[Cite as *State ex rel. Honda of Am. Mfg., Inc., v. Indus. Comm.*, 2011-Ohio-6292.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Honda of America Mfg., Inc.,	:	
Relator,	:	
v.	:	No. 10AP-1032
Industrial Commission of Ohio and Kerry E. DuPuis,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on December 8, 2011

Vorys, Sater, Seymour and Pease, LLP, Carl D. Smallwood, and *Bethany R. Spain*, for relator.

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

Cannizzaro, Bridges, Jillisky & Streng, LLC, and *Robert L. Bridges*, for respondent Kerry E. DuPuis.

IN MANDAMUS
ON OBJECTIONS TO MAGISTRATE'S DECISION

KLATT, J.

{¶1} Relator, Honda of America Manufacturing, Inc. ("relator" or "Honda"), commenced this original action in mandamus seeking an order compelling respondent Industrial Commission of Ohio ("commission") to vacate its order granting permanent total

disability ("PTD") compensation to respondent Kerry E. DuPuis ("claimant") and apportioning 30 percent of that award to relator. Relator requests that we vacate the entire PTD award or, at least, determine that none of the award be assigned to relator.

{¶2} Pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth District Court of Appeals, we referred this matter to a magistrate who issued a decision, including findings of fact and conclusions of law, which is appended hereto. The magistrate found that: (1) the commission's consideration of untimely medical evidence does not warrant the granting of a writ of mandamus; (2) the commission did not abuse its discretion by allocating a portion of the PTD award to Honda; (3) the commission did not abuse its discretion by determining that claimant lacked rehabilitation potential; and (4) the commission did not abuse its discretion by awarding claimant PTD compensation in light of Honda's contention that he did not exhaust all rehabilitation efforts. Based upon these findings, the magistrate has recommended that we deny relator's request for a writ of mandamus.

{¶3} Relator has filed objections to the magistrate's decision. Relator argues that: (1) the magistrate incorrectly found that the commission did not abuse its discretion in concluding that the claimant lacked rehabilitation potential; and (2) the magistrate's conclusion that the claimant is entitled to PTD compensation despite insufficient rehabilitation efforts is not supported by the facts in the record.[1] For the following reasons, we find that relator's objections lack merit.

[1] Although a minor point, relator also objects in a footnote to the magistrate's factual findings that Honda submitted the reports of Dr. Renneker and Dr. May. Honda contends that those reports were submitted by claimant, not by Honda. The commission does not dispute this contention.

{¶4} In its first objection, relator argues that the magistrate erred when she failed to find that the commission abused its discretion in concluding that claimant lacked rehabilitation potential. Relator asserts that, because the vocational evidence does not support the commission's decision, the commission abused its discretion. We disagree.

{¶5} As the commission points out, the commission, as the exclusive evaluator of disability, is not bound to accept vocational evidence, even if uncontradicted. *State ex rel. Jackson v. Indus. Comm.*, 79 Ohio St.3d 266, 270-71, 1997-Ohio-152. Therefore, the commission is entitled to review the injured worker's nonmedical factors, and make its own determination. Here, the commission did not abuse its discretion in finding that the claimant lacked realistic rehabilitation potential because of his significant physical and psychological restrictions. The commission also adequately explained the basis for reaching this conclusion. Therefore, we overrule relator's first objection.

{¶6} In its second objection, relator argues that the magistrate erred in concluding that claimant made sufficient attempts at rehabilitation to justify PTD compensation. Again, we disagree.

{¶7} Rehabilitative efforts are just one of a number of factors the commission can consider in awarding PTD compensation. Here, it is undisputed that claimant engaged in some vocational rehabilitation. The commission found that claimant made sufficient efforts at rehabilitation and the magistrate determined that the commission did not abuse its discretion in so finding. Again, given claimant's significant physical and psychological limitations, the commission did not abuse its discretion in awarding PTD compensation. For these reasons, we overrule relator's second objection.

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

Objections overruled; writ of mandamus denied.

SADLER and DORRIAN, JJ., concur.

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A P P E N D I X

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Honda of America Mfg., Inc.,	:	
Relator,	:	
v.	:	No. 10AP-1032
Industrial Commission of Ohio and Kerry E. DuPuis,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on June 6, 2011

Vorys, Sater, Seymour and Pease, LLP, Carl D. Smallwood, and *Bethany R. Spain*, for relator.

