[Cite as *State ex rel. Patterson v. Indus. Comm.*, 2013-Ohio-1016.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Sharon Patterson,	:	
Relator,	:	
v.	:	No. 11AP-1063
Industrial Commission of Ohio and Richard Goldfarb,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on March 19, 2013

Crowley, Ahlers & Roth Co., L.P.A., and *Edward C. Ahlers*, for relator.

Michael DeWine, Attorney General, and *Patsy A. Thomas*, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

CONNOR, J.

{¶ 1} Relator, Sharon Patterson ("relator"), 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 denying her application for permanent total disability ("PTD") compensation and to enter a new order awarding said compensation.

{¶ 2} The court referred this matter to a magistrate pursuant to Civ.R. 53(C) and Loc.R. 13(M) of the Tenth District Court of Appeals. The magistrate issued a decision, including findings of fact and conclusions of law, which is appended to this decision. Therein, the magistrate concluded the commission was not required to accept the vocational report of Robert E. Breslin, M.S., C.R.C. ("Breslin"). The magistrate further found the commission did not err in determining that relator's failure to pursue vocational rehabilitation reflected negatively on her PTD application. Accordingly, the magistrate recommended denial of relator's request for a writ of mandamus.

{¶ 3} Relator filed objections to the magistrate's decision. The commission filed a memorandum opposing the objections. Relator also filed a reply. This cause is now before the court for a full review regarding relator's objections.

{¶ 4} As a preliminary matter, the commission has filed a motion to strike relator's reply memorandum, which was filed without seeking leave, and argues that said reply is unauthorized. Although Civ.R. 53(D)(3)(b) and Loc.R. 13(M)(3) provide for the filing of objections to a magistrate's decision, the commission contends that neither rule allows the objecting party to file a "reply" or an additional response to a memorandum opposing the objections. The commission argues this court has routinely rejected additional pleadings filed beyond those authorized by the applicable rules.

{¶ 5} We agree with the commission. Therefore, we grant the commission's motion to strike relator's reply memorandum, and consequently, we shall not consider it in our review of relator's objections. *See State ex rel. Cynthia Davis v. Pub. Emps. Retirement Bd.*, 174 Ohio App.3d 135, 2007-Ohio-6594, ¶ 3 (10th Dist.) (although the local rule requires the objecting party to file a memorandum in support of objections to the magistrate's decision simultaneously with its objections and also authorizes the filing of a memorandum in opposition to said objections, it does not provide for additional memoranda).

{¶ 6} We shall now discuss the presented objections. Relator raises the following three objections: (1) the magistrate erred by accepting and ratifying a decision which failed to provide the meaningful explanation required under *State ex rel. Noll v. Indus. Comm.*, 57 Ohio St.3d 203 (1991), (2) the magistrate erred in accepting a decision that reflects a misunderstanding and/or a misapplication of the directives set forth in *State ex*

rel. Stephenson v. Indus. Comm., 31 Ohio St.3d 167 (1987), and (3) the magistrate erred in adopting a decision from the commission that was based upon an incorrect understanding and/or application of vocational rehabilitation concepts. These objections are essentially the same arguments which were considered by the magistrate.

{¶ 7} Because relator's first and second objections are related, we shall address them together.

{¶ 8} In her first objection, relator contends the magistrate erred in accepting the findings of the staff hearing officer ("SHO") because the SHO failed to analyze both the medical and non-medical factors and provide a "meaningful explanation," pursuant to the requirements of *Noll*, as to its consideration of both sets of factors. Specifically, relator contends that, in light of Breslin's vocational report, in which he opined relator was precluded from performing sedentary, unskilled, and semi-skilled work, and in light of the report of Andrew Freeman, M.D., setting forth relator's extensive physical restrictions, the commission must explain its consideration of Breslin's report and explain the reasoning for its conclusion that relator can still work.

{¶ 9} In her second objection, relator submits the magistrate erred in upholding the SHO's denial of PTD because the SHO failed to provide an analysis of how the non-medical factors in *Stephenson*, in combination with relator's medical impairment, would permit sustained remunerative employment, given the physical restrictions set forth by Dr. Freeman, and given the vocational report of Breslin.

{¶ 10} Under *Stephenson*, the commission must consider the non-medical factors of age, education, and work history, in addition to other factors, such as physical, psychological, and sociological factors, in its PTD analysis. Thorough consideration of the *Stephenson* factors is essential to the determination of PTD where a claimant's medical capacity to do work is not dispositive and the non-medical factors indicate that the claimant cannot realistically return to the job market. *State ex rel. Gay v. Mihm*, 68 Ohio St.3d 315 (1994). Furthermore, pursuant to *Noll*, the commission must also state what evidence it relied upon and provide a brief explanation for its decision.

