[Cite as *State ex rel. Seitaridis v. Indus. Comm.*, 2011-Ohio-3593.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

The State of Ohio on Relation of Spiros Seitaridis,	:	
Relator,	:	
v.	:	No. 10AP-494
Delta Plating, Inc. and The Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on July 21, 2011

Regas & Haag, Ltd., and John S. Regas, for relator.

Michael DeWine, Attorney General, and *Eric Tarbox*, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

DORRIAN, J.

{¶1} Relator, Spiros Seitaridis, commenced this original action requesting a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission"), to vacate its order dated January 28, 2010. The order denied relator's application for permanent total disability ("PTD") compensation.

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

decision. In her decision, the magistrate recommended that this court deny relator's request for a writ of mandamus.

{¶3} Relator has timely filed his objections to the magistrate's decision:

> [Relator] objects to the Magistrate's findings related to [1] the classification of his educational level and [2] regarding whether he would be capable of light work activity despite restrictions related to his dominant right upper extremity.

Relator also asserts in his statement of facts that the commission improperly found he had transferable vocational skills. Relator does not, however, object to the magistrate's findings regarding the same, nor does relator include in his memorandum in support of his objection any argument regarding this issue. Therefore, we confine our review to the two matters identified above.

{¶4} Regarding his capability to perform light-work activity despite restrictions related to his dominant right upper extremity, relator specifically contends that: (1) the magistrate's decision does not address the fact that the staff hearing officer ("SHO") failed to analyze how upper extremity limitations would limit an individual's ability to perform light-work activity; (2) the magistrate overstepped her role by evaluating medical evidence of record and drawing her own conclusions related to the probative value of the medical evidence, despite the fact that the SHO did not perform the same evaluation and did not rely upon that medical evidence in her decision; and (3) the magistrate placed too much emphasis upon the functional capacity evaluation ("FCE") performed on April 15, 2008. (See Objection to Magistrate's Decision, at 7.) In addition, relator objects to the magistrate's factual finding that Dr. Bond concluded that relator could perform light-duty work with restrictions on "repetitive lifting" with the right upper extremity. (See

Magistrate's Decision ¶30, 31, and 43.) We will first address relator's objection to the magistrate's factual finding regarding "repetitive lifting."

{¶5} Pursuant to Civ.R. 53(D)(4)(d), we undertake an independent review of the objected matters "to ascertain that the magistrate has properly determined the factual issues and appropriately applied the law."

{¶6} Upon review of Dr. Bond's reports dated May 28 and July 27, 2009, this court finds that the report dated May 28, 2009 indicates that relator can perform light work and states "restrictions limited with use of right upper extremity." Neither report characterizes these restrictions as relating to "repetitive lifting." Furthermore, the commission's order mailed January 28, 2010 does not characterize the restrictions identified by Dr. Bond as relating to "repetitive lifting." Therefore, relator's objection to the magistrate's finding of fact is well-taken. We will amend the magistrate's finding in ¶30 and ¶31, respectively, to state that Dr. Bond concluded and further opined that relator remained capable of performing light work with "restrictions limited with use of right upper extremity." In addition, the magistrate's characterization of Dr. Bond's opinion in her conclusions of law at ¶43 and 45 shall also be amended accordingly.

{¶7} We will now address relator's remaining arguments regarding whether he would be capable of performing light-work activity despite restrictions related to his dominant right upper extremity.

{¶8} A relator seeking a writ of mandamus must establish: " '(1) a clear legal right to the relief prayed for, (2) a clear legal duty upon respondent to perform the act requested, and (3) that relator has no plain and adequate remedy in the ordinary course of the law.' " *Kinsey v. Bd. of Trustees of the Police & Firemen's Disability & Pension*

Fund of Ohio (1990), 49 Ohio St.3d 224, 225, quoting *State ex rel. Consolidated Rail Corp. v. Gorman* (1982), 70 Ohio St.2d 274, 275. "A clear legal right exists where the [commission] abuses its discretion by entering an order which is not supported by 'some evidence.' " Id.

{¶9} The present issue before this court pertains to whether the commission abused its discretion in denying relator's application for PTD compensation. Ohio Adm.Code 4121-3-34(B)(1) defines PTD as "the inability to perform sustained remunerative employment due to the allowed conditions in the claim." Therefore, the key inquiry here is whether relator is capable of performing sustained remunerative employment.

