

[Cite as *State ex rel. Martin v. Indus. Comm.*, 2012-Ohio-2984.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel.
James M. Martin,

Relator,

v.

Industrial Commission of Ohio et al.,

Respondents.

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:
:

No. 11AP-252

(REGULAR CALENDAR)

D E C I S I O N

Rendered on June 29, 2012

Law Office of James A. Whittaker, LLC, Laura I. Murphy,
and James A. Whittaker, for relator.

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

IN MANDAMUS

FRENCH, J.

{¶ 1} Relator, James M. Martin ("relator"), filed an original action, which asks this court to issue a writ of mandamus ordering respondent Industrial Commission of Ohio to vacate its order denying him permanent total disability ("PTD") compensation and to enter an order granting that compensation.

{¶ 2} This matter was referred to a magistrate pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate issued a decision, which includes findings of fact and conclusions of law and is appended to this decision, recommending that this court grant a writ of mandamus because the report of Donald J. Tosi, Ph.D., is so internally inconsistent that it must be eliminated from evidentiary consideration, and a new adjudication of relator's application is necessary. No objections to the magistrate's decision have been filed.

{¶ 3} Finding no error of law or other defect in the magistrate's decision, we adopt the decision as our own, including the findings of fact and conclusions of law contained in it. In accordance with the magistrate's decision, we grant a writ of mandamus ordering the commission to vacate its October 5, 2010 order and, in a manner consistent with the magistrate's decision, enter a new order that adjudicates relator's PTD application.

Writ of mandamus granted.

BROWN, P.J., and DORRIAN, J., concur.

A P P E N D I X

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel.	:	
James M. Martin,	:	
	:	
Relator,	:	No. 11AP-252
	:	
v.	:	(REGULAR CALENDAR)
	:	
Industrial Commission of Ohio et al.,	:	
	:	
Respondents.	:	
	:	

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

Rendered on December 28, 2011

Law Office of James A. Whittaker, LLC, Laura I. Murphy, and James A. Whittaker, for relator.

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

IN MANDAMUS

{¶ 4} In this original action, relator, James M. Martin, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order denying him permanent total disability ("PTD") compensation, and to enter an order granting the compensation.

Findings of Fact:

{¶ 5} 1. Relator has two industrial claims arising out of his employment as a police officer with respondent Springfield Township, a state-fund employer.

{¶ 6} 2. Claim No. 97-319655 arises from an injury that occurred January 20, 1997. That claim is allowed for:

Sprain of right knee and leg; contusion of lower right leg; contusion face/scalp/neck; abrasion, right hip; current tear lateral meniscus right knee; current tear medial meniscus right knee; prolong post traumatic stress.

{¶ 7} 3. Claim No. 97-489866 arises from an injury that occurred August 25, 1997. That claim is allowed for:

Sprain right knee/leg; lumbar disc displacement; current tear medial meniscus right knee; right knee anteromedial rotary instability; sciatica; traumatic arthropathy right knee; aggravation of pre-existing lumbar degenerative disc disease; trochanteric bursitis of right hip; tear anterior cruciate left knee; tear medial meniscus with bucket handle fragment left knee; lumbar/lumbosacral disc degeneration L1-2, L2-3, L3-4, laryngitis; left laryngeal granuloma.

{¶ 8} 4. On April 19, 2010, treating psychologist William C. Melchior, Ed.D., wrote:

* * * Mr. Martin is a 57 year old male who sustained a work related injury on 01-20-97 while employed as a police officer for Springdale township. Mr. Martin's claim has been allowed for Prolonged Post Traumatic Stress Disorder (309.81). He has been in treatment with myself since 01-20-04. Mr[.] Martin continues to experience a number of symptoms related to his PTSD which result in significant limitations affecting his ability to return to work. Dr. Larson, in his 03-20-09 report, has stated: "Mr. Martin clearly shows the three aspects of Post Traumatic Stress Disorder: increased arousal, avoidance of things, places that remind him of police work, memories of repetitive violent dreams and

flashes of the incident. His level of physiological arousal for six years is still remarkably high." Mr. Martin's PTSD symptoms are also frequently triggered by increased pain resulting from his multiple injur[i]es. Mr. Martin has attempted to participate in vocational rehabilitation; however, on 02-16-10 his vocational rehabilitation was closed. In the Vocational Rehabilitation Closure Report (02-16-2010), it was stated, "The case manager staffed this referral with the DMC and the MCO. It was agreed that due to the barriers listed above and his ong[o]ing symptoms of pain and aggravation of his PTSD symptoms that he was not feasible for RTW or participation in vocational program." More over, given the extent and ongoing nature of Mr. Martin's P[TS]D, it is this psychologist's opinion that Mr. Martin is determined to be permanently and totally disabled from work.

{¶ 9} 5. On April 21, 2010, treating chiropractor Dan Buchanan, D.C., wrote:

As you know, Jim Martin has been a patient of mine over the past years for the above mentioned multiple injuries to multiple body parts, which were caused by the occupational accident that occurred on 8/25/97. It is my understanding that recently Mr. Martin was found to be unable to participate in vocational rehabilitation.

Mr. Martin continues to suffer with substantial impairments, caused by his allowed diagnosis, and at this time his current treatment would be considered supportive in nature.

Based on Mr. Martin's history, his subjective complaints, his physical exam findings, and his current level of function, and based solely on the allowed diagnoses in his claim; I am of the opinion with a reasonable degree of medical certainty that Mr. Martin is permanently and totally disable[d] from any forms of sustained remunerative employment.

{¶ 10} 6. On April 20, 2010, relator filed an application for PTD compensation.

{¶ 11} 7. On May 25, 2010, at the commission's request, relator was examined by psychologist Donald J. Tosi, Ph.D. In his eight-page narrative report, Dr. Tosi states:

History of Present Illness: The Injured Worker was employed by Springfield Township as a police officer at the

time of the 01/20/1997 injury. He was arresting a subject for domestic violence and a fight ensued when the subject resisted. The Injured Worker was punched in the face multiple times. The subject and another officer fell on the Injured Worker, causing injuries (see allowed physical conditions). The Injured Worker was injured again on 8/25/1997 (while still working for Springfield Township). He lost his balance during a training exercise and injured his right knee and lower back and hips. He states, "I tried to go back to work after the injuries. My retirement was in October of 2002."

* * *

Mental Status Examination: Cognitively, the Injured Worker appears to be a man of average intelligence. He is alert, oriented in all spheres, with adequate reality contact. Concentration and attention are mildly reduced. Comprehension of simple commands is unimpaired. Stream of thought and flow of ideas are normal. Educational deficits are absent. There is no evidence of cognitive dysfunction due to psychoses, head injury, or organicity. Delusions and hallucinations are absent. The Injured Worker's thoughts are clear, understandable, relevant, and goal-directed. His associations are reasonably well organized. He answers questions appropriately. Memory functions are generally intact in all time frames. He gave a reasonable account of his activities and life events in chronological order. Abstract reasoning, concept formation, and fund of knowledge are estimated to be within normal limits. He has a functional understanding of everyday objects. His judgement [sic] is fair. He has a past history of dysfunctional marriages. Insight is average.

Mood and Affect (injury-specific): The Injured Worker reports periodic crying spells (2-3 times per week). He has not attempted suicide, and denies any suicidal ideation, plan, or intent. Psychomotor retardation and agitation are absent. Symptoms of post-traumatic stress are reported and include: nightmares ("two times a week at least"); explosive outbursts (approximately three times per month); flashbacks (three times per month); hypervigilance; avoids crowds; easily startled; mild reductions in social activities; and anxiousness ("at least twice a week"). He would be willing to return to his

former job if not for physical issues. Dissociative reactions are absent and he denies any assaultive behavior.

