[Cite as *State ex rel. Ohio State Univ. v. Indus. Comm.*, 2012-Ohio-3917.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. The Ohio State University,	:	
Relator,	:	No. 11AP-525
v.	:	(REGULAR CALENDAR)
Industrial Commission of Ohio and Scott Greentree,	:	
Respondents.	:	

D E C I S I O N

Rendered on August 28, 2012

Dinsmore & Shohl LLP, *Michael L. Squillace* and *Christen S. Hignett*, for relator.

Michael DeWine, Attorney General, *Sandra E. Pinkerton* and *Gerald H. Waterman*, for respondent Industrial Commission of Ohio.

Arthur C. Graves, for respondent Scott Greentree.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

BRYANT, J.

{¶ 1} Relator, The Ohio State University, commenced this original action requesting a writ of mandamus that orders respondent Industrial Commission of Ohio to vacate its order awarding permanent total disability compensation to respondent Scott Greentree, and to find claimant is not entitled to such compensation.

I. Facts and Procedural History

{¶ 2} Pursuant to Civ.R. 53 and Loc.R. 13(M) of the Tenth Appellate District, this matter was referred to a magistrate who issued the appended decision, including findings of fact and conclusions of law. The magistrate identified the contested issue: whether Dr. Writesel's finding that claimant has a 17 percent impairment is irreconcilable with his conclusion that claimant is permanently and totally disabled. The magistrate concluded Dr. Writesel's report is not internally inconsistent and therefore is some evidence upon which the commission could rely. Moreover, the magistrate determined the commission did not abuse its discretion in denying relator's request for reconsideration premised, in part, on a surveillance tape available before the staff hearing officer issued the decision awarding permanent total disability compensation. The magistrate thus decided the requested writ should be denied.

II. Objections

{¶ 3} Relator filed objections to the magistrate's conclusions of law:

> [I.] The Magistrate's Decision violates *State ex rel. Galion Mfg. Div. v. Haygood* (1991), 60 Ohio St.3d 38, in that the Magistrate did not find this case is one that is so extreme to justify an award of permanent total disability based solely upon the medical component of the claim.
>
> [II.] The Magistrate erred in failing to find that Dr. Writesel's opinion is "internally inconsistent" and therefore, cannot constitute "some evidence" upon which an award of permanent total disability compensation can be based, in violation of *State ex rel. Lopez v. Indus. Comm.* (1994), 69 Ohio St.3d 445, and *State ex rel. Kroger v. Johnson*, 2011-Ohio-530.
>
> [III.] The Magistrate erred by relying upon *State ex rel. Schottenstein Stores v. Indus. Comm.* 10th Dist. No. 07AP-1066, 2009-Ohio-2142, in finding that Mr. Greentree's chronic pain supports the award of permanent total disability, and by ignoring the dictates of *State ex rel. Noll v. Indus. Comm.* (1991), 57 Ohio St.3d 203.

A. *First Objection*

{¶ 4} Relator's first objection contends the magistrate's decision violates the Supreme Court's opinion in *State ex rel. Galion Mfg. Div. Dresser Industries, Inc. v.*

Haygood, 60 Ohio St.3d 38 (1991). According to relator, the Supreme Court in that case held that "permanent total disability compensation may be awarded without review of non-medical factors only in 'extreme situations where medical factors alone preclude sustained remunerative employment.' " (Emphasis sic.) (Relator's objections, at 3.)

{¶ 5} *Galion Mfg.*, however, was addressing a claimant's request that in the future the commission specifically identify non-medical disability factors relied on in granting or denying benefits. In resolving the issue, the court determined the commission need not discuss non-medical disability factors in every case, because "there are some situations where an award of such benefits may properly be based on medical factors alone." *Id.* at 40. Claimant here presents such case: Dr. Writesel concluded based on medical factors alone that claimant is not capable of sustained remunerative employment. Moreover, nothing in *Galion Mfg.* indicates compensation should be denied, even though the medical evidence supports it, unless the case is "extreme." The commission, then, did not violate *Galion Mfg.* in awarding permanent total disability compensation based on the medical evidence alone. Relator's first objection is overruled.

B. *Second and Third Objections*

{¶ 6} Because relator's second and third objections are interrelated, we address them jointly. Together, they contend Dr. Writesel's report was internally inconsistent and therefore is not some evidence on which the commission could rely. Moreover, relator asserts, *State ex rel. Schottenstein Stores Corp. v. Indus. Comm.*, 10th Dist. No. 07AP-1066, 2009-Ohio-2142, does not salvage the doctor's report. Relator's two objections largely reargue the heart of the magistrate's decision. For the reasons set forth in the decision, the objections are unpersuasive.