{¶10} In determining whether relator is capable of performing sustained remunerative employment, the commission shall first consider the medical evidence and determine relator's residual functional capacity. Ohio Adm.Code 4121-3-34(B)(4). After consideration of the medical evidence, if the commission determines that relator is unable to return to his former position of employment, but may be able to engage in sustained remunerative employment, the commission shall then consider nonmedical and vocational factors, known as the *Stephenson* factors, found at Ohio Adm.Code 4121-3-34(B)(3). See Ohio Adm.Code 4121-3-34(D)(2)(b) and (c); see also *State ex rel. Stephenson v. Indus. Comm.* (1987), 31 Ohio St.3d 167; *State ex rel. Corona v. Indus. Comm.* (1998), 81 Ohio St.3d 587; and *State ex rel. Nikoli v. Indus. Comm.*, 10th Dist. No. 08AP-349, 2009-Ohio-243, ¶5-6. Therefore, we begin our analysis by examining the commission's determination, based upon the medical evidence, that relator has the functional capacity to perform "light work."

{¶11} As noted above, the commission abuses its discretion by entering an order which is not supported by "some evidence." In *State ex rel. Noll v. Indus. Comm.* (1991), 57 Ohio St.3d 203, the Supreme Court of Ohio reiterated the requirement that the commission " 'must specifically state which evidence and only that evidence which has been relied upon to reach their conclusion, and a brief explanation stating why the claimant is or is not entitled to the benefits requested.' " Id. at 204, quoting *State ex rel. Mitchell v. Robbins & Myers, Inc*. (1983), 6 Ohio St.3d 481, 483-84. In *Noll*, it further admonished that the court " 'will no longer search the commission's file for "some evidence" to support an order of the commission not otherwise specified as a basis for its decision.' " Id., quoting *Mitchell* at 483-84.

{¶12} Here, in compliance with *Noll*, the commission indicated that its determination regarding residual functional capacity is based upon Dr. Bond's May 28 and July 27, 2009 medical reports. Further, the commission notes that Dr. Bond's reports are "found persuasive." Also, in discussing the medical evidence, the commission does not specifically state any other reports of medical professionals upon which it relied.

{¶13} We will now consider relator's contentions that the magistrate erred in not addressing the fact that the SHO failed to analyze how upper extremity limitations would limit an individual's ability to perform light-work activity. The commission specifically relied on Dr. Bond's reports in considering the medical evidence. Dr. Bond opined that relator could engage in "light work" with "restrictions limited with use of right upper extremity." (See May 28, 2009 report of Dr. Bond.)

> "Light work" means exerting up to twenty pounds of force occasionally, and/or up to ten pounds of force frequently, and/or a negligible amount of force constantly (constantly: activity or condition exists two-thirds or more of the time) to

> move objects. Physical demand may be only a negligible amount, a job should be rated light work: (1) when it requires walking or standing to a significant degree; or (2) when it requires sitting most of the time but entails pushing and/or pulling or arm or leg controls; and/or (3) when the job requires working at a production rate pace entailing the constant pushing and/or pulling of materials even though the weight of those materials is negligible.

Ohio Adm.Code 4121-3-34(B)(2)(b). Presumably, Dr. Bond's opinion that relator could engage in "light work" also encompassed a further opinion that relator could engage in "sedentary work."

> "Sedentary work" means exerting up to ten pounds of force occasionally (occasionally: activity or condition exists up to one-third of the time) and/or a negligible amount of force frequently (frequently: activity or condition exists from one-third to two-thirds of the time) to lift, carry, push, pull, or otherwise move objects. Sedentary work involves sitting most of the time, but may involve walking or standing for brief periods of time. Jobs are sedentary if walking and standing are required only occasionally and all other sedentary criteria are met.

Ohio Adm.Code 4121-3-34(B)(2)(a).

{¶14} It is well-settled that "a medical report that identifies the worker's exertional category as defined in the Ohio Administrative Code and does not include additional opinions regarding specific restrictions on sitting, lifting, standing, and so forth is still sufficient to constitute some evidence." *State ex rel. O'Brien v. Cincinnati, Inc.*, 10th Dist. No. 07AP-825, 2008-Ohio-2841, ¶9, citing *State ex. rel. Ace v. Toyota of Cincinnati Co.*, 10th Dist. No. 03AP-517, 2004-Ohio-3971, ¶30. However, 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.' " *State ex. rel. Howard v. Millennium Inorganic Chemicals*, 10th Dist. No. 03AP-

637, 2004-Ohio-6603, quoting *State ex. rel. Owens-Corning Fiberglass v. Indus. Comm.*, 10th Dist. No. 03AP-684, 2004-Ohio-3841, ¶56. Therefore, if the physician imposes *specific* restrictions, "the commission must review the doctor's report and actually make certain that any physical restrictions the doctor listed correspond with an ability to actually perform at the exertional level indicated by the doctor." *O'Brien* at ¶10, citing generally *Owens-Corning* and *Howard*.

