

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

State of Ohio ex rel. Paul Scarberry,	:	
Relator,	:	
v.	:	No. 12AP-707
Comfort Specialist and Industrial	:	(REGULAR CALENDAR)
Commission of Ohio,	:	
Respondents.	:	

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D E C I S I O N

Rendered on July 18, 2013

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*O'Connor, Acciani & Levy*, and *Ronald T. Bella*, for relator.

*Michael DeWine*, Attorney General, and *Justine S. Casselle*,  
for respondent Industrial Commission of Ohio.

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IN MANDAMUS  
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

KLATT, P.J.

{¶ 1} Relator, Paul Scarberry, commenced this original action in mandamus seeking an order compelling respondent, Industrial Commission of Ohio ("commission"), to vacate its order denying him permanent total disability ("PTD") compensation and to enter an order granting said compensation.

{¶ 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 reports of Dr. Fritzhand and Dr. Tosi are some evidence supporting the commission's

denial of PTD. The magistrate also found that the commission did not abuse its discretion by failing to identify and discuss the Cody vocational report because the commission did not rely on that report. 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 objection, relator contends that the magistrate erred by rejecting relator's argument that the commission abused its discretion by failing to consider, or explain, how relator's physical and psychological limitations affected his ability to engage in sustained remunerative employment. We disagree.

{¶ 4} The commission explained in considerable detail why it believed relator was not foreclosed from obtaining sustained remunerative employment despite his physical and psychological limitations. The commission is the expert on assessing vocational factors. In addition, the commission is not required to identify and discuss a report that it rejected. *State ex rel. Lovell v. Indus. Comm.*, 74 Ohio St.3d 250 (1996). We see nothing in the record that indicates that the commission abused its discretion in assessing the non-medical factors applicable to relator or in its explanation of its decision. Therefore, we overrule relator's first objection.

{¶ 5} In his second objection, relator contends that the magistrate erred by concluding that the commission is an expert on whether relator is capable of sustained remunerative employment, and even if an expert, there not was some evidence to support its denial of PTD. Again, we disagree.

{¶ 6} The commission may credit offered vocational evidence, but expert opinion is not critical or necessary because the commission is the expert on this issue. *State ex rel. Jackson v. Indus. Comm.*, 79 Ohio St.3d 266, 271 (1997). It is well-settled law that the commission is the expert on non-medical factors, including vocational evidence. *State ex rel. Patterson v. Indus. Comm.*, 10th Dist. No. 11AP-1063, 2013-Ohio-1016.

{¶ 7} Here, the commission identified the non-medical factors it considered—relator's age, education, and work history—and detailed its findings as to those factors. Because the commission is the expert on non-medical factors, and because there is some evidence to support its decision, we overrule relator's second objection.

{¶ 8} 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.*

TYACK and T. BRYANT, JJ., concur.

T. BRYANT, J., retired, of the Third Appellate District,  
assigned to active duty under authority of Ohio Constitution,  
Article IV, Section 6(C).

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**APPENDIX**

## IN THE COURT OF APPEALS OF OHIO

## TENTH APPELLATE DISTRICT

State of Ohio ex rel. Paul Scarberry,	:	
	:	
Relator,	:	No. 12AP-707
	:	
v.	:	(REGULAR CALENDAR)
	:	
Comfort Specialist and Industrial	:	
Commission of Ohio,	:	
	:	
Respondents.	:	
	:	

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MAGISTRATE'S DECISIONRendered on February 28, 2013

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*O'Connor, Acciani & Levy, and Ronald T. Bella, for relator.**Michael DeWine, Attorney General, and Justine S. Casselle,*  
for respondent Industrial Commission of Ohio.

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## IN MANDAMUS

{¶ 9} In this original action, relator, Paul Scarberry, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order denying him permanent total disability ("PTD") compensation and to enter an order granting the compensation.

Findings of Fact:

{¶ 10} 1. On December 10, 2002, relator injured his lower back when he fell from a ladder while employed as a heating, ventilation, and air conditioning ("HVAC") specialist. The employer was a state-fund employer.

{¶ 11} 2. The industrial claim (No. 02-882123) is allowed for:

Lumbar sprain; recurrent disc herniation L4-5; depressive disorder; lumbar spondylosis of the bilateral lumbar facets from L2-L3, L3-L4, L4-L5, and L5-S1.

{¶ 12} 3. Relator has undergone four surgeries to his lower back since the date of injury.

