[Cite as *State ex rel. Krantz v. Indus. Comm.*, 2010-Ohio-4319.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. George Krantz,	:	
Relator,	:	
v.	:	No. 09AP-876
Industrial Commission of Ohio and Go For It Transportation,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on September 14, 2010

Law Offices of Kurt M. Young LLC, and *Kurt M. Young*, for relator.

Richard Cordray, Attorney General, and *Allan K. Showalter*, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO MAGISTRATE'S DECISION

TYACK, P.J.

{¶1} George Krantz 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 and to compel the commission to enter a new order granting him 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 is appended to this decision. The magistrate's decision contains detailed findings of fact and conclusions of law. The magistrate's decision includes a recommendation that we deny the request for a writ.

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

{¶4} In 1986, Krantz was only 26 years old when he had a serious fall while working as a truck driver. His workers' compensation claim has been recognized for "undisplaced fracture tip of left greater trochanter," "left lumbar strain, left sacroiliac strain, lumbar radiculitis," and "lumbar spondylosis at L2-3, L3-4 and L5-S1."

{¶5} About 18 months after his fall, he was able to find new work as a truck driver, but the pain in his left hip continued. He had cortisone injections and received services from both an orthopedic surgeon and a physical medicine specialist. He has had ongoing treatment from a chiropractor for pain relief.

{¶6} After Krantz filed for PTD compensation, he was examined by Harvey A. Popovich, M.D., MPH. Dr. Popovich found Krantz capable of medium work, which includes work involving use of force in the 20 to 50 pound range. Dr. Popovich found only a 2 percent whole person impairment.

{¶7} Clearly, the medical evidence before the commission was consistent with the commission's finding that Krantz was not entitled to PTD compensation.

The remaining issues involve the application of the so-called *Stephenson* factors to Krantz's application for PTD compensation. *State ex rel. Stephenson v. Indus. Comm.* (1987), 31 Ohio St.3d 167.

{¶8} Krantz still has many potential years of employment. He has a GED and the basic academic skills consistent with that of a high school graduate. His medical condition is nowhere near that often seen by the court in situations where injured workers are seeking PTD compensation.

{¶9} The staff hearing officer ("SHO") who addressed the merits of Krantz's application for PTD compensation viewed Krantz's discontinuation of rehabilitation services as a negative factor. This may seem unfair, since Krantz repeatedly made efforts to keep his rehabilitation file open. However, ultimately he chose to discontinue the services. The commission had the option of viewing that choice as a negative.

{¶10} The second objection to the magistrate's decision, which reads "the magistrate erred by finding the IW had not availed himself of all opportunities to re-enter the workforce," is overruled.

{¶11} The first objection filed on behalf of Krantz reads:

> The Magistrate erred by finding the allowance of the additional condition does not in any way detract from the evidentiary value of relator's demonstrated ability to work while employed with R. H. Leasing.

{¶12} The record before us does not indicate that Krantz was unable to do the work for his last employer. The employer simply did not need Krantz's services. The lumbar spondylosis which was recognized as a condition only after the employment apparently existed and was diagnosed before the employment with R.H. Leasing ended.

The timing of the recognition of the condition does not automatically correspond with when the condition materialized. Indeed, the condition will always be medically recognized and diagnosed before an injured worker can have it recognized for purposes of a workers' compensation claim.

{¶13} We overrule the first objection to the magistrate's decision.

{¶14} Both objections having been overruled, we adopt the findings of fact and conclusions of law contained in the magistrate's decision. As a result, we deny the request for a writ of mandamus.

Objections overruled; writ denied.

FRENCH and SADLER, JJ., concur.

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A P P E N D I X

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. George Krantz,	:	
Relator,	:	
v.	:	No. 09AP-876
Industrial Commission of Ohio and Go For It Transportation,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on June 18, 2010

Law Offices of Kurt M. Young LLC, and *Kurt M. Young*, for relator.