{¶15} Here, Dr. Bond identified the exertional level of "light work." He also identified a specific restriction in stating "restrictions limited with use of right upper extremity." We find this restriction to be ambiguous and vague. In reviewing Dr. Bond's May 28, 2009 report, however, we note more specific findings, including Dr. Bond's objective findings of "decreased range of motion and strength at the right wrist/hand with mild findings on Semmes-Weinstein monofilament testing of a slight sensory loss consistent with right carpal tunnel syndrome." These objective findings were based upon Dr. Bond's examination of relator in which he found that:

> Active *range of motion* at the right wrist was as follows: flexion to 40 out of 60 degrees, extension to 40 out of 60 degrees, radial deviation to 10 out of 20 degrees, and ulnar deviation to 20 out of 30 degrees. *Muscle strength* testing (wrist flexor and extensor strength, and hand pincer grip and clenched grip strength) revealed grade 4/5 strength (active movement against gravity and some resistance). * * * Sensory testing to sharp touch (Semmes-Weinstein monofilament testing) revealed diminished light touch *sensation* (blue filament) at the right thumb, index, and middle fingers.

(See May 28, 2009 report of Dr. Bond.) (Emphasis added.)

{¶16} The commission ultimately concluded that relator could perform "nearly a full range of light work." We note that "light work" involves either "exerting up to twenty pounds of force," or "exerting up to ten pounds of force," "moving objects," "pushing

and/or pulling or arm * * * controls," or "constant pushing and/or pulling of materials." See Ohio Adm.Code 4121-3-34(B)(2)(b). The commission also concluded that relator could perform a "full range of sedentary work." "Sedentary work" involves either "exerting up to ten pounds of force," or "exerting a negligible amount of force * * * to lift, carry, push, pull or otherwise move objects." See Ohio Adm.Code 4121-3-34(B)(2)(a). This court questions whether these are the restrictions to which Dr. Bond refers in noting "restrictions limited with use of right upper extremity," and whether relator's impaired range of motion, muscle strength (grip) or sensation prohibit him from engaging in these activities. We do not know the answer to these questions. Nor can we hypothesize answers as neither we, nor the magistrate, are medical experts trained to interpret the physician's findings. For these reasons, we agree that the magistrate erred in not addressing the fact that the SHO failed to analyze how or if upper extremity limitations would limit relator's ability to perform light-work activity.

{¶17} We recognized that in the present matter the commission discussed of Dr. Richterman's report within the four corners of its decision, but the commission based its determination of residual functional capacity solely upon the medical evidence found in Dr. Bond's reports. In the context of addressing medical evidence, the commission notes that the reports of Dr. Bond are found persuasive. On the other hand, the commission discussed Dr. Richterman's reports in the context of addressing vocational factors. Relying upon Dr. Richterman's report, the commission noted that Dr. Richterman felt there was a need for vocational rehabilitation, that relator entered vocational rehabilitation, and that, in April of 2008, relator was discharged from Dr. Richterman's care after an FCE reflected that he was capable of medium-level work.

{¶18} The commission did not rely on Dr. Richterman's reports in making its determination regarding relator's residual functional capacity. If it had, it is conceivable that the commission would have found a residual functional capacity of "medium work," rather than "light work" or "sedentary work." Indeed, the commission may have found the medical evidence presented by Dr. Bond to be more credible than that presented by Dr. Richterman simply because Dr. Bond's assessment was more recent than Dr. Richterman's assessment (by approximately 14 months). Nevertheless, these determinations of weight and credibility are for the commission to make. Furthermore, nowhere in its order does the commission indicate that it relied upon the FCE as medical evidence in denying relator's PTD application. Therefore, we disagree with the magistrate's reasoning at ¶46.

{¶19} Thus, we sustain relator's objection to the magistrate's findings regarding whether relator would be capable of light-work activity, despite restrictions related to his dominant right upper extremity.

