

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

[State ex rel.] Robert Boyd,	:	
Relator,	:	
v.	:	No. 14AP-413
The Scotts Miracle-Gro Company et al.,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on June 11, 2015

Michael J. Muldoon, for relator.

Vorys, Sater, Seymour and Pease LLP, and *Robert A. Minor*,
for respondent The Scotts Miracle-Gro Company.

Michael DeWine, Attorney General, and *Patsy A. Thomas*, for
respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

TYACK, J.

{¶ 1} Robert Boyd filed this action in mandamus, seeking a writ to compel the Industrial Commission of Ohio ("commission") to vacate its order denying his application for permanent total disability ("PTD") compensation and further compel the commission to make other orders in conjunction with reviewing the merits of his application.

{¶ 2} In accord with Loc.R. 13(M) of the Tenth Appellate District, the case was referred to a magistrate to conduct appropriate proceedings. The parties stipulated the pertinent evidence and filed briefs. The magistrate then issued a magistrate's decision,

appended hereto, which contains detailed findings of fact and conclusions of law. The magistrate's decision includes a recommendation that we deny the request for a writ.

{¶ 3} Counsel for Boyd has filed objections to the magistrate's decision. Counsel for the commission has filed a memorandum in response. Counsel for Scott's Miracle-Gro Company ("Scotts"), Boyd's former employer, has also filed a memorandum in response. The case is now before the court for a full, independent review.

{¶ 4} Boyd is over 90 years of age. He acquired asbestosis while working for Scotts. He has had several medical problems during his long life, including coronary heart disease and cancer of the rectum. The cancer necessitated surgery and a colostomy.

{¶ 5} The physician who examined Boyd for Scotts reported that the asbestosis has been minimal and stable. This contrasted with a report filed on behalf of Boyd which indicated that he had an 80 percent whole person impairment as a result of his asbestosis.

{¶ 6} Given this conflict of medical reports, the commission had Boyd examined by Herbert Grodner, M.D. Dr. Grodner found "a few thin areas of calcified plural plaquing in the upper lobes, mild bronchiectasis of the upper lobes of the lungs and some plural thickening." As a result, Dr. Grodner reported a ten percent impairment to Boyd's whole person.

{¶ 7} Boyd reported to the commission that he believes Dr. Grodner and his staff improperly administered a breathing test. He also complained of the fact Dr. Grodner took no chest x-rays. Therefore Boyd felt he did not receive a fair and valid examination. He requested a new examination from a commission specialist. No new examination was ordered and Boyd's application for PTD compensation was denied.

{¶ 8} In his objections, counsel for Boyd attacks the ability of Dr. Grodner to express an opinion with respect to impairment caused by asbestosis. Counsel also attacks the conclusion that Boyd, at age 92, is capable of pursuing sustained remunerative employment.

{¶ 9} We cannot say that the commission could not consider or rely on the report of Dr. Grodner. Dr. Grodner is a board certified pulmonologist. He fully understands the issues with respect to asbestosis. He simply found minimal impairment which was a finding consistent with several other medical reports in the record before us.

{¶ 10} We also cannot say that Boyd is disabled as a result of asbestosis, given the minimal impairment indicated in the reports of Dr. Grodner and Dr. Shadel.

{¶ 11} We therefore overrule the objections to the magistrate's decision. We adopt the findings of fact and conclusions of law contained therein. As a result, we therefore deny the request for a writ.

Objections overruled; writ denied.

DORRIAN and BRUNNER, JJ., concur.

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Respondents.	:	

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

Rendered on March 27, 2015

Michael J. Muldoon, for relator.

Vorys, Sater, Seymour and Pease LLP, and Robert A. Minor,
for respondent The Scotts Miracle-Gro Company.

Michael DeWine, Attorney General, and Patsy A. Thomas, for
respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶ 12} In this original action, relator, Robert Boyd, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order denying his application for permanent total disability ("PTD") compensation, to eliminate the report of Herbert Grodner, M.D. from further evidentiary consideration, to refer relator to a "qualified medical specialist" pursuant to R.C. 4123.68(Y) who shall meet the three requirements allegedly set forth in commission resolution R03-1-02, and to thereafter adjudicate the PTD application.