Richard Cordray, Attorney General, and *Allan K. Showalter*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶15} In this original action, relator, George Krantz, 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:

{¶16} 1. On June 28, 1986, relator sustained an industrial injury while employed as a truck driver. On that date, relator fell from a ladder as he was washing his truck.

{¶17} 2. Initially, the industrial claim (No. 86-16624) was allowed for "undisplaced fracture tip of left greater trochanter."

{¶18} 3. In 1992, the claim was further allowed for "left lumbar strain, left sacroiliac strain, lumbar radiculitis."

{¶19} 4. On February 28, 2007, relator moved for the allowance of additional conditions. In support, relator submitted a report, dated December 27, 2005, from his treating chiropractor, Autumn R. Keller, D.C.

{¶20} 5. Following a July 13, 2007 hearing, a staff hearing officer ("SHO") issued an order additionally allowing the claim for "lumbar spondylosis at L2-3, L3-4 and L5-S1." The SHO's order indicates reliance upon a report from Dr. Keller dated December 277, 2005.

{¶21} 6. Earlier, by letter dated February 20, 2006, relator's rehabilitation file was closed effective February 13, 2006. Relator administratively appealed the closure.

{¶22} 7. Following a June 22, 2006 hearing, a district hearing officer ("DHO") issued an order finding the closure to be in error. The DHO referred the matter back to the Ohio Bureau of Workers' Compensation ("bureau") for a feasibility determination.

{¶23} 8. On December 13, 2006, bureau vocational case manager Michael K. MacGuffie issued a "Vocational Rehabilitation Closure Report" on form RH-21:

> Mr. Krantz was referred for vocational rehabilitation services July 18th, 2006, and an initial assessment was conducted a

short time later to determine feasibility for services. Upon completion of this process, Mr. Krantz was determined to be a suitable candidate for return to work services, and an Individualized Written Vocational Rehabilitation Plan was developed to facilitate this process. Services included a comprehensive vocational evaluation, work-conditioning, Job Seeking Skills Training (JSST), job placement assistance, 30-day return to work monitor and vocational rehabilitation case management.

Mr. Krantz participated in all services offered and there were no issues or concerns regarding his attendance, cooperation or follow through. Mr. Krantz displayed a positive attitude throughout this process and there were no problems with his compliance.

In summary, Mr. Krantz began a job search on October 16th, 2006, and secured a position with R&H Leasing, an expediting company, as a truck driver. This was a part time position (20-25 hours per week) and Mr. Krantz made local runs throughout his catchment area. He was able to work approximately 29 hours the first two weeks of employment; but the work slowed down considerably and he only received 4 hours the next two weeks. He has not worked in any significant capacity since this time.

After discussing the limited hours available with Mr. Krantz, it was decided that he was not suitably employed (due to limited hours), and an Individualized Written Vocational Rehabilitation Plan was submitted to resume job search/ placement activities. The Bureau of Workers[']Compensation, however, did not accept the plan, indicating that Mr. Krantz was suitably employed, even though he had not worked any significant hours since mid-November 2006. The BWC's rationale was that Mr. Krantz was limiting his availability for work, due to childcare needs.

It is noted that Mr. Krantz is a single parent, having sole custody of his 6-year old son. As a result, Mr. Krantz needs to ensure the proper supervision of his son, while at work. It is further noted that many single parents have to work around childcare needs and this is by no means an unusual circumstance. It is also felt that this could have been accommodated and was within the scope of chapter 4

> services. Simply put, Mr. Krantz would have benefited from resumption of job search/placement services to identify a position that meet [sic] his financial and childcare obligations (as this was not an insurmountable barrier).
>
> However, the Bureau of Workers' Compensation declined to implement an amended rehabilitation plan to address this issue, indicating that Mr. Krantz is suitably employed. This writer does not concur with this assessment.
>
> This case is being closed without prejudice to Mr. Krantz, as he was cooperative and compliant throughout this process.

{¶24} 9. Relator administratively appealed the December 13, 2006 closure.

