

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Marlene Strayer, :  
 :  
 Relator, :  
 :  
 v. : No. 12AP-855  
 : (REGULAR CALENDAR)  
 Franklin County Commissioners and :  
 Industrial Commission of Ohio, :  
 :  
 Respondents. :  
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D E C I S I O N

Rendered on August 20, 2013

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*Michael J. Muldoon*, for relator.

*Ron O'Brien*, Prosecuting Attorney, and *Joseph C. Mastrangelo*, for respondent Franklin County Commissioners.

*Michael DeWine*, Attorney General, and *John R. Smart*, for respondent Industrial Commission of Ohio.

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IN MANDAMUS  
ON OBJECTION TO THE MAGISTRATE'S DECISION

DORRIAN, J.

{¶1} Relator, Marlene Strayer, commenced this original action requesting a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order denying her application for permanent total disability ("PTD") compensation and to find that she is entitled to that compensation.

{¶2} Pursuant to Civ.R. 53(D) and Loc.R. 13(M), this matter was referred to a magistrate, who issued the appended decision, including findings of fact and conclusions

of law. In his decision, the magistrate noted relator's argument that the commission incorrectly analyzed the nonmedical factors. In resolving that argument, the magistrate decided the commission did not abuse its discretion in determining that: (1) relator's age "does not prevent her from obtaining simple entry level sedentary jobs," and relator's advanced age may be viewed in the context of her high school and some college education; (2) relator had "the ability to quickly learn the work skills of entry-level sedentary work," even with a lack of transferable skills. (Magistrate's Decision at ¶ 39, 48.) The magistrate concluded that a lack of transferable skills does not mandate a PTD award. Accordingly, the magistrate determined the requested writ should be denied.

{¶3} Although relator does not specifically state the objection, relator generally contends the commission failed to appropriately assess the nonmedical disability factors, in particular relator's advanced age and lack of transferable skills. Relator asserts that the commission and the magistrate ignored probative evidence that nonmedical disability factors would preclude her from engaging in sustained remunerative employment. The crux of her argument is that the staff hearing officer ("SHO") found that relator had no transferable skills, yet erred in concluding that, in spite of the lack of transferable skills, relator can find employment. These are essentially the same arguments made to the magistrate.

{¶4} Relator points to the vocational opinion of Molly S. Williams, vocational consultant, wherein she stated in her May 7, 2012 report: "When all of the disability factors are correctly identified, stated, and considered: an individual unable to perform her customary past relevant work as a Bus Assistant \* \* \*; an individual of advanced age \* \* \* (age 55 or over); an individual with a high school education and above completed in the remote past (1956); an individual with no transferable skill(s); and an individual not expected to make a vocational adjustment to other work based upon the allowed physical conditions as assessed by [the commission's physician], it is obvious that the claimant is permanently and totally disabled."

{¶5} The SHO based his order on the medical report of James H. Rutherford, M.D., and the vocational report of Craig Johnston, Ph.D., vocational consultant. Regarding the nonmedical disability factors, the SHO found: (1) the injured worker's age does not prevent her from obtaining simple entry-level sedentary jobs; (2) the injured

worker's education, high school and some college in the remote past, indicates that she possesses basic literacy/math skills such that she has the academic background to acquire the job skills necessary to perform entry-level sedentary work; (3) the injured worker's job history would not give her transferable skills for sedentary level work; however, the injured worker has at least average academic skills which would provide her with the ability to quickly learn the work skills of entry-level sedentary work. These findings are supported by Dr. Johnston's April 26, 2012 report, in which he opined that "[relator's] age of 76 years is a potential barrier to employment, but \* \* \* in terms of entry-level work activity, it would not be work prohibitive[;] \* \* \* claimant's possession of a high school diploma, by itself, would qualify her for most entry-level work activities[;] \* \* \* [h]er reported work history supports the capacity for entry-level work[;] [c]ombined, her age, education, and work history support the capacity for entry-level work that is unskilled and semiskilled[;] \* \* \* [b]ased on the totality of vocational factors, if she maintains a sedentary physical capacity, [relator] remains capable of sustained remunerative employment."

