[Cite as *State ex rel. Navistar, Inc. v. Indus. Comm.*, 2012-Ohio-2029.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Navistar, Inc.,	:	
Relator,	:	
v.	:	No. 10AP-190
Industrial Commission of Ohio and Ronald E. Burton,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on May 8, 2012

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

Michael DeWine, Attorney General, and *John R. Smart*, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

CONNOR, J.

{¶ 1} Relator Navistar, Inc., brings this original action seeking a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its award of 30 percent permanent partial disability ("PPD") compensation in favor of respondent/claimant Ronald E. Burton, and ordering the commission to enter an order incorporating an offset for prior awards granted to Burton. Pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth District Court of Appeals, this matter was referred to a

magistrate, who has now rendered a decision and recommendation that includes findings of fact and conclusions of law and is appended to this decision. The magistrate recommends that we grant a writ of mandamus ordering the commission to modify its award of compensation. Both Navistar and the commission have filed objections to the magistrate's decision, and the matter is now before the court for our independent review. For the reasons that follow, we overrule all objections and adopt the magistrate's recommendation to grant a writ of mandamus.

{¶ 2} The claim that underlies this action is the latest in three resulting from left shoulder injuries suffered by Burton in the course of his employment with Navistar. In 1997, Burton's claim was allowed for a left shoulder sprain and rotator cuff sprain. In 2001, a new left shoulder injury gave rise to another allowed claim for a left shoulder sprain and left rotator cuff tear. After various applications for increase in his percentage of PPD for these two claims, the commission awarded Burton an aggregate of 23 percent PPD representing a corresponding percentage of whole person impairment for the two left shoulder claims.

{¶ 3} Burton suffered a new left shoulder injury on the job, and the commission ultimately allowed his claim for a left shoulder labral tear. He applied for a further percentage of PPD from this 2008 claim, listing his prior left shoulder injuries and allowed claims on his application. An examination by Dean Imbrogno, M.D., on behalf of the Bureau of Workers' Compensation opined that Burton had a 20 percent permanent partial impairment of the whole person. Burton then obtained his own examination by James E. Lundeen, Sr., M.D., who opined that based upon the left shoulder injury, Burton had suffered a 52 percent whole person impairment. A district hearing officer ("DHO") awarded 4 percent PPD based upon Dr. Imbrogno's report, and a staff hearing officer ("SHO") modified this to reflect PPD of 30 percent, based upon the reports of both Drs. Lundeen and Imbrogno. Unlike the DHO's order, the SHO's order does not reference any prior awards for disability based upon left shoulder impairment.

{¶ 4} The magistrate's decision concludes that Navistar did not effectively raise before the commission the question of whether prior awards for left shoulder injuries should be offset against the 30 percent award for the 2008 claim. The magistrate also concludes that the report of Dr. Lundeen was flawed and could not be considered by the commission. The magistrate therefore ultimately concludes that no offset should be allowed, but that this court should issue a writ of mandamus ordering the commission to amend its latest order to reduce the PPD award for the 2008 claim from 30 percent to 20 percent.

{¶ 5} The commission has objected to the magistrate's recommendation that Dr. Lundeen's report be disregarded. Navistar has objected to the magistrate's refusal to allow an offset for prior claims for injuries to the same body area, and asserts that this in effect grants a double recovery.

{¶ 6} Addressing first the commission's objection, we find no error in the magistrate's conclusion that Dr. Lundeen's report must be eliminated from evidentiary condition. Dr. Lundeen's report makes reference to two separate surgeries in connection with the 2008 claim, when the record gives no indication of a second surgery for that claim. Dr. Lundeen's calculation of a 50 percent whole person impairment is accordingly based on a flawed evidentiary assumption, and the report should not be considered.

