[Cite as *State ex rel. Univ. Hosps. Health Sys. v. Indus. Comm.*, 2013-Ohio-2214.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

The State of Ohio ex rel. University Hospitals Health System,	:	
Relator,	:	No. 12AP-715
v.	:	(REGULAR CALENDAR)
Industrial Commission of Ohio and Marie Sheets,	:	
Respondents.	:	

D E C I S I O N

Rendered on May 30, 2013

Rademaker, Matty, Henrikson & Greve LLC, Michael J. Roche, and *Justin W. Whelan,* for relator.

Michael DeWine, Attorney General, and *Kevin J. Reis,* for respondent Industrial Commission of Ohio.

Leland Vincent, and *Leah VanderKaay,* for respondent Marie Sheets.

IN MANDAMUS

BROWN, J.

{¶ 1} Relator, University Hospitals Health System, has filed an original action requesting that this court issue a writ of mandamus ordering respondent, Industrial Commission of Ohio, to vacate its order awarding permanent total disability compensation to respondent, Marie Sheets, and to enter an order denying said compensation.

{¶ 2} This matter was referred to a magistrate of this court 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, recommending that this court deny relator's request for a writ of mandamus. No objections have been filed to that decision.

{¶ 3} Finding no error of law or other defect on the face of the magistrate's decision, this court adopts the magistrate's decision as our own, including the findings of fact and conclusions of law. In accordance with the magistrate's recommendation, relator's requested writ of mandamus is denied.

Writ of mandamus denied.

KLATT, P.J., and TYACK, J., concur.

_____

[Cite as *State ex rel. Univ. Hosps. Health Sys. v. Indus. Comm.*, 2013-Ohio-2214.]

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

The State of Ohio ex rel. University Hospitals Health System,	:	
Relator,	:	No. 12AP-715
v.	:	(REGULAR CALENDAR)
Industrial Commission of Ohio and Marie Sheets,	:	
Respondents.	:	

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

Rendered on February 28, 2013

Rademaker, Matty, Henrikson & Greve LLC, Michael J. Roche, and *Justin W. Whelan,* for relator.

Michael DeWine, Attorney General, and *Kevin J. Reis,* for respondent Industrial Commission of Ohio.

Leland Vincent and *Leah VanderKaay,* for respondent Marie Sheets.

IN MANDAMUS

{¶ 4} In this original action, relator, University Hospitals Health System ("UHHS" or "relator") requests a writ of mandamus ordering respondent Industrial

Commission of Ohio ("commission") to vacate its order awarding permanent total disability ("PTD") compensation to respondent Marie Sheets ("claimant") and to enter an order denying the compensation.

Findings of Fact:

{¶ 5} 1. On October 18, 2003, claimant injured her right shoulder while employed in the housekeeping department of UHHS, a self-insured employer under Ohio's workers' compensation laws. On that date, claimant experienced pain in her right shoulder while pushing a heavy linen cart.

{¶ 6} 2. The industrial claim (No. 03-876533) is allowed for:

> Rotator cuff tear- right; bursitis right shoulder; brachial plexus injury to the C6 nerve root; major depressive disorder; generalized anxiety disorder; left shoulder impingement syndrome; left shoulder bursitis; tendonitis of the left shoulder rotator cuff.

The above noted claim allowances regarding the left shoulder were added to the claim following a September 21, 2010 hearing before a district hearing officer ("DHO") at which the DHO recognized the UHHS's additional certification of the claim.

{¶ 7} 3. Claimant has had three right shoulder surgeries. In the commission's "statement of facts" prepared for the hearing on claimant's application for PTD compensation, the surgery dates and procedures are described:

> 01/21/2004, Diagnostic arthroscopy, right shoulder; debridement of partial thickness rotator cuff tear and arthroscopic repair of superior labral tear.
>
> 02/15/2007, Asad, Mumford and arthroscopic rotator cuff repair right shoulder.
>
> 02/15/2008, Arthrotomy right shoulder with open decompression. Modified Mumford. Removal of bursa. Rotator cuff repair.

{¶ 8} 4. In a report dated March 16, 2010 regarding his examination of claimant at UHHS's request, Paul C. Martin, M.D., states that the February 2008 right shoulder surgery was performed by a "Dr. Fumich" who had obtained an MRI scan prior to the surgery. However, the record does not contain an operative report from a "Dr. Fumich."

In his March 16, 2010 report, Dr. Martin further states that claimant "sees Dr. Fumich on a monthly basis and currently provides her with medications."

