[Cite as *State ex rel. Cuyahoga Metro. Hous. Auth.*, 2011-Ohio-2866.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Cuyahoga Metropolitan Housing Authority,	:	
Relator,	:	
v.	:	No. 10AP-351
The Industrial Commission of Ohio and Angel L. Aponte,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on June 14, 2011

Porter Wright Morris & Arthur LLP, Fred J. Pompeani and *Rebecca A. Kopp*, for relator.

Michael DeWine, Attorney General, and *Andrew J. Alatis*, for respondent Industrial Commission of Ohio.

Shapiro, Marnecheck, Riemer & Palnik, and *Matthew A. Palnik*, for respondent Angel L. Aponte.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

KLATT, J.

{¶1} Relator, Cuyahoga Metropolitan Housing Authority, commenced this original action in mandamus seeking an order compelling respondent, Industrial Commission of Ohio ("commission"), to vacate its order granting permanent total disability

("PTD") compensation to respondent, Angel L. Aponte ("claimant"), and to enter an order denying said compensation.

{¶2} Pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth District Court of Appeals, we referred this matter to a magistrate who issued a decision, including findings of fact and conclusions law, which is appended hereto. The magistrate found that: (1) the commission's denial of claimant's June 20, 2008 motion for the exercise of continuing jurisdiction did not preclude the commission from granting claimant's second PTD application under the doctrine of res judicata; and (2) Dr. Kovach's October 21, 2008 report need not be eliminated from evidentiary consideration. Based upon these findings, the magistrate has recommended that we deny relator's request for a writ of mandamus.

{¶3} Relator has filed four objections to the magistrate's decision. Although stating four objections, the relator essentially makes two arguments. It in his first three objections, relator argues that the magistrate erroneously ruled that the commission did not abuse its discretion by relying on Dr. Kovach's report. In his fourth objection, relator argues that the magistrate erroneously concluded that the commission's order complied with *State ex rel. Noll v. Indus. Comm.* (1991), 57 Ohio St.3d 203. We disagree with both of relator's arguments.

{¶4} Contrary to relator's argument in support of its first three objections, the commission did not abuse its discretion by relying on Dr. Kovach's October 21, 2008 report. As noted by the magistrate, Dr. Kovach correctly identified the allowed conditions in the claim. He also states that his medical opinion is the same as it was in 2006 when he concluded that the claimant's allowed lumbosacral conditions rendered him permanently and totally disabled from engaging in sustained remunerative employment.

Dr. Kovach concludes his October 21, 2008 report by stating that the main disability factors are the lower back conditions and that the claimant is not capable of sustained, gainful employment. Although Dr. Kovach noted certain nonallowed conditions in the history portion of his report, his ultimate opinion is premised on the allowed conditions. Dr. Kovach's report is some evidence to support the commission's decision and the commission did not abuse its discretion by relying upon it. For this reason, we overrule relator's three objections.

{¶5} In its fourth objection, relator argues that the commission's decision failed to comply with *Noll* because Dr. Kovach's report is not some evidence upon which the commission could rely. For the reasons previously noted, the commission did not abuse its discretion in relying on Dr. Kovach's October 21, 2008 report. Moreover, the commission explained its decision and identified the evidence upon which it relied. The commission is not required to explain why it did not rely upon other evidence in the record. The commission's decision is *Noll* compliant. Therefore, we overrule relator's fourth objection.

{¶6} 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.

SADLER and CONNOR, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Cuyahoga Metropolitan Housing Authority,	:	
Relator,	:	
v.	:	No. 10AP-351
The Industrial Commission of Ohio and Angel L. Aponte,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on February 22, 2011

Porter Wright Morris & Arthur LLP, Fred J. Pompeani and *Rebecca A. Kopp*, for relator.

Michael DeWine, Attorney General, and *Andrew J. Alatis*, for respondent Industrial Commission of Ohio.

Shapiro, Marnecheck, Riemer & Palnik, and *Matthew A. Palnik*, for respondent Angel L. Aponte.

IN MANDAMUS

{¶7} In this original action, relator, Cuyahoga Metropolitan Housing Authority, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order awarding permanent total disability ("PTD") compensation to respondent Angel L. Aponte ("claimant") and to enter an order denying said compensation.

Findings of Fact:

{¶8} 1. Claimant has two industrial claims arising out of and in the course of his employment as an appliance repairman for relator, a self-insured employer under Ohio's workers' compensation laws.

{¶9} 2. The December 16, 1993 injury (No. L257826-22) is allowed for:

> Lumbosacral strain; contusion/strain right knee; contusion left thigh; contusion/abrasion right chest wall; disc desiccation and protrusion at L4-L5 and L5-S1 and L5 nerve root irritation.

{¶10} 3. The July 28, 1998 injury (No. 98-628481) is allowed for:

> Right shoulder sprain; tendonitis of right shoulder; glenoid labral tear.