{¶ 7} Turning to Navistar's assertion that the failure to consider prior awards results in a double recovery for failure to offset the percentage of PPD awarded in those prior claims, we also adopt the magistrate's conclusion of law in this respect. The magistrate has correctly found that Ohio Adm.Code 4123-3-15(C)(6) and 4121-3-15(C)(1) allow the employer, when objecting to a tentative order awarding compensation, to obtain independent medical examination. Navistar did not do so, but permitted the administrative proceedings to go forward upon the reports of Drs. Imbrogno and Lundeen. In addition, Navistar requested only that the 2001 claim file be produced as a reference file at commission proceedings when considering the 2008 claim, and did not request the 1997 claim file. Based on these two circumstances, the commission did not

have before it sufficient medical evidence to conclude that the two prior injuries in forming the basis for the 1997 and 2001 claims would necessarily operate in direct subtraction of the percentage of PPD awarded for the 2008 claim. While Navistar asserts in support of its objections here that the matter is a question of simple arithmetic and automatic deduction for the prior claims, we find no authority for this proposition. R.C. 4123.57(A) does prohibit aggregated PPD awards totaling more than 100 percent, but the statute is silent on PPD awards accumulating at lesser percentages. Without medical evidence to corroborate that the impairments resulting from the three successive left shoulder injuries in fact represent impairments of the same nature and scope, the commission was not obligated to implement a setoff between the various claims and awards.

{¶ 8} In summary, upon independent review of the magistrate's decision and the objections presented by the parties, we overrule all objections, adopt the magistrate's decision as our own, and issue a writ of mandamus ordering the commission to amend the November 19, 2009 order of its SHO to reflect a 20 percent PPD award, based solely upon Dr. Imbrogno's report, in favor of respondent Ronald E. Burton.

Objections overruled;
Writ of mandamus granted.

FRENCH and TYACK, JJ., concur.

A P P E N D I X

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Navistar, Inc.,	:	
Relator,	:	
v.	:	No. 10AP-190
Industrial Commission of Ohio and Ronald E. Burton,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on March 23, 2011

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

Michael DeWine, Attorney General, and *John R. Smart*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶ 9} In this original action, relator, Navistar, Inc., requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its award of 30 percent permanent partial disability ("PPD") compensation in industrial claim No. 08-830661 and to enter an order that offsets prior awards for left shoulder injuries in two other industrial claims.

Findings of Fact:

{¶ 10} 1. Respondent Ronald E. Burton ("claimant") has three industrial claims involving left shoulder injuries that relate to his employment with relator, a self-insured employer under Ohio's workers' compensation laws. These left shoulder injuries occurred respectively in 1997, 2001, and 2008.

{¶ 11} 2. The earliest left shoulder injury occurred on March 3, 1997. That industrial claim (No. 97-408779) is allowed for "sprain shoulder/arm NOS left shoulder; sprain rotator cuff left."

{¶ 12} 3. On October 16, 2001, claimant sustained his second left shoulder injury. That industrial claim (No. 01-875591) is allowed for "sprain left shoulder (NOS); tear left rotator cuff."

{¶ 13} 4. On March 18, 2002, claimant filed an application for the determination of the percentage of PPD in the 1997 claim. The application prompted the Ohio Bureau of Workers' Compensation ("bureau") to have claimant examined on July 9, 2002 by Alan A. Palmer, M.D., who then issued a two-page narrative report stating:

> ASSESSMENT: According to section 16.4i, figures 16-40, 16-43 and 16-46, the sum of Mr. Burton's left shoulder range-of-motion deficits/upper extremity impairments is an 11% upper extremity impairment. According to table 16-3, an 11% upper extremity impairment equals a 7% whole person impairment for both allowed conditions in the claim.
>
> OPINION: Ronald E. Burton has a 7% whole person impairment due to injuries sustained at work on March 3, 1997. This opinion is based upon the AMA Guides for the Evaluation of Permanent Impairment, Fifth Edition and the conditions allowed.

{¶ 14} 5. On August 8, 2002, in the 1997 claim, the bureau issued a tentative order awarding seven percent PPD based upon Dr. Palmer's report. Apparently, there was no objection to the bureau's tentative order.

{¶ 15} 6. On September 18, 2003, claimant filed an application for the percentage of PPD in the 2001 industrial claim.

{¶ 16} 7. The September 18, 2003 application prompted two medical examinations—one by Seth H. Vogelstein, D.O., and the other by Richard M. Ward, M.D. Dr. Vogelstein opined that claimant has an 8 percent whole person impairment in the 2001 industrial claim. Dr. Ward opined that claimant has a 14 percent PPD in the 2001 industrial claim.

{¶ 17} 8. Following a January 23, 2004 hearing, a district hearing officer ("DHO") awarded 11 percent PPD in the 2001 industrial claim based upon the reports of Drs. Vogelstein and Ward.