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

Cannizzaro, Bridges, Jillisky & Streng, LLC, and *Robert L. Bridges*, for respondent Kerry E. DuPuis.

IN MANDAMUS

{¶9} Relator, Honda of America Mfg, Inc. ("Honda"), has filed this original action requesting that this court issue a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order which granted an award of

permanent total disability ("PTD") compensation to respondent Kerry E. DuPuis ("claimant") and apportioning 30 percent of that award to Honda, and ordering the commission to either vacate the entire award of PTD compensation or, at least, determine none of the award be assigned to Honda.

Findings of Fact:

{¶10} 1. Claimant has sustained four work-related injuries. Three of those injuries occurred while he was employed at Honda and the final injury occurred in March 2005, when claimant was working for CTL Engineering ("CTL") as an inspector/field technician.

{¶11} 2. Claimant's claim number and allowance for injuries which occurred while he was employed with Honda include:

> [C]laim L49922-22 has been allowed for: bilateral chondromalacia of patella.
>
> [C]laim L276198-22 has been allowed for: traumatic amputation mid metacarpal of left hand excluding the small finger; strain of right trapezius muscle.
>
> [C]laim 98-450646 has been allowed for: tear of right rotator cuff.

The 2005 injury which occurred when he was employed with CTL is claim number 05-827407 and has been allowed for the following conditions:

> Fracture distal radius-closed; open wound left forehead-complete; contusion of right knee; contusion of left elbow; closed fracture lumbar vertebrae; cellulitis and buttock; tear right medial collateral ligament; tear lateral meniscus right knee; degenerative joint disease right knee; recurrent depressive psychosis-moderate right.

{¶12} 3. Claimant filed his application for PTD compensation on May 5, 2009. According to his application, claimant was 44 years of age when he filed the application,

was currently receiving Social Security disability payments, and indicated that he had not worked since the March 2005 injury. Claimant further indicated that he had completed high school in 1972, and that he could read, write, and perform basic math. Claimant indicated that he had attempted rehabilitation and stated, as follows, on his application: "[r]ehab has been attempted on numerous occasions. Neither my physician of record or my psychologist has recommended further rehabilitation attempts." With regards to his limitations, claimant explained "I am extremely limited in my physical capabilities based upon my multiple workers' compensation claims. My depression prevents me from interacting in any employment or social settings and severely limits my ability to concentrate." Claimant indicated further that his treating physicians, Drs. May and Lowe, had indicated that it was time for him to cut back or limit his activities.

{¶13} 4. Claimant submitted two reports from his treating psychologist, Beal D. Lowe, Ph.D. In his July 11, 2008 letter, Dr. Lowe stated:

> I am writing to report my professional opinion that Mr. Dupuis is permanently and totally disabled as a result of the combined effects of his physical injuries, and related pain, and his allowed psychological condition of Major Depression.
>
> Perhaps, in the absence of the limitations which arise as a result of his major depression, Mr. Dupuis might be able to overcome his physical limitations and pain and resume some type of employment. I do not know his full physical capacities but I do know that he is, by nature, a self-reliant and independent man.
>
> However, as a result of his severe depressive symptoms, which have persisted despite treatment, I do not believe Mr. Dupuis has the cognitive or interpersonal capacity, or the stamina and persistence, to sustain work. Based on my observation and contact with him over approximately 2 years, I find him to have Moderate impairments in activities of daily living, Mild impairments in social functioning,

> Moderate impairments in concentration, persistence and pace and Moderate impairments in his capacity to adapt to work situations. Mr. Dupuis spends the greatest part of his time isolated and inactive at home. He is sometimes able to engage in helping an elderly neighbor and has been able to travel to be with family and for other purposes. He sometimes plays cards with friends. However, his daily functioning is very limited and he does not have stamina to persist throughout an 8 hour day. In addition, Mr. Dupuis presents as a man with significant problems with irritability and temper and, as a result, is found to lack capacity to adapt to a stressful work situation of any type.

