

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel.	:	
Manpower of Dayton, Inc.,	:	
Relator,	:	
v.	:	No. 14AP-376
The Industrial Commission of Ohio	:	(REGULAR CALENDAR)
and Inge Fox,	:	
Respondents.	:	

D E C I S I O N

Rendered on June 30, 2015

Coolidge Wall Co., L.P.A., David C. Korte, Michelle D. Bach and Joshua R. Lounsbury, for relator.

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

Hochman & Plunkett Co., L.P.A., Gary D. Plunkett and Brett Bissonnette, for respondent Inge Fox.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

DORRIAN, J.

{¶ 1} In this original action, relator, Manpower of Dayton, Inc., requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order awarding permanent total disability ("PTD") compensation to respondent Inge Fox ("claimant") and to enter an order denying the compensation.

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

{¶ 3} The magistrate made several findings. First, the magistrate found that, while the impairment report of Kenneth J. Manges, Ph.D., may have strayed into evaluation of non-medical vocational factors, the report clearly contained his opinion regarding impairment, free of any non-medical or vocational considerations. Accordingly, the magistrate held that the impairment opinion provided some evidence supporting the commission's PTD award effective July 10, 2012.

{¶ 4} Second, the magistrate found that Dr. Manges' reports are readily identifiable as a "vocational" report and an "impairment" report and, therefore, it was not necessary to issue a writ of clarification regarding upon which report the commission relied.

{¶ 5} Third, the magistrate found that Jane T. Lutz, M.D.'s reference to the claimant's daily living activities did not make his opinion regarding impairment equivocal. The magistrate concluded that Dr. Lutz's report provided some evidence to support the commission's findings that the allowed physical conditions alone prohibit all sustained remunerative employment.

{¶ 6} Finally, the magistrate found that the opinion of Thomas Heitkemper, Ph.D, which was made within a reasonable degree of "medical/psychological probability," was not incompetent or invalid. The magistrate referenced the relator's failure to cite to any authority which would invalidate Dr. Heitkemper's use of the term "medical/psychological probability," as well as relator's failure to address Ohio Adm.Code 4121-3-34(C)(1) and the commission's "Medical Examination Manual." Accordingly, the magistrate concluded that the report of Dr. Heitkemper was some evidence upon which the commission can and did rely to support a finding

that the allowed psychological conditions of the claim alone prohibit all sustained remunerative employment.

{¶ 7} With all this in mind, the magistrate recommended that this court deny the requested writ of mandamus.

{¶ 8} Relator has filed the following objections to the magistrate's decision:

1. The Magistrate erred when he found that Dr. Manges provided some evidence to support the Industrial Commission of Ohio's finding that claimant's allowed psychological conditions alone prohibit her from performing sustained remunerative employment.
2. The Magistrate erred when he concluded that the Industrial Commission of Ohio did not need to clarify which report of Dr. Manges it relied upon in support of its decision.
3. The Magistrate erred when he found that Dr. Lutz's report is not equivocal.
4. The Magistrate erred when he found that Dr. Heitkemper's report was some evidence supporting a finding that the allowed psychological conditions alone prohibit all sustained remunerative employment.
5. The Magistrate erred when he failed to address Manpower's argument that the SHO Order did not meet the requirements of *State ex rel Noll v. Industrial Commission*, 57 Ohio St.3d 203, 567 N.E.2d 245 (1991), when the SHO relied solely upon Dr. Manges' report to support the start date of permanent total disability.

{¶ 9} To obtain a writ of mandamus, a relator must demonstrate 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. "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. " 'Where a commission order is adequately explained and based on some evidence, * * * the order will not be disturbed as manifesting an abuse of discretion.' " *State ex rel. Avalon Precision Casting Co. v. Indus. Comm.*, 109 Ohio St.3d 237, 2006-Ohio-2287, ¶ 9, quoting *State ex rel. Mobley v. Indus. Comm.*, 78 Ohio St.3d 579, 584 (1997), ¶ 9.

{¶ 10} Relator does not object to the magistrate's findings of fact and, therefore, we adopt them as our own.

{¶ 11} The arguments presented in the first, second, and third objections are not new and are essentially a reiteration of the same arguments previously made to and addressed by the magistrate. After a careful and independent review, for the reasons stated in the magistrate's decision, we do not find merit to relator's first, second, and third objections.

{¶ 12} In his fourth objection, relator argues that the magistrate failed to recognize the authority it presented to support its argument that Dr. Heitkemper was not qualified to provide a medical opinion. In its brief, relator cites to *State ex rel. Kohl's Dept. Stores v. Indus. Comm.*, 151 Ohio App.3d 624 (10th Dist.2003); *Baker v. Ohio Bur. of Workers' Comp.*, 140 Ohio App.3d 766 (1st Dist.2000), and *State ex rel. Burnem v. Indus. Comm.*, 18 Ohio App.3d 27 (10th Dist.1984).

