



{¶2} Pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth District Court of Appeals, we referred to this matter to a magistrate who issued a decision, including findings of fact and conclusions of law, which is appended hereto.

{¶3} The magistrate found that the commission did not abuse its discretion when it determined that there were sedentary jobs that relator could perform that were within the air quality restrictions noted by Drs. Cunningham and Bloomfield. According to the magistrate, this nonmedical determination was within the commission's expertise and this court should not substitute its judgment for that of the commission. Accordingly, the magistrate has recommended that we deny relator's request for a writ of mandamus.

{¶4} Relator has filed objections to the magistrate's decision. In his first objection, relator argues that the medical restrictions imposed by Drs. Cunningham and Bloomfield are inconsistent with the conclusion that relator can perform sedentary work. Essentially, relator argues that the medical reports indicate that relator is incapable of performing sedentary work in any work environment. We disagree.

{¶5} Contrary to relator's assertion, the functional restrictions noted in the medical reports are not so restrictive as to prohibit relator from performing sedentary work in all work environments. Dr. Bloomfield opined that relator could perform sedentary work in an environment where there were no allergens. Dr. Cunningham opined that relator could perform sedentary work but must avoid environmental triggers such as chemicals and fumes. There was also evidence before the commission that relator could engage in normal life activities such as driving, working out in a gym, shopping, doing housework, going the movies, and going to the park. Given this evidence, the commission did not abuse its discretion when it denied relator PTD compensation. Accordingly, we overrule relator's first objection.

{¶6} In his second objection, relator argues that the magistrate's recommendation conflicts with this court's decisions in *State ex rel. Howard v. Millennium Inorganic Chemicals*, 10th Dist. No. 03AP-637, 2004-Ohio-6603, and *State ex rel. Libecap v. Indus. Comm.* (Sept. 5, 1996), 10th Dist. No. 96APD01-29. Again, we disagree. We acknowledge that " 'where a physician places the claimant generally in the sedentary category but has set forth functional capacities so limited that no sedentary work is really feasible \* \* \* then the commission does not have discretion to conclude based on that report that the claimant can perform sustained remunerative work of a sedentary nature.' " *Howard* at ¶9, citing *State ex rel. Owens Corning Fiberglass v. Indus. Comm.*, 10th Dist. No. 03AP-684, 2004-Ohio-3841, ¶56. See also *Libecap*. However, as we noted above, the restrictions imposed by Drs. Cunningham and Bloomfield do not prohibit relator from performing sedentary work in all work environments. We also agree with the magistrate's conclusion that the commission did not abuse its discretion in finding that there were sedentary jobs available to relator that were within the restrictions imposed by Drs. Cunningham and Bloomfield. Therefore, we overrule relator's second objection.

{¶7} Following an independent review of this matter, we find that the magistrate has properly determined the facts and applied the appropriate law. Therefore, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein. In accordance with the magistrate's decision, we deny relator's request for a writ of mandamus.

*Objections overruled; writ of mandamus denied.*

BROWN and CONNOR, JJ., concur.

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**APPENDIX**

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. John D. Johnson,	:	
	:	
Relator,	:	
	:	
v.	:	No. 09AP-1158
	:	
Industrial Commission of Ohio and	:	(REGULAR CALENDAR)
Kelsey-Hayes fka TRW Inc.,	:	
	:	
Respondents.	:	
	:	

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MAGISTRATE'S DECISION

Rendered on August 12, 2010

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*Philip J. Fulton Law Office, Ross R. Fulton and Philip J. Fulton, for relator.*

*Richard Cordray, Attorney General, and Kevin J. Reis, for respondent Industrial Commission of Ohio.*

*Critchfield, Critchfield & Johnston, Ltd., and Susan E. Baker, for respondent Kelsey Hayes Company.*

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IN MANDAMUS

{¶18} In this original action, relator, John D. Johnson, 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:

{¶9} 1. Relator has an industrial claim (No. 01-805057) which is allowed for "hypersensitivity pneumonitis; occupational asthma; pulmonary embolism." Relator's injuries arose in the course of his employment as a machine operator for respondent Kelsey Hayes Company ("employer"), a self-insured employer under Ohio's workers' compensation laws. January 15, 2001 is listed by the commission as the date of diagnosis of the industrial injury. Relator has not worked since January 2001.

