[Cite as *State ex rel. Smith v. Indus. Comm.*, 2013-Ohio-283.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Daniel A. Smith,	:	
Relator,	:	
v.	:	No. 11AP-1127
Industrial Commission of Ohio and Hogan Services, Inc.,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on January 31, 2013

Agee, Clymer, Mitchell & Laret, and *Gregory R. Mitchell*, for relator.

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

Charles D. Smith & Associates, LLC, Charles D. Smith and *Ryan E. Bonina*, for respondent Hogan Services, Inc.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

KLATT, P.J.

{¶ 1} Relator, Daniel A. Smith, commenced this original action in mandamus seeking an order compelling respondent, Industrial Commission of Ohio ("commission"), to vacate its order that denied his motion for a scheduled loss of use award for the functional loss of vision in his left eye, and to grant said motion.

{¶ 2} Pursuant to Civ.R. 53(C) and Loc.R. 13(M) of the Tenth District Court of Appeals, we referred this matter to a magistrate who issued a decision, including findings

of fact and conclusions of law, which is appended hereto. The magistrate found that the commission did not abuse its discretion when it denied relator's request for a scheduled loss of use award. The magistrate determined that Dr. Deardorff's opinion is some evidence supporting the commission's decision. The magistrate further found that neither *State ex rel. Gidley v. Indus. Comm.*, 10th Dist. No. 04AP-1316, 2005-Ohio-5534 nor *State ex rel. Kroger Co. v. Stover*, 31 Ohio St.3d 229 (1987), required the commission to grant relator's motion. Therefore, the magistrate has recommended that we deny relator's request for a writ of mandamus.

{¶ 3} Relator has filed objections to the magistrate's decision. In his first and fourth objections, relator contends that the magistrate's decision conflicts with *Gidley* and *State ex rel. Smith v. Indus. Comm.*, 197 Ohio App.3d 289, 297 (10th Dist.2012). We disagree.

{¶ 4} Citing *Gidley* in support, relator argues that Dr. Deardorff did not offer a specific medical opinion regarding the permanency of relator's loss of vision in his left eye. According to relator, Dr. Deardorff only cited to abstract research and diagnostic criteria for conversion disorder generally. However, relator mischaracterizes Dr. Deardorff's report.

{¶ 5} Dr. Deardorff examined relator after relator filed his motion for a scheduled loss award. The examination and subsequent report specifically addressed the subject of relator's motion—i.e., whether or not relator's loss of vision in his left eye was permanent. Based upon his examination, Dr. Deardorff concluded that relator's diminished vision in his left eye was not permanent. Dr. Deardorff's conclusion is a medical opinion regarding the permanency of relator's condition and his reference to research and diagnostic criteria only support the conclusion he drew based upon his examination.

{¶ 6} The facts here are dramatically different than those confronting the court in *Gidley*. In *Gidley*, the medical report at issue was issued two years before the claimant filed for a scheduled loss award. Therefore, the report was not considered a medical opinion addressing relator's condition at the time the claimant moved for the scheduled loss compensation. In the case at bar, Dr. Deardorff examined relator in connection with relator's motion and his medical opinion addressed the permanency of relator's condition

at the time of his examination. For these reasons, the magistrate's decision is not in conflict with *Gidley*.

{¶ 7} Relator also argues in his first and fourth objections that the magistrate's decision is inconsistent with *Smith* because Dr. Deardorff allegedly did not consider "the practical application of clinical or other data in opining on the extent of relator's vision loss." Therefore, according to relator, Dr. Deardorff failed to use the appropriate standard to determine if relator had suffered a total loss of vision in his left eye for purposes of R.C. 4123.57(B). Again, we disagree.

{¶ 8} Dr. Deardorff's report reflects that he applied practical considerations in assessing relator's condition. For example, Dr. Deardorff specifically noted that "while [relator] complained of vision loss, it did not interfere with his ability to read, move about the office or drive. As such, the symptom severity is mild at best." These facts contrast sharply with the facts in *Smith* wherein the claimant was in a persistent vegetative state due to a brain injury. Therefore, there were no reliable tests to determine loss of vision because the claimant could not respond to any visual stimuli. Based on these facts, the court in *Smith* issued a limited writ and held specific testing demonstrating 100 percent loss of vision was not necessary and the commission must consider whether "the practical application of clinical or other data shows a loss of 100 percent or less." The magistrate's decision here is not in conflict with *Smith*. Moreover, the magistrate emphasized that relator presented no evidence that any vision loss he suffered was permanent.

{¶ 9} For these reasons, we overrule relator's first and fourth objections.

{¶ 10} In his second objection, relator contends that the magistrate erred when she concluded that Dr. Deardorff's report was not equivocal and inconsistent. Essentially, relator argues that Dr. Deardorff's report is equivocal because in response to one question, he stated that relator's vision loss "is very unlikely to be permanent" and in response to a later question, he stated "as was indicated earlier, the vision loss is not permanent." We find relator's argument unpersuasive.

{¶ 11} Essentially, Dr. Deardorff was stating the same conclusion two different ways. Dr. Deardorff's second statement expressly clarifies what he meant by his earlier statement—"as indicated earlier, the vision loss is not permanent." When read as a whole,

we cannot conclude that Dr. Deardorff's report is equivocal or inconsistent. He clearly opines that relator's vision loss is not permanent.

