[Cite as *State ex rel. Guthman v. Indus. Comm.*, 2013-Ohio-462.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Karl Guthmann,	:	
Relator,	:	
v.	:	No. 12AP-70
Industrial Commission of Ohio and Buckeye Poured Walls, Inc.,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on February 12, 2013

Law Office of Stanley R. Jurus, and *Joseph R. Sutton*, for relator.

Michael DeWine, Attorney General, and *Corinna V. Efkeman*, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

SADLER, J.

{¶ 1} In this original action, relator, Karl Guthmann, seeks 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 said compensation.

I. BACKGROUND

{¶ 2} Pursuant to Civ.R. 53 and Loc.R. 13(M) of the Tenth Appellate District, this matter was referred to a magistrate who issued a decision, including findings of fact and conclusions of law, which is appended hereto. The magistrate found that medical reports

completed by Ellen Price, D.O., were equivocal and did not constitute some evidence upon which the commission could rely, and further determined that the commission's staff hearing officer ("SHO") failed to consider restrictions identified in the Occupational Activity Assessment ("OAA") completed by Joel L. Cohen, Ph.D. Accordingly, the magistrate recommended that this court issue a writ of mandamus ordering the commission to vacate its November 8, 2011 order and enter a new order that adjudicates the PTD application.

II. DISCUSSION

{¶ 3} The commission has filed objections to the magistrate's decision. The commission does not object to the magistrate's findings of fact, and, upon review of the same, we adopt them as our own. The objections challenge the magistrate's decision on the following grounds:

> I. The commission did not abuse its discretion by relying upon the reports of Dr. Ellen Price, which are not equivocal.
>
> II. The commission did not abuse its discretion by failing to specifically state that it considered the Occupational Activity Assessment, Mental & Behavioral Examination ("OAA") form in addition to the narrative report of Dr. Joel L. Cohen.

{¶ 4} To be entitled to extraordinary relief in mandamus, a relator must show that it has a clear legal right to the relief sought and that the commission has a clear legal duty to provide such relief. *State ex rel. AutoZone, Inc. v. Indus. Comm.*, 117 Ohio St.3d 186, 2008-Ohio-541, ¶ 14. "To show the clear legal right, relator must demonstrate that the commission abused its discretion by entering an order unsupported by some evidence in the record." *State ex rel. Hughes v. Goodyear Tire & Rubber Co.*, 26 Ohio St.3d 71, 73 (1986). When the record contains "some evidence" to support the commission's factual findings, a court may not disturb the commission's findings in mandamus. *State ex rel. Fiber-Lite Corp. v. Indus. Comm.*, 36 Ohio St.3d 202 (1988), syllabus. "The burden on relator is a heavy one." *State ex rel. Stevens v. Indus. Comm.*, 10th Dist. No. 10AP-1147, 2012-Ohio-4408, ¶ 7.

{¶ 5} In its first objection, the commission argues that the magistrate erred by finding that Dr. Price's reports were equivocal in identifying the restrictions based on

relator's allowed conditions. "Equivocation disqualifies an opinion from consideration and occurs 'when a doctor repudiates an earlier opinion, renders contradictory or uncertain opinions, or fails to clarify an ambiguous statement.' " *State ex rel. George v. Indus. Comm.*, 130 Ohio St.3d 405, 2011-Ohio-6036, ¶ 15, quoting *State ex rel. Eberhardt v. Flxible Corp.*, 70 Ohio St.3d 649, 657 (1994).

{¶ 6} Here, Dr. Price's initial report identified restrictions that were based in part on conditions not allowed in the claim. When she was asked to clarify the restrictions that were based solely on the allowed conditions, Dr. Price completed an addendum stating, "I don't see much difference in the assessment that I gave and the assessment that you considered allowed." (Stipulation of Evidence, 4.) In our view, this statement did not clarify which restrictions were based solely on the allowed conditions in relator's claim. Because the addendum "fails to clarify an ambiguous statement," we find the opinions presented by Dr. Price were equivocal and insufficient to constitute some evidence upon which the commission could rely. *See George* at ¶ 15. Accordingly, the commission's first objection is overruled.

