[Cite as *State ex rel. Smiths Med. Asd, Inc. v. Indus. Comm.*, 2011-Ohio-464.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Smiths Medical Asd, Inc.,	:	
Relator,	:	No. 10AP-163
v.	:	(REGULAR CALENDAR)
Industrial Commission of Ohio, and Vickie Stevens,	:	
Respondents.	:	

D E C I S I O N

Rendered on February 3, 2011

Schottenstein, Zox & Dunn, L.P.A., Felix Wade, and *Jennifer M. McDaniel*, for relator.

Mike DeWine, Attorney General, and *Sandra E. Pinkerton*, for respondent Industrial Commission of Ohio.

Craig T. Lelli, for respondent Vickie Stevens.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

FRENCH, J.

{¶1} Relator, Smiths Medical Asd, Inc. ("relator"), has filed an original action in mandamus requesting this court to issue a writ of mandamus ordering respondent,

Industrial Commission of Ohio ("commission"), to vacate its order that awarded permanent total disability ("PTD") compensation to respondent Vickie Stevens ("claimant"), and to enter an order denying that compensation.

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

{¶3} No objections were submitted concerning the magistrate's findings of fact, and we adopt them as our own. In brief, claimant has claims allowed for injuries suffered in 1997 and for carpal tunnel syndrome beginning in 1993.

{¶4} In a report dated April 30, 2009, Charles J. Kistler, D.O., concluded that claimant "is permanently and totally impaired from sustained remunerative employment solely as a result of the injuries suffered in these claims that give her ongoing restrictions that prevent her from being able to return to active, gainful employment." Claimant filed an application for PTD compensation and submitted Dr. Kistler's report in support.

{¶5} In a report dated July 24, 2009, Douglas Gula, D.O., concluded that claimant "is capable of working in a [sedentary] job classification." Dr. Gula stated, however, that claimant "should limit lifting to 10 pounds and avoid work that would require repetitive turning or twisting of her neck. She would require periodic breaks of 10 minutes every 2 hours."

{¶6} Boyd W. Bowden, D.O., also examined claimant. He assessed a 31 percent whole person impairment and indicated that claimant is capable of sedentary work.

{¶7} After a November 2009 hearing, a staff hearing officer ("SHO") issued an order awarding PTD compensation beginning April 30, 2009. The SHO relied on the reports of Drs. Kistler and Gula. As for Dr. Gula's report, the SHO concluded that Dr. Gula had misstated restrictions that are part of sedentary work. Specifically, he should not have included within sedentary work his conditions that claimant 1) should avoid turning or twisting her neck, and 2) needs periodic breaks. The SHO concluded: "Therefore, if [claimant] is not even able to meet the requirements set out for sedentary work, then the [SHO] finds that [claimant] is permanently and totally impaired as a result of the allowed conditions in both claims."

{¶8} In this action, the magistrate concluded the following: 1) the commission did not abuse its discretion by relying on Dr. Kistler's report, which is some evidence to support the award of PTD compensation; 2) the commission abused its discretion by relying on Dr. Gula's report, which is not some evidence supporting the award; and 3) because Dr. Kistler's report alone is sufficient to support an award, the writ should be denied.

{¶9} Relator raises two objections to the magistrate's decision. First, relator objects to the magistrate's conclusion that Dr. Kistler's report is some evidence supporting an award. Instead, relator contends, Dr. Kistler's conclusion that claimant is permanently and totally disabled is inconsistent with the restrictions he identifies, i.e.,

upper extremity restrictions that place claimant within the confines of sedentary employment. As the magistrate indicated, however, Dr. Kistler also noted claimant's pain. We note, too, Dr. Kistler's statements that claimant's "cervical spine shows diminished range of motion." He notes "muscular spasm" in the dorsal spine, "extreme pain," "pain over the area of the T10 and 11 disks in the dorsal spine," and "cervical pain and spasm with radicular pain down her arms." While Dr. Kistler's concluding paragraph may have referred specifically to limitations relating to claimant's upper extremities, Dr. Kistler states expressly that he considered the "conditions allowed in these claims," conditions that involve more than her upper extremities. We overrule relator's first objection.

{¶10} In its second objection, relator contends that we should return this matter to the commission. The SHO awarded PTD "[b]ased upon the reports of Dr. Kistler and Dr. Gula." Given the magistrate's conclusion that Dr. Gula's report is not some evidence supporting the award, relator argues, we should return this matter to the commission so that it may consider whether Dr. Kistler's report alone is sufficient to support the award.

