

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel.	:	
Maynard E. Jackson, Sr.,	:	
	:	
Relator,	:	
	:	
v.	:	No. 14AP-218
	:	
Dennis Construction Sanitation, Inc.	:	(REGULAR CALENDAR)
and Industrial Commission of Ohio,	:	
	:	
Respondents.	:	

D E C I S I O N

Rendered on March 17, 2015

Gallon, Takacs, Boissoneault & Schaffer Co., L.P.A., and Theodore A. Bowman, for relator.

Michael DeWine, Attorney General, and *Stephen D. Plymale*, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

BROWN, P. J.

{¶ 1} Relator, Maynard E. Jackson, Sr., brings this original action seeking a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order finding that relator was working while receiving non-working wage loss ("NWWL") and temporary total disability ("TTD") compensation, that he fraudulently misrepresented or concealed such employment, and was overpaid to the full extent of all compensation received during those time periods, and to order the commission to find that he was not working during those time periods.

{¶ 2} Pursuant to Civ.R. 53 and Loc.R. 13(M) of the Tenth District Court of Appeals, this matter was referred to a magistrate, who has rendered a decision and recommendation that includes findings of fact and conclusions of law and is appended to this decision. The magistrate concluded that the commission did not abuse its discretion and recommended that this court deny the requested writ of mandamus. Relator has filed objections to the magistrate's decision, and the matter is now before us for our independent review.

{¶ 3} As reflected in the facts given in the magistrate's decision, relator was involved in a work-related injury on August 26, 2005. Relator's industrial claim was allowed for the following conditions: cervical, thoracic and lumbrosacral sprain/strain; herniated disc L4-5; and lumbar degenerative disc disease, L4-5. Relator subsequently filed for and began receiving NWWL and TTD compensation. Relator received NWWL compensation from August 24 through November 14, 2008 ("the first time period"), TTD compensation from November 15, 2008 through May 8, 2009 ("the second time period"), and NWWL compensation from June 1 through July 24, 2009 ("the third time period").

{¶ 4} On October 9, 2008, the Ohio Bureau of Workers' Compensation ("BWC") Special Investigation Unit ("SIU") received an allegation that relator had been working while receiving TTD and NWWL compensation. An agent working for SIU obtained records from Tri-State Expedited Services, Inc. ("Tri-State"), which indicated that relator had worked for Tri-State as a semi-truck driver during the relevant time periods. SIU produced a Report of Investigation, which detailed its findings. The BWC filed a C-86 motion on June 1, 2012, asking the commission to exercise its continuing jurisdiction and find, based on the evidence contained in the SIU's Report of Investigation, that relator had received an overpayment of NWWL and TTD benefits, and had committed fraud against the BWC.

{¶ 5} A district hearing officer granted the BWC's motion, and relator appealed that ruling to a staff hearing officer ("SHO"). The SHO noted that, although relator previously told the SIU investigators that he had not worked since 2005, at the October 16, 2013 hearing before the SHO, relator "finally admitted that he had actually worked for Tri-State," although he claimed he only worked there in September and October 2008. As such, the SHO concluded that relator was neither credible nor

persuasive. The SHO found that the "persuasive evidence in file, which is contained in the Report of Investigation of the Bureau of Workers' Compensation Specialist Investigations Department," confirmed that relator "was, in fact, employed from 08/24/2008 through 11/14/2008; from 11/15/2008 through 05/08/2009; and from 06/01/2009 through 07/24/2009." Accordingly, the SHO ordered that the TTD and NWWL benefits paid during those time periods were to be vacated and an overpayment declared, as R.C. 4123.56 prohibits an individual who is receiving such benefits from returning to work. See R.C. 4123.56(A) and (B)(2); Ohio Adm.Code 4123-18-04(C)(1). The SHO also found that relator committed civil fraud, as he had submitted false documentation and false oral statements indicating that he was not working during the relevant time periods.

