

[Cite as *State ex rel. Clark v. Indus. Comm.*, 2009-Ohio-5779.]

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

State of Ohio ex rel. Joseph E. Clark, Sr., :  
Relator, :  
v. : No. 08AP-1105  
Industrial Commission of Ohio : (REGULAR CALENDAR)  
and Franklin County Commissioners, :  
Respondents. :  
:

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D E C I S I O N

Rendered on November 3, 2009

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*Connor, Evans & Hafenstein, LLP, and Katie L. Woessner,*  
for relator.

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

*Ron O'Brien, Prosecuting Attorney, and Amy L. Hiers,* for  
respondent Franklin County Commissioners.

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IN MANDAMUS  
ON OBJECTIONS TO MAGISTRATE'S DECISION

TYACK, J.

{¶1} Joseph E. Clark, Sr., filed this action in mandamus seeking a writ to compel the Industrial Commission of Ohio ("commission") to vacate its order denying him permanent total disability ("PTD") 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 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 issue a writ compelling the commission to vacate its order denying him PTD compensation and enter a new order adjudicating Clark's application for the compensation.

{¶3} The commission has filed objections to the magistrate's decision. Clark's former employer, the Franklin County Commissioners have also filed objections. Counsel for Clark has filed a memorandum in response. The case is now before the court for a full, independent review.

{¶4} Clark was first injured in 2000. His workers' compensation claim has been recognized for "sprain lumbar region" and "sprain of neck."

{¶5} In August 2004, Clark was working as a deputy sheriff when he was seriously injured in an automobile collision. His workers' compensation was expanded to include:

Sprain left shoulder/arm; sprain of left ribs; contusion of chest wall; concussion with loss of consciousness of 30 minutes or less; contusion of neck; contusion of back; adjustment disorder with depressed mood; contusion of back, thoracic; contusion of left shoulder.

Clark has not worked since.

{¶6} Clark began receiving temporary total disability ("TTD") compensation. The TTD compensation was terminated in 2007 based upon findings that Clark had reached

maximum medical improvement ("MMI"). Clark then filed an application for PTD compensation.

{¶7} All the reports before the commission, except one, indicated that Clark cannot return to his former position with the Franklin County Sheriff's office. The focus of inquiry then became Clark's suitability for other employment and his ability to be retrained for employment for which is physically and emotionally suited.

{¶8} A staff hearing officer ("SHO") with the commission found Clark capable of new employment, relying on six separate reports from medical, psychological and biological experts. The SHO did not do a complete, independent vocational analysis, but relied upon the report of Robert Sproule, MA, Vocational Specialist. Sproule did not have the opportunity to review a report from Kelly E. Lindsay, M.D., who found Clark incapable of multitasking. Dr. Lindsay's report was one of the reports upon which the SHO relied.

{¶9} Our magistrate felt that Dr. Lindsay's report was important in determining Clark's residual functional capacity. The magistrate found that without a complete picture as to Clark's residual functional capacity, Sproule's vocational report was incomplete and could not be the basis for denying PTD compensation unless the SHO did an additional vocational analysis.

{¶10} The objections filed on behalf of the commission assert that the SHO did, in fact, do an independent vocational analysis. We respectfully disagree. Although the SHO mentioned Clark's age and educational background as positive factors, the SHO did not complete the consideration of so-called *Stephenson* factors necessary for a complete analysis of Clark's ability to perform sustained remunerative employment. *State ex rel. Stephenson v. Indus. Comm.* (1987), 31 Ohio St.3d 167. The magistrate recommends

that the commission do a complete analysis. The magistrate was correct. We overrule the commission's objections to the magistrate's decision.

{¶11} The objections filed on behalf of the Franklin County Commissioners are the same, stated in slightly different words. For the reasons set forth above, we also overrule those objections.