{¶11} This court has, on occasion, returned a matter to the commission for adjudication where we have rejected some, but not all, of the commission's analysis. See e.g. *State ex rel. Barfield v. Indus. Comm.*, 10th Dist. No. 10AP-61, 2010-Ohio-5552, and cases cited therein. We have done so where the commission's discussion of an improper basis for its decision is intertwined with a proper basis. In *Barfield*, for example, we concluded that the hearing officer's "erroneous analysis of the vocational

rehabilitation issue" was "so intertwined with the analysis of the medical and nonmedical factors that we must grant a limited writ and return this matter to the commission to consider relator's application for permanent total disability compensation without at the same time considering that she did not engage in vocational rehabilitation." Id. at ¶7.

{¶12} Here, in contrast, we can discern two independent sources for the commission's decision: Dr. Kistler's report and Dr. Gula's report. Even eliminating Dr. Gula's report as evidence, Dr. Kistler's report is some evidence to support the award of PTD compensation. Therefore, we overrule relator's second objection.

{¶13} Following independent review, pursuant to Civ.R. 53, we adopt the magistrate's decision, including the findings of fact and conclusions of law contained in it, as our own. Accordingly, we deny the requested writ.

Objections overruled;
writ of mandamus denied.

BRYANT, P.J., and KLATT, J., concur.

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Smiths Medical Asd, Inc.,	:	
Relator,	:	
v.	:	No. 10AP-163
Industrial Commission of Ohio and Vickie Stevens,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on September 30, 2010

Schottenstein, Zox & Dunn, L.P.A., Felix Wade, William J. Barath and *Jennifer M. McDaniel*, for relator.

Richard Cordray, Attorney General, and *Sandra E. Pinkerton*, for respondent Industrial Commission of Ohio.

Craig T. Lelli, for respondent Vickie Stevens.

IN MANDAMUS

{¶14} In this original action, relator, Smiths Medical Asd, Inc. ("relator" or "Smiths Medical"), requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order awarding permanent total

disability ("PTD") compensation to respondent Vickie Stevens ("claimant"), and to enter an order denying said compensation.

Findings of Fact:

{¶15} 1. Claimant has two industrial claims arising out of her employment as a machine operator for Smiths Medical, a self-insured employer under Ohio's workers' compensation laws.

{¶16} 2. Claim No. 97-629584 arose from an injury occurring December 12, 1997 when claimant fell over a hose on the floor. The claim is allowed for "sprain of neck; dorsal sprain/strain; disc herniation at C5-6 with spinal stenosis; C6-7 and T10-11 disc herniations; internal disc derangement with loss of disc height and spondylosis C5-6."

{¶17} 3. Claim No. OD228505 is allowed for "bilateral carpal tunnel syndrome; mild trigger finger, right middle and left middle fingers." September 23, 1993 is listed by the commission as the injury date.

{¶18} 4. On March 17, 2009, at her own request, claimant was examined by Charles J. Kistler, D.O. In his report dated April 30, 2009, Dr. Kistler states:

> I had the pleasure of examining Vickie L. Stevens on 03-17-09 for injuries sustained in Claim #97-629584, date of injury 12-12-97, which is allowed for sprain of the cervical spine, sprain of the dorsal spine, herniated disk at C5-C6 with spinal stenosis, C6-7 herniated disk with herniated disk at T11 and 12 and internal disk derangement with loss of disk height and spondylosis and claim #OD228505, date of injury 09-23-93, which is allowed for mild trigger finger of the right middle and left middle finger and bilateral carpal tunnel syndrome.
>
> * * *

The extremities show the patient is right-hand dominant. There is scarring in both palms from carpal tunnel release. The biceps and triceps reflexes are diminished to +1 in the upper extremities. The pulses are +2. The grip strength is 2-1/2 out of 5 on the left and right side. The cervical spine shows diminished range of motion with forward bending 20 degrees, back bending 10 degrees, right side-bending 15 degrees, left side-bending 15 degrees, right rotation 15 degrees, left rotation 15 degrees. There are spasms noted. There is positive Tinel's and positive Phalen's sign on the left and right hand. There is evidence of triggering of the middle fingers of the left and right hand.