{¶11} 4. On March 2, 2005, claimant moved for temporary total disability ("TTD") compensation in claim number L257826-22.

{¶12} 5. Following a June 1, 2005 hearing, a district hearing officer ("DHO") issued an order awarding TTD compensation from February 22, 2005 through March 14, 2005. Noting that claimant had returned to work on May 17, 2005, the DHO ordered relator to consider further TTD compensation payments through May 16, 2005.

{¶13} 6. Apparently, relator did not administratively appeal the DHO's order of June 1, 2005 and the order became final.

{¶14} 7. On March 21, 2006, at claimant's request, he was examined by Ralph Kovach, M.D., who issued a two-page narrative report concluding:

> After examining Mr. Aponte, it is my medical opinion, within reasonable certainty that his allowed lumbosacral conditions have rendered him permanently and totally disabled from engaging in sustained, remunerative employment. His exam and post surgical status renders a permanent and total disability state.

{¶15} 8. On February 6, 2007, claimant filed an application for PTD compensation. In support, claimant submitted the March 21, 2006 report of Dr. Kovach.

{¶16} 9. On August 25, 2007, at the commission's request, claimant was examined by R. Scott Krupkin, M.D. In his three-page narrative report, Dr. Krupkin opined that the allowed conditions of the two industrial claims produce a 15 percent whole person impairment.

{¶17} 10. On August 25, 2007, Dr. Krupkin completed a physical strength rating form. On the form, Dr. Krupkin indicated by his checkmark that the industrial injuries permit "light work."

{¶18} 11. Following a December 13, 2007 hearing, a staff hearing officer ("SHO") issued an order denying the PTD application. The SHO's order explains:

> After full consideration of the issue it is the order of the Staff Hearing Officer that the Application filed 02/06/2007, for Permanent and Total Disability Compensation, be denied. All medical and vocational proof on file was reviewed and considered. This order is based on the report of Dr. R. Scott Krupkin.
>
> Dr. Krupkin evaluated the injured worker at the request of the Industrial Commission. Dr. Krupkin indicated that, as a result of the residuals of the two injuries cited above, the injured worker was limited to the performance of work in the light work classification and below.
>
> The injured worker's former position of employment was a position in which he moved appliances as well as servicing them and making repairs to the units. This work clearly required lifting and other exertion and would place it in an exertional level above the light work classification. The Staff Hearing Officer, therefore, finds that the two injuries under consideration have prevented the injured worker from returning to his former position of employment.

> The next issue to be considered is whether the injured worker has the capacity to make a vocational transition to the light work of which Dr. Krupkin finds him to be capable. The injured worker is forty-seven years [sic] old and so is a worker of middle age. The Staff Hearing Officer finds this to be a vocationally neutral factor. The injured worker is a high school graduate and has demonstrated the intellectual acumen necessary to learn the appliance repair skills required in both jobs he held. His educational background and intelligence are vocational assets. It is true that the injured worker neither reads nor writes in English. There had been no showing, however, that there is anything that would prevent him from learning to do so. The injured worker does have a narrow vocational history. He has had two jobs and they involved the same type of work activity. This is a vocational deficit as a broader vocational base would increase his changes [sic] for a successful adaptation to a different type of work.
>
> An important consideration here is that the injured worker has made no attempt to vocationally rehabilitate himself. While his nonmedical disability factors may not be the strongest nor are they so negative that the Staff Hearing Officer is willing to conclude that the injured worker is not a good candidate for vocational rehabilitation. An injured worker has a duty to take such steps as he can to return to the work force. Such has not been done here. It may turn out that the injured worker cannot be vocationally rehabilitated. If that is the case then a future application for permanent total disability compensation might be granted. At this time, however, the Staff [H]earing Officer finds that such a grant of compensation would be premature. The application is denied for the reason that the injured worker has failed to show that he can not be vocationally rehabilitated.

{¶19} 12. During February 2008, claimant underwent a vocational evaluation performed by Paul T. Kijewski of Vocational Services Team (VST). In a five-page narrative report dated April 10, 2008, Kijewski concluded:

> Again, Mr. Aponte's case is a difficult one. His lack of English language skills, pain issues and limited transferable skills and the current state of the local labor market combine to make the prognosis for a successful return to work in this

> case poor. In our opinion, Mr. Aponte is not a feasible candidate for vocational rehabilitation services.

{¶20} 13. On June 20, 2008, citing the Kijewski report, claimant moved the commission for the exercise of continuing jurisdiction over the SHO's order of December 13, 2007 that denied the PTD application.