{¶ 7} The commission's second objection challenges the magistrate's conclusion that the SHO failed to consider the restrictions identified in the OAA form completed by Dr. Cohen. Specifically, the commission asserts that the SHO is presumed to have considered all of the evidence before it—including the OAA form—and that the magistrate was prohibited from presuming otherwise. We agree.

{¶ 8} "Although the commission is required to consider all evidence properly before it, it is not required to list each piece of evidence that it considered in its order." *State ex rel. Rothkegel v. Westlake*, 88 Ohio St.3d 409, 410 (2000). "[T]he presumption of regularity that attaches to commission proceedings * * * gives rise to a second presumption—that the commission indeed considered all the evidence before it." *State ex rel. Lovell v. Indus. Comm.*, 74 Ohio St.3d 250, 252 (1996). "Where, as here, the commission lists only the evidence relied upon, omission does not raise the presumption that the evidence was overlooked." *Rothkegel* at 410.

{¶ 9} Here, the SHO's order lists only the evidence upon which it relied, and, as such, the SHO is presumed to have considered all evidence properly before it—including the OAA completed by Dr. Cohen. Relator has presented nothing to rebut this

presumption, and he fails to explain how the limitations identified in the OAA conflict with the conclusion in Dr. Cohen's examination report that relator is capable of returning to work. Both the OAA and the examination report reach such a conclusion. "Accordingly, that the SHO's order does not mention certain evidence does not prove that it was not considered given the presumption of regularity that attaches to commission proceedings." *State ex rel. Wyrick v. Indus. Comm.*, 10th Dist. No. 08AP-275, 2009-Ohio-635, ¶ 31, citing *Lovell* at 252. Accordingly, the commission's second objection is sustained.

III. CONCLUSION

{¶ 10} Upon review of the magistrate's decision, an independent review of the record, and due consideration of the commission's objections, we find the magistrate has properly determined the pertinent facts. With regard to the magistrate's conclusions of law, however, we agree with the magistrate's conclusion that Dr. Price's reports were equivocal and did not constitute some evidence upon which the commission could rely, but reject the magistrate's conclusion that the SHO failed to consider the restrictions identified in the OAA completed by Dr. Cohen. We, therefore, adopt the magistrate's decision to the extent the magistrate recommends that this court grant a writ of mandamus in light of Dr. Price's equivocal reports, but reject that portion of the magistrate's decision regarding the SHO's consideration of the OAA form completed by Dr. Cohen. Accordingly, we grant a writ of mandamus ordering the commission to vacate its order of November 8, 2011, and, in a manner consistent with our decision, enter a new order adjudicating relator's PTD application.

Writ of mandamus granted.

DORRIAN, J., concurs.
TYACK, J., concurs in part, dissents in part.

TYACK, J., dissenting in part.

{¶ 11} Karl Guthmann clearly has significant physical and emotional issues as a result of his employment as a heavy equipment operator. The question is whether he is capable of sustained remunerative employment. He is personally convinced that he is

incapable of work and resents any suggestion otherwise. This complicates both his physical health assessment and his mental health assessment.

{¶ 12} Dr. Price evaluated Guthmann and found him physically capable of work, but placed numerous contingencies on that opinion. She reported that he was capable of sedentary work that involved minimal repetitive motion. She reported the sedentary work had to involve work where he could change work stations every hour. She reported that he could tolerate sitting or standing for only one hour at a time.

{¶ 13} The staff hearing officer ("SHO") who ruled upon Guthmann's application for PTD compensation made no mention of the limitations. The limitations are significant and raise the question of who is going to hire a 55-year old man who has not worked for many years and who is convinced he is incapable of work when he would have to change work stations every hour, sit or stand for no more than one hour at a time, and engage in work which is not repetitious.

{¶ 14} If an addendum to Dr. Price's report does not incorporate those limitations, then her report and her addendum conflict. If the addendum does incorporate those limitations, the SHO should address them.

{¶ 15} Dr. Cohen, the commission's psychological expert, also placed conditions on Guthmann's ability to pursue sedentary work. Dr. Cohen suggested a work environment with limited stimulation and deemphasized deadlines. Dr. Cohen also expressed reservations as to Guthmann's ability to work around other people. The SHO who addressed the merits of Guthmann's application for PTD compensation does not address these limitations, let alone address the impact of the limitations of Dr. Cohen when joined with the limitations of Dr. Price.