{¶ 13} In *Kohl's Dept. Stores*, the objection presented before the court was the question of whether a psychologist's report, in which the psychologist expressed an opinion on medical issues, could constitute some evidence to support continued temporary total disability. The magistrate concluded that the psychologist's report was not some evidence because the psychologist expressed an opinion on medical issues. This court, however, found that the psychologist was qualified to express an opinion as to whether claimant's allowed condition of depression had reached maximum medical improvement and that "[t]he fact that [the psychologist] may have considered her depression to find its source in a medical condition, here,

claimant's headaches should not necessarily preclude consideration of his report as to the psychological aspects of her claim." *Id.* at ¶ 7.

{¶ 14} In *Baker* at 771, the First District Court of Appeals rejected the bureau's argument that, lacking medical degrees, two psychologists were legally incompetent to express an opinion on the cause of the claimant's suicidal impulse. The court noted that the medical diagnoses had already been made by medical doctors and allowed by the Bureau of Workers' Compensation; their existence was not disputed. Likewise, the psychological diagnoses were not disputed and had been previously allowed. The court defined the question before the psychologists as whether the medical conditions caused Mark Baker to lose rational judgment and commit suicide. The query was not medical but, rather, psychological. The court found that the trained psychologists were particularly qualified to express an opinion upon the matter.

{¶ 15} In the syllabus of *Burnem*, this court opined that "[a] registered nurse is not qualified to make a medical diagnosis as to the type of medical care needed by an industrial claimant seeking payment of nursing services rendered by his wife, pursuant to R.C. 4121.44(L) and Ohio Adm.Code 4123-7-25(F)."

{¶ 16} We do not find that these cases support relator's argument. In particular, we note that Dr. Heitkemper's opinion after examining claimant on July 31, 2013, addressed psychological conditions or consequences of the medical conditions. He opined as follows:

My opinion is that Ms. Fox is incapable of engaging in sustained remunerative employment. While she is at a mild level of impairment for concentration and persistence, she is moderately impaired in the areas of activities of daily living and socialization. In addition, she [is] also at a moderate level of impairment in the area of adaptation. Her difficulty with being able to adapt to changes in the work environment, even given the simplest of tasks, would result in her not being able to work. She would be easily overwhelmed, and would rapidly become even more depressed when faced with even minor stressors in a work-related setting. This is an

individual who has essentially "given up" on life, and requires assistance from her husband and son, in even basic day to day activities around the house. Therefore, she is incapable of work. This conclusion is reached within a reasonable degree of medical/psychological probability.

{¶ 17} As further evidence of the nature of Dr. Heitkemper's opinion being psychological rather than medical, we note the caption of the form he submitted on July 31, 2013: "Occupational Activity Assessment, *Mental & Behavioral Examination*." (Emphasis added.)

{¶ 18} Therefore, after careful and independent review, for the reasons stated in the magistrate's decision, we do not find merit to relator's fourth objection.

{¶ 19} Finally, in his fifth objection, relator argues that the magistrate failed to address its argument that the staff hearing officer ("SHO") did not comply with the requirements of *State ex rel. Noll v. Indus. Comm.*, 57 Ohio St.3d 203 (1991). Rather, relator argues that the SHO relied exclusively on Dr. Manges' report to support the date of PTD. We disagree. At page 13 of his decision (¶ 55 of appendix), the magistrate quotes *Noll* and summarizes relator's argument that the SHO violated *Noll* by failing to specify upon which of Dr. Manges' two reports she relied in making her December 17, 2013 decision. The magistrate addressed relator's argument and determined it was not necessary to issue a writ for clarification. Accordingly, we do not find merit to relator's fifth objection to the magistrate's decision.

{¶ 20} Upon review of the magistrate's decision, an independent review of the record, and due consideration of relator's objections, we find that the magistrate has properly determined the pertinent facts and concluded that a writ is not warranted. We, therefore, overrule relator's objections to the magistrate's decision and adopt the findings of fact and conclusions of law of the magistrate. Accordingly, the requested writ of mandamus is hereby denied.

Objections overruled; writ denied.

TYACK and BRUNNER, JJ., concur.

APPENDIX
IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio ex rel.	:	
Manpower of Dayton, Inc.,	:	
Relator,	:	
v.	:	No. 14AP-376
The Industrial Commission of Ohio	:	(REGULAR CALENDAR)
and Inge Fox,	:	
Respondents.	:	

MAGISTRATE'S DECISION

Rendered on March 27, 2015

Coolidge Wall Co., L.P.A., David C. Korte, Michelle D. Bach and Joshua R. Lounsbury, for relator.

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

Hochman & Plunkett Co., L.P.A., Gary D. Plunkett and Brett Bissonnette, for respondent Inge Fox.

IN MANDAMUS

{¶ 21} In this original action, relator, Manpower of Dayton, Inc., requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order awarding permanent total disability ("PTD") compensation to respondent Inge Fox and to enter an order denying the compensation.

Findings of Fact:

{¶ 22} 1. On July 12, 2006, Inge Fox ("claimant") sustained an industrial injury while performing sandblasting for relator, a self-insured employer under Ohio's workers' compensation laws. On that date, because there was a hole in the glove she was wearing, the sand went through the glove onto her hand.

