[Cite as *State ex rel. Kelsey Hayes Co. v. Grashel*, 2011-Ohio-6169.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Kelsey Hayes Company,	:	
Relator,	:	
v.	:	No. 10AP-386
Arthur Grashel and The Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

NUNC PRO TUNC[1]

Rendered on December 6, 2011

Critchfield, Critchfield & Johnston, Ltd., and *Susan E. Baker*, for relator.

Philip J. Fulton Law Office, and *Ross R. Fulton*, for respondent Arthur Grashel.

Michael DeWine, Attorney General, and *LaTawnda N. Moore*, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

[1] This Nunc Pro Tunc Decision was issued to correct two clerical errors contained in ¶3 and ¶4 of the original decision released December 1, 2011, and is effective as of that date.

CONNOR, J.

{¶1} Relator, Kelsey Hayes Company ("relator"), has filed this action requesting that this court issue a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate the September 1, 2009 order which awarded permanent total disability ("PTD") compensation to respondent, Arthur Grashel ("claimant"), and to enter an order which denies PTD compensation.

{¶2} The 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, including findings of fact and conclusions of law, which is appended to this decision. Therein, the magistrate concluded the commission's denial of claimant's February 22, 2005 temporary total disability ("TTD") application did not implicitly constitute a finding that claimant voluntarily abandoned the workforce, and therefore collateral estoppel did not apply to bar litigation of the job departure issue in claimant's PTD application. The magistrate also found that pursuant to the severability exception set forth in *State ex rel. Verbanek v. Indus. Comm*., 73 Ohio St.3d 562, 1995-Ohio-330, the rule established in *State ex rel. Zamora v. Indus. Comm*. (1989), 45 Ohio St.3d 17 ("the *Zamora* rule") did not bar the commission from relying upon the September 20, 2004 note and November 8, 2004 report of Dr. Pue to corroborate claimant's hearing testimony regarding the reason for his September 2004 job departure. The magistrate also found the adjudication of claimant's prior TTD motion did not necessarily include the adoption of all of the opinions expressed by Dr. Rosenberg, even though the commission relied on Dr. Rosenberg's ultimate conclusion that claimant was not totally disabled as a result of the allowed

conditions. Thus, the magistrate determined there was some evidence to support the determination that claimant did not voluntarily abandon the workforce. Furthermore, the magistrate concluded the commission's reliance upon Dr. Pue's June 11, 2007 report did not violate the *Zamora* rule because the report was based upon new tests and constituted new findings to support PTD. Consequently, the magistrate determined claimant was entitled to PTD and recommended that this court deny relator's request for a writ of mandamus.

{¶3} Relator filed objections to the magistrate's decision. The commission and the claimant both filed memoranda opposing the objections. This cause is now before the court for a full review regarding relator's objections, which include objections to both the magistrate's findings of fact as well as the conclusions of law.

{¶4} With respect to the findings of fact, relator argues the magistrate erred by failing to include the following factual findings: (1) the commission's February 22, 2005 order denying the claimant's request for TTD found the requested period of disability from September 20, through November 15, 2004 was not caused by the allowed conditions in the claim; (2) the claimant did not file a mandamus appeal from the aforementioned February 22, 2005 order of the commission, and therefore it constitutes a final decision of the commission; (3) the commission's October 12, 2005[2] order denying the claimant's first request for PTD relied upon the June 6, 2005 report of Dr. Rosenberg, which was based upon Dr. Rosenberg's November 24, 2004 exam that formed the basis for the prior denial of TTD, and upon the July 26, 2005 report of Dr. Cunningham, which found the claimant

[2] Relator's brief refers to the commission's order here as having been issued on May 5, 2005. However, that date is the date on which claimant filed the application for PTD. The order denying said PTD was issued on October 12, 2005.

to be capable of medium work; and (4) the commission's October 12, 2005 order found Dr. Pue's September 6, 2005 report was not some evidence upon which it could rely because Dr. Pue did not opine the claimant was incapable of any sustained remunerative activity.

{¶5} With respect to the magistrate's conclusions of law, relator objects to the following conclusions: (1) the commission's reliance on Dr. Pue's September 20, 2004 note and November 8, 2004 report does not violate the rule set forth in *Zamora;* (2) collateral estoppel does not bar the commission from determining the claimant's departure from employment in September 2004 was injury-induced; and (3) the June 11, 2007 report of Dr. Pue is some evidence upon which the commission can rely to support its award of PTD.

{¶6} We find relator's objections to the magistrate's findings of fact to be without merit. Many of the findings which relator claims the magistrate "omitted" are referenced in the magistrate's decision, albeit in slightly different language than that advanced by relator. Others are simply not relevant to the pertinent issues here.

{¶7} For example, relator contends the magistrate's findings of fact fail to establish that the February 22, 2005 order of the commission denied claimant's request for TTD based upon non-allowed conditions. However, the magistrate's decision quotes from the SHO's order which specifically states that it "relies on the report of Dr. Rosenberg" and that "Dr. Rosenberg opined that the injured worker is not totally disabled as a result of the allowed conditions in the claim." (Feb. 22, 2011 Magistrate's Decision (appended hereto), at ¶12.)

{¶8} Relator also objects to the magistrate's omission of the fact that claimant did not file a mandamus appeal from the February 22, 2005 denial of TTD. Given the magistrate's analysis and conclusions of law, this "fact" is of little or no consequence here, since it does not affect the issues on appeal.

{¶9} In addition, relator objects to the magistrate's failure to state that the October 12, 2005 order denying the initial request for PTD relied upon a report of Dr. Rosenberg, which had served as the basis for a prior TTD denial, and a report of Dr. Cunningham, which found claimant to be capable of medium work, and also failed to state that Dr. Pue's September 5, 2006 report was not some evidence upon which the commission could rely. Again, we fail to see how these purported omissions are relevant to the disputed issues involved in this action, given the magistrate's conclusions of law, as shall be more fully explained below.

{¶10} We believe the magistrate properly determined the relevant factual issues and noted the relevant facts in his findings of fact. Thus, we overrule relator's objections involving the magistrate's findings of fact.

{¶11} Next we address relator's objections to the magistrate's conclusions of law. In his first objection, relator asserts the magistrate erred in determining the commission's reliance on Dr. Pue's September 20, 2004 note and November 8, 2004 report did not violate the *Zamora* rule. Relator submits the *Zamora* rule bars use of this medical evidence because the evidence was rejected by the commission in 2005 and now cannot be relied upon in order to arrive at a different conclusion in 2009. Relator argues the magistrate should have focused his analysis on whether the commission rejected all of

Dr. Pue's reports, not Dr. Rosenberg's report, which was expressly relied upon to determine claimant's disability was not caused by the allowed conditions in the claim.

{¶12} Pursuant to the *Zamora* rule, the commission cannot rely upon a medical report which it previously rejected as unpersuasive. However, despite the *Zamora* rule, pursuant to the severability exception established in *Verbanek*, opinions expressed in medical reports may be severable. See also *State ex rel. Rutherford v. Indus. Comm*., 10th Dist. No. 05AP-986, 2007-Ohio-12, ¶21.