{¶25} 10. Following a May 1, 2007 hearing, a DHO issued an order to reopen vocational rehabilitation services:

> The District Hearing Officer (DHO) finds that the injured worker remains eligible and feasible for vocational re-habilitation services. The DHO relies on the report of Robert Sproule, C.D.M.S., which states that the injured worker's rehabilitation file should be re-opened. The injured worker returned to part-time employment. However, due to a downturn in the business, the injured worker's job was no longer available. In the first two (2) weeks of employment, the injured worker worked approximately 14 hours and had more limited hours following that. Therefore, the DHO finds that the injured worker did not quit this job, but the job became unavailable to him.
>
> Every indication in the vocational rehabilitation file indicates that the injured worker was compliant with vocational rehabilitation services. In particular, in a report, dated 12/13/2006, by the vocational rehabilitation manager, it is noted that the injured worker displayed a positive attitude throughout the process and there were no problems with his compliance. Vocational Rehabilitation Services determined that the [sic] Mr. Krantz was not suitably employed when the hours he received reduced down to four (4) in two (2) weeks.

> Therefore, the DHO finds that the injured worker's vocational rehabilitation services plan is to be re-opened that he remains eligible and feasible for services.

{¶26} 11. On August 3, 2007, case manager MacGuffie issued another vocational rehabilitation closure report closing the rehabilitation file effective July 24, 2007:

> Mr. Krantz's vocational file was reopened via an appeal and his case was reassigned to continue vocational rehabilitation services. Specifically, Mr. Krantz resumed his job search with the assistance of job placement services to augment his efforts.
>
> Mr. Krantz engaged in this activity for an 8-week period, and was noted to be cooperative and compliant with the requirements outlined in his Individualized Written Vocational Rehabilitation Plan. Mr. Krantz, however, did not receive a viable job offer from these efforts.
>
> After consulting with Mr. Krantz and discussing additional services to facilitate a return to work (i.e., training), he indicated that he would like to discontinue services upon completion of his job search and requested that his case be closed in the field.
>
> Since participation is voluntary and Mr. Krantz requested discontinuation, this writer is proceeding accordingly and closing this vocational file, without prejudice.

{¶27} 12. Apparently, the August 3, 2007 closure was not administratively appealed.

{¶28} 13. On October 1, 2007, relator filed an application for PTD compensation.

{¶29} 14. The PTD application form asks the applicant to provide information regarding his work history. In response, relator indicated that he was employed as a "Semi-Driver" in the "Trucking" industry from November 2006 to April 2007. In response

to the query of how many days per week he worked this job, relator wrote: "On Call." The hourly rate of pay was "$10.00."

{¶30} 15. The PTD application prompted the commission to schedule relator for an examination to be performed by Harvey A. Popovich, M.D. The examination occurred January 30, 2008. In his five-page narrative report, Dr. Popovich appropriately listed the claim allowances.

{¶31} 16. On January 30, 2008, Dr. Popovich also completed a physical strength rating form on which he opined that relator is capable of "medium work."

{¶32} 17. Following an August 12, 2008 hearing, an SHO issued an order denying relator's PTD application. The SHO's order explains:

> The injured worker is an approximately 48 year old male whose date of birth is 9/26/1959. The injured worker has a 12th grade education but was 1/4 credit short of his high school diploma. The injured worker was also trained through Superior Truck Driver Training and Vocational School and is capable of performing basic math, reading and writing.
>
> The injured worker has worked as a semi-truck driver his entire employment life.
>
> This injury [occurred] on 6/20/1986 when the injured worker was approximately 26 years old. He was on a ladder hosing down the top of his truck trailer when the ladder collapsed. The injured worker fell a distance of approximately 8 feet and had immediate pain in his left hip. He was unable to get up. The injured worker was taken to St. Vincent Hospital emergency department when he was given X-rays, crutches, and discharged home. He had further medical attention from orthopedic surgeons, but no surgery or other treatment to the hip. Approximately 18 months later, he found new work as a truck driver on an unrestricted basis.
>
> Subsequent to that time period, the injured worker had treatment with Dr. Sullivan, consisting of cortisone injections

