[Cite as *State ex rel. Petermann L.L.C. v. Ragle*, 2012-Ohio-5659.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Petermann LLC,	:	
	:	
Relator,	:	
v.	:	No. 11AP-556
Linda D. Ragle and Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on December 4, 2012

Frost Brown Todd LLC, *Christine L. Robek*, and *Joanne W. Glass*, for relator.

Harris & Burgin, L.P.A., and *Jeffrey W. Harris*, for respondent Linda D. Ragle.

Michael DeWine, Attorney General, and *Rema A. Ina*, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

BROWN, P.J.

{¶ 1} Relator, Petermann LLC, 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 that granted permanent total disability ("PTD") compensation to Linda D. Ragle ("claimant"), respondent, and to enter an order denying said compensation.

{¶ 2} This matter was referred to a court-appointed magistrate pursuant to Civ.R. 53(C) and Loc.R. 13(M) of the Tenth District Court of Appeals. The magistrate issued the

appended decision, including findings of fact and conclusions of law, and recommended that this court grant relator's request for a writ of mandamus. The commission and claimant have filed objections to the magistrate's decision.

{¶ 3} The commission's sole objection and claimant's second objection will be addressed together, as they are related. Claimant and the commission argue in these objections that the magistrate erred when he found that Dr. Craig Cleveland's reports did not constitute some evidence upon which the commission could rely to grant PTD because they were equivocal. They first contend the magistrate incorrectly found Dr. Cleveland's statement in his September 8, 2010 report that claimant had reached maximum medical improvement ("MMI") was contradicted by his checkmark on the September 29, 2010 C-84 form indicating that claimant had not reached MMI. The parties note that no one ever disputed that claimant had reached MMI, and the employer accepted Dr. Cleveland's statement of MMI in order to cease temporary total disability compensation, so the magistrate could not rely on this ground to invalidate Dr. Cleveland's opinions.

{¶ 4} We agree with the magistrate. Although claimant calls it "preposterous" that a checkmark on a C-84 indicating a claimant has not reached MMI can be found to contradict and invalidate a report by the same doctor that finds the claimant has reached MMI, claimant provides no authority for her claim. Simply put, Dr. Cleveland indicated in one document that claimant had reached MMI and indicated in other documents that claimant had not reached MMI. These are clearly contradictory statements and conclusions. We also find the fact that the parties apparently never disputed whether claimant reached MMI did not preclude the magistrate from raising the issue on his own in determining whether Dr. Cleveland's opinions constituted some evidence to support PTD.

{¶ 5} Also, to the extent that claimant argues that the magistrate's determination in this respect reweighed and reinterpreted the evidence, which is beyond the scope of review of the magistrate, we disagree. The magistrate did not weigh the evidence in making the above determination. The conclusion that Dr. Cleveland's reports were contradictory does not involve the weighing or interpreting of the reports. Therefore, this argument is without merit.

{¶ 6} Claimant and the commission next contend that the magistrate incorrectly found Dr. Cleveland's September 8, 2010 office note to be internally inconsistent, if not equivocal, because Dr. Cleveland stated that claimant could not perform a sedentary job but then also stated in the same paragraph that claimant could conduct a job search with the understanding of her limitations. Claimant asserts that, in making the statement that claimant could conduct a job search, the doctor was trying to make the point that, although a job search could be performed, no jobs actually exist that claimant could perform. Similarly, the commission proposes that even claimants who are medically PTD may physically "participate" in a job search, but Dr. Cleveland understood that claimant's limitations would make it impossible for her to actually perform any job found during such a search.

{¶ 7} We find claimant's and the commission's arguments unavailing. Claimant's and the commission's strained interpretation of Dr. Cleveland's statement regarding claimant's conducting a job search is without any support and not consistent with the context of the statement. There would be no reason for Dr. Cleveland to point out that claimant could conduct a futile job search. Instead, a plain reading of Dr. Cleveland's statement is that he believed that claimant could conduct a search for jobs within her limitations, which is wholly inconsistent with his prior statement that claimant was incapable of performing a sedentary job. For these reasons, we find the commission's sole objection and the claimant's second objection are without merit.

{¶ 8} Claimant argues in her first objection that the magistrate erred when he found Dr. Michael Rozen's report did not constitute some evidence. The magistrate found that the commission could not selectively rely upon one finding in Dr. Rozen's report to support its finding of PTD while ignoring the rest of Dr. Rozen's report and his ultimate conclusion that claimant is not permanently and totally disabled. Although claimant asserts that the commission was permitted to do so, the more pertinent issue regarding the commission's use of Dr. Rozen's report is whether the conclusion the commission drew from its use of the doctor's report was correct.