{¶ 16} I believe the commission needs to address the impact of their two sets of limitations on the questions of whether or not Guthmann can engage in sustained remunerative employment and then follow this up with the impact of the nonmedical factors on his ability to engage in sustained remunerative employment.

{¶ 17} I believe the objections to the magistrate's decision should be overruled and the writ be more comprehensive.

A P P E N D I X

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Karl Guthmann,	:	
Relator,	:	No. 12AP-70
v.	:	(REGULAR CALENDAR)
Industrial Commission of Ohio et al.,	:	
Respondents.	:	

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

Rendered on August 29, 2012

Law Office of Stanley R. Jurus, and *Joseph R. Sutton*, for relator.

Michael DeWine, Attorney General, and *Corinna V. Efkeman*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶ 18} In this original action, relator, Karl Guthmann, 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:

{¶ 19} 1. Relator has two industrial claims arising out of his employment as a heavy equipment operator for Buckeye Poured Walls, Inc., a state-fund employer.

{¶ 20} 2. On July 9, 1986, relator sustained an industrial injury (claim No. 86-24977) that is allowed for:

> Thoracic and lumbar strain and sprain; adjustment disorder with depressed mood; major depressive disorder single episode.

{¶ 21} 3. Claim No. OD193774 is allowed for "bilateral carpal tunnel syndrome." December 1, 1987 is the official date of diagnosis of the occupational disease.

{¶ 22} 4. On September 14, 2010, at his own request, relator was examined by Charles J. Kistler, D.O., for the allowed physical conditions of the two industrial claims. In his two-page narrative report dated September 16, 2010, Dr. Kistler opined:

> It is my medical opinion, based on reasonable medical certainty and probability, that Karl Guthmann suffers from conditions that render him permanently and totally impaired from sustained remunerative employment from these accidents. Thus it is my medical opinion, based on reasonable medical certainty and probability, taking into account only those conditions allowed in this claim, from a physical standpoint and with reference to the AMA Guidelines to the Evaluation of Permanent Impairment, Sixth Edition, that Karl Guthmann is permanently and totally impaired from sustained remunerative employment solely as a result of the injuries suffered in these claims.

{¶ 23} 5. On September 14, 2010, at his own request, relator was examined by psychologist Michael Glenn Drown, Ph.D. In his four-page narrative report dated September 19, 2010, Dr. Drown opined:

> Considering his age, education, lack of marketable skills, diminished overall adaptiveness, and his multiple work injuries, it is within reasonable certainty that his psychiatric disability, Adjustment Disorder, Unspecified, is permanent total. In reference to the AMA Guide (Fourth Edition) regarding Mental and Behavioral Disorders, his psychiatric impairment (taking in the whole body) falls within the extreme range.

{¶ 24} 6. On October 22, 2010, relator filed an application for PTD compensation. In support of the application, relator submitted the reports of Drs. Kistler and Drown.

{¶ 25} 7. On February 2, 2011, at the commission's request, relator was examined for the allowed physical conditions for the two industrial claims by Ellen Price, D.O. In her five-page narrative report dated February 7, 2011, Dr. Price opined:

> In my opinion, the patient can work in the sedentary work category. He might need to minimize repetitive motion and should change work stations every hour. The patient also has a sitting and standing tolerance of 1 hour because of his low back. The patient is at MMI.

{¶ 26} 8. On February 5, 2011, Dr. Price completed a physical strength rating form. On the form, Dr. Price indicated by her mark that relator is capable of "sedentary work." The form also asks the examining physician to give "[f]urther limitations, if indicated." In the space provided, Dr. Price wrote in her own hand:

> Sit – Stand 1 [hour]
> Minimize repet[it]ive motion – should [change] work station [every] hour.