{¶ 11} Relator contends the commission was required to consider Breslin's observations and conclusions and explain why it disagreed with them. However, it is well-settled law that the commission is the expert on non-medical factors, including

vocational evidence. *State ex rel. Jackson v. Indus. Comm.*, 79 Ohio St.3d 266 (1997). Thus, the commission was not required to accept Breslin's vocational report. And, as stated by the magistrate, the commission can reject the conclusion of a rehabilitation report and still draw its own conclusion from the same non-medical information. *State ex rel. Ewart v. Indus. Comm.*, 76 Ohio St.3d 139, 141 (1996). Furthermore, the SHO was not required to discuss a report upon which it did not rely. *State ex rel. Lovell v. Indus. Comm.*, 74 Ohio St.3d 250, 252 (1996) (orders are only required to cite the evidence that was relied upon, not enumerate all evidence considered). Finally, the commission's order complies with *Noll* and *Stephenson* because the SHO thoroughly considered the required non-medical factors and adequately explained the reasoning behind its decision.

{¶ 12} Accordingly, relator's first and second objections are overruled.

{¶ 13} In her third objection, relator argues the magistrate erred because the SHO's decision was based upon an incorrect understanding and/or application of the concepts of vocational rehabilitation.

{¶ 14} The Supreme Court of Ohio has consistently found PTD claimants generally have an obligation to undergo rehabilitation opportunities. In *State ex rel. B.F. Goodrich Co. v. Indus. Comm.*, 73 Ohio St.3d 525 (1995), the Supreme Court acknowledged that the commission lacked the authority to force a claimant to participate in rehabilitation services, but also that the court was "disturbed" by the idea that a claimant might simply decide to forgo retraining opportunities that could enhance re-employment opportunities. *Id.* at 529. The court further stated that "[a]n award of permanent total disability compensation should be reserved for the most severely disabled workers and should be allowed only when there is no possibility for re-employment." *Id.*

{¶ 15} " '[I]t is not unreasonable to expect a claimant to participate in return-to-work efforts to the best of his or her abilities or to take the initiative to improve reemployment potential. While extenuating circumstances can excuse a claimant's nonparticipation in reeducation or retraining efforts, claimants should no longer assume that a participatory role, or lack thereof, will go unscrutinized.' " *State ex rel. Franklin Cty. Bd. of Commrs. v. Indus. Comm.*, 10th Dist. No. 10AP-1016, 2012-Ohio-279, ¶ 38, quoting *State ex rel. Wilson v. Indus. Comm.*, 80 Ohio St.3d 250, 253-54 (1997).

{¶ 16} Here, there is nothing in the record to indicate that, at the time her vocational rehabilitation file was open, relator submitted medical evidence to the bureau indicating vocational rehabilitation was medically prohibited, or that she was medically unable to participate in vocational rehabilitation. Relator herself did not respond to the bureau's inquires, but her counsel did respond on her behalf, simply stating she did not believe there was any type of work that she could do on a sustained basis, as a result of her pain. Given this, the commission did not abuse its discretion in finding that relator's failure to pursue vocational rehabilitation constituted a negative reflection upon her application. Accordingly, we overrule relator's third objection.

{¶ 17} In conclusion, after an independent review, pursuant to Civ.R. 53, we find the magistrate has properly determined the pertinent facts and applied the appropriate law. Therefore, relator's objections to the magistrate's decision are overruled, and we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein. In accordance with the magistrate's decision, we deny the requested writ of mandamus.

Objections overruled;
writ of mandamus denied;
motion to strike granted.

BROWN and DORRIAN, JJ., concur.

A P P E N D I X

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Sharon Patterson,	:	
Relator,	:	
v.	:	No. 11AP-1063
Industrial Commission of Ohio and Richard Goldfarb,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on August 10, 2012

Crowley, Ahlers & Roth Co., L.P.A., and *Edward C. Ahlers*, for relator.

Michael DeWine, Attorney General, and *Patsy A. Thomas*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶ 18} In this original action, relator, Sharon Patterson, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate the July 14, 2011 order of its staff hearing officer ("SHO") that denied relator's application for permanent total disability ("PTD") compensation, and to enter an order granting the compensation.