{¶ 9} Contrary to the commission's determination, the magistrate found that the medical restrictions found in Dr. Rozen's report did not prohibit all sedentary work, and we agree. In his report, Dr. Rozen stated that claimant should refrain from work that

requires lifting weight greater than five pounds. The commission found that this did not meet the definition of sedentary work, which is defined as (1) exerting up to ten pounds of force occasionally, and/or (2) exerting a negligible amount of force frequently. However, the magistrate found that the ten-pound restriction is a "ceiling" not a "floor." In other words, the definition of "sedentary" does not require an employee to be able to lift ten pounds to fit within that definition; rather, any ability to exert force below the ten-pound threshold would fit within the definition of "sedentary." Claimant does not directly address this point, and we agree with the magistrate's analysis in this respect.

{¶ 10} Furthermore, the magistrate found that, notwithstanding the issue of the ten-pound restriction, the definition of "sedentary" also includes the ability to exert a negligible amount of force frequently, and Dr. Rozen did not restrict claimant to exerting a negligible amount of force frequently. Claimant argues that it is "impossible" to conclude that the commission did not take the negligible force requirement into account because the commission found that "Dr. Rozen's conclusions as to the Injured Worker's physical capabilities do not meet the definition of sedentary work, but are below sedentary." We disagree with claimant's view. The commission's unexplained, generic statement that Dr. Rozen's conclusions do not meet the definition of sedentary work does not demonstrate that it considered the negligible force component of the definition of "sedentary." The commission does not mention the negligible force issue anywhere in the order. Therefore, we find the magistrate's criticism of the commission's order was valid. Thus, claimant's first objection is overruled.

{¶ 11} After an examination of the magistrate's decision, an independent review of the record pursuant to Civ.R. 53, and due consideration of the commission's and the claimant's objections, we overrule the objections and adopt the magistrate's findings of fact and conclusions of law. Claimant's writ of mandamus is granted, and the matter is remanded to the commission.

Objections overruled; writ of mandamus granted; cause remanded.

CONNOR and DORRIAN, JJ., concur.

[Cite as *State ex rel. Petermann L.L.C. v. Ragle*, 2012-Ohio-5659.]

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Petermann LLC,	:	
Relator,	:	
v.	:	No. 11AP-556
Linda D. Ragle and Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on July 18, 2012

Frost Brown Todd LLC, *Christine L. Robek*, and *Joanne W. Glass*, for relator.

Harris & Burgin, L.P.A., and *Jeffrey W. Harris*, for respondent Linda D. Ragle.

Michael DeWine, Attorney General, and *Rema A. Ina*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶ 12} In this original action, relator, Petermann LLC, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order awarding permanent total disability ("PTD") compensation to respondent Linda D. Ragle, and to enter an order denying the compensation.

Findings of Fact:

{¶ 13} 1. On November 2, 2007, Linda D. Ragle ("claimant") sustained an industrial injury while employed as a bus driver for relator, a state-fund employer. On that date, relator fell to the ground as she was walking to her bus.

{¶ 14} 2. The industrial claim (No. 07-392049) is allowed for:

> Sprain lumbosacral; contusion right knee; substantial aggravation of pre-existing L5-S1 spondylolisthesis; L5-S1 lumbar radiculopathy; L5-S1 nerve root compression.

{¶ 15} 3. On January 16, 2009, claimant underwent low back surgery performed by Grigory Goldberg, M.D. In his operative report of that date, Dr. Goldberg wrote:

> PROCEDURES:
>
> [One] Posterior lumbar fusion of L4-L5 and L5-S1.
> [Two] Pedicle instrumentation of right and left L4, right and left L5 and right and left S1.
> [Three] Diskectomy with endplate preparation and fusion of L5-S1.
> [Four] Fusion of L5-S1 with two PEEK cages.
> [Five] Bilateral foraminotomy with laminectomy and decompression of L5-S1 and L4-L5.
> [Six] Intraoperative x-ray interpretation.

{¶ 16} 4. Following her surgery, claimant came under the care of attending physician Craig P. Cleveland, M.D.

{¶ 17} 5. On May 19, 2010, claimant was examined by Dr. Cleveland. His office note of that date states:

> Assessment / Plan
> 1. refill pain meds, 2. try the Pamelor for pain control and to help depression sx, 3. Voc Rehab – not appropriate at this time due to persistent pain, still adjusting meds. 4. pt not looking forward to injections, stimulators or really anything involving a surgical procedure or needles, was reluctant to agree to a trial period w/ a spinal stim unit, but unless she gets near complete relief would not wish to have a permanent placement of a unit, 5. FCE done to determine capabilities (see PT note 04/2010) and she has lit[t]le capability to perform job duties let alone RTW, 6. consider BDI testing and submit C9 for additional dx of depression[.]

{¶ 18} 6. On July 19, 2010, Dr. Cleveland completed a C-84 based upon his May 19, 2010 examination. On the C-84, Dr. Cleveland certified a period of temporary total disability ("TTD") beginning the date of injury, i.e. November 2, 2007 to an estimated return-to-work date of September 30, 2010.