{¶12} As a result, we adopt the findings of fact and conclusions of law contained in the magistrate's decision. We, therefore, issue a writ of mandamus compelling the commission to vacate the SHO's order of October 8, 2008 and compelling the commission to address the merits of Clark's application for PTD compensation again with due consideration to the magistrate's insight and our findings.

*Objections overruled;  
writ of mandamus granted.*

BRYANT, J., concurs.  
FRENCH, P.J., dissents

FRENCH, P.J., dissenting.

{¶13} I respectfully dissent. In my view, it was sufficient for the staff hearing officer ("SHO") to detail the contents of Mr. Sproule's report, conclude that it is persuasive, and "adopt[ ] Mr. Sproule's opinion as her own." Unlike the order at issue in *State ex rel. Kinnebreu v. Clinic Ctr. Hotel*, 80 Ohio St.3d 688, 1998-Ohio-170, here, the SHO's order allows us to discern her reasoning and the basis for her decision. Therefore, I would sustain the relevant objections.

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**APPENDIX**

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Joseph E. Clark, Sr.,	:	
Relator,	:	
v.	:	No. 08AP-1105
Industrial Commission of Ohio	:	(REGULAR CALENDAR)
and Franklin County Commissioners,	:	
Respondents.	:	

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MAGISTRATE'S DECISION

Rendered on June 18, 2009

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*Connor, Evans & Hafenstein, LLP, and Katie L. Woessner,*  
for relator.

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

*Ron O'Brien, Prosecuting Attorney, and Amy L. Hiers,* for  
respondent Franklin County Commissioners.

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IN MANDAMUS

{¶13} In this original action, relator, Joseph E. Clark, Sr., requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order denying him permanent total disability ("PTD") compensation, and to enter an order granting said compensation.

Findings of Fact:

{¶14} 1. Relator has two industrial claims arising out of his employment with respondent Franklin County Commissioners ("employer"), a state-fund employer. His August 24, 2000 injury (claim number 00-512948) is allowed for "sprain lumbar region; sprain of neck." His August 31, 2004 injury (claim number 04-854250) is allowed for:

Sprain left shoulder/arm; sprain of left ribs; contusion of chest wall; concussion with loss of consciousness of 30 minutes or less; contusion of neck; contusion of back; adjustment disorder with depressed mood; contusion of back, thoracic; contusion of left shoulder.

{¶15} 2. The August 31, 2004 injury occurred while relator was employed with the Franklin County Sheriff. On that date, relator was involved in an automobile collision. Relator has not worked since the date of that injury.

{¶16} 3. Relator began receiving temporary total disability ("TTD") compensation.

{¶17} 4. Following a December 22, 2006 hearing, a staff hearing officer ("SHO") issued an order finding that relator had reached maximum medical improvement ("MMI") with respect to his allowed musculoskeletal conditions. However, the SHO found that relator had not reached MMI with respect to the "allowed brain injury and psychological conditions."

{¶18} 5. On April 24, 2007, at the request of the Ohio Bureau of Workers' Compensation ("bureau"), relator was examined by psychologist Lee Howard, Ph.D. In his 20-page narrative report, Dr. Howard stated that he conducted a "[n]europsychological [e]valuation." He also indicated that a March 2007 referral letter requested that he examine "for extent of psychological condition for adjustment disorder

with depressed mood and concussion with loss of consciousness for 30 minutes or less." On pages 17 and 18 of his report, Dr. Howard rendered opinions in response to several queries. Dr. Howard opined:

The claimant has reached maximum medical improvement for his head injury and adjustment disorder with depressed mood[.] \* \* \*

\* \* \*

The claimant can return to his previous type of employment without restrictions and/or modifications as his presentation is subjective in nature only and not objectively validated. This does not take into account the other physical allowances in this claim, motivational/attitudinal factors, the subjective presentation as mentioned above, and a significant simulation of mental illness/symptom magnification/malingering tendency measured on multiple objective psychometric tests.