Physical Functioning (injury specific): Physically, chronic pain is present in the right side, right foot, and right knee. Pain behaviors are observed (i.e., some position shifting). Sleep is erratic. Appetite is fair to excessive. A fluctuation in weight (gain of 40 pounds post-injury) is reported. Energy level since the injury is low. Sex drive is low. He reports no current sexual activity.

Aspects of Residual Functioning (specific to the allowed psychological condition)

Daily Activities: The Injured Worker's daily activities include light housework, doing some laundry, taking care of two dogs, talking to people on the phone, preparing meals, attending church, reading (newspapers, books and magazines), watching television, listening to the radio, grocery shopping, dining out on occasion, using a home computer, and attending medical appointments and therapies. He is able to care for his basic personal needs and drive independently. He is able to handle his personal finances. He travels to South Carolina once a year to see his grandchildren. Most travel is local. He follows medication prescriptions and is aware of safety precautions. He is able to leave his home. He has no hobbies ("not any more").

Impairment: Mild

Social Interaction: The Injured Worker's social support is adequate. He lives with his wife. He relates to a few friends and family. He gets along well with people in general ("people I know"). There is evidence of reduced social functioning (i.e., he prefers to stay home).

Impairment: Mild

Adaptation (ability to respond appropriately to changes in the work place): The Injured Worker is able to maintain attendance, use his own transportation, be aware of normal hazards, follow safety procedures, set realistic goals, deal with supervisors, deal with coworkers, make judgements [sic], plan, and work under specific instructions. The Injured Worker

is aware of safety issues. He is able to follow normal directions. He requires normal supervision. Restrictions or limitations are primarily physical. He would function best under normal to moderate stress conditions with work tasks that are simple to moderate in complexity. He is not at risk in the workplace.

Impairment: Mild

Concentration, Persistence, and Pace: The Injured Worker is able to sustain focus and attention long enough to permit completion of tasks in a low to moderate stress work environment. He is able to complete a normal workday and work week and maintain regular attendance from a psychological standpoint.

Impairment: Mild

* * *

PSYCHOLOGICAL TESTING

Millon Clinical Multiaxial Inventory-III (MCMI-III)

The following test findings are based on the Injured Worker's responses to a widely used standardized psychological test. As with all such tests, the validity of test results is limited by the Injured Worker's honesty and self-awareness. The report findings below should be taken as generalized probability statements.

The MCMI-III is computer scored by NCS and interpreted by Psych Screen Inc. The salient points of this interpretation are presented.

VALIDITY OF TEST RESULTS

Testing had such a severe "fake bad" exaggeration of pathology that test results are probably grossly distorted and invalid. If not due to numbering-numbering or to reading problems, this may represent either a cry for help or conscious malingering.

EMOTIONAL FUNCTIONING

Test scores may indicate a Major Depression or may represent a severe Adjustment Disorder.

Mr. Martin is a worrier who is over-ruminative. Physical symptoms due to autonomic over-arousal can exist.

Post Traumatic Stress Disorder symptoms are endorsed.

Impulse control is poor with Mr. Martin impulsively acting out without consideration of alternatives. He acts directly on feelings to gain immediate gratification with little forethought.

Mr. Martin's reported energy level is within the Normal range.

* * *

Discussion:

This Injured Worker has been involved in psychiatric-/psychological treatment since 2003. He worked up until May, 2002. At this time, the Injured Worker's symptoms of Post-Traumatic Stress Disorder are of mild severity and would not preclude him from returning to his former position. Clearly, the Injured Worker has reached maximum medical improvement. Psychological testing (MCMI-III) reveals a severe tendency toward symptom magnification.

Diagnosis: DSM-IV multi-axial classification (injury specific)

Axis I: Prolonged Post-Traumatic Stress Disorder

Axis II: Diagnosis Deferred

Axis III: See Related/Unrelated Medical Conditions

Axis IV: Unemployed/See Unrelated Life Stressors

Axis V: GAF- 65

Opinion: The following opinion is based on a reasonable degree of psychological certainty and specific to Post-Traumatic Stress Disorder (PTSD).