{¶ 19} 7. On July 21, 2010, claimant was again examined by Dr. Cleveland at his office. The July 21, 2010 office note states:

> Musculoskeletal: Motor Strength and Tone: abnormal motor strength; able to step up w/ L leg w/o prob, hesitation and tremor in the R leg on step. Joints, Bones, and Muscles: tenderness; positive sitting leg extension R side, positive sitting root R. Extremities: no cyanosis or edema.
>
> Neurologic: Gait and Station: irregular gait.
>
> Back: Thoracolumbar Appearance: abnormal posture standing and sitting; limited ROM – Flex 60, Lat 40, Rot 60 degrees, remarkable pain esp w/ movement, core weakness seen best 2-3/5 with leg raise and lowering giving way at 40 deg, unable to raise scapula of the exam table w/ abd flexion.
>
> * * *
>
> Assessment / Plan
> 1. cont to show weakness inthe [sic] R leg, core weakness and instability, 2. consider back brace for support to allow better pain control and function – C9, 3. no change in meds, discussed that could incr pain meds tho in past has resulted in drowsiness[.]

{¶ 20} 8. On July 22, 2010, Dr. Cleveland completed a C-9 requesting authorization for a functional capacity evaluation ("FCE"). The managed care organization ("MCO") approved the FCE.

{¶ 21} 9. On August 17 and 19, 2010, claimant underwent the approved FCE. The FCE was performed by physical therapist Tina Cope, P.T.

{¶ 22} 10. Tina Cope issued a five-page narrative FCE report. On the first page of the report, under the heading "Conclusions" the report states:

> **Summary of Findings:**
>
> At this time, Ms. Ragle has demonstrated functional tolerances and lifting capabilities consistent at or below Sedentary Physical Demand Category (PDC) as defined by the Dictionary of Occupational Titles (DOT). Ms. Ragle presented for a functional evaluation to determine her current physical capabilities. Ms. Ragle sustained her injury in November 2007 and has [been] off work since November 2007. Specific functional deficits are outlined in the following pages. Ms. Ragle reports pain from 4-10/10 and an Oswestry score of 88%. Active mobility measurements revealed limitations in the cervical and lumbar spine and manual muscle test measurements showed weakness of the right lower extremity. Ms. Ragle demonstrated limitations in positional and mobility tolerances as noted in the tables below with limitations due to pain. Material handling tasks were demonstrated safely and with fair body mechanics after verbal cuing. Apprehension, self limitation due to fear of re-injury and pain complaints limited the patient significantly in her overall function. These behaviors and limitations could be a barrier to further improvement in the patient's condition. An accurate assessment of Ms. Ragle's current functional abilities have been established with today's testing.
>
> **Recommendations:** Ms. Ragle is currently functioning at or below a sedentary level work ability due to complaints of severe low back and right lower extremity pain. At this time, Ms. Ragle does not demonstrate the functional abilities to safely perform the required job duties of a bus driver. Until the barriers noted above are addressed further physical therapy intervention is not recommended.

{¶ 23} 11. On August 30, 2010, Dr. Cleveland completed a form provided by the Ohio Bureau of Workers' Compensation ("bureau") captioned "Physician's Report of Work Ability" ("MEDCO-14"). On the form, Dr. Cleveland listed July 21, 2010 as the examination date. He indicated by his mark that claimant can lift or carry up to 10 pounds on an "occasional" basis where "occasional" is defined as "1-33%." He further indicated by his marks that claimant cannot bend, reach below knee level or push/pull. Claimant can sit on an occasional basis. Claimant cannot lift above shoulder level.

{¶ 24} The form asks the doctor to indicate by his mark whether the restrictions are permanent or temporary. Dr. Cleveland marked that the restrictions are permanent. The form then asks "if temporary, how long?" In response, Dr. Cleveland wrote "8/24/2010."

{¶ 25} On another part of the form, Dr. Cleveland listed August 24, 2010 as the date that the industrial injury had reached maximum medical improvement ("MMI").

> In the space provided, Dr. Cleveland wrote:
>
> The restrictions are based on the FCE completed August 17. Her abilities as demonstrated on this FCE suggest that she has reached MMI.

{¶ 26} 12. On September 8, 2010, claimant was again examined by Dr. Cleveland at his office. In his office notes, Dr. Cleveland wrote:

> Assessment / Plan
> [One] activity from FCE suggests cannot do a sedentary job due to pain from sitting, cannot from FCE perform anyother [sic] work duties without medications, total disabilities is the only route, cannot do voc rehab due to her inability to perform in PT but could look at job search with the understanding of her limitations, 2. adjust meds to get better pain relief and decr ms spasm, 3. encouraged her to be as active as possible[.]

{¶ 27} 13. On September 8, 2010, Dr. Cleveland wrote to claimant's counsel:

> Ms. Ragle was injured while performing the duties of her employment with Peterman[n] Bus Service. The injuries lead to low back surgery, but only after a significant delay which directly lead to persistent symptoms.
>
> The patient participated in physical therapy, but was unable to progress sufficiently secondary to the pain she was experiencing. An FCE was done to evaluate her current presentation. The FCE showed that she was unable to participate in the testing due to pain and weakness. The FCE placed her abilities at or below sedentary. This description is essential since she cannot do a sedentary job due to pain and would need to be limited to sitting no more than 20 to 30 minutes at a time.