{¶13} Here, even though the SHO relied upon the report of Dr. Rosenberg to find claimant's allowed conditions were not the proximate cause of his claimed period of disability, and thus claimant was not TTD, the SHO's February 22, 2005 order did not implicitly reject Dr. Pue's September 20, 2004 note and November 8, 2004 report, and as a result, those medical reports need not be removed from further evidentiary consideration in subsequent proceedings, such as the PTD determination at issue here.

{¶14} We agree with the magistrate's conclusion that the SHO's adoption of Dr. Rosenberg's opinion finding the allowed conditions of the claim were not the proximate cause of the claimed period of disability did not necessarily include adoption of Dr. Rosenberg's opinion that claimant did not suffer at all from the allowed conditions. Even though the commission accepted Dr. Rosenberg's opinion that the allowed conditions were not the proximate cause of the claimed period of disability, and therefore it implicitly rejected Dr. Pue's C-84, pursuant to the *Zamora* rule and the application of the *Verbanek* severability exception, the commission was not prohibited from relying upon Dr. Pue's September 20, 2004 note and November 8, 2004 report to corroborate the claimant's hearing testimony regarding his motivation for departure from the workforce. This

evidence supports the conclusion that claimant's departure was not voluntary; rather, his motivation for departure was, in whole or in part, as a result of his injury-related breathing problems, even though the industrial injury was not the proximate cause of his disability. The magistrate correctly determined there is no requirement that a claimant demonstrate he is temporarily totally disabled by the allowed conditions of the claim at the time of an injury-induced job departure.

{¶15} In his second objection, relator argues the magistrate erred in concluding the commission's determination that claimant's departure from work was injury-induced was not barred by collateral estoppel. We find this objection to be without merit.

{¶16} The commission's determination that the allowed conditions of the claim were not the proximate cause of the claimed disability did not constitute a determination of ineligibility due to job departure, as the motivation of the departure was not put into issue at that time. In addition, the standards and burdens of proof differ between these two concepts. With TTD, it is the claimant's burden to demonstrate there is a proximate causal relationship between his work-related injuries and the disability, and to produce medical evidence to support it. *State ex rel. Dinner v. Indus. Comm.*, 10th Dist. No. 03AP-322, 2004-Ohio-1778, ¶27, citing *State ex rel. Quarto Mining Co. v. Foreman*, 79 Ohio St.3d 78, 1997-Ohio-71. Voluntary abandonment, on the other hand, is an affirmative defense. The burden of proof with respect to demonstrating voluntary abandonment falls upon the employer or the administrator. *State ex rel. Angell Mfg. Co. v. Long*, 10th Dist. No. 02AP-1389, 2003-Ohio-6469, ¶82. Consequently, because the issue of voluntary abandonment was not actually litigated, collateral estoppel did not

operate to bar litigation of the voluntary abandonment/job departure issue at the PTD hearing at issue. Therefore, we overrule relator's second objection.

{¶17} Finally, in his third objection, relator argues the magistrate erred in concluding the June 11, 2007 report of Dr. Pue was some evidence upon which the commission could rely to support its award of PTD. Relator contends that because the commission did not have some evidence upon which it could rely to find claimant was disabled due to the allowed conditions when he left the workplace in September 2004, the commission could not rely upon the June 11, 2007 report of Dr. Pue to find that claimant is now entitled to PTD.

{¶18} As set forth in our analysis above, collateral estoppel does not apply to bar Dr. Pue's opinion as to claimant's rationale for leaving his former job because those issues were not necessarily litigated. And pursuant to the *Zamora* rule and its severability exception as established in *Verbanek*, it was not improper for the commission to rely upon Dr. Pue's September 20, 2004 note and November 8, 2004 report, along with claimant's testimony, to determine claimant did not voluntarily abandon his position in September 2004.

{¶19} Furthermore, we find the magistrate properly concluded the March 21, 2007 pulmonary function tests served as new findings to support Dr. Pue's PTD opinion contained in his June 11, 2007 report and, as a result, the report is not a repeat of earlier reports that were implicitly rejected, and therefore the *Zamora* rule is not applicable. See *State ex rel. Omni Manor, Inc. v. Indus. Comm*., 10th Dist. No. 08AP-776, 2009-Ohio-4209, ¶32 (the commission may rely on a new report from a doctor whose previous

reports have been rejected where the new report relates to a separate and distinct event and where the latter report is not simply a repeat of the former report).

{¶20} Because the *Zamora* rule does not require elimination of Dr. Pue's June 11, 2007 report, the commission could properly rely upon that report as some evidence to support its award of PTD. Accordingly, we overrule relator's third objection.

{¶21} Following an independent review pursuant to Civ.R. 53, we find the magistrate has properly determined the pertinent facts and applied the appropriate law. Therefore, relator's objections to the magistrate's decision are overruled and 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 the requested writ of mandamus.

Objections overruled;
writ of mandamus denied.

KLATT and SADLER, JJ., concur.

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A P P E N D I X

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

Rendered on February 22, 2011

Critchfield, Critchfield & Johnston, Ltd., and *Susan E. Baker*, for relator.

Philip J. Fulton Law Office, and *Ross R. Fulton*, for respondent Arthur Grashel.

Michael DeWine, Attorney General, and *Rachel L. Lawless*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶22} In this original action, relator, Kelsey Hayes Company, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its September 1, 2009 order awarding permanent total disability ("PTD") compensation to respondent Arthur Grashel ("claimant") and to enter an order denying said compensation.

Findings of Fact:

{¶23} 1. Claimant has an industrial claim (No. 01-838216) that is allowed for "hypersensitivity pneumonitis; hypersensitivity induced reactive upper airway disease." The industrial claim arose out of and in the course of claimant's employment with relator, a self-insured employer under Ohio's workers' compensation laws. June 13, 2001 is the date the commission officially recognizes as the date of injury. At the time of injury, claimant was employed by relator as a machinist.

{¶24} 2. Claimant received temporary total disability ("TTD") compensation from November 2001 to May 2003 when he returned to work on the assembly side of the plant.

{¶25} 3. On October 7, 2003, treating physician Charles A. Pue, M.D., examined claimant and conducted testing. In a two-page narrative report of that date, Dr. Pue wrote:

> CHIEF COMPLAINT: Increasing fatigue, shortness of breath, and hoarseness.
>
> HISTORY: The patient has been working on the assembly side of the plant since his return to work. However, he notes that he is gradually starting to get increasing symptoms of fatigue, muscle aches, and tremors. He is having increasing episodes of hoarseness and shortness of breath. On one particularly [sic] day he states that all the employees were experiencing burning of their eyes, headaches, sore throat, hoarseness after he believes phenol was added to the coolant. He also states there were some other chemicals added that day, which he will try to obtain what they were.

He noted more tremors of his hands and feet and his energy is dropped off to the point that he is now sleeping whenever he is not at work again. This is what had happened in the past before he became quite ill and had to be removed from the work environment. He at this point, he is not ready to [be] removed from the work environment as he feels he would like to try to continue working if at all possible. * * *
Past medical history, family history, social history, and review of systems [sic] are reviewed and unchanged except as noted above. He still continues to smoke 1 to 3 cigarettes per day.