{¶ 13} 4. On July 10, 2011, treating physician, Allan T. Rison, M.D., opined:

At this point, it is my medical opinion that Paul Scarberry is deemed to be totally and permanently disabled due to his work-related injury. The patient has tried multiple surgical and interventional measures over the years that have only brought him to a baseline level of pain which makes most activities intolerable for him for long periods of time. The patient has also had significant depression regarding loss of function and quality of life. This in combination leads me to the conclusion of permanent disability.

At this point, the patient's pain is manageable for minimal and limited activities and he has been unable to undergo vocational rehab due to depression and difficulty sitting for long periods of time. Mr. Scarberry has tried to return to his previous occupation, however he was intolerant to it. He also has had acceleration of pain in which he underwent subsequent spinal cord stimulation permanent placement. Although this does help to control his day-to-day symptoms, it does not control acceleration of pain due to increased amounts of physical activity.

{¶ 14} 5. On July 29, 2011, relator filed an application for PTD compensation. In support of his application, relator submitted the July 10, 2011 report of Dr. Rison.

{¶ 15} 6. The PTD application form asks the applicant to provide information regarding his education. Relator indicated that he completed the tenth grade in 1980. Although he did not graduate from high school due to his father's death, he did later obtain a certificate for passing the General Educational Development ("GED") test.

{¶ 16} Relator received special training in HVAC.

{¶ 17} The application form posed three questions to the applicant: (1) "Can you read?" (2) "Can you write?" and (3) "Can you do basic math?" Given a choice of "Yes," "No," and "Not well," relator selected the "Yes" response to all three queries.

{¶ 18} The application also asked the applicant to provide information regarding work history. Relator was employed as an HVAC installer from 1999 to 2003. Before that he was employed as a security guard and a welder.

{¶ 19} 7. On September 27, 2011, at the commission's request, relator was examined by psychologist Donald J. Tosi, Ph.D. In his ten-page narrative report dated October 4, 2011, Dr. Tosi states:

**Mental Status Examination:** Cognitively, the Injured Worker is alert, oriented in all spheres, with adequate reality contact. Concentration and attention are mildly reduced. He is able to comprehend simple commands. He is able to comprehend complex commands. Stream of thought and flow of ideas are normal. There is no evidence of educational deficits. There is no evidence of cognitive dysfunction due to psychoses, head injury, or organicity. Perseveration and hallucinations are absent. Mild paranoid thoughts are present (suspiciousness, lack of trust). He expresses his thoughts clearly. Thinking is goal-directed. His associations are reasonably well organized. The Injured Worker responds to questions appropriately. Memory functions are mildly reduced. He gave a fair account of his life events in chronological order. Abstract reasoning, concept formation, and fund of knowledge are estimated to be within normal limits. He has a functional understanding of everyday objects. His judgement [sic] is fair. The Injured Worker has a past history of a dysfunctional marriage and legal problems. Executive functions (i.e. decision-making, flexibility, social perceptions) are intact and estimated to be low average. Insight is fair.

{¶ 20} At page ten of his report, Dr. Tosi opines that relator suffers a 25 percent permanent impairment due to the allowed depressive disorder. Dr. Tosi further opines:

The Injured Worker is able to work in a low to moderate work stress environment. Work tasks should be simple to moderate in complexity.

{¶ 21} 8. On October 5, 2011, Dr. Tosi completed a form captioned, "Occupational Activity Assessment, Mental & Behavioral Examination." On the form, Dr. Tosi indicates by his mark "This Injured Worker is capable of work with the limitation (s) and/or modification (s) noted below:"

{¶ 22} In the space provided, Dr. Tosi wrote "See report."

{¶ 23} 9. On October 14, 2011, at the commission's request, relator was examined by Martin Fritzhand, M.D. Dr. Fritzhand examined only for the allowed physical conditions of the claim. In his five-page narrative report, Dr. Fritzhand opined that relator suffers a 25 percent whole person impairment due to the allowed physical conditions of the claim.

{¶ 24} 10. On October 14, 2011, Dr. Fritzhand completed a physical strength rating form. On the form, Dr. Fritzhand indicates by his mark that relator is capable of "light work." In the space provided, Dr. Fritzhand added further limitations:

[Patient] should alternate from weight-bearing to sitting position as needed.

{¶ 25} 11. On November 15, 2011, vocational expert William T. Cody interviewed relator by telephone. Cody also reviewed the reports of Dr. Fritzhand and Dr. Tosi. In his four-page narrative report, Cody opines:

From a psychological standpoint, Dr. Tosi (2011), in his psychological specialist report, finds that Mr. Scarberry can perform work activity in spite of the psychological limitations present because of his work injury.