> The FCE shows that she cannot perform any job due to the pain, and is additionally limited due to medications. There was the suggestion of looking at a vocational rehabilitation program (work conditioning and work hardening). This is not an option since the patient could not participate in physical therapy at a level to progress her to either conditioning or hardening.
>
> The patient is considered MMI due to her injury, successful surgery but sub-optimal results due to the delay in surgical intervention. Her inability to participate and progress in therapy will not allow her to return to her previous position as a bus driver, and to any position at this time as described above and in the FCE. She is considered totally disabled at this time.

{¶ 28} 14. On September 15, 2010, claimant filed an application for PTD compensation. In support, claimant submitted Dr. Cleveland's September 8, 2010 report to claimant's counsel.

{¶ 29} 15. On September 29, 2010, Dr. Cleveland completed a C-84 certifying TTD from November 2, 2007 to an estimated return-to-work date of November 30, 2010. The C-84 form asks the examining physician:

> Has the work related injury(s) or disease reached a treatment plateau at which no fundamental functional or physiological change can be expected despite continuing medical or rehabilitative intervention? (Maximum Medical Improvement)
>
> In response, Dr. Cleveland marked the "No" box.

{¶ 30} The C-84 form asks the physician to list the "[d]ate of last exam or treatment." Dr. Cleveland failed to respond to this query.

{¶ 31} 16. On October 19, 2010, at relator's request, claimant was examined by orthopedic surgeon Michael J. Rozen, M.D. In his 13-page narrative report dated October 24, 2010, Dr. Rozen opined:

> **QUESTIONS AND RESPONSES:**
>
> * * *

Question #1: Considering all of the allowed physical conditions in the claim, is Ms. Ragle capable of performing sustained remunerative employment? If so, at what level? What restrictions, if any does she have related to all the allowed conditions? Explain. Please complete the attached activity assessment.

Answer #1: To a reasonable degree of medical certainty, Ms. Ragle states she [is] in constant pain for which she takes oral medications. She states that she can only sit or stand for relatively short intervals of time of 10 to 15 minutes before having to change position. To a reasonable degree of medical certainty, Ms. Ragle can participate in sedentary work employment that allows her to frequently change from a sitting to a standing position and does not confine her to a specific workplace. Doing telephone calls for corporations, such as Expeditor are certainly an employment option the cla[i]mant could participate in. It is acknowledged that she will need to have work conditions that allow her to change positions from sitting to standing to walking so that she can accommodate her needs for her pain medication and variable cycles in her pain discomfort. The work should allow her to work with frequent changes in position between sitting and standing so that she can accommodate her own desires to alter her body position. She should refrain from work that requires bending, stooping, squatting, pulling, pushing, or lifting or carrying weight greater than five pounds.

Question #2: Can Ms. Ragle perform her previous position at Petermann as described by the attached job descriptions? What about other positions such as monitor?

Answer #2: To a reasonable degree of medical certainty, Ms. Ragle is unable to perform her previous position as a bus driver at Petermann. To a reasonable degree of medical certainty, from a physical demand viewpoint after reviewing the job description of a "monitor[,]" Ms. Ragle is able to perform the essential job functions of a monitor.

Question #3: What further treatment, if any, is recommended as medically necessary and related to the

> allowed physical conditions in the claim? Is Ms. Ragle stable enough to participate in vocational rehabilitation? Explain.
>
> **Answer #3: To a reasonable degree of medical certainty, the claimant has reached maximum medical improvement and is in the maintenance phase of treatment. She is currently being treated with various oral medications. To a reasonable degree of medical certainty, the claimant is stable enough to participate in vocational rehabilitation.**
>
> * * *
>
> Question #6: Please offer any additional insight you feel is relevant.
>
> **Answer #6: Organizations such as Expeditor have home based work programs that are sedentary in nature and allow the individual to alter between a sitting and standing position and to work their own hours depending on their clinical symptomatology. This type of program would be ideal for Ms. Ragle.**
>
> Question #7: In your medical opinion-based on a reasonable degree of medical certainty and the allowed conditions-is Ms. Ragle permanently and totally disabled? Please present rationale.
>
> **Answer #7: To a reasonable degree of medical certainty, based on allowed conditions Ms. Ragle is not permanently and totally disabled. She is able to participate in sedentary work.**

{¶ 32} 17. On November 23, 2010, Dr. Cleveland completed another C-84. He certified TTD from November 2, 2007 to an estimated return-to-work date of January 31, 2011 based on a November 15, 2010 examination.