in the left hip and has been treated by a physical pain medicine specialist, Dr. Trevidi, and also has had physical therapy. The injured worker's current treatment consists of chiropractic care.
The Staff Hearing Officer finds a significant issue the injured worker's last date of work. The injured worker last worked for R.H. Leasing in November of 2006. He was working for them on an on-call basis, short haul deliveries. At some point after December of 2007, R.H. Leasing simply quit calling him for jobs, and the injured worker has not performed any work activity since that time.

When questioned at the hearing, the injured worker testified that although he had been able to do the short-term driving for R.H. Leasing, they did not have any work available for him.

The injured worker did participate in rehabilitation and received Living Maintenance. This was terminated on 7/24/2007. At that time, the injured worker had been engaged in job search placement services and looking for work. The job search trainer consulted with the injured worker at that time to discuss additional services to facilitate a return to work such as training, but the injured worker indicated he would like to discontinue services upon completion of his job search and requested that his case be closed. The vocational specialist closed the injured worker's vocational rehabilitation case as participation in the program is voluntary.

This Staff Hearing Officer finds that based upon the injured worker's last work activity, and the voluntary closure of his vocational rehabilitation services, that it does not appear that the injured worker has availed himself of all opportunities to re-enter the work force. It does not appear that the injured worker was unable to perform the work of short-term driving at R.H. Leasing, simply that company did not have any other work for him. In regard to the vocational rehabilitation, the injured worker had not obtained a job after a few weeks of job search, and voluntarily terminated the program at his request.

The Staff Hearing Officer finds these are barriers to a finding of permanent and total disability.

In addition to this, this Staff Hearing Officer finds that on a physical basis the injured worker is not permanently and totally disabled. The injured worker was evaluated by Dr. Popovich on 1/30/08. Dr. Popovich took a full and complete history of the injured worker, reviewed medical evidence on file, and performed a physical examination. As a result of the above, Dr. Popovich opined that the injured worker has only a 2 percent whole person impairment related to the allowed physical conditions in this claim and is capable of performing sustained remunerative work at the medium work level.

The Staff Hearing Officer finds the injured worker is capable of not only taking care of his personal issues and activities of daily living, but caring for and supporting an 8 year old son. The injured worker has full custody of his son. The injured worker testified at hearing that he does the cooking, laundry approximately once a month, walks his son 1/2 block to the bus, does grocery shopping approximately once per month. The injured worker lives in a third floor apartment and lifts and carries his own groceries with his son's help. The injured worker vacuums, drives, watches television, reads books from time to time, and socializes with friends in the building. The injured worker testified at hearing that while he was participating in physical therapy, his back did improve, but since he has not been able to maintain physical therapy or those exercises it has again worsened. In that physical therapy program, the injured worker participated for approximately 12 weeks, 2 hours a day, and the highest weight lifted was 15 pounds. The injured worker testified at hearing that he is capable of lifting a gallon of milk which is approximately 8 pounds. Based upon the opinion of Dr. Popovich, the injured worker could exert 20 to 50 pounds of force occasionally, and/or 10 to 25 pounds of force frequently and/or greater than negligible up to 10 pounds of force constantly, to move objects.

The re-employment specialist in the vocational rehabilitation program, Mr. Schlagheck, indicated that the injured worker's termination was also in part due to the injured worker's rural area and lack of short-haul driving positions in that area.