* * *

IMPRESSION:
[One] Mild underlying [chronic obstructive pulmonary disease].

[Two] Superimposed reactive airways disease, which began after his work related inhalational exposure.

[Three] Continue recurrent hoarseness, which is exacerbated by exposure to the metal working fluids likely indicating laryngeal edema and irritation.

[Four] No evidence for obvious recurrence of hyper-sensitivity, pneumonitis at this point but he is continuing to have progressive fatigue and malaise, which were the prodrome of the illness that ultimately occurred in 2000 and 2001 at the plant.

PLAN:
[One] The patient wants to continue [to] try to work at this time and I cautioned him that if his symptoms increase to contact me.

[Two] Repeat spirometry on next visit.

[Three] ENT and VLS evaluation to evaluate the severity of his vocal cord abnormality.

[Four] Once again I encouraged the patient to completely quite [sic] smoking as soon as possible.

[Five] Continue Combivent.

> [Six] Continue his Aciphex for his reflux, which is well controlled despite symptoms.

{¶26} 4. September 20, 2004 was claimant's last day at work at the plant operated by relator.

{¶27} 5. On September 20, 2004, Dr. Pue completed a C-84 certifying TTD from September 20, 2004 to an estimated return-to-work date of November 15, 2004.

{¶28} 6. Also on September 20, 2004, Dr. Pue authored a handwritten note stating: "Remove from work environment immediately for decreased PFT's and increased symptoms."

{¶29} 7. On October 13, 2004, claimant moved for TTD compensation. In support, claimant submitted the September 20, 2004 C-84 and note of Dr. Pue.

{¶30} 8. On November 8, 2004, claimant was again examined by Dr. Pue. In a two-page narrative report, Dr. Pue wrote:

> CHIEF COMPLAINT: Improving shortness of breath, cough and wheezing.
>
> HISTORY: The patient returns six weeks after removal from TRW plant. His symptoms had increased and his PFTs had decreased since he had returned to employment on the assembly side of the plant. He states that approximately two to three weeks after removal from [the] work * * * environment, his symptoms began to improve. His fatigue has improved, dyspnea has improved, cough improved, sputum production has decreased and overall his sense of well-being has improved. He still feels he is not back to his baseline, although, he is much better than he was six weeks ago. He continues to avoid cigarette smoke exposure. His use of Combivent has decreased significantly since the last evaluation. * * *
>
> * * *

> IMPRESSION:
> [One] Resolving re exacerbation of hypersensitivity-induced reactive airway disease.
>
> [Two] History of hypersensitivity pneumonitis.
>
> PLAN:
> [One] Continue avoidance of metalworking fluid exposure and remain off work from the TRW plant.
> [Two] Continue bronchodilator therapy.
>
> [Three] Follow up in three months with repeat spirometry at that time.
>
> [Four] The patient will need vocational retraining, as he will never be able to return to the work environment at TRW as this re-exacerbation occurred while on the "clean side" of the plant.

{¶31} 9. On November 17, 2004, at relator's request, claimant was examined by David M. Rosenberg, M.D. In his five-page narrative report dated November 24, 2004, Dr. Rosenberg wrote:

> * * * The issue to be addressed is whether or not Mr. Grashel has been temporarily and totally disabled from September 20, 2004 as a result of the allowed conditions of hypersensitivity pneumonitis and hypersensitivity-induced reactive airways disease. * * *
>
> It was noted that the BWC information outlined a motion requesting temporary total disability from September 20 through November 15, 2004. Dr. Pue had removed him from the workplace because of increasing symptoms. Wheezing had been noted with chest tightness and fatigue.
>
> Dr. Pue on September 20, 2004 noted that Mr. Grashel returned with progressive symptoms. He had been working since May, 2003 in the assembly area, and described various exposures to odors and fumes from the machining side. His symptoms included hoarseness, coughing, sputum production, and he was attempting to stay at work until his planned retirement in December, 2004. * * *

* * *

At the time of MY EVALUATION Mr. Grashel stated that he had been off of work in relationship to his initial injury starting in 2001. Subsequently, after rehabilitation, he went back to work in May, 2003, and continued with his employment until September 20, 2004. At that point, he had increasing respiratory symptoms with shortness of breath and marked fatigued [sic]. Consequently, he couldn't do his work and had to leave the workplace. He specifically stated that he couldn't do any overtime and the fatigue was "unbelievable". Currently, he was symptomatic with shortness of breath walking in from the parking lot, but better than he was several months ago when he left work. Also, his cough and sputum production are better, although it still persisted, and he also wheezed. * * *

* * *

His SOCIAL HISTORY was notable in that he continued to smoke. He stated that he started smoking regularly at age 30, about a half-pack to a pack of cigarettes/day, and smoked regularly until age 40. He quit for five years and resumed smoking around age 45. It was around the year 2000 (age 57) that he started using some Zyban. With that, he would smoke intermittently, and continued to do so at the present time, although he was trying to taper off, smoking a cigarette every five hours. He never smoked a pipe or cigars.

His WORK HISTORY was notable in that over the last several years he had been on the assembly side of the facility. He stated the doors to the machining side were close to where he was stationed, and therefore, he could smell the various chemicals coming from that side. On the assembly side, work stations were constantly rotated, so that at times he was closer to the openings, but he never worked on the machining side. He stated that the chemical odors caused a sore throat and his eyes would burn. Subsequently, he reached the point that his breathing was getting bad, and was convinced the fumes were getting into the ventilation system. * * *

* * *

In SUMMARY, Mr. Grashel is a 59 year old who has been allowed for hypersensitivity pneumonitis, as well as hypersensitivity-induced airways disease. He has a long and continued smoking history, as is confirmed by history and by his elevated carboxyhemoglobin level. In May of last year, he described increasing fatigue and respiratory symptoms, and because of worsening symptoms, was taken out of the workplace in September, 2004. He continues to have airway symptoms and is being treated for airways disease, as well as reflux. On examination he had decreased breath sounds without rales, rhonchi or wheezes. His pulmonary function tests revealed mild airflow obstruction, similar to what he displayed two years ago; there has been no significant change. His chest X-ray reveals some hyperaeration [sic] compatible with chronic obstructive pulmonary disease.