{¶ 12} Relator also argues in his second objection that Dr. Deardorff's opinion is ambiguous because he did not express an opinion regarding the extent of vision loss. Therefore, relator asserts that the magistrate should have remanded the case to the commission to determine if the vision loss is at least 25 percent and compensable under R.C. 4123.57(B). This argument misses the mark because unless the vision loss is permanent, relator is not entitled to a scheduled loss award. Not only did Dr. Deardorff opine that the vision loss was not permanent, the staff hearing officer also noted that relator offered no evidence that "if there is a functional loss of vision in the left eye, it is permanent."

{¶ 13} For these reasons, we overrule relator's second objection.

{¶ 14} In his third objection, relator contends that the magistrate failed to properly apply the law as it enunciated in *Kroger*. We disagree. *Kroger* simply does not apply here.

{¶ 15} In *Kroger*, the claimant suffered an eye injury. The court considered whether lens implant surgery constitutes a correction of the claimant's vision, or the restoration of it. If the surgery was restorative, the commission must assess the post-surgical visual acuity to determine loss; if corrective, the pre-surgical vision acuity determines the loss. The court held that the improvement in vision resulting from the corneal transplant is a correction to vision and cannot be considered when determining the percentage of vision actually lost. We fail to see how the legal principal at issue in *Kroger* is applicable to the facts here. Nor does the relator make any attempt to explain why it is applicable. Therefore, we overrule relator's third objection.

{¶ 16} Following an independent review of this matter, we find that the magistrate has properly determined the facts and applied the appropriate law. Therefore, 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 relator's request for a writ of mandamus.

Objections overruled; writ of mandamus denied.

CONNOR and DORRIAN, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Daniel A. Smith,	:	
Relator,	:	
v.	:	No. 11AP-1127
Industrial Commission of Ohio and Hogan Services, Inc.,	:	(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 23, 2012

Agee, Clymer, Mitchell & Laret, and *Gregory R. Mitchell*, for relator.

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

Charles D. Smith & Associates, LLC, Charles D. Smith and *Ryan E. Bonina*, for respondent Hogan Services, Inc.

IN MANDAMUS

{¶ 17} Relator, Daniel A. Smith, has filed this original action requesting that this court issue a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order which denied him a total loss of vision award for his left eye and ordering the commission to find that he is entitled to that compensation.

Findings of Fact:

{¶ 18} 1. Relator sustained a work-related injury on March 21, 2007 and his workers' compensation claim was initially allowed for "contusion of left scalp." Sometime later, relator's claim would be additionally allowed for "variants of migraine without mention of intractable migraine; cervical sprain." In 2009, relator's claim would be additionally allowed for "conversion disorder."

{¶ 19} 2. Relator was examined by Richard L. Lockwood, D.O., whose practice involved diseases and surgery of the eye. In his May 10, 2007 report, Dr. Lockwood examined relator's eyes in an effort to determine why he was experiencing a certain loss of vision in his left eye. Dr. Lockwood was unable to explain why relator had reduced vision in his left eye following his head trauma.

{¶ 20} 3. An independent medical examination was performed by Arthur L. Hughes, M.D., whose specialty was neurology. At this time, relator's claim was only allowed for contusion of left scalp. In his June 13, 2007 report, Dr. Hughes discussed relator's loss of vision in his left eye. He noted further that doctors who had examined relator were not able to account for the diminished vision and further opined that relator's then allowed condition of contusion of left scalp had reached maximum medical improvement ("MMI").

{¶ 21} 4. Dr. T. Poling authored a letter dated July 5, 2007 opining that relator's migraine headaches as well as his loss of vision in the left eye were directly and causally related to the March 21, 2007 injury.

{¶ 22} 5. Relator was also examined by David K. Hirsh, M.D., and he authored three reports which are contained in the stipulation of evidence. In a letter dated September 5, 2007 and addressed to Dr. Lockwood, Dr. Hirsh noted that upon examination, relator's uncorrected distance visual acuities were 20/20– 1 in the right eye and 20/400 in the left eye. He noted further that nothing he did improved the visual acuity relator experienced in his left eye. Dr. Hirsh noted that the physical examination was "completely normal including the absence of a left relative afferent papillary defect [and that] [t]he absence of a relative afferent papillary defect in the setting of a normal fundus exam is itself an unexplainable inconsistency given the apparent severity of the left eye's visual acuity and field loss." Dr. Hirsh concluded that he could find no abnormality

to explain relator's left eye vision loss and suspected that the diagnosis was a "functional nonphysiologic" vision loss. Dr. Hirsh recommended an MRI.

{¶ 23} 6. In his October 29, 2007 report, Dr. Hirsh indicated that during testing, relator had complained that the video display was hurting his eyes and that the technician believed that relator had been blinking a great deal which invalidated the test results.

{¶ 24} 7. In his November 7, 2007 report, Dr. Hirsh indicated that he still did not have an explanation for relator's severe left eye visual acuity and field loss.

{¶ 25} 8. Relator was evaluated by Michael Jones, D.O. In his January 14, 2008 report, Dr. Jones noted that relator's eye exam was normal and that the eye was functioning. Like Dr. Hirsh, he suspected there was a nonphysiologic left eye vision loss.

{¶ 26} 9. Relator was also examined by Jeffrey D. Hutchison, D.O., an ophthalmologist. In his February 15, 2008 report, Dr. Hutchison stated, "[i]n summary, Mr. Smith demonstrates subjectively reduced visual acuity on the left. There are no objective findings on today's exam to explain this." Because there was no objective way for him to evaluate relator's visual acuity, he was unable to opine that relator suffered from the condition visual loss NOS.