{¶ 23} 2. The industrial claim (No. 06-853505) is allowed for:

Left wrist tendonitis; left wrist contusion; complex regional pain syndrome/reflex sympathetic dystrophy left upper extremity; complex regional pain syndrome/reflex dystrophy right upper extremity; reflex sympathetic dystrophy of the bilateral lower extremities; pain disorder associated with both psychological factors and general medical condition; dysthymic disorder.

{¶ 24} 3. On March 19, 2013, claimant filed an application for PTD compensation. In support of her application, claimant submitted two reports authored by psychologist Kenneth J. Manges, Ph.D. Both reports are dated July 10, 2012. One report is captioned "Permanent Total Impairment from psychological claim allowance" and shall be referred to as the "impairment report." The impairment report is seven pages in length. The other report is captioned "Vocational Evaluation" and shall be referred to as the "vocational report." The vocational report is also seven pages in length.

{¶ 25} 4. On the first page of the impairment report, under the heading "Examination Question," Dr. Manges wrote:

Is the claimant, based on her allowed psychological condition(s) permanently and totally impaired from doing work? If she is precluded from work due to her psychological impairment what would you opine the amount of the impairment and please give a basis for your opinion.

{¶ 26} 5. On the third page of the impairment report, under the heading "Psychological History," Dr. Manges wrote:

Mrs. Fox reported no psychological intervention prior to her 2006 industrial injury. She has had outpatient counseling

since her injury, for about one year. She was seen twice a month until BWC stated she had reached [maximum medical improvement] and treatment was stopped.

She denied ever having had treatment for alcohol or substance abuse. She has no suicidal thoughts or attempts.

{¶ 27} 6. Beginning at page five of the impairment report, under the heading "Overall Findings and Conclusions," Dr. Manges wrote:

This author examined the claimant's psychological functioning using the medical information, interview data and standardized testing. All of the test findings are as noted above. The claimant's subjective assertions are consistent with her medical condition.

Based upon all the medical evidence, tests, interview and knowledge of the job market, it is this examiner's opinion that remunerative employment for Mrs. Fox is outside of the scope of realistic possibility. She is limited in performing work because of her allowed psychological condition.

Even sedentary employment, which could accommodate some of Mrs. Fox's physical conditions, cannot accommodate all of her limitations. There are several obstacles to her employability.

- She has marked psychological difficulties
- She cannot perform work within expected levels of consistency and pace due to her psychological impairments (Pain disorder associated with both psychological factors and general medical condition).

Within the greater Dayton, Ohio area where Mrs. Fox resides and could potentially work if she were not injured, jobs that would be able to accommodate her conditions do not exist.

Ms. Fox's psychological condition would preclude her capacity to perform even simple routine, repetitive tasks.

* * *

Her whole person impairment from a psychological perspective is 55% fifty five percent for her Pain Disorder Associated with both psychological factors and general

medical condition and 25% for her Dysthymic disorder as noted below.

* * *

Therefore, based upon her allowed conditions, it is this examiner's opinion within a reasonable degree of psychological certainty, that Mrs. Fox is totally disabled from participating in any type of employment as a direct result of her impairments from her industrial injury, Claim #06-853505 due to her psychological conditions.

{¶ 28} 7. On the first page of the vocational report, under the heading "Examination Question," Dr. Manges wrote:

{¶ 29} Is the claimant based on her allowed physical and psychological condition(s), capable of returning to her former employment or capable of being re-trained to perform alternative work now or in the future?

{¶ 30} On the second page of the vocational report, under the heading "Psychological History," Dr. Manges wrote:

Mrs. Fox reported no psychological intervention prior to her 2006 industrial injury. She has had outpatient counseling since her injury, for about one year. She was seen twice a month until BWC stated she had reached MMI and treatment was stopped.

{¶ 31} Beginning at page six of the vocational report, under the heading "Overall Findings and Conclusions, Dr. Manges wrote:

Mrs. Fox does not have the capacity to perform academic functions consistent with entry level clerical skills. Due to her allowed medical conditions she cannot concentrate, relate to coworkers or supervisors or complete a normal work routine without interruption from her psychological symptoms.

This author examined the claimant's vocational functioning using the medical information, interview data and standardized testing. All of the test findings are as noted above. The claimant's subjective assertions are consistent with her medical condition.

Based upon all the medical evidence, tests, interview and knowledge of the job market, it is this examiner's opinion that remunerative employment for Mrs. Fox is outside of the scope of realistic possibility. She is limited in performing work because of her allowed conditions, and inability to transfer her past work skills as either a machine press operator or sandblaster. She has a 95 percent vocational disability.

Even sedentary employment, which could accommodate some of Mrs. Fox's physical conditions, cannot accommodate all of her limitations. There are several obstacles to her employability.

- She has no rehabilitation potential
- She has no transferability to alternative work
- She has psychological difficulties
- She cannot perform work within expected levels of consistency and pace.

Within the greater Dayton, Ohio area where Mrs. Fox resides and could potentially work if she were not injured, jobs that would be able to accommodate her conditions do not exist.