DISUCSSION: Based on a review of the above information, it can be appreciated that Mr. Grashel has mild airflow obstruction, which is unchanged compared to two years ago. This mild airways disease which is fixed at the present time, but at times is associated with a slight bronchodilator response, undoubtedly relates to his long and continued cigarette smoking. He has only a mild degree of impairment, and clearly is not disabled from performing his employment. From an impairment perspective, his mild obstruction clearly does not explain his reported exercise limitations and fatigue. Also, in reviewing the records, his pulmonary function tests have not deteriorated over time, even based on Dr. Pue's evaluations. Mr. Grashel described increasing cough, sputum production and respiratory symptoms, but there is no objective basis to indicate this has been related to either of the allowed conditions of hypersensitivity-induced reactive airways disease or hypersensitivity pneumonitis (HP). He clearly does not have HP based on the absence of interstitial changes on chest X-ray, a normal diffusing capacity and no evidence of restriction. Also, he does not have hypersensitivity-induced reactive airways disease. He simply has mild obstructive lung disease related to his long and continued (his carboxyhemoglobin is increased) smoking history, and his treatment since September is simply for this respiratory problem. The type of respiratory flaring Mr. Grashel has experienced over the last several years, is typical in the patients I see on a daily basis with smoking related chronic obstructive pulmonary disease. He

> clearly has reached maximum medical improvement for the previously allowed conditions.
>
> In CONCLUSION, it can be stated with a reasonable degree of medical certainty, that Mr. Grashel's exacerbation simply is consequent to smoking related chronic obstructive pulmonary disease. Currently, there is no basis for diagnosing Mr. Grashel as having HP or any reactive airways or asthma consequent to the workplace. He clearly is not totally disabled as a result of the allowed conditions. * * *

{¶32} 10. Following a January 12, 2005 hearing, a district hearing officer ("DHO") issued an order denying claimant's October 13, 2004 motion.

{¶33} 11. Claimant administratively appealed the DHO's order of January 12, 2005.

{¶34} 12. Following a February 22, 2005 hearing, a staff hearing officer ("SHO") issued an order affirming the DHO's order of January 12, 2005. The SHO's order explains:

> Temporary total disability compensation is specifically disallowed for the requested period of 9/20/2004 through 11/15/2004. The Staff Hearing Officer relies on the report of Dr. Rosenberg dated 11/24/2004 in denying this period of disability. Dr. Rosenberg opined that the injured worker's "exacerbation" is consequent to his smoking-related chronic obstructive pulmonary disease. He bases this opinion on the fact that the injured worker's chest x-ray revealed hyperaeration compatible with chronic obstructive pulmonary disease. He also indicated that the injured worker has mild obstructive lung disease related to his long and continued smoking history based on the injured worker's carboxyhemoglobin level being increased. Dr. Rosenberg opined that the injured worker is not totally disabled as a result of the allowed conditions in this claim. He further noted that although the injured worker is claiming an "exacerbation" of his allowed conditions, Dr. Rosenberg notes that the injured worker's pulmonary function test revealed mild air-flow obstruction similar to what he

> displayed two years ago, thereby opining that there has been no significant change.
>
> The Staff Hearing Officer has reviewed and considered all the evidence on file prior to rendering this decision.

{¶35} 13. On March 19, 2005, another SHO mailed an order refusing claimant's administrative appeal from the SHO's order of February 22, 2005.

{¶36} 14. Earlier, on January 10, 2005, Dr. Pue wrote:

> To summarize, Arthur Grashel made efforts to return to employment at the TRW Plant. He was maintained on the assembly side of the plant, which limited his exposure, but did not lower exposure to zero to the fumes of the metalworking fluid. He had a reoccurrence of his symptoms that had occurred in the spring of 2001 and for that reason he was removed from employment again in September 2004. His symptoms once again began to improve after two to three weeks after removal from the work environment and continued to improve at our last evaluation in November 2004. He, however, at that time was still not back to his baseline. It is my opinion that Mr. Grashel cannot return to employment at the TRW Plant. He still has significant impairment with an FEV1 of only 55% of predicted on our last evaluation. Hopefully in the future, he can return to employment, but would need to be in a non-metalworking environment.

{¶37} 15. On May 5, 2005, claimant filed his first application for PTD compensation. In support, claimant submitted the January 10, 2005 report of Dr. Pue.

{¶38} 16. Following an October 12, 2005 hearing, an SHO issued an order denying claimant's PTD application filed May 5, 2005. The SHO's order of October 12, 2005 specifically rejects Dr. Pue's January 10, 2005 report. The SHO's order concludes:

> * * * [B]ecause the injured worker retains the physical capacity to perform sedentary, light, and medium level work, with the only restriction being no exposure to metal working fluid, and because the injured worker is vocationally qualified by his age and education, with the ability to read, write,

perform basic math, and having supervisory skills, the Staff Hearing Officer finds that the injured worker is capable of sustained remunerative employment and is not permanently and totally disabled. * * *

{¶39} 17. Earlier, on September 6, 2005, Dr. Pue wrote:

This is a letter in response to your request dated August 19, 2005. As you know, Mr. Grashel has limitations in his ability to return to the work environment at the TRW Plant in Mount Vernon, Ohio. He continues to have wheezing, cough, shortness of breath, and chest tightness. These episodes have been exacerbated by exposure to heat, humidity, strong odors such as car exhaust and strong perfumes, and rapid changes in the weather. Respiratory infections that would otherwise be considered a minor viral illness have induced severe respiratory complaints with exacerbation of his underlying illness. For this reason, Mr. Grashel is unable to return to the work environment at the TRW Plant, specifically, because of his sensitivity to the strong fumes that are present within the plant. The odors there would trigger his exacerbations. Use of a respirator would reduce his exposure, but given his marked sensitivity, I feel he would have a high likelihood of relapse even with a respirator use. If he is able to return to other employment in the future, he will need to be in an environment that avoids the above noted noxious stimuli that have triggered his attacks in the past.

{¶40} 18. On June 11, 2007, Dr. Pue wrote:

Mr. Grashel previously had his initial lung injury in 2001 while working at the TRW plant at Mt. Vernon, Ohio. He improved and returned to the work environment. However in September 2004, despite working on the assembly side of the plant, he had reexacerbation of symptoms with exposure to low levels of the fumes of the metalworking fluid. His symptoms worsened and his pulmonary function tests declined. For this reason, I have maintained that he should continue to permanently avoid any exposure to the metalworking fluid at TRW. His most recent pulmonary function tests on March 21, 2007 demonstrated an FEV1 of 1.53 liters (49% of predicted) with a ratio of 56%. He uses Ventolin HFA inhaler p.r.n. for shortness of breath episodes. He also avoids exposure to strong fumes and odors that

> trigger his symptoms. For this reason, he has needed to tightly control his environment to avoid exacerbations.
>
> To summarize, Mr. Arthur Grashel is permanently and totally disabled as a result of his lung injury as an employee at the TRW Plant at Mt. Vernon, Ohio. We did have the patient return to work initially, but he developed reexacerbation and had to be removed from the facility again in 2004. He has been maintained away from the facility indefinitely since that time. With his continued abnormal pulmonary function tests, it is reasonable to conclude that he is now permanently and totally disabled and unable to return to employment.

{¶41} 19. On July 18, 2007, claimant filed his second application for PTD compensation. In support, claimant submitted the June 11, 2007 report of Dr. Pue.

{¶42} 20. On April 16, 2008, the second PTD application was heard by an SHO. The hearing was recorded and transcribed for the record.