{¶ 6} The magistrate noted that relator did not challenge the commission's conclusion that he was working during the first time period. Rather, relator asserted only that the commission abused its discretion by finding that he was working during the second and third time periods. The magistrate concluded that the commission had not abused its discretion. The magistrate noted that 50 of the 180 pages in the SIU report contained evidence establishing that relator was working during the second and third time periods, and stated that "[t]he 50 relevant pages are easily distinguishable from the rest." (Magistrate's decision, ¶ 41.) Accordingly, the magistrate concluded that the SHO's order complied with *State ex rel. Mitchell v. Robbins & Myers, Inc.*, 6 Ohio St.3d 481 (1983), and *State ex rel. Noll v. Indus. Comm.*, 57 Ohio St.3d 203 (1991), as the commission identified the evidence it relied on and provided an explanation for its findings.

{¶ 7} Relator presents the following objection to the magistrate's decision:

1. The magistrate's conclusion, page 7, ¶ 1, that "the commission did not abuse its discretion because there is some evidence in the record establishing that relator was working during the contested time periods and further demonstrating that he committed fraud."
2. The magistrate's search of evidence in the record, at page 7, ¶ 5, without any reference to an order of the Industrial Commission, specifically: "The SIU report and the documents attached thereto consist of 183 pages. The BWC's motion itself constitutes 2 pages and the SIU report constitutes 11. The primary evidence establishing that relator

worked during the second and third time periods includes the interview with Shimmel, the letter from [Getz], the records from Tri-State, and the two employment applications relator completed."

3. The magistrate's search of evidence in the record, at page 8, ¶ 2, without any reference to an order of the Industrial Commission, specifically: "Considering all the above evidence submitted, the magistrate finds that approximately 50 pages are relevant to the second and third time periods at issue. Most of the evidence, including copies of orders, physician reports and notes, relator's rehabilitation plans, and records from Fremont Federal Credit Union are relatively inconsequential to the BWC's case. The 50 relevant pages are easily distinguishable from the rest."

4. The magistrate's conclusion, page 9, ¶ 4, that "Contrary to relator's assertions, there was some evidence before the commission that relator was working during the relevant time periods at issue, the commission identified that evidence adequately, and provided an explanation for its findings, including finding that the relator committed fraud."

{¶ 8} Pursuant to Civ.R. 53(D)(4)(d), we undertake an independent review of the objected matters "to ascertain that the magistrate has properly determined the factual issues and appropriately applied the law." A relator seeking a writ of mandamus must establish: " '(1) a clear legal right to the relief prayed for, (2) a clear legal duty upon respondent to perform the act requested, and (3) that relator has no plain and adequate remedy in the ordinary course of the law.' " *Kinsey v. Bd. of Trustees of Police & Firemen's Disability & Pension Fund of Ohio*, 49 Ohio St.3d 224, 225 (1990), quoting *State ex rel. Consol. Rail Corp. v. Gorman*, 70 Ohio St.2d 274, 275 (1982). "A clear legal right exists where the [commission] abuses its discretion by entering an order which is not supported by 'some evidence.' " *Id.*

{¶ 9} This court will not determine that the commission abused its discretion when there is some evidence in the record to support the commission's findings. *State ex rel. Rouch v. Eagle Tool & Mach. Co.*, 26 Ohio St.3d 197, 198 (1986). The some evidence standard "reflects the established principle that the commission is in the best position to determine the weight and credibility of the evidence and disputed facts." *State ex rel.*

Woolum v. Indus. Comm., 10th Dist. No. 02AP-780, 2003-Ohio-3336, ¶ 4, citing *State ex rel. Pavis v. Gen. Motors Corp., B.O.C. Group*, 65 Ohio St.3d 30, 33 (1992).

{¶ 10} Relator admits that his objections are "closely related, and involve substantially similar legal analysis." (Relator's Objections, 4.) As relator addresses his objections together, we address the objections jointly as well. Relator asserts that the magistrate herein "did exactly what *Noll* clearly teaches a reviewing court not to do and searched the record for evidence to justify the decision of the Commission." (Relator's Objections, 6.) Relator contends that the SHO's order did not identify "with any degree of specificity the evidence relied upon with respect to the two periods at issue." (Relator's Objections, 8.) The SHO's order, however, clearly states that it is based on the SIU Report of Investigation. Relator asserts that, because the attachments to the Report of Investigation are quite lengthy, the SHO's general citation to the entire Report of Investigation as the evidence in support of its order violated the requirements of *Noll*.