{¶ 18} 9. In October 2005, claimant filed an application for an increase in his percentage of PPD in the 2001 industrial claim.

{¶ 19} 10. In March 2006, relator and claimant entered into an agreement that claimant has a 5 percent increase in his percentage of PPD in his 2001 claim which increases the claim percentage to 16 percent. Following a March 17, 2006 hearing, a DHO approved the agreement and awarded the 5 percent increase.

{¶ 20} 11. On April 25, 2008, claimant sustained his third left shoulder injury. The industrial claim (No. 08-830661) was initially certified by relator for "left shoulder sprain." However, by letter dated August 27, 2008, relator additionally certified the claim for "left superior labral anterior to superior (SLAP) tear."

{¶ 21} 12. On July 2, 2009, claimant filed an application for the percentage of PPD in his 2008 industrial claim—the claim at issue in this action.

{¶ 22} 13. The July 2, 2009 application is on bureau form C-92 which asks the applicant to list other industrial claim numbers and their allowed conditions. On the C-92, claimant listed the industrial claim numbers for his 1997 and 2001 industrial claims and their corresponding ICD-9 codes for the allowed conditions.

{¶ 23} 14. On August 12, 2009, at the bureau's request, claimant was examined by Dean Imbrogno, M.D., for the allowed conditions in the 2008 claim. In his five-page narrative report, Dr. Imbrogno states:

> DETERMINATION OF PERMANENT PARTIAL IMPAIRMENT

The determination of Permanent Partial Impairment is based upon the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition.

Chapter 16 is utilized. The injured worker [is] found to have impairment due to abnormal shoulder range of motion. From Figure 16-40, there is 5% impairment of the upper extremity due to abnormal flexion of the shoulder. There is 1% impairment of the upper extremity due to abnormal extension of the shoulder. From Figure 16-43, there is 5% impairment of the shoulder due to abnormal abduction and 0% impairment for normal adduction. From Figure 16-46, there is 1% impairment due to abnormal external rotation and 3% impairment due to abnormal internal rotation. Adding these impairments is equivalent to a 15% impairment of the upper extremity and abnormal range of motion of the left shoulder.

The injured worker also had an arthroplasty of the left shoulder. From Section 16.7b, Table 16-27, for a distal clavicle resection arthroplasty, the injured worker is allowed a 10% of the upper extremity.

Due to the injured worker's SLAP lesion, this is consistent with shoulder instability patterns. From Table 16-26, the injured worker [is] allowed a 12% upper extremity impairment due to this shoulder instability pattern.

It is also noted that the injured worker has weakness in his left shoulder but this cannot be rated and is taken in consideration with the other evaluations. The AMA Guides specifically note that weakness can only be evaluated if full range of motion is documented, which it is not here.

Combining the above upper extremity impairments of 12%, 15%, and 10%, the injured worker [is] found to have a 33% impairment of the left upper extremity. From Table 16-33, this is equivalent to a 20% impairment of the whole person.

SUMMARY

In my medical opinion, the injured worker has a 20% permanent partial impairment of the whole person as

> determined by utilization of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition.

{¶ 24} 15. On August 31, 2009, the bureau mailed a tentative order awarding 20 percent PPD based upon Dr. Imbrogno's report.

{¶ 25} 16. Both relator and claimant filed objections to the bureau's August 31, 2009 tentative order.

{¶ 26} 17. Notwithstanding a right to do so, relator did not obtain a medical examination of claimant following its objection to the tentative order.

{¶ 27} 18. However, claimant did obtain a medical examination at his own request. On October 8, 2009, claimant was examined by James E. Lundeen, Sr., M.D., who issued a four-page narrative report, stating:

> HISTORY
>
> * * *
>
> Surgical procedures: Arthroscopic shoulder surgery was performed on July 25, 2008.
>
> * * *
>
> Prior and/or subsequent injuries to same areas: The claimant indicates, he sustained tear of the left rotator cuff in October 2001.
>
> * * *
>
> EXAMINATION
>
> LEFT SHOULDER
>
> | | | |
> |---|---|---|
> | Figure 16-40, page 476, 5th Ed AMA Guides
Flexion | 30 degrees | 10% IUE |
> | Figure 16-40, page 476, 5th Ed AMA Guides
Extension | 0 degrees | 3% IUE |
> | Figure 16-43, page 477, 5th Ed AMA Guides
Abduction | 20 degrees | 7% IUE |