{¶20} As we did in *State ex rel. Libecap v. Indus. Comm.* (Sept. 5, 1996), 10th Dist. No. 96APD01-29, and *Howard*, we recognize that, in the case at bar, there is room for interpretation of the medical evidence. Therefore, we will grant a limited writ of mandamus so that the commission may clarify the issue of whether the "restrictions limited with use of right upper extremity" and impairments outlined in Dr. Bond's reports are consistent with the possibility of relator maintaining sustained remunerative employment, whether "light work" or "sedentary work." In so doing, the commission may seek clarification from Dr. Bond. See *State ex rel. Chrysler Corp. v. Indus. Comm.*, 81 Ohio St.3d 158, 164, 1998-Ohio-460.

{¶21} Our granting of this limited writ renders relator's remaining objections moot.

{¶22} Based upon the foregoing, we sustain in part and overrule in part relator's objection to the magistrate's decision. We adopt the findings of fact contained in the magistrate's decision as amended in ¶6 of this decision. We do not, however, adopt the conclusions of law contained in the magistrate's decision. We issue a limited writ of mandamus compelling the commission to vacate its order denying relator's application for PTD compensation. The writ shall further compel the commission to enter a new order, either granting or denying PTD compensation, and to clarify the issue of whether the "restrictions limited with use of right upper extremity" and impairments outlined in Dr. Bond's reports are consistent with the possibility of relator maintaining sustained remunerative employment, whether "light work" or "sedentary work."

Objection sustained in part and overruled in part; limited writ of mandamus granted.

BROWN and FRENCH, JJ., concur.

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APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Spiros Seitaridis,	:	
Relator,	:	
v.	:	No. 10AP-494
Delta Plating, Inc. and Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on January 31, 2011

Regas & Haag, Ltd., and *John S. Regas*, for relator.

Michael DeWine, Attorney General, and *Jeanna R. Volp*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶23} Relator, Spiros Seitaridis, has filed this mandamus action requesting that this court issue a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order which denied his application for permanent total disability ("PTD") compensation, and ordering the commission to find that he is entitled to that compensation.

Findings of Fact:

{¶24} 1. Relator has sustained two work-related injuries, the most significant of which occurred on August 29, 2004. Relator's workers' compensation claims have been allowed for the following conditions: Claim No. 03-866377 is allowed for "contusion of right knee; contusion of chest wall." Claim No. 04-396923 is allowed for "fracture right lower radius with ulna-closed; right carpal tunnel syndrome; ulnar carpal impingement with radial ulnar joint degeneration, right wrist [and] trigger ringer, right long finger."

{¶25} 2. An independent medical examination was performed by Alan H. Wilde, M.D. In his January 25, 2008 report, Dr. Wilde opined that relator's conditions had reached maximum medical improvement ("MMI"), and that he could perform light-duty work provided there were no repetitive activities using his right wrist and a lifting restriction of 20 pounds with his right arm.

{¶26} 3. Relator was referred for vocational rehabilitation in February 2008.

{¶27} 4. Relator's treating physician, Dr. Richterman, referred relator for a functional capacity evaluation ("FCE"). That evaluation was performed on April 15, 2008. The evaluator concluded as follows:

> The results of this evaluation indicate that Spiros Seitaridi [sic] is demonstrating functional abilities in the medium physical demand category based [on] his functional ability over an 8 hour day. Mr. Seitaridi [sic] completed intake interview, musculoskeletal screening, grip testing, push/pull testing, positional tolerance testing, material handling ability, aerobic capacity testing and circuit training. Overall performance was consistent as noted with an consistent [illegible] heart rate throughout the session and consistency with grip testing noted with an expected bell shaped curve on the maximum voluntary effort. However, Mr. Seitaridi [sic] demonstrated self limiting behavior during material handling tasks due to subjective reports of wrist pain. Additional, BTE simulation of grip desting [sic] suggested the right wrist was

> 58% of the uninvolved wrist based on [illegible] force output. Overall, I feel Mr. Seitaridi [sic] could demonstrate abilities to function in a heavy physical demand category if self limiting behavior was not noted during the examination.

{¶28} 5. Ultimately, relator's vocational rehabilitation file was closed. (September 2, 2008). Apparently, relator sought employment for 13 weeks; however, he was not able to secure employment. According to the vocational evidence in the record, the majority of relator's contacts were performed over the internet in spite of the fact that relator was informed that this could be a barrier to his finding employment. Relator's vocational rehabilitation consultant provided relator with potential jobs to review; however, relator only had one telephone interview. Apparently, relator indicated that he would like to start his own business and manage it.