The injured worker testified at hearing the need to do only short-haul driving, both related to the allowed conditions in

> the claim and the fact that he has sole custody and care of his 8 year old son.
>
> The Staff Hearing Officer finds the injured worker has good vocational factors. He is a reasonably young man, capable of re-training, or vocational re-training. The injured worker has almost a 12th grade education with some additional vocational training thereafter. The injured worker's job experience is limited, however, he is capable of performing the basic activities of his former position of employment with some restrictions, such as short-haul, and limited lifting. The requirement that the injured worker perform only short-haul driving is as much a factor of lifestyle choice, the rural area in which he lives, and the need to care for his son, as it is the allowed conditions in this claim.
>
> The Staff Hearing Officer finds the injured worker is, in fact, physically capable of performing sustained remunerative work activity. A permanent and total disability award is an inability to perform sustained remunerative employment.
>
> This Staff Hearing Officer does not find that to be the case here, and based upon the injured worker's own testimony at hearing, his educational background, prior work experience and skill levels, as well as the physical abilities identified by the medical opinion of Dr. Popovich, the injured worker is capable of performing sustained remunerative work activity.
>
> Therefore, the IC-2 Application filed on 10/1/2007 is DENIED.
>
> The Staff Hearing Officer finds the injured worker could, in fact, perform short-haul driving and other activities in a medium, light, or sedentary capacity. However, the injured worker's choice of living in a rural area limits his employment options. That is a lifestyle choice and not a factor related to the allowed conditions in this claim.
>
> Based upon all of the above, the Staff Hearing Officer finds the injured worker is not permanently and totally disabled nor is precluded from performing sustained remunerative work activity.

(Emphasis sic.)

{¶33} 18. On September 21, 2009, relator, George Krantz, filed this mandamus action.

Conclusions of Law:

{¶34} Two main issues are presented: (1) whether the commission could rely upon relator's demonstrated abilities working for R.H. Leasing during late 2006 when, subsequently, his industrial claim was additionally allowed for "lumbar spondylosis at L2-3, L3-4 and L5-S1," and (2) whether the commission abused its discretion in addressing the nonmedical factors.

{¶35} Finding no abuse of discretion, it is the magistrate's decision that this court deny relator's request for a writ of mandamus, as more fully explained below.

{¶36} THE FIRST ISSUE

{¶37} The first issue is easily answered. In effect, relator argues that the commission's allowance of the claim for the additional condition following hearings during June and July 2007, constitutes a change in relator's medical condition that occurred subsequent to relator's employment with R.H. Leasing during late 2006 and, thus, has the effect of eliminating the evidentiary value of relator's demonstrated work abilities while employed with R.H. Leasing.

{¶38} Relator's argument ignores that the commission's allowance of the additional condition of "lumbar spondylosis at L2-3, L3-4 and L5-S1" was premised upon a report from Dr. Keller dated December 27, 2005, a report that relator has failed to submit to the stipulated record. Because Dr. Keller's report predates relator's employment with R.H. Leasing, the presumption is that the "lumbar spondylosis at L2-3,

L3-4 and L5-S1," predates the employment with R.H. Leasing. Consequently, the allowance of the additional condition does not in any way detract from the evidentiary value of relator's demonstrated ability to work while employed with R.H. Leasing.

{¶39} THE SECOND ISSUE – NONMEDICAL FACTORS

{¶40} As earlier noted, the second issue is whether the commission abused its discretion in addressing the nonmedical factors. Several sub-issues are presented with respect to the nonmedical factors.

{¶41} VOCATIONAL REHABILITATON ISSUE

{¶42} In its order, the commission found that relator's July 24, 2007 voluntary closure of his vocational rehabilitation file is a "barrier to a finding of permanent and total disability."

{¶43} The Supreme Court of Ohio has repeatedly held that a "certain accountability" be demanded of the claimant as to any effort to enhance reemployment prospects. *State ex rel. Bowling v. Natl. Can Corp.*, 77 Ohio St.3d 148, 153, 1996-Ohio-200.