Ms. Fox's allowed conditions would preclude her capacity to perform even simple routine, repetitive tasks. A transfer analysis of work was conducted using the McCroskey transferability program. The [Injured Worker] was found to be without transferability due to her combined physical and psychological conditions.

Her limitations are such that she cannot perform within the usual and customary expectations of a normal work routine; she would be unable to maintain a consistent pace or to be persistent in a work like task. Her academic abilities preclude other than rudimentary clerical skills.

Therefore, based upon her allowed conditions, it is this examiner's opinion within a reasonable degree of vocational certainty, that Mrs. Fox is totally disabled from participating in any type of employment as a direct result of her industrial injury, Claim #06-853505.

{¶ 32} 8. On July 29, 2013, at the commission's request, relator was examined by James T. Lutz, M.D., who is board certified in occupational

medicine. Dr. Lutz examined only for the allowed physical conditions of the claim. He did not examine for the allowed psychological conditions.

{¶ 33} In his three-page narrative report, Dr. Lutz states:

Inge Fox is a 55-year-old female who was injured on 7/12/06 while working as a cell specialist. On the date of injury, Ms. Fox was sandblasting with a glove that had a hole in it. She jerked her left arm out of the way when the bare spot in her glove was sandblasted. She underwent three surgical procedures related to this injury, all of which involved placement of temporary and permanent spinal cord stimulators. She is currently under the care of a pain management specialist, Dr. Soin, whom she sees every three months. Her current medications related to the injury of record include Percocet 10/325 mg, typically #6 per day; morphine sulfate TER 60 mg twice per day; and Flexeril. She is currently not under any psychiatric history. Her current symptoms include constant pain of all four extremities, generally worse on the left side. She rates her pain from 5-10 on the Visual Analog Scale for all four extremities. She also describes intermittent swelling of both knees, typically worse on the left. She indicates that she has frequent flare-ups of her symptoms, averaging 2-3 times per month for 3-10 days at a time, where her pain is so severe that she is essentially functionless. Her symptoms are exacerbated with any significant use of the upper extremities, prolonged standing and walking, and weather changes.

Regarding her activities of daily living: Ms. Fox lives with her husband, adult son, and a grandson in their own home. When able, she does some light housecleaning light cooking, and light laundry. She no longer drives due to her upper extremity symptoms and her medications. She spends a significant amount of time watching television. She will occasionally go for short walks in the yard. She estimates she can stand for 30-60 minutes at a time, walk for 15-20 minutes at a time, and sit for one hour at a time when not having a flare-up.

* * *

DISCUSSION: Inge Fox sustained an industrial injury on 7/12/06 whose claim allowances are noted above. She has undergone three surgical procedures related to this injury, all involving placement of spinal cord stimulators. She

describes constant pain of all four extremities with episodes of severe flare-ups averaging 2-3 times per month for anywhere from 3-10 days at a time, during which time she is essentially functionless.

ANSWERS TO SPECIFIC QUESTIONS:

[One] Regarding impairment, reference is made to the Fifth Edition of the AMA Guides in arriving at the following impairment assessment. For left wrist tend[on]itis and left wrist contusion: Ms. Fox warrants a 0% impairment. For complex regional pain syndrome/reflex sympathetic dystrophy, left upper extremity: Utilizing table 13-22, Ms. Fox warrants a 20% whole person impairment. For complex regional pain syndrome/reflex dystrophy, right upper extremity: Again, utilizing table 13-22, Ms. Fox warrants a 25% whole person impairment. For reflex sympathetic dystrophy of the bilateral lower extremities: Utilizing table 13-15, Ms. Fox warrants a 15% whole person impairment. Combining 25+20+15, Ms. Fox warrants a 49% whole person impairment.

[Two] Please see enclosed completed Physical Strength Rating. In my opinion, based on the history as provided by the claimant, the medical evidence submitted and findings on physical examination, this injured worker is incapable of work. In my opinion, this injured worker is incapable of exerting up to 10-pounds of force occasionally, and/or a negligible amount of force frequently to lift, carry, push, pull, or otherwise move objects while sitting most of the time even with occasionally walking or standing for brief periods of time.

{¶ 34} 9. On July 29, 2013, Dr. Lutz completed a commission form captioned "Physical Strength Rating." On the form, Dr. Lutz indicated by his mark: "This Injured Worker is incapable of work."

{¶ 35} 10. On July 31, 2013, at the commission's request, relator was examined by clinical psychologist Thomas Heitkemper, Ph.D. In his 11-page narrative report, Dr. Heitkemper opines:

My opinion is that Ms. Fox is incapable of engaging in sustained remunerative employment. While she is at a mild level of impairment for concentration and persistence, she is moderately impaired in the areas of activities of daily living

and socialization. In addition, she [is] also at a moderate level of impairment in the area of adaptation. Her difficulty with being able to adapt to changes in the work environment, even given the simplest of tasks, would result in her not being able to work. She would be easily overwhelmed, and would rapidly become even more depressed when faced with even minor stressors in a work-related setting. This is an individual who has essentially "given up" on life, and requires assistance from her husband and son, in even basic day to day activities around the house. Therefore, she is incapable of work. This conclusion is reached within a reasonable degree of medical/psychological probability.