{¶10} 2. On October 9, 2008, relator filed an application for PTD compensation. In support, relator submitted a report, dated September 9, 2008, from Charles A. Pue, M.D.:

\* \* \* It is my opinion that Mr. John D. Johnson is permanently unable to return to gainful employment. This is a direct result of his previous occupational induced lung injury (occupational asthma, HRAD, HP, and PE). He has been left with severe dyspnea with any exertion. On an exercise test, he was found to have moderate exercise impairment on 09/02/08. Prior to his original lung injury, he had been [a] very high-performing individual, able to ride his bicycle 100 miles at a time. Since the lung injury, he is unable to return to his previous occupation and is short of breath just talking. He is markedly sensitive to environmental factors that trigger his exacerbations. He requires bronchodialator therapy. He is on chronic inhaled steroids. He has an IVC filter and he is on chronic Coumadin therapy. Nebulizer treatments that are required for his breathing exacerbate his tremors, which also makes it more difficult for him to function. He has required frequent treatments with prednisone for exacerbations of his bronchospasm with most recent course of prednisone in August 2008.

To summarize, Mr. John D. Johnson is permanently and totally disabled due to his multiple problems as noted above as a direct result of his occupational-induced injury. He is unable to return to gainful employment as a result of these injuries.

{¶11} 3. On November 24, 2008, at the employer's request, relator was examined by John W. Cunningham, M.D. In his four page narrative report, Dr. Cunningham states:

### **HISTORY**

This 64-year-old individual was previously evaluated by this physician in regards to this claim on 02/02/06, and the reader of this report is referred to that prior communication. The chronology of events and the history of this claim obtained from the injured worker on this date were specifically reviewed with him and they are basically unchanged since I last evaluated him in 2006. He states he worked for the above employer for 25 years, beginning on 01/09/76, and last working in the year 2001, and always worked in production. He denies a history of prior pulmonary difficulties and states he has never smoked. He states his past medical history is remarkable in that he has high blood pressure and had an aortic valve replacement approximately three years ago, for which he takes Coumadin, and he also has a Greenfield filter. He states he was also diagnosed with steroid induced diabetes. He denies drug allergies. He states his medications include Advair, Pro-Air, Xopenex, Coumadin, blood pressure medication, aspirin, and a diuretic. He states his surgeries in his lifetime include the aortic valve replacement, along with removal of a benign cyst of the kidney. He states his only other serious injury in his lifetime was a fractured wrist.

Review of his social history reveals that he is married and his children are grown and have left home. He states he drives his own motor vehicle and is able to perform his own activities of daily living without assistance. He states he has never smoked and he denies alcohol consumption.

\* \* \*

His current symptoms that he related to me in 2006 were specifically reviewed with him. At the present time, he continues to complain of chest pain, which in the past was severe but now is only tightness. He continues to state that he can walk only one city block without stopping. He continues to state that he attends the YMCA for exercise, which he describes as light exercise, three times per week. He continues to state that he can walk one flight of stairs without stopping, but not two. He continues to deny symptoms in regards to the calves compatible with deep vein thrombosis. He states he continues to sleep on two pillows

when previously he slept on only one pillow. He continues to complain of occasional episodes of paroxysmal nocturnal dyspnea, and he continues to complain of an occasional productive cough without a history of hemoptysis. He states he continues to utilize a nebulizer, which helps his symptoms. On this date, he states that some days he feels good and other days he cannot breathe, but overall when his current symptoms are compared with his 2006 symptoms, they are very little changed.

Since last being evaluated, he states he may have had a CT scan of the chest, and he knows that he had several pulmonary function tests. He denies a history of pollen allergies. He complains that cold weather and hot weather both increase his symptoms. He gives an example of a few weeks ago he was painting a porch railing at home with primer and he became short of breath with a cough and tightness, without wheezing. He states he stopped painting and his symptoms cleared in approximately one-half hour.