{¶ 33} 18. On December 1, 2010, at the commission's request, claimant was examined by Richard T. Sheridan, M.D. In his six-page narrative report, Dr. Sheridan opined:

> **DISCUSSION & OPINION**
>
> [One] The injured worker has reached maximum medical improvement with regard to each specified allowed

> condition. She has resolved the lumbosacral sprain. She has resolved the contusion to her right knee. She has resolved the substantial aggravation of pre-existing L5-S1 spondylolisthesis through the lumbar spine fusion. She has resolved the L5-S1 lumbar radiculopathy through lumbar spine fusion. She has resolved the L5-S1 nerve root compression through lumbar spine fusion.
>
> [Two] Based on the **AMA Guides Fifth Edition** and with reference to the Industrial Commission Medical Examination Manual, the estimated percentage for the sprain lumbosacral is 0% and for the contusion of right knee 0%. For the substantial aggravation of pre-existing L5-S1 spondylolisthesis she merits 24% whole-person impairment. I went to Table 15-7 (IIF) on Page 404 and allocated 12% for the double level fusion. I went to Table 15-8 on Page 407 and Table 15-9 on Page 409 and allocated 4% for loss in flexion, 5% for loss in extension, and 2% for loss in lateral flexion to either side. That gives 11% whole-person impairment. I went to Table 15-18 on Page 424 and allocated 2% whole-person impairment for L5 hypesthesia in the right lower extremity. I went to the Combined Values Chart on Page 604 and combined 12% and 11% and got 22% and combined 22% and 2% and got 24% whole-person permanent partial impairment.
>
> [Three] Due to the fact that I believe she is severely impaired referable to right lower extremity function, I believe her residual functional capacity is for sedentary work only.

{¶ 34} 19. On December 1, 2010, Dr. Sheridan completed a Physical Strength Rating form. On the form, Dr. Sheridan indicated by his mark that claimant is capable of "sedentary work."

{¶ 35} 20. On January 24, 2011, Dr. Cleveland completed yet another C-84 on which he extended TTD to an estimated return-to-work date of March 31, 2011 based on a December 28, 2010 examination.

{¶ 36} 21. Following a February 3, 2011 hearing, a staff hearing officer ("SHO") issued an order denying the PTD application. The SHO's order explains:

> The Injured Worker sustained this injury on 11/02/2007 when she was working for the named employer as a bus driver. On the date of injury she fell when she stepped on a rock. The claim is recognized for a conditions [sic] involving

her right knee and, more significantly, involving her low back. The Injured Worker has undergone a surgical procedure on her back in January of 2009. Since the surgical procedure, she continues to have symptoms in her low back and into her lower extremity. She has not returned to any work since 2008.

In support of the application, the Injured Worker submitted a medical report from Dr. Craig Cleveland, dated 09/08/2010. Dr. Cleveland has been the Injured Worker's treating physician. He had ordered a functional capacity evaluation for the Injured Worker to determine her residual functional capacity since the surgery. Dr. Cleveland indicated in his report that the Injured Worker was currently performing at less than a sedentary level in her activities of daily living. Dr. Cleveland indicated that the Injured Worker would be unable to participate in physical therapy in order to increase her capacity due to the Injured Worker's current pain level. He opined that the functional capacity evaluation showed that the Injured Worker could not perform any job and that her abilities were at or below a sedentary work level. He stated that the Injured Worker had reached maximum medical improvement because she has had a surgical procedure and there was no further treatment regimen planned, but that her results post-surgery were sub-optimal.

The Injured Worker was examined at the request of the Employer by Dr. Rozen on 10/19/2010. Dr. Rozen produced a report, dated 10/24/2010, detailing his opinion based upon that exam. Dr. Rozen stated that the Injured Worker can participate in sedentary work employment provided she be allowed to frequently change positions from sitting to standing. However, he also stated that she should refrain from work activity that requires lifting or carrying weight greater than five pounds.

The Hearing Officer finds that the sedentary work is defined by the Industrial Commission as exerting up to ten pounds of force occasionally and/or a negligible amount of force frequently. The Hearing Officer finds that Dr. Rozen's conclusions as to the Injured Worker's physical capabilities do not meet the definition of sedentary work, but are below sedentary.

Finally, the Injured Worker was examined at the request of the Industrial Commission by Dr. Sheridan on 12/01/2010.

> The Hearing Officer reviewed Dr. Sheridan's report in which he concluded that the Injured Worker could perform sedentary work. The Hearing Officer does not find Dr. Sheridan's report to be persuasive. Dr. Sheridan stated in his conclusion that the Injured Worker has resolved each of the conditions that are recognized in the claim, including the condition of radiculopathy. However, he also indicates that the injured worker is "severely impaired" due to her right lower extremity function. He does not explain these two seemingly contradictory statements. The Hearing Officer finds that the Injured Worker's allowed radiculopathy condition has not resolved. Her treating physician indicates that the Injured Worker has significant symptoms of low back pain and pain and weakness into the lower extremity. The Hearing Officer finds that the Injured Worker's current impairments are the result of these conditions.
>
> Based upon the conclusion of Dr. Cleveland, and upon the restrictions set forth by Dr. Rozen, the Hearing Officer finds that the Injured Worker is unable to perform sedentary work activity. The Hearing Officer finds that the Injured Worker is unable to participate in physical therapy in order to increase her residual functional capacity. Therefore, the Hearing Officer finds that the Injured Worker is unable to perform the duties of sustained remunerative employment.
>
> The Application for Permanent and Total Disability, filed on 09/15/2010, is hereby granted. Permanent and total disability benefits are ordered to commence effective 09/08/2010, the date of Dr. Cleveland's report, and to continue without suspension unless future facts or circumstances should warrant the stopping of the award.
>
> Because the Hearing Officer finds that the medical evidence alone supports the conclusion that the Injured Worker is permanently and totally disabled, no consideration of vocational factors is warranted.
>
> This order is based upon the functional capacity evaluation dated 08/19/2010, the conclusion of Dr. Cleveland dated 09/08/2010 and the restrictions set forth by Dr. Rozen in a report dated 10/24/2010.