{¶43} During direct examination of claimant, the following exchange occurred among claimant, claimant's counsel and the hearing officer:

> [Claimant's counsel] You retired in 2007 primarily because of your health problems; is that right?
>
> [Claimant] Yes, sir.
>
> HEARING OFFICER: 2007?
>
> [Claimant's counsel] 2007. That's the actual retirement date.
>
> [Claimant's counsel] But you had stopped working in 2004?
>
> [Claimant] Yes, sir.
>
> [Claimant's counsel] You stopped working in 2004, when you moved back to the assembly side of the plant and had a flare-up of your lung condition?
>
> [Claimant] Yes, I was restricted to the assembly side by the company and also by Dr. Pue, to try to stay away from the

> coolant, but it didn't help. In 16 months I was right back where I was at.
>
> * * *
>
> HEARING OFFICER: May I clarify something for my own edification? I have a letter from the injured worker dated December 3, 2007, saying I will be retiring January 1, 2008.
>
> [Claimant] Yes, I went in and filled out the papers.
>
> HEARING OFFICER: But you haven't actually worked since 2004?
>
> [Claimant] No, ma'am.

(Apr. 16, 2008 Tr. 9-11.)

> During final arguments, relator's counsel argued:
>
> [Relator's counsel] * * * [T]he claimant has voluntarily abandoned the work place in 2004. I think that's supported by your decision on the temporary total from March of 2005, that the claimant was unable to work due to the nonallowed condition arising from his history of smoking.
>
> * * *
>
> * * * As far as I know the claimant hasn't sought employment since that time in any other field. I also find he is barred from permanent total disability when he is not engaged in rehabilitation efforts. Since 2004 to my knowledge he hasn't engaged in those efforts.

(Apr. 16, 2008 Tr. 18, 21.)

{¶44} 21. Following the April 16, 2008 hearing, the SHO issued an order awarding PTD compensation starting June 11, 2007, the date of Dr. Pue's report. However, the SHO failed to address the issue of whether or not claimant voluntarily abandoned the workforce in 2004.

{¶45} 22. On June 5, 2008, the three-member commission mailed an order denying relator's request for reconsideration of the SHO's order of April 16, 2008.

{¶46} 23. In June 2008, relator filed in this court a mandamus action against the commission and claimant. On February 25, 2009, this court entered judgment that a limited writ of mandamus issue. *State ex rel. Kelsey Hayes Co. v. Grashel*, 10th Dist. No. 08AP-484, 2009-Ohio-818. This court's judgment entry states:

> * * * [I]t is the judgment and order of this court that a limited writ of mandamus issue against respondent Industrial Commission of Ohio ordering it to vacate its award of PTD compensation to Arthur Grashel and to enter a new order either granting or denying PTD compensation after considering the issue of whether or not Arthur Grashel voluntarily abandoned the workforce in 2004. * * *

{¶47} 24. On September 1, 2009, an SHO re-heard claimant's May 5, 2005 application for PTD compensation pursuant to this court's writ of mandamus. The September 1, 2009 hearing was recorded and transcribed for the record.

> During direct examination by his counsel, claimant testified:
>
> [Claimant's counsel] What happened to you in September of 2004?
>
> [Claimant] Well, I started having the breathing again and I was laboring to get from the parking lot to where I was working at and I had a scheduled appointment with Dr. Pue and I went and saw him and he had me try to do a breathing test or whatever and he said I wasn't going back in there and he took me out.
>
> [Claimant's counsel] So Dr. Pue took you out of work in September of 2004?
>
> [Claimant] Right.
>
> * * *

[Claimant's counsel] The last time you worked was 2004 at TRW?

[Claimant] Yes.

[Claimant's counsel] And Dr. Pue took you out at that point; is that correct?

[Claimant] Yes.

[Claimant's counsel] And you haven't been back to work any time since then?

[Claimant] Yes.

[Claimant's counsel] And you took an early retirement at age 62?

[Claimant] Yes.

[Claimant's counsel] And you took full retirement January 8?

[Claimant] At age 65.

(Sept. 1, 2009 Tr. 8-9, 12.)

During cross-examination by relator's counsel, claimant testified:

[Relator's counsel] In 2004, you took Social Security Retirement because you didn't have any income; right?

[Claimant] Or insurance.

[Relator's counsel] You didn't apply for Social Security Disability?

[Claimant] No.

[Relator's counsel] You didn't apply for disability retirement from TRW, did you?

[Claimant] Huh-uh.

[Relator's counsel] Is that a no?

> [Claimant] No.
>
> [Relator's counsel] You never attempted to find other work after September of 2004; correct?
>
> [Claimant] No.
>
> [Relator's counsel] Never applied for any other jobs?
>
> [Claimant] No.
>
> [Relator's counsel] You never tried to go through vocational rehabilitation training?
>
> [Claimant] No.

(Sept. 1, 2009 Tr. 18-19.)

{¶48} 25. Following the September 1, 2009 hearing, the SHO issued an order awarding PTD compensation. The order explains:

> It is the order of the Staff Hearing Officer that the Injured Worker has established he is entitled to permanent total disability benefits.
>
> The Hearing Officer finds the Injured Worker remains eligible for permanent total disability compensation as he did not voluntarily abandon the workforce. The Injured Worker separated from his employment with the instant Employer in September of 2004. The Injured Worker's last day of employment was 09/20/2004. However, said separation is not deemed voluntary as the medical evidence and the testimony of the Injured Worker support a finding that the Injured Worker left work due to the allowed conditions in this claim.
>
> This finding is based on the Injured Worker's testimony as well as the medical evidence from Dr. Pue.
>
> The Injured Worker testified he took early retirement benefits at age 62.

The medical evidence from Dr. Pue is consistent with the Injured Worker's testimony regarding the circumstances of his separation. Dr. Pue's 09/20/2004 note indicates "remove from work environment immediately for decreased PFTS and increased symptoms." Moreover, Dr. Pue's 11/08/2004 treatment record recommends continued avoidance of metal-working fluid exposure and remaining off work from the TRW plant. Dr. Pue references the re-exacerbation of symptoms that occurred while on the "clean side" of the plant.

Thus, the Hearing Officer concludes the Injured Worker did not abandon his employment and remains eligible for the permanent total disability compensation awarded herein. This finding is consistent with the Court's decision set forth in State ex rel. Baker Material Handling Corp. v. Indus. Comm. (1994) 69 Ohio St. 3d 202. The court held that an employee who retires prior to becoming permanently and totally disabled is precluded from eligibility for permanent total disability only if the retirement is voluntary and constitutes an abandonment of the entire job market. The Injured Worker testified he left work in 2004 due to breathing problems. The medical evidence from Dr. Pue and the Injured Worker's testimony support a finding that the Injured Worker's retirement was not voluntary but was induced by his industrial injury.

The Permanent Total Disability award is based on Dr. Pue's 06/11/2007 report. Dr. Pue noted that the Injured Worker sustained the initial injury in 2001 and returned to work. In September of 2004 Dr. Pue noted the Injured Worker experienced a re-exacerbation of his symptoms with fume exposure. Dr. Pue noted the Injured Worker's symptoms worsened and pulmonary function testing declined. Dr. Pue opines the Injured Worker is permanently totally disabled as a result of the industrial injury. The Injured Worker testified he uses an inhaler and nebulizer on a daily basis. He testified he uses and [sic] inhaler from two to four times per day.