Findings of Fact:

{¶ 13} 1. Relator has an industrial claim (No. 05-894496) that is allowed for "asbestosis both lungs." August 9, 2005 is the official date of diagnosis. The occupational disease was received in the course of and arising out of relator's employment with respondent, The Scotts Miracle-Gro Company, a self-insured employer under Ohio's workers compensation laws.

{¶ 14} 2. On June 25, 2013, at his own request, relator was examined by Marissa Mertz, M.D. In her four-page narrative report, Dr. Mertz opined that relator "has total whole person impairment of 80%" and that she is "permanently and totally disabled."

{¶ 15} 3. On August 27, 2013, relator filed an application for PTD compensation. In support, relator submitted the June 25, 2013 report of Dr. Mertz.

{¶ 16} 4. At the employer's request, Robert F. Shadel, M.D. conducted a medical file review. He did not examine the relator. In his report dated October 2, 2013, Dr. Shadel opines:

The claimant's asbestosis has been repeatedly evaluated and found to be quite mild, with only minimal pleural thickening limited to his upper lung lobes. This pleural thickening has remained quite stable over the last 9 years, with stable lung X-rays and CT scan findings from 2004 through 2012 studies—demonstrating a low degree of long stable pleural thickening only. His lung condition has not significantly affected his lung function/capacity with two normal lung function studies. Dramatic findings reported by Dr. Mer[t]z appear medically inconsistent and incompatible with the claimant's well demonstrated mild and actually minimal lung pleural thickening with no appreciable effect on lung function, and medically likely within the realm of reasonable medical probability fail to relate to the condition of asbestosis in this claimant but relate to his co-morbid medical conditions and age.

Thus, through the stable objective findings since 2004, the claimant's asbestosis does not prevent him from engaging in sustained remunerative employment.

* * *

Mr. Boyd is of advanced age of 90 years. This alone has affected his physical function abilities. However, Mr. Boyd has coronary heart disease, treated with coronary stent

following heart attack. This has a major effect on his physical functioning abilities. In addition, Mr. Boyd has had cancer of the rectum that required surgery with colostomy. This disease affects his overall physical function ability as well.

However, the asbestosis has been minimal and stable; has had no progression at all over the last 9 years as per the objective imaging and pulmonary function testing, and thus, fails to contribute to his inability to work that is based on the multiple above unrelated medical conditions.

* * *

From condition of asbestosis alone, it is difficult to isolate effects of asbestosis from his other severely limiting medical conditions. It is likely based on mild asbestosis with none of minimal effect on lung function from asbestosis, he should not be working in a high physical demand job - not lifting over 25 lbs., not walking for more than 10-15 minutes more than occasionally, should not have exposure to sustained high ambient temperatures or to asbestos or vermiculite.

{¶ 17} 5. On November 27, 2013, at the commission's request, relator was examined by Dr. Grodner who issued a five-page narrative report. Under "Physical Examination," Dr. Grodner wrote:

The lungs revealed diffuse wheezes and rhonchi. There is good ventilatory excursion. There is no use of accessory muscles of respiration. The heart had a regular sinus rhythm. There are no murmurs, gallops or rubs. The abdomen is soft, no organomegaly, masses or tenderness. Extremities show no clubbing or cyanosis.

Spirometry was performed in the office and is valid. There is a ventilatory impairment characterized by a normal FEVI percent but a reduced FEVI and forced vital capacity. The flow rates are also moderately reduced. A bronchodilator study did not reveal significant reversibility.