{¶6} "The commission alone shall be responsible for the evaluation of the weight and credibility of the evidence before it. This court's role in the review of mandamus actions challenging the Industrial Commission's decision as to the extent of disability \* \* \* shall henceforth be limited to a determination as to whether there is some evidence in the record to support the commission's stated basis for its decision." *State ex rel. Burley v. Coil Packing, Inc.*, 31 Ohio St.3d 18, 20-21 (1987). The commission had some evidence, in the form of Dr. Johnston's report, to support its findings. Furthermore, the commission evaluated the reports of Ms. Williams and Dr. Johnston and acted within its discretion to rely on Dr. Johnston's report over Ms. Williams' report. The commission did not abuse its discretion in assessing the nonmedical disability factors and in ultimately deciding that those factors support relator's ability to engage in sedentary work. Relator's objection is overruled.

{¶7} Following an independent review pursuant to Civ. R. 53, we find the magistrate has properly determined the pertinent facts and applied the salient law to them. Accordingly, we adopt the magistrate's decision as our own, including the findings

of fact and conclusions of law contained in it. In accordance with the magistrate's decision, we deny the requested writ of mandamus.

*Objection overruled; writ denied.*

TYACK and SADLER, JJ., concur.

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**APPENDIX**

**IN THE COURT OF APPEALS OF OHIO**

**TENTH APPELLATE DISTRICT**

State ex rel. Marlene Strayer,	:	
	:	
Relator,	:	No. 12AP-855
	:	
v.	:	(REGULAR CALENDAR)
	:	
Franklin County Commissioners and Industrial Commission of Ohio,	:	
	:	
Respondents.	:	

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**MAGISTRATE'S DECISION**

Rendered on May 9, 2013

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*Michael J. Muldoon*, for relator.

*Ron O'Brien*, Prosecuting Attorney, and *Joseph C. Mastrangelo*, for respondent Franklin County Commissioners.

*Michael DeWine*, Attorney General, and *John R. Smart*, for respondent Industrial Commission of Ohio.

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**IN MANDAMUS**

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

**Findings of Fact:**

{¶9} 1. Relator has four industrial claims arising from her employment as a bus assistant with respondent Franklin County Commissioners ("employer").

{¶10} 2. Her first industrial claim (No. 07-359201) arises from a May 16, 2007 injury. The claim is allowed for "sprain of neck; cervical radiculitis."

{¶11} 3. Her second industrial claim (No. 07-841154) arises from a June 29, 2007 injury. The claim is allowed for "sprain thoracic region."

{¶12} 4. Her third industrial claim (No. 08-838269) arises from a June 27, 2008 injury. The claim is allowed for "sprain left shoulder; contusion left shoulder."

{¶13} 5. Her fourth industrial claim (No. 09-821639) arises from a May 11, 2009 injury. The claim is allowed for "sprain of neck."

{¶14} 6. On October 6, 2011, at relator's own request, she was examined by chiropractor David M. Grunstein, D.C. In his five-page narrative report dated November 9, 2011, Dr. Grunstein opined:

**OPINION:** Based on the consultation and examination findings above stated and how these findings correlate with the A.M.A. Guides, it is my opinion that the above named presented in this office with a total whole person impairment of 44 percent whole person impairment, on the above stated date, for the above stated conditions. It is also my opinion that when taking into consideration the above stated information and the attached functional capacities evaluation that this person is permanently and totally disabled from partaking in any type of sustained gainful remunerative employment and should be considered permanently and totally disabled.

{¶15} 7. On December 8, 2011, relator filed an application for PTD compensation. In support, relator submitted the November 9, 2011 report of Dr. Grunstein.