{¶14} 5. In his April 14, 2009 letter, Dr. Lowe referred to a functional capacity evaluation and a previous vocational assessment which had not been made available to him previously. Dr. Lowe was asked to reconsider his opinion that claimant was permanently and totally disabled after reviewing these documents. Dr. Lowe indicated that his opinion had not changed and stated:

> A recent summary of Mr. Dupuis's physical capacities (VocWorks; 12/15/08) found him to have residual physical capacity to perform Sedentary/Light work. I note that this report found that Mr. Dupuis's only strengths for returning to work included his capacity to lift and carry in the Sedentary to Light strength and his ability to demonstrate average grip strength and dexterity scores for the right hand. These are certainly minimal capacities for employment. In addition, the VocWorks evaluation found barriers for returning to work to include Mr. Dupuis' reports of pain in the low back, knees and shoulders and his inability to demonstrate lifting capacity at a frequent rate. I find these to be significant additional limitations to his employability insofar as this pain, in combination with his allowed depressive condition, would reduce his functional cognitive and interpersonal effectiveness in any job.
>
> Ron Durgin, Ph.D. (1/22/08) performed a Vocational Assessment of Mr. Dupuis. Based on medical evidence available to him, he found Mr. Dupuis to have physical capacity for a variety of semi-skilled Sedentary work which would allow him to alternate between sitting and standing.

> Dr. Durgin found Mr. Dupuis to have no significant access to jobs in the labor market and, as a result, to be unemployable. I agree with this assessment.

{¶15} 6. At the time he filed his application, claimant submitted no other medical evidence; however, Honda did submit the May 7, 2009 report of Nancy Renneker, M.D. who opined that claimant was unable to perform sedentary work and was permanently and totally disabled from performing sustained or remunerative employment due to his residual physical impairments and noted the following restrictions:

> Kerry Dupuis has the following permanent work restrictions: (1) no kneeling, squatting, climbing of ladders or stairs (2) I am in agreement with Mr. Dupuis' permanent work restrictions from his right shoulder surgeon i.e. from Dr. Van Steyn of no use of right arm above horizontal and no lifting of any object weighing more than 5 lbs in right arm. It is also my medical opinion that [Ke]rry Dupuis is unable to push or pull with his right arm, nor is he able to repetitively use his right arm for any task (3) no use of left arm, including left hand remnant, for any task and (4) no floor to waist bending and Mr. Dupuis is unable to perform any job task which requires repetitive trunk rotation or sustained lumbar flexion.

{¶16} 7. Honda also submitted the June 15, 2009 report of Charles B. May, D.O., who indicated that he agreed with both Drs. Renneker and Lowe that claimant was permanently and totally disabled from any form of substantial gainful employment as a direct and approximate result of his physical and psychological conditions.

{¶17} 8. Claimant was later examined by Lewis Seeder, M.D. In his July 1, 2009 report, Dr. Seeder noted the allowed conditions as well as claimant's history, identified the medical records which he reviewed and opined as follows:

> The medical records note that Claim 05-827407 from 5/5/05 included lumbar vertebral fractures, a fracture of the left forearm, ligament and meniscus tears of the right knee requiring surgery, and the diagnosis of a depressive

> psychosis. Reviewing the history and findings, the prior allowed conditions within the reviewed claims would have no significant impact on these conditions with regard to his ongoing work. The history provided indicates the individual was employed on a full-time basis until the injury in May 2005.
>
> With regard to the noted allowed conditions within Claims L49922-22, L276198-22, and 98-450646, the individual should be capable of ongoing work activity at a medium physical capacity level.
>
> * * *
>
> With respect to Claim L49922-22 allowed for bilateral chondromalacia of the patella, using Table 17-10 there is a 4% impairment for the right knee and an additional 4% for the left knee. The impairment total is 8% of the whole person.
>
> With respect to Claim L276198-22, there is a 60% impairment of the whole person.
>
> With respect to Claim 98-450646 allowed for right rotator tear, for the range of motion losses under Figures 16-40, 16-43, and 16-46, there is a 7% impairment of the whole person. Using Table 16-27 for the right shoulder surgery, there is a 6% impairment of the whole person. The total impairment with regard to the allowed conditions is then 17% of the whole person.

{¶18} 9. Dr. Seeder also completed an occupational activity assessment indicating that, due to the amputation of his left hand, claimant was unable to handle objects and could only occasionally reach overhead, at waist, knee, and floor level.

{¶19} 10. A psychological assessment was performed by Bruce J. Goldsmith. In his September 8, 2009 report, Dr. Goldsmith identified the allowed conditions, as well as the medical records which he reviewed. Ultimately, Dr. Goldsmith concluded that claimant's psychological allowed conditions had reached maximum medical improvement

("MMI"), and that he had a mild level of impairment in regard to activities of daily living as well as a moderate level of impairment with regard to social functioning, adaptation, as well as concentration, persistence, and pace. Dr. Goldsmith estimated that claimant had a 25 percent impairment and, with regard to his ability to perform sustained remunerative employment, Dr. Goldsmith stated: "The degree of emotional impairment due to his industrial accident of 5/09/05 would currently not be expected to prevent him from working. He appears capable of relating adequately to others, concentrating, attending, persisting and adapting to perform low stress tasks within his physical abilities."