{¶ 27} 10. Relator was also examined by Robert R. Whitten, M.D., who determined the extent of relator's physical disability. His report is the first report in the stipulation of evidence which noted the additional allowed conditions of migraine variant and sprain of the neck. In his July 25, 2008 report, Dr. Whitten indicated that relator informed him that he had recently renewed his driving license, including his commercial driving license, and that he was unrestricted within the boundaries of the state of Ohio. Dr. Whitten opined that relator's then-allowed conditions (contusion of left scalp, variance of migraine without mention of intractable migraine and cervical sprain) had reached MMI and that he could be able to return to his former position of employment.

{¶ 28} 11. Relator was treating with Leslie Risin, Ph.D., a clinical psychologist. In her August 14, 2008 report, Dr. Risin noted that relator complained that he saw a flash of light whenever his left eye was opened or closed and that his left eye was extremely light sensitive. Dr. Risin concluded that relator's symptoms met the criteria for depressive disorder NOS, and addressed his visual difficulties, stating:

> In my clinical opinion, Daniel clearly has emotional problems that are directly related to his injury. In light of the

> fact that specialists have been involved in evaluating his visual problems and have found no physiological basis, Daniel may have a (300.11) Conversion Disorder. The essential feature of this disorder is that the symptom (left eye blindness in Daniel's case) is not intentionally produced or feigned and cannot be explained by a neurological or general medical condition.

{¶ 29} 12. An independent psychiatric examination was conducted by Michael E. Miller, M.D. In his October 14, 2008 report, Dr. Miller opined that relator was demonstrating a conversion symptom relative to his vision in his left eye and suggested that he be seen by a psychologist and a psychiatrist and that he should be prescribed an antidepressant medication. He also noted that the conversion symptoms would make his prognosis more negative.

{¶ 30} 13. In a letter dated November 24, 2008, Dr. Risin opined that relator had a conversion disorder that was directly related to his injury.

{¶ 31} 14. On January 20, 2009, relator filed a motion asking that his claim be additionally allowed for conversion disorder.

{¶ 32} 15. Relator was examined by James R. Hawkins, M.D. In his March 18, 2009 report, Dr. Hawkins ultimately concluded that he could not support a diagnosis of conversion disorder related to the industrial injury. Dr. Hawkins provided the following rationale:

> His visual symptoms due [do] qualify as a pseudo-neurological symptom and, after appropriate investigation, this symptom cannot be explained medically. This symptom is providing substantial secondary gain. Generally conversion symptoms occur or are preceded by conflicts or other stressors. Typically, conversion symptoms occur following psychological stress, not an industrial injury. There is some evidence to support a diagnosis of Malingering in the sense that the symptom is unexplainable medically and is providing substantial secondary gain.

{¶ 33} 16. Dr. Risin drafted a report dated March 26, 2009[1] rebutting Dr. Hawkins' report. Dr. Risin remained of the opinion that relator had a conversion disorder.

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[1]Dr. Risin's report is mistakenly dated March 26, 2008, but, in actuality, should be dated March 26, 2009.

{¶ 34} 17. Relator's motion seeking the additional allowance of conversion disorder was heard before a district hearing officer ("DHO") on April 15, 2009. The DHO granted the motion and allowed relator's claim for conversion disorder based on the March 26, 2009 report of Dr. Risin and the October 14, 2008 report of Dr. Miller.

{¶ 35} 18. In a letter dated May 11, 2009, Dr. Risin indicated that a C-9 had been submitted seeking an ophthalmologist consult stating that "[g]iven that his blindness seems to be unremitting, it is essential that we continue to rule out any potential explanation for Daniel's symptoms."

{¶ 36} 19. An independent psychiatric evaluation was performed by Alan B. Levy, M.D. In his May 21, 2009 report, Dr. Levy noted that relator continued to complain of a bright light in his left eye which interfered with his ability to see out of his left eye and required him to continually wear sunglasses. Dr. Levy opined that relator's depression no longer disabled him from working. Dr. Levy also opined that relator's conversion disorder had reached MMI, stating:

> There has not been any change in his allowed condition of Conversion Disorder[.] Given the duration of time that he has been in therapy and the successful improvement in his depression with antidepressants without any improvement in his conversion symptoms of the white light affecting his left eye, I would say that his Conversion Disorder is at MMI[.] It would not be appropriate to regard him as permanently disabled on the basis of a Conversion Disorder as there is secondary gain from this condition inherent in its diagnosis[.] It is reasonable for him to return to work and reasonable for him to engage in vocational rehabilitation in order to find a position that he is able to work in[.] He is no longer temporarily disabled by any of his psychiatric conditions[.]

{¶ 37} 20. On June 5, 2009, relator filed a C-86 motion seeking a scheduled loss of use award for the functional loss of vision of his left eye. In support of his motion, relator submitted the following previously discussed reports: the July 5, 2007 report of Dr. Poling, the September 5, October 29 and November 7, 2007 reports of Dr. Hirsh, the August 14, 2008 report of Dr. Risin and the October 14, 2008 report of Dr. Miller.