Dr. Freeman examined the Injured Worker on 11/27/2007. He assigned a 26% whole person impairment and opined the Injured Worker can perform sedentary work with restrictions. Dr. Freeman completed a physical strength rating report and found the Injured Worker could perform

sedentary work. Dr. Freeman further limited the Injured Worker's exposure to aerosolized metal-working fluids and environments containing pulmonary irritants such as fumes, dust, and temperature extremes.

After reviewing the Injured Worker's non-medical disability factors, the Hearing Officer concludes the Injured Worker is unable to engage in work consistent with the restrictions of Dr. Freeman.

This finding is based on the 01/22/2008 vocational report of Dr. Lowe. The Injured Worker is 66 years of age. Although the Injured Worker is not a younger individual, age alone is never a total bar to employment.

The Injured Worker is a high school graduate with a four year apprenticeship in offset printing. The Injured Worker's past work history consists of work as an offset printer, plant manager, and assembler.

Dr. Lowe noted and reviewed Dr. Freeman's report. The Injured Worker reported that his symptoms are made worse by cold air, grass, diesel fumes, chemicals, perfumes, and cigarettes. Dr. Lowe reviewed the Injured Worker's age, education and work experience as well as the report of Dr. Freeman and concluded the Injured Worker lacks the capacity to perform sedentary employment. Dr. Lowe concludes the Injured Worker is unable to perform the sedentary work with restrictions as recommended by Dr. Freeman.

Accordingly, based on Dr. Lowe's opinion, the Hearing Officer concludes the Injured Worker is unable to perform sedentary work with restrictions.

Therefore, an award of permanent total disability benefits is appropriate.

* * *

Said award is ordered to commence effective 06/11/2007, the date of Dr. Pue's report. The opinion of Dr. Pue is found persuasive.

{¶49} 26. On March 27, 2010, the three-member commission, voting two-to-one, mailed an order denying relator's request for reconsideration.

{¶50} 27. On April 22, 2010, relator, Kelsey Hayes Company, filed this mandamus action.

Conclusions of Law:

{¶51} Three issues are presented: (1) whether the commission's reliance upon Dr. Pue's September 20, 2004 note and his November 8, 2004 report violates the rule set forth in *State ex rel. Zamora v. Indus. Comm*. (1989), 45 Ohio St.3d 17 (the *Zamora* rule); (2) whether collateral estoppel barred the commission from determining that claimant's job departure in September 2004 was injury-induced; and (3) whether the June 11, 2007 report of Dr. Pue is some evidence upon which the commission can rely to support its PTD award.

{¶52} The magistrate finds: (1) the commission's reliance upon Dr. Pue's September 20, 2004 note and his November 8, 2004 report does not violate the *Zamora* rule; (2) collateral estoppel did not bar the commission from determining that claimant's job departure in September 2004 was injury-induced; and (3) the June 11, 2007 report of Dr. Pue is some evidence upon which the commission can rely to support the PTD award.

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

PTD Eligibility: The Doctrine of Voluntary Workforce Abandonment

{¶54} Ohio Adm.Code 4121-3-34(D) sets forth the commission's guidelines for the adjudication of PTD applications. Ohio Adm.Code 4121-3-34(D)(1)(d) states:

> If, after hearing, the adjudicator finds that the injured worker voluntarily removed himself from the work force, the injured worker shall be found not to be permanently and totally disabled. If evidence of voluntary removal or retirement is brought into issue, the adjudicator shall consider evidence that is submitted of the injured worker's medical condition at or near the time of removal/retirement.

{¶55} Paragraph two of the syllabus of *State ex rel. Baker Material Handling Corp. v. Indus. Comm*. (1994), 69 Ohio St.3d 202, states:

> An employee who retires prior to becoming permanently and totally disabled is precluded from eligibility for permanent total disability compensation only if the retirement is voluntary and constitutes an abandonment of the entire job market. * * *

{¶56} In *State ex rel. Garrison v. Indus. Comm*., 10th Dist. No. 08AP-419, 2009-Ohio-2898, ¶54, this court, speaking through its magistrate, states:

> The case law indicates that a two-step analysis is involved in the determination of whether a claimant has voluntarily removed himself from the workforce prior to becoming PTD such that a PTD award is precluded. The first step requires the commission to determine whether the retirement or job departure was voluntary or involuntary. If the commission determines that the job departure was involuntary, the inquiry ends. If, however, the job departure is determined to be voluntary, the commission must consider additional evidence to determine whether the job departure is an abandonment of the workforce in addition to an abandonment of the job. *State ex rel. Ohio Dept. of Transp. v. Indus. Comm*., Franklin App. No. 08AP-303, 2009-Ohio-700.

{¶57} In *State ex rel. Rockwell Internatl. v. Indus. Comm*. (1988), 40 Ohio St.3d 44, 46, the court expanded eligibility for TTD compensation by expanding the definition of a voluntary abandonment of employment:

> Neither [*State ex rel. Ashcraft v. Indus. Comm*. (1987), 34 Ohio St.3d 42] nor [*State ex rel. Jones & Laughlin Steel Corp. v. Indus. Comm*. (1985), 29 Ohio App.3d 145] states

> that *any* abandonment of employment precludes payment of temporary total disability compensation; they provide that only voluntary abandonment precludes it. While a distinction between voluntary and involuntary abandonment was contemplated, the terms until today have remained undefined. We find that a proper analysis must look beyond the mere volitional nature of a claimant's departure. The analysis must also consider the reason underlying the claimant's decision to retire. We hold that where a claimant's retirement is causally related to his injury, the retirement is not "voluntary" so as to preclude eligibility for temporary total disability compensation.

(Emphasis sic.)

{¶58} In *State ex rel. Mid-Ohio Wood Prods., Inc. v. Indus. Comm.*, 10th Dist. No. 07AP-478, 2008-Ohio-2453, this court held that an injury-induced job abandonment under *Rockwell* can be supported by the claimant's hearing testimony:

> We have carefully reviewed the cases that the magistrate cites in his decision, and we find nothing in them that holds that there must be objective medical evidence corroborating a claimant's testimony regarding his motivation for abandonment of his employment. On the contrary, as noted hereinabove, the commission must make a factual determination, based upon all of the surrounding circumstances, whether the motivation for the claimant's departure was, in whole or in part, the allowed conditions for which the claimant has already discharged his burden of proof. Here, the commission did so, and did not abuse its discretion in crediting the claimant's testimony, particularly in light of the office notes from Drs. Bennington, Ellis, and Dyer, which indicate that the claimant reported suffering severe, constant back pain since the date of injury. * * *

Id. at ¶18.

The *Zamora* Rule and the Commission's PTD Award

{¶59} *Zamora* prohibits the commission from relying on a medical report that the commission had earlier found unpersuasive. *State ex rel. Jeep Corp. v. Indus. Comm*. (1992), 64 Ohio St.3d 378, 381.

{¶60} The *Jeep* court summarized *Zamora*, stating:

> * * * In *Zamora*, the claimant simultaneously applied to have an additional psychiatric allowance and to have himself declared permanently totally disabled. The claimant was examined by various specialists, including Dr. Dennis W. Kogut, who stated that the claimant's depression preceded his industrial injury and that the contribution of the industrial injury to the depression was minimal.
>
> The commission allowed the psychiatric condition and, in so doing, implicitly rejected Kogut's report. However, ten months later, the commission denied the application for permanent total disability based partially on Dr. Kogut's same narrative. The claimant challenged the commission's subsequent reliance on that report, arguing that once rejected, the report was removed from evidentiary consideration. We agreed.