{¶ 27} 9. On February 11, 2011, at the commission's request, relator was examined by psychologist Joel L. Cohen, Ph.D. In his 13-page narrative report, Dr. Cohen stated:

> I think at this juncture it would not be reasonable to continue to consider this as an adjustment reaction. Hence I would concur with Dr. Bowen that at this point what we're looking at is a diagnosis of recurrent major depression and I see no reason to assume that that is ever going to change. While returning him to psychiatric care might well be reasonable in the context of getting him back onto an adequate medication protocol I don't know that we should anticipate nor expect that even if we do that it is going to substantially alter his level of function on any kind of an appreciable level. More to the point, even as he alludes to a desire to get back onto an antidepressant, the reality is what he emphasized more than an antidepressant was his desire to re-access pain medication. And I would be very reluctant to do so not only because of his substance abuse history but also because at least in the context of the current field of thought around pain control from a scientific prospective [sic] it is absolutely adamant that any continued use of narcotic analgesics be tied to a patient's willingness to establish and pursue functional goals, and I don't know that I expect nor anticipate Mr. Guthmann would be willing to do so. That having been said I do know that the issue at hand is

> whether or not his psychological condition precludes him returning to the worksite. The answer is not as simple as one might expect nor anticipate. While I do have concerns about the level of his stress the reality is that I do believe that with Mr. Guthmann, and in fact many of my clientele, active involvement in some type of a productive activity outside of the home would actually benefit him from a purely emotional and psychological perspective. Hence, from my point of view, while his level of depression is concerning it does not prevent him from working in some meaningful capacity. On the other hand his absolute conviction that he can't work and in fact should not be asked to work is in fact I think the primary limiting factor, and I don't know that any treatment at this point and time is necessarily going to alter that to any substantial degree. From my perspective, at this juncture Mr. Guthmann is in fact at maximum medical improvement relative to his psychological condition. This does not preclude ongoing maintenance care in order to keep him at his current level and that could very well require periodic visits with a psychiatrist to initiate and maintain medication, but I don't know that I would consider that to be an acute or sub acute quite obviously and hence, I think that MMI is in fact reasonable to consider at this juncture.

{¶ 28} 10. On April 15, 2011, Dr. Cohen completed a form captioned "Occupational Activity Assessment, Mental & Behavioral Examination." On the form, Dr. Cohen indicated by his mark "[t]his injured worker is capable of work with the limitation(s)/modification(s) noted below."

{¶ 29} In the space provided, Dr. Cohen wrote in his own hand:

> [Patient] will most likely do best in a work setting with limited stimulation & deemphases [sic] on imminent deadlines. Also likely to do better in task oriented rather than people oriented settings.

{¶ 30} 11. Following a July 6, 2011 hearing, a staff hearing officer ("SHO") issued an interlocutory order instructing:

> The Industrial Commission examining specialist, Dr. Ellen Price, provides an "assessment" in her 02/07/2011 report that includes non-allowed lumbar and/or thoracic conditions more significant than the allowed sprains and strains. It appears from this that her opinion as to the Injured Worker's physical restriction is based, at least in part, on conditions

> that are not allowed in the claim. Therefore, the claim is referred back to the Industrial Commission Medical Section to obtain an addendum from Dr. Ellen Price providing physical restrictions due solely to the allowed conditions and explaining how the examination findings, including significant Waddell's findings, cause the restrictions.
>
> Once the addendum from Dr. Price is obtained, it is requested that an addendum from Joel Cohen (Psychologist) be obtained to see if any new findings or conclusions by Dr. Price alter Dr. Cohen's findings and opinion's in any way.
>
> Once the above requested addendum's are obtained, the claim is to be reset on the Injured Worker's application for permanent total disability. If the requested addendum's cannot be obtained the claim may be reset for hearing without them.

{¶ 31} 12. 12. By letter dated August 18, 2011, a commission claims examiner communicated to Dr. Price as follows:

> CLAIM ALLOWANCE(S): THORACIC AND LUMBAR STRAIN AND SPRAIN; ADJUSTMENT DISORDER WITH DEPRESSED MOOD; MAJOR DEPRESSIVE DISORDER SINGLE EPISODE. BILATERAL CARPAL TUNNEL
>
> The Industrial Commission requires additional information in regards to your report dated 2/7/11, most specifically, your report provides an "assessment" that includes non-allowed lumbar and/or thoracic conditions more significant than the allowed sprains and strains.
>
> Please provide physical restrictions due solely to the allowed conditions of THORACIC AND LUMBAR STRAIN AND SPRAIN and explain how the examination findings, including significant Waddell findings, cause the restrictions noted on page 4 of your narrative report.