{¶21} 14. Following a September 5, 2008 hearing, a DHO issued an order denying claimant's motion:

> * * * [T]he claimant's C-86 motion filed 6/20/2008, requests continuing jurisdiction with respect to claimant's permanent total disability application which was denied. Claimant's counsel wishes to revisit the issue by way of continuing jurisdiction since the application was denied in part for claimant not attempting vocational rehabilitation.
>
> Claimant has subsequently attended vocational rehabilitation after the permanent total disability application was denied. He was found not to be a vocational candidate. Claimant's counsel has requested that the Industrial Commission revisit it's [sic] prior ruling denying the permanent total disability application based on this new evidence.
>
> The District Hearing Officer denies the request to exercise continuing jurisdiction under R.C. Section 4123.52 because this power is not unlimited. There must be new and changed circumstances subsequent to the initial order, fraud, clerical error, or error by an inferior administrative tribunal or subordinate Hearing Officer as cited in the case Bowman v. I.C. 65 OS3d 317 (1992). The District Hearing Officer finds that an attempt at vocational rehabilitation and the finding that the claimant is not a vocational candidate is insufficient evidence to be considered as a new and changed circumstance to warrant revisiting the permanent total disability application.
>
> The District Hearing Officer notes that the statute does not prohibit the claimant from filing another more updated PTD application that will be processed de novo.

(Emphases sic.)

{¶22} 15. Claimant administratively appealed the DHO's order of September 5, 2008.

{¶23} 16. Following an October 7, 2008 hearing, an SHO issued an order that affirms the DHO's order. The SHO's order explains:

> Staff Hearing Officer finds that, the exercising of continuing jurisdiction is not the right avenue to pursue when trying to reapply for permanent and total disability benefits that were previously denied. Therefore, the motion is denied.

{¶24} 17. Apparently, the SHO's order of October 7, 2008 was not administratively appealed.

{¶25} 18. On October 21, 2008, at claimant's request, claimant was again examined by Dr. Kovach who issued a two-page narrative report which states in its entirety:

> Angel Aponte is currently 49 years of age. He last worked in November 2005. I previously examined this individual in 2006. He had to stop working due to the disabling nature of his lower back. He injured his back while working as an appliance technician in 1993. He was bending over working and fell. He also injured his right knee and chest area. He has had multiple lumbar MRI studies, which confirmed the allowed conditions. He also had [a] nerve conduction study that identified left S1 neuritis. He has been treated with spinal injections, therapy and medications. He has had two lumbar surgeries relating to this accident. In 1996 the L4, L5 levels were surgically addressed (right laminotomy and microdisecctomy). Two months later, lumbar MRI revealed a left-sided herniated disc at L5-S1, and he required additional lumbar surgery (left laminectomy and foraminotomy for the L5, S1 levels). He did return to his job following these surgeries and suffered a separate injury to his right shoulder when he lifted an air conditioner unit. That injury occurred on 7-28-98. He required right shoulder surgery in 1998 relating to this injury. Updated lumbar MRI studies (most recent in May 2008) have shown increased degenerative changes. Imaging studies have confirmed scarring around the L5 nerve root (left), arachnoiditis, recurrent herniation of disc at

> L4-5 (right sided) and recurrent, degenerative herniated disc at L5-S1. He is under medical care currently and requires medication on a regular basis for control of pain. He is also experiencing locking of the right knee, which occurs about once per month. He had this same complaint in 2006 when I examined him; however, this has increased in frequency over that time.
>
> Since my last examination, he has continued with low back pain with radiation down both legs. He complains of diminished sensation in both legs and feet – medial sides. He is limited largely with respect to walking, standing, sleeping and stair climbing. He also has difficulty with reaching using his right arm. The pain in his back and limitations have increased over time.
>
> Right shoulder exam shows three scars from arthroscopy. Right shoulder range of motion is limited: flexion 110, extension 45, abduction 115, internal rotation 50 and external rotation 40 degrees. Moderate motor weakness in [sic] evident for the right shoulder. Lumbar exam reveals a midline, 10 cm operative scar that extends from L3 to S1. There is moderate tenderness over the lumbar spine. Lumbar lordosis is flattened. There is no spasm today. There is moderate lower extremity weakness bilaterally. Gait is antalgic. There is pain with lumbosacral range of motion, which confirms flexion at 50% of normal, extension limited to 10 degrees and lateral bending limited to 10 degrees to right and left. Sensation is decreased for the lower legs bilaterally. Deep tendon reflexes are diminished/trace at the knee and ankle bilaterally. Right knee exam reveals flexor and extensor weakness. There is negative McMurray and Lachman.
>
> My medical opinion remains as stated in 2006. A permanent and total disabled status relating to this individual is supported within all reasonable certainty. His updated diagnostics have shown an overall worsening of his condition over time. He has denied any intervening injury. The main disabling factor is the lower back conditions. He is not capable of sustained, gainful employment.

{¶26} 19. On October 30, 2008, claimant filed his second PTD application. In support, claimant submitted the October 21, 2008 report of Dr. Kovach.