\* \* \*

The claimant can perform at the simple, moderate, and low complex task range. He can perform at the low, moderate and moderately high stress range. \* \* \*

{¶19} 6. On April 26, 2007, at the bureau's request, relator was examined by Kelly E. Lindsay, M.D., who specializes in physical medicine rehabilitation. In his four-page narrative report dated May 1, 2007, the physical examination is described in part:

Examination of the head for cognition shows he is alert and oriented x3. Crenial nerves II-XII are grossly intact. There is some memory problem. He can repeat 3/3 objects but only recall 1/3 objects after two minutes. He has a difficult time repeating the alphabet skipping every other letter. He is coordinated and has a stable gait.

{¶20} In response to specific queries, Dr. Lindsay rendered several opinions, in pertinent part:

In my medical opinion, he has reached a treatment plateau. He may need to continue utilizing the services of a psychologist and a traumatic brain injury specialist to continue with altering medications and such, but it is not going to improve his fundamental, functional or physiological status.

\* \* \*

I do not think he can return to his former position of employment as he had a traumatic brain injury in regards to a concussion with a loss of consciousness and now his judgment and impulsivity is altered. He was a supervisor in the sheriff's department. Therefore, with a job title such as that, placing a man with a traumatic brain injury back into that environment would not be beneficial for him.

\* \* \*

He can frequently lift up to 20 pounds, occasionally lift up to 21- 50 pounds, but nothing more than that. He can frequently bend, twist, turn, and reach below the knee. He can occasionally push, pull, squat, and kneel. He can frequently stand, sit, walk and lift above the shoulder. These are permanent restrictions. He will also be limited in a cognitive capacity. His job duties would have to be limited to single tasks at a time as he had an injury to his brain. Multitasking would be very challenging for him. He would need rest breaks during the day. Overwhelming and overloading him with an injury of this capacity would likely lead to agitation and frustration on his part.

{¶21} 7. Following an August 15, 2007 hearing, an SHO issued an order terminating TTD compensation effective the date of the hearing. The termination was premised upon the MMI opinions contained in the April 24, 2007 report of Dr. Howard and the May 1, 2007 report of Dr. Lindsay.

{¶22} 8. On February 6, 2008, relator filed an application for PTD compensation.

{¶23} 9. On March 11, 2008, at the employer's request, relator was examined by Seth H. Vogelstein, D.O. In his six-page narrative report, Dr. Vogelstein opined:



In summary, it is my medical opinion, considering all the allowed physical conditions, that Mr. Clark is capable of returning to sustained remunerative employment. In my opinion he should avoid lifting greater than 50 pounds occasionally and 20 pounds frequently. He can perform moderate amounts of bending, stooping and squatting. In my opinion he does not require any restrictions as far as standing or ambulating are concerned. In my opinion he would be able to work eight hours a day, five days a week. In my opinion the above restrictions are permanent in nature.

During my discussion with Mr. Clark he did inform me that he does drive. He states that his daily activities also include chores such as the laundry, vacuuming and dishes. Taking these factors into account in conjunction with his physical findings and his ability to answer my questions in an appropriate, friendly and thoughtful manner, it is my medical opinion, with a reasonable degree of medical probability that Mr. Clark is not permanently and totally disabled from all forms of sustained remunerative employment. Again, in my opinion he could not perform the duties of a Sheriff, but in my medical opinion the allowed conditions in these two claims are not rendering him permanently and totally disabled at this time.

{¶24} 10. On March 17, 2008, at the employer's request, relator was examined by psychologist Donald J. Tosi, Ph.D. In his ten-page narrative report, Dr. Tosi opined:

Adjustment Disorder with depressed mood is allowed in the claim. Psychological testing (MCMI-III) reveals a very strong tendency toward symptom magnification, which is indicative of malingering. This finding is also consistent with Dr. Howard's (4/24/07) report. As well, I did not find the Injured Worker permanently and totally disabled based on my previous examination (7/24/07). Nor did I find him permanently and totally disabled as a result of the findings of this examination. Overall, any impairments across the four areas of residual functioning are within the mild range. He would function best in low to moderate work stress situations.