{¶ 7} Relator contends Dr. Writesel's report is internally inconsistent because his assessing a 17 percent impairment for claimant is not reconcilable with his ultimate conclusion that claimant is not capable of working. The magistrate's decision explains why the cases on which relator relies do not resolve the decision here: relator presents an additional factor not found in those cases but apparent in the *Schottenstein* case.

{¶ 8} In *Schottenstein*, Dr. Stewart's report assessed the claimant there with a 15 percent impairment rating but also found the claimant permanently and totally disabled due to chronic pain. This court concluded the 15 percent rating did not include the chronic

pain factor and thus did not preclude a finding of permanent total disability compensation. Likewise, here, Dr. Writesel observed claimant suffers from a significant amount of chronic pain in his low back that radiates to his legs. As the magistrate pointed out, Dr. Writesel, in finding claimant to be permanently and totally disabled, not only assessed a 17 percent impairment rating but specifically noted claimant has "persistent back pain symptoms that preclude his ability to perform any duties in a sustained functional status." (Magistrate's Decision, at ¶ 20.) Pursuant to *Schottenstein*, Dr. Writesel's 17 percent impairment rating is not inconsistent with his conclusion that claimant is incapable of sustained remunerative employment. Relator's second and third objections are overruled.

III. Disposition

{¶ 9} Following independent review pursuant to Civ.R. 53, we find the magistrate has properly determined the pertinent facts and applied the salient law to them. Accordingly, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained in it. In accordance with the magistrate's decision, we deny the requested writ of mandamus.

Objections overruled;
writ denied.

SADLER and TYACK, JJ., concur.

Appendix

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Relator,	:	No. 11AP-525
v.	:	(REGULAR CALENDAR)
Industrial Commission of Ohio and Scott Greentree,	:	
Respondents.	:	

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

Rendered on March 12, 2012

Dinsmore & Shohl LLP, *Michael L. Squillace*, and *Christen S. Hignett*, for relator.

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

Arthur C. Graves, for respondent Scott Greentree.

IN MANDAMUS

{¶ 10} Relator, The Ohio State University, 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 awarded permanent total disability ("PTD") compensation to respondent, Scott Greentree ("claimant"), and ordering the commission to find that claimant is not entitled to that compensation.

Findings of Fact:

{¶ 11} 1. Claimant has sustained numerous work-related injuries during his 26 years of employment with relator, the most significant injury and the injury upon which this PTD application is based, occurred on December 16, 2005, and is allowed for the following conditions:

> Herniated nucleus pulposus at L4-L5; dysnomia; lumbar post laminectomy syndrome; substantial aggravation pre-existing depressive disorder.

{¶ 12} 2. Claimant has received temporary total disability compensation for both the physical and psychological conditions allowed in this claim.

{¶ 13} 3. Claimant had lumbar surgery on May 18, 2006, two epidural steroid injections, several courses of physical therapy, and bi-monthly treatments and examinations by Eric A. Schaub, M.D.

{¶ 14} 4. On April 16, 2010, claimant filed his application for PTD compensation. At the time he filed his application, claimant was 51 years old, was receiving a disability retirement, had graduated from the tenth grade, but later received his GED, served in the United States Navy, had special training in plumbing and welding, and could read, write, and perform basic math.

{¶ 15} 5. Evidence from claimant's treating physician, Dr. Schaub, includes the following: (1) the February 26, 2010 letter wherein Dr. Schaub indicated that claimant's post laminectomy syndrome with persistent and marginally controlled pain significantly limited his normal activities, and ongoing psychological condition precluded him from gainful employment at this time; (2) the February 26, 2010 clinic note indicating that claimant was being referred to Dr. Orzo for pain management in hopes that Dr. Orzo could provide claimant assistance controlling his pain level; (3) the June 10, 2010 clinic note of Dr. Schaub indicating that Dr. Orzo was considering a spinal cord stimulator trial and that, at that time claimant was not permanently totally disabled and a functional capacity evaluation ("FCE") was necessary; (4) the July 23, 2010 clinic note indicating that the spinal cord stimulator trial did not significantly improve claimant's level of pain and indicating that Dr. Schaub wanted the FCE performed; (5) the August 6, 2010 clinic note indicating that claimant's level of pain remained unchanged and that the FCE was

scheduled; (6) the September 24, 2010 clinic note indicating that claimant's pain had significantly increased following the FCE which had indicated that claimant could perform in the light category; (7) the October 21, 2010 clinic note indicating that claimant needed approximately one week to recover from the FCE and that, at this time, claimant could conceivably work 20 hours per week; and (8) the December 2, 2010 clinic note noting that claimant had recently applied for PTD compensation.