{¶ 38} 21. An independent medical examination was conducted by Kathleen A. McGowan, M.D., at Riverside Eye Physicians and Surgeons. In her July 28, 2009 report,

Dr. McGowan identified the allowed conditions and provided her examination findings. Because her testing yielded contradictory results, Dr. McGowan indicated that she could not state that relator had a loss of vision in his left eye and recommended additional testing. Specifically, Dr. McGowan stated:

> Mr. Smith's *subjective* statement of what he now sees with his left eye is variable and contradictory—at one point he denies any perception of a light that appears on a plain white visual field screen just 1/3 metric from his face, while at another time he describes being able to see part of the 20/400 "E". And he follows the optokinetic drum, and his image in a mirror, normally with his left eye. Unfortunately, a valid VER, (an *objective* measure of visual potential) was not obtainable on the left eye, because of Mr. Smith's constant blinking and looking away from the test target. Because of his variable and contradictory subjective visual acuity responses, it is not possible to determine with any degree of accuracy what his visual acuity really is, or whether there has been any degree of visual loss. The description of the work-related injury itself sounds rather mild, and unlikely to produce a loss of vision. There is no clinical evidence on ophthalmic examination of any abnormality, such as optic neuropathy or retinal detachment or a relative afferent papillary deficit, that would support a subjective complaint of visual loss. In my medical opinion, I do not think that any alleged visual loss, if there is indeed any such visual loss, would be a direct and proximate result of the work injury as described by the injured worker. I would recommend that another attempt be made to obtain a valid VER on his left eye. If he fails to cooperate a second time, consideration should be given to the possibility of malingering, as suggested by Dr. Hawkins.

(Emphasis sic.)

{¶ 39} 22. Relator's motion seeking a total loss of use of his left eye was heard before a DHO on September 14, 2009. After acknowledging that no physical cause had been established for relator's loss of vision and that his claim had been additionally allowed for the psychological condition of conversion disorder, the DHO determined that relator had met his burden of proof, stating:

> That leaves only the legal question as to whether the psychological eye problems amount to a total loss of use. On that question, there is nothing contrary to Injured Worker's

> evidence that he has a PSYCHOLOGICAL total loss of vision. The Bureau of Workers' Compensation chose not to get any contrary PSYCHOLGOICAL evidence. Indeed, as previously noted, the psychological evidence acquired by the Bureau of Workers' Compensation fully supports Injured Worker's position.
>
> Injured Worker met his burden of proof.

(Emphasis sic.)

{¶ 40} The DHO rejected respondent Hogan's Services, Inc.'s ("employer") argument that, inasmuch as relator's claim was only recently allowed for conversion disorder, that more time was necessary before determining that he had reached MMI. In rejecting that argument, the DHO stated:

> [E]very mental health professional who has examined Injured Worker agrees that he is at maximum medical improvement. Thus, by definition, while continued maintenance treatment is required, no further psychological improvement is expected.

{¶ 41} The DHO relied on the following reports: the January 24 and August 14, 2008 and March 26, 2009 reports of Dr. Risin as well as the October 14, 2008 report of Dr. Miller.

{¶ 42} 23. Relator was examined by Paul A. Deardorff, Ph.D., to address the following issue:

> Based upon the allowed psychological condition of Conversion Disorder or Depressive Disorder, does Mr. Smith suffer from the alleged condition of loss of vision of the left eye related to the is industrial injury by way of flow thru or do you believe there is insufficient evidence on file to relate this condition to this industrial injury? Please explain.

{¶ 43} After identifying the voluminous records which he reviewed, and taking a history from relator, Dr. Deardorff administered the MMPI - 2 (Minnesota Multiphasic Personality Inventory – 2) test. Dr. Deardorff concluded that the results of the testing were invalid, stating:

> Mr. Smith's MMPI-2 profile is not valid as test evidence is strongly indicative of the over reporting of emotional difficulty. It is important to note that he independently read and completed the 567-item questionnaire.

{¶ 44} Dr. Deardorff concluded that there was insufficient evidence to support a vision loss in the left eye. Specifically, Dr. Deardorff concluded:

> It is important to note that this examiner is not a trained physician and has no training in ocular disorders. The claimant reports a loss of vision of the left eye, but drove to the appointment, maneuvered about the office without difficulty, and completed a 567-item personality inventory unassisted. While he reported sensitivity to light and removed his glasses only when the examiner dimmed the lights, his comments and test data were suggestive of an over-reporting of his difficulties. For example, he reported significant sleep problems immediately prior to the evaluation yet showed no signs of fatigue. Further, he appeared to be easily suggestible as he, often without hesitation, acquiesced to the examiner's questions regarding unusual physiological ailments. In addition, test data are also indicative of a tendency to over-endorse emotional difficulty. Based only on his comments, clinical presentation and personality test data, this examiner does not believe that there is sufficient evidence supporting vision loss of the left eye.

(Emphasis sic.)

{¶ 45} 24. The employer's appeal from the September 14, 2009 DHO's order granting a loss of use award was heard before a staff hearing officer ("SHO") on November 5, 2009. The SHO vacated the prior DHO's order and denied relator's motion for a total loss of vision. After discussing the report of Dr. Deardorff, the SHO concluded that medical evidence did not demonstrate that any loss of vision suffered by relator was permanent. In discussing the report of Dr. Deardorff, the SHO stated:

> The Injured Worker was examined by Dr. Paul Deardorff, Ph.D. He stated, "Based upon research and the diagnostic criteria of a conversion disorder, the vision loss is very unlikely to be permanent." He went on to state, "While the Injured Worker complained of vision loss, it did not interfere with his ability to read, move about the office or drive. As such, the symptom severity is mild at best. As was indicated earlier, the vision loss is not permanent. Research indicates that the prognosis for recovery from conversion disorder is highly favorable. Further, research indicates that patients who have clearly identifiable stressors in their lives, acute onset of symptoms, and a short interval between symptom

> onset and treatment, have the best prognosis. The individuals symptoms of conversion disorder are usually self-limited and do not lead to lasting disabilities." The Staff Hearing Officer finds that a functional loss of use of an eye needs to be a permanent condition before it can be allowed as a loss of vision under Revised Code 4123.57.