Figure 16-43, page 477, 5th Ed AMA Guides
Adduction 10 degrees 1% IUE

Figure 16-46, page 479, 5th Ed AMA Guides
Internal rotation 20 degrees 4% IUE

Figure 16-46, page 479, 5th Ed AMA Guides
External rotation 0 degrees 2% IUE

Left shoulder range of motion IUE = 27%

Table 16-27 Impairment of the Upper Extremity After Arthroplasty of Specific Bones or Joints. 5th Edition AMA Guides. Page 506.

Open surgery: 10% IUE
Open surgery: 10% IUE

Table 16-15, page 492, 5th Ed AMA Guides
Maximum Upper Extremity Impairment Due to Unilateral Sensory or Motor Deficits or to Combined 100% Deficits of the Major Peripheral Nerves

Axillary nerve function, deltoid muscle, vertical abduction of the shoulder.

25% IUE

Musculocutaneous nerve function, coracobrachialis, biceps and brachialis muscles, upper arm movements

15% IUE

Table 16-3, page 439, 5th Ed AMA Guides
87% IUE equates with 52% [whole person impairment]

Left shoulder [whole person impairment] = 52%

OPINION

On the basis of only the allowed condition(s), the medical history and all medical information available at this time, the findings on physical examination being both subjective and objective, and the 5th Edition AMA Guides to the evaluation

> of permanent partial impairment, the permanent partial impairment for this claim, in terms of percentage of the whole person is, in my opinion, 52.

{¶ 28} 19. Having received notice of an October 20, 2009 hearing, by letter dated October 15, 2009, relator's counsel requested that the commission make available at the hearing the 2001 claim file "as a reference claim."

{¶ 29} 20. On October 20, 2009, a DHO heard the objections to the bureau's August 31, 2009 tentative order regarding the 2008 claim. Following the hearing, the DHO issued an order stating:

> The order of the Administrator, issued 08/31/2009, is modified.
>
> The Application is granted. The District Hearing Officer finds from proof of record that the Injured Worker has a permanent partial disability of 4 percent, which entitles Injured Worker to an award of compensation for a period of 8 weeks.
>
> This order is based upon the report(s) of Dr(s). Imbrogno.
>
> This order is also based upon the prior percentage award made in Claim 01/875591.

{¶ 30} 21. On October 27, 2009, pursuant to R.C. 4123.57(A), claimant moved for reconsideration of the DHO order of October 20, 2009.

{¶ 31} 22. Following a November 19, 2009 hearing, a staff hearing officer ("SHO") issued an order upon reconsideration:

> The Staff Hearing Officer orders that the District Hearing Officer's decision is modified to the extent that the Injured Worker is found to have a permanent partial disability of 30 percent resulting in an award of compensation for a period of 60 weeks.
>
> This order is based upon the report(s) of Drs. Lundeen and Imbrogno.

{¶ 32} 23. On January 21, 2010, the three-member commission, on a two-to-one vote, mailed an order denying relator's request for reconsideration of the SHO order of November 19, 2009.

{¶ 33} 24. On February 26, 2010, relator, Navistar, Inc., filed this mandamus action.

Conclusions of Law:

{¶ 34} Two issues are presented: (1) whether relator effectively raised in the administrative proceedings the issue it presents here—whether the commission had a duty to offset the PPD awards in the 1997 and 2001 claims against the award in the 2008 claim to prevent an alleged double recovery, and (2) whether the October 8, 2009 report of Dr. Lundeen must be eliminated from evidentiary consideration.

{¶ 35} The magistrate finds: (1) relator failed to effectively raise in the administrative proceedings the issue it presents here—whether the commission had a duty to offset the prior PPD awards against the award in the 2008 claim to prevent an alleged double recovery, and (2) the October 8, 2009 report of Dr. Lundeen must be eliminated from evidentiary consideration.

{¶ 36} Accordingly, it is the magistrate's decision that this court issue a writ of mandamus, as more fully explained below.