{¶ 16} 6. Claimant was evaluated by Michael A. Murphy, Ph.D. In his October 12, 2009 report, Dr. Murphy indicated that claimant had chronic pain in the lower back and right leg, including right hamstring cramps, which was wearing him out. Concerning claimant's activities of daily living ("ADL"), Dr. Murphy noted that claimant drove, performed normal house work, occasionally washed cars, did his laundry, prepared microwavable meals, watched television, shopped, visited relatives, operated a self-propelled mower, performed yard work, dined out, worked on computers, and made repairs around his apartment. Dr. Murphy also noted that claimant traveled to Michigan in 2009, and that his hobbies included repairing tractors and motorcycles. Concerning social interaction, Dr. Murphy noted that claimant felt totally isolated. Concerning his adaptation (ability to respond appropriately to changes in the workplace), Dr. Murphy noted that claimant's work history was good and that he would function best under normal stress conditions with simple work tasks. Concerning claimant's concentration, persistence, and pace, Dr. Murphy concluded that claimant could complete a normal workday and work week and maintain regular attendance from a psychological standpoint. In conclusion, Dr. Murphy opined that claimant's allowed psychological condition had reached maximum medical improvement ("MMI") and that his psychological condition alone did not preclude him from performing his former occupation and that, at present, he could perform small engine repair.

{¶ 17} 7. The record contains the October 9, 2009 report of Akram Sadaka, M.D., who evaluated claimant for his allowed physical conditions. Dr. Sadaka noted that claimant continued having pain in his lower back and chronic active right S1 radiculopathy. Dr. Sadaka concluded that claimant's allowed physical conditions had reached MMI and that he was capable of sedentary work.

{¶ 18} 8. The record also contains the October 3, 2010 report of Marianne N. Collins, Ph.D., who examined claimant for his allowed psychological condition. Dr. Collins opined that claimant's allowed psychological condition had reached MMI, assessed a 30 percent whole person impairment, and opined that he was incapable of work, noting as follows:

> Mr. Scott Greentree is mildly impaired in his ability to maintain is ADLs. He is able to understand, remember, and follow instructions that are detailed in nature. His ability to pay attention, to concentrate, to persist at a reasonable pace are considered moderately impaired overall due to his depressive disorder. He would be able to withstand moderate levels of stress, and has learned how to walk away when he is becoming upset. However, he has become withdrawn, slightly mistrustful, and lives in self-isolation. He would be markedly impaired in his ability to relate to others, including coworkers and supervisors.

{¶ 19} 9. Claimant was examined by Kenneth A. Writesel, D.O., at the request of the commission. In his October 3, 2010 report, Dr. Writesel noted:

> He states that he has constant low back pain related to the injury sustained in December 2005. He states the pain radiates at times to the left calf and foot with some intermittent numbness and burning type paresthesias. The pain is made worse with prolonged activity of any type, such as walking or standing. His are palliated with rest or change of activity.

{¶ 20} Dr. Writesel concluded that claimant's allowed physical conditions had reached MMI, assessed a 5 percent whole person impairment for his dyssomnia and a 13 percent whole person impairment for claimant's allowed lumbar conditions, for a total impairment of 17 percent.[1] Dr. Writesel concluded that claimant was incapable of work as follows:

> In my opinion, Mr. Greentree is incapable of sustained remunerative employment due to the fact that he has persistent back pain symptoms that preclude his ability to perform any duties in a sustained functional status.

[1] It appears that Dr. Writesel made a mathematical error in that the total level of impairment should be 18 percent.

{¶ 21} 10. The record also contains the August 8, 2010 report of Walter H. Hauser, M.D., who examined claimant for his allowed physical conditions. Dr. Hauser concluded that claimant's allowed physical conditions had reached MMI, that he could perform medium level work, lifting up to 40 pounds on a regular basis, and that claimant was no longer benefiting from his current treatment. Dr. Hauser concluded that claimant could return to work.