{¶ 36} 11. On July 31, 2013, Dr. Heitkemper completed a commission form captioned "Occupational Activity Assessment, Mental & Behavioral Examination." On the form, Dr. Heitkemper indicated by his mark: "This Injured Worker is incapable of work."

{¶ 37} 12. Following a December 17, 2013 hearing, an SHO issued an order awarding PTD compensation starting July 10, 2012. Based upon the reports of Drs. Manges, Lutz and Heitkemper, the SHO determined that the allowed conditions of the claim alone prohibit all sustained remunerative employment. Therefore, the SHO did not find it necessary to consider the non-medical factors.

{¶ 38} 13. The SHO's order of December 17, 2013 explains:

Permanent and total disability compensation is awarded from 07/10/2012 (less any compensation that previously may have been awarded over this same period of time), and is ordered to continue without suspension unless future facts or circumstances warrant the cessation of the award. Such payments are to be made in accordance with Ohio Revised Code Section 4123.58(A).

Permanent and total disability compensation is awarded from 07/10/2012 based upon the report of * * * Dr. Manges from that same date. Dr. Manges opined that the Injured Worker is permanently and totally disabled from all forms of sustained remunerative employment.

The cost of this award is to be apportioned at 100% in the present claim.

The Staff Hearing Officer finds that Ms. Fox sustained the relevant industrial injury on 07/12/2006 while performing her regular job duties as a cell specialist. Ms. Fox was injured when she was sandblasting with a glove that had a hole in it. While sandblasting, she jerked her left arm out of the way when the bare spot was sandblasted.

Ms. Fox's claim is allowed for both physical/orthopedic conditions and psychological conditions.

The Staff Hearing Officer notes that the Injured Worker was found [to] have reached maximum medical improvement in this claim effective 03/30/2011.

The Injured Worker is 56 years old and is a high school graduate.

The Injured Worker has been awarded Social Security Disability Benefits in the amount of \$952.00 every month.

Both the Injured Worker and the Self-Insuring Employer have presented and submitted evidence in support of their respective positions regarding the Injured Worker's permanent total disability application.

That evidence has been reviewed by the Staff Hearing Officer.

The Industrial Commission of Ohio caused the Injured Worker to be examined by Dr. James T. Lutz on 07/29/2013 with respect to the allowed physical/orthopedic conditions in the claim.

In the opinion of Dr. Lutz, the allowed conditions in the claim have reached maximum medical improvement and are permanent with a resulting 25% whole person impairment.

In the further opinion of Dr. Lutz, "*This Injured Worker is incapable of exerting up to ten pounds of force occasionally, and/or a negligible amount of force frequently to lift, carry, push, pull or otherwise move objects while sitting most of the time even with occasionally walking or standing for brief periods of time.*" In the opinion of Dr. Lutz, based upon the history of the claim as provided by the Injured Worker, and based upon the medical evidence submitted to file and

based upon his own clinical examination findings, the Injured Worker is incapable of performing any work activities.

Dr. Lutz also completed a Physical Strength Rating form, which he signed and dated 07/29/2013. On this form, he reiterates his opinion that the Injured Worker is incapable of performing any work activities due to this industrial injury.

The Injured Worker was also examined at the request of the Industrial Commission of Ohio by Dr. Thomas W. Heitkemper on 07/31/2013 with regard to the allowed psychological conditions in the claim.

In the opinion of Dr. Heitkemper, the allowed psychological conditions have reached maximum medical improvement and are permanent with resulting 36% whole person impairment.

In the further opinion of Dr. Heitkemper, the Injured Worker is: *"Incapable of engaging in sustained remunerative employment."* Dr. Heitkemper also completed an Occupational Activity Assessment form which he signed and dated 07/31/2013. On that form, Dr. Heitkemper reiterates his opinion that the Injured Worker is incapable of work of any kind due to the allowed psychological conditions in the claim.

It is the finding of the Staff Hearing Officer, based upon the reports of Dr. Lutz and Dr. Heitkemper, referenced above, that the allowed conditions in the claim have reached maximum medical improvement and are permanent. It is the further finding of the Staff Hearing Officer, based on these same reports, that the Injured Worker cannot return to and perform the duties of her former position of employment as a result of her industrial claim.

It is the further finding of the Staff Hearing Officer, based upon the reports of Dr. Manges, Dr. Lutz and Dr. Heitkemper that the Injured Worker is unable to perform any sustained remunerative employment solely as a result of the medical impairment caused by the allowed conditions in this claim. Therefore, pursuant to *State ex rel. Speelman v. Indus. Comm.*, (1992), 73 Ohio App.3d 757, it is not necessary to discuss or to analyze the Injured Worker's non-medical disability factors.

This order is based on the reports of Dr. Manges, Dr. Heitkemper and Dr. Lutz.

{¶ 39} 14. On May 6, 2014, relator, Manpower of Dayton, Inc., filed this mandamus action.