Dr. Tosi warns that Mr. Scarberry has a "**Class III**" (emphasis added) or moderate level of impairment in his ability to sustain concentration and adapt to a new kind of work activity.

Dr. Tosi underestimates the psychological capacity needed to adapt to and perform a new kind of work activity when one has physical and psychological restrictions. The level of limitations he says that Mr. Scarberry has eliminates him from being able to reliably learn or perform a new kind of work activity. This is especially true with a moderate impairment in concentrating and adapting to a new kind of work activity. Impairments of this degree in the areas that are central to learning a new job can preclude someone from learning or performing a new kind of work.

If the faulty assumption is made that Mr. Scarberry has the psychological capacity to work, the analysis must continue.

From a physical perspective, Dr. Fritzhand (2011), in his physical medicine specialist report, states that Mr. Scarberry has significant limitations because of his work-related injury, but restricts him to the performance of sedentary work in

spite of the physical limitations from which he suffers because of his work related injury.

Mr. Scarberry has work experience in positions performed at the very heavy and medium levels of physical demand and has acquired skills that transfer to other medium level work. He has no experience in or skills that transfer to work performed at the sedentary level of physical demand. Therefore, only unskilled or semiskilled work performed at the sedentary level of physical demand can be considered for Mr. Scarberry, according to the limitations provided by Dr. Fritzhand, Mr. Scarberry's restricted work history may not support his performance of semiskilled work within his physical capacity.

Dr. Fritzhand cautions that Mr. Scarberry **"should alternate from weight-bearing to sitting position as needed"** (emphasis added). This additional limitation precludes the unskilled and semiskilled sedentary jobs that could otherwise be considered as appropriate for Mr. Scarberry, as the need to change position **"as needed"** (emphasis added) cannot be accommodated in unskilled or semiskilled work. This limitation can only be accommodated in highly skilled work activity. Mr. Scarberry does not have the skills to allow him the opportunity to perform highly skilled work of this kind.

If the unbelievable assumption is made that there is work that fits within the parameters established by Dr. Fritzhand, the analysis must continue.

Mr. Scarberry would be unable to adapt to a new kind of work activity. He has a significant level of pain, a work history to which he cannot return, a moderate level of impairment in his ability to concentrate and adapt to a new kind of work activity and the need to move from sitting to standing as needed. Under these circumstances he could not be expected to adequately adapt to the new tools, tasks, procedures, and rules involved in performing a new type of work activity, a type of work that he has not performed in the past. This holds true even for unskilled work. When a significant level of pain is combined with: physical restrictions, psychological limitations, and a restricted work history to which one cannot return, they serve as contributing factors to an inability to make vocational adjustments.



Therefore, in the opinion of this vocational expert, Paul Scarberry is permanently and totally occupationally disabled. That is, there are no jobs in the local or national economies that he is able to perform. This conclusion was reached considering his age, education, restricted work history, and the physical and psychological limitations that he has as a result of his allowed injury, claim number 02-882123. This appears to have been the situation since he last worked in 2003.

Mr. Scarberry's inability to work within a schedule and his inability to regularly attend any kind of activity, as discussed above, would preclude him from performing part time work in a competitive situation. Assuming that part time work is available, it must be performed as scheduled. Mr. Scarberry indicated that he couldn't perform scheduled activities on a regular basis. This statement is consistent with the medical information reviewed.

(Emphasis sic.)

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

The Hearing Officer finds that the Injured Worker sustained an injury in the course of and arising out of employment on 12/10/2002 when he fell off of a ladder and injured his back. The claim was subsequently allowed for a psychological condition. As a result of this industrial injury, the Injured Worker underwent four surgical procedures including a partial hemilaminectomy, discectomy, and lumbar interbody fusion at L4-5 on 03/26/2003, decompression of the left L4-5 nerve root adhesion on 01/18/2006, placement of a spinal cord stimulator on 02/07/2007 and partial laminectomy with insertion of electrode on 05/17/2007. The Injured Worker takes methadone for treatment of his allowed orthopedic conditions and Xanax for treatment of the allowed psychological conditions in the claim.

The Injured Worker has undergone two attempts at rehabilitation, the first in April, 2005 and the second in January, 2009. In both cases, the Injured Worker's rehabilitation file was closed due to medical instability.

The Injured Worker underwent a functional capacity evaluation completed by WorkWell Systems dated 5/25/2011. It was noted in this report that the Injured

Worker does not have any goals at this time but further stated "he notes that his goal is to obtain disability."