{¶ 9} 5. In his seven-page report of his December 9, 2008 examination at UHHS's request, Sheldon Kaffen, M.D., reviews medical records pertaining to Dr. Fumich. In that regard, Dr. Kaffen writes:

> The claimant came under the care of Dr. Fumich on 10/30/07 with complaints of pain and limitation of motion of the right shoulder. On physical examination, there was pain and crepitus with shoulder rotation. There was a full range of motion. X-rays of the right shoulder were obtained and reported as showing the two suture anchors in the superior glenoid. An os acromiale was noted. An MRI of the right shoulder was performed on 11/17/07. This study reports findings for a recurrent tear of the rotator cuff involving the teres minor tendon. There was fluid communication between the shoulder capsule and the subdeloid bursa. There was evidence of a previous acromioplasty without evidence for impingement. The claimant underwent surgery to the right shoulder under combined general and interscalene block on 2/15/08. The procedure consisted of an open arthrotomy of the right shoulder with a modified Mumford repair of the rotator cuff and removal of bursal tissue. The findings at surgery consisted of a thickened bursa remaining hooking and impingement of the acromion anteriorly and a retear of the rotator cuff. The claimant continued under the care of Dr. Fumich post-operatively and was referred for out-patient physical therapy. The office note of 5/15/08 reports a full active and passive range of motion of the right shoulder. Atrophy about the right shoulder was noted at the office visit of 6/12/08. The office note of 7/14/08 indicates weakness about the shoulder and atrophy in the triceps and deltoid muscle. An EMG study was performed on 9/23/08. The study reports findings of "acute partial denervation is noted in the right supraspinatus and rhomboid muscle indicating dorsal scapular and super scapular nerve involvement." An x-ray of the right shoulder was performed on 9/30/08 and is reported as no change from the x-ray of 10/30/07. The claimant was seen by Dr. Fumich on 9/30/08 with complaints of continued pain and weakness of the right shoulder. On examination, there was muscle atrophy about the shoulder. Dr. Fumich concluded "She has a nerve injury".

{¶ 10} 6. Following a September 23, 2011 hearing, a DHO issued an order terminating temporary total disability ("TTD") compensation effective the hearing date. TTD compensation was terminated on grounds that the industrial injury had reached maximum medical improvement ("MMI").

{¶ 11} 7. Claimant administratively appealed the DHO's order of September 23, 2011.

{¶ 12} 8. Following a November 3, 2011 hearing, a staff hearing officer ("SHO") issued an order affirming the DHO's order of September 23, 2011.

{¶ 13} 9. Earlier, by letter dated April 18, 2011 addressed to claimant's counsel, orthopedic surgeon Robert Mark Fumich, M.D., wrote:

> This is in response to your April 13, 2011 letter referable to Marie Sheets.
>
> It is my opinion Marie Sheets is permanently and totally disabled, and cannot engage in sustained remunerative employment as a result of both right and left shoulder conditions.
>
> Please note I hold the above opinions within a reasonable degree of medical certainty.

{¶ 14} 10. On June 16, 2011, claimant filed an application for PTD compensation. In support, claimant submitted the April 18, 2011 letter or report from Dr. Fumich.

{¶ 15} 11. On September 12, 2011, at the commission's request, claimant was examined for all of the allowed physical conditions of the claim by physiatrist John G. Nemunaitis, M.D. In his seven-page narrative report, Dr. Nemunaitis opines:

> PHYSICAL EXAMINATON:
>
> The Injured Worker was alert and oriented. She had significant limitation of range of motion and functioning of both shoulders. She had difficulty putting her clothing on. She needed the assistance of her husband. She was unable to raise either arm fully over her head. She was independent in ambulatory functioning.
>
> The examination of the right shoulder revealed marked atrophy of the right deltoid muscles, as well as scapular muscles. There was significant weakness of the right

shoulder, approximately 75%, associated with the atrophy. There appeared to be no atrophy of the distal upper extremity muscles, including the biceps and triceps. The active range of motion of the right shoulder was markedly limited to 40 degrees of active flexion, 20 degrees of active extension, 30 degrees of abduction, 20 degrees of adduction, 40 degrees of external rotation, and 80 degrees of internal rotation. Active range of motion of the left shoulder was 80 degrees of flexion, 30 degrees of extension, 50 degrees of abduction, 40 degrees of adduction, 80 degrees of internal rotation, and 70 degrees of external rotation. There was no atrophy of the left delphoid and scapular muscles. There was no distal atrophy. Active range of motion of elbow joint, including flexion, extension, and supination, is normal. There were surgical scars of prior surgery of the right shoulder.

Wrist range of motion, as well as finger range of motion, was normal. There was no evidence of allodynia. The radial pulse was normal. Skin color was good, as was skin temperature. The neurological examination of the right upper extremity showed normal biceps, triceps, and brachial radialis reflexes. There was no sensory loss to light touch and pain. Motor examination demonstrated no weakness of the distal right upper extremity, including the hand. There was marked weakness of the right shoulder, including the deltoid and scapular muscles.