{¶ 18} Under "[r]eview of medical records:" Dr. Grodner wrote:

In reviewing the file, an evaluation by Marissa Mertz performed on June 25, 2013. Dr. Mertz opined a whole person impairment of 80%. A report by Dr. Shadel indicates that there was a chest x-ray done on August 2, 2005 that noted no abnormalities in the lungs or pleura and a pulmonary function

study was normal. A CT scan of the chest, which was a high-resolution CT scan, in August of 2005 revealed a few thin areas of calcified pleural plaquing in the upper lobes consistent with asbestos exposure. There was also some mild bronchiectasis of the upper lobes. A chest x-ray dated 10/22/2012 noted some pleural thickening in the upper lobes, no pleural effusion or lung infiltrate. Dr. Shadel felt that the claimant's asbestosis has been minimal and stable with no progression over the past number of years. There is a letter to Mr. Boyd from Dr. Lockey dated October 27, 2004. He states that the PA chest x-ray on May 18, 2004 was interpreted by a local and University of Cincinnati radiologist and demonstrated no significant abnormalities. Pulmonary function studies were within normal limits. There is a PATIENT chest x-ray from 5/18/2004 that revealed minimal non-specific pleural thickening. The high resolution CT scan dated August 2005 showed thin areas of calcified pleural plaquing involving the upper lobes and along the left heart border consistent with asbestos exposure. Minimal bronchiectasis in the posterior aspect of the right lower lobe. There are notes from Dr. Michael Corriveau dated October 2012. He notes that he had rectal carcinoma and was status post resection and colostomy. He also had a myocardial infarction and hypertension. Dr. Corriveau's assessment was that he had bilateral pleural plaquing, some restrictive lung disease based on pulmonary function study dated June 28, 2012, persistent cough of unclear etiology, shortness of breath and CT scan did not clearly show lung parenchymal disease.

{¶ 19} In his narrative report, Dr. Grodner further opined:

This gentleman does have some restrictive impairment of a relatively mild degree as the result of the pleural changes due to asbestos exposure. There is no evidence of parenchymal impairment. There would not be expected to be any obstructive airway disease as a result of this gentleman's asbestosis, especially in view of the fact that no significant parenchymal changes are noted. Therefore, referring to the Fifth Edition of the AMA Guides, page 107, table 5-12, the claimant would have a class 2 respiratory impairment which would be 10% impairment to the whole person.

Referring to the Fifth Edition of the AMA Guides, page 4, table -12, the impact of the claimant's condition of pulmonary asbestosis upon the activities of daily living would be minimal. The actual findings with respect to the pulmonary function

[sic] studies and the mild restrictive impairment may affect walking and climbing stairs to a very minimal degree. Other activities such as personal hygiene, communication, sleep and sexual function should in no way be affected by this gentlemen's allowance of pulmonary asbestosis.

Spirometry at the time of my examination did reveal some element of obstructive airway disease. The obstructive airway disease is not a result of asbestos exposure. I am not certain why he has obstructive airway disease, especially in view of him being a lifelong nonsmoker but there was some evidence of mild bronchiectasis approximately 8-9 years ago and therefore, there could have been some progression since that time, which might explain any obstructive airway disease.

{¶ 20} 6. On November 27, 2013, Dr. Grodner completed a "Physical Strength Rating," which is a form provided by the commission. On the form, Dr. Grodner indicated by his mark that relator is capable of "light work."

{¶ 21} 7. It is undisputed that Dr. Grodner is not a "B Reader." Also, he did not order x-rays with respect to his examination of relator. As indicated in his report, he performed spirometry and he did a bronchodilator study in connection with his physical examination.

{¶ 22} 8. At relator's request, vocational expert Molly S. Williams performed a vocational review. In her two-page narrative report dated January 1, 2014, Williams concludes:

[W]hen all of the disability factors are correctly identified, stated, and considered: an individual with no past relevant work; an individual of advanced age (fifty-five or over); an individual with a high school education completed in the remote past (1943); 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 condition, as assessed by The Industrial Commission's Specialist, Herbert A. Grodner, M.D., it is obvious that the claimant is permanently and totally disabled.

{¶ 23} 9. On January 30, 2014, relator wrote to the commission:

I appeared for the examination with Dr. Grodner, at the request of the Industrial Commission.

Dr. Grodner's staff requested I breathe into a machine for five minutes straight. I was unable to do that because I started coughing. Therefore, I do not believe that the test was completed properly. Secondly, the doctor did not take any chest x-ray.

Based upon the above[,] I do not feel that I received a fair and valid examination by Dr. Grodner.