The Injured Worker was examined at the request of the Industrial Commission by Dr. Fritzhand with regard to the allowed orthopedic conditions in the claim.

Dr. Fritzhand issued an 10/14/2011 report which indicated that the Injured Worker has persistent low back pain despite previous operative intervention. He noted that on neurological examination there was no evidence of muscle weakness or atrophy and that all sensory modalities were well preserved. He noted that straight leg raising was diminished on both the left and right side. He noted that the Injured Worker ambulates with a slight limping gait and has slight difficulty bending forward but that range of motion studies are diminished.

Dr. Fritzhand concluded that the allowed orthopedic conditions in the claim have reached maximum medical improvement and result in the 23% whole person impairment rating. Dr. Fritzhand indicated that the Injured Worker could engage in sedentary and light work activity and that the Injured Worker should be able to alternate from weight bearing to sitting position as needed.

The Injured Worker was examined at the request of the Industrial Commission by Dr. Tosi who issued a report dated 10/04/2011. Dr. Tosi administered psychological testing including the MCMI-III. He noted that the psychological testing provided a valid profile for the Injured Worker. He noted that testing showed a strong "fake bad" response that in which the Injured Worker overly exaggerated and distorted his problems. He stated that this limits the validity of the test findings as the Injured Worker's true level of problems/symptoms would likely to [sic] be less than what is indicated in the test results.

With regard to the mental status examination, Dr. Tosi stated that the Injured Worker is alert and oriented in all spheres and has adequate contact with reality. He noted that the Injured Worker's concentration and attention are mildly reduced and that he has the ability to comprehend simple and complex commands and that his stream of thought and flow of ideas are normal. He stated that there was no evidence of educational deficits. He stated that the Injured Workers' thoughts are expressed clearly and that his

thinking was goal directed. He stated that abstract reasoning, concept formation and fund of knowledge were estimated to be within normal limits and that his judgment is fair. He stated that executive functions such as decision making, flexibility and social perceptions are intact and estimated to be in the low average range.

Dr. Tosi noted that the Injured Worker's ability to engage in daily functions are mildly impaired. He noted that the Injured Worker engages in reading of newspapers, magazines, and books, watches television and uses a home computer. He noted that the Injured Worker has a moderate impairment in social interaction and noted that the Injured Worker is in conflict with his family.

Dr. Tosi noted that the Injured Worker has a moderate impairment in his ability to respond appropriately to changes in the work place and noted that the Injured Worker would have some difficulty with supervisors and co-workers but noted that the Injured Worker would be able to function under low stress work conditions and that he should work at tasks which are simple to moderate in complexity.

With regard to concentration, persistence, and pace, Dr. Tosi indicated that the Injured Worker would have a moderate impairment. He noted that the Injured Worker is able to sustain focus or attention long enough to permit completion of tasks in a low stress work environment. He indicated that the Injured Worker would be able to complete a normal work day and work week and maintain regular attendance from a psychological standpoint.

Dr. Tosi concluded his report by indicating that the Injured Worker's psychological testing reveals a broad tendency toward symptom magnification and that the Injured Worker would be able to function under a low to moderate stress work environment. He stated that the Injured Worker could work at tasks which are simple to moderate in complexity. He noted that the Injured Worker's psychological condition had reached maximum medical improvement and results in a 25% whole person impairment rating.

The Hearing Officer finds that the Injured Worker's orthopedic and psychological conditions are permanent and have reached maximum medical improvement. The Hearing Officer finds that the Injured Worker could engage in sedentary and light work activity from an orthopedic point of

view and that the Injured Worker would be able to engage in such work activity as long as he would be able to alternate from weight-bearing to a sitting position as needed. The Hearing Officer further finds that the Injured Worker would be able to engage in employment activity in a low to moderate stress work environment involving tasks which are simple to moderate in complexity based upon the allowed psychological conditions in the claim.

The Staff Hearing Officer finds that the Injured Worker is 47 years of age, has a tenth grade education and a GED and has previous work experience as a security guard, welder, and heating and air conditioning installer.

The Hearing Officer finds that the Injured Worker's age of 47 is not a barrier to the Injured Worker returning to the workforce in a sedentary to light work position of employment within the restrictions noted by Dr. Tosi. The Hearing Officer finds that the Injured Worker's age is not a barrier to Injured Worker adapting to new work rules, processes, procedures and methods involved in a new occupation.