The dorsal spine shows kyphosis and lordosis with para-vertebral muscular spasm. There is extreme pain noted. There is pain over the area of the T10 and 11 disks in the dorsal spine. There is evidence of cervical spondylosis and evidence of a herniated disk at T10 and 11. There are ongoing problems with the neck area. There is a scar from previous surgery. She has numbness, tingling, weakness and pain in her arms, shoulders, into her hands, fingers and wrists. She continues to have cervical pain and spasm with radicular pain down her arms.

Her diagnoses are sprain of the neck, sprain thoracic region, cervical spondylosis, herniated disks C5-C6, herniated disks T10-11, cervical spinal stenosis, displacement at C5-C6, bilateral carpal tunnel syndrome, mild trigger finger right and left middle finger.

It is my medical opinion, based on the history given to me and my examination of this patient, that these injuries were sustained as a direct result of her Industrial-related accident in Claim #96-629584 and Claim #OD-228505. It is further my opinion, taking into account only those conditions allowed in these claims and with reference to the American Medical Association Guidelines to the Evaluation of Permanent Impairment, Fifth Edition, that Vickie L. Stevens is permanently and totally impaired from sustained remunerative employment solely as a result of the injuries suffered in these claims that give her ongoing restrictions that prevent her from being able to return to active, gainful employment. Those restrictions show that she is totally limited from lifting and using her upper extremities on a regular basis as she

> did in her previous field of employment. She cannot use her arms for rapid or strong gripping. She is limited to less than sedentary work. The patient is permanently and totally disabled from sustained remunerative employment.

{¶19} 5. On May 21, 2009, claimant filed an application for PTD compensation. In support, claimant submitted the April 30, 2009 report of Dr. Kistler.

{¶20} 6. On July 24, 2009, at relator's request, claimant was examined by Douglas Gula, D.O. In his six-page narrative report, Dr. Gula opines:

> 2. Can Ms. Stevens return to her former work activity? If so, are there any limitations or restrictions.
>
> Based on the allowed conditions of claims #97-629584 and #OD228505 * * *, it is my opinion Ms. Stevens cannot return to her former work activity, but is capable of working in a sedentary job classification.
>
> * * *
>
> 4. Considering the allowed conditions in claim #97-629584 and OD228505, is Ms. Stevens physically capable of engaging in sustained remunerative employment?
>
> Based on the examination results today, the provided medical records and in sole consideration of the allowed conditions, it is my opinion Ms. Stevens is physically capable of engaging in sustained remunerative employment in a sedentary job classification. Please note she was functionally evaluated by Ohio Diagnostic Services on September 25, 2008, and found to meet the technical requirements of a sedentary physical demand category with the associated restrictions. Within the sedentary job classification she should limit lifting to 10 pounds and avoid work that would require repetitive turning or twisting of her neck. She would require periodic breaks of 10 minutes every 2 hours.

{¶21} 7. On August 25, 2009, at the commission's request, claimant was examined by Boyd W. Bowden, D.O. In his four-page narrative report, Dr. Bowden concludes at page four:

> DISCUSSION:
>
> 1. It is the feeling of the examiner that the Injured Worker has reached maximum medical improvement with reference to her allowed claims.
>
> 2. Utilizing the Guides to the Evaluation of Permanent Impairment, Fifth Edition, a 25% whole person impairment is established with the cervical spine and 8% to the dorsal spine, 0% for carpal tunnel and 0% for the triggering fingers. Utilizing the Combined Value Chart a 31% whole person impairment is established for this Injured Worker.
>
> 3. The Physical Strength Rating form has been filled out.

{¶22} 8. On a physical strength rating form dated August 25, 2009, Dr. Bowden indicated by his checkmark that claimant is capable of "sedentary work."

{¶23} 9. Following a November 8, 2009 hearing, a staff hearing officer ("SHO") issued an order awarding PTD compensation beginning April 30, 2009. The SHO's order explains:

> Permanent and total disability compensation is awarded from 04/30/2009 for the reason that 04/30/2009 is the date of the report from Dr. Kistler which is the earliest supporting medical evidence from a physician.
>
> * * *
>
> Based upon the reports of Dr. Kistler and Dr. Gula, it is found that the Injured Worker is unable to perform any sustained remunerative employment solely as a result of the medical impairment caused by the allowed conditions. Therefore, pursuant to State ex rel. Speelman v. Indus. Comm. (1992),