The examination of the left upper extremity did not demonstrate significant deltoid atrophy. There was no surgical scar. There was no peripheral edema of either upper extremity. Peripheral pulses were palpable in both upper extremities. Skin color was normal in both upper extremities.

In the left upper extremity, range of motion and strength of the elbow, wrist, and hand were normal. There was no swelling of any of the peripheral joints. Again, the radial pulse was intact. There was no evidence of allodynia in either upper extremity. There was no significant motor weakness of the left upper extremity. Neurological exam was normal.

DISCUSSION:

The Injured Worker does have significant reduction in range of motion of both upper extremities, the right upper extremity greater than the left. She also has symptoms of

brachial plexus injury on the right, although the electrodiagnostic studies were not fully supportive. Clinical findings were certainly compliant with a possible upper trunk entrapment or injury in the C5-C6 distribution, which would be primarily the upper trunk. The clinical findings are not definitive, however the Injured Worker does have marked atrophy of the deltoid muscles, as well as the scapular muscles, and certainly the brachial plexus injury is palpable. There are other considerations, including also dorsal scapular nerve injury, but the allowed condition for a brachial plexus injury is certainly compliant with the history and clinical examination findings on the right shoulder.

She has developed symptoms in the left upper extremity that include possible left brachial plexus entrapment. The clinical findings are certainly compliant with a tendonitis of the left rotator cuff, as well as a left bursitis and impingement syndrome. The clinical examination findings do not substantiate a left brachial plexus injury.

Therefore, based on the fact that she has significant impairment of both upper extremities from the standpoint of range of motion and strength, the examination findings do conclude that the Injured Worker is not capable of work functioning at any capacity.

* * *

OPINION:

The following opinion is based on today's history and physical examination, review of the records provided, and only the allowed conditions I have been asked to consider in this claim.

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

Based on documentation provided, the Injured Worker is maximally medically improved. The Injured Worker has had extensive conservative treatment, including multiple surgeries on the right shoulder. She has failed to demonstrate significant improvement. She continues to have shoulder pain and weakness. She should be considered MMI.

[Two] Based on the AMA Guides, Fifth Edition, and with reference to the Industrial Commission Medical Examination Manual, provide the estimated percentage of whole person impairment arising from each allowed condition. Please list each condition and whole person impairment separately, and then provide a combined whole person impairment. If there is no impairment for an allowed condition indicate "O".

Based on the AMA Guides, Fifth Edition, the estimated percentage of whole person impairment arising from each allowed condition is as followed.

The estimated percentage of whole person impairment as relates to right rotator cuff tear and bursitis right shoulder is 13%.

The whole person impairment as relates to brachial plexus injury to the C6 nerve root is 18%.

The whole person impairment as relates to left shoulder impingement syndrome, left shoulder bursitis, tendonitis of the left shoulder rotator cuff is 7%.

Whole person impairment as relates to all allowed conditions examined today, therefore, is 34%.

The whole person impairments were based on the Guides to the Evaluation of Permanent Impairment, Fifth Edition, Chapter XVI on Upper Extremity Impairments, and based on tables as relate to the shoulder, as well as Tables 16-11 and 16-14 as relates to brachial plexus injuries. Also, the records provided to me by the Industrial Commission were reviewed. These records specifically related to the allowed conditions.

[Three] Complete the enclosed Physical Strength Rating. In your narrative report provide a discussion setting forth physical limitations resulting from the allowed condition(s).

The enclosed Physical Strength Rating Form was reviewed. The Injured Worker is not capable of working at any capacity based on the allowed conditions examined today. This is based on the fact that on examination, it was validated the Injured Worker is unable to use her right arm, has considerable limitation in functional use of her right arm,

> and the Injured Worker is unable to raise it to any functional capability secondary to both the cuff injuries, as well as the brachial plexus injury. She also has significant dysfunction of her left shoulder from the standpoint of any activities that involve any significant degree of abduction and flexion.
>
> Therefore, in light of the significant impairment of both shoulders, the Injured Worker is not capable of physical functioning at any work capacity.

{¶ 16} 12. On September 12, 2011, Dr. Nemunaitis completed a Physical Strength Rating form. On the form, Dr. Nemunaitis indicated by his mark, "[t]his Injured Worker is incapable of work."

{¶ 17} 13. Also on September 12, 2011, at the commission's request, claimant was examined by psychologist Robert L. Byrnes, Ph.D. In his four-page narrative report, Dr. Byrnes opines:

> In my opinion, having considered her allowed mental conditions, Major Depressive Disorder; Generalized Anxiety Disorder; it is my opinion that her overall impairment is mild and I assign an 17% whole person impairment for her allowed mental condition only.