{¶ 11} In *Noll* the court held that, in each commission order 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. An order of the commission should make it readily apparent from the four corners of the decision that there is some evidence supporting it." *Id.* at 206. A reviewing court "will not search the entire record for 'some evidence' to support the commission's orders." *Id. Compare Mitchell* at 483-84 (noting that a court "must specifically state which evidence and only that evidence which has been relied upon to reach their conclusion," and clarifying that it would be unnecessary "to grant a writ for purposes of clarification when the basis for a decision has been sufficiently stated"). Thus, pursuant to *Mitchell* and *Noll*, the commission is required to cite the evidence relied upon in reaching a decision, and is required to provide a brief explanation for that decision.

{¶ 12} The SHO's order states that it is based on the SIU Report of Investigation. The Report of Investigation notes that an agent for SIU "prepared and delivered a subpoena for all of Tri-State's records relating to" relator, and notes that relator completed an application for Tri-State on September 10, 2009. The report then cites to attachment 2 in support of this evidence.

{¶ 13} Attachment 2 to the Report of Investigation contains the documents Tri-State produced in response to the subpoena. The first document is a letter from Charles E. Getz, Tri-State's director of recruiting/safety & compliance. Getz's letter states that relator worked as a driver for Tri-State during the following periods and for the following persons: he drove for Brenda Rosen from August 25 to October 30, 2008, he drove for Bruce Shimmel on behalf of ACDC Leasing from October 30, 2008 to July 16, 2009, and he drove for Melinda Shipman from September 21 to November 18, 2009. A Tri-State document titled "Employee Information Detail Report" indicates that on October 30, 2008, relator switched from driving unit #117 for Rosen, to driving unit #428 for Shimmel. The report states that the operator in unit #428 drove from August 25, 2008 to July 16, 2009 for Shimmel. Attachment 2 also contains the September 10, 2009 application for qualification as a driver for Tri-State, wherein relator stated that he previously worked for Tri-State from August 1, 2008 to January 1, 2009.

{¶ 14} Relator asserts that "Getz's cursory statement does not explain the foundation on which it is based," and states that "it strains credulity to suggest that Getz's statement is reliable, probative, and substantial evidence." (Relator's Objections, 7.) It is well-established that the commission has exclusive authority to evaluate evidentiary weight and credibility. *State ex rel. Burley v. Coil Packaging, Inc.*, 31 Ohio St.3d 18 (1987). The commission found Getz's letter credible, as it was entitled to do. Moreover, the employee information detail report from Tri-State corroborates the information contained in Getz's letter.

{¶ 15} The evidence in attachment 2, which is easily located in the Report of Investigation, constitutes some evidence to support the SHO's finding that relator was working as a driver for Tri-State during the second and third time periods. The SHO's order thus complied with *Noll* and *Mitchell*, as the SHO cited the Report of Investigation as the evidence it relied upon, and explained that, because relator was working while receiving TTD and NWWL benefits, those benefits had to be vacated and an overpayment declared. Moreover, as the magistrate, this court, and the parties have all been able to identify the evidence in the SIU Report of Investigation which demonstrates that relator was working during the relevant time periods, a return for clarification of the evidence relied upon would be unnecessary. Because there is some evidence in the record to

support its decision, and the commission adequately identified that evidence, the commission did not abuse its discretion in finding that relator was working while receiving TTD and NWWL benefits.

{¶ 16} Following our examination of the magistrate's decision, an independent review of the record pursuant to Civ.R. 53, and due consideration of relator's objections, we overrule the objections and adopt the magistrate's findings of fact and conclusions of law as our own. Relator's request for a writ of mandamus is denied.

*Objections overruled;
writ denied.*

TYACK and KLATT, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel.	:	
Maynard E. Jackson, Sr.,	:	
Relator,	:	
v.	:	No. 14AP-218
Dennis Construction Sanitation, Inc.	:	(REGULAR CALENDAR)
and Industrial Commission of Ohio,	:	
Respondents.	:	

MAGISTRATE'S DECISION

Rendered on September 30, 2014

Gallon, Takacs, Boissoneault & Schaffer Co., L.P.A., and Theodore A. Bowman, for relator.