{¶29} 6. Relator was examined by Timothy Lee Hirst, M.D. In his March 24, 2009 report, Dr. Hirst provided a history, identified the records which he reviewed, provided his physical findings upon examination and ultimately concluded that relator was permanently and totally disabled.

{¶30} 7. Relator was also examined by Jess G. Bond, M.D. In his May 28, 2009 report, Dr. Bond noted relator's history, provided his physical findings upon examination, concluded that relator's conditions had reached MMI, assessed an 11 percent whole person impairment, and concluded that relator could perform light-duty work with restrictions on repetitive lifting with his right upper extremity.

{¶31} 8. Dr. Bond completed an addendum on July 27, 2009 after considering the condition of closed fracture right lower radius with ulna. Dr. Bond opined that this condition did not result in additional permanent impairment and that, in Dr. Bond's

opinion, relator remained capable of performing light-duty work with the restriction of no repetitive lifting with the right upper extremity.

{¶32} 9. Relator filed an application for PTD compensation in April 2009. At that time, relator was 61 years of age, was receiving Social Security Disability Benefits, indicated that he completed the 6th grade in Greece, had not graduated from high school nor obtained a GED, had participated in a military technical school for mechanics, could read and perform math, but, in terms of writing English, he indicated that he did not do this well. Relator's prior work history included 21 years of self-employment and approximately 6 years of factory work.

{¶33} 10. Relator's application for PTD compensation was heard before a staff hearing officer ("SHO") on January 5, 2010. The SHO relied upon the medical reports of Dr. Bond and concluded that relator could perform light-level work with the additional restriction concerning his right upper extremity. Thereafter, the SHO considered the nonmedical disability factors. The SHO found that relator's age of 62 years was a negative vocational factor; however, found that it was not work-prohibitive. The SHO also found that relator's education was a positive vocational factor:

> The Injured Worker was educated in Greece and the testimony presented at hearing reflects the Injured Worker participated in classroom education through the sixth grade. The Injured Worker then continued with three years of vocational training for mechanics, plumbing, carpentry, and electrical work from age 12 to age 15.
>
> The Injured Worker did not graduate from high school by American standards. The Injured Worker is presently enrolled in a program to obtain his GED through Goodwill.
>
> The Injured Worker's education is classified as "limited." This is considered to be a positive vocational factor. Generally, a limited education means reasoning, arithmetic, and language

> skills to do the less complicated job duties needed in semi-skilled and skilled work. Also, the Injured Worker was vocationally trained in a variety of areas which he was able to use to earn a living.

{¶34} The SHO also found relator's prior work history to be positive:

> The Injured Worker has an impressive work history. The Injured Worker was self-employed as a diesel mechanic (skilled, heavy) from 1969-1972, as an owner/operator of a gas station (skilled, heavy) from 1976-1979 and as an automobile and truck mechanic (skilled, heavy) from 1980-1997. The Injured Worker testified that his self-employment required him to perform scheduling, bookkeeping, and accounting functions in addition to the skilled trade.
>
> The Injured Worker has also worked in equipment maintenance (skilled, heavy) for a four-month period, no dates specified, which involved maintenance and repairs of trucks and equipment; factory maintenance (skilled, heavy), the former position of employment, which involved repair of factory machinery including hydraulic lines, air lines, high lifts and electrical testers from 2001-2005; and similar factory maintenance (skilled, heavy) for another employer in 2006. The IC-2 application indicates this work was done in 2007. However, the evidence in file and the Injured Worker's testimony at hearing reflect the Injured Worker was terminated by this new employer after an extended absence in 2006 following a non-industrial motor vehicle accident.
>
> The Injured Worker's employment history is found to be a positive vocational factor. It demonstrates the ability to engage in and sustain self-employment, to use the Injured Worker's vocational training, to perform skilled work on a sustained basis, and to do heavy, skilled work subsequent to the dates of injury in the Injured Worker's two industrial claims.