{¶ 18} 14. On September 12, 2011, Dr. Byrnes completed a form captioned "Occupational Activity Assessment[,] Mental & Behavioral Examination." On the form, Dr. Byrnes indicated by his mark, "[t]his Injured Worker is capable of work with the limitation(s) / modification (s) noted below:"

In the space provided, Dr. Byrnes wrote:

> This [Injured Worker] experiences anxiety and depression; however, her impairment arising from these allowed mental conditions would not prevent her from working in simple, non-demanding positions with low stress.

{¶ 19} 15. Earlier, on July 28, 2011, at relator's request, claimant was again examined by Dr. Martin. In his four-page narrative report, Dr. Martin states:

> **PHYSICAL EXAMINATION**
>
> * * *

> Examination of the right shoulder revealed well-healed scars from the previous surgical procedures. There was again a moderate degree of atrophy surrounding the shoulder joint in association with a moderate degree of discomfort in a fairly diffuse pattern over the shoulder extending into the scapular region of the right shoulder girdle. Range of motion of the shoulder revealed flexion to be 40 degrees, extension 20 degrees, abduction 40 degrees, adduction 20 degrees, internal rotation 45 degrees and external rotation was 30 degrees. Grip strength was moderately diminished and was limited by pain reproduced in the arm and shoulder.
>
> Examination of the left shoulder revealed a normal contour with no soft tissue swelling or muscle atrophy. There was a moderate degree of discomfort with palpation in a diffuse pattern over the shoulder joint extending into the scapular region. Range of motion of the shoulder revealed flexion to be 90 degrees, extension 35 degrees, abduction 80 degrees, adduction 45 degrees, internal rotation 60 degrees and external rotation was 50 degrees. Sensory examination revealed decreased sensation in the C6 nerve root distribution.
>
> * * *
>
> Based solely on the allowed physical condition in this claim, it is my medical opinion Ms. Sheets is physically capable of sustained remunerative employment. As discussed in both this report and my previous reports, although Ms. Sheets is limited in her ability to utilize her upper extremities, she is still physically capable of utilizing her arms in performing certain activities throughout the day as discussed. Her ability to utilize her left upper extremity is greater that [sic] the right upper extremity; however, still in my opinion is physically capable of sustained remunerative employment.
>
> * * *
>
> It is my opinion Ms. Sheets is physically capable of working in a sedentary work environment in which she would not be required to lift greater than 10 pounds. She should also avoid frequent or repetitive gripping or grasping activities of either upper extremity and avoid utilizing either upper extremity in an overhead position.

{¶ 20} 16. On July 29, 2011, at relator's request, claimant was examined by psychologist David J. Tosi, Ph.D. In his nine-page narrative report, Dr. Tosi writes:

> The Injured Worker's symptoms of depression/anxiety are in the mild range. Any impairments across the four areas of residual functioning, specific to the allowed psychological conditions, are in the mild range and would not prohibit the Injured Worker from sustained remunerative employment. The Injured Worker's major complaints are physical.
>
> * * *
>
> The Injured Worker has no restrictions/limitations due to the allowed psychological conditions.

{¶ 21} 17. On August 18, 2011, having reviewed the July 28, 2011 report of Dr. Martin, Dr. Fumich wrote:

> I have reviewed Dr. Martin's report and it is my opinion the restrictions are so severe that for all intent and purposes, Ms. Sheets is permanently and totally disabled and cannot engage in any remunerative employment due to her shoulder conditions. I do not believe such a job as Dr. Martin describes with the limitations exists.
>
> In addition, she needs to use her hands, shoulders and upper extremities to drive a car and this is restrictive as well.
>
> Please note I hold the above opinions within a reasonable degree of medical certainty.

{¶ 22} 18. On February 9, 2012, relator took the deposition of Dr. Nemunaitis. The deposition was recorded and transcribed for the record. During the deposition, the following exchange was recorded between relator's counsel and Dr. Nemunaitis:

> Q. Do you believe those limitations, as outline by Dr. Martin, are reasonable?
>
> A. No.
>
> Q. Why not?
>
> A. Because I think he doesn't address the pain issue. I mean, he does mention she can't use either arm over her head. He does state that.