{¶20} 11. An independent medical examination was performed by William Reynolds, M.D. In his September 9, 2009 report, Dr. Reynolds identified three of the four claims: 05-827407, L49922-22, and 98-450646. Dr. Reynolds inadvertently omitted consideration of claim L276198-22 which is allowed for traumatic amputation mid metacarpal of left hand excluding the small finger; strain of right trapezius muscle. Based upon the conditions which he did consider, Dr. Reynolds opined that claimant could perform sedentary work and assessed a 39 percent whole person impairment as further explained:

> Based on my examination and review of the medical records, utilizing the AMA Guides, 5th Edition, it is my opinion the Injured Worker has reached a level of MMI. His impairments of function as it relates to the [rotator] cuff tear has been allowed at 18%. The impairment of function as it relates to the fractured distal radius is 3%. Open wound left forehead impairment of function is 0%, contusion of the right knee 0%, contusion left elbow 0%, closed fracture L1 8%, cellulitis in the buttock 0%, tear of the right medial collateral ligament, tear of the lateral meniscus right knee, and degenerative changes right knee gives him an impairment of function of 12%. Bilateral chondromalacia of patella is 2% for the right patella and 2% for the left patella. All of these

> impairments of function combine together for a 39% impairment of function of the man as a whole.

{¶21} 12. Dr. Reynolds examined claimant a second time and, in his March 18, 2010 report, Dr. Reynolds again opined that claimant could perform sedentary work with the further limitation that he was unable to use his left hand for work and opined that, for the allowed conditions in claim No. L276198-22, claimant had a 55 percent whole person impairment.

{¶22} 13. Claimant was examined by E. Gregory Fisher, M.D., at Honda's request. In his June 18, 2009 report, Dr. Fisher identified the allowed conditions in claimant's claim, identified the medical records which he reviewed, provided his physical findings upon examination, and concluded that claimant's allowed physical conditions had reached MMI and that he was able to perform work with the following restrictions:

> Mr. DuPuis is not able to perform his former type of work as a factory worker or a general laborer, but is able to perform light duty/sedentary type activities. He should avoid activities that require squatting, kneeling or crawling, all of which would aggravate his right knee condition. He is able to sit for 4-6 hours in an 8-hour period with frequent breaks. He is able to stand and walk 2-3 hours in an 8-hour period with frequent breaks. He is able to lift and [carry] up to 5-10 pounds using his right hand.

{¶23} 14. Michael A. Murphy, Ph.D., examined claimant for his allowed psychological conditions. In his June 12, 2009 report, Dr. Murphy opined that claimant had no impairment with regard to daily activities, and a mild impairment with regards to social interaction, adaptation, as well as concentration, persistence, and pace. Dr. Murphy noted that testing demonstrated that claimant's depression had remitted to a near base line (pre-injury) level and that he was not permanently and totally disabled due to his allowed psychological condition.

{¶24} 15. Several vocational reports were also filed. The first is the October 4, 2006 report prepared by Denise O'Connor, a case manager for VocWorks, informing claimant that his vocational plan had ended and his file was being closed. Attached to that letter was a report which indicated that claimant had been provided with 13 weeks of job placement and development services but that he was unable to find employment. Apparently the determination was made that claimant did not need any more job search assistance because the service provider had determined that claimant had the skills to seek and obtain part-time employment in the light range of work strength on his own.

{¶25} 16. The record also contains the January 22, 2008 vocational assessment prepared by Rod W. Durgin, Ph.D. Following his evaluation, Dr. Durgin indicated that claimant scored in the 95th percentile indicating that he was above average in terms of intelligence and general learning ability. Dr. Durgin indicated that, prior to the May 8, 2005 injury, he would have considered claimant to be disabled, although not severely. He also noted that claimant's vocational profile consisted of similar-skilled work that is sedentary in terms of physical demand, should require no more than average degree of intelligence, and should allow him to alternate between sitting and standing. However, Dr. Durgin noted that claimant was unable to perform the full range of duties required of him and that he met the United States Department of Commerce's definition of having an occupational disability. Ultimately, Dr. Durgin noted that a "computerized occupational analysis reveals that such work constitutes 1.8 percent of the jobs existing in his local labor market" and that, "due to his age (53-vocationally advancing), physical and ex[ce]ptional limitations and lack of access to jobs in the labor force, it is my opinion that Mr. DuPuis is unemployable."