{¶16} 8. On her application, relator indicates that her date of birth is October 21, 1935. Thus, relator was 76 years of age on the date she filed her application.

{¶17} 9. Under the education section of the application, relator indicates that she graduated from high school in 1953. She also indicates that she attended "Ohio University."

{¶18} The application form asks the applicant to indicate: "What type of trade school or special training have you received and when?" In response, relator wrote: "1956 Business College."

{¶19} The application form also poses 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.

{¶20} 10. The application form also asks the applicant to provide information regarding work history. Relator indicated that she was employed as a "[b]us [a]ssistant" from 2002 to 2010 and that she worked at that job five days per week. Relator also indicated that she was self employed for ten years in the "[c]leaning" business.

{¶21} 11. The application form also asks the applicant to provide specific information regarding each job performed. With respect to the bus assistant job, relator responded to five questions:

[One] Your basic duties: Used vest straps to secure clients; operate bus lifts; secure clients on bus.

[Two] Machines, tools, equipment you used: Wheelchairs; Bus Lift; Security straps[.]

[Three] Exact operations you performed: Used vest straps to secure clients; operated bus lifts; went up and down bus lifts; secured clients in the bus.

[Four] Technical knowledge and skills you used: Bus lift operation; security strap knowledge; Client disability knowledge in order to monitor[.]

[Five] Reading/Writing you did: Incident reports; attendance reports; monitoring reports on clients.

{¶22} 12. On February 15, 2012, at the request of the employer, relator was examined by Seth Vogelstein, D.O. In his ten-page narrative report, Dr. Vogelstein opines:

It is my medical opinion that this claimant can actually return to her former duties as a bus assistant as far as the conditions in those claims are concerned. The allowed conditions in her claims, in my medical opinion, within a reasonable degree of medical probability, are resulting in

minimal if any of her current significant physical complaints and pathology.

In my medical opinion, the claimant does not require any restrictions or limitation specifically as a result of the allowed conditions in these claims. She was able to return to full duty work after a week or two after her last injury in 2009, after which she continued to perform her full duty work for another year plus until she left her job as a bus assistant, for reasons unrelated to her industrial claims.

Based upon the claimant's history and her physical findings at the time of my examination, it is my medical opinion, within a reasonable medical probability that Ms. Strayer is not permanently and totally disabled from all forms of sustained remunerative employment including that of her former position of employment, as a direct and sole result of the allowed physical condition in her multiple claims.

{¶23} 13. On March 21, 2012, at the commission's request, relator was examined by James H. Rutherford, M.D. In his nine-page narrative report, dated April 4, 2012, Dr. Rutherford opines:

Based only on the claim allowances of the four claims under consideration, and the orthopedic impairments related to those claim allowances, it is my medical opinion that Ms. Marlene A. Strayer is capable of work activity, but she is limited to sedentary work activity. Ms. Strayer can do occasional standing and walking. Ms. Strayer can do occasional lifting of up to 10 lbs.

Please see the Discussion section above, which notes that Ms. Strayer does have pre-existing conditions, including a very marked thoracolumbar scoliosis, and marked kyphosis of 55 degrees in the thoracic spine, severe osteoporosis, and multiple compression fractures (for which she has had one procedure, a cement injection for a compression fracture). Due to these conditions, which are unrelated to the claim allowances, it is my medical opinion that Ms. Strayer would be able to stand and walk less than occasionally for work activity, and she would be able to lift and carry less than 10 lbs. These restrictions are, however, unrelated to the claim allowances.

{¶24} 14. Also on March 21, 2012, Dr. Rutherford completed a Physical Strength Rating form. On the form, Dr. Rutherford indicated by his mark that relator can perform

"sedentary work." The form asks the physician to present "[f]urther limitations, if indicated." In the space provided, Dr. Rutherford wrote:

Can stand and walk occasionally [and] can lift and carry occasionally up to 10 [pounds] when considering only the claim allowances of [09]-821639. See written report concerning conditions unrelated to the claim allowances.