{¶ 37} In *State ex rel. Maurer v. Indus. Comm.* (1989), 47 Ohio St.3d 62, the syllabus states:

> A claimant who has received a permanent partial disability award pursuant to former R.C. 4123.57(B), for an injury which subsequently deteriorates to the point of a total loss of use of an appendage or other condition qualifying for a scheduled award, may not be awarded scheduled benefits pursuant to former R.C. 4123.57(C) without an offset of the benefits received under division (B).

{¶ 38} Recently, in *State ex rel. Honda of America MFG., Inc. v. Indus. Comm.*, 10th Dist. No. 08AP-899, 2009-Ohio-4210, this court succinctly summarized the *Maurer* case:

> In *Maurer*, the claimant sustained a workplace injury and his claim was allowed for "left knee, leg and ankle." As a

> result, claimant received a PPD award pursuant to R.C. 4123.57(B) (now R.C. 4123.57(A)). A number of years later the claimant lost the use of his left leg due to the deterioration of the injuries he originally sustained. The claimant applied for a scheduled loss of use award under R.C. 4123.57(C) (now R.C. 4123.57(B)). The *Maurer* court held that a claimant who has received a PPD award under division (B) (now division (A)) for an injury that subsequently deteriorates to the point of a total loss of use of an appendage or other condition qualifying for a scheduled award under division (C) (now division (B)), may not be awarded scheduled benefits without an offset of the prior PPD award. *Id.* at paragraph one of the syllabus. The court interpreted R.C. 4123.57 as permitting a division (B) (now division (A)) award *or* a division (C) (now division (B)) award—but not both. The court reasoned that to hold otherwise would permit a double recovery for a single injury, contrary to the language and purpose of R.C. 4123.57.

Id. at ¶4. (Emphasis sic.)

{¶ 39} In *Honda*, a PPD award for partial paralysis of the left hand preceded a scheduled award for loss of use of portions of the four fingers of the left hand (which the commission erroneously held to be a loss of the entire hand because of the loss of two fingers). In *Honda*, this court applied *Maurer* to support the issuance of a writ ordering the commission to eliminate the double recovery by determining the appropriate offset: "[B]ecause the same injury gave rise to the two awards, permitting a scheduled loss of use award for the claimant's four fingers without deducting the prior PPD award, would result in a double recovery." Id. at ¶7.

{¶ 40} Citing *Honda* and *Maurer*, relator contends that the commission abused its discretion in awarding 30 percent PPD in the 2008 claim because it allegedly permitted claimant double recovery in the three claims involving left shoulder injuries.

{¶ 41} Here, the commission points out that, unlike the instant case, the *Honda* and *Maurer* cases involved awards in the same industrial claim. According to the commission, it has no duty to review other industrial claims to prevent double recovery.

{¶ 42} However, this court need not decide here whether the commission has a duty to review claims other than the one for which compensation is sought on the

application for PPD in order to prevent double recovery. This is so because relator has failed to effectively raise the issue in the administrative proceedings involving the 2008 industrial claim.

{¶ 43} Ohio Adm.Code 4123-3-15 sets forth bureau rules applicable to "Claim procedures subsequent to allowance." Ohio Adm.Code 4123-3-15(C) sets forth bureau rules regarding applications for the determination of PPD percentages.

{¶ 44} Thereunder, Ohio Adm.Code 4123-3-15(C)(6) provides:

> If the employee, the employer, or their representatives timely notify the bureau of an objection to the tentative order, the matter shall be referred to a district hearing officer who shall set the application for hearing in accordance with the rules of the industrial commission. Upon referral to a district hearing officer, the employer may obtain a medical examination of the employee, pursuant to the rules of the industrial commission.

{¶ 45} Ohio Adm.Code 4121-3-15 sets forth commission rules and is captioned "Percentage of permanent partial disability."

{¶ 46} Thereunder, Ohio Adm.Code 4121-3-15(C) provides:

> (C) Procedures upon referral to a district hearing officer
>
> (1) Should the employer file an objection to a tentative order and the employer desires to obtain a medical examination of the injured worker, the employer shall provide written notice at the time of the filing of the objection to the hearing administrator, and to the injured worker if the injured worker is unrepresented, or to the injured worker's representative, if the injured worker is represented, of the employer's intent to schedule a medical examination of the injured worker. The examination shall be conducted and the report of the medical examination submitted to the commission[.] * * *

{¶ 47} As earlier noted, relator did object to the bureau's August 31, 2009 tentative order, but did not obtain a medical examination notwithstanding its right to do so under bureau and commission rules. Instead, relator permitted the administrative proceedings to go forward at the district level upon the reports of Drs. Imbrogno and

Lundeen. The only effort made by relator to raise the issue of double recovery was to request that the 2001 claim file be made available as a reference file at the commission proceedings on the application for the percentage of PPD in the 2008 claim. Asking that the 2001 claim file be made available as a reference file at the administrative hearing was alone insufficient to raise the issue of double recovery under the circumstances here.