{¶26} 17. The evidence also contains an employability assessment performed by Craig Johnston, Ph.D. In his October 23, 2009 report, Dr. Johnston opined that claimant's age of 55 years classified him as a person of middle age by definition and that his age was a potential barrier to employment. Dr. Johnston considered claimant's high school education as consistent with the ability to engage in skilled work activity and indicated his education was an asset to his ability to secure future employment. Further, with regard to claimant's varied work history, Dr. Johnston concluded that claimant had significant transferable skills which would be an asset to his ability to secure future employment. Ultimately, Dr. Johnston concluded that claimant would reasonably be capable of obtaining employment.

{¶27} 18. Dr. Johnston completed an addendum, dated May 16, 2010, after considering the medical report of Dr. Reynolds. Taking into consideration Dr. Reynolds' conclusion that claimant can perform one-handed sedentary work; Dr. Johnston continued to maintain that claimant was capable of performing a partial range of occupations cited in his previous report.

{¶28} 19. Claimant's application was heard before a staff hearing officer ("SHO"), on June 25, 2010. The SHO identified claimant's evidence, and then discussed, in significant detail, the medical reports of Drs. Reynolds and Goldsmith, as follows:

> The Injured Worker was examined on behalf of the Industrial Commission on 09/09/2009 and on 03/09/2010 by Dr. William Reynolds, an orthopedic specialist. In the report from 09/09/2009, Dr. Reynolds evaluated all of the allowed conditions except the psychological condition and the left hand condition. Based on that report, Dr. Reynolds opined that the Injured Worker had a 39 percent whole person permanent partial impairment, and that he would be capable of sedentary employment. In the second report from the

> examination on 03/09/2010 Dr. Reynolds examined the Injured Worker's left hand. Dr. Reynolds found a 55 percent whole person impairment related to the left hand injury, and went on to conclude that the Injured Worker could perform sedentary work, with no use of his left hand. Therefore, note that Dr. Reynolds found 39 percent plus 55 percent impairment related to the allowed physical conditions. He did not perform a combined effects opinion.
>
> The Injured Worker was also examined on behalf o[f] the Industrial Commission on 09/08/2009 by Dr. Goldsmith, regarding the allowed psychological condition. Dr. Goldsmith found a 25 percent whole person permanent partial disability of a psychological nature, of moderate degree, and opined that the Injured Worker could perform low stress work.

{¶29} 20. The SHO concluded that claimant "maintains the physical and psychological capacity to perform sedentary, one-hand work of a low stress nature, at best." Thereafter, the SHO discussed the non-medical disability factors and ultimately concluded that claimant was not capable of performing some sustained remunerative employment as follows:

> Vocationally, it is found the Injured Worker's age is currently age 56. He did complete high school plus a very small amount of college. As a work history, he did production/factory work for an auto manufacturer for approximately 13 years, he performed retail sales work for a sporting goods store for about two and one-half years, and he lastly was doing construction inspection work for an engineering firm for approximately two months, up until he last worked in May of 2005. The Injured Worker's age is found to be a neutral factor, which neither advances nor prohibits his possibility of returning to work. His educational background is found to be an asset, and his work history is found to be neutral in nature. Multiple vocational reports on file have been considered, including those from Mr. Durgin and from Mr. Johnston. These reports have not been totally relied upon. Based on the Injured Worker's physical and psychological claim related impairments, it is found that he has very distinct limitations on a return to the work force.

> Physically, Dr. Reynolds opines sedentary one handed work. Even at this, it is noted that the Injured Worker also has a right shoulder impairment which would further limit his ability to sit and perform work with his right upper extremity. Additionally, the low stress restriction would be further limiting. In light of these restrictions, it is found that there is very little for a vocational evaluator or vocational specialist to work with, as far as a return to any type of employment. It is basically found that the Injured Worker does not maintain vocational potential to return to work within the narrow window of his remaining physical and psychological abilities.