Findings of Fact:

{¶ 19} 1. On April 9, 2003, relator sustained an industrial injury while employed as the caregiver for respondent Richard Goldfarb.

{¶ 20} 2. The industrial claim (No. 03-365538) is allowed for:

> Sprain right shoulder; tear right supraspinatus; sprain of neck; tear right rotator cuff; biceps tendon rupture, right; localized primary osteoarthritis right shoulder; herniated disc at C3-C4 and C4-C5; adhesive capsulitis shoulder, right; herniated disc C5-C6.

{¶ 21} 3. Relator was last employed in June 2006. She began receiving temporary total disability ("TTD") compensation from the Ohio Bureau of Workers' Compensation ("bureau").

{¶ 22} 4. On August 13, 2009, orthopedic surgeon Stephen Haverkos, M.D., examined relator. In his six-page narrative report, Dr. Haverkos opined: "She has reached [maximum medical improvement]."

{¶ 23} 5. Following a November 23, 2009 hearing, an SHO, citing the report of Dr. Haverkos, terminated TTD compensation based upon a finding that relator is at maximum medical improvement ("MMI"). TTD was terminated effective September 28, 2009, the date of the district level hearing.

{¶ 24} 6. On October 8, 2009, finding that relator had been disabled since June 23, 2006, an administrative law judge of the Social Security Administration awarded relator Social Security Disability Benefits.

{¶ 25} 7. Earlier, by letter dated August 5, 2009, the bureau informed relator:

> You have been referred and found eligible for consideration of vocational rehabilitation services to assist you with your return to work. Your Managed Care Organization, 3Hab, will now review your file and contact you regarding your ability to benefit from vocational rehabilitation at this time. Participation in vocational rehabilitation services is voluntary.

{¶ 26} 8. On August 19, 2009, relator's counsel responded by fax to the bureau's August 5, 2009 letter:

> Thank you for sending me a copy of your recent letter to Ms. Patterson dated August 5, 2009, indicating that Ms. Patterson had been found eligible for consideration of vocational rehabilitation services. I have discussed this with Ms. Patterson. She would like nothing better than to be able to go back to work but unfortunately does not believe that that is a possibility at this time. In this regard, she continues to have significant neck, left shoulder and radiating left arm problems, with severe intractable pain. She simply does not believe that there is any type of work that she could do on a sustained basis given the level of her pain. She is, in fact, pursuing a Social Security disability application at the present time.
>
> In view of the above, I would ask that you notify the MCO, 3-Hab, that Ms. Patterson is not going to be able to participate in a rehabilitation program. Again, she regrets that this is the case and if anything changes, we will certainly let you know.

{¶ 27} 9. On March 5, 2010, a bureau vocational rehabilitation case manager completed bureau form RH-21 captioned "Vocational Rehabilitation Closure Report." On the form, the vocational case manager wrote:

> She never responded to my attempts. Spoke w/ the [attorney of record] and he advised she has just received SSDI and is not physically feasible for services and would like it closed.
>
> * * *
>
> [Injured Worker] was granted SSDI and is not interested in vocational rehabilitation per [attorney of record].

{¶ 28} 10. Earlier, on January 29, 2010, Jose O. Martinez, M.D., wrote to relator's counsel:

> As you know, Ms. Patterson has been under our pain management program since October 2, 2008 via the request of John Jacquemin, MD, orthopedic surgeon at Freiberg Orthopedics. Ms. Patterson was initially seen at this clinic on 10/2/08 for her above stated conditions in her claim.
>
> * * *
>
> I am of the medical opinion that Ms. Patterson is totally and permanently disabled secondary to her progressive weakness

> and worsening pain affecting her neck and right upper extremity requiring ongoing narcotic pain medications. She had undergone right shoulder surgical procedure on 08//2006 [sic] with Glenn Reinhart, MD, orthopedic surgeon and cervical fusion at C4/C5 performed by John Jacquemin, MD, orthopedic surgeon on 01/2008.
>
> The objective physical findings on Ms. Patterson indicated ongoing and persistent weakness and numbness of the right upper extremity and cervical region, requiring massive narcotic medications for the control of her pain. She has progressive right shoulder pain and weakness affecting also her right upper extremity.
>
> Conclusion/Discussion:
>
> I am of the medical opinion that Ms. Patterson is totally and permanently disabled based on the following objective findings: Abnormal advanced imaging studies of the cervical spine and right shoulder indicating the presence of cervical disc placement at C3/C4 and C4/C5. Moreover, her right shoulder imaging study revealed ruptured bicipital tendon and rotator cuff tear, which had been repaired by Dr. Reinhart in 2006.
>
> In conclusion, I am of the opinion that Ms. Patterson is totally and permanently disabled from gainful and remunerative employment and is not a candidate for vocational rehabilitation program due to her physical instability.