{¶ 46} In finding that there was no medical evidence to support the conclusion that relator's vision loss was permanent, the SHO stated:

> There is no medical evidence whatsoever to show that, if there is a functional loss of vision in the left eye, it is permanent. The reports of the Injured Worker's physician, Dr. Risin, were reviewed and there is no such conclusion in any of his [sic] reports. Therefore, the Staff Hearing Officer finds that without a finding of permanency for the loss of vision then it must be denied.

{¶ 47} 25. Relator's appeal was refused by order of the commission mailed December 11, 2009.

{¶ 48} 26. Relator filed a request for reconsideration and, in an order mailed January 22, 2010, the commission determined that relator had presented evidence of sufficient probative value to warrant adjudication of his request for reconsideration regarding the alleged presence of a clear mistake of law. Specifically, the commission stated:

> Specifically, it is alleged that the report of Paul Deardorff, PhD, dated 09/29/2009 cannot be relied upon; the doctor's opinion is not corroborated by specified research and the Staff Hearing Officer's decision regarding permanency is contrary to the [*State ex rel. Kroger Co. v. Stover*, 31 Ohio St.3d 229 (1987)] case.

{¶ 49} 27. Before the matter was heard before the commission, Dr. Deardorff prepared an addendum to his earlier report. This addendum was filed February 16, 2010. In his addendum, Dr. Deardorff provided specific references for his conclusion that relator's conversion disorder and subsequent loss of vision were not permanent. Those references include the following:

> <u>The Diagnostic and Statistical Manual of Mental Disorder Fourth Edition – Text Revision</u>
>
> - Page 496

> - "The onset of Conversion Disorder is generally acute in individual's hospitalized with conversion symptoms, symptoms will remit within two weeks in most cases[,] reoccurrence is common, occurring in one-fifth to one-quarter of individuals within one year, with a single reoccurrence predicting future episodes[.]"
>
> - "Factors that are associated with good prognosis include acute onset, presence of clearly identifiable stress at the time of onset (industrial accident), a short interval between onset and institution of treatment and above average intelligence[.] Symptoms of paralysis, aphonia, and **blindness** are associated with a good prognosis, whereas tremors and seizures are not[.]"
>
> The National Institute of Health (www nlm nih gov)
> - Signs include a debilitating symptom that begins suddenly, a history of a psychological problem that gets better after the symptoms appears, and a lack of concern that usually occurs with a severe symptom[.]
> - Prognosis "symptoms usually last for days to weeks and they suddenly go away[.]"
>
> www MayoClinic com
> - For many people symptoms of Conversion Disorder get better without treatment[.]
> - Conversion Disorder symptoms can be severe but for most people, they get better within a few weeks[.]
>
> In short, research generally suggests that a Conversion Disorder generally follows a stressful event[.] Symptoms generally remit within weeks, although up to one-fourth of people may experience recurring[.] This examiner was unable to find research indicating that a Conversion Disorder is permanent and without any remissions[.]

(Emphasis sic.)

{¶ 50} 28. The employer filed a memorandum in support of its position opposing relator's request that the commission exercise its continuing jurisdiction. The employer noted that relator had indicated that Dr. Deardorff had not attached any research to

support his opinion and, after indicating that Dr. Deardorff was not required to provide any attachments, the employer pointed out that Dr. Deardorff had now provided references in the form of his addendum. The employer concluded by noting that there was disagreement among the physicians and specialists who had examined relator as to the extent of his vision problems and that it had been impossible to measure the extent of any vision loss.

{¶ 51} 29. In an order mailed April 2, 2010, the commission determined that it did not have authority to exercise its continuing jurisdiction and reinstated the SHO's order.

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

Conclusions of Law:

{¶ 53} Relator makes the following arguments: (1) because his vision loss had lasted two and one-half years, the condition was permanent; (2) Dr. Deardorff's report does not constitute some evidence because he did not actually base his prognosis on his examination of relator in contravention of this court's holding in *State ex rel. Gidley v. Indus. Comm.*, 10th Dist. No. 04AP-1316, 2005-Ohio-5534; (3) Dr. Deardorff's report is equivocal and internally inconsistent; and (4) the commission's order denying him a total loss of use award is premised on the commission's assumption that his vision may some day be restored or corrected in contravention of *State ex rel. Kroger Co. v. Stover*, 31 Ohio St.3d 229 (1987).

{¶ 54} For the reasons that follow, it is this magistrate's decision that the commission did not abuse its discretion when it denied relator a total loss of vision.

{¶ 55} The Supreme Court of Ohio has set forth three requirements which must be met in establishing a right to a writ of mandamus: (1) that relator has a clear legal right to the relief prayed for; (2) that respondent is under a clear legal duty to perform the act requested; and (3) that relator has no plain and adequate remedy in the ordinary course of the law. *State ex rel. Berger v. McMonagle*, 6 Ohio St.3d 28 (1983).

{¶ 56} R.C. 4123.57(B) provides a schedule for the payment of compensation for certain enumerated losses. Specifically, the statute provides:

> For the loss of the sight of an eye, one hundred twenty-five weeks.

> For the permanent partial loss of sight of an eye, the portion of one hundred twenty-five weeks as the administrator in each case determines, based upon the percentage of vision actually lost as a result of the injury or occupational disease, but, in no case shall an award of compensation be made for less than twenty-five per cent loss of uncorrected vision. "Loss of uncorrected vision" means the percentage of vision actually lost as the result of the injury or occupational disease.