{¶ 24} 10. On January 31, 2014, at relator's request, a pre-hearing conference was held by the Cincinnati hearing administrator. On February 5, 2014, the hearing administrator mailed a "compliance letter," stating:

At today's pre-hearing conference, the Injured Worker's representative argued the Industrial Commission should schedule a new specialist examination because Herbert A. Grodner, M.D., was not qualified to evaluate the Injured Worker's impairment and because he did not conduct additional testing.

Dr. Grodner's report is not found to be fatally flawed and therefore, a new examination will not be scheduled. The weight and credibility of all evidence in the file is best addressed by the Staff Hearing Officer at the hearing on the merits of the Permanent Total Disability application.

At this time, the claim file will be docketed for a hearing on the merits.

{¶ 25} 11. On May 14, 2014, relator's PTD application was heard by an SHO. The hearing was recorded and transcribed for the record. During the hearing, relator's counsel objected to Dr. Grodner's report:

The Industrial Commission had the claim examined by Dr. Grodner. Just for the record, I would reiterate the objections that I made to the hearing administrator that, number one, that the - - he's not a B reader, which the statute requires as far as making the diagnosis concerning this condition; and secondly, Mr. Boyd indicated that he had problems with coughing and was not able to complete the pulmonary functioning studies correctly and also the chest X-rays were done, but just for the record, I reiterate those objections I had, which the hearing administrator overruled.

{¶ 26} During the hearing, employer's counsel argued:

I think that Mr. Muldoon is misreading the Commission's resolution. It's Resolution R03-1-02 and that requires the injured worker to submit with his application a written interpretation of X rays by a B reader, pulmonary function studies, an interpretation by a licensed physician and statement of causal relation. That's incumbent upon the injured worker. It's not the competency of the state's examiner.

Dr. Grodner is board certified in both internal medicine and pulmonology and he did conduct an examination. He had available CT scans and plain films, the plain films from October 22 of 2012, he also had comparison films that showed no progression of any disease. He did do pulmonary function studies and * * * he found that claimant had relatively mild degree of pleural changes and with respect to the pulmonary functions studies he characterized, I believe, as a mild restrictive impairment.

{¶ 27} 12. Following the May 14, 2014 hearing, the SHO issued an order denying the PTD application. The SHO's order explains:

In support of the Injured Worker's application for permanent and total disability compensation, he submitted the 06/25/2013 evaluation opinion of Dr. Marissa Mertz to whom the Injured Worker was referred by his attorney of record, but with whom no traditional physician/patient relationship was established. Dr. Mertz opined that the Injured Worker "is permanently and totally disabled" and "has total whole person impairment of 80%."

In response to the filing of the Injured Worker's application for permanent and total disability compensation, the Injured Worker was examined at the request of the Industrial Commission by Dr. Herbert Grodner on 11/27/2013. Dr. Grodner found that although the Injured Worker had some restrictive impairment of a relatively mild degree as the result of the pleural changes due to asbestos exposure, but that there was no evidence of parenchymal impairment. He opined that there would not be expected to be any obstructive airway disease as a result of the Injured Worker's asbestosis and he opined that the Injured Worker had a class II respiratory impairment which would be 10% impairment to the whole person.

Dr. Grodner opined that the impact of the Injured Worker's pulmonary asbestosis upon the activities of daily living would be minimal. He opined that the mild restrictive impairment may affect walking and climbing stairs to a "very minimal degree."

Dr. Grodner opined that the Injured Worker is capable of performing light work regarding the allowed condition in this claim. Further, the Staff Hearing Officer finds, based upon the opinion expressed by Dr. Grodner on 11/27/2013, that the Injured Worker's allowed condition has reached maximum medical improvement.

In response to the filing of the Injured Worker's IC-2 application for permanent and total disability compensation, the Employer arranged for Dr. Robert Shadel to review the Injured Worker's claim file. Dr. Shadel opined on 10/02/2013 that the Injured Worker's claim file. Dr. Shadel opined on 10/02/2013 that he Injured Worker's asbestosis has been repeatedly evaluated and found to be quite mild, with only minimal pleural thickening limited to his upper lung lobes. He opined that the pleural thickening has "remained quite stable over the last nine years." He opined that the Injured Worker's lung condition has not significantly affected his lung function/capacity with two normal lung function studies.