Conclusions of Law:

{¶ 40} Several issues are presented: (1) whether the impairment report of Dr. Manges provides some evidence to support the commission's finding that the psychological conditions of the industrial claim alone prohibit claimant from performing all sustained remunerative employment, (2) whether this court must issue a limited writ of mandamus instructing the commission to clarify as to which of the two July 10, 2012 reports of Dr. Manges it relied, (3) whether the report of Dr. Lutz is equivocal and, thus, not some evidence supporting the commission's finding that the allowed physical conditions alone prohibit all sustained remunerative employment, and (4) whether the psychological report of Dr. Heitkemper must be removed from evidentiary consideration because he states that his opinion that claimant is incapable of work was reached within a reasonable degree of "*medical/psychological probability*." (Emphasis added.)

{¶ 41} The magistrate finds: (1) the impairment report of Dr. Manges provides some evidence to support the commission's finding that the psychological conditions of the industrial claim alone prohibit claimant from performing all sustained remunerative employment, (2) this court need not issue a limited writ of mandamus instructing the commission to clarify as to which of the two July 10, 2012 reports of Dr. Manges it relied, (3) Dr. Lutz's report is not equivocal, and (4) the report of Dr. Heitkemper need not be removed from evidentiary consideration.

Basic Law

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

{¶ 43} Ohio Adm.Code 4121-3-34(D) sets forth the commission's guidelines for the adjudication of PTD applications.

{¶ 44} Ohio Adm.Code 4121-3-34(D)(2)(a) provides:

If, after hearing, the adjudicator finds that the medical impairment resulting from the allowed condition(s) in the claim(s) prohibits the injured worker's return to the former position of employment as well as prohibits the injured worker from performing any sustained remunerative employment, the injured worker shall be found to be permanently and totally disabled, without reference to the vocational factors listed in paragraph (B)(3) of this rule.

{¶ 45} The Supreme Court of Ohio has repeatedly held that "impairment" rather than "disability" is the proper subject of medical reports. *State ex rel. Lawrence v. American Lubricants Co.*, 40 Ohio St.3d 321 (1988). In *State ex rel. Dallas v. Indus. Comm.*, 11 Ohio St.3d 193 (1984), the court explained the different meaning of the terms. "Impairment" is the amount of anatomical and/or mental loss of function and is to be determined by the doctor and set forth within the medical reports. "Disability" is the effect that the physical (or mental) impairment has on the ability to work, which is to be determined by the commission and its hearing officers. *Id.*

{¶ 46} However, in the workers' compensation system, doctors are often asked to opine as to whether the claimant can return to his or her former position of employment or whether the claimant can perform sustained remunerative employment based upon the impairments resulting from one or more allowed conditions in the claim. While, technically, those types of opinions are disability opinions, the cases have universally permitted the commission to rely on those opinions.

{¶ 47} In *State ex rel. DaimlerChrysler Corp. v. Bilbao*, 10th Dist. No. 04AP-861, 2005-Ohio-2802, this court had occasion to set forth law pertinent here:

It is well-settled that, when a medical expert expresses a disability opinion based on non-medical factors, such as

education and employment history, that opinion is disqualified from evidentiary consideration. *State ex rel. Ohio State Univ. v. Allen*, Franklin App. No. 03AP-823, 2004-Ohio-3839, at ¶ 18, citing *State ex rel. Shields v. Indus. Comm.* (1996), 74 Ohio St.3d 264, 268, 658 N.E.2d 296, and *State ex rel. Catholic Diocese of Cleveland v. Indus. Comm.* (1994), 69 Ohio St.3d 560, 634 N.E.2d 1012. "However, where the doctor's medical and vocational commentaries can be separated, the commission may simply disregard a physician's opinions on vocational matters and accept the purely medical opinion." *Allen*, at ¶ 18, citing *Catholic Diocese*. Thus, when it is clear from the doctor's report that he or she rendered a medical opinion based solely on the allowed conditions, the commission may rely on the medical opinion while ignoring any superfluous vocational opinion offered by the doctor. *State ex rel. Steelcraft Mfg. Co. v. Indus. Comm.*, Franklin App. No. 01AP-1271, 2002-Ohio-3778, at ¶ 37, citing *Catholic Diocese*.

Id. at ¶ 4.

First Issue

{¶ 48} Here, relator points out portions of the impairment report that suggest Dr. Manges strayed into rendering opinions that impermissively consider medical impairment and non-medical factors.

{¶ 49} For example, in his impairment report, Dr. Manges states:

Based upon all the medical evidence, tests, interview and knowledge of the job market, it is this examiner's opinion that remunerative employment for Mrs. Fox is outside of the scope of realistic possibility.

{¶ 50} Pointing to Dr. Manges reference to "knowledge of the job market," relator asserts that Dr. Manges strayed into rendering an opinion that considers non-medical or vocational factors that are outside Dr. Manges role in a PTD proceeding.

{¶ 51} Also, relator points out that, in his impairment report, Dr. Manges states:

Within the greater Dayton, Ohio area where Mrs. Fox resides and could potentially work if she were not injured, jobs that would be able to accommodate her conditions do not exist.