The Hearing Officer finds that the Injured Worker has a tenth grade education and obtained a GED. The Hearing Officer finds that the Injured Worker can read and engage in basic mathematical computation without difficulty based upon his statements outlined on his Application for Permanent Total Disability Compensation. The Hearing Officer finds that the Injured Worker's tenth grade education and GED are positive factors with regard to the Injured Workers' ability to return to work.

The Hearing Officer finds that the Injured Worker also received training in heating and air conditioning for a six month period and also attended criminal justice classes in 2008. The Injured Worker's HVAC training involved learning basic electrical work as well as how to repair heating and air conditioning units. The Injured Worker testified that his six month heating and air conditioning training involved reading written material and taking tests as well as hands-on training.

The Injured Worker also testified that he had two year on-the-job apprenticeship training where he learned further heating and air conditioning skills through on-the-job training.

The Hearing Officer finds that the Injured Worker's past educational level and specialized training indicates that the Injured Worker has a level of intelligence which demonstrates that the Injured Worker would be able to engage in at least entry-level sedentary employment activity. The Hearing Officer finds that this level of education would allow the Injured Worker to learn to perform some other type of employment. The Hearing Officer finds that the Injured Worker's educational level is sufficient in order for the Injured Worker to engage in entry-level unskilled occupations or to learn new employment skills and participate in retraining programs.

The Hearing Officer finds that the Injured Worker's past work history has involved employment in a variety of positions including work as a security guard, welder, and heating and air conditioning installer. The Hearing Officer finds that the Injured Worker's past work experience has included semi-skilled and skilled employment activity.

The Injured Worker's employment as a heating and air conditioning installer involved installation and repair of furnaces and air conditioning units. His job required the Injured Worker to have specific math and reading skills including the ability to add and subtract and use fractions. The Injured Worker testified that he was required to read service manuals in order to learn how to install and repair heating and air conditioning units. He also testified that he was required to read blueprints in his position. The Injured Worker testified that this position required him to supervise the work of five to ten other individuals in order to insure that work was done properly. He also indicated that he was required to make sure that materials were properly ordered for jobs and to "make sure things were done which were needed to be done." He also indicated that this job required him to give written reports regarding the hours work[ed] on various jobs as well as the material used on various jobs.

The Injured Worker's employment as a security guard required the Injured Worker to use computers and monitors to monitor the security of buildings. He indicated that he was required to read manuals regarding security procedures and to write reports regarding building maintenance issues. He indicated that he supervised two individuals in this position and made sure that these individuals completed their security rounds.

The Injured Worker's employment as a welder required him to read blueprints and to fill out paperwork in order to keep track of products which were being welded. He indicated that this job required him to use mathematical skills.

A review of the Injured Worker's past work experience indicates that the Injured Worker is able to master skilled and semi-skilled employment activity. The Injured Worker's past work experience demonstrates that the Injured Worker is able to obtain information and knowledge from either a formal classroom setting involving written material or from on-the-job training and to apply the information learned in those settings to various positions of employment. The Injured Worker demonstrated the ability to review the work of others and to insure that work was done according to various specifications. The Injured Worker also demonstrated the ability to keep records and to impart information in written form to supervisors. The Injured Worker also demonstrated the ability to estimate materials needed for a job and to order the materials to make sure that a job was done properly.

The Hearing Officer finds that the Injured Worker's past work experience demonstrates that the Injured Worker has the ability to master a wide variety of skills in skilled and semi-skilled employment activity. The Hearing Officer finds that the Injured Worker's ability to master such skills in the past indicates that the Injured Worker would have the ability to perform at least unskilled entry sedentary to light employment which would involve work in a low to moderate work stress environment which involves work tasks which are simple to moderate in complexity.

Based upon the Injured Worker's age, education, and work experience, as well as the reports of Dr. Tosi dated 10/04/2011 and the report of Dr. Fritzhand dated 10/14/2011, the Hearing Officer finds that the Injured Worker is not permanently and totally disabled.

{¶ 27} 13. On August 24, 2012, relator filed this mandamus action.

#### Conclusions of Law:

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

{¶ 29} For its determination of residual functional capacity, Ohio Adm.Code 4121-3-34(B)(4), the commission, through its SHO, relied upon the reports of Dr. Fritzhand

and Dr. Tosi. Relying upon those reports, the commission determined that relator is physically able to perform light work and sedentary work as long as the job permits alternating from weight-bearing to a sitting position as needed. Also, the job must meet Dr. Tosi's psychological restrictions that the work be performed "in a low to moderate work stress environment" and that "[w]ork tasks should be simple to moderate in complexity."