Regarding the findings reported by Dr. Mertz, Dr. Shadel opined that the "traumatic findings reported by Dr. Mertz appear medically inconsistent and incompatible with the Injured Worker's well-demonstrated mild and actually minimal lung pleural thickening with no appreciable effect on lung function, and medically likely within the realm of reasonable medical probability failed to relate to the condition of asbestosis in this claimant, but relate to his co-morbid medical conditions and age."

Dr. Shadel opined that the Injured Worker's asbestosis does not prevent him from engaging in sustained remunerative employment and Dr. Shadel opined that the Injured Worker's asbestosis "fails to contribute to his inability to work." Dr. Shadel opined that the Injured Worker:

"should not be working in a high physical demand job - - not lifting over 25 lbs., not walking for more than 10-15 minutes more than occasionally, should not have exposure to

sustained high ambient temperatures, or to asbestos or vermiculite."

Based upon the reports of Dr. Shadel and Dr. Grodner, the Staff Hearing Officer finds that the Injured Worker retains the physical capability to perform work. Having determined that the Injured Worker retains the physical capability to perform at least light work, the Staff Hearing Officer now turns to an analysis of the Injured Worker's vocational disability factors.

The Staff Hearing Officer finds that the Injured Worker is presently 90 years of age, having been born on 06/26/1923. He received a high school diploma in 1943, but has had no special training and had no military experience.

He explained upon his application for permanent and total disability compensation that he is able to read, write, and perform basic math and is able to drive a car. The Injured Worker explained at this hearing that he has a current drivers license but has some concerns about his vision.

Regarding his work history, the Injured Worker explained that after graduating from high school in 1943 he primarily worked on his father's farm until 1966, although he ran an appliance store from approximately one year in the mid 1950's.

The Injured Worker explained that in 1967, at approximately the age of 43, the Injured Worker ceased working on his father's farm and began to work for the instant Employer. He continued to work there until retiring at the age of 62 when the Employer introduced computerization. He explained that he drove a fork truck for approximately nine years before becoming a warehouse supervisor. He explained that he also started a new facility for the Employer in New Jersey and he has also been the supervisor of truck and rail warehouse operations.

The Injured Worker testified regarding employment after his retirement from the instant Employer that he worked for Stapleton Chrysler as a runner for a period of four to five years. He drove for the dealership and ran titles for four to five days per week for four hours per day, approximately. It was developed at this hearing that his employment for Stapleton Chrysler ended in 2008, approximately, when the owner of the dealership ran into legal difficulties.

The Staff Hearing Officer finds that the Injured Worker's advanced age is a negative factor to be considered when assessing the Injured Worker's vocational capabilities. However, the Injured Worker's lengthy work experience in a large scale supervisory position is a strong positive factor when assessing the Injured Worker's vocational capabilities. The Injured Worker's high school diploma is also a positive factor. The Staff Hearing Officer finds that the Injured Worker has relevant work experience as a car dealership runner, a clerical position with some driving responsibilities. The fact that the work experience was a[s] recently as 2008 is also a strong positive factor. The Injured Worker presently holds a valid driver's license and passed a vision test to obtain that license, according his testimony at this hearing.

The Staff Hearing Officer finds that the Injured Worker is not prevented from returning to work at a position of employment as a car dealership runner by the allowed condition in this claim. The Staff Hearing Officer finds that the Injured Worker has experience and skills for such a position and that such a position is not outside of the restrictions described by Dr. Grodner or Dr. Shadel. Finally, the Staff Hearing Officer finds that the Injured Worker still [possesses] the requisite driver's license needed to perform such a position. Consequently, it is the order of the Staff Hearing Officer that the Injured Worker's application for permanent total disability compensation filed 08/27/2013 is denied; the Injured Worker is capable of performing sustained remunerative employment within the restrictions imposed by this claim.