\* \* \*

### **DISCUSSION**

In my medical opinion, for the purposes of this evaluation, this individual has attained maximum medical improvement status and a level of permanency in regards to this claim. His status is unchanged since I previously evaluated him in 2006, when it was my medical opinion that this individual was capable of most medium physical work activity provided he is not asked to lift, carry, push, pull, or otherwise move objects greater than 40 pounds in the course of his work activity, on the basis of this claim and this claim only. It must be noted that some of his exercise intolerance is related to his aortic valvular disease, which is unrelated to this claim and/or his employment for the above employer. This individual is capable of sedentary and light work with occasionally medium work of up to 40 pounds exertion. This examiner could find no change in status in regards to this claim since I previously evaluated him on 02/02/06 \* \* \*. This individual should avoid "environmental triggers", such as chemical odors and fumes, but that is true whether he is working or not working.

{¶12} 4. On January 5, 2009, at the commission's request, relator was examined by Ronald J. Bloomfield, M.D. In his three page narrative report, Dr. Bloomfield states:

**History: \* \* \***

He was diagnosed in 2001 with hypersensitivity pneumonitis and occupational asthma and he never returned to the workplace.

Unrelated to his allowed conditions he did undergo an aortic valve replacement a few years ago and he has a benign resting tremor. He was recently diagnosed with colon cancer.

\* \* \*

**Review of Medical Records: \* \* \***

Most helpful were the records from Dr. Pue who has taken care of this gentleman since time of diagnosis in 2001. Dr. Pue has noted marked improvement in Mr. Johnson after he was removed from his workplace. Mr. Johnson does get episodes of dyspnea at rest on an infrequent basis, but on a frequent basis gets dyspnea with exertion. He continues to exercise using a treadmill. Dr. Pue mentions that the osteoporosis is most likely secondary to the long period of steroid use that Mr. Johnson has taken for his lung disease.

**Review of Pulmonary Conditions:** Mr. Johnson says that he has good days and bad days. He lives in a modular home with no basement, one level. He is able to get around quite well in his home. He does not require any assistance with any of his activities of daily living. The cold air is especially bad on him and he stays inside during the winter months. He does go to the YMCA a few times a week and tries to exercise. He wishes to keep some resemblance of physical activity, but he does tire easily. He cannot go up steps without stopping to rest. He does not have a chronic cough and, as Dr. Pue has mentioned in his medical records and Mr. Johnson tells me today, he has done much better since being removed from any allergens in his environment. He does not have any pets and he has never used tobacco.

\* \* \*

**Discussion:**

**Question 1:** It is my medical opinion that John D. Johnson has indeed reached maximum medical improvement with regard to his allowed pulmonary conditions.

**Question 2:** Based on the *AMA Guides 5th Edition* for all of his pulmonary conditions combined, which they should be, he is evaluated using Table 5-9, Page 104. He is a score of 4 and this places him in a 25% impairment of the whole person. I have completed the enclosed physical strength rating. He is capable of performing sedentary work in a restricted environment where there are no allergens or essentially an environment where OSHA would never require any face masks or breathing apparatus.

In conclusion, this 64 ½-year-old gentleman is at [maximum medical improvement]. He can perform only sedentary work with some work restrictions based on the air environment.

{¶13} 5. On January 5, 2009, Dr. Bloomfield completed a physical strength rating form. On the form, Dr. Bloomfield indicated by his checkmark that relator is capable of performing "sedentary work."

{¶14} Under the preprinted query "[f]urther limitations, if indicated," Dr. Bloomfield wrote in his own hand: "Indoors only[.] No allergens, fumes, smoke exposure."

{¶15} 6. The employer submitted a four page report dated March 9, 2009 from "vocational specialist" Janet Kilbane, M.Ed., who is employed by a company doing business as VocWorks. In her report, Kilbane concludes:

*Discussion:*

This specialist completed a vocational assessment of this file on 3/26/06. Review of the updated medical indicates that little has changed since 3/26/06 with regard to the allowed conditions of the claim, and it appears per the file review that the claimant reports essentially the same activity level. The claimant reported that he continues to do a light workout at his local YMCA as he did in 2006, he performs light housework, he is able to drive himself, he goes to the movies, and he occasionally takes short walks. From a vocational standpoint, this activity level would demonstrate that he still is capable of sedentary and light work.