Q. You agree with that?

A. Yeah. I agree with that. She can't use either arm over her head. I agree she should avoid frequent or repetitive grip or grasping activities of either upper extremity because of the pain, but I think that where the difference in our opinions is is that the severity of her pain and the degree of dysfunction of that right shoulder and degree of atrophy and the pain caused by the right shoulder does influence what she can do at any level of functioning with that arm. In other words, if she uses that arm even down, trying to grasp distal to the elbow, she has pain in the shoulder. She had much more pain and actually cannot raise the arm, but I found it difficult to believe that an individual who cannot raise either arm over their head, who cannot grip either arm -- even he says this -- would be able to work in any capacity, you know, because of the pain and the dysfunction that they have.

Q. Do you believe her symptoms, particularly her pain for which you are emphasizing here --

A. Yes.

Q. -- could improve with any additional treatments?

A. No. That's why I said she's MMI. She has had extensive treatment, three surgeries on the shoulder and therapy, et cetera. I don't think she's going to improve.

Q. Okay. According to Dr. Martin's report, Ms. Sheets continues to be capable of doing some light activities such as writing, washing dishes if she keeps her arm close to her body and some limited computer work.

A. Well, I don't think she can wash dishes even with her arm -- how do you wash dishes with your arm close to your body? My wife had total hip surgery and I've been the housewife for the last few weeks. I assure you, there's no way a person can wash dishes down here.

Can she be at a desk and maybe with her left arm do things at a desk? Maybe that's possible, but, you know, any activity of that right arm causes her a tremendous degree of pain and it is physiological pain.

Q. Okay. But she could do activity with her right arm if there were limitations to control that pain; correct?

A. I can't answer that in terms of, you know, it's a general term, limitations. I would say she can't do anything with the right arm. She has total disuse of the right arm from the standpoint of pain and the other physiological problems that I mentioned.

Q. And you understand the Industrial Commission has denied this claim for total loss of use of the right upper extremity; correct?

A. I don't recall if they denied the entire arm.

Q. Let's take a look at your report. The first page, you list the claim allowances and disallowed condition, total loss of use of the right upper extremity.

Did you review the medical, or do you recall reviewing the medical that was relied upon by the [I]ndustrial Commission in denying this claim for total loss of use?

A. I think that it's a matter of definition. What do you mean by total use of the upper arm? I'm not saying she has total disuse of the upper arm. She has distal hand functioning and that. I'm saying she cannot use the arm functionally at work because of the severity of her shoulder pain, the weakness of her shoulder and dysfunction associated with all the, you know, cuff surgery and so forth, the shoulder pathology as well as the brachial plexus injury so that when I say she cannot use the right arm functionally, I'm just saying because of pain and that.

I'm not saying the entire arm is, you know, is of no use. No. I'm not saying that as such. She certainly has distal hand functions. She has functions at the elbow level but not for work capability.

Q. Okay. So in your report, when you say injured worker is unable to use her right arm, that's incorrect?

A. Functionally or at work?

Q. What functions can she do with that right arm?

> A. Well, she can use distal hand function which I imagine -- see, the big problem is I think that's something that would probably be difficult for me to say as such. She does have distal hand functions, but the problem is in terms of what activities she can do with the distal hand functioning will depend to what extent it affects the shoulder and the brachial plexus and the pain involved with that so that, you know, if you asked me what functional activities she could do [activities of daily living] wise and job wise, I think that would probably be best assessed by a functional assessment, if that were an issue.
>
> Q. It certainly is an issue in this case.
>
> A. In this case, in my opinion, because of the pain and that, she couldn't function at work in any capacity.
>
> Q. Is it possible, then, that a functional capacity evaluation could impact or change your opinion in this case?
>
> A. No.

(Depo. 29-33.)

{¶ 23} 19. On November 16, 2011, an SHO issued a tentative order awarding PTD compensation based upon the report of Dr. Nemunaitis.

{¶ 24} 20. Relator timely objected to the tentative order.

{¶ 25} 21. Following an April 19, 2012 hearing, an SHO issued an order awarding PTD compensation starting September 24, 2011 based upon the reports of Drs. Fumich and Nemunaitis. The SHO did not analyze the non-medical factors. The SHO's order explains:

> Permanent and total disability compensation is awarded from 09/24/2011 for the reason that Injured Worker was declared maximum medical improvement on 09/23/2011 and this starting date is supported by the report of Dr. Fumich dated 04/18/2011.
>
> Based upon the reports of Drs. Fumich, Nemunaitis, it is found that the Injured Worker is unable to perform any sustained remunerative employment solely as a result of the medical impairment caused by the allowed conditions. Therefore, pursuant to State ex rel. Speelman v. Indus.

Comm. (1992), 73 Ohio App.3d 757, it is not necessary to discuss or analyze the Injured Worker's non-medical disability factors.