Question 1: Has the Injured Worker reached a maximum medical improvement with regard to each specified allowed condition? Briefly describe the rationale for your opinion. If "yes" then please continue to items #2 and #3.

The Injured Worker has reached maximum medical improvement (see Discussion).

Question 2: Based on the AMA Guides, 2nd and 5th Editions, and with reference to the Industrial Commission Medical Examination Manual, provide the estimated percentage of whole person impairment arising from each allowed psychological/psychiatric condition. Please list each condition and whole person impairment separately, and then provide a combined whole person impairment. If there is no impairment or an allowed condition, indicate zero (0) percent.

The AMA Guides 5th Edition, Chapter 14 (Mental and Behavioral Disorders) discusses an approach to evaluate and classify mental and behavioral disorders. However, neither of the Guides' 4th or 5th Editions provide impairment percentages. The Industrial Commission of Ohio requires a percent impairment be given for each allowed condition.

Therefore, a Table has been constructed for use by the examiners to assist them in classifying and estimating percent impairment, and in order to fulfill the I.C. requirements. This Table combines the principles for estimating percentage of impairment taken from the Guides 2nd Edition, Chapter 11, Table 1, and the classes of impairment taken from the Guides 5th Edition, Chapter 14, Table 14.1. A checkpoint for consistency is also offered by the Global Assessment of Functioning (GAF), as this value is inversely related to whole person percentage impairment.

<u>Area of Functioning</u>	<u>Level of Impairment</u>
Activities of Daily Living	Class II
Sustained Concentration and Memory	Class II
Social Interaction	Class II
Adaptation	Class II
GAF Value	65
Whole Person Impairment	Class II

Percentage of Permanent Impairment for PTSD: 18%

Question 3: Complete the enclosed Occupational Activity Assessment. In your narrative report, provide a discussion setting forth mental limitations resulting from the allowed condition(s).

Specific to PTSD, the Injured Worker is able to return to his former position of employment without limitations. In formulating this opinion, I am not taking into consideration the allowed physical conditions.

{¶ 12} 8. On May 29, 2010, Dr. Tosi completed a form captioned "Occupational Activity Assessment, Mental & Behavioral Examination." On the form, Dr. Tosi indicated by his mark, "[t]his Injured Worker has no work limitations."

{¶ 13} 9. On May 26, 2010, at the commission's request, relator was examined by Ron M. Koppenhoefer, M.D. In his seven-page narrative report, Dr. Koppenhoefer wrote:

Medical History: Mr. Martin is a 57-year-old right handed male who was examined on May 26, 2010 for two injuries. At the time of both injuries, he states that he was working as a police officer. His first injury occurred on January 20, 1997 while doing an arrest with a fellow officer. He states that an altercation occurred and his partner and the criminal fell on top of him. He states that this injured his right knee as well as having several abrasions.

He underwent surgery which was arthroscopic in nature. After completion of physical therapy he was able to return to work. He returned to work in July of 1997. He states that he had some weakness of his knee at that time.

During a training session on August 25, 1997 he again was injured. The injury occurred when during the training exercise he was pushed into a drainage ditch. At that time, he experienced pain involving his right knee as well as pain involving his low back. In addition, he also had pain involving his left knee.

He underwent surgery by Dr. John Turba in February of 1998 which was arthroscopic in nature followed by physical therapy. He then was able to return to work but had continual problems. He indicates that the last time he was able to work was October 31, 2002.

He indicates that he has had approximately five surgeries on his right knee. He did undergo a right total knee replacement on August 9, 2007 by Dr. Lim. Following this he was placed in physical therapy. After therapy was completed he denies having any other treatment involving his right knee.