{¶30} 21. Lastly, the SHO apportioned the award as follows:

> The cost of this award is apportioned as follows: 70 percent in claim #05-827407 and 30 percent in claim #L276198-22.
>
> This apportionment is based upon a finding that the injuries in claim number 05-827407 are primarily responsible for the Injured Worker's inability to return to work, although significant disability also remains due to the left hand injury in claim number L276198-22.

{¶31} 22. Honda filed a request for reconsideration arguing that the commission's order granting PTD compensation contained mistakes of fact and law arguing that the commission considered evidence which was not timely filed, and there was no evidence to support the SHO's findings that claimant could not be vocationally rehabilitated.

{¶32} 23. Although the commission took the issue under advisement, the commission ultimately denied the motion finding that Honda failed to meet the burden of proving that sufficient grounds existed to justify the exercise of continuing jurisdiction.

{¶33} 24. Thereafter, Honda filed the instant mandamus action in this court.

Conclusions of Law:

{¶34} In this mandamus action, Honda challenges the commission's order in four respects. Honda argues that the commission abused its discretion by: (1) considering

medical evidence that was not timely submitted; (2) by allocating part of the PTD award to Honda; (3) finding that claimant lacked rehabilitation potential; and (4) awarding PTD compensation to claimant in spite of his failure to exhaust all rehabilitation efforts.

{¶35} It is this magistrate's decision that this court should not grant Honda's request for a writ of mandamus. Specifically, the magistrate finds that: (1) the commission's consideration of untimely medical evidence does not warrant the granting of a writ of mandamus; (2) the commission did not abuse its discretion by allocating a portion of the PTD award to Honda; (3) the commission did not abuse its discretion by determining that claimant lacked rehabilitation potential; and (4) the commission did not abuse its discretion by awarding claimant PTD compensation in light of Honda's contention that he did not exhaust all rehabilitation efforts.

{¶36} The Supreme Court of Ohio has set forth three requirements which must be met in establishing a right to a writ of mandamus: (1) that relator has a clear legal right to the relief prayed for; (2) that respondent is under a clear legal duty to perform the act requested; and (3) that relator has no plain and adequate remedy in the ordinary course of the law. *State ex rel. Berger v. McMonagle* (1983), 6 Ohio St.3d 28.

{¶37} The relevant inquiry in a determination of permanent total disability is claimant's ability to do any sustained remunerative employment. *State ex rel. Domjancic v. Indus. Comm.* (1994), 69 Ohio St.3d 693. Generally, in making this determination, the commission must consider not only medical impairments but also the claimant's age, education, work record and other relevant non-medical factors. *State ex rel. Stephenson v. Indus. Comm.* (1987), 31 Ohio St.3d 167. Thus, a claimant's medical capacity to work is not dispositive if the claimant's non-medical factors foreclose employability. *State ex*

rel. Gay v. Mihm (1994), 68 Ohio St.3d 315. The commission must also specify in its order what evidence has been relied upon and briefly explain the reasoning for its decision. *State ex rel. Noll v. Indus. Comm.* (1991), 57 Ohio St.3d 203.

{¶38} Ohio Adm.Code 4121-3-34 pertains to PTD disability and, regarding a claimant's application and the submission of medical evidence, Ohio Adm.Code 4121-3-34 provides, in pertinent part:

> (C)(1) Each application for permanent total disability shall be accompanied by medical evidence from a physician, or a psychologist or a psychiatric specialist in a claim that has been allowed for a psychiatric or psychological condition, that supports an application for permanent and total disability compensation. The medical examination upon which the report is based must be performed within twenty-four months prior to the date of filing of the application for permanent and total disability compensation. * * * If the application for permanent total disability is filed without the required medical evidence, it shall be dismissed without hearing.
>
> * * *
>
> (4)(a) The injured worker shall ensure that copies of medical records, information, and reports that the injured worker intends to introduce and rely on that are relevant to the adjudication of the application for permanent total disability compensation from physicians who treated or consulted the injured worker within five years from date of filing of the application for permanent total disability compensation, that may or may not have been previously filed in the workers' compensation claim files, are contained within the file at the time of filing an application for permanent total disability.
>
> (b) The employer shall be provided fourteen days after the date of the industrial commission acknowledgement letter provided for in paragraph (C)(2) of this rule to notify the commission if the employer intends to submit medical evidence relating to the issue of permanent total disability compensation to the commission.
>
> * * *

