IN THE SUPREME COURT OF OHIO

The State, ex. rel. Navistar, Inc. Relator, v. Industrial Commission of Ohio and Gary E. Bisdorf, Respondents.	: : : : : : : : : : :	Supreme Court No. 2018-1416 On Appeal from the Franklin County Court of Appeals, Tenth Appellate District Court of Appeals Case No. 16 AP-776

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I. Claims

Appellee, Gary Bisdorf ("Bisdorf") is a retired employee of Appellant, Navistar, Inc. ("Navistar"). During his thirty-year employment with Navistar, Bisdorf had two occupational injuries; in 1971 he injured his left knee, and, in 2001, he injured his right shoulder (Ohio BWC claim nos. 493424-22 and 01-880461, respectively). (Index of Record, "Record" no. 3, Complaint at ¶ 3-4, Record no. 20, Answer of Bisdorf at ¶ 3-4, Record no. 23, Answer of Commission at ¶ 1.)

In 2015, fourteen years after his retirement, he filed an application with the Industrial Commission of Ohio ("the commission") for lifetime compensation, or "permanent total disability" ("PTD"), claiming an inability to engage in sustained remunerative employment as a result of his workers' compensation injuries. (Record No. 27 at 1-19.)

II. The PTD Application

Bisdorf's PTD application was filed on November 24, 2015. (*Id.*) It was accompanied by a report from a one-time evaluation conducted by a non-treating chiropractic physician, David Grunstein. (*Id.* at 8-12 and 15-19.)

At the time of the PTD application, Bisdorf was 66 years old with a high school diploma. *Id.* at 4. His work for Navistar began a few years after high school, in 1971, and continued for more than thirty years. *Id.* at 6, and Transcript of SHO Hearing at p. 3, *Id.* at 58. He took a non-disability retirement from Navistar in 2003. (*Id.*) There is no dispute that this retirement was voluntary and there is no evidence that Bisdorf was medically disabled at the time of his retirement. (*See* the commission order of October 2, 2007, *Id.* at 116, and Court Decision of December 12, 2017, Record no. 94 at ¶4). Following retirement, he did not apply for Social

Security Disability, only Social Security Retirement when he reached the age at which he became eligible. (PTD Application, Record no. 27, at 3 and Trans. p. 11, Lines 6-11, *Id.* at 56.)

Bisdorf did not seek employment after retirement, but took a job when a friend "talked him into" a position at a retail gun store. (Trans. p. 9, *Id.* at 64.) The work lasted from 2004-2010, stopping only when the gun store was closed by its owners. (Trans. at p.11 lines 12-17, *Id.* at 66.) During his employment at the store, claimant applied for a closed period of temporary total compensation ("TTD") in connection with a 2007 knee surgery. (DHO order of October 2, 2007, *Id.* at 116.) The commission awarded a closed period of TTD, specifically finding that Bisdorf's retirement from Navistar in 2003 was a voluntary retirement, but compensation could be paid following his return to the workforce at the gun store. *Id.* Bisdorf continued working at the gun store several more years, until it went out of business in 2010. (Trans. p. 9, *Id.* at 64.)

Five years later, on October 10, 2015, Bisdorf was referred by his attorney to Chiropractor Grunstein, and the PTD application was filed with the Grunstein report. (*Id.* at 9.) There is no medical evidence of record of Bisdorf's work capabilities between the time the gun store closed in 2010 through the date of Grunstein's exam in 2015.

III. Commission Proceedings

In response to the PTD application, Bisdorf was evaluated on January 18, 2016 by an orthopedic specialist, Christopher Holzapfel, M.D., at the request of the self-insured employer Navistar. (*Id.* at 24.) Dr. Holzapfel found that Bisdorf could return to sustained remunerative employment with certain identified restrictions. (*Id.* at 27.) The Commission referred Bisdorf for a medical evaluation conducted by James Rutherford, M.D. on March 4, 2016. Record at 35. Dr. Rutherford's opinion which restricted Bisdorf to sedentary work and concluded that "Mr. Bisdorf is not capable of doing even sedentary work activities as defined by the Ohio Bureau of

Workers' Compensation and the U.S. Department of Labor." (*Id.* at 40.) Vocational reports were submitted by Bisdorf (Molly S. Williams, Vocational Consultant, April 4, 2016) and Navistar (Craig Johnston, PhD, May 3 and May 5, 206). (*Id.* at 45, 50 and 55, respectively.)