73 Ohio App.3d 757, it is not necessary to discuss or analyze the Injured Worker's non-medical disability factors.

The Injured Worker submitted a report dated 04/30/2009 from Dr. Charles J. Kistler. His report concludes[:] "It is my medical opinion, based on the history given to me and my examination of this patient, that these injuries were sustained as a direct result of her industrial related accident in Claim 96-629584 and Claim OD228505. It is further my opinion, taking into account only those conditions allowed in these claims and with reference to the American Medical Association Guidelines to the Evaluation of Permanent Impairment, Fifth edition, that Vickie L. Stevens is permanently and totally impaired from sustained remunerative employment solely as a result of the injuries suffered in these claims that give her ongoing restrictions that prevent her from being able to return to active, gainful employment. Those restrictions show that she is totally limited from lifting and using her upper extremities on a regular basis as she did in her previous field of employment. She cannot use her arms for rapid or strong gripping. She is limited to less than sedentary work. The patient is permanently and totally disabled from sustained remunerative employment."

The Injured Worker was also examined on 07/24/2009 by Dr. Douglas Gula who is an Occupational Medicine Specialist. He found that the Injured Worker could do sedentary work but then qualified that by stating[:] "Within the sedentary job classification she should limit lifting to 10 pounds and avoid work that would require repetitive turning or twisting of her neck. She would require periodic breaks of 10 minutes every 2 hours."

Although Dr. Gula finds her able to do sedentary work, he gives restrictions that are not part of the definition of sedentary work. He adds that she should avoid the repetitive turning or twisting of her neck and the necessity for periodic breaks of 10 minutes every 2 hours. Those two requirements are not part of the definition of sedentary work. Further, Dr. Kistler has stated that the Injured Worker meets less than sedentary requirements. Therefore, if the Injured Worker is not even able to meet the requirements set out for sedentary work, then the Staff Hearing Officer finds that the Injured Worker is permanently and totally impaired as a result of the

> allowed conditions in both claims. Since this decision is not based on any disability factor, they will not be discussed in this order.

{¶24} 10. On February 6, 2010, the three-member commission mailed an order denying relator's request for reconsideration of the SHO's order.

{¶25} 11. On February 22, 2010, relator, Smiths Medical Asd, Inc., filed this mandamus action.

Conclusions of Law:

{¶26} It was determined by the commission that the medical impairment resulting from the allowed conditions of the two industrial claims prohibit claimant from performing all sustained remunerative employment and, thus, the vocational or nonmedical factors need not be reviewed. In reaching this determination, the commission stated reliance upon the reports of Drs. Kistler and Gula.

{¶27} Given the above-described scenario, two issues are presented: (1) whether Dr. Kistler's report constitutes some evidence supporting the PTD award, and (2) whether Dr. Gula's report constitutes some evidence supporting the PTD award.

{¶28} The magistrate finds: (1) Dr. Kistler's report is some evidence supporting the award, and (2) Dr. Gula's report is not some evidence supporting the commission's determination that the industrial injuries alone prohibit all sustained remunerative employment.

{¶29} Because Dr. Kistler's report supports the PTD award, it is the magistrate's decision that this court deny relator's request for a writ of mandamus, as more fully explained below.

{¶30} Ohio Adm.Code 4121-3-34 sets forth the commission's rules regarding the adjudication of PTD applications. Ohio Adm.Code 4121-3-34(D) sets forth the commission's guidelines for the adjudication of PTD applications. Thereunder, Ohio Adm.Code 4121-3-34(D)(2) states:

> (a) If, after hearing, the adjudicator finds that the medical impairment resulting from the allowed condition(s) in the claim(s) prohibits the injured worker's return to the former position of employment as well as prohibits the injured worker from performing any sustained remunerative employment, the injured worker shall be found to be permanently and totally disabled, without reference to the vocational factors listed in paragraph (B)(3) of this rule.
>
> (b) If, after hearing, the adjudicator finds that the injured worker, based on the medical impairment resulting from the allowed conditions is unable to return to the former position of employment but may be able to engage in sustained remunerative employment, the non-medical factors shall be considered by the adjudicator.
>
> The non-medical factors that are to be reviewed are the injured worker's age, education, work record, and all other factors, such as physical, psychological, and sociological, that are contained within the record that might be important to the determination as to whether the injured worker may return to the job market by using past employment skills or those skills which may be reasonably developed. * * *

DR. KISTLER'S REPORT

{¶31} Relator presents two challenges to Dr. Kistler's report. First, relator argues that Dr. Kistler's PTD opinion is based in part upon a nonallowed condition.