{¶35} Ultimately, the SHO concluded that relator was not permanently and totally disabled:

> The totality of the evidence does not demonstrate that the Injured Worker is permanently and totally disabled as a result of the allowed conditions in claim numbers 03-866377 and 04-396923. The Injured Worker has the residual

> functional capacity for nearly a full range of light work and for a full range of sedentary work. While the Injured Worker's age is "closely approaching advanced age," it is potentially an impediment to employment but not fully work-prohibitive, as evidenced by the Injured Worker's desire to return to work in some form of self-employment. The Injured Worker has received vocational training, which he has used throughout his entire work life, and has demonstrated the ability to do a variety of skilled work. The Injured Worker has a number of skills, which may transfer to less exertional work, and the Injured Worker can also perform entry-level work.
>
> Based on the above-listed physical capacity and non-medical disability factors, the Staff Hearing Officer finds the Injured Worker's disability is not total, and that the Injured Worker is capable of engaging in sustained remunerative employment, or being retrained to engage in sustained remunerative employment. Therefore, the Injured Worker's request for an award of permanent disability benefits is denied.

(Emphasis sic.)

{¶36} 11. Relator's request for reconsideration was denied in an order mailed April 8, 2010.

{¶37} 12. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶38} In this mandamus action, relator argues that the commission's analysis constitutes an abuse of discretion. Specifically, relator argues that the commission abused its discretion by: (1) classifying his education as limited and finding it to be a vocational asset; (2) finding that he could perform virtually the full range of light work and full range of sedentary work; and (3) finding that he had developed transferable skills from his past work activities.

{¶39} The magistrate concludes that the commission did not abuse its discretion by: (1) classifying relator's education as limited; (2) finding that he could perform the full

range of sedentary work as well as virtually the entire range of light work; and (3) finding that relator had developed some transferable skills. As such, this court should deny relator's request for a writ of mandamus.

{¶40} The relevant inquiry in a determination of permanent total disability is claimant's ability to do any sustained remunerative employment. *State ex rel. Domjancic v. Indus. Comm.* (1994), 69 Ohio St.3d 693. Generally, in making this determination, the commission must consider not only medical impairments but also the claimant's age, education, work record and other relevant nonmedical factors. *State ex rel. Stephenson v. Indus. Comm.* (1987), 31 Ohio St.3d 167. Thus, a claimant's medical capacity to work is not dispositive if the claimant's nonmedical factors foreclose employability. *State ex rel. Gay v. Mihm* (1994), 68 Ohio St.3d 315. The commission must also specify in its order what evidence has been relied upon and briefly explain the reasoning for its decision. *State ex rel. Noll v. Indus. Comm.* (1991), 57 Ohio St.3d 203.

{¶41} The magistrate will first address relator's contention that the commission abused its discretion regarding its findings concerning his physical abilities. In its order, the SHO specifically relied upon the reports of Dr. Bond. With regard to relator's physical abilities, the SHO stated as follows:

> The Injured Worker was evaluated by Dr. Bond on 5/28/2009 regarding permanent total disability. Dr. Bond evaluated the allowed conditions of both the Injured Worker's claims and concluded that all conditions had reached maximum medical improvement, the allowed contusions in claim number 03-866377 resulted in no whole person impairment, the allowed conditions of claim number 04-396923 resulted in 11% whole person impairment, and the allowed conditions of claim number 04-396923 limited the Injured Worker to light-level work with additional language indicating the "restrictions limited with use of right upper extremity."

> "Light work" means exerting up to twenty pounds of force occasionally, and/or up to ten pounds of force frequently and/or a negligible amount of force constantly (constantly: activity or condition exists two-thirds or more of the time) to move objects. Physical demand may be only a negligible amount, a job should be rated light work: (1) when it requires walking or standing to a significant degree; or (2) when it requires sitting most of the time but entails pushing and/or pulling or arm or leg controls; and/or (3) when the job requires working at a production rate pace entailing the constant pushing and/or pulling of materials even though the weight of those materials is negligible.

* * *

The Injured Worker's residual functional capacity for light work as found by Dr. Bond would preclude the Injured Worker's return to work at any of the jobs he previously performed. Therefore, the Injured Worker's effort to be vocationally retrained for less exertional work is a factor to be considered in this permanent total disability determination.

The Injured Worker's physician of record, Dr. Richterman, indicated in the treatment note dated 2/12/2008 that the Injured Worker was capable of light-level work and needed both work hardening and vocational rehabilitation. The Injured Worker entered vocational rehabilitation in March of 2008 and was initially placed in work hardening. Following the completion of work hardening the Injured Worker was given a functional capacity evaluation on 4/15/2008 which reflected the Injured Worker was capable of medium-level work. The 4/22/2008 treatment note of Dr. Richterman reflects the results of the functional capacity evaluation were discussed with the Injured Worker and the Injured Worker was essentially discharged from care with the ability to return on an as-needed basis.