{¶ 32} 13. On September 26, 2011, Dr. Price faxed the following response:

> I am in receipt of your letter from August 18th concerning my dictation on Mr. Guthmann from an IME from 02/02/2011. The patient did indeed have 4/5 Waddell's signs but this does not indicate anything more than the patient crying for help. It does not mean that he is malingering or that there are any other overlying issues. The

> patient does have significant lumbar and thoracic strain. He has bilateral sacrolliitis. I don't see much difference in the assessment that I gave and the assessment that you considered allowed, which is "thoracic and lumbar strain/sprain, adjustment disorder, depressed mood, and major depressive disorder." The patient is able to work, in my opinion, sedentary work. I arrived at that decision basically from his physical examination and also from how he presented in the office and what kind of things he can do at home.

{¶ 33} 14. Following a November 8, 2011 hearing, an SHO issued an order denying the PTD application. The SHO's order of November 8, 2011 explains:

> It is the finding of Staff Hearing Officer that the Injured Worker retains physical, psychological, and intellectual capacities to engage in sustained remunerative employment. In finding that the Injured Worker is not permanently and totally disabled, the Staff Hearing Officer relies upon the medical report of Dr. Ellen Price, D.O., dated 02/07/2011 and addendum dated 10/05/2011 and the report of Dr. Joel L. Cohen, Ph.D., dated 02/11/2011.
>
> The Injured Worker is a 53-year-old male high school graduate who has the ability to read, write, and perform basic math. The record does not indicate that the Injured Worker attended any vocational training after graduation. However, the Injured Worker learned the trade of heavy equipment operator with on the job training. The Staff Hearing Officer notes that the Injured Worker's employment records are inconsistent. The record[s] document that the Injured Worker had been a heavy equipment operator for 12 years and owned a lawn service business for seven years. The Injured Worker's employment record[s] also document that the Injured Worker had only worked for a few months in 2001 and has not had steady employment since 1986. Basically, the Injured Worker stopped working at the age of 31.
>
> The Injured Worker sustained two work related injuries. The Injured Worker has a 1987 occupational disease claim, which is allowed for bilateral carpal tunnel, and he has a 1986 claim, which is allowed for thoracic, lumbar sprain and adjustment disorder and major depressive disorder. A review of the file documents that the Injured Worker in 1989 had carpal tunnel surgery and has not had any ongoing

> treatment for his carpal tunnel. With respect to the 1986 claim, the Injured Worker has long periods of no treatment for his back. [T]here is no record of active treatment from 2001 to 2010. The Injured Worker also had gaps in his treatment for his psychological treatment from 2005 forward. When the Injured Worker did have treatment for his back, he received shots for pain.
>
> The Injured Worker has [a] host of other medical conditions that are not related to the industrial injuries. The Injured Worker has hypertension, fracture left ankle/steel plate in his leg, diagnosed with emphysema, lumbar degenerative arthritis, and spondylosis and alcohol abuse. The Injured Worker told Dr. Cohen, that he does not take any medications [and] that he sometimes uses his girlfriend's pain medication.
>
> On 02/07/2011, Dr. Ellen Price examined the Injured Worker on behalf of the Industrial Commission to determine whether the Injured Worker retains the residual physical capacities to engage in sustained remunerative employment. She finds that the Injured Worker retains the residual physical capacity to engage in sedentary employment, that he was not permanently and totally disabled based upon the allowed physical conditions and that he has a 17 percent whole person impairment.
>
> On 02/11/2011, Dr. Joel Cohen, Ph.D. examined the Injured Worker on behalf of the Industrial Commission to determine whether the Injured Worker retains the residual physiological capacity to engage in sustained remunerative employment. He noted that the Injured Worker had a host of other physical conditions that were not related to the industrial injury. Dr. Cohen noted that even thought [sic] the Injured Worker spoke of debilitating back pain, he did not notice that the Injured Worker had any pain behavior. (Staff Hearing Officer notes that the only allowed back conditions are for sprains and strains that occurred in 1986.[)] He notes that the Injured Worker had not worked in 24-25 years and that the Injured Worker was adamant that he could not work outside of the home due to physical and emotional reasons. The Injured Worker indicated that it was inappropriate for the Injured Worker to be asked to work.