Michael DeWine, Attorney General, and Stephen D. Plymale, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶ 17} Relator, Maynard E. Jackson, Sr., has filed this original action requesting that this court issue a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order which found that he was working while receiving non-working wage loss ("NWWL") and temporary total disability ("TTD") compensation, that he fraudulently misrepresented or concealed such employment and was overpaid to the full extent of all compensation received during those time periods, and ordering the commission to find that he was not working during those time periods.

Findings of Fact:

{¶ 18} 1. Relator sustained a work-related injury on August 26, 2005 and his workers' compensation claim has been allowed for the following conditions:

Cervical, thoracic and lumbosacral sprain/strain; herniated disc L4-5; lumbar degenerative disc disease, L4-5.

{¶ 19} 2. This workers' compensation case involves three separate time periods wherein relator was paid compensation: (1) NWWL compensation from August 24 through November 14, 2008 ("first time period"); (2) TTD compensation from November 15, 2008 through May 8, 2009 ("second time period"), at which time it was terminated based upon the finding that relator's conditions had reached maximum medical improvement ("MMI"); and (3) NWWL compensation from June 1 through July 24, 2009 ("third time period").

{¶ 20} 3. On October 9, 2008, the Ohio Bureau of Workers' Compensation ("BWC") Special Investigation Unit ("SIU") received an allegation from an anonymous source indicating that relator had been driving a semi-truck while receiving disability compensation. Records were obtained from Tri-State Expedited Services ("Tri-State"), a trucking company that leased vehicles to various subcontractors and also hired, trained, and dispatched drivers for those subcontractors. Agents for the SIU contacted Tri-State and were provided the following information concerning relator's employment:

Brenda Rosen - August 25, 2008 to October 30, 2008 -
CONFLICT received WLN

Bruce Shimell / ACDC Leasing - October 30, 2008 to July 16,
2009 - CONFLICT received WLN AND TT

{¶ 21} 4. With regard to the first time period in which NWWL compensation was paid, the SIU compiled the following records: (1) a statement from Brenda Rosen on behalf of PB Rose, Inc., dba Two Dogs Trucking, an entity which owned one or more trucks leased to Tri-State. Rosen employed drivers to operate vehicles pursuant to a leasing arrangement with Tri-State. Rosen stated that relator drove for her company and she produced documentation that he was issued eight checks totaling \$3,282.99. Rosen further indicated that Tri-State retained driver's logs; and (2) SIU was able to corroborate relator's receipt of payments after securing documents from the Fremont Federal Credit

Union reflecting those deposits. Relator does not dispute that some evidence was presented indicating he was paid compensation for the first time period at issue.

{¶ 22} 5. With regard to the second and third time periods at issue, the SIU presented the following evidence: (1) SIU agents interviewed Bruce Shimmel on March 29, 2010. Shimmel provided the following information: After being in business for 15 years, Shimmel went out of business the first week of July 2009. Shimmel did not specifically remember relator, but stated that he had 80 drivers working for him at that time. Shimmel further indicated that his computer crashed when he was closing down and records were lost. Shimmel did not have any paper records to provide, but indicated Tri-State would have a copy of any contract involving relator and dates he had been working. In addition, Shimmel specifically stated, if Tri-State's records showed relator had been driving for them during a specific time period those records could be counted on for their accuracy; (2) a letter from Charles E. Getz, Director of Recruiting/Safety and Compliance for Tri-State and a computer printout concerning relator's employment for the following time periods: "He drove for Brenda Rosen from 08/25/08 to 10/30/08[;] Drove for ACDC Leasing (Bruce Shimell [sic]) from 10/30/08 to 07/16/09[;] Drove for Melinda Shipment [sic] from 09/21/09 to 11/18/09"; and (3) two applications for qualification as a driver dated August 25, 2008 and September 10, 2009. On page one of the application, relator answered "[y]es" to the question: "Have you ever been under contract to Tri-State or driven for any truck owner while under contract to Tri-State?" Relator listed the dates "8/1/08 to 1/1/09." On page two of the application, relator again indicated that he had been employed or under contract with Tri-State from August 2008 through January 2009.