{¶ 28} 13. On May 20, 2014, relator, Robert Boyd, filed this mandamus action.

Conclusions of Law:

{¶ 29} Several issues are presented: (1) whether the commission abused its discretion by relying on Dr. Grodner's report when Dr. Grodner did not meet all of the three requirements set forth in commission resolution R03-1-02, (2) whether relator's advanced age of 90 years compels a PTD finding, or that age is so advanced that, as a matter of law, it outweighs the positive vocational factors, and (3) whether the commission abused its discretion in determining that he possessed a valid driver's license and that his license would permit his "returning to work at a position of employment as a car dealership runner by the allowed condition in this claim."

{¶ 30} The magistrate finds: (1) the commission did not abuse its discretion by relying upon Dr. Grodner's report, (2) relator's advanced age of 90 years does not compel a PTD finding, and (3) the commission did not abuse its discretion with respect to relator's driver's license.

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

First Issue

{¶ 32} Relator puts at issue commission resolution R03-1-02 effective March 5, 2003, which modified resolution R96-1-01 effective February 26, 1996.

{¶ 33} Effective February 26, 1996, the commission enacted resolution R96-1-01 which declares:

THEREFORE BE IT RESOLVED that it is the policy of the Industrial Commission that at a minimum the following evidence is necessary to be submitted by the claimant prior to the referral of the claim to the Administrator for an examination by a qualified medical specialist pursuant to the provisions of Section 4123.68 concerning claims for occupational diseases of the respiratory tract resulting from injurious exposure to dust:

- A written interpretation of x-rays by a certified "B reader."
- Pulmonary functions studies and interpretation by a licensed physician.
- An opinion of causal relationship by a licensed physician.

{¶ 34} Effective March 5, 2003, the commission enacted resolution R03-1-02 which declares:

THEREFORE BE IT RESOLVED that Resolution R96-1-01 be modified to the extent that it is the policy of the Commission that, at a minimum, the following evidence is necessary to be submitted by the injured worker prior to the referral of the claim to the Administrator for an examination by a qualified medical specialist pursuant to the provisions of Section 4123.68 of the Ohio Revised Code concerning claims for asbestosis, as well as for claims for silicosis, coal miners pneumoconiosis, and for occupational diseases of the respiratory tract resulting from injurious exposure to dust, and at a minimum, the following evidence is also necessary to be submitted by an injured worker prior to the adjudication of

a contested claim filed for any asbestos-related occupational disease, other than mesothelioma:

- A written interpretation of x-rays by a certified "B reader."
- Pulmonary functions studies and interpretation by a licensed physician.
- An opinion of causal relationship by a licensed physician.

{¶ 35} R.C. 4123.68(Y) provides in part:

Before awarding compensation for disability or death due to silicosis, asbestosis, or coal miners' pneumoconiosis, the administrator shall refer the claim to a qualified medical specialist for examination and recommendation with regard to the diagnosis, the extent of disability, the cause of death, and other medical questions connected with the claim. An employee shall submit to such examinations, including clinical and x-ray examinations, as the administrator requires.

{¶ 36} In *Anders v. Powertrain Div., Gen. Motors Corp.*, 157 Ohio App.3d 815, 2004-Ohio-2469 (3d Dist.), the Third District Court of Appeals had occasion to interpret commission resolution R96-1-01. The court held that an employee claiming the right to participate in the workers' compensation fund must submit the three items set forth in the resolution *prior* to being referred to a qualified medical specialist for the mandatory R.C. 4123.68(Y) examination. *Anders* at ¶ 25. Moreover, the examination by a qualified medical specialist is a pre-requisite, i.e., condition precedent, to a determination of whether the claimant has a right to participate in the fund. *Id.* at ¶ 28.