\* \* \*

I do not think this Injured Worker could function in his previous job as a sheriff. Such a position would be too

stressful. He would be able to hold down many different jobs in law enforcement (i.e., dispatcher, investigator, instructor). Therefore, the Injured Worker is not permanently and totally disabled.

{¶25} 11. On May 1, 2008, at the commission's request, relator was examined by Robin G. Stanko, M.D., who specializes in physical medicine and rehabilitation. In his five-page narrative report, Dr. Stanko opined:

\* \* \* With respect to his musculoskeletal injuries, I feel the claimant could perform activity at medium work levels, that is, lifting 20 lbs. frequently and up to 50 lbs. With regard to his cognitive impairments, I feel he would have to work in a structured environment where he did not have to make rapid cognitive decisions or judgement decisions. \* \* \*

{¶26} 12. On May 1, 2008, Dr. Stanko also completed a physical strength rating form. On the form, Dr. Stanko indicated by his mark that relator is capable of "medium work." He further wrote: "Requires structured cognitive work environment."

{¶27} 13. On May 1, 2008, at the commission's request, relator was examined by psychologist Dr. Earl F. Greer, Jr., Ed.D. In his four-page narrative report, Dr. Greer opined:

[One] The injured worker has reached maximum medical improvement with regards to his Adjustment Disorder with Depressed Mood reporting having been involved in psychological/psychiatric treatment for approximately three and a half years.

[Two] His degree of permanent emotional impairment due to his industrial accident on 8/31/2004 and referenced by the AMA Guide to Permanent Impairment (5th and 2nd Editions); is presently estimated at Class III /30%.

[Three] The degree of emotional impairment due to his industrial accident on 8/31/2004 would currently not be expected to solely prevent him from working but would prevent him from working as a police officer, primarily because of the required possibility of having to use deadly

force. Work would be expected to be therapeutic, enhancing self-worth. Concentration, persistence and pace were adequate.

(Emphases sic.)

{¶28} 14. At the employer's request, vocational expert Robert Sproule prepared a vocational report dated July 16, 2008. In his five-page narrative report, Sproule lists the records he reviewed. The reports of Drs. Vogelstein, Tosi, Stanko and Greer are among the reports listed as having been reviewed. Absent from the listing are the April 24, 2007 report of Dr. Howard and the May 1, 2007 report of Dr. Lindsay.

{¶29} Using "VocRehab software," Sproule performed a "transferable skills analysis" that identifies "employment options." Sproule explained:

The transferable skills analysis was done utilizing the light to medium strength level based on the current medical evidence presented, with consideration for the need to work in structured, low to moderate stress work environments. At this level there were several realistic transferable occupations related to knowledge and skills he obtained from his previous work. \* \* \*

{¶30} Sproule lists nine occupations as "potential employment options" for relator. Seven of the nine occupations are described as sedentary. The other two are described as "light." The sedentary occupations are surveillance system monitor, gate guard, dispatcher, police clerk, civil service clerk, finger print clerk, and registration clerk. The two "light" occupations are security guard and bailiff.

{¶31} Sproule further opined:

The claimant is currently 49 years old, still considered a younger worker. In general, age refers to one's chronological years and the extent to which one's age affects the ability to adapt to the new work situations and to do work in competition with others. Many employers prefer younger employees such as the claimant who have more work life

remaining over the course of employment. The claimant's age would be a positive vocational factor.

The claimant graduated from high school. Individuals with this educational background are considered to have a "high school education or above", which means ability in reasoning, arithmetic, and language skills acquired through formal schooling at twelfth grade education or above. Generally an individual with these educational abilities can perform semi-skilled through skilled work. The claimant possesses the necessary abilities to obtain, or be trained to obtain light to medium, entry-level to skilled work. The claimant's education would be a positive vocational factor.