{¶44} In *State ex rel. B.F. Goodrich Co. v. Indus. Comm.*, 73 Ohio St.3d 525, 529, 1995-Ohio-291, the court stated:

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

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

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

{¶46} Here, relator's suggests that the commission abused its discretion in interpreting the evidence relating to participation in bureau-sponsored vocational rehabilitation:

> An examination of the injured worker's rehabilitation participation demonstrates a different conclusion than the hearing officer's flat statement and inference the injured worker voluntarily limited, then closed rehabilitation after only a few short weeks of job searching. In contrast, the injured worker expended great effort to get into and to stay in vocational rehabilitation. The injured worker initiated vocational rehabilitation in 2005, litigated vocational rehabilitation issues over the next two years, twice requiring Industrial Commission orders to re-open, before successfully completing a full 13 week job search program. * * *

(Relator's brief at 12.)

In a footnote, relator asserts:

> * * * The conclusion of the Industrial Commission Staff Hearing Officer that Krantz had ["]not obtained a job after a few weeks of job search, and voluntarily terminated the program at his request["] is enormously misleading, slanted and smacks in the face of Krantz's two years of participation in the rehabilitation effort. * * *

(Relator's brief at 13.)

{¶47} The magistrate disagrees with relator's suggestion that the commission abused its discretion in finding a so-called "barrier." Again, the commission's order states:

> The injured worker did participate in rehabilitation and received Living Maintenance. This was terminated on 7/24/2007. At that time, the injured worker had been engaged in job search placement services and looking for work. The job search trainer consulted with the injured worker at that time to discuss additional services to facilitate a return to work such as training, but the injured worker indicated he would like to discontinue services upon completion of his job search and requested that his case be closed. The vocational specialist closed the injured worker's vocational rehabilitation case as participation in the program is voluntary.

{¶48} The above-quoted portion of the commission's order begins with the commission's acknowledgement that relator "did participate in rehabilitation." Thus, the commission's order does credit relator for his participation in vocational rehabilitation prior to the July 24, 2007 voluntary termination or file closure. However, the remainder of the above-quoted part of the order is devoted to the commission's reasoning as to why the voluntary closure is viewed as a "barrier" to a finding of PTD. Thus, while the commission did credit relator for his participation, it nevertheless concluded that his July 24, 2007 voluntary closure shows that he has not "availed himself of all opportunities to re-enter the work force."

{¶49} Based upon the above analysis, the magistrate does not find an abuse of discretion on the vocational rehabilitation issue. The commission's interpretation of the evidence is supported by the record.

{¶50} RURAL AREA ISSUE

In its order, the commission concludes:

> The Staff Hearing Officer finds the injured worker could, in fact, perform short-haul driving and other activities in a medium, light, or sedentary capacity. However, the injured worker's choice of living in a rural area limits his employment options. That is a lifestyle choice and not a factor related to the allowed conditions in this claim.

{¶51} In his brief, relator writes: "The injured worker acknowledges he lives in a rural area and contests this as an acceptable basis upon which to deny Permanent Total Disability." (Relator's brief at 14.)

{¶52} Contrary to relator's suggestion, the commission did not deny PTD compensation simply because relator lives in a rural area where jobs are presumably less available than urban areas. Relator seemingly answers his own question when he cites to *State ex rel. Speelman v. Indus. Comm.* (1992), 73 Ohio App.3d 757, 763, wherein the court states:

> The issue is not whether a job is actually available, particularly within a specific geographical area, but whether the claimant is reasonably qualified for sustained remunerative employment. In exercising its discretion, the Industrial Commission can take into account the extreme scarcity of the type of employment for which claimant is hypothetically qualified. The fact that claimant may be required to move is not sufficient to justify a finding that the claimant is permanently and totally disabled.

{¶53} It was not improper for the commission to comment in its order that it is relator's choice to live in a rural area where finding a job near his home is more difficult to do. This comment is particularly appropriate in light of the bureau's July 24, 2007 closure report indicating that relator unsuccessfully "resumed his job search with the

assistance of job placement services," and that he engaged in this activity "for an 8-week period."

AGE, EDUCATION, AND WORK HISTORY

Initially, in its order, the commission states:

> The injured worker is an approximately 48 year old male whose date of birth is 9/26/1959. The injured worker has a 12th grade education but was 1/4 credit short of his high school diploma. The injured worker was also trained through Superior Truck Driver Training and Vocational School and is capable of performing basic math, reading and writing.
>
> The injured worker has worked as a semi-truck driver his entire employment life.