{¶32} Clearly, nonallowed medical conditions cannot be used to advance or defeat a claim for PTD compensation. *State ex rel. Waddle v. Indus. Comm.* (1993), 67 Ohio St.3d 452. 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 or her 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.

{¶33} In the first paragraph of his three-page report, Dr. Kistler incorrectly states that claim No. 97-629584 is allowed for "herniated disk at T11 and 12" when in fact the claim is allowed for "T10-11 disc herniations."

{¶34} However, later in his report, in discussing the examination he performed, Dr. Kistler writes: "There is pain over the area of the T10 and 11 disks in the dorsal spine. There is evidence of cervical spondylosis and evidence of a herniated disk at T10 and 11." Thus, Dr. Kistler correctly notes the claim allowance during his discussion of his examination. In the next paragraph of his report, Dr. Kistler again correctly notes the claim allowance as "herniated disks T10-11."

{¶35} While technically "herniated disk at T11-12," as it appears in Dr. Kistler's report, is not an allowed condition, that fact alone is not grounds for concluding, as relator does here, that Dr. Kistler's PTD opinion is based even in part upon a nonallowed condition.

{¶36} Significantly, in describing the findings of his physical examination, Dr. Kistler correctly references the allowed condition and the error is not repeated there. Under such circumstances, the commission could conclude, as does this magistrate, that the error in the first paragraph of the report in identifying the allowed condition is indeed a typographical error.

{¶37} Inaccuracies in a medical report that are harmless and inadvertent do not disqualify the report from evidentiary consideration. *State ex rel. Warnock v. Indus. Comm.*, 100 Ohio St.3d 34, 2003-Ohio-4833.

{¶38} Next, relator claims that Dr. Kistler's report is equivocal and internally inconsistent.

{¶39} 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.

{¶40} 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.

{¶41} 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.

{¶42} 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.

{¶43} "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.

{¶44} Ohio Adm.Code 4121-3-34(B)(2)(a) provides:

> "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.

{¶45} Here, relator argues:

> Dr. Kistler opined Stevens has ongoing restrictions that prevent her from being able to return to active, gainful employment. * * * However, Dr. Kistler never specifically identifies what these "restrictions" would be. Dr. Kistler states those restrictions show she is totally limited from lifting and using her upper extremities on a regular basis as she did in her previous field of employment. This simply means she could not return to her former position of employment. It does not support a conclusion that Stevens is restricted from all forms of sustained remunerative employment. Finally, Dr. Kistler states she cannot use her arms for rapid or strong gripping and she is limited to less then [sic] sedentary work. * * * The only restrictions Dr. Kistler specifically identified in his report dealt with Stevens['] upper extremities. He does not explain how these restrictions dealing with her upper extremities limits [sic] her to less then [sic] sedentary employment.
>
> * * *
>
> Based on the restrictions specifically outlined by Dr. Kistler, Stevens would be capable of performing sedentary work as she would only need to exert up to ten pounds of force

> occasionally and a negligible amount of force frequently to lift, carry, push, pull or otherwise move objects. This is inconsistent with his ultimate conclusion that she is PTD. Furthermore, there are many types of sedentary positions that does [sic] not require lifting and using upper extremities on a regular basis and do not require using arms for rapid or strong gripping. * * *

(Relator's brief at 10-11.)

{¶46} Relator's argument is unpersuasive. To begin, it is incorrect for relator to suggest that upper extremity restrictions are the "only" basis for Dr. Kistler's PTD opinion even though Dr. Kistler did find that claimant "is totally limited from lifting and using her upper extremities on a regular basis," and "she cannot use her arms for rapid or strong gripping."

{¶47} Relator seems to suggest, incorrectly, that the only basis for the PTD opinion was the restricted range of motion of both upper extremities.

{¶48} In fact, Dr. Kistler reported that claimant experiences "pain over the area of the T10 and 11 disks in the dorsal spine." She has "pain in her arms, shoulders, into her hands, fingers and wrists. She continues to have cervical pain and spasm with radicular pain down her arms."

{¶49} Clearly, pain can be a factor in a PTD opinion. *State ex rel. Unger v. Indus. Comm.*, 70 Ohio St.3d 672, 676, 1994-Ohio-143.

{¶50} Dr. Kistler's report indicates that pain was a factor in his PTD opinion.