The claimant is now older; he will turn 65 this year. Although the claimant is approaching the traditional age of retirement, this specialist would point out that there is not a direct correlation between age and employability. Although some employers may prefer a younger worker, there are also

employers that appreciate the benefits of a seasoned worker, such as experience and mature work behaviors. This specialist would also note that in our society we have a population of people that choose to work past the traditional retirement age of 65.

The claimant's job history consists of unskilled to semi-skilled work. The claimant still would be capable of unskilled work; however, limited to jobs in the unskilled category that are in the sedentary and light work capacity. Unskilled work does not require a person to have specific prior experience or transferable skills. These jobs are learned through short-term on-the-job training. Short-term is defined as 1 to 90 days. Examples of the type of jobs the claimant could do are cashier, counter clerk, front desk clerk, security TV monitor/gate guard, cashier, some retail sales jobs, auto sales and local light delivery. The claimant will have to discriminate among individual work environments to ensure there are no constant irritants. The claimant could use the assistance of a job placement service to help him with that process.

{¶16} 7. Following an April 29, 2009 hearing, a staff hearing officer ("SHO") issued an order denying relator's PTD application. The SHO's order explains:

The Injured Worker was born on 08/05/1944 and is now 64 years old. The Injured Worker is a high school graduate and indicates on his IC-2 application that he can read, write, and perform basic math. The Injured Worker's past work history has consisted of factory work including that of a press operator and machine operator. The Injured Worker last worked with the named Employer in approximately 2001. The Injured Worker worked for the named Employer for approximately 25 years.

The Injured Worker contracted hypersensitivity pneumonitis and occupational asthma as a result of his exposure to metalworking fluid while employed by the named employer. His claim was subsequently allowed for a pulmonary embolism. The Injured Worker testified that his current treatment in this claim consists of a seeing Dr. Pue approximately two times a year and the Injured Worker uses various inhalers and occasionally uses a nebulizer. It does not appear from review of the file that the Injured Worker has made any return to work attempts since the diagnosis in this claim and it does not appear that he participated in any vocational rehabilitation programs. The Injured Worker

testified that he has been receiving Social Security Disability payments since approximately 2002.

The Staff Hearing Officer relies on the medical reports of Dr. Ronald J. Bloomfield dated 01/05/2009 and John W. Cunningham dated 11/24/2008 in finding that the Injured Worker is not permanently and totally disabled.

Dr. Bloomfield examined the Injured Worker on behalf of the Industrial Commission. Dr. Bloomfield noted that all of the allowed conditions had reached maximum medical improvement and that the Injured Worker had a 25% permanent partial impairment. Dr. Bloomfield opined that the Injured Worker would be physically capable of performing sedentary work with the restrictions that he should not be exposed to allergens indicating that the Injured Worker should work in places where OSHA wouldn't require any face masks or breathing apparatus. Dr. Bloomfield completed a Physical Strength Rating form on 01/05/2009 in which he opined the Injured Worker would be capable of sedentary work, should work indoors, and should not be exposed to allergens, fumes, or smoke exposure.

The Injured Worker was examined on behalf of the Employer by Dr. John W. Cunningham on 11/24/2008. Dr. Cunningham agreed that the Injured Worker worker [sic] would be physically capable of performing sedentary work. However, Dr. Cunningham also indicated the Injured Worker would additionally be capable of light work with some occasional medium work of up to 40 pounds exertion. Dr. Cunningham agreed with Dr. Bloomfield, in finding that the Injured Worker should avoid environmental triggers such as chemical orders [sic] and fumes whether he was working or not working.