{¶ 29} 11. On March 23, 2010, relator filed an application for PTD compensation. In support, relator submitted the January 29, 2010 report of Dr. Martinez.

{¶ 30} 12. On April 26, 2010, at the commission's request, relator was examined by Andrew Freeman, M.D., who is board certified in preventive medicine (occupational medicine). In his five-page narrative report, Dr. Freeman opined that the allowed physical injuries of the claim produce a 36 percent whole person impairment.

{¶ 31} 13. Also on April 26, 2010, Dr. Freeman completed a physical strength rating form. On the form, Dr. Freeman indicated by his mark that relator is capable of "sedentary work." The form asks the examining physician to state "FURTHER limitations, if indicated." (Emphasis sic.) In response, Dr. Freeman wrote:

> [W]ith no repetitive use of the right arm or hand, no reaching with the right arm, and no required neck flexion, extension, turning or tilting more than 5 degrees[.]

{¶ 32} 14. At relator's request, vocational expert Robert E. Breslin, prepared a nine-page report dated June 16, 2010. The Breslin report states:

> **Analysis of Work History:**
>
> The claimant has a history of **semi-skilled, medium work** (as described by the U.S. Department of Labor in their occupational information) in the closely related positions Nurse Assistant and Home Health Aide. She indicated that both of these positions were performed at the heavy level of exertion due to the need to lift, push, pull and otherwise move heavy patients.
>
> She also has some part-time experience working in the semi-skilled, medium position of Janitor.
>
> **Transferability of Work Skills:**
>
> **Ms. Patterson did not acquire work skills that transfer to jobs at a lower exertional level than her past work in spite of her semi-skilled work history.** All of her nursing and nursing related skills involved direct patient care, which requires lifting, carrying, pushing, pulling, standing and walking. The exertional demands of these jobs in terms of lifting, carrying, pushing, pulling, standing and walking, either as described in the D.O.T. or as performed by Ms. Patterson, far exceed the physical capabilities described by Dr. Freeman * * *.
>
> * * *
>
> **Analysis of Vocational Implications of Provided Medical Assessments:**
>
> * * *
>
> The "Physical Strength Rating Form" submitted by **Dr. Freeman** restricted Ms. Patterson to sedentary work with additional restrictions on dominant hand use. In addition, Dr. Freeman placed severe limitations on Ms. Patterson's cervical range of motion. All of these restrictions have vocational implications whether considered separately or in

combination. Obviously, she would not be capable of performing light, medium or heavy work given Dr. Freeman's opinion.

Dr. Freeman's restrictions on repetitive hand use and reaching with the dominant hand and arm would eliminate access to sedentary, unskilled and semi-skilled occupations. As noted above, Ms. Patterson has not acquired skills transferable to skilled sedentary occupations. She also does not have the level of educational attainment required of skilled work.

In addition, the limitation of neck flexion, extension, turning and titling to no more than five degrees would, in and of itself, eliminate sedentary, unskilled and semi-skilled work activity. Sedentary work is performed at a bench, table, desk or counter and requires the ability [to] move the head to a greater degree than the very minimal amount allowed by Dr. Freeman's restrictions. An individual working at a sedentary work station would be required, at a minimum, to look down at an angle greater than five degrees to see objects on the work surface (e.g. objects being assembled or text being read).

Both the restriction on hand use and the restriction on neck movement provided by Dr. Freeman would, if considered individually, eliminate access to sedentary, unskilled and semi-skilled occupations. Additionally, these restrictions would eliminate access to most sedentary, skilled jobs. Obviously, Ms. Patterson is also precluded from performing sedentary, skilled occupations by the absence of acquired skills that transfer to sedentary work.