He underwent surgery on his left knee on June 24, 2009 which was an ACL reconstruction by Dr. Lim. He indicates that this was followed by approximately six months of physical therapy.

For his chronic back problems related to his injury of August 25, 1997, he indicates that a spinal cord stimulator was placed for treatment of his low back pain as well as a right sciatic nerve injury related to his injury of August 25, 1997.

Currently, he is still having constant pain involving his lumbar spine. He describes the pain as a dull aching pain which is aggravated by bending, squatting and lifting activities. Sitting is limited to times of 15 minutes as well as standing for times of 5 minutes. The pain radiates into the posterior thigh and calf to the dorsum of his right foot. He describes this leg pain as a constant burning sensation.

* * *

Discussion: Based on my examination and taking into effect the allowed conditions in these claims, it is my medical opinion that Mr. Martin has reached maximum medical improvement for all the allowed conditions.

When using the AMA Guides Fifth Edition, he would have the following degree of impairment related to his claims[.]

* * *

The combined values chart would indicate that he has a total of a 36% impairment to the body as a whole.

Based on my examination and review of the medical records, it is my medical opinion that Mr. Martin is limited to sedentary work activities at this time based on the allowed conditions in these claims.

{¶ 14} 10. On May 26, 2010, Dr. Koppenhoefer completed a physical strength rating form. On the form, Dr. Koppenhoefer indicated by his mark that relator can perform "sedentary work."

{¶ 15} 11. On June 9, 2010, relator filed motions for leave to depose Drs. Tosi and Koppenhoefer. As to both motions, relator alleged that the doctor's report "is vague and ambiguous and cannot be cured at the hearing."

{¶ 16} 12. Following a July 23, 2010 hearing, a staff hearing officer ("SHO") issued an order denying the motions for leave to depose Drs. Tosi and Koppenhoefer. The SHO's order explains:

In the motions, the Injured Worker requested to depose Dr. Tosi and Dr. Koppenhoefer regarding their written reports.

It is the finding of the Staff Hearing Officer that Dr. Tosi examined the Injured Worker on behalf of the Industrial Commission of Ohio on 05/25/2010 to determine whether the Injured Worker was permanently totally impaired as a result of the allowed psychological condition in claim 97-319655. Dr. Tosi examined the Injured Worker and produced a report dated 06/02/2010. The Injured Worker alleges that Dr. Tosi's report is internally inconsistent and the only possible way to cure the defect is for a deposition.

It is the finding of the Staff Hearing Officer that the report of Dr. Tosi is not internally inconsistent nor vague. Any potential error or defect contained in the report can be adequately addressed or resolved by a Hearing Officer through the

adjudicatory process of the pending Permanent and Total Disability Application.

It is the finding of the Staff Hearing Officer that Dr. Koppenhoefer examined the Injured Worker on behalf of the Industrial Commission of Ohio on 05/26/2010. Dr. Koppenhoefer examined the Injured Worker to determine whether the Injured Worker was permanently and totally impaired as a result of the allowed physical conditions previously allowed in claims 97-489866 and 97-319655. The Injured Worker alleged that Dr. Koppenhoefer's report is vague and ambiguous.

It is the finding of this Staff Hearing Officer that Dr. Koppenhoefer's report is not vague and internally inconsistent. Dr. Koppenhoefer's ultimate finding that the Injured Worker is capable of sedentary work activity when solely considering the allowed conditions is not inconsistent with the restrictions listed on page three of his report. The restrictions listed on page three of the report are Dr. Koppenhoefer's notations of the Injured Worker's self-reporting of his physical abilities. The limitations listed on page three of the report are not Dr. Koppenhoefer's opinion, but the Injured Worker's self reporting of what the Injured Worker thinks his abilities are. Dr. Koppenhoefer clearly states his opinion as to the Injured Worker's physical abilities when solely considering the allowed conditions on page six of the report and the Physical Strength Rating Form attached to the end of the report. Any potential problems contained within Dr. Koppenhoefer's report can be adequately resolved by a Staff Hearing Officer adjudicating the pending Permanent and Total Disability Application.