{¶ 37} In *Esters v. Daimlerchrysler Corp.*, 9th Dist. No. 22030, 2004-Ohio-4586, the claimant, Buddy Esters, filed an industrial claim alleging that he had contracted asbestosis as a result of his exposure to asbestos arising out of his employment with Daimlerchrysler Corporation. The commission and its hearing officers denied the claim because Esters failed to meet the minimum evidence requirements established by commission resolution R96-1-01. Esters appealed to the Summit County Court of Common Pleas pursuant to R.C. 4123.512 and that court granted summary judgment in favor of the employer and the commission. On appeal, the Ninth District Court of Appeals affirmed. The appellate court explained:

Ordinarily, asbestosis claims are compensable occupational diseases. R.C. 4123.68(AA). However, asbestosis claims must be referred to a qualified medical specialist before compensation can be awarded. R.C. 4123.68(Y). This examination is mandatory. See *Anders*, 2004-Ohio-2469, at ¶ 15, 157 Ohio App.3d 815, N.E.2d 923. Failure to submit to the examination results in a forfeiture of all compensation. R.C. 4123.68(Y).

The long period between initial contact with asbestos and its apparent effect and the difficulty in determining that the exposure is the cause of the disease gives rise to the need for an examination by a medical specialist. *Anders*, 2004-Ohio-2469, at ¶ 16, 157 Ohio App.3d 815, 813 N.E.2d 923, citing *Goldman v. Johns-Manville Corp.* (June 30, 1986), 6th Dist. No. L-85-016. In light of this difficulty and the sheer volume of asbestosis claims, the Commission adopted Resolution 96-1-01, requiring the three items of evidence mentioned *supra*. *Anders*, 2004-Ohio-2469, at ¶ 17, 157 Ohio App.3d 815, 813 N.E.2d 923.

Id. at ¶ 9-10.

{¶ 38} In *Wright v. Leggett & Platt*, 9th Dist. No. 04CA008466, 2004-Ohio-6736, the Ninth District Court of Appeals rejected a challenge to the validity of resolution R96-1-01:

This Court agrees with our sister court, the Third District, that Resolution 96-1-01 was adopted in accord with the authority granted the Industrial Commission by R.C. 4121.03(E)(1). *Anders*, 157 Ohio App.3d at 822, 813 N.E.2d 923. Resolution 96-1-01 dictates the specific quantum of evidence necessary to bring the matter before the Industrial Commission. As such, it is not in conflict with R.C. 4123.68(Y). Further, it does not enact a new law, it merely administers a law currently in existence. See *Donnelly v. Fairview Park* (1968), 13 Ohio St.2d 1, 233 N.E.2d 1, 233 N.E.2d 500, paragraph two of the syllabus. Accordingly, this Court finds that the adoption of Resolution 96-1-01 was a valid exercise of the authority granted to the Industrial Commission.

Id. at ¶ 11.

{¶ 39} The *Wright* court also rejected a challenge to the resolution under the Equal Protection Clause of the Ohio Constitution. *Id.* at ¶12.

{¶ 40} Having reviewed the cases that have interpreted commission resolution R96-1-01, the magistrate concludes that resolution R03-1-02 effective March 5, 2003 has no applicability to the questioned competency of Dr. Grodner's report.

{¶ 41} To begin, Dr. Grodner was not asked to perform an R.C. 4123.68(Y) examination involving an alleged right to participate in the state insurance fund. Rather, Dr. Grodner was asked by the commission to conduct an examination regarding relator's application for PTD compensation. Ohio Adm.Code 4121-3-34(C)(5)(iii) provides that the claims examiner shall "[s]chedule appropriate medical examination(s) by physician(s) to be selected by the commission * * *." Because Dr. Grodner did not perform an R.C. 4123.68(Y) examination involving the right to participate, it is clear that the commission's resolutions have no applicability here.

{¶ 42} Relator simply misinterprets the commission's resolutions in his challenge to Dr. Grodner's report. Clearly, Dr. Grodner's report is competent medical evidence notwithstanding that he is not a "B reader" who renders his own interpretation of x-rays that he himself has ordered.

{¶ 43} In short, Dr. Grodner's report is indeed some evidence upon which the commission relies to establish residual functional capacity in the adjudication of the PTD application. Thus, the commission's determination that relator is medically able to perform light-work must stand.