Based on the medical reports of Dr. Bloomfield and Dr. Cunningham, which are found to be persuasive, the Injured Worker retains the physical functional capacity to perform at least sedentary level work with the restriction of not being exposed to environmental triggers/allergens. When the Injured Worker's level of injury-related medical impairment is considered in conjunction with his non-medical disability factors, the Staff Hearing Officer concludes that the Injured Worker is capable of sustained remunerative employment and is not permanently and totally disabled.

The Staff Hearing Officer also relies on the Employability Assessment report of Janet Kilbane dated 03/09/2009 in

finding the Injured Worker is not permanently and totally disabled. Ms. Kilbane performed a vocational assessment on behalf of the Employer. Ms. Kilbane noted that with regard to the Injured Worker's current age of 64, that there is no direct correlation between age and employability. The Staff Hearing Officer notes that age alone is not a basis on which to award permanent total disability but rather is a factor to be considered.

The Staff Hearing Officer finds that the Injured Worker's High School education is a vocational asset. A high school education generally implies that an Injured Worker has the intellectual capacity to undergo additional short term academic retraining, and also to intellectually complete an extensive on-the-job training program for semi-skilled work. The Injured Worker has in fact performed some semi-skilled work in his past work history per the report of Ms. Kilbane. The Staff Hearing Officer also notes that the Injured Worker self reports on his IC-2 application that he can read, write and perform basic math. These basic abilities would aid the Injured Worker in any attempt to become reemployed.

The Staff Hearing Officer notes that the Injured Worker's past history has consisted of factory work. The Injured Worker had a long tenure with the employer of record as a machine operator for approximately 25 years. The Staff Hearing Officer finds that this long tenure at one job suggests a stable, loyal, and dependable employee that would be worth another employer making an investment in. The Staff Hearing Officer finds this to be an asset to reemployment. The Staff Hearing Officer also notes that per the report of Ms. Kilbane, the Injured Worker does have transferable skills including the ability to work with people, the ability to make decisions and judgements, the ability to follow instructions, the ability to drive, the ability to perform physical activity in at least the sedentary level capacity, the ability to read, write, and do basic math, and the ability to learn new information and to record information. Based on a transferable skills analysis, Ms. Kilbane was able to identify several potential jobs that the Injured Worker could perform within this sedentary work capacity level. Ms. Kilbane also pointed out that unskilled work does not require a person to have specific prior or [sic] experience or transferable skills. She notes that these jobs are learned through short term on-the-job training which the Injured Worker's educational level would allow him to do. She noted that the Injured Worker could use the assistance of a job placement service to help him identify jobs within his sedentary work restriction which

would qualify as potential work environments to ensure that there are no irritants.

Therefore, because the Injured Worker retains the physical functional capacity to perform at least sedentary work with the additional restriction of no exposure to allergens or environmental triggers, based on the report of Dr. Bloomfield, and because the Injured Worker is qualified by his age and his high school education, and his ability to read, write, and perform basic math, to pursue rehabilitation or additional short term training or education if he chooses to do so, the Staff Hearing Officer finds that the Injured Worker is capable of sustained remunerative employment and is not permanently and totally disabled. Accordingly, the IC-2 application filed 10/09/2008 is denied.

Conclusions of Law:

{¶17} It is the magistrate's decision that this court deny relator's request for a writ of mandamus, as more fully explained below.

{¶18} In *State ex rel. Howard v. Millennium Inorganic Chemicals*, 10th Dist. No. 03AP-637, 2004-Ohio-6603, Robert L. Howard applied for PTD compensation. In denying his application, the commission relied on the reports of John Dobrowski, M.D., an otorhinolaryngologist, who examined Howard in February 2001. Dr. Dobrowski issued a narrative report and he also completed two forms. On the first form, Dr. Dobrowski indicated that Howard was "capable of physical work activity" but did not indicate a level. On a subsequent form, Dr. Dobrowski indicated that Howard was capable of activity at the sedentary level.