The claimant's vocational history demonstrates the ability to learn and perform complex work tasks, to interact with the public and other populations, and supervise others. The claimant's work history would be a positive vocational factor.

\* \* \*

It is this reviewer's professional opinion that based on the weight of the medical evidence for the allowed conditions of the claim, the claimant has occupational work capacities, positive vocational factors, transferable work capabilities from his previous work experience, and the capability to perform and learn complex work tasks. The claimant would be capable of sustained remunerative employment in occupations identified in the transferable skills analysis. From a vocational perspective, the claimant is not permanently and totally disabled from all sustained, remunerative employment.

{¶32} 15. Following an October 8, 2008 hearing, an SHO issued an order denying relator's PTD application. The SHO's order explained:

\* \* This finding is based upon the following reports: Drs. Stanko, Greer, Vogelstein, Tosi, Lindsay, Howard, and on the vocational ability report of Mr. Sproule

The Staff Hearing Officer relies upon the report of Dr. Stanko dated 05/01/2008 on behalf of the Industrial Commission. In that report Dr. Stanko opines, with regard to his muscular skeletal injuries, that the claimant is capable of activity at the medium work levels. Dr. Stanko opines that with respect to

the cognitive impairments, the injured worker would have to work in a structured environment where he would not have to make rapid cognitive decisions or judgment decisions. Based on the report of Dr. Stanko, the Staff Hearing Officer concludes that the injured worker is capable of work at the medium work activity level, with the requisite that the injured worker requires a structured cognitive work environment.

The Staff Hearing Officer bases this finding on the persuasive report of Dr. Greer, dated 05/01/2008 on behalf of the Industrial Commission. In that report, Dr. Greer finds that this injured worker is capable of work with the limitation that he is not able to return to his former position of employment as a police officer primarily because of the required possibility of having to use deadly force. Dr. Greer, in fact, opined that work would be therapeutic for this injured worker, enhancing his self-worth.

The Staff Hearing Officer finds the report of Dr. Greer persuasive to support that the injured worker is capable of sustained remunerative employment with consideration given to the allowed psychological condition in this claim, so long as it is a job not requiring the possibility of using deadly force.

The Staff Hearing Officer relies on the report of Dr. Vogelstein, on behalf of the employer, dated 03/11/2008. In that report, Dr. Vogelstein opines that the injured worker would not be able to return to his work as a sheriff, but that he could perform other types of work in the light to medium categories with respect to the allowed physical conditions in this claim.

The Staff Hearing Officer finds the report of Dr. Vogelstein to support the conclusion that the injured worker is capable of sustained remunerative employment in the light to medium type categories with respect to the allowed physical conditions in this claim.

The Staff Hearing Officer relies on the report of Dr. Tosi, dated 03/17/2008 on behalf of the employer. In that report, Dr. Tosi concludes that the injured worker could not function in his previous job as a sheriff, but that he would be able to hold down many different jobs in law enforcement, for example dispatcher, investigator, instructor, with regard to the allowed psychological condition in this claim. Dr. Tosi

states that the injured worker would function best in low to moderate work stress situations.

The Staff Hearing Officer finds the report of Dr. Tosi to support the finding and conclusion that the allowed psychological condition does not prevent the injured worker from engaging in any and all kinds of employment in the low to moderate work stress environment.

The Staff Hearing Officer relies on the report of Dr. Lindsay, dated 05/01/2007 on behalf of the BWC. Dr. Lindsay opines that the injured worker would be capable with regard to his physical restrictions of work activity in the medium to light work activity range, and that he would be limited in a cognitive capacity to jobs requiring single tasks at a time. He is capable of working eight hours, five days a week, according to the Report of Workability, dated 04/25/2007, from Dr. Lindsay.

The Staff Hearing Officer finds the report of Dr. Lindsay persuasive to support the conclusion that the allowed physical conditions do not prevent the injured worker from engaging in at least certain types of sustained remunerative employment within the medium to light type category and limited to single tasks at a time.