The PTD application came for hearing before an Industrial Commission Staff Hearing Officer ("SHO") on May 10, 2016, where a court reporter was present to transcribe the proceedings. (Order, *Id.* at 88, Trans., *Id.* at 56.) During the hearing, Bisdorf testified that he did not look for work after the gun store closed because "I considered myself retired." (Trans. at p. 11, lines 6-17, *Id.* at 66.) Retirement was discussed at least five times during the hearing. (Trans. at 7:7, 11:8, 10, 11:11, 19:16, *Id.* at 62-74.)

The SHO issued a decision, mailed May 13, 2016, awarding PTD compensation, starting October 22, 2015, the date of Chiropractor Grunstein's report. (*Id.* at 93-94.) The order made the following findings:

> Based upon the reports of James Rutherford, M.D. dated 03/16/2016, and David Grunstein, D.C., dated 10/22/15, it is found that the Injured Worker is unable to perform any sustained remunerative employment solely as a result of the medical impairment caused by the allowed physical conditions. Therefore, pursuant to State ex rel Speelman v. Indus. Comm., 73 Ohio App. 3d 757, 598 N.E. 2d 192 (10th Dist. 1992), it is not necessary to discuss or analyze the Injured Worker's non-medical disability factors. (*Id.*)

The order was silent on the subject of Bisdorf's retirement. Navistar moved for reconsideration of the PTD order, identifying as error, the commission's failure to evaluate claimant's retirement in the order, and reliance upon the conclusory opinion of Dr. Rutherford and the opinion of Dr. Grunstein which found claimant capable of working at least part-time. Reconsideration was refused by the Commission on July 1, 2016. (*Id.* at 91, 96, 110.)

IV. Mandamus Proceedings

Navistar filed a complaint for a writ of mandamus on November 15, 2016. The Magistrate determined that a limited writ should be granted ordering the commission to vacate the May 10, 2016 order of the SHO awarding PTD, and to enter an order that determines whether claimant voluntarily abandoned the workforce.

Bisdorf and the commission submitted objections. The Court of Appeals adopted the Magistrate's findings of fact, overruled Bisdorf's objections, and sustained the commission's objection, denying the requested writ of mandamus on the question of voluntary abandonment of the workforce and remanding the case back to the Magistrate for a ruling on the remainder of Navistar's complaint.

The Court of Appeals noted Bisdorf's sworn testimony that he considered himself retired and didn't look for work after the gun store closed. While the Court acknowledged that hearing officers are expressly required to address the issue of voluntary retirement or abandonment, the Court disagreed with the Magistrate's finding that the testimony and evidence before the SHO "sufficiently raised" the issue.

The Magistrate issued a second decision on March 21, 2018, denying Navistar's request for a writ of mandamus on the remaining issues in the case. Navistar filed objections, which were overruled by the Court of Appeals on August 23, 2018. The instant appeal as of right followed.

ARGUMENT

Proposition of Law Number I: **Consideration of evidence presented of claimant's non-disability retirement by a commission hearing officer adjudicating PTD is mandatory under Ohio Admin. Code §4121-3-34(D)(1)(d) .**

The statutory purpose of permanent total disability is to compensate injured employees for impairment of earning capacity. *State, ex rel. Gen. Motors Corp. v. Indus. Comm.*, 42 Ohio

St. 2d 278, 282, 328 N.E.2d 387 (1975). Voluntary retirement precludes permanent total disability compensation because it breaks the causal nexus between the injury and the loss of earnings. "The character of a claimant's retirement is therefore critical to a PTD analysis." *State ex rel. Cinergy Corp. Duke Energy v. Heber,* 130 Ohio St.3d 194 at 195, 2011-Ohio-5027, at ¶5, 957 N.E.2d 1 at 2.