{¶ 23} 6. The SIU report itself is 11 pages long and attached thereto are 26 attachments including records from Tri-State and memoranda from interviews, etc.

{¶ 24} 7. The BWC filed a motion asking the commission to exercise its continuing jurisdiction, find that relator had been overpaid NWWL and TTD compensation, and further asking the commission to make a finding of fraud.

{¶ 25} 8. The BWC's motion was heard before a district hearing officer ("DHO") on August 17, 2012. The DHO found that relator had been overpaid compensation and further made a finding of fraud.

{¶ 26} 9. Relator appealed and the matter was heard before a staff hearing officer ("SHO") on October 16, 2012. The SHO found:

When the Injured Worker was originally interviewed by the Bureau of Workers' Compensation Special Investigations Unit, on 01/27/2011, he stated that he had not worked for anyone, "since 2005." Furthermore, when he was advised that the Bureau of Workers' Compensation had records, from Tri-State Expedited Service [sic], showing that he had worked as a truck driver, he then stated that Tri-State was, "full of shit." However, at the hearing of Tuesday, 10/16/2012, the Injured Worker finally admitted that he had actually worked for Tri-State Expedited Service [sic] in September of 2008 and October 2008. Thus, the testimony at hearing was totally opposite his prior statements. The Injured Worker further testified that he did not work during August of 2008 nor during any period from November, 2008 through May 8, 2009 or from June 1, 2009 through July 24, 2009. This Staff Hearing Officer does not find the Injured Worker's testimony to be credible nor persuasive. Furthermore, the Injured Worker's witnesses were not found to be credible.

The SHO explained:

The persuasive evidence in file, which is contained in the Report of Investigation of the Bureau of Workers' Compensation Specialist Investigations Department, dated 05/16/2012, confirms that the Injured Worker was, in fact, employed from 08/24/2008 through 11/14/2008; from 11/15/2008 through 05/08/2009; and from 06/01/2009 through 07/24/2009.

* * *

Therefore, it is the **order** of this Staff Hearing Officer that **temporary total disability compensation previously awarded, for the period from 11/15/2008 through 05/08/2009 is hereby VACATED and declared to be an OVERPAYMENT**, as the Injured Worker had, in fact, returned to work for the period from 11/15/2008 through 05/08/2009.

* * *

Therefore, it is the further **order** of this Staff Hearing Officer that **Non-Working Wage Loss previously paid, for the periods of 08/24/2008 through 11/14/2008**

and from 06/01/2009 through 07/24/2009, is hereby VACATED and declared to be an OVERPAYMENT, as the Injured Worker had, in fact, found employment for those periods.

(Emphasis sic.)

{¶ 27} The SHO also determined that relator committed civil fraud finding that relator had a duty to disclose that he had returned to work as a truck driver. His concealment of his work activity was material because he would not have received either NWWL or TTD compensation if he had not concealed his employment. His submission of false documentation indicated he knew his statements were false and intended to mislead the BWC. The BWC justifiably relied upon the false documentation and misrepresentations and paid relator NWWL and TTD compensation and, as a result, the BWC suffered a loss. As indicated in the order, the SHO relied on the SIU report.

{¶ 28} 10. Relator filed an appeal asserting that newly discovered evidence showed the SHO erred in finding that relator was working while receiving TTD compensation during the second time period. This new evidence included a status change form dated October 30, 2008, which relator indicates demonstrates he had been scheduled to drive for Shimmel as a team driver with Brent Kromer beginning in October of 2008. However, the October 30, 2008 form shows that Kromer would be driving "single for now."

{¶ 29} Relator also submitted e-mails between Mike Wyandt, Equipment Manager for Tri-State, and Tonya Reed, Director of Billing and Credit for T.S. Expediting Services, Inc. dba Tri-State. In e-mails dated November 20, 2012, Wyandt requested information concerning whether Shimmel continued to pay for relator's occupational accident insurance from October 1, 2008 through July 16, 2009 or if there was a period of time when insurance was cancelled because relator was unqualified to drive. Wyandt further inquired if relator's insurance had been cancelled because he was unqualified to drive. Reed responded indicating she could not provide that information concerning relator.