{¶ 37} 22. On February 25, 2011, relator moved for reconsideration of the SHO's order of February 3, 2011.

{¶ 38} 23. On April 16, 2011, the three-member commission, on a two-to-one vote, mailed an interlocutory order stating:

> It is the finding of the Industrial Commission that the Employer has presented evidence of sufficient probative value to warrant adjudication of the request for reconsideration regarding the alleged presence of a clear mistake of law of such character that remedial action would clearly follow.
> Specifically, it is alleged that the Staff Hearing Officer made a clear mistake of law by finding the Injured Worker was unable to perform sustained remunerative employment because she is limited to work that is less than sedentary. The ability to perform less than sedentary employment does not automatically equate to a finding that the Injured Worker is unable to perform sustained remunerative employment and thus, is permanently and totally disabled.
>
> Based on these findings, the Industrial Commission directs that the Employer's request for reconsideration, filed 02/25/2011, is to be set for hearing to determine whether the alleged mistake of law as noted herein is sufficient for the Industrial Commission to invoke its continuing jurisdiction.
>
> In the interest of administrative economy and for the convenience of the parties, after the hearing on the question of continuing jurisdiction, the Industrial Commission will take the matter under advisement and proceed to hear the merits of the underlying issue. The Industrial Commission will thereafter issue an order on the matter of continuing jurisdiction under R.C. 4123.52. If authority to invoke continuing jurisdiction is found, the Industrial Commission will address the merits of the underlying issue.

{¶ 39} 24. Following a May 17, 2011 hearing, the three-member commission, on a two-to-one vote, denied reconsideration. The commission's May 17, 2011 order explains:

> After further review and discussion, it is the finding of the Industrial Commission that it does not have authority to exercise continuing jurisdiction pursuant to R.C. 4123.52 and State ex rel. Nicholls v. Indus. Comm. (1998), 81 Ohio St.3d 454, State ex rel. Foster v. Indus. Comm. (1999), 85 Ohio St.3d 320, and State ex rel. Gobich v. Indus. Comm., 103 Ohio St.3d 585, 2004-Ohio-5990. The Employer has failed to meet its burden of proving that sufficient grounds exist to justify the exercise of continuing jurisdiction.

> Therefore, the Employer's request for reconsideration, filed 02/25/2011, is denied, and the Staff Hearing Officer order, issued 02/17/2011, remains in full force and effect.

{¶ 40} 25. On June 23, 2011, relator, Petermann LLC, filed this mandamus action.

Conclusions of Law:

{¶ 41} The commission, through its SHO's order of February 3, 2011, awarded PTD compensation based upon a finding that the allowed conditions of the industrial claim alone prohibit claimant from performing any sustained remunerative employment without reference to the vocational factors. *See* Ohio Adm.Code 4121-3-34(D)(2)(a).

{¶ 42} In rendering its finding, the commission states in the last paragraph of its order that it relies upon "the functional capacity evaluation dated 08/19/2010, the conclusion of Dr. Cleveland dated 09/08/2010 and the restrictions set forth by Dr. Rozen in a report dated 10/24/2010."

{¶ 43} It can be noted that Dr. Cleveland's September 8, 2010 conclusion is premised upon his interpretation of the FCE.

{¶ 44} Two main issues are presented: (1) does the September 8, 2010 report of Dr. Cleveland constitute some evidence supporting the commission's finding that claimant is medically prohibited from performing all sustained remunerative employment, and (2) did the commission abuse its discretion in determining that the medical restrictions set forth in Dr. Rozen's report prohibit all sedentary work and thus all sustained remunerative employment?

{¶ 45} The magistrate finds: (1) the September 8, 2010 report of Dr. Cleveland does not constitute some evidence supporting the commission's finding that claimant is medically prohibited from performing all sustained remunerative employment, and (2) the commission did abuse its discretion in determining that the medical restrictions set forth in the report of Dr. Rozen prohibit all sedentary work and thus all sustained remunerative employment.