> (d) Upon the request of either the injured worker or the employer and upon good cause shown, the hearing administrator may provide an extension of time, to obtain the medical evidence described in paragraphs (C)(4)(a) and (C)(4)(b) of this rule. Thereafter, no further medical evidence will be admissible other than additional medical evidence approved by a hearing administrator that is found to be newly discovered medical evidence that is relevant to the issue of permanent total disability and which, by due diligence, could not have been obtained under paragraph (C)(4)(a) or (C)(4)(b) of this rule.
>
> (5)(a) Following the date of filing of the permanent and total disability application, the claims examiner shall perform the following activities:
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> * * *
>
> (iii) Schedule appropriate medical examination(s) by physician(s) to be selected by the commission.
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> * * *
>
> (7) If the employer or the injured worker request, for good cause shown, that a pre-hearing conference be scheduled, a pre-hearing conference shall be set.
>
> * * *
>
> (9) After the pre-hearing conference, unless authorized by the hearing administrator, no additional evidence on the issue of permanent and total disability shall be submitted to the claim file. If the parties attempt to submit additional evidence on the issue of permanent and total disability, the evidence will not be admissible on the adjudication of permanent total disability compensation.

{¶39} Ohio Adm.Code 4121-3-34 provides a threshold requirement: if a claimant's application is not supported by some evidence, it will be dismissed.

{¶40} In the present case, it is undisputed that the only medical reports which claimant submitted with his application for PTD compensation where the two reports from

Dr. Lowe addressing his psychological condition. The reports of Drs. Renneker and May were written and submitted after claimant filed his application. As such, those reports should not have been considered. However, while the SHO did mention those reports, there was no indication that the SHO actually relied on those reports. Dr. Renneker specifically concluded that claimant was unable to perform sedentary work and that he was permanently and totally disabled. However, the commission did not make this determination. Instead, the commission relied upon the medical report of Dr. Reynolds and concluded that claimant was limited to sedentary one-handed work. Likewise, Dr. May concluded that claimant was unable to perform any substantial gainful employment and yet, as previously indicated, the commission found otherwise. As such, in spite of the fact that the commission identified this evidence, there is no indication this evidence was relied on. To the extent that any abuse of discretion occurred simply because the commission identified those reports, that abuse of discretion does not warrant the granting of a writ of mandamus.

{¶41} Honda next contends that the commission abused its discretion by allocating any portion of the award of PTD compensation to Honda specifically arguing that claimant's claims with Honda do not have any allowed psychological conditions. As part of this argument, Honda appears to be asserting that, because claimant only attached a medical report considering his allowed psychological condition, the commission was precluded from considering all of the allowed physical conditions in claimant's multiple claims when it determined whether or not he was entitled to an award of PTD compensation. In making this argument, Honda cites no case law and this magistrate could not find any such case law either.

{¶42} Because both the employer and the commission have the authority to require that a claimant submit to an independent medical examination with a physician of the employer's and/or commission's own choosing, and because the commission has the discretion to rely on any medical evidence, whether filed by the claimant or the employer or generated as a result of an independent medical examination requested by the commission, it is not an abuse of discretion for the commission to consider the medical evidence in the file concerning all of claimant's allowed conditions, both physical and psychological.

{¶43} In allocating a portion of the PTD award to Honda, and by citing the reports of both Drs. Reynolds and Goldsmith, those medical reports support the commission's apportionment. Specifically, Dr. Reynolds opined that claimant had a 55 percent whole person impairment due to the allowed condition with claim No. L276198-22 which is allowed for traumatic amputation mid metacarpal of left hand. Concerning the other allowed physical conditions, Dr. Reynolds opined that claimant had a 39 percent whole person impairment. Clearly, there is medical evidence in the record supporting the commission's determination that this allowed condition, traumatic amputation mid metacarpal of left hand, constitutes a significant impairment of claimant's ability to perform some sustained remunerative employment. Further, the commission accepted Dr. Reynolds' conclusion that claimant was restricted to sedentary employment provided that there was no use of the left hand. The allowance for a left hand injury occurred in the Honda claim. The fact that claimant had been able to work after he left his employment with Honda, despite this injury to his left hand, does not mean that now, given the other allowed physical and psychological conditions, that his left hand injury has no impact on

his ability to perform some sustained remunerative employment. This is a significant impairment.

{¶44} The commission also relied on the medical report of Dr. Goldsmith who opined that claimant had a 25 percent whole person impairment due solely to the allowed psychological condition.