An employee, who, prior to becoming permanently and totally disabled, voluntarily retires for reasons unrelated to the allowed injury, is ineligible for PTD compensation. R.C. 4123.58(D)(3); *Cinergy, supra.* ("A retirement initiated by a claimant for reasons unrelated to the industrial injury is considered voluntary."), citing *State ex rel. Rockwell Internatl. v. Indus. Comm.*, 40 Ohio St.3d 44, 531 N.E.2d 678 (1988).

Commission hearing officers are instructed to deny permanent total disability where the employee is found to have voluntarily removed himself from the work force:

> If, after hearing, the adjudicator finds that the injured worker voluntarily removed himself or herself from the work force, the injured worker shall be found not to be permanently and totally disabled. If evidence of voluntary retirement is brought into issue, the adjudicator shall consider evidence that is submitted of the injured workers' medical condition at or near the time of the removal/retirement.
>
> Ohio Adm. Code 4121-3-34(D)(1)(d), "Guidelines for adjudication of applications for permanent total disability compensation."

The introductory paragraph to the rule mandates consideration of voluntary retirement when evidence is brought into issue as it states that the guidelines contained within the rule "shall be followed by the adjudicator." *Id.*

Once there is evidence that the claimant's retirement is voluntary and unrelated to the allowed claim conditions, failure to address the issue of the claimant's retirement is an abuse of discretion. *Cinergy, supra at* ¶ 6. Simply mentioning retirement in the commission's order is insufficient consideration. The *Cinergy* Court noted that, "the hearing officer's brief reference to

[the injured worker's] assertion that he retired because of his injury does not constitute an affirmative determination on the character of his departure." *Id.*

Here, the record lacks review by the SHO regarding Bisdorf's voluntary retirement and is completely devoid of any determination of the nature of Bisdorf's departure from the workplace in 2010. The commission's failure to consider whether Bisdorf voluntarily retired constitutes an abuse of discretion.

There can be no mistake that voluntary retirement was an issue at the staff hearing since Navistar presented both written evidence and testimony related to the subject. The record includes Bisdorf's January 9, 2003, application for non-contributory retirement benefits through the employer's pension plan. (*See* Gary E. Bisdorf's Application for Non-Contributory Retirement Benefits and Supplemental Information Form dated December 2, 2002, time-stamped by the commission September 21, 2007, also attached as Exhibit A to Request of Employer for Reconsideration dated June 10, 2016, Record no. 27 at 101-102.) Included with the form is Bisdorf's completed supplemental information form that verifies that he was not receiving Social Security Disability benefits at the time of his retirement in 2003. (*Id.*) Additional evidence is contained within Bisdorf's PTD application which confirms he did not apply for Social Security Disability, only Social Security retirement. (*See* the PTD Application, at 3, *Id.* at 3; SHO Trans. at p. 3, lines 12-22, *Id.* at 58.) An election of regular retirement and not disability, *i.e.,* Social Security, demonstrates a claimant's intent to leave the labor force at the time of retirement and is a factor upon which the commission may rely to deny permanent total disability compensation. *State ex rel. McAtee v. Industrial Comm.*, 76 Ohio St. 3d 648, 650 1996-Ohio-297, 670 N.E.2d 234 (1996).

Testimony presented at the SHO hearing also confirmed that Mr. Bisdorf abandoned the workforce after retiring. After last working in 2010, he did not seek work elsewhere because, "I just retired. Just done 30 years in a factory." (Trans. at p. 11, lines 6-11, Record No 27 at 66.) The testimony continued:

Q: You considered yourself retired?

A. Yeah, I considered myself retired.

(Trans. at p. 11, lines 10-11, *Id.* at 65.)