{¶ 30} The initial e-mail from Wyandt to Reed, stated:

Dates are as follow[s]: 10-2008 to 07-19-2009 for Bruce Shimmel, AC/DC, but never drove for Bruce Shimmel, ever. Mr. Maynard Jackson provided proof from the 15th of October 2008 of a serious Medical problem which would not allow him to drive a truck at that time, (provided that

medical proof on 11/21/2012). Mr. Jackson showed active in our system during stated time period above, projected to drive in a Bruce Shimmel Truck, AC/DC, starting on 10/30/2008, but this company, Tri-State Expedited [sic] was never informed or told that Mr. Jackson was out as a driver, medically. Prior to the above time period, Mr. Maynard Jackson drove [a] truck for Two Dogs Trucking, Ms. Brenda Rosen[,] and left Brenda Rosen due to a very old truck and way to[o] many mechanical issues with their truck, unit #-117.

Mr. Jackson was cancelled as an Active Driver for this company on July 16th, 2009 due to many months of inactivity. Well after July 16, 2009, Mr. Jackson was medically released and allowed to re-up with Malinda [sic] Shipman as her employee and a driver in Ms. Shipman's Truck for Tri-State Expedited Services, Inc. and for a period of time, less than two months, ran for Ms. Malinda [sic] Shipman.

{¶ 31} 11. In an order mailed November 29, 2012, the BWC refused relator's appeal.

{¶ 32} 12. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶ 33} Relator does not challenge the commission's finding that he was working during the first time period at issue and he does not challenge the finding of fraud related to the first period either. Although he had originally denied that he worked during the first time period, relator admitted later that he did.

{¶ 34} Relator asserts that the commission abused its discretion by finding that he was working during the second and third time periods at issue. Relator argues that, contrary to the first time period, the commission lacked any competent evidence upon which to base a finding that he was working. Relator also asserts that, pertaining to the second and third time periods, the commission's reference to the SIU report violates the principles of *State ex rel. Noll v. Indus. Comm.*, 57 Ohio St.3d 203 (1991), because the commission failed to identify any particular statements or documents included in the more than 180-page report upon which the commission relied to determine that relator had been employed and that he had committed fraud.

{¶ 35} The magistrate finds that the commission did not abuse its discretion because there is some evidence in the record establishing that relator was working during the contested time periods and further demonstrating that he committed fraud.

{¶ 36} The Supreme Court of Ohio has set forth three requirements which must be met in establishing a right to a writ of mandamus: (1) that relator has a clear legal right to the relief prayed for; (2) that respondent is under a clear legal duty to perform the act requested; and (3) that relator has no plain and adequate remedy in the ordinary course of the law. *State ex rel. Berger v. McMonagle*, 6 Ohio St.3d 28 (1983).

{¶ 37} In order for this court to issue a writ of mandamus as a remedy from a determination of the commission, relator must show a clear legal right to the relief sought and that the commission has a clear legal duty to provide such relief. *State ex rel. Pressley v. Indus. Comm.*, 11 Ohio St.2d 141 (1967). A clear legal right to a writ of mandamus exists where the relator shows that the commission abused its discretion by entering an order which is not supported by any evidence in the record. *State ex rel. Elliott v. Indus. Comm.*, 26 Ohio St.3d 76 (1986). On the other hand, where the record contains some evidence to support the commission's findings, there has been no abuse of discretion and mandamus is not appropriate. *State ex rel. Lewis v. Diamond Foundry Co.*, 29 Ohio St.3d 56 (1987). Furthermore, questions of credibility and the weight to be given evidence are clearly within the discretion of the commission as fact finder. *State ex rel. Teece v. Indus. Comm.*, 68 Ohio St.2d 165 (1981).

{¶ 38} Relator's first argument is that the commission's October 16, 2012 SHO order does not meet the requirements of *State ex rel. Mitchell v. Robbins & Myers, Inc.*, 6 Ohio St.3d 481 (1983) and *Noll*. Those cases require that the commission identify the evidence upon which it relied and provide a brief explanation for its decision. Relator contends that the BWC's motion and the investigation report constitute more than 180 pages of records and, as such, the commission's order fails to identify the evidence upon which the commission relied.