{¶45} Questions of credibility and the weight to be given the evidence are clearly within the discretion of the commission as fact finder. *State ex rel. Teece v. Indus. Comm.* (1981), 68 Ohio St.2d 165. Given the evidence relied on by the commission, the magistrate finds that the commission did not abuse its discretion in apportioning 30 percent of the award to Honda based on this medical evidence.

{¶46} Honda's next two arguments will be addressed together. Honda argues that the commission abused its discretion by determining that claimant lacked rehabilitation potential and in awarding claimant PTD compensation in spite of his failure to exhaust all rehabilitation efforts. Honda's argument is based on the fact that claimant was involved in vocational rehabilitation after the 2005 injury. Honda points out that claimant participated in 13 weeks of job placement and development with VocWorks, and that when his file was closed in September 2006, the case manager indicated that he believed claimant could find work on his own. To the extent that claimant did not continue to seek employment, Honda argues that he did not exhaust all rehabilitation efforts. Further, Honda points out that the vocational evidence demonstrates that claimant is a highly intelligent man who has successfully held down a number of different jobs and who has significant transferable skills. As such, Honda argues that, from a vocational standpoint, claimant is not entitled to an award of PTD compensation.

{¶47} It is undisputed that the commission has the discretion to accept one vocational report while rejecting another vocational report and that, as the ultimate evaluator of disability, the commission need not rely on any vocational evidence submitted in a claim. See *State ex rel. Jackson v. Indus. Comm.*, 79 Ohio St.3d 266, 1997-Ohio-152, and *State ex rel. Singleton v. Indus. Comm.* (1994), 71 Ohio St.3d 117. Honda appears to recognize this statement of law but attacks the commissioner's order for its failure to provide greater detail and analysis. Given that the vocational reports in evidence are lengthy, and provide significant detail, it appears Honda believes the commission's order should address the vocational issues in similar detail.

{¶48} On many occasions, parties have argued before this court that the commission should be required to at least discuss the vocational evidence contained in the record. The question the parties continue to ask is whether or not the hearing officers are truly qualified to make the vocational assessments which they make. While the magistrate can understand their frustration, the Supreme Court of Ohio has stated that the commission is the expert in this area. Until such time that courts require more of the commission's hearing officers and requires more than a brief explanation, this magistrate finds it is not an abuse of discretion for the commission to render its own determination concerning the vocational evidence. In this particular case, the hearing officer noted there were several vocational reports in the record and specifically identified the reports of Drs. Durgin and Johnston, one of which was submitted by claimant and the other submitted by Honda. Both examiners acknowledged that claimant is a very intelligent man; however, they came to the opposite conclusions. Dr. Durgin opined that claimant was unemployable while Dr. Johnston opined that claimant was capable of obtaining

employment. Dr. Durgin opined that claimant's restrictions were so significant that claimant was precluded from finding employment, it appears that the commission agreed.

{¶49} Honda also argues that, since the commission found claimant's age and work history to be neutral vocational factors and his education to be a positive factor, the commission should have ultimately concluded that claimant was employable. (Neutral + neutral + positive = positive.) The magistrate does not agree. The commission looks at the medical evidence and determines if a claimant can work. The commission then considers the vocational factors. Lastly, the commission considers the medical evidence together with the vocational evidence to determine if some sustained remunerative employment is possible.

{¶50} Further, to the extent that Honda argues that claimant did not exhaust all rehabilitation efforts, the magistrate specifically notes that, in the closure report from VocWorks, it was recommended that claimant continue to seek part-time employment in the light range of work strength. The commission specifically relied on medical evidence that claimant was restricted to sedentary one-handed work. Nothing in the evidence submitted by the parties from VocWorks would substantiate that any consideration was given to those specific limitations. As such, the magistrate cannot find that the report from VocWorks requires a finding that claimant failed to exhaust all rehabilitation efforts and that, if he had only been motivated, he could have obtained other employment.

{¶51} Based on the foregoing, it is this magistrate's opinion that the commission should have rejected the reports of Drs. Renneker and May. However, since the commission did not rely on those reports based upon other competent, credible medical evidence before it, the commission did not abuse its discretion in awarding claimant PTD

compensation. Accordingly, it is this magistrate's decision that this court should deny Honda's request for a writ of mandamus.

/s/Stephanie Bisca Brooks
STEPHANIE BISCA BROOKS
MAGISTRATE

NOTICE TO THE PARTIES

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