* * *

* * * The Injured Worker has the residual functional capacity for nearly a full range of light work and for a full range of sedentary work. * * *

{¶42} Ohio Adm.Code 4121-3-34(B)(2) defines "sedentary work" and "light work" as follows:

> (a) "Sedentary work" means exerting up to ten pounds of force occasionally (occasionally: activity or condition exists up to one-third of the time) and/or a negligible amount of force frequently (frequently: activity or condition exists from one-third to two-thirds of the time) to lift, carry, push, pull, or otherwise move objects. Sedentary work involves sitting most of the time, but may involve walking or standing for brief periods of time. Jobs are sedentary if walking and standing are required only occasionally and all other sedentary criteria are met.
>
> (b) "Light work" means exerting up to twenty pounds of force occasionally, and/or up to ten pounds of force frequently, and/or a negligible amount of force constantly (constantly: activity or condition exists two-thirds or more of the time) to move objects. Physical demand may be only a negligible amount, a job should be rated light work: (1) when it requires walking or standing to a significant degree; or (2) when it requires sitting most of the time but entails pushing and/or pulling or arm or leg controls; and/or (3) when the job requires working at a production rate pace entailing the constant pushing and/or pulling of materials even though the weight of those materials is negligible.

{¶43} As noted in the findings of fact, Dr. Bond opined that relator was capable of performing light work provided that he limit repetitive use of his right upper extremity. Dr. Bond did not include any limitations regarding relator's ability to sit. As such, in finding that relator could perform light-duty work provided he limit the repetitive use of his right upper extremity, Dr. Bond's reports appear to support a finding that relator could perform the full range of sedentary work.

{¶44} In reviewing the medical evidence, the SHO also discussed the treatment note of relator's treating physician, Dr. Richterman, who indicated that relator was capable of light-level work and recommended both work hardening and vocational rehabilitation.

On the "Physician's Report of Work Ability," Dr. Richterman opined that relator could lift/carry up to 20 pounds frequently and up to 50 pounds occasionally. No restrictions were noted concerning relator's hand/wrist. The SHO also noted the FCE from April 2008 which reflected that relator was capable of medium-level work. Regarding relator's abilities, the examiner concluded that relator could frequently lift 27 pounds from floor to waist and from waist to shoulder as well as 17 pounds from shoulder to overhead. The examiner concluded that relator could frequently lift 37 pounds from floor to waist, 27 pounds from waist to shoulder and 22 pounds from shoulder to overhead. Further, regarding manipulative ability, the examiner concluded that relator had no deficits in frequently object handling, fingering, simple hand grasp, firm hand grasp, and fine/gross manipulation. Regarding active range of motion, relator's right shoulder flexion was 150 degrees (normal 180 degrees), abduction was 150 degrees (normal 180 degrees), internal and external rotation were 75 degrees (normal 90 degrees), extension and adduction were normal. Regarding his right elbow, relator's supination was 50 degrees (normal 80 degrees), while flexion, extension and pronation were normal. Regarding his wrist, relator's flexion was 70 degrees (normal 80 degrees), while extension, radial and ulnar deviation were normal.

{¶45} As above noted, light-duty work means the ability to exert up to 20 pounds of force occasionally (1/3) and/or up to 10 pounds of force frequently (2/3), and/or a negligible amount of force constantly. The only restriction which relator has involves repetitive lifting with his right upper extremity. Relator argues that Dr. Bond's report fails to define what his limitations are and that, by definition, light-duty work will require him to

exceed those limitations. Relator argues that in order to perform light work, he will be required to perform repetitive and/or constant motions with his right upper extremity.

{¶46} Relator's argument is understandable and, at first glance, appears to have some merit. However, the only objective medical evidence of relator's ability to actually use his right upper extremity is contained in the FCE. This evaluation actually details few limitations in relator's ability to use his right upper extremity. Relator's treating physician likewise provides few limitations on relator's ability to use his right upper extremity. While these reports were not specifically relied on, they were discussed and were generated by relator's own doctor. When this is considered, the magistrate finds that any potential questions which may arise from Dr. Bond's reports are answered by relator's own doctor.