{¶27} 20. On February 24, 2009, at relator's request, claimant was examined by Paul C. Martin, M.D. In his five-page narrative report, Dr. Martin concludes:

> Is the claimant capable of sustained remunerative employment with regard to the allowed claim conditions?
>
> Based upon Mr. Aponte's objective clinical findings and when considering the allowed conditions in this claim, it is my medical opinion he does not present with medical evidence which would support him as being permanently and totally impaired from all sustained remunerative employment. It is noteworthy that after each of these work injuries, Mr. Aponte had returned to his former position of employment. It is also worth noting that in addition to the allowed conditions in this claim, Mr. Aponte has also been identified as having degenerative disc disease/arthritis at other levels of the lumbar spine which are not causally related to this work injury and which result in additional impairment over and above that which can be causally related to this work injury.
>
> What are the claimant's physical capabilities with regard to the allowed claim conditions?
>
> As it relates to the allowed conditions in the referenced claims in this report, it is my opinion Mr. Aponte is physically capable of working in a modified work environment which would be considered light in nature. This would consist of lifting up to 20 pounds on an occasional basis; avoidance of activities requiring frequent or repetitive bending, twisting, or stooping; working in a position where he would be able to alternate his sitting and standing activities to avoid prolonged periods in any one position; and avoid working with the right arm in an overhead position for prolonged periods of time.

(Emphasis omitted.)

{¶28} 21. On July 7, 2009, at the commission's request, claimant was examined by Kirby J. Flanagan, M.D., who issued a six-page narrative report dated July 13, 2009. Dr. Flanagan states:

> In regard to the allowed condition of disc desiccation and protrusion at L4-5 and L5-S1, and L-5 nerve root irritation, it

> is my opinion that impairment is best described by DRE Lumbar Category III, with **thirteen percent** whole person impairment.
>
> **SUMMARY**: In summary, it is my opinion that Mr. Aponte has a combined whole person impairment of **thirteen percent** for all of the allowed conditions in claim # 97-628481 [sic] and claim # L257826-22.

(Emphases sic.)

{¶29} 22. On July 16, 2009, Dr. Flanagan completed a physical strength rating form. On the form, Dr. Flanagan indicated by his mark that the industrial injuries permit "medium work."

{¶30} 23. On September 8, 2009, Kijewski issued an addendum to his April 10, 2009 report:

> In his report, Dr. Flanagan stated that Mr. Aponte was capable of performing "Medium Work." The factors which led me to the conclusion that he is not a feasible candidate for vocational rehabilitation remain unchanged in light of Dr. Flanagan's report. Mr. Aponte's last job at the Cuyahoga Metropolitan Housing Authority required him to perform tasks which fall into the Heavy range of physical demands as did his job at Lakeview Terrace Apartments. He worked as an Auto Mechanic for one year but has no formal training in this field. His experience is distant and his skills outdated. His limited English skills would be a barrier to working in grocery stores as in [sic] did in Puerto Rico. He has four years of experience as a Meat Cutter but this work is classified as Heavy and beyond his capabilities. His experience is also distant. Mr. Aponte's limited ability to speak English and his inability to read or write English eliminate academic training as an avenue by which to acquire new vocational skills. His ability to acquire skills via on the job training would be adversely affected due to same reasons.
>
> In summary, the results of Dr. Flanagan's report do not change the conclusion reached in my original report. My opinion that Mr. Aponte [is] not a feasible candidate for vocational rehabilitation services stands.

{¶31} 24. Following a January 7, 2010 hearing, an SHO issued an order awarding PTD compensation. The order explains:

> The starting date is 10/21/2008. This is based upon the 10/21/2008 report of Dr. Kov[a]ch which is the first date of medical evidence of permanent total disability.
>
> The award is to be apportioned 50% in 98-628481 and 50% in L257826-22 for the reason that these claims are equally contributing to Injured Worker's inability to perform sustained and gainful employment.
>
> The Injured Worker's Permanent and Total Disability Application filed 10/30/2008 is granted to the following extent. The Staff Hearing Officer finds that the Injured Worker has met his burden of proof that the injuries he sustained while working for the named Employer now prevent him from returning to his former position of employment as a repairman, and that based upon the vocational factors noted below, the Injured Worker is unable to find and perform sustained and gainful employment with[in] his residual functional capacity.
>
> Injured Worker is a 47-year-old individual who has claims relating to the above noted conditions. Injured Worker filed a Permanent and Total Disability Application prior to this application on 02/06/2007. That application was heard on 12/13/2007 and denied. In the order the Hearing Officer at that time found an important consideration was that the Injured Worker,
>
> > "has made no attempt to vocationally rehabilitate himself. While his nonmedical disability factors may not be the strongest nor are they so negative that the Staff Hearing Officer is willing to conclude that the injured worker is not a good candidate for vocational rehabilitation. An injured worker has a duty to take such steps as he can return to the work force. Such has not been done here. It may turn out that the injured worker cannot be vocationally rehabilitated. If that is the case then a future application for permanent total disability compensation might be granted."