{¶ 22} 11. The record also contains the August 23, 2010 report of Richard H. Clary, M.D., who examined claimant for his allowed psychological condition. Dr. Clary concluded that claimant's allowed psychological condition had reached MMI and that the psychological condition did not cause any limitations or restrictions on his ability to work. In Dr. Clary's opinion, claimant's limitations were caused by his pain.

{¶ 23} 12. On August 17, 2010, claimant underwent the FCE. The evaluator noted self-limiting behavior, i.e., claimant stopped tasks before maximum effort was reached, which could be caused by pain, psychosocial issues or attempts to manipulate the test results. The evaluator concluded that claimant could perform light-duty work, provided that he be able to alternate between sitting, standing, and walking.

{¶ 24} 13. A vocational assessment was performed by Al Walker, M.S. In his November 21, 2010 report, Mr. Walker concluded that claimant could perform at least light-strength work and that, after taking into consideration the medical examinations, transferable skills analysis, and labor market analysis, Mr. Walker also concluded that there are numerous jobs for which claimant has demonstrated the aptitudes and abilities, general educational development, and physical capabilities to perform.

{¶ 25} 14. In a tentative order mailed October 22, 2010, a staff hearing officer ("SHO") indicated that PTD compensation should be awarded. The SHO relied on the medical reports of Drs. Writesel and Collins and concluded that from a physical and psychological standpoint, claimant was incapable of performing sustained remunerative employment.

{¶ 26} 15. Relator objected and requested a hearing.

{¶ 27} 16. A hearing was held before an SHO on November 29, 2010 and resulted in an order granting claimant PTD compensation based solely upon the report of Dr. Writesel and without consideration of the non-medical disability factors.

{¶ 28} 17. Relator filed a request for reconsideration and attached video surveillance taken November 13, 2010, and Dr. Hauser's December 13, 2010 report indicating that claimant's activities in the video were consistent with the findings following the FCE and he was not permanently totally disabled.

{¶ 29} 18. In an order mailed January 28, 2011, the commission denied relator's request for reconsideration.

{¶ 30} 19. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶ 31} Relator contends that the report of Dr. Writesel does not constitute some evidence upon which the commission could rely in awarding claimant PTD compensation because Dr. Writesel only found a 17 percent impairment. It is relator's contention that this low impairment is irreconcilable with Dr. Writesel's conclusion that claimant is permanently and totally disabled. Relator also contends that the commission abused its discretion by denying its motion for reconsideration.

{¶ 32} The magistrate finds that the report of Dr. Writesel does constitute some evidence upon which the commission could rely and that the commission did not abuse its discretion by denying relator's request for reconsideration.

{¶ 33} In order for this court to issue a writ of mandamus as a remedy from a determination of the commission, relator must show a clear legal right to the relief sought and that the commission has a clear legal duty to provide such relief. *State ex rel. Pressley v. Indus. Comm.*, 11 Ohio St.2d 141 (1967). A clear legal right to a writ of mandamus exists where the relator shows that the commission abused its discretion by entering an order which is not supported by any evidence in the record. *State ex rel. Elliott v. Indus. Comm.*, 26 Ohio St.3d 76 (1986). On the other hand, where the record contains some evidence to support the commission's findings, there has been no abuse of discretion and mandamus is not appropriate. *State ex rel. Lewis v. Diamond Foundry Co.*, 29 Ohio St.3d 56 (1987). Furthermore, questions of credibility and the weight to be given evidence are clearly within the discretion of the commission as fact finder. *State ex rel. Teece v. Indus. Comm.*, 68 Ohio St.2d 165 (1981).

{¶ 34} 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., 69 Ohio St.3d 693 (1994). 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 nonmedical factors. *State ex rel. Stephenson v. Indus. Comm.*, 31 Ohio St.3d 167 (1987). Thus, a claimant's medical capacity to work is not dispositive if the claimant's nonmedical factors foreclose employability. *State ex rel. Gay v. Mihm*, 68 Ohio St.3d 315 (1994). 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.*, 57 Ohio St.3d 203 (1991). Relator's challenge to the report of Dr. Writesel is that Dr. Writesel's report is internally inconsistent because his assessment of a 17 percent impairment is irreconcilable with his ultimate conclusion that claimant is incapable of working.

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

{¶ 36} 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) (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.*, 71 Ohio St.3d 582 (1995) (finding that another report from Dr. Katz contained the same infirmities as those contained in his report in *Lopez*).

