician's opinions on vocational matters and accept the purely medical opinion." *Allen*, at ¶ 18, citing *Catholic Diocese*. Thus, when it is clear from the doctor's report that he or she rendered a medical opinion based solely on the allowed conditions, the commission may rely on the medical opinion while ignoring any superfluous vocational opinion offered by the doctor. *State ex rel. Steelcraft Mfg. Co. v. Indus. Comm.*, Franklin App. No. 01AP-1271, 2002-Ohio-3778, at ¶ 37, citing *Catholic Diocese*.

{¶42} In the paragraph captioned "Discussion," Dr. Vargo renders an opinion that relator is permanently and totally disabled, and such opinion is premised in part upon nonmedical factors. That is, Dr. Vargo states specifically that he is taking into account that relator "has a GED with a 9th grade education."

{¶43} It can be further noted that the "Discussion" paragraph contains the physical restrictions caused by the industrial injury. Those physical restrictions are not repeated in the next paragraph.

{¶44} In the next paragraph captioned "Conclusion," reference to nonmedical factors are absent. That is, in that paragraph, there is no reference to nonmedical factors when Dr. Vargo opines "the injured worker is unable to return to remunerative employment due to the rather severe restrictions placed upon him as a consequence of his industrial injury."

{¶45} In his order, the SHO quotes the physical restrictions set forth in the "Discussion" paragraph. The SHO does not quote Dr. Vargo's mention of the nonmedical factors.

{¶46} Having quoted Dr. Vargo's physical restrictions, the SHO concludes that they indicate that relator "does not have the retained functional capacity to perform even sedentary work."

{¶47} Thus, the SHO actually determined that the physical restrictions set forth in Dr. Vargo's report support the conclusion that relator is unable to return to remunerative employment due to those restrictions. Significantly, the SHO separated the physical restrictions from any mention of the nonmedical factors in concluding that the restrictions eliminate even sedentary work.

{¶48} Significantly, the SHO was able to separate Dr. Vargo's medical and vocational commentaries. The SHO simply disregarded Dr. Vargo's opinion on the vocational matters, but accepted his medical findings. This was a permissible exercise of the SHO's authority to weigh the evidence before him.

{¶49} Apparently, the commission viewed Dr. Vargo's report differently. As indicated by its order of June 3, 2008, the commission focused upon that portion of Dr. Vargo's report where he states: "Further, the injured worker only has a GED with a 9th grade education which greatly limits the type of alternate employment that he could function in."

{¶50} Based solely upon the above-quoted language from Dr. Vargo's report, the commission concluded that the SHO "relied upon a medical report * * * that considers non-medical disability factors."

{¶51} Based upon the above analysis, it is clear that the commission simply disagreed with the SHO over the evidentiary interpretation to be given to Dr. Vargo's

report. Thus, the commission did not have grounds for the exercise of continuing jurisdiction. *Royal*.

{¶52} The SHO, exercising original jurisdiction over the PTD application, could have rejected Dr. Vargo's report on grounds that its evidentiary value is diminished by Dr. Vargo's reliance upon nonmedical factors in rendering his opinion contained in the "Discussion" paragraph. But the SHO was not required to reject Dr. Vargo's report on that basis.

{¶53} Equivocal medical opinions are not evidence. *State ex rel. Eberhardt v. Flxible Corp.* (1994), 70 Ohio St.3d 649, 657. Equivocation occurs when a doctor repudiates an earlier opinion, renders contradictory or uncertain opinions, or fails to clarify an ambiguous statement. *Id.*

{¶54} A medical report can be so internally inconsistent that it cannot be some evidence upon which the commission can rely. *State ex rel. Lopez v. Indus. Comm.* (1994), 69 Ohio St.3d 445; *State ex rel. Taylor v. Indus. Comm.* (1995), 71 Ohio St.3d 582.

{¶55} In its order, the commission did not find that Dr. Vargo's report was equivocal nor did it find that the report was so internally inconsistent that it cannot be some evidence upon which it can rely.

{¶56} Moreover, it is not an equivocation for Dr. Vargo to render an opinion that relator is permanently and totally disabled based upon the physical restrictions produced by the industrial injury and another opinion that the nonmedical factors further render relator permanently and totally disabled. While the latter opinion is not within Dr. Vargo's expertise, the former opinion is.

{¶57} Moreover, that Dr. Vargo feels that the nonmedical factors further render relator unable to perform sustained remunerative employment does not render his report internally inconsistent under *Lopez*.

{¶58} In short, the commission had no grounds for finding that Dr. Vargo's report fails to constitute some evidence upon which the SHO could rely in awarding PTD compensation. Having no grounds for rendering such a finding, it is clear that the commission simply disagreed with the SHO over the persuasiveness of Dr. Vargo's report. The commission felt that Dr. Vargo's reference to nonallowed conditions diminished the evidentiary value of his report. The SHO did not. Clearly, such disagreement cannot be the basis for the exercise of continuing jurisdiction.

{¶59} Accordingly, for all the above reasons, it is the magistrate's decision that this court issue a writ of mandamus ordering the commission to vacate its order of June 3, 2008 and to enter an order that reinstates the SHO's order of March 31, 2008.

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).