The Injured Worker's Application for Permanent and Total Disability, filed 06/16/2011, is granted for the reason that she has meet her burden of proof that the injuries she sustained from the incident on 10/18/2003, have left her with the inability to perform any sustained and gainful employment. This is specifically based upon the opinions of Drs. Fumich and Nemunaitis.

This order is based upon the following. The Injured Worker was injured on 10/18/2003. The Injured Worker sustained the following injuries to her right and left shoulder; rotator cuff tear- right; bursitis right shoulder; brachial plexus injury to the C6 nerve root; major depressive disorder; generalized anxiety disorder; left shoulder impingement syndrome; left shoulder bursitis; tendonitis of the left shoulder rotator cuff. The Staff Hearing Officer finds that the Injured Worker is not permanently totally disabled based upon the allowed psychological conditions but is unable to perform any sustained and gainful employment based upon the physical injuries to her right and left shoulders.

The Injured Worker underwent surgery on the right shoulder on 01/21/2004 for a arthroscopy and debridement of partial thickness rotator cuff tear and arthroscopic repair of the superior labral tear. The Injured Worker testified that she returned to work but the shoulder continued to be symptomatic and she underwent a second surgical procedure on 02/15/2007. The Injured Worker returned to work after the second surgery and the symptoms to her right shoulder continued resulting in a third surgery with open decompression, removal of bursa, and rotator cuff repair on 02/15/2008. This third surgery resulted in the Injured Worker being unable to return back to the workforce.

The Staff Hearing Officer finds that the Injured Worker is unable to perform any sustained and gainful employment based upon the reports of Dr. Fumich and Dr. Nemunaitis. Dr. Fumich is the Injured Worker's attending physician and has stated in numerous reports that it is his opinion that the Injured Worker is permanently and totally disabled, and cannot engage in sustained remunerative employment as the result of both right and left shoulder conditions.

> The Injured Worker was examined by Dr. Nemunaitis on 09/12/2011. Dr. Nemuanitis' opinion was that the Injured Worker was incapable of work. Dr. Nemunaitis was deposed by the Employer regarding this report. The Staff Hearing Officer reviewed this deposition and finds that the opinion of Dr. Nemunaitis in his 09/12/[2011] report remains unchanged.
>
> The Employer had the Injured Worker examined by Dr. Martin on 07/28/2011. Dr. Martin had examined the Injured Worker previously. Dr. Martin found that the Injured Worker was not permanently and totally disabled and was able to perform some sustained and gainful employment.
>
> The Staff Hearing Officer is persuaded by the credible testimony of the Injured Worker regarding her impairment to her shoulders. Though the Injured Worker has retained distal function of the wrist and hands (to some extent, as she testified to problems with gripping and grasping), the Injured Worker has significant reduction in the range of motion in both upper extremities with the right greater than the left. After reviewing the reports on file, the Staff Hearing Officer finds significant and persuasive the objective finding of marked atrophy including marked atrophy of the deltoid muscles as well as the scapular muscles with a finding by Dr. Nemunaitis of brachial plexus injury.
>
> The Injured Worker testified that the impairments she suffers as the result of these shoulder injuries include a significant impairment in her activities of daily living regarding cooking, cleaning, shopping, eating, dressing, bathing, and driving an automobile. The Staff Hearing Officer notes that the impairment is greater on the right, and that the Injured Worker is right hand dominant. The Staff Hearing Officer also finds persuasive the Injured Worker's testimony that it is her desire to continue working, and that is supported by the fact that the Injured Worker did return to work after the injury, she did return to work after her first surgery, and she again returned to the workforce after her second surgery.
>
> Thus based upon the opinions of the Injured Worker's Physician of Record, Dr. Fumich, and the Independent Exam of Dr. Nemunaitis, and the credible testimony of the injured worker, the Staff Hearing Officer finds that the Injured

> Worker has met her burden of proof, that the injuries she sustained from the 10/18/2003 incident have left her with the inability to perform any sustained and gainful employment, and thus her application is granted to the above extent.

{¶ 26} 22. On May 26, 2012, the three-member commission, on a unanimous vote, denied relator's request for reconsideration of the SHO's order of April 19, 2012.

{¶ 27} 23. On August 24, 2012, relator, University Hospitals Health System, filed this mandamus action.

Conclusions of Law:

{¶ 28} Two issues are presented: (1) whether the reports of Dr. Fumich are some evidence upon which the commission can and did rely, and (2) whether the report of Dr. Nemunaitis is some evidence upon which the commission can and did rely.

{¶ 29} The magistrate finds: (1) the reports of Dr. Fumich are some evidence upon which the commission can and did rely, and (2) the report of Dr. Nemunaitis is some evidence upon which the commission can and did rely.