Therefore, it is hereby the order of the Staff Hearing Officer that the Injured Worker's requests to depose Dr. Tosi and Dr. Koppenhoefer are denied.

This order is based upon the reports of Dr. Koppenhoefer dated 05/26/2010 and Dr. Tosi dated 06-02-2010, Ohio Administrative Code Section 4121-3-09 and Ohio Administrative Code Section 4121-3-34.

{¶ 17} 13. Following an October 5, 2010 hearing, an SHO issued an order denying the PTD application. The SHO's order explains:

The Staff Hearing Officer finds that the Injured Worker's condition has become permanent and he is unable to return to his former position of employment as a police officer due to the allowed conditions in the claim.

Dr. Koppenhoefer, physical medicine and rehabilitation specialist, examined the Injured Worker at the request of the Industrial Commission on 05/26/2010. Dr. Koppenhoefer opined that the Injured Worker is capable of engaging in sedentary work based upon the allowed conditions in the claim. Dr. Koppenhoefer opined that sedentary work means exerting up to ten pounds of force occasionally and/or a negligible amount of force frequently to lift, carry, push, pull or otherwise move objects. Dr. Koppenhoefer opined that sedentary work involves sitting most of the time, but may involve walking or standing for brief periods of time. Dr. Koppenhoefer opined that jobs are sedentary if walking and standing are required only occasionally and all other sedentary criteria are met.

Dr. Tosi, psychologist, examined the Injured Worker at the request of the Industrial Commission on 06/02/2010. Dr. Tosi opined that the Injured Worker, based on the allowed psychological condition, is able to sustain focus and attention long enough to permit completion of task[s] in a low to moderate stress work environment. Dr. Tosi opined that the Injured Worker is able to complete a normal work day and work week and maintain regular attendance from a psychological standpoint. Dr. Tosi opined that the Injured Worker is able to maintain attendance, use his own transportation, be aware of normal hazards, follow safety procedures, set realistic goals, deal with supervisors and co-worker's [sic], make judgements [sic], plan and work under specific instructions. Dr. Tosi opined that the Injured Worker requires normal supervision. Dr. Tosi opined that the Injured Worker would function best under normal to moderate stress conditions with work tasks that are simple to moderate in complexity. Dr. Tosi opined based upon the allowed psychological condition, that the Injured Worker is able to engage in sustained remunerative employment.

The Staff Hearing Officer finds that the capabilities listed by Dr. Koppenhoefer and Dr. Tosi are the capabilities the Injured Worker has as a result of the recognized orthopedic and psychological conditions in the claim.

The Staff Hearing Officer finds that the Injured Worker is 58 years of age and has a high school education. The Staff Hearing Officer finds that the Injured Worker has a long established work history as a police officer, fire fighter and factory worker. The Staff Hearing Officer finds the Injured Worker's employment history being long and established, demonstrates highly desirable traits such as steadiness and dependability.

The Staff Hearing Officer finds that the Injured Worker's age of 58 does not preclude training for some other employment. The Staff Hearing Officer finds that the training may include on-the-job instruction that requires only a few weeks. The Staff Hearing Officer finds it is well established there is no age which a worker must be deemed too old to learn a new job. State ex rel. Moss v. Industrial Commission (1996), 75 Ohio St.3d 414. The Staff Hearing Officer finds that the Injured Worker's twelfth grade education and steady work history are assets which will allow him to learn new work rules and procedures.

The Staff Hearing Officer finds that the Injured Worker, with the medical capabilities listed by Dr. Koppenhoefer and Dr. Tosi, together with his age of 58, twelfth grade education and steady dependable work history, render him capable of performing sustained remunerative employment. The Staff Hearing Officer further notes that the Injured Worker completed several specialized training courses at the police academy.