Affect of Age, Education and Work History on Employability:

Age: Ms. Patterson's age of 53 makes her a "person of middle age" according to the classification system of the Ohio Industrial Commission. In general, however, individuals over the age of 50 have a more difficult time obtaining employment than do younger individuals of comparable education, work experience and skill background. They remain unemployed for longer periods of time and often accept employment in occupations below their previous skill and earning levels. Thus, Ms. Patterson's

> age would be considered a liability when considering her potential employability.
>
> Education: Ms. Patterson's 11th grade education makes her an individual of "limited education" according to the Ohio Industrial Commission classification. The lack of a high school diploma or equivalency diploma is a barrier to employment in a significant percentage of entry-level unskilled occupations.
>
> Work Experience: Ms. Patterson's medium, semi-skilled work history did not provide her with skills transferable to work within her capabilities or with highly marketable skills. As a result, her work experience is not a vocational asset given her current capabilities and limitations.
>
> **Employability Opinion:**
>
> Based on Ms. Patterson's age, education, work experience and acquired work skills, and in light of the medical information reviewed regarding her current capabilities and limitations, including the analysis of the vocational limitations of those factors outlined above, it is my professional opinion that she is unable to perform any competitive occupation that exists in the regional or national economy.

(Emphasis sic.)

{¶ 33} 15. Following a July 28, 2010 hearing, an SHO mailed an order on August 24, 2010 that denies the PTD application.

{¶ 34} 16. On September 9, 2010, relator moved for reconsideration of the SHO's order of July 28, 2010.

{¶ 35} 17. On October 22, 2010, on a two-to-one vote, the three-member commission mailed an order denying reconsideration.

{¶ 36} 18. On January 13, 2011, relator filed in this court a mandamus action which was assigned case No. 11AP-45.

{¶ 37} 19. On April 21, 2011, in case number 11AP-45, this court entered its journal entry of dismissal, stating:

> On April 18, 2011, relator, through counsel, filed a Civ.R. 41(A) notice of dismissal which this court accepts. Accordingly, this action is dismissed with prejudice effective

> April 18, 2011. Costs shall be assessed against respondent Industrial Commission of Ohio.

{¶ 38} 20. On June 21, 2011, an SHO mailed an order acknowledging this court's April 21, 2011 entry, vacating the SHO's order of July 28, 2010, and ordering relator's PTD application to be reheard. The June 21, 2011 order explains:

> Pursuant to the Judgment Entry of the Tenth Appellate District Court of Appeals, dated 04/21/2011, which was filed with the Industrial Commission on 06/10/2011, for the case of State ex rel. Sharon Patterson v. Industrial Commission, assigned Case No. 11AP0045, it is found that the requested Writ of Mandamus has been dismissed with prejudice.
>
> Therefore, it is the order of the Industrial Commission that the previous order issued 07/28/2010, findings mailed 08/24/2010, which denied the application for permanent total disability, be vacated; and a new order be issued, as so instructed by the court.
>
> Accordingly, this claim is to be referred to the Hearing Administrator for appropriate review and to schedule a hearing on the issue of the Injured Worker's IC-2 Application for Permanent Total Disability filed on 03/23/2010. It is ordered the hearing is to be reschedule[d] before a different Staff Hearing Officer than the Staff Hearing Officer who adjudicated the IC-2 Application on 07/28/2010.

{¶ 39} 21. Pursuant to the SHO's order of June 21, 2011, the PTD application was scheduled for hearing before another SHO on July 14, 2011.

{¶ 40} 22. Following the July 14, 2011 hearing, the SHO mailed an order on July 26, 2011 that again denies the PTD application. The SHO's order of July 14, 2011 explains:

> The Injured Worker suffered the injury allowed in this claim on 04/09/2003 when she was employed for the named Employer as caregiver. On the date of injury, she was lifting the patient and felt a pop in [her] right shoulder. The claim is recognized for right shoulder and cervical conditions and the Injured [W]orker underwent surgical procedures on the right shoulder and on the cervical spine, including a cervical discectomy and fusion. The Injured Worker has not worked since 2006 according to the medical reports in file.

The Injured Worker was examined at the request of the Industrial Commission by Dr. Andrew Freeman on 04/26/2010. Dr. Freeman performed a physical examination of the Injured Worker and reviewed selected medical records from the claim file. Dr. Freeman stated that the Injured Worker has reached maximum medical improvement for the recognized conditions in the claim. He apportioned a 36% whole person impairment as the result of the recognized conditions in this claim. He indicated that he Injured Worker could perform sedentary work when considering the recognized conditions in the claim.

Sedentary work is defined as exerting up to 10 pounds of force occasionally and/or a negligible amount of force frequently 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.

Dr. Freeman indicated that the Injured Worker had further limitations including no repetitive use of the right arm or hand, no reaching with the right arm and no required neck flexion, extension, turning or tilting more than 5 degrees.