{¶47} Turning now to relator's first argument, relator contends that the commission abused its discretion by finding that his education is classified as limited. Relator points to Ohio Adm.Code 4121-3-34(B)(3)(b) which provides, in pertinent part:

> (b) "Education" is primarily used to mean formal schooling or other training which contributes to the ability to meet vocational requirements. The numerical grade level may not represent one's actual educational abilities. If there is no other evidence to contradict it, the numerical grade level will be used to determine educational abilities.
>
> * * *
>
> (ii) "Marginal education" means sixth grade level or less. An injured worker will have ability in reasoning, arithmetic, and language skills which are needed to do simple unskilled types of work. Generally, formal schooling at sixth grade level or less is marginal education.
>
> (iii) "Limited education" means seventh grade level through eleventh grade level. Limited education means ability in reasoning, arithmetic and language skills but not enough to allow an injured worker with these educational qualifications to do most of the more complex job duties needed in semi-

> skilled or skilled jobs. Generally, seventh grade through eleventh grade formal education is limited education.

{¶48} Relator points out that he only completed the 6th grade. As such, relator contends that the commission abused its discretion by finding that he had a limited education (generally, 7th through 11th grade formal education is limited education) instead of a marginal education (generally, formal schooling at 6th grade level or less is marginal education).

{¶49} Relator is correct that the record indicates that he completed the 6th grade. However, relator's interpretation of the Ohio Administrative Code provision omits the fact that the numerical grade level may or may not represent a claimant's actual educational abilities. See, Ohio Adm.Code 4121-3-34(B)(3)(b).

{¶50} In determining that relator had a limited education (instead of a marginal education), the commission specifically noted that, in addition to completing the 6th grade, relator had three years of vocational training in mechanics, plumbing, carpentry, and electrical work from age 12 to 15. The SHO noted further that relator was presently enrolled in a program to obtain a GED through Goodwill. The SHO also noted that relator had been vocationally trained in a variety of areas which he was able to use to earn a living. As such, the SHO explained why relator's numerical grade level did not represent his actual educational abilities. This was not an abuse of discretion.

{¶51} Lastly, relator argues that the commission abused its discretion by finding that he had developed transferable skills from his past work activities. Relator specifically points to the vocational report of Mr. Anderson who had concluded that relator had not developed any skills which would transfer to sedentary or light levels of work. Relator argues that Mr. Anderson's opinion is correct.

{¶52} In concluding that relator did indeed have some transferable skills, the SHO noted that relator had been self-employed as a diesel mechanic and had been the owner/operator of a gas station. According to relator's own testimony, his self-employment required him to perform scheduling, bookkeeping, and accounting functions in addition to the skilled trade. As such, the record indicates that, by his own testimony, relator presented evidence that he had some skills which would transfer to sedentary or light-duty work.

{¶53} In reviewing the vocational report from Mr. Anderson, it is interesting to note that Mr. Anderson only lists the following work experience:

> Mr. Seitaridis [was] employed as a Maintenance Mechanic by Delta Plating, Inc. at the time of his work related injuries. He has additional work experience as an industrial truck mechanic and automobile mechanic. All jobs in the U.S. Economy are listed in the Dictionary of Occupational Titles, (DOT). Accordingly, Mr. Spiros Seitaridis' work history would be classified as follows:
>
> | JOB TITLES | * * * | SKILL LEVEL | STRENGTH LEVEL |
> |---|---|---|---|
> | Mechanic, Maintenance | * * * | SKILLED | HEAVY |
> | Mechanic, Industrial Truck | * * * | SKILLED | MEDIUM |
> | Automobile Mechanic | * * * | SKILLED | MEDIUM |
>
> There would be no transferable skills developed from any of his past work activities to the sedentary or light levels of exertion.

{¶54} Mr. Anderson made no reference to the fact that relator had been self-employed and the owner/operator of a gas station for several years. Given that it appears that Mr. Anderson did not have evidence of all of relator's past work history, his

conclusion that relator had no transferable skills is put into question. Further, the commission can reject vocational reports and conduct its own analysis of the nonmedical factors. *State ex rel. Jackson v. Indus. Comm.* (1997), 79 Ohio St.3d 266. As the Supreme Court of Ohio has stated, the commission is the ultimate evaluator of disability. See *State ex rel. Singleton v. Indus. Comm.* (1994), 71 Ohio St.3d 117. As such, the commission was not required to accept the conclusions of Mr. Anderson and relator has not demonstrated that the commission abused its discretion in finding that he did have some transferable skills.

{¶55} Based on the foregoing, it is this magistrate's decision that relator has not demonstrated that the commission abused its discretion by denying his application for PTD compensation and this court should deny relator's request for a writ of mandamus.

/s/ *Stephanie Bisca Brooks*
STEPHANIE BISCA BROOKS
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).