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

{¶ 47} Turning to the first issue, analysis begins with the observation that Dr. Cleveland is an examining and treating physician. On a C-9 dated July 22, 2010, he requested authorization of the FCE that was performed by physical therapist Tina Cope on August 17 and 19, 2010. In his September 8, 2010 report, Dr. Cleveland interprets the FCE in light of his own knowledge of claimant's overall medical condition obtained through his examinations as treating physician. With his interpretation of the FCE, Dr. Cleveland takes into account his knowledge of claimant's pain and medications. Thus, even though physical therapist Tina Cope opined that claimant "is currently functioning at or below a sedentary level work ability," Dr. Cleveland opines "[s]he is considered totally disabled at this time."

{¶ 48} In short, the FCE is a resource that Dr. Cleveland uses in rendering his own opinion based upon his medical expertise. Obviously, Tina Cope is not a physician and, thus, her FCE standing alone, cannot support a commission finding on residual functional capacity.

{¶ 49} Notwithstanding the above analysis, Dr. Cleveland's September 8, 2010 report is problematical when viewed with other medical reports from Dr. Cleveland. Some basic law needs to be set forth.

{¶ 50} The Supreme Court of Ohio has held that a medical report can be so internally inconsistent that it cannot constitute some evidence supporting a commission decision. *State ex rel. Lopez v. Indus. Comm.*, 69 Ohio St.3d 445 (1994). By extension, the court held in *State ex rel. M. Weingold & Co. v. Indus. Comm.*, 97 Ohio St.3d 44, 2002-Ohio-5353, that substantial inconsistencies between two C-84s generated by the same examination compel the same result as in *Lopez*.

{¶ 51} This court followed the *M. Weingold* rationale in *State ex rel. Genuine Parts Co. v. Indus. Comm.*, 160 Ohio App.3d 99, 2005-Ohio-1447 (10th Dist.), wherein this court stated:

> Contrary to the respondent's contention, Dr. Snell's C-84 is not evidence upon which the commission could rely because the C-84 is inconsistent with Dr. Snell's examination notes. Recognizing this inconsistency does not require the weighing of evidence as respondent argues. We give no greater weight to either the C-84 or the examination notes. We simply find, as did the magistrate, that they relate to the same

> examination and that they are inconsistent. The fact that the inconsistency arises from statements contained in two different documents rather than in one report is not significant. Again, it is clear that both documents were prepared by Dr. Snell and relate to the same physical examinations. As the magistrate notes, the same rationale was applied in *State ex rel. M. Weingold & Co. v. Indus. Comm.*, 97 Ohio St.3d 44, 2002-Ohio-5353 * * *, which involved substantial inconsistencies between two C-84s arising from the same examination.

{¶ 52} In *Genuine Parts,* Dr. Snell certified the allowed lumbosacral sprain as the cause of TTD when his office notes failed to mention a lumbosacral sprain but did discuss serious disallowed and nonallowed conditions.

{¶ 53} Although Dr. Cleveland has examined claimant on many occasions, the September 8, 2010 examination is key. Apparently, that examination produced three documents: (1) the September 8, 2010 office note, (2) the September 8, 2010 report to claimant's counsel in support of the PTD application, and (3) the September 29, 2010 C-84 certifying TTD from the date of injury to an estimated return-to-work date of November 30, 2010.

{¶ 54} On the September 29, 2010 C-84, as earlier noted, Dr. Cleveland failed to indicate the "[d]ate of last exam or treatment." However, the record before this court discloses that September 8, 2010 is the date of examination most recent to September 29, 2010. Accordingly, the presumption is that the September 29, 2010 C-84 is premised upon the September 8, 2010 examination.

Ohio Adm.Code 4121-3-34(D)(1)(f) provides:

> If, after hearing, the adjudicator finds that the injured worker's allowed medical condition(s) is temporary and has not reached maximum medical improvement, the injured worker shall be found not to be permanently and totally disabled because the condition remains temporary.

{¶ 55} Dr. Cleveland's certification of TTD on the September 29, 2010 C-84 which includes his opinion that the industrial injury is not at MMI is inconsistent with Dr. Cleveland's opinion in his September 8, 2010 report that "[t]he patient is considered MMI." In short, the C-84 and the September 8, 2010 report present inconsistent opinions

as to whether the industrial injury is at MMI. Given this inconsistency, the September 8, 2010 report upon which the commission relied must be eliminated from evidentiary consideration.

{¶ 56} The magistrate further observes that the September 8, 2010 office note itself is internally inconsistent, if not equivocal, on claimant's ability to perform sustained remunerative employment. While stating that the "FCE suggests [claimant] cannot do a sedentary job," the office note later states "but could look at job search with the understanding of her limitations." Obviously, if claimant is unable to perform sustained remunerative employment, it is futile to perform a job search.

{¶ 57} The internal inconsistency of the September 8, 2010 office note itself undermines the reliability of the September 8, 2010 report.

{¶ 58} In short, based upon the above analysis, neither the FCE nor the September 8, 2010 report of Dr. Cleveland present some evidence upon which the commission may rely.