{¶25} 15. At relator's request, vocational expert Molly S. Williams performed a "vocational review" dated May 7, 2012. In her three-page report, Ms. Williams states:

I have reviewed and formally adopt the factual findings presented in The Industrial Commission of Ohio, Specialist Report, dated April 4, 2012, as prepared by James H. Rutherford, M.D.

\* \* \*

[W]hen all of the disability factors are correctly identified, stated, and considered: an individual unable to perform her customary past relevant work as a Bus Assistant, both as she performed it and as it is normally performed within the national economy; an individual of advanced age \* \* \* (age fifty-five or over); an individual with a high school education and above completed in the remote past (1956); an individual with no transferable skill(s); and an individual not expected to make a vocational adjustment to other work based upon the allowed physical conditions as assessed by The Industrial Commission's Specialist, James H. Rutherford, M.D., it is obvious that the claimant is permanently and totally disabled.

{¶26} 16. At the employer's request, vocational expert Craig Johnston, Ph.D., prepared a five-page report dated April 26, 2012, in which he opines:

According to Dr. Grunstein, the claimant is permanently and totally disabled. Based on this opinion, Ms. Strayer would be unemployable, regardless of the relevant vocational factors. Conversely, Seth Vogelstein, D.O. opines the claimant to have no limitations stemming from the allowed conditions. Based on this opinion, Ms. Strayer would be capable of all former work as well as any other work activities within her vocational capacities.

Between these two extremes is the opinion of James Rutherford, M.D., who finds the claimant to be capable of sedentary work activity. At the sedentary level, the claimant

could not return to past work, but would be capable of other entry-level work activity, including occupations related to past work. Two occupations are said to be related when the [sic] fall into the same work fields (describes the purpose of a job) and/or MPSMS (describes the materials used, products developed, subject matter dealt with, and services rendered in the work activity). The claimant has demonstrated experience in the work fields of protecting and in the MPSMS of regulation, protection and related services; both of which contain other sedentary work activities, including surveillance system monitor (monitors premises of public buildings to detect crimes or disturbances, using closed circuit television monitors, and notifies authorities by telephone of need for corrective action); police aide (performs any combination of tasks in police department to relieve police officers of clerical duties) and referral-and-information aide (receives callers and responds to complaints in person or by telephone for government agency). Other entry-level occupations that commonly hire older workers include information clerk (answers inquiries from persons entering establishment such as hospital or office complex), front desk receptionist (greet guests arriving at country club, catered social function, or other gathering place), and seated cashier in a movie theater, entertainment box office, parking garage, or cafeteria. No advanced qualifications are required of any of these occupations, which range from unskilled to low semiskilled. At the sedentary level vocational options remain available to Ms. Strayer.

Ms. Strayer does appear to have unrelated medical conditions which negatively impact her employability. Both Dr. Rutherford and Dr. Vogelstein identify these unrelated conditions as being much more significant than the allowed conditions, and according to Dr. Vogelstein, the claimant returned to work 6-7 days after her last injury, and continued to work until September 2010, leaving work only when she became emotionally upset about the loss of a pet. Despite this, the claimant maintains the vocational capacities for work. She is a high school graduate who engaged in entry-level work as recently as 2010, when she was approximately 74 years of age. She resides in the major metropolitan area of Columbus, OH, and can drive a car to access job openings. There are numerous jobs available for older workers with diminished physical capacities, and which do not require understanding of advanced technology, including surveillance monitor, police aide, referral aide, information

clerk, receptionist, and cashier. Based on the relevant vocational factors, and taking into consideration the allowed conditions of the respective claims, if one accepts the medical opinions of either Dr. Rutherford or Dr. Vogelstein, the claimant remains employable. Her age would not prevent a return to work, and this is supported by the fact that she obtained work at the age of 66, continued to work until the age of 76, and the current availability of jobs for older individuals. Based on the totality of vocational factors, if she maintains a sedentary physical capacity, Marlene Strayer remains capable of sustained remunerative employment.