Bisdorf abandoned the entire job market both in 2003 and then again in 2010, with no medical evidence that he was permanently and totally impaired prior to his abandonment. He took regular retirement, rather than disability retirement. He does not dispute the voluntary nature of his departure from the workforce. The SHO simply overlooked it, and the commission refused to consider it.

In excusing the commission from considering evidence of claimant's retirement in this case, the Court of Appeals erroneously relied upon a case which has no application to the facts before this Court; *State ex rel. Quarto Mining Co. v. Foreman,* 79 Ohio St. 3d 78 (1997)

In *Quarto*,

> The employer nowhere denies that it failed to raise the retirement issue administratively. Nor does the employer claim to have raised the issue administratively, at all, by any means, "formal" or otherwise, during either of the proceedings culminating in the [PTD] order of June 15, 1993, or in any of the proceedings leading to the two prior commission orders denying PTD.
>
> *Quarto, supra,* at 81.

The Court determined that an employer may not raise the issue of retirement for the first time in a mandamus action, where it admittedly failed to raise the issue before the commission. *Id.* at 82.

That is not the case here. Navistar first produced evidence of Bisdorf's retirement in connection with the 2007 request for temporary total. The record contains Bisdorf's non-disability pension records and his statement that he had not applied for nor was he receiving Social Security Disability. The commission considered the evidence, finding that Bisdorf voluntarily retired in 2003 from Navistar, and that he became eligible for TTD when he re-entered the workforce in 2004 at the gun shop.

With respect to Bisdorf's second voluntary retirement, after the gun shop closed in 2010, Navistar took Bisdorf's testimony under oath, at the PTD hearing, where a court reporter was present to record the proceedings. Bisdorf's counsel also presented his client's testimony, resulting in a transcribed record, which contains at least five references to the nature of claimant's retirement.

The production of this evidence is not conclusive on the subject of the nature of claimant's retirement, but does trigger the obligation of the SHO to include in the order a determination of the character of the claimant's departure from the workplace. Only a return of this matter to the commission for that assessment can remedy this defect.

Proposition of Law Number II: **A four-hour work day is not the minimum threshold requirement for sustained remunerative employment under Ohio Adm. Code 4121-3-34 (B)(1).**

Permanent total disability is compensation for an inability to perform sustained remunerative employment. Ohio Adm. Code 4121-3-34(B)(1). Sustained employment does not have to be full-time or regular, but may include intermittent, occasional, or part-time work. See *State ex rel. McDaniel v. Indus. Comm'n.,* 118 Ohio St.3d 319, 2008-Ohio-2227, 889 N.E.2d 93; *State ex rel. Toth v. Indus. Comm'n.,* 80 Ohio St.3d 360, 362, 1997 Ohio 108, 686 N.E.2d 514 (1997).

A four-hour work day is not the minimum threshold requirement for sustained remunerative employment. *State, ex rel. Bonnlander v. Hamon,* 150 Ohio St. 3d 567, 2017-Ohio-4003, 84 N.E.3d 1004. Since such a "bright line" test would circumvent the commission's fact finding role as the exclusive evaluator of permanent total disability, assessments of disability must be made on a case-by-case basis. *Id.* at 569. The *Bonnlander* Court upheld the commission's finding that a claimant who is physically capable of sedentary work, but further limited to working "part-time, up to 4 hours a day" with additional psychological restrictions and "multiple breaks" was not permanently totally disabled. *Id.* at 568. The Court also noted the inclusion of an analysis of the *Stephenson* non-medical factors (age, education, and transferrable skills) in the hearing officer's order. *Id.*

The medical reports of Drs. Rutherford and Grunstein were cited by the commission as its basis for finding that Bisdorf was medically incapable of work thereby relieving the commission of its obligation to assess the non-medical *Stephenson* factors in the case. As noted by the Court of Appeals, it is not disputed by the parties that the sum of claimant's ability to engage in sustained remunerative employment under these reports is a work day of four hours. (*See* the reports of Drs. Rutherford, Record no. 27 at 35, Grunstein, *Id.* at 8, and Decision, Record no. 70 at 2.) This is consistent with claimant's last employment, where he was engaged in part-time work for over 6 years until the business closed. (Trans. at p.11 ¶12, Record no. 27 at 5 and 66.)