The Hearing Officer finds that the Injured Worker has reached maximum medical improvement for the conditions recognized in this claim. The Hearing Officer finds that the Injured Worker is unable to return to her former position as a caregiver as the result of these conditions. However, the Hearing Officer finds that the Injured Worker retains the residual functional capacity to perform sedentary work, provided that she not be required to perform repetitive activities or reaching with her right upper extremity and a job did not require significant neck flexion, extension, turning or tilting.

The Injured Worker is currently 54 years of age. She indicated on her application that she attended high school through the 11th grade, but did not graduate from high school. She indicated that she left high school to start working to help her family. She has not received a GED. However, she further indicated on her application that she is able to read, write and perform basic math.

The Injured Worker's prior work history as listed on the application involved janitorial work on a part-time basis for 5 years, concurrent nurse aide work for nursing homes for approximately 5 years and private duty home health aide work for a period of 10 years. At hearing, she testified to other employment. She testified that she worked for a healthcare facility as a dietary aide. This work involved work in the cafeteria and serving food. She also worked for the same healthcare facility in housekeeping, performing cleaning activities. The Injured Worker indicated a work history beginning in 1986 on the PTD application. However, at hearing, she acknowledged working prior to 1986, and in fact, had two allowed Workers' Compensation claims from prior to 1986.

The Hearing Officer finds that the Injured Worker's age of 54 years is a neutral vocational factor. Individuals of this age expect to remain in the workforce for a number of years. The Hearing Officer finds that the Injured [W]orker's education level is not a positive vocational factor because she has not received either her high school degree or her GED. However, the Injured Worker is able to read, write and perform basic math. In addition, the Injured Worker has obtained employment with several different Employers for many years and was able to maintain employment despite only having an 11th grade formal education.

The Hearing Officer finds that the Injured Worker's prior work history is a positive vocational factor. The Injured Worker had been in the workforce since at least 1978, according to the claims print-out in file. She has worked mainly in the healthcare field performing as a private-duty home healthcare aide and as a nurse's aide in a number of nursing homes. In both of these positions she performed direct patient care, including bathing, feeding, dressing patients. She also was required to take blood pressure readings and temperatures and chart these numbers. In her private duty work, she also performed cleaning activities. The Injured Worker worked part-time as a janitor for a janitorial company which involved mostly physical work. As noted above, she also worked at a healthcare facility in the dietary department, serving food to patients and working in a cafeteria. She also worked in housekeeping at this healthcare facility. The Injured Worker has been able to obtain employment with many different employers and maintain employment for several years, which is evidence of

her consistency as an employee. In addition, the Injured Worker indicated that, while she was not certified as a nurse's aide, she learned the medical duties involved in caring for patients, including blood pressure monitoring, bathing and lifting patients and using any necessary equipment to do so. The Hearing Officer finds that the Injured Worker is of an age where she could undergo a short-term, on-the-job training program to learn the new work skills, rules and procedures which may be required for a return to the workforce.

The Injured Worker has not participated in vocational rehabilitation. She was contacted by the Bureau of Workers' Compensation in 2010 to participate in such services. The Injured Worker did not directly respond to these attempts to enroll her in vocational rehabilitation. According to the Vocational Rehabilitation Closure Report, her file was closed based upon her lack of response to the attempts and to communication with her attorney indicating that she was not physically feasible for services and had just been awarded Social Security Disability Benefits. The Injured Worker has not made any subsequent attempts to participate in any retraining or re-education.

The Hearing Officer finds that the Industrial Commission may consider not only past employment skills but also those which may be reasonably developed. The Hearing Officer finds that permanent total disability compensation should be reserved for the most severely disabled workers and should only be granted when there is no possibility for re-employment. The Hearing Officer finds that the Injured Worker's failure to pursue any type of retraining, re-education or rehabilitation reflects negatively on her application.

Based upon a review of all of the evidence in file, the Hearing Officer finds that the Injured Worker's ability to return to sedentary work that did not require use of the right arm or significant neck flexion and extension, as well as her prior work history, the Hearing Officer finds that the Injured Worker is able to perform the duties of sustained remunerative employment. The Hearing Officer therefore finds that the Injured Worker is not permanently and totally disabled. The application for permanent and total disability compensation, filed on 03/23/2010 is denied.

> This order is based upon the medical report in file from Dr. Freeman dated 04/26/2010.

{¶ 41} 23. On August 2, 2011, relator moved for reconsideration of the SHO's order of July 14, 2011.