{¶ 52} While relator can point to statements in Dr. Manges' impairment report that stray into an evaluation of non-medical vocational factors, it is nevertheless clear that Dr. Manges rendered an impairment opinion, free of any non-medical or vocational considerations that, by itself, supports the finding that the allowed psychological conditions alone prohibit all sustained remunerative employment.

{¶ 53} Again, in his impairment report, Dr. Manges opines:

Her whole person impairment from a psychological perspective is 55% fifty five percent for her Pain Disorder Associated with both psychological factors and general medical condition and 25% for her Dysthymic disorder as noted below.

* * *

Therefore, based upon her allowed conditions, it is this examiner's opinion within a reasonable degree of psychological certainty, that Mrs. Fox is totally disabled from participating in any type of employment as a direct result of her impairments from her industrial injury, Claim #06-853505 due to her psychological conditions.

{¶ 54} Clearly, the above impairment opinion provides the some evidence supporting the commission's PTD award effective July 10, 2012, the date of the report.

Second Issue

{¶ 55} The syllabus of *State ex rel. Noll v. Indus. Comm.*, 57 Ohio St.3d 203 (1991), states:

In any order of the Industrial Commission granting or denying benefits to a claimant, the commission must specifically state what evidence has been relied upon, and briefly explain the reasoning for its decision.

{¶ 56} Citing the syllabus of *Noll*, relator contends that the SHO's failure to specify which of the two reports of Dr. Manges was relied upon was an abuse of discretion requiring this court to issue a limited writ instructing the commission to specify which report was relied upon.

{¶ 57} Ambiguous commission orders are generally returned to the commission for clarification if the ambiguity prevents the court from conducting a meaningful review. *State ex rel. Buttolph v. Gen. Motors Corp., Terex Div.*, 79 Ohio St.3d 73, 75 (1997). However, the court will not return for clarification of the evidence relied upon if a return is unnecessary. *State ex rel. David's Cemetery v. Indus. Comm.*, 92 Ohio St.3d 498 (2001).

{¶ 58} Here, in its reply brief, relator asserts that the SHO's order of December 17, 2013 is ambiguous as to which report from Dr. Manges was relied upon and therefore, this matter must be returned to the commission for clarification of the evidence relied upon. The magistrate disagrees that the ambiguity requires a return to the commission.

{¶ 59} Here, we have only two reports that are readily identifiable from the record. One of the reports, as previously noted, is clearly identified on the front page of the report as a "Vocational Evaluation." Moreover, a reading of the report clearly indicates that the vocational report is what it is said to be—a vocational report. The vocational report concludes with a vocational opinion that considers the non-medical factors discussed in the report.

{¶ 60} The other report from Dr. Manges is clearly identified on the front page as a report as to "impairment."

{¶ 61} The commission and its hearing officers can be presumed to understand basic law regarding the adjudication of PTD applications. Relator's position here, in effect, invites this magistrate to presume that the SHO did not understand basic law regarding the adjudication of PTD applications. It is inconceivable, in the absence of evidence to the contrary, that the SHO would have relied upon Dr. Manges' vocational report to support a finding that the allowed psychological conditions alone prohibit all sustained remunerative employment.

{¶ 62} Therefore, it is clearly unnecessary to issue a writ for clarification of which report was relied upon.

Third Issue

{¶ 63} The third issue is whether the report of Dr. Lutz is equivocal and, thus, not some evidence supporting the commission's finding that the allowed physical conditions alone prohibit all sustained remunerative employment.

{¶ 64} 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.*

{¶ 65} A medical report can be so internally inconsistent that it cannot be some evidence upon which the commission can rely. *State ex rel. Lopez v. Indus. Comm.*, 69 Ohio St.3d 445 (1994); *State ex rel. Taylor v. Indus. Comm.*, 71 Ohio St.3d 582 (1995). However, a court will not second-guess a doctor's medical expertise to support a claim of internal inconsistency. *State ex rel. Young v. Indus. Comm.*, 79 Ohio St.3d 484 (1997).

{¶ 66} In *State ex rel. Certified Oil Corp. v. Mabe*, 10th Dist. No. 06AP-835, 2007-Ohio-3877, this court states:

"In general, the court does not 'second guess' medical opinions from medical experts and will remove a medical opinion from evidentiary consideration as having no value only when the report is patently illogical or contradictory * * *." *State ex rel. Tharp v. Consol. Metal Prods.*, Franklin App. No. 03AP-124, 2003-Ohio-6355, ¶ 67. Moreover, it is well established that issues of weight and credibility of evidence lie outside the scope of mandamus inquiry. *State ex rel. Burley v. Coil Packing, Inc.* (1987), 31 Ohio St.3d 18, 31 OBR 70, 508 N.E.2d 936. The commission, as the finder of fact, has exclusive authority to determine the persuasiveness of evidence. *State ex rel. Teece v. Indus. Comm.* (1981), 68 Ohio St.2d 165, 429 N.E.2d 433; *State ex rel. Bell v. Indus. Comm.* (1995), 72 Ohio St.3d 575, 651 N.E.2d 989.