Accordingly, the Staff Hearing Officer finds that the Injured Worker is able to engaged [sic] in sustained remunerative employment.

All medical reports and vocational reports on file were reviewed and considered.

{¶ 18} 14. On March 15, 2011, relator, James M. Martin, filed this mandamus action.

Conclusions of Law:

{¶ 19} Three issues are presented: (1) did the commission abuse its discretion in denying relator's June 9, 2010 motions for leave to depose Drs. Tosi and Koppenhoefer; (2) did the commission abuse its discretion in relying upon the report of Dr. Koppenhoefer; and (3) did the commission abuse its discretion in relying upon the report of Dr. Tosi.

{¶ 20} The magistrate finds: (1) the commission did not abuse its discretion in denying relator's motions for leave to depose Drs. Tosi and Koppenhoefer; (2) the commission did not abuse its discretion in relying upon the report of Dr. Koppenhoefer; and (3) the commission did abuse its discretion in relying upon the report of Dr. Tosi.

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

{¶ 22} Turning to the first issue, effective April 4, 2004, Ohio Adm.Code 4121-3-09(A) states:

(7) Procedure for obtaining the oral deposition of, or submitting interrogatories to, an industrial commission or bureau physician.

(a) A request to take the oral deposition of or submit interrogatories to an industrial commission or bureau physician who has examined an injured or disabled worker or reviewed the claim file and issued an opinion shall be submitted in writing to the hearing administrator * * *.

(b) The request must set out the reasons for the request * * *.

(c) If the hearing administrator finds that the request is a reasonable one, the hearing administrator shall issue a compliance letter that will set forth the responsibilities of the party that makes the request. * * *

* * *

(d) * * * [W]hen determining the reasonableness of the request for deposition or interrogatories the hearing administrator shall consider whether the alleged defect or potential problem raised by the applicant can be adequately addressed or resolved by the claims examiner, hearing administrator, or hearing officer through the adjudicatory process within the commission or the claims process within the bureau of workers' compensation.

{¶ 23} As earlier noted, relator's stated reason for the depositions alleged that the doctors' reports are "vague, contradictory, and ambiguous and cannot be cured at hearing."

{¶ 24} In the order denying the deposition requests, the SHO found that Dr. Tosi's report "is not internally inconsistent nor vague" and that "[a]ny potential error or defect contained in the report can be adequately addressed or resolved" at the PTD hearing.

{¶ 25} The SHO also found that Dr. Koppenhoefer's report "is not vague and internally inconsistent" and that "[a]ny potential problems contained within [the] report can be adequately resolved" at the PTD hearing.

{¶ 26} The magistrate agrees with the SHO's determination that the alleged defects with respect to the reports can be adequately addressed or resolved by the SHO at the PTD hearing. See *State ex rel. Cox v. Greyhound Food Mgt., Inc.*, 95 Ohio St.3d 353, 2002-Ohio-2335.

{¶ 27} As earlier noted, the second issue is whether the commission abused its discretion in relying upon the report of Dr. Koppenhoefer.

{¶ 28} Equivocal medical opinions are not evidence upon which the commission can rely. *State ex rel. Eberhardt v. Flxible Corp.* (1994), 70 Ohio St.3d 649, 657. Equivocation occurs when a doctor repudiates an earlier opinion, renders contradictory or uncertain opinions, or fails to clarify an ambiguous statement. *Id.*

{¶ 29} A medical report can be so internally inconsistent that it cannot be some evidence upon which the commission can rely. *State ex rel. Lopez v. Indus. Comm.*, 69 Ohio St.3d 445, 1994-Ohio-458 (despite "normal" physical findings, Dr. Katz assessed a high degree of impairment and then concluded that the claimant could perform heavy foundry labor); *State ex rel. Taylor v. Indus. Comm.* (1995), 71 Ohio St.3d 582 (finding that another report from Dr. Katz contained the same infirmities as those contained in his report in *Lopez*).