{¶ 37} Relator first cites the *Lopez* case above referenced in support of its argument that Dr. Writesel's report is so internally inconsistent that it cannot constitute some evidence to support the commission's decision. In *Lopez*, Dr. Katz's physical findings upon examination were essentially normal. In spite of essentially normal physical findings, Dr. Katz assessed a 50 percent impairment yet, at the same time, concluded that the claimant could return to his former position of employment performing heavy-duty foundry work.

{¶ 38} The commission sent Dr. Katz a copy of the claimant's job description indicating that it was comprised of exclusively physical labor including the requirement to

lift and carry between 26 to 50 pounds, 70 times per day, and 51 to 100 pounds, 30 times a day. After reading this description, Dr. Katz indicated that his opinion remained unchanged.

{¶ 39} The commission relied on the report of Dr. Katz and, following an analysis of the non-medical disability factors, concluded that the claimant was not permanently and totally disabled.

{¶ 40} Following the filing of a mandamus complaint in this court, a writ of mandamus was issued on grounds that the commission's order did not satisfy the requirements of *Noll*, 57 Ohio St.3d 203, and the matter was returned to the commission for further consideration.

{¶ 41} Both parties appealed and the claimant challenged Dr. Katz's report. The court concluded that, although unequivocal, Dr. Katz's report was so internally inconsistent that it could not constitute some evidence to support the commission's decision. Specifically, the court was unable to reconcile the seeming contradictions between the normal findings, the high (50 percent) degree of impairment, and the conclusion that the claimant could perform heavy-duty foundry labor. Relator argues that the exact opposite situation is presented here and that a low percentage of impairment is irreconcilable with an opinion that one is permanently totally disabled.

{¶ 42} Relator also cites *State ex rel. Roy v. Indus. Comm.*, 83 Ohio St.3d 199 (1998), wherein the court, in denying a writ of mandamus seeking to vacate an order denying a PTD application, found that a medical report which assessed a low (15 percent) impairment constituted some evidence to support the commission's denial of the application. Relator argues that, as in *Roy*, this court must find that Dr. Writesel's 17 percent impairment is low and, inasmuch as a report assessing a 15 percent impairment was used to deny an application for PTD compensation, relator contends that the same result must be had here.

{¶ 43} This magistrate disagrees.

{¶ 44} In *State ex rel. Schottenstein Stores Corp. v. Indus. Comm.*, 10th Dist. No. 07AP-1066, 2009-Ohio-2142, the employer challenged Dr. Stewart's report on several grounds. One challenge concerned the fact that Dr. Stewart's 15 percent impairment rating was low and could not constitute some evidence upon which the commission could

rely to award PTD compensation to the claimant, Haskell Hysell. In adopting the decision of its magistrate, this court stated:

> Analysis begins with the observation that in the caselaw, the Supreme Court of Ohio has, on occasion, characterized an impairment rating in its discussion of medical reports at issue in a mandamus action involving workers' compensation. For example, in *State ex rel. Beiber v. Metco Welding Co.* (1996), 77 Ohio St.3d 1, 3, 670 N.E.2d 463, the court states:
>
> > We have similar difficulty with the commission's characterization of a fifty-nine percent impairment as being "low to moderate." We note that in *State ex rel. Lopez v. Indus. Comm.* (1994), 69 Ohio St.3d 445, 449, 633 N.E.2d 528, 531, we viewed a fifty percent impairment as high. * * *
>
> In *State ex rel. Domjancic v. Indus. Comm.* (1994), 69 Ohio St.3d 693, 635 N.E.2d 372, the court refused to grant a full writ of mandamus pursuant to *State ex rel. Gay v. Mihm* (1994), 68 Ohio St.3d 315, 626 N.E.2d 666, following the court's determination that the commission's order denying PTD compensation failed to comply with *State ex rel. Noll v. Indus. Comm.* (1991), 57 Ohio St.3d 203, 567 N.E.2d 245. The *Domjancic* court instead granted a limited writ, explaining:
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> > * * * Generally, in cases where *Gay* relief has been recommended, the commission's order has coupled vocationally unfavorable evidence with medical evidence that assessed a relatively high degree of physical impairment. This case does not fit that profile. * * *
>
> *Id.* at 697, 567 N.E.2d 245.
>
> In *Domjancic,* the commission had relied upon the medical report of commission specialist Dr. Joseph I. Gonzalez who assessed a "16% permanent partial impairment of the whole person for the allowed conditions recognized in this claim." *Id.* at 693, 567 N.E.2d 245.
>
> Presumably, the *Domjancic* court viewed a 16 percent permanent partial impairment as not being a "relatively high degree of physical impairment." *Id.* at 697, 567 N.E.2d 245.