{¶61} Despite the rule in *Zamora*, *State ex rel. Verbanek v. Indus. Comm*., 73 Ohio St.3d 562, 1995-Ohio-330, has been viewed as permitting severability in the analysis of whether *Zamora* prohibits reliance on a report. *State ex rel. Rutherford v. Indus. Comm*., 10th Dist. No. 05AP-986, 2007-Ohio-12, ¶21.

{¶62} Relator's invocation of *Zamora* is focused initially on the February 22, 2005 SHO's order that denies claimant's October 13, 2004 motion for TTD compensation. While the SHO's order states exclusive reliance on Dr. Rosenberg's November 24, 2004 report, relator argues that the SHO implicitly rejected reports from Dr. Pue that were submitted in support of the motion. That is, relator argues the SHO implicitly rejected Dr. Pue's September 20, 2004 note and his November 8, 2004 report and that those medical

records must be removed from further evidentiary consideration in any subsequent commission proceedings.

{¶63} Relator then points out that, following the September 1, 2009 hearing on the PTD application, Dr. Pue's September 20, 2004 note and his November 8, 2004 report were specifically relied upon by the SHO in determining that claimant did not voluntarily abandon his employment in 2004. Relator concludes that the SHO's reliance upon Dr. Pue's records of September 20 and November 8, 2004 constitutes an abuse of discretion in the award of PTD.

{¶64} Under the *Verbanek* severability rule, analysis must begin with a determination here of what the SHO's order of February 22, 2005 actually rejected when it relied exclusively upon Dr. Rosenberg's report to deny the motion for TTD compensation.

{¶65} Directly at issue before the SHO at the February 22, 2005 hearing was whether the allowed conditions of the claim were the proximate cause of the claimed period of disability. In addressing that issue, the SHO relied upon Dr. Rosenberg's opinion that claimant was not disabled as a result of the allowed conditions.

{¶66} While Dr. Rosenberg's November 24, 2004 report offers opinions that claimant "clearly does not have HP" and "does not have hypersensitivity-induced reactive airways disease," acceptance of those opinions was not a prerequisite to acceptance of Dr. Rosenberg's ultimate conclusion that claimant "is not totally disabled as a result of the allowed conditions." That is, the some evidence needed to support the SHO's determination that claimant was not disabled by the allowed conditions need not include Dr. Rosenberg's opinion that claimant no longer suffers from the allowed conditions of the

claim. Dr. Rosenberg was of the opinion that claimant's "exacerbation" was a consequence of his chronic obstructive pulmonary disease, which is not an allowed condition.

{¶67} In short, while is must be concluded that Dr. Pue's C-84 was implicitly rejected, the adjudication of claimant's motion for TTD did not necessarily include adoption of Dr. Rosenberg's opinions that claimant does not suffer at all from the allowed conditions of the claim.

{¶68} Based upon the above analysis, the magistrate concludes that the SHO who awarded PTD compensation was free to use Dr. Pue's September 20, 2004 note and his November 8, 2004 report to corroborate claimant's hearing testimony that, as the SHO put it, "he left work in 2004 due to breathing problems." That is, the SHO who awarded PTD compensation was not bound by Dr. Rosenberg's opinions in his November 24, 2004 report that claimant does not suffer from the allowed conditions at all.

{¶69} Unmistakably, the allowed conditions of the claim are medically capable of producing breathing problems. As Dr. Pue put it in his November 8, 2004 report, and as noted by the SHO in the order, claimant was instructed to "[c]ontinue avoidance of metalworking fluid exposure and remain off work from the TRW plant."

{¶70} While neither the commission nor claimant have medical expertise, *State ex rel. Yellow Freight Sys., Inc. v. Indus. Comm.* (1998), 81 Ohio St.3d 56, 58, claimant can, nevertheless, testify credibly that he suffered breathing problems that motivated his job departure in September 2004. Dr. Pue's reports provide the corroboration that the breathing problems were related to the industrial injury even though the industrial injury was not the proximate cause of claimant's disability. There is indeed no requirement that

a claimant prove that he is temporarily totally disabled by the allowed conditions of the claim at the time of an injury-induced job departure.

{¶71} Thus, the magistrate concludes that the commission's order awarding PTD compensation does not violate the *Zamora* rule in determining that claimant's job departure was injury-induced.

Collateral Estoppel and the Commission's PTD Award

{¶72} A derivative of res judicata, collateral estoppel bars 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. Kincaid v. Allen Refractories Co*., 114 Ohio St.3d 129, 2007-Ohio-3758, ¶18. It requires an identity of parties and issues in the proceedings and applies equally to administrative hearings. Id.

{¶73} Relator claims here that the issue of whether claimant voluntarily abandoned his job in September 2004 was determined in the SHO's order of February 22, 2005 that denied TTD compensation, and thus that issue could not be relitigated at the September 1, 2009 hearing on claimant's PTD application. Relator is incorrect.

{¶74} As indicated earlier, the sole issue before the SHO at the February 22, 2005 hearing was whether claimant was medically unable to return to his job due to the allowed conditions of the claim. The commission determined that the allowed conditions of the claim were not the proximate cause of the claimed disability. That determination was not a determination of ineligibility due to the job departure. The motivation for claimant's job departure was not put in issue by the employer (relator herein) in the proceedings that determined claimant's motion for TTD compensation. Accordingly, it is clear that

collateral estoppel is inapplicable and could not bar the litigation of the job departure issue at the hearing on the PTD application.

Dr. Pue's June 11, 2007 Report

{¶75} Besides relator's challenge to claimant's eligibility for PTD compensation under the voluntary abandonment doctrine, relator also challenges the merit determination of the PTD award.

{¶76} Ohio Adm.Code 4121-3-34 sets forth the commission's rules for the adjudication of PTD applications. Ohio Adm.Code 4121-3-34(D) sets forth the commission's guidelines for adjudication of PTD applications.

{¶77} Thereunder, the rules provide:

> (2)
>
> (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[.] * * *
>
> (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.

{¶78} "It is not improper [for the commission] to state alternative grounds for supporting the [PTD] order, but those grounds should not be merged together and should be explained separately so that a reviewing court can understand what has been done." *State ex rel. Speelman v. Indus. Comm.* (1992), 73 Ohio App.3d 757, 761.

{¶79} In the SHO's order of September 1, 2009 awarding PTD compensation, the SHO stated alternative grounds for supporting the PTD award. Those two grounds correspond to the two guidelines set forth at Ohio Adm.Code 4121-3-34(D)(2)(a) and (b) as quoted above.

{¶80} For the first ground, the SHO exclusively relied upon the June 11, 2007 report of Dr. Pue who opined that claimant " is permanently and totally disabled as a result of his lung injury" and "is now permanently and totally disabled and unable to return to employment." Given reliance upon Dr. Pue's report, there is no need for the commission to consider the nonmedical factors. Ohio Adm.Code 4121-3-34(D)(2)(a).