{¶ 42} 24. On September 30, 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 Injured Worker has presented evidence of sufficient probative value to warrant adjudication of the request for reconsideration regarding the alleged presence of a clear mistake of fact in the order from which reconsideration is sought, and a clear mistake of law of such character that remedial action would clearly follow.
>
> Specifically, it is alleged that the Staff Hearing Officer failed to consider all of the Injured Worker's restrictions in determining her residual functional capacity.
>
> Based on these findings, the Industrial Commission directs that the Injured Worker's request for reconsideration, filed 08/02/2011, is to be set for hearing to determine whether the alleged mistakes of fact and law as noted herein are 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.

{¶ 43} 25. Following a November 15, 2011 hearing, the three-member commission, on a three-to-zero vote, issued an order denying reconsideration. The November 15, 2011 order explains:

> 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 Injured Worker has failed to meet her burden of proving that sufficient grounds exist to justify the exercise of continuing jurisdiction. Therefore, the Injured Worker's request for reconsideration, filed 08/02/2011, is denied, and the Staff Hearing Officer order, issued 07/26/2011, remains in full force and effect.

{¶ 44} 26. On December 2, 2011, relator, Sharon Patterson, filed this mandamus action.

Conclusions of Law:

{¶ 45} Two issues are presented: (1) whether the commission was required to accept the Breslin vocational report, and (2) whether the commission abused its discretion in determining that relator's failure to pursue the vocational rehabilitation services offered by the bureau in August 2009 reflects negatively upon the PTD application.

{¶ 46} The magistrate finds: (1) the commission was not required to accept the Breslin vocational report, and (2) the commission did not abuse its discretion in determining that the failure to pursue vocational rehabilitation reflects negatively upon the PTD application.

{¶ 47} Accordingly, it is the magistrate's decision that this court deny relator's request for a writ of mandamus, as more fully explained below.

{¶ 48} For its determination of residual functional capacity, the commission through its SHO, relied exclusively upon the medical reports of Dr. Freeman. Ohio Adm.Code 4121-3-34(B)(4). As earlier noted, Dr. Freeman indicated that the industrial injury permits sedentary work with specific limitations. The limitations are:

> [W]ith no repetitive use of the right arm or hand, no reaching with the right arm, and no required neck flexion, extension, turning or tilting more than 5 degrees[.]

{¶ 49} Here, relator does not challenge the reports of Dr. Freeman as constituting some evidence upon which the commission can rely. In fact, relator concedes in her brief

that "[t]he SHO elected to accept Dr. Freeman's findings and conclusions, which was her prerogative." (Relator's brief, at 4)

{¶ 50} Preliminarily, it can be noted that relator has significant limitations with her dominant right arm and hand, but has no limitations with her non-dominant left arm and hand. This may be why relator does not contend that Dr. Freeman's restrictions prohibit all sedentary employment. Rather, relator challenges the commission's analysis of the non-medical factors.

{¶ 51} Turning to the first issue, the commission may credit offered vocational evidence, but expert opinion is not critical or even necessary because the commission is the expert on the vocational issue. *State ex rel. Jackson v. Indus. Comm.*, 79 Ohio St.3d 266 (1997). Moreover, the commission may reject the conclusion of a rehabilitation report and draw its own conclusion from the same non-medical information. *State ex rel. Ewart v. Indus. Comm.*, 76 Ohio St.3d 139 (1996).

{¶ 52} Here, the commission conducted its own independent analysis of the vocational factors in reaching its conclusion that relator is vocationally qualified to perform the type of sedentary work that Dr. Freeman said she could perform. The SHO's order of July 14, 2011 does not even mention the Breslin report nor was the SHO required to address a report upon which no reliance was placed. *State ex rel. Lovell v. Indus. Comm.*, 74 Ohio St.3d 250 (1996).

{¶ 53} Here, relator expresses her disagreement with the law as set forth in *Jackson* and *Ewart* and suggests that the commission abused its discretion by failing to accept Breslin's analysis. But the law is indeed clear. The commission is the expert on the vocational factors and thus there is no need to rely upon the findings and opinions of a vocational expert such as Breslin.

{¶ 54} Turning to the second issue, the Supreme Court of Ohio has repeatedly addressed the obligation of a PTD claimant to undergo opportunities for rehabilitation. *State ex rel. B.F. Goodrich Co. v. Indus. Comm.*, 73 Ohio St.3d 525 (1995); *State ex rel. Bowling v. Natl. Can Corp.*, 77 Ohio St.3d 148 (1996); *State ex rel. Wood v. Indus. Comm.*, 78 Ohio St.3d 414 (1997); *State ex rel. Wilson v. Indus. Comm.*, 80 Ohio St.3d 250 (1997); *State ex rel. Cunningham v. Indus. Comm.*, 91 Ohio St.3d 261 (2001).