{¶27} 17. Following a July 17, 2012 hearing, a staff hearing officer ("SHO") issued an order denying relator's application for PTD compensation. The SHO's order explains:

This order is based on the medical report of Dr. Rutherford and the vocational report of Mr. Johnston. The Injured Worker has incurred four industrial injuries. The first injury occurred on 05-16-2007. This injury occurred when the Injured Worker was opening a ceiling fan on a bus and felt a snap in her mid-back. The claim was allowed for neck sprain and cervical radiculitis. The Injured Worker missed about eight days of work due to this injury. The second injury occurred on 06-29-2007. The Injured Worker, who was working as a bus driver aide when she suffered a mid-back injury (thoracic sprain) as a result of the bus stopping quickly. The third injury was a 06-27-2008 injury. This was a left shoulder sprain and a left shoulder contusion. This injury occurred when the arm of a wheelchair rolled and hit her left shoulder. The last injury was a 05-11-2009 date of injury. The Injured Worker, again working as a bus assistant, incurred a neck sprain when her bus was rear-ended by a car. All treatment for these injuries was conservative in nature with no surgeries being reported. She last worked on 09-25-2010. Based on the medical report of Dr. Rutherford, the Injured Worker is found capable of performing sedentary level employment. Because the Injured Worker does have residual work capacity, her disability factors are next reviewed to determine what impact those factors have on the Injured Worker's overall reemployment potential. In that light, the record reveals the following disability factors. The Injured Worker is 76 years old, she graduated from high school and attended college in the 1950's for approximately two and one-half years. She has worked as a bus assistant, clerical worker, and she co-owned a home cleaning business.

Relying on Mr. Johnston's vocational report, the following findings are made in reference to Injured Worker's disability factors. The Injured Worker's age, 76, is not found by itself to be work prohibitive. Many entry level sedentary positions are filled by older workers due to their reputation as being dependable. While Injured Worker's age could be a barrier for more skilled positions where younger workers would have an advantage, the Injured Worker's age does not prevent her from obtaining simple entry level sedentary jobs.

The Injured Worker's education, high school and some college in the remote past, indicates that she possesses basic literacy/math skills such that she has the academic background to acquire the job skills necessary to perform entry level sedentary work, i.e., comprehend written instructions, author short reports, handle money and make change.

The Injured Worker's job history, as a bus assistant, clerical worker and self-employed house cleaner would not give the Injured Worker transferable skills for sedentary level work. However, as explained previously, the Injured Worker has at least average academic skills which would provide her with the ability to quickly learn the work skills of entry-level sedentary work. Consequently, while the Injured Worker's job history is not an asset for entry-level sedentary employment, she nevertheless possesses the academic skills to quickly learn entry-level sedentary positions as said entry-level jobs require normally a very short training period.

Mr. Johnston suggested several entry level sedentary job positions that the Injured Worker would qualify for. Specifically listed were surveillance system monitors (monitors premises of public buildings using television monitors, and notifies authorities by telephone of the need for corrective action), informational clerks at hospitals or office complexes (answers inquiries from persons entering establishments), front desk receptionist (greeted guests arriving at country clubs, catered social functions or other gathering places) and seated cashier in movie theaters, entertainment box offices, parking garages or cafeterias.

Consequently, it is evident that there are job positions commensurate with the Injured Worker's residual capacity such that the Injured Worker could qualify [sic] for presently or after brief retraining taking into account the Injured Worker's present age, education and work history.

{¶28} 18. On October 1, 2012, relator, Marlene Strayer, filed this mandamus action.