Thereafter, the commission's order states:

> The injured worker testified at hearing the need to do only short-haul driving, both related to the allowed conditions in the claim and the fact that he has sole custody and care of his 8 year old son.
>
> The Staff Hearing Officer finds the injured worker has good vocational factors. He is a reasonably young man, capable of re-training, or vocational re-training. The injured worker has almost a 12th grade education with some additional vocational training thereafter. The injured worker's job experience is limited, however, he is capable of performing the basic activities of his former position of employment with some restrictions, such as short-haul, and limited lifting. The requirement that the injured worker perform only short-haul driving is as much a factor of lifestyle choice, the rural area in which he lives, and the need to care for his son, as it is the allowed conditions in this claim.
>
> The Staff Hearing Officer finds the injured worker is, in fact, physically capable of performing sustained remunerative work activity. A permanent and total disability award is an inability to perform sustained remunerative employment.

> This Staff Hearing Officer does not find that to be the case here, and based upon the injured worker's own testimony at hearing, his educational background, prior work experience and skill levels, as well as the physical abilities identified by the medical opinion of Dr. Popovich, the injured worker is capable of performing sustained remunerative work activity.

{¶54} According to relator, "[a]s to age, [the commission] has merely asserted the obvious, i.e., the injured worker was 48 years old at the time he filed the Permanent Total Disability application." (Relator's brief at 10.)

{¶55} As for education, relator acknowledges that he has obtained his GED and that pursuant to Ohio Adm.Code 4121-3-34(B)(3)(b)(iv), the GED is equivalent to a high school education. Also, it can be noted that relator was only 1/4 credit short of his high school diploma.

{¶56} According to relator, the commission's "assessment of work experience and transferrable skills is woefully lacking." (Relator's brief at 10.) Relator complains that the commission "does not identify even one skill transferrable to other semi-skilled employment." (Relator's brief at 11-12.)

{¶57} Relator's contentions as to the commission's analysis of age and work history are easily answered.

{¶58} As for age, the commission found that, at age 48, relator "is a reasonably young man, capable of re-training, or vocational re-training." The commission's treatment of relator's age was appropriate. *State ex rel. Ellis v. McGraw Edison Co.*, 66 Ohio St.3d 92, 94, 1993-Ohio-209 (the commission exercised its prerogative in concluding that, at age 51, claimant was young, not old, and that age was a help, not a

hindrance). *State ex rel. Murray v. Mosler Safe Co.*, 67 Ohio St.3d 330, 1993-Ohio-90 (the commission concluded that at age 49, claimant was "relatively young").

{¶59} As for relator's contention regarding the commission's treatment of his work experience, a reference to Ohio Adm.Code 4121-3-34(B)(3)(c)(iv) may be helpful:

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

{¶60} A lack of transferable skills does not mandate a PTD award. *State ex rel. Ewart v. Indus. Comm.*, 76 Ohio St.3d 139, 142, 1996-Ohio-316. Thus, even if it can be argued that the commission's order fails to identify even one transferable skill, that would not be fatal to upholding the order. *Ewart*.

{¶61} ACTUAL SUSTAINED REMUNERATIVE EMPLOYMENT

{¶62} The commission's focus upon relator's short-haul driving experience with R.H. Leasing was for support of the finding that relator had demonstrated an ability to perform sustained remunerative employment in late 2006. Contrary to relator's suggestion, there is no real issue here as to whether the short-lived employment with R.H. Leasing can be viewed as actual sustained remunerative employment. Clearly, relator's employment with R.H. Leasing provided the commission with some evidence, if not substantial evidence, that, in late 2006, relator exhibited a capacity for sustained remunerative employment as a short-haul truck driver, even if it can be held that the number of hours per week and the number of weeks worked never resulted in actual sustained remunerative employment.

{¶63} 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).