{¶ 48} Analysis of the October 20, 2009 order of the DHO (which was modified by the SHO on reconsideration) readily reveals the fallacy of relator's position here that double recovery is properly prevented by simply offsetting the PPD award in the 2001 claim against any award in the 2008 claim. As earlier noted, the DHO had before him the 2001 claim file as the so-called reference file at relator's request. He did not have the 1997 claim file as a reference file because relator did not ask that the 1997 claim file be made available at the DHO hearing as a reference file.

{¶ 49} In determining a PPD award of 4 percent for the 2008 claim, the DHO relied on the report of Dr. Imbrogno and the 2001 claim file. Apparently, the DHO simply subtracted the 16 percent PPD award in the 2001 claim from Dr. Imbrogno's 20 percent estimate of whole person impairment. It was clearly improper for the DHO to do this without medical evidence to support the offset.

{¶ 50} While both the 2001 and 2008 claims are allowed for left shoulder sprains that could potentially cause a double recovery, the 2001 claim is allowed for a left rotator cuff tear and the 2008 claim is allowed for a left labrum tear.

{¶ 51} To deduct the 16 percent PPD award of the 2001 claim from Dr. Imbrogno's 20 percent estimate of whole person impairment to arrive at a 4 percent PPD award for the 2008 claim, as the DHO did here, is to improperly assume that the rotator cuff tear allowed in the 2001 claim is the same injury as the SLAP tear allowed in the 2008 claim.

{¶ 52} It is well-settled that neither the commission nor its hearing officers have medical expertise. *State ex rel. Yellow Freight Sys., Inc. v. Indus. Comm.* (1998), 81 Ohio St.3d 56, 58.

{¶ 53} Clearly, the DHO could not properly deduct all or even a part of the 16 percent PPD award in the 2001 claim without medical evidence to support the deduction, and relator provided no such medical evidence. Thus, the SHO properly modified the DHO's order of October 20, 2009.

{¶ 54} Conceivably, had relator exercised its right to have claimant examined by a physician of its own choosing, the medical report generated by such examination could have included an analysis by the medical expert as to any potential double recovery among the three industrial claims.

{¶ 55} Alternatively, absent an examination by a physician of relator's own choosing, relator could have asked the commission to have its own physician conduct a file review to determine whether Dr. Imbrogno's estimate of a 20 percent whole person impairment in the 2008 claim presents a double recovery based upon analysis of the medical reports relied upon to support the PPD awards in the 1997 and 2001 claims. But relator failed to exercise this option also.

{¶ 56} In short, given the above analysis, the magistrate concludes that relator failed to effectively raise in the administrative proceedings the double recovery issue it presents here.

{¶ 57} As earlier noted, the second issue is whether the October 8, 2009 report of Dr. Lundeen must be eliminated from evidentiary consideration.

{¶ 58} In his report, Dr. Lundeen writes:

> Open surgery: 10% IUE
> Open surgery: 10% IUE

{¶ 59} There is no evidence of a second surgery in the 2008 claim. Moreover, Dr. Lundeen himself only identifies the "[a]rthroscopic shoulder surgery * * * performed on July 25, 2008." Thus, Dr. Lundeen's calculation of a 52 percent whole person impairment is flawed.

{¶ 60} In the magistrate's view, this facial error in Dr. Lundeen's report requires its removal from evidentiary consideration.

{¶ 61} Removing Dr. Lundeen's report from evidentiary consideration, only the report of Dr. Imbrogno survives. Dr. Imbrogno's report supports only a PPD award of 20 percent.

{¶ 62} Accordingly, it is the magistrate's decision that this court issue a writ of mandamus ordering the commission to amend the November 19, 2009 order of its SHO so that a 20 percent PPD award is entered based solely upon Dr. Imbrogno's report.

/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).