{¶ 57} Recently, in *State ex rel. Smith v. Indus. Comm.*, 10th Dist. No. 11AP-61, 2012-Ohio-1011, this court specifically considered a situation which has some bearing on the facts of this case. Specifically, George Smith ("George") suffered a work-related injury in 1995 and, in the course of undergoing surgery to correct the resulting hernia, George suffered a brain injury. George's claim was allowed for "bilateral inguinal hernia, anoxic brain damage, and seizure disorder." *Id.* at ¶ 3. The commission awarded George permanent and total disability compensation in 1998 and in 2004 the commission granted his motion for scheduled loss of use award for the loss of use of his legs and arms.

{¶ 58} Later, George sought a scheduled loss of use award for the total loss of both his vision and hearing. Concerning his vision, all the medical evidence indicated that George's eyes, including the optic nerve, were functioning; however, due to the anoxic brain damage, George was unable to respond to any visual stimuli. Because there was no way to measure George's vision loss due to his inability to respond verbally or otherwise, the commission denied his request.

{¶ 59} Ultimately, this court granted a writ of mandamus ordering the commission to conduct a new adjudication of George's applications for scheduled loss awards for a total loss of vision and hearing under R.C. 4123.57(B). While acknowledging the statute's requirement that the medical evidence must establish a total loss of vision, this court acknowledged that, in certain situations, scheduled loss of vision awards had been made where the medical evidence showed less than a total loss of use. Specifically, this court stated:

> This precedent leads us to conclude that this court and the Supreme Court have interpreted "total loss" of vision or hearing under R.C. 4123.57(B) to mean something other than a clinical finding of a 100 percent loss based solely on audiological findings. Instead, while not relying expressly on

> the for-all-practical-purposes standard articulated in loss-of-appendage cases like [*State ex rel. Alcoa Bldg. Prods. v. Indus. Comm.*, 102 Ohio St.3d 341, 2004-Ohio-3166], this court and the Supreme Court of Ohio have held that the commission does not abuse its discretion by awarding scheduled loss benefits for a total loss of vision or hearing where the medical evidence considers the practical application of clinical or other data showing a loss of 100 percent or less. Accordingly, we sustain in part relator's first and third objections.

Id. at ¶34.

{¶ 60} While this court did not address whether or not the medical evidence in the *Smith* case was sufficient to warrant a total loss of vision award, it appears that such awards can be made in spite of the fact that the claimant cannot explain the loss based on the ability of the eyes to function. In spite of the fact that there were no reliable tests to determine George's loss of vision, this court determined that such a finding was unnecessary and returned the matter to the commission.

{¶ 61} The question under R.C. 4123.57(B) is whether relator has demonstrated that he suffered loss of sight or partial loss of sight. The answer to that question determines whether relator receives 125 weeks of compensation or some percentage thereof. Further, under R.C. 4123.57(B), relator must demonstrate that his loss of vision is permanent, i.e., that his conversion disorder and any loss of vision experienced as a result of that conversion disorder have reached a treatment plateau from which no fundamental functional or physiological change can be expected within reasonable medical probability in spite of continuing medical or rehabilitative procedures. *See* Ohio Adm.Code 4121-3-32(A)(1).

{¶ 62} It is undisputed that relator's claim has been allowed for conversion disorder. *Taber's Cyclopedic Medical Dictionary* 479 (20th Ed.2005) defines "conversion disorder" as:

> A psychological disorder marked by symptoms or deficits affecting motor or sensory function that mimic a neurological or general medical disease. Psychological factors are associated with and precede the condition. Symptoms may include loss of sense of touch, double vision, blindness, deafness, paralysis, and hallucinations. Individuals with conversion symptoms show "la belle

> indifference" or relative lack of concern. The symptoms are not intentionally produced or feigned. The diagnosis cannot be established if the condition can be explained by the effects of medication or a neurological or other general medical condition.

{¶ 63} As above indicated, a conversion disorder is a psychological condition diagnosed where an individual suffers symptoms affecting motor or sensory function which mimic a neurological or general medical disease, but which cannot be attributed to a neurological or general medical disease. In the present case, the medical evidence indicates that relator's eyes are healthy and functioning normally. However, in spite of this, relator began experiencing visual difficulties. In describing his actual symptoms when evaluated, relator has described his condition in the following ways: flash of light/bright light (reports of Drs. Jones, Whitten, Hawkins, Levy, Risin, and Deardorff), blurred vision (reports of Drs. Hutchison and Hirsh), and light sensitivity (reports of Drs. Hutchison, Levy, Miller, and Risin). All the doctors acknowledge that relator's symptoms were subjective and that there were no tests which could objectively validate relator's symptoms.

{¶ 64} While this court acknowledged in *Smith* that a total loss of use could be awarded in the absence of medical proof establishing a 100 percent loss, George did not react at all the visual or verbal stimuli. Although the medical evidence established that George's eyes themselves were not damaged, it was clear from testing that George could not perceive and convey any ability to see. Further, George's overall condition continued to deteriorate and, given the anoxic brain injury, it was undisputed that none of his conditions would ever improve. The magistrate finds that these facts—consistent inability to respond and the continuing deterioration of his condition—differentiates the factual pattern in *Smith* from the factual pattern here. In the present case, there was no way to medically validate what vision loss relator actually had in his left eye. Instead of consistent findings, the doctors evaluating relator provided different descriptions of relator's response to visual stimuli and some doctors opined that relator was malingering (Drs. Hawkins and McGowan). No one questioned the veracity of George's responses.