> Notwithstanding that cases can be found in which the courts have characterized an impairment rating, relator cites to no case that holds that a doctor's impairment rating for the allowed conditions precludes him or her from rendering an opinion that the claimant is incapable of sustained remunerative employment. The lack of a direct correlation between a doctor's impairment rating and the claimant's ability to perform sustained remunerative employment is recognized at Ohio Adm.Code 4121-3-34(D)(3)(f):
>
> > 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.
>
> Moreover, relator's suggestion that Dr. Stewart's 15 percent impairment rating is low fails to recognize that, with respect to claimant's chronic pain, Dr. Stewart cautioned "[t]here is no other criteria in the Guides for additional impairment beyond this 15%" for the allowed conditions of the claim. Thus, the 15 percent rating does not include the chronic pain.
>
> In short, there is no inconsistency as a matter of law between Dr. Stewart's narrative evaluation of the allowed conditions and his conclusion on the physical strength rating form that "[t]his injured worker is not capable of physical work activity."

Schottenstein Stores at ¶ 59-65.

{¶ 45} The magistrate finds that this court's decision in *Schottenstein Stores* supports the commission's order here. Relator may argue that the *Schottenstein Stores* case is not on point because there was extensive discussion in that case that Hysell suffered chronic pain syndrome. The magistrate notes that there is evidence in this case that claimant has a significant amount of chronic pain in his lower back that radiates to his legs. In finding that he was permanently and totally disabled, Dr. Writesel specifically noted that claimant had "persistent back pain symptoms that preclude his ability to perform any duties in a sustained functional status." Pain can support a court finding of PTD. As in *Schottenstein Stores*, the magistrate would deny relator's request for a writ of mandamus.

{¶ 46} To the extent that relator relies on *State ex rel. Kroger Co. v. Johnson*, 128 Ohio St.3d 243, 2011-Ohio-530, the argument is not persuasive. *Kroger* involved an award of permanent partial disability due to the alleged loss of use of the right hand of Dan C. Johnson. This court found that Dr. Renneker's assessment of a 27 percent hand impairment was inconsistent with her conclusion that Johnson had lost the total use of his hand. (Johnson retained 73 percent of his hand's use and was not a total loss.) The standard applied in determining loss of use issues differs significantly from the standard applied in determining whether an injured worker is permanently totally disabled.

{¶ 47} Relator also contends that the commission abused its discretion by denying his request for reconsideration. The magistrate disagrees.

{¶ 48} In its motion for reconsideration, relator argued that it had newly discovered evidence in the form of surveillance taken prior to the hearing before the SHO and a report by Dr. Hauser written after the hearing before the SHO constituted newly discovered evidence that claimant was capable of performing outside the restrictions set forth in Dr. Writesel's report.

{¶ 49} In response, the commission and claimant argue that the surveillance video did not constitute newly discovered evidence which relator could not have presented to the commission at the time of the hearing.

{¶ 50} Although Dr. Hauser's report analyzing claimant's activities and comparing them to the medical evidence was written after the SHO hearing, the video surveillance itself was taken prior to the hearing and relator could have presented this as evidence from which the SHO could have concluded that claimant could perform work at some level. Also, relator could have requested a short continuance so that Dr. Hauser could review the video.

{¶ 51} In reality, relator is asking this court to reweigh the evidence. However, questions of credibility and the weight to be given evidence are clearly within the discretion of the commission as fact finder and is immaterial whether other evidence, even if greater in quality and/or quantity, supports a decision contrary to the commission's. *Teece*, 68 Ohio St.2d 165; *State ex rel. Pass v. C.S.T. Extraction Co.*, 74 Ohio St.3d 373 (1996). Whether or not this court would have relied on Dr. Writesel's report is immaterial. Dr. Writesel's report constitutes some evidence and the commission

does not abuse its discretion when it relies on the report of a doctor which constitutes some evidence.

{¶ 52} Based on the foregoing, it is this magistrate's conclusion that relator has not demonstrated that the commission abused its discretion in awarding PTD compensation to claimant and this court should deny the 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).