Second Issue

{¶ 44} The second issue is whether relator's age of 90 years compels a PTD finding. Relator seems to suggest that his age compels a PTD finding or that his age is so advanced that, as a matter of law, it outweighs the positive vocational factors. The magistrate disagrees with relator's suggestion.

{¶ 45} In his brief, relator emphasizes his age at several points. At page 11 of his brief, relator states: "It should be noted that the Relator, at this time, is ninety (90) years of age." (Relator's Brief, 11.)

{¶ 46} At page 18 of his brief, relator states: "The Staff Hearing Officer concluded that a ninety (90) year old individual with significant lung impairments is capable of working which clearly flies in the face of reality." (Relator's Brief, 18.)

{¶ 47} In his reply brief, at page three, relator states:

The Relator would submit that the Staff Hearing Officer has created a "legal fiction" to conclude that * * * Relator with a significant lung impairment and ninety (90) years of age is able to work.

{¶ 48} At page four of his reply brief, relator expands his argument regarding age:

It is clear in this case that the Relator should be commended for working up into his eighties. However, based upon his significant lung impairment, one cannot avoid considering the significant disability factors in this case which would include that he is ninety years of age. The Judges of the State are required to terminate their employment at the age of seventy-two; pilots of this Nation have to terminate their employment at the age of sixty-five. These are educated individuals. In the instant case, you have a high school graduate who basically did unskilled physical work his entire life. Clearly that has been taken away from him by his significant and life threatening lung impairment. The Relator would submit that it strains the credulity of a lay person that this ninety year old individual, with a significant medical lung impairment, is found to be able to work by the Industrial Commission.

{¶ 49} In the May 14, 2014 order, the SHO addresses the age factor. While conceding that relator's advanced age is a "negative factor," the SHO indicates that relator's age must be viewed in the context of several positive factors. Relator held a warehouse supervisory job which the SHO found to be "a strong positive factor." Also, the SHO found that relator's high school education was a positive factor. Moreover, the SHO pointed to relator's experience as recent as 2008, as a car dealership runner which was a clerical position with some driving responsibility.

{¶ 50} Ohio Adm.Code 4121-3-34 sets forth the commission's rules applicable to the adjudication of PTD applications.

{¶ 51} Ohio Adm.Code 4121-3-34(B) provides for definitions.

{¶ 52} Ohio Adm.Code 4121-3-34(B)(3) is captioned "Vocational factors."

{¶ 53} 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.

{¶ 54} *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.

{¶ 55} 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.

{¶ 56} Here, the SHO did not view relator's age in isolation. It was well within the commission's fact finding discretion to weigh relator's advanced age against the positive vocational factors, and to conclude that relator can perform sustained remunerative employment.

Third Issue

{¶ 57} At the May 14, 2014 hearing, the following exchange occurred between relator, his spouse, his counsel and the SHO:

HEARING OFFICER: You're still driving right now, right?

THE CLAIMANT: Huh?

HEARING OFFICER: You are driving now, currently?

THE CLAIMANT: No.

HEARING OFFICER: You're not? Your application said you were.

THE CLAIMANT: No, I got licensed.

MRS. BOYD: He passed his test, but he has some glaucoma, but some macular degeneration now.

MR. MULDOON: You just passed your driver's license, so you have a license to drive?

THE CLAIMANT: Yes, I've still got my license.

(Tr. 23-34.)

{¶ 58} In the May 14, 2014 order, the SHO states:

The Injured Worker presently holds a valid driver's license and passed a vision test to obtain that license, according to his testimony at this hearing.

The Staff Hearing Officer finds that the Injured Worker is not prevented from returning to work at a position of employment as a car dealership runner by the allowed condition in this claim. The Staff Hearing Officer finds that the Injured Worker has experience and skills for such a position and that such a position is not outside of the restrictions described by Dr. Grodner or Dr. Shadel. Finally, the Staff Hearing Officer finds that the Injured Worker still [possesses] the requisite driver's license needed to perform such a position.

{¶ 59} Under the circumstances here, the SHO was not required to find that relator is no longer able to drive a vehicle. It is the commission that weighs the evidence. This court will not reweigh the evidence in this mandamus action. 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).