{¶ 30} Ohio Adm.Code 4121-3-34(D)(3)(f) provides:

The adjudicator shall not consider the injured worker's percentage of permanent partial impairment as the sole basis for adjudicating an application for permanent and total disability.

{¶ 31} In his report, Dr. Koppenhoefer writes under the portion of his report captioned "**Medical History**":

Currently, he is still having constant pain involving his lumbar spine. He describes the pain as a dull aching pain which is aggravated by bending, squatting and lifting activities. Sitting is limited to times of 15 minutes as well as standing for times of 5 minutes. The pain radiates into the posterior thigh and calf to the dorsum of his right foot. He describes this leg pain as a constant burning sensation.

{¶ 32} Later in his report, Dr. Koppenhoefer opines that relator "is limited to sedentary work activities." Also, on the physical strength rating form, Dr. Koppenhoefer indicates by his mark that relator is capable of sedentary work. However, Dr. Koppenhoefer never states whether he agrees with relator's own self-assessment that his sitting is limited to 15 minutes at a time and that his standing is limited to 5 minutes at a time. According to relator, Dr. Koppenhoefer's failure to state in his report whether or not he agrees with relator's own self-assessment flaws the report to such extent that it cannot constitute some evidence upon which the commission can rely. The magistrate disagrees.

{¶ 33} Relator cites to no authority for the proposition that an examining doctor must state in his or her report whether or not he or she agrees with the claimant's own self-assessment that may have been reported to the doctor and noted in the report.

{¶ 34} Moreover, relator's own self-assessment is not inconsistent with the commission's definition of sedentary work. Ohio Adm.Code 4121-3-34(B)(2)(a) states:

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

{¶ 35} That relator may be limited to sitting 15 minutes at a time and standing for 5 minutes at a time does not mean that he cannot sit "most of the time" as the definition provides.

{¶ 36} That relator may need to alternate between sitting and standing during the workday does not mean that he cannot do a job that requires sitting most of the time.

{¶ 37} Relator also suggests that the report of Dr. Koppenhoefer must be eliminated from evidentiary consideration because he opines a 36 percent whole person impairment and an ability to perform sedentary work. Relator suggests that, under *Lopez*, it is internally inconsistent for Dr. Koppenhoefer to render both opinions. The magistrate disagrees. Relator's argument ignores Ohio Adm.Code 4121-3-34(D)(3)(f) as quoted above. Moreover, a 36 percent whole person impairment is not by law inconsistent with an ability to perform sedentary work.

{¶ 38} The third issue, as previously noted, is whether the commission abused its discretion in relying upon the report of Dr. Tosi.

{¶ 39} As relator points out, in his report, Dr. Tosi opines under the "**Adaption**" heading:

* * * He would function best under normal to moderate stress conditions with work tasks that are simple to moderate in complexity. * * *

{¶ 40} Under the "**Concentration, Persistence, and Pace**" heading, Dr. Tosi opines: "The Injured Worker is able to sustain focus and attention long enough to permit completion of tasks in a low to moderate stress work environment."

{¶ 41} Further, it can be noted again that Dr. Tosi opined that relator "has no work limitations" and that he can return to his former position as a police officer.

{¶ 42} On January 20, 1997, the date of relator's second injury, he was severely injured while arresting a person for domestic violence. A fight ensued when the subject resisted arrest.

{¶ 43} Clearly, it is inconsistent for Dr. Tosi to opine that relator can return to police work with no work limitations when his ability to concentrate limits him to "a low to moderate stress work environment." Under *Lopez*, Dr. Tosi's report is so internally inconsistent that it must be eliminated from evidentiary consideration.

{¶ 44} Accordingly, for all the above reasons, it is the magistrate's decision that this court issue a writ of mandamus ordering the commission to vacate its SHO's order of October 5, 2010 and, in a manner consistent with this magistrate's decision, enter a new order that adjudicates the PTD application.

/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).