{¶19} Dr. Dobrowski's narrative report is summarized by this court:

\* \* \* [Dr. Dobrowski] found that claimant experienced severe obstruction of the larynx and upper trachea due to the industrial injury. Surgery had been attempted to try to obtain a better air flow, but it was unsuccessful, and claimant must use a tracheal stoma. Dr. Dobrowski opined that claimant experienced severe shortness of breath, which was aggravated by activities beyond personal cleansing and grooming or the equivalent, and he estimated a "greater than

fifty percent" impairment of the whole person based on the breathing difficulties. In addition, claimant also suffered substantial speech impairment, including loss of audibility and functional efficiency. Speech was "labored and impracticably slow," although claimant could make himself understood for a short period of time if the listener was close and the environment was quiet. Dr. Dobrowski found an 85 percent loss of speech capacity, which accounted for an additional 30 percent impairment of the whole person. Combining the breathing impairment with the speech impairment, Dr. Dobrowski found an overall impairment of 80 percent when "using the strictest criteria," but he stated that the impairment rating could "easily be elevated to ninety percent" due to the characteristics of the obstructed air passage.

Id. at ¶18.

{¶20} In *Howard*, this court concluded:

\* \* \* [T]he commission abused its discretion in denying relator's PTD application, based upon Dr. Dobrowski's report, without adequately resolving the apparent inconsistency between the medical restrictions contained in that report and the concept of the ability to maintain sustained remunerative employment.

Id. at ¶12.

{¶21} In rendering its conclusion regarding Dr. Dobrowski's report, this court, in

*Howard*, had occasion to summarize relevant case law:

\* \* \* Millennium, joined by the commission, argues that the case of *State ex rel. Libecap v. Indus. Comm.* (Sept. 5, 1996), 10<sup>th</sup> Dist. No. 96APD01-29, affirmed (1998), 83 Ohio St.3d 178, 699 N.E.2d 63, is factually distinguishable from the present case such that the magistrate erroneously relied upon it in reaching her conclusions. Specifically, respondents point out that the medical report relied upon in *Libecap* opined that the claimant was capable of performing sedentary work but also indicated physical restrictions due to the allowed conditions that were inconsistent with the legal definition of sedentary work. Based upon this obvious inconsistency, a panel of this court issued a limited writ vacating the order denying the claimant's PTD application, and remanding the matter for reconsideration of the order. The court declined to grant a full writ because it

acknowledged "some room for interpretation of the medical and psychological evidence."

Respondents argue that Dr. Dobrowski's report in the present case contains no inconsistencies of the type we deemed problematic in *Libecap*. They note that Dr. Dobrowski concluded that relator is capable of performing sedentary work, and identified no restrictions that are inconsistent or incompatible with that type of work. They argue that the magistrate impermissibly reweighed the evidence and substituted her judgment for that of the commission.

*Libecap* has been cited for the proposition that, "where a physician places the claimant generally in the sedentary category but has set forth functional capacities so limited that no sedentary work is really feasible \* \* \* then the commission does not have discretion to conclude based on that report that the claimant can perform sustained remunerative work of a sedentary nature." *State ex rel. Owens Corning Fiberglass v. Indus. Comm.*, 10<sup>th</sup> Dist. No. 03AP-684, 2004-Ohio-3841, ¶56. The "commission cannot simply rely on a physician's 'bottom line' identification of an exertional category but must base its decision on the specific restrictions imposed by the physician in the body of the report." *Ibid*. The court in *Owens Corning* went on to explain:

In *Libecap*, the problem was not that the doctor's report was defective because claimant was placed in the sedentary category. Doctors may be unaware of legal criteria and the doctor in that case had set forth clear and unambiguous functional restrictions in his discussion that would permit short periods of sedentary activity. Rather, the problem was with the *commission's* finding of capacity for sedentary, sustained remunerative employment based on a report that, read in its entirety, clearly precluded sustained remunerative employment of a sedentary nature.

Conversely, where a physician's checklist states that the claimant is medically precluded from performing any sustained remunerative employment but where the narrative report, read in its entirety, clearly and unambiguously sets forth a capacity for sustained remunerative employment, then the commission lacks discretion to rely on that report for a finding of medical inability to perform any sustained remunerative employment.

Id. at ¶56-57. (Emphasis sic.)