The Injured Worker then attempted vocational rehabilitation and by District Hearing Officer order dated 02/26/2008, the vocational rehabilitation program at VST was authorized to determine Injured Worker's feasibility and/or vocational plan. A report dated 04/10/2008 was filed and this report concludes that the Injured Worker would not be a candidate for vocational services. A review of that report's findings and conclusion are found to be a significant factor in granting Injured Worker's current Permanent and Total Disability Application. Mr. Paul T. Kijewski, the certified vocational evaluator for VST, concludes that,

> "Mr. Aponte's case is a difficult one. His lack of English language skills, pain issues and limited transferable skills in the current state of the local labor market combine to make the prognosis for a successful return to work in this case poor. In our opinion, Mr. Aponte is not a feasible candidate for vocational rehabilitation services."

The Staff Hearing Officer finds that the medical evidence is persuasive that the Injured Worker would not be able to return to his former position of employment. The Injured Worker was examined on 07/13/2009 by Dr. Flanagan for the Industrial Commission who found that the Injured Worker had a 13% permanent partial disability relating to his right shoulder and relating to his low back disc problems. The Staff Hearing Officer finds that Dr. Flanagan found the Injured Worker was able to perform medium heavy work.

The Staff Hearing Officer finds that Dr. Kovach's opinion in his 10/21/2008 report is more persuasive and more consistent with the facts and the medical evidence on file. Dr. Kovach notes in his report the following medical history relating to the Injured Worker.

> "He has had multiple lumbar MRI studies, which confirmed the allowed conditions. He also had [a] nerve conduction study that identified left S1 neuritis. He has been treated with spinal injections, therapy and medications. He has had two lumbar surgeries relating to this accident. In 1996 the L4, L5 levels were surgically addressed (right laminotomy and microdiscectomy). Two months later, lumbar MRI revealed a left-sided herniated disc at L5-S1, and he required additional lumbar surgery (left laminectomy

> and foraminotomy for the L5, S1 levels). He did return to his job following these surgeries and suffered a separate injury to his right shoulder when he lifted an air conditioner unit. That injury occurred on 7-28-98. He required right shoulder surgery in 1998 relating to this injury. Updated lumbar MRI studies (most recent in May 2008) have shown increased degenerative changes. Imaging studies have confirmed scarring around the L5 nerve root (left), arachnoiditis, recurrent herniation of disc at L4-5 (right sided) and recurrent, degenerative herniated disc at L5-S1. He is under medical care currently and requires medication on a regular basis for control of pain."

The Staff Hearing Officer finds that Dr. Kovach's opinion that Injured Worker can never return to his former position of employment and that he is not capable of sustained gainful employment is more persuasive with the medical evidence than the report of Dr. Flanagan.

If one assumes that the Injured Worker could return to some employment, the Staff Hearing Officer is persuaded that based upon the vocational evidence as outlined in the reports of Paul T. Kijewski from VST that the Injured Worker is not a feasible candidate for vocational rehabilitation services is persuasive.

Though the Injured Worker has a positive vocational factor in his age, Injured Worker's other vocational factors are deficits so great as evidenced by the opinion of Mr. Paul Kijewski that it would not be feasible for the Injured Worker to be able to find employment in today's current labor market. The report from Mr. Kijewski reviews the vocational factors relating to Injured Worker's education which includes a high school degree from Puerto Rico and his prior work experience which is absent any jobs in a sedentary capacity but rather includes repair technicians and/or auto mechanic which do not have the transferable skills needed to find work at a sedentary job.

Thus the Staff Hearing Officer finds that the Injured Worker has met his burden of proof, that the opinion of Dr. Kovach is found more persuasive and more consistent with the medical evidence than the opinions of Dr. Flanagan and Dr. Martin in his 02/24/2009 report, and that the Injured Worker has attempted to be vocationally rehabilitated and that based

> upon the approved vocational service team which was approved by District Hearing Officer order dated 03/26/2008, their opinion was the Injured Worker is not a feasible candidate for vocational rehabilitation services and thus Injured Worker's Permanent and Total Disability Application filed on 10/30/2008 is granted to the above extent.

(Emphasis sic.)

{¶32} 25. On February 5, 2010, relator moved for reconsideration of the SHO's order of January 7, 2010.

{¶33} 26. On March 13, 2010, the three-member commission, voting two-to-one, mailed an order denying relator's request for reconsideration.

{¶34} 27. On April 15, 2010, relator, Cuyahoga Metropolitan Housing Authority, filed this mandamus action.