{¶51} Thus, besides the significant restrictions on use of the upper extremities that relator points to, claimant also suffers pain and spasms that Dr. Kistler took into consideration.

{¶52} Relator also incorrectly suggests that Dr. Kistler's report must be read to support only an inability to return to the former position of employment, rather than an inability to perform all sustained remunerative employment. While Dr. Kistler did indicate that the medical restrictions do prevent a return to the former position of employment, he also opined that claimant is permanently and totally disabled from sustained remunerative employment.

{¶53} Dr. Kistler's report need not be read as evidence of an ability to perform sedentary employment, even if it be true as relator posits, that "there are many types of sedentary positions that does [sic] not require lifting and using upper extremities on a regular basis and do not require using arms for rapid or strong gripping." Again, relator's argument ignores the pain and spasms that contribute to PTD.

{¶54} In *State ex rel. Frigidaire, Inc. v. Indus. Comm.*, 70 Ohio St.3d 166, 1994-Ohio-377, the employer challenged a commission PTD award in mandamus. The commission's PTD award was premised upon a report from Dr. Elizabeth Reed, stating in its entirety:

> "The above patient is totally & permanently disabled, due to back injury (Trauma aggravating arthritic changes in lumbar & thoracic spine). He is able to walk short distances but is unable to do any lifting or work.
>
> "He is using some hydrotherapy and taking Motrin at the present time.
>
> "He also shows considerable depression & nervousness for which he takes Elavil. This may be related to the head injury & laceration."

Id. at 166-67.

{¶55} Upholding the PTD award, the court explains:

> Frigidaire also alleges a lack of supportive findings in the report. We again disagree. Although skimpy, the report pinpoints the claimant's arthritic condition as the source of his problems. It also indicates that claimant cannot do lifting and is restricted to brief walking, both of which would impact on his ability to work. Given the commission's authority to evaluate evidentiary weight and credibility, its decision to rely on Reed's report is not an abuse of discretion.

Id. at 168.

{¶56} Comparing Dr. Reed's report with that of Dr. Kistler, it is clear that Dr. Kistler's report is far from "skimpy." Moreover, Dr. Kistler does render "supportive findings," as previously discussed.

{¶57} In short, relator has failed to show that Dr. Kistler's report lacks evidentiary value. Clearly, it is some evidence upon which the commission can and did rely to support the PTD award.

{¶58} As earlier noted, the second issue is whether Dr. Gula's report constitutes some evidence supporting the PTD award. The magistrate finds that Dr. Gula's report is not some evidence supporting a determination that the industrial injury alone prohibits all sustained remunerative employment.

> Again, Ohio Adm.Code 4121-3-34(B)(2)(a) provides:
>
> "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.

{¶59} In his July 24, 2009 report, Dr. Gula concludes that claimant "is physically capable of engaging in sustained remunerative employment in a sedentary job classification."

Dr. Gula further opined:

> * * * Within the sedentary job classification she should limit lifting to 10 pounds and avoid work that would require repetitive turning or twisting of her neck. She would require periodic breaks of 10 minutes every 2 hours.

{¶60} Referring to the definition of sedentary work, the commission determined that Dr. Gula's medical restrictions actually prohibit the performance of sedentary work even though Dr. Gula opined that claimant could perform sedentary work within those restrictions. Thus, the commission disagreed with Dr. Gula's opinion and then concluded that his report supports the conclusion that claimant cannot even perform sedentary work and is thus permanently and totally disabled.

{¶61} Because the commission has no medical expertise, it cannot rewrite Dr. Gula's report to say something that it does not say. *State ex rel. Wheeling-Pittsburgh Steel Corp. v. Indus. Comm.*, 10th Dist. No. 05AP-913, 2006-Ohio-3912, citing *State ex rel. Yellow Freight Sys., Inc. v. Indus. Comm.*, 81 Ohio St.3d 56, 1998-Ohio-654.

{¶62} Had the commission relied upon Dr. Gula's medical opinion that claimant is medically able to perform sedentary work even within the restrictions that he imposed, an analysis of the nonmedical factors would have been required by the commission. As earlier noted, the commission did not undertake such analysis because it (improperly)

relied upon Dr. Gula's report to support a determination that the industrial injury alone prohibits all sustained remunerative employment.

{¶63} Even though the commission improperly relied upon Dr. Gula's report, clearly, Dr. Kistler's report is some evidence supporting the commission's PTD award.

{¶64} Accordingly, 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).