{¶ 30} Relator does not challenge the commission's determination of residual functional capacity, nor does relator contend that the reports of Dr. Fritzhand and Dr. Tosi fail to provide the commission with some evidence to support its determination of residual functional capacity.

{¶ 31} However, relator does challenge the commission's consideration of the nonmedical factors.

{¶ 32} Relator contends that the commission abused its discretion by: (1) failing to consider the Cody vocational report or (2) failing to explain why the Cody report was rejected. The magistrate disagrees.

{¶ 33} The commission's charge is to review the evidence of the claimant's age, education, work history, and other relevant nonmedical characteristics and to decide for itself from that evidence whether the claimant is realistically foreclosed from sustained remunerative employment. *State ex rel. Jackson v. Indus. Comm.*, 79 Ohio St.3d 266, 271 (1997). The commission may credit offered vocational evidence, but expert opinion is not critical or even necessary because the commission is the expert on this issue. *Id.*

{¶ 34} In *State ex rel. Lovell v. Indus. Comm.*, 74 Ohio St.3d 250, 252 (1996), the court states:

*State ex rel. Mitchell v. Robbins & Myers, Inc.* (1983), 6 Ohio St.3d 481, 6 OBR 531, 453 N.E.2d 721, directed the commission to cite in its orders the evidence on which it *relied* to reach its decision. Reiterating the concept of reliance, *State ex rel. DeMint v. Indus. Comm.* (1990), 49 Ohio St.3d 19, 20, 550 N.E.2d 174, 176, held:

"*Mitchell* mandates citation of only that evidence *relied* on. It does not require enumeration of all evidence *considered*." (Emphasis original.)

Therefore, because the commission does not have to list the evidence considered, the presumption of regularity that attaches to commission proceedings (*State ex rel. Brady v. Indus. Comm.* [1989], 28 Ohio St.3d 241, 28 OBR 322, 503 N.E.2d 173) gives rise to a second presumption—that the commission indeed considered all the evidence before it. That presumption, however, is not irrebuttable, as [*State ex rel. Fultz v. Indus. Comm.*, 69 Ohio St.3d 327 (1994)] demonstrates.

*Id.* (Emphasis sic.)

{¶ 35} Here, the SHO's order indeed fails to mention the Cody report or to explain why the report was rejected. That is because the SHO did not rely upon the Cody report. Rather, the SHO conducted his own analysis of the nonmedical factors as he is permitted to do. The SHO was not required to mention the Cody report or to explain why the report was rejected. The presumption here is that the SHO did in fact consider the Cody report but did not find it persuasive. There was no abuse of discretion. *Lovell*.

{¶ 36} Again, in his report, Cody states:

Dr. Fritzhand cautions that Mr. Scarberry "**should alternate from weight-bearing to sitting position as needed**" (emphasis added). This additional limitation precludes the unskilled and semiskilled sedentary jobs that could otherwise be considered as appropriate for Mr. Scarberry, as the need to change position "**as needed**" (emphasis added) cannot be accommodated in unskilled or semiskilled work. This limitation can only be accommodated in highly skilled work activity. Mr. Scarberry does not have the skills to allow him the opportunity to perform highly skilled work of this kind.

(Emphasis sic.)

{¶ 37} In essence, relator argues that Cody's statement, as quoted above, must be accepted as true and thus compels a finding that relator is permanently and totally disabled. The magistrate disagrees.

{¶ 38} Relator cites to no case authority to support Cody's proposition that a sit/stand option can only be accommodated in highly skilled sedentary work. And again, the commission was not required to accept Cody's proposition.

{¶ 39} But even if it can be held that a sit/stand option can only be accommodated in highly skilled work, Cody's ultimate conclusion is flawed because it is premised upon



his view that relator does not have the skills to allow him to perform highly skilled work. Cody fails to address relator's ability to retrain for new skills beyond what he has currently.

{¶ 40} In his order, the SHO clearly goes beyond Cody's analysis. The SHO explains in great detail why he believes that relator has the "intelligence" and education that will allow him "to learn new employment skills and participate in retraining programs," despite his current lack of skills.

{¶ 41} In *State ex rel. B.F. Goodrich v. Indus. Comm.*, 73 Ohio St.3d 525 (1995), the court held that the commission abused its discretion in a PTD decision when it failed to address whether the claimant can retrain for sustained remunerative employment. Here, the SHO found that relator has the ability to retrain. Cody did not address this issue in his report.

{¶ 42} Accordingly, for all of 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).