Conclusions of Law:

{¶35} Two main issues are presented: (1) whether the commission's denial of claimant's June 20, 2008 motion for the exercise of continuing jurisdiction over the commission's denial of claimant's first PTD application precluded the commission, under the doctrine of res judicata, from granting claimant's second PTD application, and (2) whether the October 21, 2008 report of Dr. Kovach, upon which the commission relied, must be eliminated from evidentiary consideration because allegedly Dr. Kovach relied upon nonallowed conditions in rendering his opinion that the industrial injuries alone prohibit sustained remunerative employment.

{¶36} The magistrate finds: (1) the commission's denial of claimant's June 20, 2008 motion for the exercise of continuing jurisdiction did not preclude the commission from granting claimant's second PTD application under the doctrine of res judicata, and

(2) the October 21, 2008 report of Dr. Kovach need not be eliminated from evidentiary consideration.

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

{¶38} Turning to the first issue, res judicata operates to preclude the relitigation of a point of law or fact that was at issue in a former action between the same parties and was passed upon by a court of competent jurisdiction. *State ex rel. B.O.C. Group, General Motors Corp. v. Indus. Comm.* (1991), 58 Ohio St.3d 199, 200. The doctrine applies to commission proceedings, but is limited by the commission's continuing jurisdiction over industrial claims under R.C. 4123.52. Id.

{¶39} The *B.O.C. Group* court stated:

> * * * As stated in 3 Larson, Workers' Compensation Law (1989) 15-426,272(99) to 15-426,272(100), Section 79.72(f):
>
> "It is almost too obvious for comment that res judicata does not apply if the issue is claimant's physical condition or degree of disability at two entirely different times * * *. A moment's reflection would reveal that otherwise there would be no such thing as reopening for change in condition. The same would be true of any situation in which the facts are altered by a change in the time frame * * *."

Id. at 201.

{¶40} The commission's continuing jurisdiction under R.C. 4123.52 is not unlimited. Its prerequisites are: (1) new and changed circumstances; (2) fraud; (3) clear mistake of fact; (4) clear mistake of law; or (5) error by an inferior tribunal. *State ex rel. Nicholls v. Indus. Comm.* (1998), 81 Ohio St.3d 454.

{¶41} The *Nicholls* court suggests that new and changed circumstances also encompasses the rule regarding previously undiscoverable evidence. See also *State ex rel. Keith v. Indus. Comm.* (1991), 62 Ohio St.3d 139.

{¶42} In *State ex rel. Youghiogheny & Ohio Coal Co. v. Indus. Comm.* (1992), 65 Ohio St.3d 351, the court held that commission denial of PTD compensation does not require the subsequent application to show new and changed circumstances in order to obtain a PTD award.

{¶43} To begin, relator characterizes the commission's order awarding PTD compensation as a finding that "new and changed circumstances warranted an award of permanent and total disability compensation." (Relator's brief, at 11.) This characterization needs clarification.

{¶44} Indeed, in awarding PTD compensation, the SHO necessarily determined that claimant's disability status had changed. After all, the first PTD application had been denied. But to say that the commission found "new and changed circumstances warranted an award of permanent and total disability compensation," is to incorrectly suggest that the commission was exercising its continuing jurisdiction over its prior denial of PTD compensation, and that "new and changed circumstances" was a prerequisite to the commission's PTD award. *Youghiogheny* makes it clear that the prerequisites for the exercise of continuing jurisdiction are not necessarily at issue on a second PTD application where the applicant seeks compensation for a period subsequent to that which he sought in his first application. This makes sense because the PTD applications seek compensation for different periods of time.

{¶45} The instant case is unusual as far as second PTD applications go because, prior to filing his second PTD application, claimant sought to have the commission revisit or reopen its decision on his first PTD application. Clearly, in that situation, the prerequisite of new and changed circumstances was at issue. The commission's determination that it lacked continuing jurisdiction to reopen its decision to deny the first PTD application is not under challenge here.

{¶46} Here, without citation to authority, relator claims that the commission's denial of claimant's June 20, 2008 motion for the exercise of continuing jurisdiction "was *res judicata* and prohibited the Commission's ultimate finding in its January 7, 2010 decision." (Relator's brief, at 12; emphasis sic.) Clearly, relator is incorrect.

{¶47} The commission's denial of claimant's June 20, 2008 motion for the exercise of continuing jurisdiction has no preclusive effect upon the commission's adjudication of claimant's second PTD application.

{¶48} The second PTD application filed October 30, 2008 was premised upon Dr. Kovach's October 21, 2008 report—a report that post-dates the December 13, 2007 hearing on the first PTD application by almost ten months. Clearly, the second PTD application sought compensation for a period of claimed disability that was subsequent to and different than the claimed period of disability adjudicated by the commission with respect to the first PTD application. Under such circumstances, the doctrine of res judicata does not bar the commission's award of PTD compensation. *B.O.C. Group*. See *State ex rel. Ford Motor Co., Sharonville Transmission Plant v. Indus. Comm.*, 10th Dist. No. 07AP-1084, 2008-Ohio-4890, ¶18, 83.