{¶81} For the second ground, the SHO relied upon the November 27, 2007 report from Dr. Freeman who opined that the industrial injury restricts claimant to sedentary work. Further limitations were noted. Given the reliance upon Dr. Freeman's report to establish claimant's residual functional capacity at the sedentary level, under the rules, the SHO was required to consider the nonmedical factors. Ohio Adm.Code 4121-3-34(D)(2)(b). In considering the nonmedical factors, the SHO relied upon the January 22, 2008 vocational report from Dr. Lowe who opined that the vocational factors do not permit sedentary work.

{¶82} Challenging the first of the alternative grounds set forth in the SHO's order awarding PTD compensation, relator contends that Dr. Pue's June 11, 2007 report cannot be some evidence to support the PTD award.

{¶83} Citing *State ex rel. Crocker v. Indus. Comm.*, 111 Ohio St.3d 202, 2006-Ohio-5483 ("*Crocker II*"), relator contends that the commission's reliance upon Dr. Pue's June 11, 2007 report violates the *Zamora* rule. The magistrate disagrees.

{¶84} In *Crocker II*, the Supreme Court of Ohio affirmed this court's decision in *State ex rel. Crocker v. Indus. Comm.*, 10th Dist. No. 04AP-820, 2005-Ohio-4390 ("*Crocker I*"), wherein it was held that *Zamora* prohibited the commission's reliance upon a June 10, 2003 report from treating neurologist Allan G. Clague, M.D., in denying the claimant's motion for an R.C. 4123.57(B) scheduled-loss award.

{¶85} Previously, the commission had implicitly rejected two reports from Dr. Clague dated February 17 and February 28, 2003, when it terminated TTD compensation on grounds that the industrial injury had reached maximum medical improvement ("MMI").

{¶86} As indicated by this court in *Crocker I*, following a February 17, 2003 examination, Dr. Clague opined that the claimant, Paul D. Crocker, had not reached MMI. Earlier, on January 15, 2003, at the employer's request, Crocker was examined by Gregory A. Ornella, M.D., who opined that Crocker had reached MMI. On February 28, 2003, after reviewing Dr. Ornella's report, Dr. Clague reiterated his opinion that Crocker's allowed conditions would improve and that therefore Crocker was not at MMI. *Crocker I* at ¶17.

{¶87} Thereafter, following an April 25, 2003 hearing, an SHO terminated TTD compensation on MMI grounds based upon Dr. Ornella's report, thus implicitly rejecting the reports from Dr. Clague dated February 17 and February 28, 2003.

{¶88} On June 10, 2003, Dr. Clague authored another report in which he again noted that he expected improvement in Crocker's injuries. *Crocker I* at ¶25. Following a November 5, 2003 hearing, a commission deputy denied Crocker's motion for a scheduled-loss award based upon Dr. Clague's June 10, 2003 report.

{¶89} Crocker filed a mandamus action in this court challenging the commission's denial of his motion for scheduled-loss compensation. This court agreed with Crocker that *Zamora* prohibited the commission's reliance upon Dr. Clague's June 10, 2003 report, and thus issued a writ of mandamus. The employer (Sauder Woodworking) and the commission appealed as of right to the Supreme Court of Ohio.

{¶90} In affirming this court's judgment, the court, in *Crocker II*, explains:

> Sauder Woodworking and the commission argue that *Zamora* can block revival of only the February 17, 2003 and February 28, 2003 reports. They argue that it cannot be used to disqualify a June 10, 2003, report that did not exist when the commission issued its April 25, 2003 maximum-medical-improvement order. In some situations, appellants would be correct, but not here.
>
> Appellants' exclusive focus on dates erodes their argument. *Zamora* would be meaningless if it were concerned only with chronology and not content. If only chronology mattered, a doctor could simply copy an old report, put a new date on it, and submit it as new evidence. *Zamora* instead seeks to prohibit exactly what happened here. In all three reports, Dr. Clague consistently issued the same opinion on the subject of further improvement: Crocker would get better with additional treatment. When Clague made that statement in February, it was deemed unpersuasive, and temporary total disability compensation was accordingly denied. When Dr. Clague made the statement in June, the commission suddenly deemed it persuasive and used it to deny Crocker's loss-of-use application. This result is unfair and inappropriate. Dr. Clague's opinion on future improvement is either persuasive or it is not. The commission cannot have it both ways, particularly to Crocker's dual detriment.
>
> Contrary to appellants' representation, this result does not mean that once a doctor's opinion has been rejected, the commission can never rely on any future report from that doctor again. What the commission cannot do is accept the same doctor's opinion on one matter that it previously rejected. In this case, the uniformity of issues rendered the

> commission's reliance on Dr. Clague's June 10, 2003 report an abuse of discretion.

Id. at ¶14-16.

{¶91} In *State ex rel. Omni Manor, Inc. v. Indus. Comm*., 10th Dist. No. 08AP-776, 2009-Ohio-4209, this court had occasion to examine the *Crocker* cases.

{¶92} In *Omni Manor*, Dr. Vargo conducted two very thorough examinations some three years apart and issued a report following each examination. In *Omni Manor*, this court, speaking through its magistrate, stated:

> * * * The reports relate to separate and distinct events, i.e., the two examinations. That some similarities between the reports may exist does not show, as relator seems to suggest, that the latter report is simply a repeat of the former.
>
> The commission rejected Dr. Vargo's report of his October 6, 2004 examination. The commission later accepted Dr. Vargo's report of his August 17, 2007 examination. The commission did not thereby revive the October 6, 2004 report that it had previously rejected. Relator's reliance upon *Crocker II* is misplaced.
>
> Based upon the above analysis, the magistrate concludes that Dr. Vargo's August 17, 2007 report constitutes some evidence upon which the commission can and did rely in awarding PTD compensation. The *Zamora* rule does not require evidentiary elimination of the August 17, 2007 report.

Id. at ¶32-34.

{¶93} Here, in his June 11, 2007 report, Dr. Pue points to the "most recent pulmonary function tests on March 21, 2007." Obviously, the March 21, 2007 pulmonary function tests post-date Dr. Pue's September 20, 2004 note and his November 8, 2004 report that were implicitly rejected by the commission when denying TTD compensation. Clearly, the March 21, 2007 pulmonary function tests serve as new findings that support

the PTD opinion contained in the June 11, 2007 report. Therefore, the June 11, 2007 report is not simply a repeat of Dr. Pue's earlier reports that were implicitly rejected. Under such circumstances, the *Zamora* rule was not violated when the commission relied upon Dr. Pue's June 11, 2007 report to support its PTD award.

{¶94} Here, relator also challenges the commission's second of the alternative grounds for awarding PTD compensation. However, this court need not address this challenge because Dr. Pue's June 11, 2007 report is indeed some evidence supporting the first ground for supporting the PTD award.

{¶95} Accordingly, for all the above reasons, it is the magistrate's decision that this court deny relator's request for a writ of mandamus.

/s/ Kenneth W. Macke
KENNETH W. MACKE
MAGISTRATE

NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).