Id. at ¶ 4.

{¶ 67} Here, relator asserts "Dr. Lutz's description of [claimant's] daily activities contradicts his *conclusions* regarding her physical restrictions." Relator concludes that Dr. Lutz's report is "contradictory" and,

thus, cannot constitute some evidence upon which the commission relied. (Emphasis added.) (Relator's Brief, 17-18.)

{¶ 68} Presumably, when relator refers to Dr. Lutz's *conclusions* it is referring to the two paragraphs under the heading "Answers to Specific Questions." In those two concluding paragraphs of the report, Dr. Lutz opines that claimant has a 49 percent whole person impairment and that she "is incapable of work." Dr. Lutz also concludes that claimant:

[I]s incapable of exerting up to 10-pounds of force occasionally, and/or a negligible amount of force frequently to lift, carry, push, pull, or otherwise move objects while sitting most of the time even with occasionally walking or standing for brief periods of time.

{¶ 69} Relator's argument invites this court to compare Dr. Lutz's *conclusions* with the single paragraph under the heading "Regarding her activities of daily living." Relator does not invite this court to look at other paragraphs of Dr. Lutz's report, such as the one captioned "Discussion"—a paragraph stating that claimant has undergone three surgical procedures, all involving placement of spinal cord stimulators. That paragraph further indicates that claimant "describes constant pain of all four extremities with episodes of severe flare-ups * * * during which time she is essentially functionless." In effect, relator ignores the pain findings from the discussion of Dr. Lutz's report.

{¶ 70} Moreover, in its brief, when describing or summarizing the paragraph regarding the activities of daily living, relator deletes key words that alter the meaning. For example, relator states that "Dr. Lutz acknowledges that [claimant] is capable of 'some light housecleaning [sic], light cooking, and light laundry.' * * * Relator deletes the words "[w]hen able" that precede the words immediately quoted. (Relator's Brief, 17.)

{¶ 71} Relator's assertion that Dr. Lutz's report is equivocal lacks merit. Clearly, Dr. Lutz's report provides some evidence to support the commission's findings that the allowed physical conditions alone prohibit all sustained remunerative employment.

Fourth Issue

{¶ 72} The fourth issue, as earlier noted, is whether the report of Dr. Heitkemper must be removed from evidentiary consideration because he states his opinion that claimant is incapable of work was reached within a reasonable degree of "*medical/psychological probability*." (Emphasis added.)

{¶ 73} Ohio Adm.Code 4121-3-34(C) sets forth the commission's rules regarding the processing of PTD applications.

{¶ 74} Ohio Adm.Code 4121-3-34(C)(1) provides:

Each application for permanent total disability shall identify, if already on file, or be accompanied by *medical evidence* from a physician, or a psychologist or a psychiatric specialist in a claim that has been allowed for a psychiatric or psychological condition, that supports an application for permanent total disability compensation. * * * The *medical evidence* used to support an application for permanent total disability compensation is to provide an opinion that addresses the injured worker's physical and/or mental limitations resulting from the allowed conditions in the claim(s).

(Emphasis added.)

{¶ 75} Thus, Ohio Adm.Code 4121-3-34(C)(1) strongly infers that the report of a psychologist is "medical evidence."

{¶ 76} The commission publishes a "Medical Examination Manual." Under the heading "Introduction" at page one, the manual states:

This Manual presents Commission policies for independent medical examinations and medical file reviews. The purpose for the independent medical examination (IME) is to determine the degree of impairment resulting from an allowed work injury. Most examinations are to assist the Commission in the consideration of Permanent Total Disability (PTD).

{¶ 77} Thereafter, the manual provides instructions for "Mental and Behavioral Examinations." The manual provides a reporting format for a "psychiatric evaluation" and for a "psychological assessment."

{¶ 78} Citing R.C. 4732.01(A), relator contends that it was improper for Dr. Heitkemper to state that his opinion as to claimant's inability to work was reached within a reasonable degree of "*medical/psychological probability*." (Emphasis added.) Relator's argument lacks merit.

{¶ 79} R.C. 4732.01(A) provides:

"Psychologist" means any person who holds self out to the public by any title or description of services incorporating the words "psychologic," "psychological," "psychologist," "psychology," or any other terms that imply the person is trained, experienced, or an expert in the field of psychology.

{¶ 80} Clearly, R.C. 4732.01(A) does not prohibit the use of the term "medical evidence" when referring to a report from an examining psychologist appointed by the commission.

{¶ 81} Relator does not address Ohio Adm.Code 4121-3-34(C)(1) nor the commission's "Medical Examination Manual."

{¶ 82} Relator fails to cite to any authority that supports its contention that Dr. Heitkemper's use of the term "medical/psychological probability" renders his opinion incompetent or invalid. Accordingly, relator's contention lacks merit. The report of Dr. Heitkemper is indeed some evidence upon which the commission can and did rely to support a finding that the allowed psychological conditions of the claim alone prohibit all sustained remunerative employment.

{¶ 83} 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).