{¶ 65} As noted in the findings of fact, when relator filed his motion seeking a total loss of vision in his left eye, he attached six reports which were all written before his claim

was allowed for conversion disorder. Two of those reports (the March 26, 2009 report of Dr. Risin and the October 14, 2008 report of Dr. Miller) had been relied upon by the commission when allowing his claim for conversion disorder. After reviewing each of those reports, the magistrate notes that none of those reports indicate that relator's conversion disorder/vision loss is permanent or total. In his July 5, 2007 report, Dr. Poling only indicates that relator's loss of vision is directly and causally related to his March 21, 2007 injury. Dr. Hirsh's September 5, October 29, and November 7, 2007 reports indicate that there is no explanation for relator's severe left eye visual acuity and field loss. In her August 14, 2008 report, Dr. Risin indicates that relator informed her that he can only see light and that his left eye is extremely light sensitive. Dr. Risin opines that relator may have a conversion disorder. Finally, in his October 14, 2008 report, Dr. Miller states that relator does have conversion disorder and that this conversion disorder will mean that his psychiatric condition will take longer to improve.

{¶ 66} Clearly, a review of relator's medical evidence lacks any opinion that to a reasonable degree of medical certainty, relator's conversion disorder/vision loss is permanent. In his brief, relator quotes the DHO's order indicating that "every mental health professional who has examined Injured Worker agrees that he is at maximum medical improvement," but relator does not identify any of those doctors or their reports and relator cannot do so because the DHO's statement is incorrect. In fact, there is only one report in the record which could, conceivably, be relied on to find that relator's conversion disorder and loss of vision was permanent and this would be the May 21, 2009 report of Dr. Levy who opined that relator's conversion disorder had reached maximum medical improvement. To the extent that relator argues that a condition which has reached maximum medical improvement is permanent, Dr. Levy's report is the only report which could be relied upon to support such a finding. However, Dr. Levy's report has not been relied upon. None of the remaining physicians' reports give an opinion that relator's conversion disorder is permanent.

{¶ 67} The SHO recognized that the medical evidence did not support a finding of permanency:

> There is no medical evidence whatsoever to show that, if there is a functional loss of vision in the left eye, it is permanent. The reports of the Injured Worker's physician,

> Dr. Risin, were reviewed and there is no such conclusion in any of his [sic] reports. Therefore, the Staff Hearing Officer finds that without a finding of permanency for the loss of vision then it must be denied.

{¶ 68} As above indicated, the SHO found that relator failed to meet his burden of proving that his conversion disorder/vision loss was permanent. Finding that relator's medical evidence did not support a total loss of vision, the SHO found that relator failed to meet his burden of proof. Given this finding, the SHO was not required to make any other findings nor was the SHO required to cite any other evidence. However, in spite of the finding that relator did not meet his burden of proof, the SHO did point to other evidence in the record which indicated that: (1) as a general rule, conversion disorders are not permanent, and (2) that relator's conversion disorder was not permanent.

{¶ 69} In challenging Dr. Deardorff's report, relator indicates that he did not actually base relator's prognosis on his examination of relator in contravention of this court's holding in the *Gidley* case. Relator also argues that Dr. Deardorff's report is equivocal and inconsistent. For the reasons that follow, this magistrate disagrees.

{¶ 70} Randy M. Gidley suffered a work-related injury when chemicals splashed into his eyes. Although his eyes healed, Gidley developed vision problems which could not be attributed to any neurological or physical condition. Gidley's claim was allowed for conversion disorder and he filed a motion seeking a total loss of use of vision.

{¶ 71} The issue involved addressed a statement made by Dr. Alan Letson concerning hysterical blindness. Dr. Letson examined Gidley the day after he sustained his injury. Dr. Letson could not find any evidence of retinal abnormality or injury in either eye, nor did he find any evidence of optic nerve abnormality. In fact, all of the testing revealed that Gidley's eyes were healthy. At that time, Dr. Letson made the following statement in his report:

> I did raise the issue of hysterical blindness with Randy and indicated that this was often a transient phenomenon. I told him that I found absolutely no indication of any significant ocular trauma that would result in NLP vision and that if indeed this level of visual function were true, then we would have to look to other sources of vision loss.

Id. at ¶ 16.

{¶ 72} Almost two years later, Gidley's claim was additionally allowed for conversion disorder and Gidley moved for compensation for the alleged loss of vision of his left eye.

{¶ 73} In denying Gidley's request, the commission relied on Dr. Letson's report. Gidley filed a mandamus action in this court and one of the issues involved the commission's reliance on Dr. Letson's report. This court agreed with the magistrate's statement that:

> Clearly, Dr. Letson's statement is not time relevant to the permanency issue raised by relator's May 12, 2004 motion filed more than two years after Dr. Letson's statement. Moreover, Dr. Letson was simply indicating to his patient some hopeful information regarding the clinical course of hysterical blindness generally. Dr. Letson's statement was not offered as a medical opinion specific to relator's condition at the time relator moved for R.C. 4123.57 (B) compensation.

Id. at ¶ 43.

{¶ 74} In the present case, relator points to the following quote from Dr. Deardorff's report:

> As was indicated earlier, the vision loss is not permanent. Research indicates that the prognosis for recovery from conversion disorder is highly favorable. Further, research indicates that patients who have clearly identifiable stressors in their lives, acute onset of symptoms, and a short interval between symptom onset an treatment, have the vest prognosis. The individual symptoms of conversion disorder are usually self-limited and do not lead to lasting disabilities.

{¶ 75} Relator contends that the above statement is general in nature and relates to nothing more than the course of a conversion disorder in general and does not relate to relator specifically. The magistrate disagrees.

{¶ 76} First, relator ignores that portion of the paragraph which immediately precedes the paragraph upon which he relies. In those sentences, Dr. Deardorff stated:

> While the injured worker complaint of vision loss, it did not interfere with his ability to read, move about the office or drive. As such, the symptoms severity is mild at best.