{¶ 59} Turning to the second issue, the commission relied upon the report of Dr. Rozen to support its finding that the industrial injury prohibits all sustained remunerative employment even though Dr. Rozen opined in his report that claimant "can participate in sedentary work employment that allows her to frequently change from a sitting to a standing position and does not confine her to a specific workplace."

{¶ 60} The commission relied upon the report of Dr. Rozen to support its finding that claimant is medically prohibited from all sustained remunerative employment even though Dr. Rozen opined that "claimant is stable enough to participate in vocational rehabilitation."

{¶ 61} The commission relied upon the report of Dr. Rozen to support its finding even though Dr. Rozen opined that it "would be ideal" for claimant to participate in "home based work programs that are sedentary in nature."

{¶ 62} In *State ex rel. O'Brien v. Cincinnati, Inc.*, 10th Dist. No. 07AP-825, 2008-Ohio-2841, at ¶ 10, this court summarized relevant case law:

> [T]he commission cannot simply rely on a physician's "bottom line" identification of an exertional category without examining the specific restrictions imposed by the physician in the body of the report. See *State ex rel. Owens-Corning*

> *Fiberglas Corp. v. Indus. Comm.*, Franklin App. No. 03AP-684, 2004-Ohio-3841; and *State ex rel. Howard v. Millennium Inorganic Chemicals*, Franklin App. No. 03AP-637, 2004-Ohio-6603. In both *Owens-Corning* and *Howard*, the doctor indicated that the injured worker could perform at a certain strength level, and yet, the rest of the report indicated greater restrictions on the injured worker that would actually render him incapable of performing the strength level work that the doctor had indicated he could perform. This court held in *Owens-Corning* and *Howard* that the commission cannot simply rely upon a determination that an injured worker can perform at a certain strength level; rather, the commission must review the doctor's report and actually make certain that any physical restrictions the doctor listed correspond with an ability to actually perform at the exertional level indicated by the doctor.

{¶ 63} In his report, Dr. Rozen sets forth claimant's medical restrictions:

> Ms. Ragle can participate in sedentary work employment that allows her to frequently change from a sitting to a standing position and does not confine her to a specific workplace. It is acknowledged that she will need to have work conditions that allow her to change positions from sitting to standing to walking so that she can accommodate her needs for her pain medication and variable cycles in her pain discomfort. The work should allow her to work with frequent changes in position between sitting and standing so that she can accommodate her own desires to alter her body position. She should refrain from work that requires bending, stooping, squatting, pulling, pushing, or lifting or carrying weight greater than five pounds.

{¶ 64} In the SHO's order of February 3, 2011, the commission explains why it finds that Dr. Rozen's restrictions do not permit even sedentary work:

> Dr. Rozen stated that the Injured Worker can participate in sedentary work employment provided she be allowed to frequently change positions from sitting to standing. However, he also stated that she should refrain from work activity that requires lifting or carrying weight greater than five pounds.
>
> The Hearing Officer finds that the sedentary work is defined by the Industrial Commission as exerting up to ten pounds of

> force occasionally and/or a negligible amount of force frequently. The Hearing Officer finds that Dr. Rozen's conclusions as to the Injured Worker's physical capabilities do not meet the definition of sedentary work, but are below sedentary.

{¶ 65} The commission's finding that Dr. Rozen's restrictions do not permit sedentary work is premised upon a misreading of Ohio Adm.Code 4121-3-34(B)(2)(a) which provides:

> "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.

{¶ 66} In effect, the commission interprets its rule to mean that all sedentary work is precluded unless the claimant has the residual functional capacity to exert at least ten pounds of force occasionally. As relator puts it, the commission here views ten pounds of exertional capacity as a "floor" rather than a "ceiling." (Relator's reply brief, at 3.)

{¶ 67} Clearly, the commission's interpretation of its rule is incorrect and thus constitutes an abuse of discretion.

{¶ 68} In his report, Dr. Rozen states that claimant "should refrain from work that requires * * * lifting or carrying weight greater than five pounds." Significantly, Dr. Rozen does not restrict or prohibit claimant from exerting a negligible amount of force frequently which, under the definition, is an alternative basis for finding a capacity for sedentary work. Thus, even if it can be said that a five pound exertional capacity cannot satisfy that part of the definition, Dr. Rozen placed no restriction as to work that requires a negligible amount of force frequently. Thus, the commission's analysis fails to consider the definition in its entirety.

{¶ 69} In short, the commission did not have discretion to view Dr. Rozen's restrictions as prohibiting all sedentary work.

{¶ 70} Given that analysis, Dr. Rozen's report is not some evidence supporting the commission's determination that the industrial injury alone prohibits all sustained remunerative employment.

{¶ 71} On remand of this cause to the commission for further proceedings, Dr. Rozen's report remains in play for the commission's consideration as to residual functional capacity. The commission is free to accept or reject Dr. Rozen's report. However, the commission cannot interpret the medical restrictions as a prohibition of all sedentary employment.

{¶ 72} 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 February 3, 2011 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).