> Dr. Cohen noted in his report "while I do have concerns about the level of the [sic] his stress the reality is that I do believe that with Mr. Guthmann, in fact many of my clientele, active involvement in some type of a productive activity outside of the home would actually benefit him from a purely emotional and psychological perspective. Hence from my point of view, while his level of depression is concerning it does not prevent him from working in some meaningful capacity. On the other hand, his absolute conviction that he cannot work and in fact should not be asked to work is in fact I think the primary limiting factor, and I don't know that any treatment at [t]his point and time is necessarily going to alter that to any substantial degree."
>
> It is the finding of the Staff Hearing Officer that the Injured Worker is not permanently and totally, disabled based upon the reason set forth in this order.
>
> The Injured Worker is a 54-year-old high school graduate who has the ability to read write and perform basic math. The Injured Worker has demonstrated that he has the ability to comprehend and learn new task[s]. The Injured Worker learned the skill of a heavy equipment operator on the job and he also noted that he had a landscaping business.
>
> Dr. Ellen Price opined that the Injured Worker retains the physical capacity to engage in sustained remunerative employment of a sedentary nature.
>
> Dr. Cohen opined that the work activity would be productive for the Injured Worker; however, the attitude that he cannot work and should not be asked to work is a limiting factor.
>
> The Staff Hearing Officer finds that the Injured Worker can seek unskilled sedentary type employment that is within his physical capacity. The Staff Hearing Officer finds that the Injured Worker has an obligation to seek other social service agencies that would help the Injured Worker obtain employment.
>
> There is no evidence that the Injured Worker had event [sic] attempted to engage in a rehabilitation effort. In fact, the file document[s] that Injured Worker has not had any ongoing medical treatment for years that could help to change his physical and psychological symptoms in order to change his perception that he cannot work due to the industrial injuries.

{¶ 34} 15. On January 30, 2012, relator, Karl Guthmann, filed this mandamus action.

Conclusions of Law:

{¶ 35} Two issues are presented: (1) did the commission abuse its discretion in its stated reliance upon the February 7, 2011 report of Dr. Price and her October 5, 2011 addendum, and (2) did the commission abuse its discretion in its stated reliance upon the February 11, 2011 report of Dr. Cohen without mentioning his April 15, 2011 report.

{¶ 36} Finding that the commission abused its discretion as to its reliance upon the reports of Drs. Price and Cohen, it is the magistrate's decision that this court issue a writ of mandamus, as more fully explained below.

RELIANCE ON THE REPORTS OF DR. PRICE

{¶ 37} 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*. Ambiguous statements, however, are considered equivocal only while they are unclarified. *Id*.

{¶ 38} Following her February 2, 2011 examination, Dr. Price issued a five-page narrative report dated February 7, 2011, and she completed a physical strength rating form dated February 5, 2011.

{¶ 39} Both reports indicate that relator is physically able to perform sedentary work but with further limitations as noted in both reports.

{¶ 40} In the interlocutory order of July 6, 2011, the SHO found that the February 7, 2011 report of Dr. Price includes "non-allowed lumbar and/or thoracic conditions more significant than the allowed sprains and strains." To correct the reliance upon non-allowed conditions, the SHO ordered that the commission's medical section obtain an addendum from Dr. Price.

{¶ 41} In her September 26, 2011 addendum, Dr. Price states in part:

> The patient does have significant lumbar and thoracic strain. He has bilateral sacrolliitis. I don't see much difference in the assessment that I gave and the assessment that you considered allowed, which is "thoracic and lumbar strain/sprain, adjustment disorder, depressed mood, and

> major depressive disorder." The patient is able to work, in my opinion, sedentary work.

{¶ 42} Dr. Price was not asked to complete another physical strength rating form.

{¶ 43} In her addendum, Dr. Price does not indicate whether she still finds the further limitations on sedentary work. She simply states "the patient is able to work, in my opinion, sedentary work." Yet she seems to suggest that her addendum findings are the same as her earlier findings when she states in her addendum "I don't see much difference in the assessment that I gave and the assessment that you considered allowed."