The Staff Hearing Officer relies on the report of Dr. Howard, Ph.D., dated 04/24/2007, on behalf of the BWC. In that report, Dr. Howard opines that the injured worker can return to his previous type of employment without restrictions and/or modifications, based on Dr. Howard's opinion that the injured worker's presentation is subjective in nature only and not objectively validated. Dr. Howard opines that the claimant on a psychological basis can perform at the simple, moderate and low complex task range, and that he can perform at the low, moderate and moderately high stress range.

The Staff Hearing Officer finds the report of Dr. Howard persuasive to support the conclusion that the allowed psychological conditions do not prevent the injured worker from engaging in any and all kinds of employment, including the injured worker's former position of employment.

The claimant is now 51 years old. He has a High School Diploma and he has additional training through Ohio Police

Officer Training Academy. He can read, write and perform basic math. He can also drive a car, but states on his application that this is for in-town driving only, and that distances make him nervous. His work history includes 24 years as a sheriff with Franklin County, and as a special duty officer. He last worked on the date of his second injury, 08/31/2004. That injury occurred when he was a passenger in a police vehicle that was struck head on. His other reported injury on 08/24/2000, also while working as a sheriff, occurred when he was lifting heavy boxes and experienced pain in his low back and neck.

The employer had a Vocational Ability Report from evaluation by Robert Sproule, MA, Vocational Specialist, and that report is dated 07/16/2008. Mr. Sproule opines that the claimant's age would be a positive vocational factor. Mr. Sproule opines that the claimant's education would also be a positive vocational factor. He opines that generally an individual with similar educational abilities can perform semi-skilled through skilled work, and that the claimant possesses the necessary abilities to obtain, or be trained to obtain light to medium, entry-level to skilled work. Mr. Sproule opines that the claimant's work history would be a positive vocational factor. He opines that the claimant's vocational history demonstrates the ability to learn and perform complex work tasks, to interact with the public and other populations, and supervise others. He concludes that it is his professional opinion, based on the weight of the medical evidence for the allowed conditions of the claim, that the claimant has occupational work capacities, positive vocational factors, transferable work capabilities from his previous work experience, and the capability to perform and learn complex work tasks. He opines that the injured worker would be capable of sustained remunerative employment in occupations identified in the transferable skills analysis of his report. He concludes that from a vocational perspective the claimant is not permanently and totally disabled from all sustained remunerative employment.

The Staff Hearing Officer finds the report of Vocational Specialist Mr. Sproule persuasive to support the conclusion that the claimant is not permanently and totally disabled from all sustained remunerative employment from a vocational perspective, and adopts Mr. Sproule's opinion as her own.

The Staff Hearing Officer further notes that the injured worker has not engaged in any vocational rehabilitation program through the BWC or the BVR in order to enhance his work capabilities and skills from his previous occupations, although Dr. Rabold, in a report dated 05/31/2007, said that she wanted to address the injured worker's readiness for vocational readiness in Fall, 2007.

Based on all of the above reports, the Staff Hearing Officer finds that the injured worker is not permanently and totally disabled from all sustained remunerative employment and denies the application for permanent and total disability filed 02/06/2008.

{¶33} 16. On December 22, 2008, relator, Joseph E. Clark, Sr., filed this mandamus action.

#### Conclusions of Law:

{¶34} It is the magistrate's decision that this court issue a writ of mandamus, as more fully explained below.

{¶35} Ohio Adm.Code 4121-3-34 sets forth the commission's rules applicable to the adjudication of PTD applications. Ohio Adm.Code 4121-3-34(B) sets forth definitions applicable to the commission's rules. Pertinent here, Ohio Adm.Code 4121-3-34(B)(4) states:

"Residual functional capacity" means the maximum degree to which the injured worker has the capacity for sustained performance of the physical-mental requirements of jobs as these relate to the allowed conditions in the claim(s).