"[F]unctional abilities may be so limited that only brief periods of work activities would be possible, which would not constitute sustained remunerative employment. \* \* \* [That is,] regardless of the fact that the physician placed claimant in the 'sedentary' category, the specific restrictions [may be] so narrow as to preclude sustained remunerative employment." *State ex rel. Clevite Elastomers v. Torok*, 10<sup>th</sup> Dist. No. 02AP-116, 2002-Ohio-4770, ¶14.

Id. at ¶7-10.

{¶22} Here, citing *Howard* and the case law summarized therein, relator contends that the medical restrictions identified by Drs. Cunningham and Bloomfield in their reports are inconsistent with the doctors' conclusions that the allowed conditions of the industrial claim do not prohibit sustained remunerative employment.

{¶23} As relator points out, Dr. Cunningham opined that relator "should avoid 'environmental triggers', such as chemical odors and fumes, but that is true whether he is working or not working." Dr. Bloomfield opined that relator is only capable of sedentary work "in a restricted environment where there are no allergens or essentially an environment where OSHA would never require any face masks or breathing apparatus."

{¶24} According to relator:

\* \* \* Here, like *Howard*, it is practically impossible to find a workplace environment that excludes these allergens. The IC's found restrictions would require Mr. Johnson to find an employer with facilities that exclude **all** allergens, dust, or irritants, which is an insurmountable task. It is hard to imagine that most employers have **completely** allergen free environments that do not contain normal levels of dust, mold, and mildew. An employer would need a completely sealed off environment to allow Mr. Johnson to work. Since such environments are practically non-existent, it is hard to imagine where Mr. Johnson could actually work. The reality is that the functional capabilities set out for Mr. Johnson—namely, **no** exposure to dust or allergens—are so limited and hard to find that remunerative employment is not practicable. A writ of mandamus granting PTD is therefore

warranted because the underlying medical evidence makes clear that no sedentary work is feasible.

(Relator's brief, at 9.) (Emphases sic.)

{¶25} In the magistrate's view, the commission's reliance upon the reports of Drs. Cunningham and Bloomfield raised the question administratively as to whether there are sufficient numbers of sedentary jobs in the economy that meet the air quality restrictions contained in the reports of Drs. Cunningham and Bloomfield. Apparently, the commission, through its SHO, determined that such jobs exist when, in referencing the Kilbane report, the commission's order states:

\* \* \* She noted that the Injured Worker could use the assistance of a job placement service to help him identify jobs within his sedentary work restriction which would qualify as potential work environments to ensure that there are no irritants.

{¶26} Here, in effect, relator invites this court to vacate the commission's finding that there exist sedentary jobs that meet the air quality restrictions, and that a job placement service could assist relator in finding such a job. In effect, relator invites this court to itself determine that there are no sedentary jobs in the economy that can meet the air quality restrictions set forth by the two relied upon doctors.

{¶27} The commission is the expert on the nonmedical or vocational issues that come before it. *State ex rel. Jackson v. Indus. Comm.* (1997), 79 Ohio St.3d 266, 271.

{¶28} Here, the commission actually had a vocational report from a vocational expert that supports its determination that sedentary jobs exist in the economy that meet the air quality restrictions set forth by the relied upon doctors.

{¶29} Here, in effect, relator invites this court to usurp the commission's expertise and to substitute its own opinion as to whether such jobs exist. This court must decline the invitation. *Jackson*.

{¶30} Relator's reliance upon *Howard* and the case law summarized therein is misplaced. In *Howard*, the true issue was whether Dr. Dobrowski's conclusion that Howard could perform sedentary work was inconsistent with the medical restrictions set forth in the doctor's report. In *Howard*, this court's analysis focused upon Dr. Dobrowski's description of Howard's medical conditions and restrictions. Here, relator's challenge to the work conclusions of Drs. Cunningham and Bloomfield require this court to engage in a nonmedical determination as to whether jobs exist in the economy that can accommodate relator's air quality restrictions. As earlier noted, that nonmedical analysis lies within the expertise of the commission.

{¶31} 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/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).