{¶49} The second issue, as previously noted, is whether the October 21, 2008 report of Dr. Kovach, upon which the commission relied, must be eliminated from evidentiary consideration because allegedly Dr. Kovach relied upon nonallowed conditions in rendering his opinion that the industrial injuries alone prohibit sustained remunerative employment.

{¶50} On May 27, 2008, claimant underwent an MRI of his lumbar spine. The record contains a three-page report from the interpreting radiologist. Dr. Kovach relied, in large part, upon his own interpretation of the MRI report in rendering his opinion that claimant "is not capable of sustained, gainful employment."

{¶51} In his October 21, 2008 report, Dr. Kovach writes:

> * * * Updated lumbar MRI studies (most recent in May 2008) have shown increased degenerative changes. Imaging studies have confirmed scarring around the L5 nerve root (left), arachnoiditis, recurrent herniation of disc at L4-5 (right sided) and recurrent, degenerative herniated disc at L5-S1. * * *

{¶52} According to relator, the references to "arachnoiditis" and "recurrent herniation[s]" are references to nonallowed conditions.

{¶53} A claimant must always show the existence of a direct and proximate causal relationship between his or her industrial injury and the claimed disability. *State ex rel. Waddle v. Indus. Comm.* (1993), 67 Ohio St.3d 452. Nonallowed medical conditions cannot be used to advance or defeat a claim for compensation. Id.

{¶54} The mere presence of a nonallowed condition in a claim for compensation does not in itself destroy the compensability of the claim, but the claimant must meet his burden of showing that an allowed condition independently caused the disability. *State ex rel. Bradley v. Indus. Comm.*, 77 Ohio St.3d 239, 242, 1997-Ohio-48.

{¶55} To analyze the issue relator raises, it is helpful to briefly review claimant's surgical history relating to his allowed low back conditions.

{¶56} The record contains an operative report indicating that on February 6, 1996, claimant underwent a surgical procedure described as "Right L4 and 5 laminotomies, right L4 microdiskectomy." "Right L4-5 disc herniation" is listed as both the operative and post-operative diagnoses. Surgery was performed by Bienvenido Ortega, M.D. The operative report further states:

> CLINICAL NOTE: This is a 36-year-old male with severe back and right leg pain which did not respond to conventional medical treatments. He had been having symptoms since a work related injury on 12/16/93. C.P. myelogram and [MRI] had shown L4-5 disc herniation and L5 nerve root defect. MRI had also shown central L5 disc protrusion.

{¶57} On April 8, 1996, neurological surgeon Pete N. Poolos, Jr., M.D., wrote:

> I have personally reviewed an MRI of the lumbar spine from West Side Imaging of March 21, 1996. This demonstrates a herniation of the L5-S1 disc on the left side with impingement of the S1 nerve root in the left intervertebral foramen. This herniation is most distinctly seen in the sagittal both the T1 and T2 weighted images.
>
> In summary, in my opinion Mr. Angel Aponte had herniation of two discs one at L4-5, which was severely symptomatic on the right side and also, to a lesser degree, L5-S1 which has worsened in the immediate postop period and now he's more symptomatic from a herniated disc at L5-S1 on the left.
>
> Mr. Aponte has indicated that he does not feel he can live with this pain and he is trying to make a decision as to whether he wishes to have surgery.

{¶58} The record also contains an operative report indicating that on April 29, 1996, claimant underwent another surgical procedure described as "[d]ecompression

laminectomy, exploration of L5 S1 left, partial foraminotomy, L5 S1 left." Surgery was performed by Dr. Poolos.

{¶59} As earlier noted, on February 24, 2009, at relator's request, claimant was examined by Dr. Martin. In his report, Dr. Martin summarizes claimant's medical history:

> On this particular date of injury, Mr. Aponte stated he had stepped on a sewer hole which had inadvertently collapsed underneath him causing him to lose his balance and fall. He reported being initially evaluated at Deaconess Hospital's Emergency Room where x-rays were obtained revealing no evidence for any fracture or dislocation. Mr. Aponte was then seen by Dr. Patil and was further evaluated with an MRI scan which revealed evidence for disc protrusion/desiccation at the L4-5 and L5-S1 levels. EMG/nerve conduction studies were also obtained in 1994, which revealed left-sided L5 nerve root irritation. Mr. Aponte was subsequently referred to Dr. Ortega who obtained a myelogram/post-myelogram CT scan which revealed evidence for a disc herniation at the L4-5 level. In February 1996, Dr. Ortega performed surgery consisting of a right L4 and L5 laminotomy with a right L4 microdiscectomy. Mr. Aponte stated his back pain improved; however, stated he continued to have symptoms related with his left leg and was then seen by Dr. Poolos. After additional diagnostic testing, Dr. Poolos performed a second surgical procedure which consisted of a decompressive laminectomy and exploration of the L5-S1 level and partial foraminotomy on the left at L5-S1. Mr. Aponte was subsequently enrolled in a physical therapy program for several weeks after the procedure. Mr. Aponte reported he continued to have difficulties with his back and legs and further MRI scan evaluation revealed various post-operative changes with no recurrent disc herniations. Mr. Aponte was eventually released to return to his former position in August 1996.
>
> Over the several years since his return to work, Mr. Aponte has continued to be followed by his private physician on a periodic basis and has been provided various medications. Mr. Aponte was also provided a course of epidural injections; however, stated these resulted in no significant long-term benefit. Mr. Aponte stated his last day of work was in 2005. He reported currently seeing Dr. Marshall on an every three month basis, stating his current form of treatment consists solely of medications.