{¶ 39} The SIU report and the documents attached thereto consist of 183 pages. The BWC's motion itself constitutes 2 pages and the SIU report constitutes 11. The primary evidence establishing that relator worked during the second and third time

periods includes the interview with Shimmel, the letter from Goetz, the records from Tri-State, and the two employment applications relator completed.

{¶ 40} The remainder of the evidence includes: subpoenas sent to Tri-State, Fremont Federal Credit Union, Brenda Rosen and Arlene Wetzel, as well as the documents gathered as a result; copies of relator's individual rehabilitation plans; a letter from the BWC to relator's treating physician asking whether or not certain activities relator was observed performing were consistent with his restrictions; summaries from interviews with relator, Wetzel and relator's sons; relator's job search documentation; First Report of Injury form; 2 BWC orders; 2 DHO orders; relator's request for TTD compensation; warrants sent to relator; reports from Ty N. Tracy, D.C. and Thomas E. Lieser, M.D.; office notes from Ricky Wright, M.D.; a BWC printout regarding a medical examination to be scheduled; and relator's direct deposit form.

{¶ 41} Considering all the above evidence submitted, the magistrate finds that approximately 50 pages are relevant to the second and third time periods at issue. Most of the evidence, including copies of orders, physician reports and notes, relator's rehabilitation plans, and records from Fremont Federal Credit Union are relatively inconsequential to the BWC's case. The 50 relevant pages are easily distinguishable from the rest.

{¶ 42} As such, to the extent that relator contends that the commission's order does not comply with *Mitchell* and *Noll* because it is impossible to discern what evidence the commission relied on, the magistrate finds that relator's argument is not well-taken.

{¶ 43} Relator also argues that, compared to the corroborating evidence the BWC presented to support the allegation that relator worked during the first period at issue, the BWC presented nothing more than statements from non-credible witnesses to support the allegation that he was working during the second and third time periods at issue. Relator contends that this alone constitutes grounds for this court to find the commission's order is not supported by some evidence. For the reasons that follow, the magistrate disagrees.

{¶ 44} Relator appears to be arguing that the quality/quantity of evidence submitted is such that the BWC did not provide some evidence that he worked during the second and third time periods. Relator also asserts that he presented evidence corroborating the statements made by him and his witnesses.

{¶ 45} Relator is correct to point out that the BWC presented significantly more evidence to support the first time period at issue. No one disputes that the commission is permitted to rely on testimony of witnesses and/or statements made by them. Both can constitute some evidence. Questions of credibility and the weight to be given evidence are clearly within the discretion of the commission as fact finder and is immaterial whether other evidence, even if greater in quality and/or quantity, supports a decision contrary to the commission's. *Teece and State ex rel. Pass v. C.S.T. Extraction Co.*, 74 Ohio St.3d 373 (1996). The magistrate finds the commission was entitled to rely on the statements the witnesses provided the SIU agents when they were interviewed.

{¶ 46} To the extent that relator contends that he presented evidence contrary to evidence presented by the BWC (October 30, 2008 status change form and November 2012 e-mails); this evidence was not submitted to the SHO at the time of the hearing. The documents were submitted in support of relator's appeal. In addition, when relator submitted this additional evidence, he never asserted this "new evidence" could not have been submitted at the time of the hearing before the SHO.

{¶ 47} Pursuant to R.C. 4123.511(E), an appeal from an SHO order to the commission is discretionary. The commission is not required to consider evidence filed after the administrative hearing process has been completed. There is no duty on the commission to consider evidence that is submitted late; instead, the commission has full discretion to reject that evidence and deny the appeal. *See State ex rel. Eckerly v. Indus. Comm.*, 10th Dist. No. 03AP-621, 2004-Ohio-3934.

{¶ 48} Contrary to relator's assertions, there was some evidence before the commission that relator was working during the relevant time periods at issue, the commission identified that evidence adequately, and provided an explanation for its findings, including finding that relator committed fraud.

{¶ 49} Based on the foregoing, it is this magistrate's decision that relator has not demonstrated the commission abused its discretion and this court should deny his request for a writ of mandamus.

/S/ MAGISTRATE
STEPHANIE BISCA BROOKS

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).