{¶ 55} In *B.F. Goodrich*, the court states:

> The commission does not, nor should it, have the authority to force a claimant to participate in rehabilitation services. However, we are disturbed by the prospect that claimant may have simply decided to forgo retraining opportunities that could enhance re-employment opportunities. An award of permanent total disability compensation should be reserved for the most severely disabled workers and should be allowed only when there is no possibility for re-employment.

Id. at 529.

{¶ 56} In *Wilson,* the court states:

> We view permanent total disability compensation as compensation of last resort, to be awarded only when all reasonable avenues of accomplishing a return to sustained remunerative employment have failed. Thus, it is not unreasonable to expect a claimant to participate in return-to-work efforts to the best of his or her abilities or to take the initiative to improve reemployment potential. While extenuating circumstances can excuse a claimant's nonparticipation in reeducation or retraining efforts, claimants should no longer assume that a participatory role, or lack thereof, will go unscrutinized.

Id. at 253-54.

{¶ 57} The *Wilson* court thus recognized that extenuating circumstances can excuse a claimant's nonparticipation in rehabilitation or retraining.

{¶ 58} The SHO's order of July 14, 2011 addresses relator's failure to pursue vocational rehabilitation.

> The Injured Worker has not participated in vocational rehabilitation. She was contacted by the Bureau of Workers' Compensation in 2010 to participate in such services. The Injured Worker did not directly respond to these attempts to enroll her in vocational rehabilitation. According to the Vocational Rehabilitation Closure Report, her file was closed based upon her lack of response to the attempts and to communication with her attorney indicating that she was not physically feasible for services and had just been awarded Social Security Disability Benefits. The Injured Worker has not made any subsequent attempts to participate in any retraining or re-education.

> The Hearing Officer finds that the Industrial Commission may consider not only past employment skills but also those which may be reasonably developed. The Hearing Officer finds that permanent total disability compensation should be reserved for the most severely disabled workers and should only be granted when there is no possibility for re-employment. The Hearing Officer finds that the Injured Worker's failure to pursue any type of retraining, re-education or rehabilitation reflects negatively on her application.

{¶ 59} Asserting that "[t]he law does not require an exercise in futility," relator claims that she should be excused for her non-participation in vocational rehabilitation because of the physical limitations caused by her industrial injury. (Relator's brief, at 13.)

According to relator:

> Does the Industrial Commission truly feel that it (or the Bureau) can "rehabilitate" an individual who, like Ms. Patterson, cannot effectively use their dominant right hand and who cannot tilt their head more than five degrees in any direction? What jobs would be possible with limitations of this magnitude? If there aren't any, as we submit, per the vocational expert, Mr. Breslin, why then would it be appropriate for the Industrial Commission to deny benefits on the basis that Ms. Patterson has not "undergone rehabilitation"?

(Relator's brief, at 13-14.)

{¶ 60} The answer to relator's questions seems obvious. How does an injured worker such as relator know that vocational rehabilitation is an exercise in futility before an effort to participate is made, particularly in the absence of a physician's opinion that the injured worker is medically unable to participate in vocational rehabilitation?

{¶ 61} Here, there is no indication in the bureau's March 5, 2010 closure report that relator ever submitted to the bureau medical evidence that vocational rehabilitation was medically prohibited. Rather, relator simply allowed her counsel to correspond with the bureau that she felt that she would never be able to return to work. Clearly, neither the commission nor the bureau were required to accept this comment from counsel as medical evidence that vocational rehabilitation was not feasible.

{¶ 62} Parenthetically, the magistrate notes that, as earlier noted, on January 29, 2010, Dr. Martinez opined that relator "is not a candidate for vocational rehabilitation program due to her physical instability." As earlier noted, Dr. Martinez's January 29, 2010 report was submitted by relator in support of her PTD application.

{¶ 63} Dr. Martinez's report was rendered some five months after relator's counsel informed the bureau that relator declines vocational rehabilitation. Thus, relator cannot point to Dr. Martinez's January 29, 2010 report as support for her decision to refuse rehabilitation.

{¶ 64} Based on the foregoing analysis, it is clear that the commission did not abuse its discretion in determining that the failure to pursue vocational rehabilitation reflected negatively upon the PTD application.

{¶ 65} Accordingly, for all the above reasons, it is the magistrate's decision that this court deny relator's request for a writ of mandamus.

/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).