> Presently, Mr. Aponte stated he has back pain on a daily basis with radiating symptoms into both legs with the left side usually worse than the right. * * *

{¶60} "Herniated disc" is defined by the Miller-Keane Encyclopedia Dictionary of Medicine, Nursing, Allied Health (7th ed.2003) as:

> [P]rotrusion of all or part of the NUCLEUS PULPOSUS through the weakened or torn outer ring (annulus fibrosus) of an intervertebral DISK; it occurs most often in the lower back and occasionally in the neck or upper portion of the spinal column. Called also disk herniation, herniation of intervertebral disk or of nucleus pulposus, ruptured disk, and, popularly, "slipped disk."

(Emphases sic.)

{¶61} "Arachnoiditis" is defined by Taber's Cyclopedic Medical Dictionary (20th ed.2005) as: "Inflammation of the arachnoid membrane."

{¶62} "Arachnoidea spinalis" is defined by Taber's as "The part of the arachnoidea enclosing the spinal cord."

{¶63} Analysis begins with the observation that, in his October 21, 2008 report, Dr. Kovach correctly lists the allowed conditions of the 1993 claim, appropriately reviews the surgical history, presents his clinical findings on examination, and, in his final paragraph, opines that the lower back conditions are the main disabling factors that render claimant incapable of sustained, gainful employment.

{¶64} When relator insists here that Dr. Kovach's report indicates reliance upon nonallowed conditions, relator is, in effect, asking this court to determine, on its own, whether Dr. Kovach's references to "arachnoidits" and "recurrent herniation[s]" are references to nonallowed conditions.

{¶65} The question initially is by what authority this court can make this determination in spite of the fact that Dr. Kovach indicates (by listing the allowed conditions) that the allowed conditions are causing an incapacity for sustained remunerative employment.

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

{¶67} A physician's report can be so internally inconsistent that it cannot be some evidence supporting the commission's decision. *State ex rel. Lopez v. Indus. Comm.*, 69 Ohio St.3d 445, 449, 1994-Ohio-458; *State ex rel. Taylor v. Indus. Comm.* (1995), 71 Ohio St.3d 582, 585.

{¶68} However, in mandamus, courts will not second-guess the medical expertise of the doctor whose report is under review. *State ex rel. Young v. Indus. Comm.*, 79 Ohio St.3d 484, 1997-Ohio-162.

{¶69} The evaluation of the weight and credibility of the evidence before it rests exclusively with the commission. *State ex rel. Thomas v. Indus. Comm.* (1989), 42 Ohio St.3d 31, 33, citing *State ex rel. Burley v. Coil Packing, Inc.* (1987), 31 Ohio St.3d 18.

{¶70} "In general, the court does not 'second guess' medical opinions from medical experts and will remove a medical opinion from evidentiary consideration as having no value only when the report is patently illogical or contradictory * * *." *State ex rel. Certified Oil Corp. v. Mabe*, 10th Dist. No. 06AP-835, 2007-Ohio-3877, quoting *State ex rel. Tharp v. Consol. Metal Prods.,* 10th Dist. No. 03AP-124, 2003-Ohio-6355, ¶67.

{¶71} Given the medical complexity involved, in effect, relator is inviting this court to second-guess Dr. Kovach's medical expertise and to render this court's own opinion as to whether the references to the MRI of May 2008 may involve nonallowed conditions.

{¶72} Interestingly, relator's own examining physician, Dr. Martin, whose report post-dates that of Dr. Kovach by some four months, fails to address the question of whether Dr. Kovach's report relied upon nonallowed conditions. Certainly, if Dr. Martin felt that Dr. Kovach had relied upon nonallowed conditions in his report, he could have rendered his opinion to that effect in his report upon being asked to do so by relator.

{¶73} In the view of this magistrate, after careful review of the record, relator's assertions that "arachnoiditis" and "recurrent herniation[s]" are references to nonallowed conditions is not supported by any observations within the realm of someone who lacks medical expertise. Given that scenario, it was clearly within the commission's discretion to accept Dr. Kovach's report as some evidence that the allowed conditions of the industrial claims support PTD.

{¶74} Accordingly, for all of 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).