Second, relator ignores the fact that Dr. Deardorff's report was prepared after he examined relator and at the time that relator's application for compensation was filed. Third, relator ignores the question which Dr. Deardorff was asked to answer and the fact that that question related specifically to relator. The question to which Dr. Deardorff replied is:

> At the time of your examination, were the vision problems (as objectively determined): (a) still present, (b) the severity and (c) it [sic] the vision loss or impairment is permanent. Does the conversion disorder improve with or without treatment?

{¶ 77} Reading the paragraph in its entirety, it is apparent that Dr. Deardorff was indicating that relator's ability to read, move about the office and drive indicated that his vision loss was mild at best and was not total. In making that statement, Dr. Deardorff referred to research which indicates that conversion disorders do not usually lead to lasting disabilities. Dr. Deardorff's statements were time relevant, were directed at relator and support the commission's determination that relator did not sustain a total loss of vision and that his visual problems were not permanent. This case does not present a *Gidley* issue to the court.

{¶ 78} Relator also contends that Dr. Deardorff's report is equivocal and inconsistent arguing that he appears to "vacillate[] between finding that there is no vision loss, to finding that there is vision loss that is not total, to finding that there *is* vision loss, but that it is not permanent." (Emphasis sic.) (Relator's brief, at 9.) For the reasons that follow, the magistrate finds that Dr. Deardorff's report is not equivocal or inconsistent.

{¶ 79} Equivocal medical opinions are not evidence. *State ex rel. Eberhardt v. Flxible Corp.*, 70 Ohio St.3d 649, 655 (1994). Equivocation occurs when a doctor repudiates an earlier opinion, renders contradictory or uncertain opinions, or fails to clarify an ambiguous statement. *Id*. Ambiguous statements, however, are considered equivocal only while they are unclarified. *Id*. The Supreme Court, at 657, further explains ambiguous statements:

> [A]mbiguous statements are inherently different from those that are repudiated, contradictory or uncertain. Repudiated, contradictory or uncertain statements reveal that the doctor is not sure what he means and, therefore, they are inherently unreliable. Such statements relate to the doctor's position on

> a critical issue. Ambiguous statements, however, merely reveal that the doctor did not effectively convey what he meant and, therefore, they are not inherently unreliable. Such statements do not relate to the doctor's position, but to his communication skills.

{¶ 80} In his report, Dr. Deardorff acknowledged that conversion disorder was an allowed condition in relator's claim. As such, Dr. Deardorff acknowledged that, as a result, relator had suffered some vision loss. Based upon his examination and observations, Dr. Deardorff also concluded that any vision loss which existed was not total. As evidence, Dr. Deardorff noted that relator was able to read, that he moved about the office without any difficulties, and that he was able to drive. As indicated previously, relator had recently renewed both his driver's license and his commercial driver's license and was currently driving without any restrictions. In essence, Dr. Deardorff's report is some evidence that to the extent that relator did suffer from a total loss of vision at some point in time after his injury, his vision was improving and was no longer total. There is nothing equivocal or inconsistent or ambiguous in Dr. Deardorff's report.

{¶ 81} To the extent that Dr. Deardorff acknowledged that relator might have some minimal vision loss, relator argues that the commission was required to determine if he had sustained at least a 25 percent loss of vision thereby qualifying him for a loss of use award less than total, the magistrate disagrees. First, all of relator's medical evidence indicated that he had a total loss of vision. Second, to the extent that any of the physicians were able to test relator's vision, the results are inconsistent. Third, some physicians have specifically noted that relator was uncooperative during the testing. As such, there is no evidence in the record from which the commission could have made such a determination.

{¶ 82} Relator's final argument is that the commission failed to properly apply the law as enunciated in *Kroger*. In that case, John W. Stover sustained corneal burns in both of his eyes and ultimately underwent corneal transplant surgery in his right eye and applied for loss of vision compensation. The commission determined that Stover had demonstrated a loss of vision and awarded him benefits.

{¶ 83} Kroger filed a mandamus action arguing that the commission abused its discretion by awarding loss of vision compensation because the commission refused to

consider the improvement of Stover's vision by virtue of the corneal transplants. Kroger's argument was that a loss which has been surgically repaired does not represent an actual loss and that a corneal transplant differed significantly from optical prostheses such as eyeglasses or contact lenses.

{¶ 84} The court rejected Kroger's argument holding that the improvement in vision resulting from the corneal transplant is a correction to vision and cannot be taken into consideration when determining the percentage of vision actually lost.

{¶ 85} Relator argues that the commission misapplied *Kroger* because he presented evidence that he did sustain a total loss of vision and that, even if his vision has improved, the loss was still total at one point in time. Relator is arguing that the resolution of his conversion disorder should be considered a correction to his vision and should not be taken into consideration when determining the percentage of vision actually lost.

{¶ 86} Unlike Stover, relator has not suffered any physical damage or harm to his left eye. Therefore, there are no surgical procedures which could restore his vision and neither glasses nor contacts can improve his vision. Relator's vision loss is a result of his suffering from conversion disorder and the record indicates that when his conversion disorder resolves, his sight will be restored.

{¶ 87} The magistrate finds that the resolution of his psychological disorder is not a correction to vision and that the court's holding in *Kroger* does not apply here.

{¶ 88} Based on the foregoing, it is this magistrate's decision that relator has not demonstrated that the commission abused its discretion in denying him a loss of vision award and this court should deny his request for a writ of mandamus.

/s/ Stephanie Bisca Brooks
STEPHANIE BISCA BROOKS
MAGISTRATE

NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).