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

{¶ 31} Ohio Adm.Code 4121-3-34 sets forth the commission's rules regarding the adjudication of PTD applications. Ohio Adm.Code 4121-3-34(D) sets forth the commission's guidelines for the adjudication of PTD applications. Thereunder, Ohio Adm.Code 4121-3-34(D)(2) states:

> (a) If, after hearing, the adjudicator finds that the medical impairment resulting from the allowed condition(s) in the claim(s) prohibits the injured worker's return to the former position of employment as well as prohibits the injured worker from performing any sustained remunerative employment, the injured worker shall be found to be permanently and totally disabled, without reference to the vocational factors listed in paragraph (B)(3) of this rule.
>
> (b) If, after hearing, the adjudicator finds that the injured worker, based on the medical impairment resulting from the allowed conditions is unable to return to the former position of employment but may be able to engage in sustained

> remunerative employment, the non-medical factors shall be considered by the adjudicator.
>
> The non-medical factors that are to be reviewed are the injured worker's age, education, work record, and all other factors, such as physical, psychological, and sociological, that are contained within the record that might be important to the determination as to whether the injured worker may return to the job market by using past employment skills or those skills which may be reasonably developed.

{¶ 32} Here, pursuant to Ohio Adm.Code 4121-3-34(D)(2)(a), the commission, through its SHO, determined that the allowed conditions of the industrial claim prohibit all sustained remunerative employment, and thus claimant is found to be permanently and totally disabled without reference to the vocational factors.

The First Issue—Dr. Fumich's Reports

{¶ 33} Relator challenges the evidentiary value of the April 18, 2011 and August 18, 2011 reports of Dr. Fumich. At first blush, the two reports seems to lack findings supportive of Dr. Fumich's conclusion that claimant is unable to engage in any sustained remunerative employment as a result of the allowed shoulder conditions of the industrial claim.

{¶ 34} In *State ex rel. Frigidaire, Inc. v. Indus. Comm.*, 70 Ohio St.3d 166 (1994), the employer challenged a commission PTD award in mandamus. The commission's PTD award was premised upon a report from Dr. Elizabeth Reed, stating in its entirety:

> The above patient is totally & permanently disabled, due to back injury (Trauma aggravating arthritic changes in lumbar & thoracic spine). He is able to walk short distances but is unable to do any lifting or work.
>
> He is using some hydrotherapy and taking Motrin at the present time.
>
> He also shows considerable depression & nervousness for which he takes Elavil. This may be related to the head injury & laceration.

Id. at 166-67.

{¶ 35} Upholding the PTD award, the court explains:

> Frigidaire also alleges a lack of supportive findings in the report. We again disagree. Although skimpy, the report pinpoints the claimant's arthritic condition as the source of his problems. It also indicates that claimant cannot do lifting and is restricted to brief walking, both of which would impact on his ability to work. Given the commission's authority to evaluate evidentiary weight and credibility, its decision to rely on Reed's report is not an abuse of discretion.

Id. at 168.

{¶ 36} Here, Dr. Fumich's reports can be said to be "skimpy"—a descriptive word used by the *Frigidaire* court to describe Dr. Reed's report at issue there.

{¶ 37} However, in the magistrate's view, the August 18, 2011 report saves the April 18, 2011 report which, standing alone, points to no findings to support the opinion that the industrial injury prohibits all sustained remunerative employment.

{¶ 38} Here, relator posits that, in his August 18, 2011 report, "Dr. Fumich did not disagree with the assessment of Dr. Martin." (Relator's brief, at 6.) Further, relator posits that "Dr. Fumich essentially agrees with the restrictions assessment of Dr. Martin" contained in Dr. Martin's July 28, 2011 report. (Relator's brief, at 6.) Moreover, the commission here agrees with relator's position when it asserts that Dr. Fumich "reasoned that Dr. Martin[']s report (clinical findings, etc.) confirmed his own findings and conclusions that [claimant] was PTD." (Commission's brief, at 11.) Essentially, the parties agreed that Dr. Fumich adopted Dr. Martin's medical findings, but not Dr. Martin's opinion that the medical findings permit sustained remunerative employment.

{¶ 39} If Dr. Fumich adopted Dr. Martin's medical findings, then Dr. Fumich's reports do contain supportive findings even though the reports themselves can be said to be "skimpy." It was not necessary for Dr. Fumich to summarize Dr. Martin's medical findings in his August 18, 2011 report.

{¶ 40} Dr. Fumich's relationship to claimant as her treating physician and surgeon is significant to the above analysis. That is, it can be presumed that Dr. Fumich was well aware of his own clinical observations when he adopted Dr. Martin's medical findings.