{¶ 44} In his November 8, 2011 order, the SHO states that Dr. Price finds that relator "retains the residual physical capacity to engage in sedentary work" with no mention of the further limitations set forth in the narrative report and the physical strength rating form. Later in the order, the SHO states "Dr. Ellen Price opined that the Injured Worker retains the physical capacity to engage in sustained remunerative employment of a sedentary nature" again with no mention of the further limitations set forth in the narrative report and the physical strength rating form.

{¶ 45} Because the SHO does not mention further limitations on sedentary work, it can be argued that the SHO found that relator can perform a full range of sedentary work with no limitations. Here, relator argues that the SHO abused his discretion in failing to indicate in his order that Dr. Price placed further limitations on sedentary work.

{¶ 46} The SHO's order fails to clarify whether he found that Dr. Price had eliminated the further limitations on sedentary work.

{¶ 47} The problem here goes deeper than the SHO's failure to explain why he does not address further limitations on sedentary work. Dr. Price's addendum is equivocal on the question of whether further limitations on the performance of sedentary work remain after Dr. Price was asked to eliminate any reliance upon non-allowed conditions.

{¶ 48} Even if we presume that the SHO's failure to address the viability of further limitations was intentional and that the SHO did not rely upon those further limitations, we still have an equivocal addendum that the SHO relied upon. Thus, it was an abuse of discretion for the SHO to rely upon Dr. Price's addendum.

{¶ 49} In the magistrate's view, the addendum could be clarified by Dr. Price in order to clarify the equivocal opinion. Even though the SHO's order is fatally flawed for its reliance upon the addendum, it may not be necessary for the commission to schedule an examination with another doctor to replace Dr. Price.

RELIANCE UPON THE FEBRUARY 11, 2011 REPORT OF DR. COHEN

{¶ 50} The commission, through its SHO, relied upon the February 11, 2011 report of Dr. Cohen but made no mention of his completion of the form captioned "Occupational Activity Assessment, Mental & Behavioral Examination" ("OAA") on April 15, 2011.

{¶ 51} As earlier noted, in his February 11, 2011 narrative report, Dr. Cohen opines "while this level of depression is concerning it does not prevent him from working in some meaningful capacity." But Dr. Cohen does not get any more specific about relator's work capacity in his narrative report.

{¶ 52} Dr. Cohen does get more specific about work capacity in his OAA:

> [Patient] will most likely do best in a work setting with limited stimulation & deemphases [sic] on imminent deadlines. Also likely to do better in task oriented rather than people oriented settings.

{¶ 53} Here, while the SHO's order of November 8, 2011 extensively quotes from and discusses Dr. Cohen's narrative report, the order fails to mention the OAA or to recognize in any way the work limitations set forth in the OAA.

{¶ 54} Because the OAA and the narrative report were generated from the same February 11, 2011 examination, the narrative report cannot be considered in isolation from the OAA. That is, both reports must be considered together under the circumstances here.

{¶ 55} There is indeed a presumption of regularity that attaches to commission proceedings, but that presumption is not irrebuttable. *State ex rel. Lovell v. Indus. Comm.*, 74 Ohio St.3d 250, 252 (1996). Here, the presumption of regularity does not lead to the conclusion that the SHO considered the OAA.

{¶ 56} The SHO's failure to address the OAA creates the presumption that the SHO did not consider or rely upon the OAA even though he clearly relied upon the narrative report. But as earlier noted, the narrative report cannot be considered or relied upon in

isolation from the OAA. Given the strong suggestion that the SHO failed to consider the OAA, the magistrate concludes that the commission abused its discretion in relying upon Dr. Cohen's report. *See State ex rel. Scouler v. Indus. Comm.*, 119 Ohio St.3d 276, 2008-Ohio-3915.

{¶ 57} Accordingly, for all of the above reasons, it is the magistrate's decision that this court issue a writ of mandamus ordering the commission to vacate its SHO's order of November 8, 2011, and, in a manner consistent with this magistrate's decision, enter a new order that adjudicates the PTD application.

/s/ Kenneth W. Macke
KENNETH W. MACKE
MAGISTRATE

NOTICE TO THE PARTIES

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