{¶36} Ohio Adm.Code 4121-3-34(D) sets forth the commission's guidelines for adjudication of PTD applications. Pertinent here, Ohio Adm.Code 4121-3-34(D)(2)(b) states:



If, after hearing, the adjudicator finds that the injured worker, based on the medical impairment resulting from the allowed conditions is unable to return to the former position of employment but may be able to engage in sustained remunerative employment, the non-medical factors shall be considered by the adjudicator.

The non-medical factors that are to be reviewed are the injured worker's age, education, work record, and all other factors, such as physical, psychological, and sociological, that are contained within the record that might be important to the determination as to whether the injured worker may return to the job market by using past employment skills or those skills which may be reasonably developed. \* \* \*

{¶37} A clear indication by the commission of the residual medical capacities it believes the claimant to possess is vital to a nonmedical review, for it is within this framework that vocational factors are analyzed. *State ex rel. Corona v. Indus. Comm.* (1998), 81 Ohio St.3d 587, 589. See also *State ex rel. Kinnebrew v. Clinic Ctr. Hotel* (1998), 80 Ohio St.3d 688.

{¶38} The commission may credit vocational evidence but expert opinion is not critical or even necessary, because the commission is the expert on the nonmedical issue. *State ex rel. Jackson v. Indus. Comm.* (1997), 79 Ohio St.3d 266, 271. Moreover, the commission is free to reject the conclusion of a rehabilitation report and draw its own conclusion from the nonmedical information. *State ex rel. Ewart v. Indus. Comm.* (1996), 76 Ohio St.3d 139, 141. It is within the commission's discretion to accept a vocational report's underlying facts while rejecting its conclusion. *State ex rel. Mann v. Indus. Comm.* (1998), 80 Ohio St.3d 656, 658.

{¶39} Here, the SHO's determination of residual functional capacity is premised upon six medical reports, i.e., the reports of Drs. Stanko, Greer, Vogelstein, Tosi, Lindsay and Howard.

{¶40} Unlike many commission orders that require a review of the nonmedical factors in a PTD determination, this order does not indicate that the SHO conducted her own analysis of the nonmedical factors. Rather, the SHO's order states:

The Staff Hearing Officer finds the report of Vocational Specialist Mr. Sproule persuasive to support the conclusion that the claimant is not permanently and totally disabled from all sustained remunerative employment from a vocational perspective, and adopts Mr. Sproule's opinion as her own.

{¶41} Moreover, in the lengthy paragraph immediately preceding the one just quoted, the order simply lists the opinions and conclusions within Sproule's report. There is no separate analysis of the nonmedical factors by the SHO. See *Kinnebreu* (commission's nonmedical conclusions were premised not on its own independent analysis, but, instead, upon the reports of Barbara Burk).

{¶42} Unfortunately, Sproule failed to review two medical reports that the SHO relied upon for the determination of residual functional capacity. That is, Sproule did not review the reports of Drs. Lindsay and Howard. As earlier noted, Dr. Lindsay opined not only that relator is physically restricted to the medium to light work activity range, but, also, that relator is limited in his cognitive capacity to jobs limited to single tasks at a time. That is, relator is unable to perform jobs that require multitasking.

{¶43} The commission was required to analyze and determine how the nonmedical factors impact relator's residual functional capacity. In analyzing the nonmedical factors, the commission must necessarily do so in the context of its determination of residual functional capacity.

{¶44} Because Sproule did not have a complete picture of the residual functional capacity as determined by the SHO, his nonmedical analysis and conclusion is not

germane to the SHO's determination of residual functional capacity. Accordingly, it was an abuse of discretion for the commission to exclusively rely upon Sproule's report for its determination of the nonmedical factors.

{¶45} Based upon the foregoing analysis, it is the magistrate's decision that this court issue a writ of mandamus ordering the commission to vacate its SHO's order of October 8, 2008 and, in a manner consistent with this magistrate's decision, issue a new order that adjudicates relator's PTD application.

/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).