Conclusions of Law:

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

{¶30} For its determination of residual functional capacity, Ohio Adm.Code 4121-3-34(B)(4), the commission, through its SHO, determined that the industrial injury permits sedentary employment. For that determination, the commission relied exclusively upon the reports of Dr. Rutherford. Here, relator seems to suggest that the commission found that she is "only fit for less than sedentary work." (Emphasis sic.) (Relator's reply brief, at 4.) Relator's suggestion is incorrect.

{¶31} In his nine-page narrative report, Dr. Rutherford opined that relator "is limited to sedentary work activity." On the Physical Strength Rating form, Dr. Rutherford indicated by his mark that relator is capable of "sedentary work." In both reports, Dr. Rutherford did indicate that relator was only able to perform less than the full range of sedentary work, but those restrictions were unrelated to the industrial claim allowances. Therefore, it is incorrect for relator to suggest here that she was found to be "only fit for less than sedentary work."

{¶32} Notwithstanding relator's incorrect suggestion as discussed above, relator does not actually challenge the commission's exclusive reliance upon Dr. Rutherford's reports. However, relator does challenge the commission's analysis of the non-medical factors.

**Advanced Age**

{¶33} Ohio Adm.Code 4121-3-34 sets forth the commission's rules applicable to the adjudication of PTD applications. Ohio Adm.Code 4121-3-34(B) provides for definitions. Ohio Adm.Code 4121-3-34(B)(3) is captioned "Vocational factors."

{¶34} Thereunder, Ohio Adm.Code 4121-3-34(B)(3)(a) provides:

"Age" shall be determined at time of the adjudication of the application for permanent and total disability. In general, age refers to one's chronological age and the extent to which one's age affects the ability to adapt to a new work situation and to do work in competition with others.

{¶35} *State ex rel. Moss v. Indus. Comm.*, 75 Ohio St.3d 414, 417 (1996) is instructive. In *Moss*, the court states:

It is not enough for the commission to just acknowledge claimant's age. It must discuss age in conjunction with the other aspects of the claimant's individual profile that may lessen or magnify age's effects.

{¶36} In *Moss*, the commission denied the PTD application of a 78-year-old applicant with an eighth grade education and an ability to read, write, and do basic math. The claimant had worked as a housekeeper. The *Moss* court stated:

Our analysis of the commission's order reveals [*State ex rel. Noll v. Indus. Comm.*, 57 Ohio St.3d 203 (1991)] compliance. In so holding, we recognize the significant impediment that claimant's age presents to her reemployment. Workers' compensation benefits, however, were never intended to compensate claimants for simply growing old.

Age must instead be considered on a case-by-case basis. To effectively do so, the commission must deem any presumptions about age rebuttable. Equally important, age must never be viewed in isolation. A college degree, for example, can do much to ameliorate the effects of advanced age.

*Id.* at 416-17.

{¶37} Here, the SHO addressed the age issue as follows:

The Injured Worker's age, 76, is not found by itself to be work prohibitive. Many entry level sedentary positions are filled by older workers due to their reputation as being dependable. While Injured Worker's age could be a barrier for more skilled positions where younger workers would have an advantage, the Injured Worker's age does not prevent her from obtaining simple entry level sedentary jobs.

{¶38} Here, relator repeatedly states that she is of "advanced age." (Relator's brief, at 8, and reply brief, at 4.) While making no specific argument that the commission abused its discretion regarding her age relator seems to suggest that her age, mandates a PTD award. Relator is incorrect in such suggestion.

{¶39} In the magistrate's view, the commission appropriately addressed relator's age. While conceding that relator's age "could be a barrier for more skilled positions

where younger workers would have an advantage," the commission, nevertheless, found that her age "does not prevent her from obtaining simple entry level sedentary jobs." In making this determination, it must be remembered that the commission is the expert on the non-medical issues. *State ex rel. Jackson v. Indus. Comm.*, 79 Ohio St.3d 266 (1997).

{¶40} Also, relator has a high school education and some college. While relator does not have a college degree, it was well within the commission's discretion to view her advanced age in the context of her education. *Moss*.