{¶ 41} It should be noted here that relator does not cite to *Frigidaire* nor contend that Dr. Fumich's reports lack supportive findings. Nevertheless, in the view of the

magistrate, the analysis of Dr. Fumich's reports under *Frigidaire* is helpful to an analysis of relator's challenge to the reports of Dr. Fumich.

{¶ 42} Here, relator contends that Dr. Fumich's reports are equivocal and uncertain.

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

{¶ 44} Relator's challenge to the evidentiary value of Dr. Fumich's August 18, 2011 report focuses upon his statement "I do not believe such a job as Dr. Martin describes with the limitations exists." According to relator, Dr. Fumich's statement calls for a vocational analysis as to whether there exists a job or jobs claimant can perform within Dr. Martin's medical findings and restrictions. Given relator's argument that a vocational analysis is required to support Dr. Fumich's belief that no job exists that can accommodate the restrictions, relator concludes that Dr. Fumich's report is uncertain and equivocal. The magistrate disagrees with relator's argument. Dr. Fumich's reports are not uncertain or equivocal as relator argues.

{¶ 45} Relator's argument simply ignores the long standing tradition of allowing physicians to opine as to whether the allowed conditions of the industrial claim prohibit sustained remunerative employment. Obviously, when a physician opines that the industrial injury alone prohibits sustained remunerative employment, that opinion, of necessity, involves the physician's own experience with jobs performed in the economy. In short, physicians may opine as to whether the industrial injury permits sustained remunerative employment absent a vocational discussion.

{¶ 46} Based upon the above analysis, the magistrate concludes that the reports of Dr. Fumich provide some evidence supporting the commission's determination that claimant is unable to perform sustained remunerative employment as a result of the industrial injury alone.

The Second Issue—Dr. Nemunaitis' Report

{¶ 47} As earlier noted, the second issue is whether the report of Dr. Nemunaitis provides some evidence upon which the commission can and did rely.

{¶ 48} According to relator, the deposition of Dr. Nemunaitis produced statements that are inconsistent with the report of Dr. Nemunaitis. To support relator's proposition of inconsistency, relator reproduces in its brief the following portion of the exchange that is reproduced by the magistrate in his decision here:

> I'm not saying the entire arm is, you know, is of no use. No. I'm not saying that as such. She certainly has distal hand functions. She has functions at the elbow level but not for work capability.
>
> Q. Okay. So in your report, when you say injured worker is unable to use her right arm, that's incorrect?
>
> A. Functionally or at work?
>
> Q. What functions can she do with that right arm?
>
> A. Well, she can use distal hand function which I imagine -- see, the big problem is I think that's something that would probably be difficult for me to say as such. She does have distal hand functions, but the problem is in terms of what activities she can do with the distal hand functioning will depend to wheat extent it affects the shoulder and the brachial plexus and the pain involved with that so that, you know, if you asked me what functional activities she could do ADL wise and job wise, I think that would probably be best assessed by a functional assessment, if that were an issue.

(Depo. 32.)

{¶ 49} Relator points out, in his report Dr. Nemunaitis stated that claimant "is unable to use her right arm" but at his deposition he stated "I'm not saying the entire arm is, you know, is of no use." According to relator, the two statements are inconsistent and thus show an uncertainty that compels the conclusion that Dr. Nemunaitis was equivocal on a critical point. The magistrate disagrees.

{¶ 50} To begin, the portion of the deposition exchange reproduced in relator's brief must be read in the context of the deposition exchange that precedes and follows the portion reproduced in relator's brief. Upon reviewing the entire relevant context, it is apparent that the portion of the exchange reproduced in relator's brief removes most of Dr. Nemunaitis' discussion of pain.

{¶ 51} As Dr. Nemunaitis indicates in his deposition testimony, severe pain limits the use of claimant's right arm, even though the arm is obviously there to permit "distal hand functioning." Pain clearly explains away any suggestion of inconsistency.

{¶ 52} Relator also argues that "uncertainty" was indicated when Dr. Nemunaitis testified:

> [I]f you asked me what functional activities she could do ADL wise and job wise, I think that would probably be best assessed by a functional assessment, if that were an issue.

(Depo. 33.)

{¶ 53} Relator's "uncertainty" argument regarding a possible "functional assessment" is answered by Dr. Nemunaitis when he answers "no" at the deposition to the following question:

> Is it possible, then, that a functional capacity evaluation could impact or change your opinion in this case?

(Depo. 33.)

{¶ 54} In short, the testimony of Dr. Nemunaitis during his deposition is not inconsistent with his report. There is no equivocation. Clearly, the report of Dr. Nemunaitis provided the commission with some evidence to support its finding that claimant is unable to perform sustained remunerative employment.

{¶ 55} 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/ MAGISTRATE
KENNETH W. MACKE

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).