#### **Work History: Lack of Transferable Skills**

{¶41} Ohio Adm.Code 4121-3-34(B)(3)(c)(iv) provides:

"Transferability of skills" are skills which can be used in other work activities. Transferability will depend upon the similarity of occupational work activities that have been performed by the injured worker. Skills which an individual has obtained through working at past relevant work may qualify individuals for some other type of employment.

{¶42} Citing and quoting from four cases, i.e., *State ex rel. Bruner v. Indus. Comm.*, 77 Ohio St.3d 243 (1997); *State ex rel. Pierce v. Indus. Comm.*, 77 Ohio St.3d 275 (1997); *State ex rel. Haddix v. Indus. Comm.*, 70 Ohio St.3d 59 (1994); *State ex rel. Mann v. Indus. Comm.*, 80 Ohio St.3d 656 (1998), relator claims, in a very general fashion, that the commission's "rationale in this case is not supported by evidence." (Relator's brief, at 10.)

{¶43} In the SHO's order of July 17, 2012, the commission addressed relator's work history as follows:

The Injured Worker's job history, as a bus assistant, clerical worker and self-employed house cleaner would not give the Injured Worker transferable skills for sedentary level work. However, as explained previously, the Injured Worker has at least average academic skills which would provide her with the ability to quickly learn the work skills of entry-level sedentary work. Consequently, while the Injured Worker's job history is not an asset for entry-level sedentary employment, she nevertheless possesses the academic skills to quickly learn entry-level sedentary positions as said entry-level jobs require normally a very short training period.

{¶44} As quoted by relator, the *Bruner* court stated:

We are disturbed by the increasing frequency with which the commission has denied permanent total disability compensation based on "transferable skills" that the commission refuses to identify. This lack of specificity is even more troubling when those "skills" are derived from traditionally unskilled jobs. As such, we find that the commission's explanation of claimant's vocational potential in this case is too brief to withstand scrutiny.

*Id.* at 245.

{¶45} As quoted by relator, the *Pierce* court stated:

The commission's discussion of claimant's work history is also inadequate. With increasing, and disturbing, frequency we are finding that no matter what claimant's employment background is, the commission finds skills-almost always unidentified-that are allegedly transferable to sedentary work. In some cases, depending on the claimant's background, these skills are self-evident. In many cases, they are not.

*Id.* at 277.

{¶46} As quoted by relator, the *Haddix* court stated:

The commission determined that claimant's prior work as a gas station attendant and press operator provided him with skills transferable to sedentary employment. The commission's order, however, does not identify what those skills are. Such elaboration is critical in this case, since common sense suggests that neither prior work is, in and of itself, sedentary.

*Id.* at 61.

{¶47} As quoted by relator, the *Mann* court stated:

The commission, in finding claimant capable of work, relies overwhelmingly on claimant's past employment. Its discussion is flawed because, despite excessive verbiage, it is no more than a recitation of claimant's nonmedical profile. The commission lists claimant's work history three times but never explains how those nonsedentary jobs equip claimant for a sedentary position. Moreover, the commission's reference to "sedentary low stress positions in the food service industry" merits further explanation. While the commission is generally not required to enumerate the jobs of which it believes claimant to be capable, its assertion that claimant could do low stress sedentary work in an industry

that is traditionally considered neither low stress nor sedentary requires further exploration.

*Id.* at 659.

{¶48} Clearly, relator's reliance on the above four cases is misplaced. Here, the commission did not find transferability of skills from relator's job history. Thus, there was no transferable skills for the commission to identify. Rather, the commission found that relator has "the ability to quickly learn the work skills of entry-level sedentary work." As the court noted in *State ex rel. Ewart v. Indus. Comm.*, 76 Ohio St.3d 139 (1996), the lack of transferable skills does not mandate a PTD award.

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

/S/ MAGISTRATE  
KENNETH W. MACKE

### **NOTICE TO THE PARTIES**

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