Where a four-hour work day is not the minimum threshold for sustained remunerative employment, the commission cannot base an award of permanent total disability in exclusive reliance upon reports finding claimant is capable of meeting that standard without explanation or analyzing the non-medical factors in the case. Doing so does not produce an analytically sound

result. It is contrary to the holding in *Bonnlander*, and the commission's position therein, that the ability to do intermittent or occasional work is included in the definition of sustained remunerative employment.

The Court of Appeals misapplied *Bonnlander,* finding that the commission was free to reach the opposite disability conclusion, than that reached in *Bonnlander,* despite evidence of a greater capability for sustained remunerative employment, and no evaluation of non-medical factors. The *Bonnlander* decision does not absolve the commission of its duty to independently assess non-medical factors to determine whether an individual who is capable of work in the sedentary range remains capable of sustained remunerative employment.

Under the Court of Appeals' logic, the commission has unfettered discretion to grant or deny PTD for an individual who is capable of engaging in a four-hour work day, without having to explain its basis for that determination. Unlike the order that was upheld in *Bonnlander*, the commission here did not discuss how many hours per day Bisdorf could work, nor did it discuss non-medical factors. The commission simply accepted Dr. Rutherford's conclusory statement that claimant is "incapable of work." Since no basis is given for the conclusion that Bisdorf's ability to work four hours a day renders him "incapable of work" the commission must be required to provide its assessment.

Proposition of Law Number III: **A conclusory medical opinion of disability which contradicts an assessment of impairment is not some evidence of PTD, and evaluation of the *Stephenson* factors is still required.**

The adjudication of disability determination rests solely within the province of the Industrial Commission, the agency charged with deciding applications for permanent total disability compensation. *State, ex rel. Lawrence v. American Lubricants Co.*, 40 Ohio St. 3d 321, 533 N.E.2d 344 (1988). Despite the fact that physicians may use the terms "impairment"

and "disability" interchangeably, it must be remembered that permanent total *impairment* is not the same as permanent total *disability* in the eyes of the Ohio Workers' Compensation Act. The Ohio Supreme Court in *State, ex rel. Stephenson v. Indus. Comm.*, 31 Ohio St. 3d 167, 171, 509 N.E.2d 946 (1987) explained the distinction;

> This court, in *State, ex rel. Dallas, v. Indus. Comm.* (1984), 11 Ohio St. 3d 193, 11 OBR 504, 464 N.E. 2d 567, and *Meeks v. Ohio Brass Co.* (1984), 10 Ohio St. 3d 147, 10 OBR 482, 462 N.E. 2d 389, noted the different meanings of the terms. We pointed out that "impairment" is the amount of a claimant's anatomical and/or mental loss of function and is to be determined by the doctors and set forth within the medical reports. We also noted that "disability" is the effect that the physical impairment has on the claimant's ability to work, which is to be determined by the Industrial Commission and its hearing officers.

While a conclusion of disability is not necessarily a fatal flaw, where the opinion is contradictory, or equivocal to the findings of medical impairment, the report is not, "some evidence" before the commission. *State, ex rel. Eberhardt v. Flxible Corp.*, 70 Ohio St. 3d 649, 640 N.E.2d 815 (1994).

Dr. Rutherford's opinion that claimant is "incapable of work" is a conclusory opinion of disability, and not an assessment of impairment. His narrative report contradicts this conclusion where it places claimant's lifting capabilities at 10 pounds, within the sedentary range of work. By definition, sedentary work involves sitting a majority of the time, but may involve walking or standing "for brief periods of time." Ohio Adm. Code 4121-3-34(B)(2)(a).

Where claimant retains the ability to engage in sedentary work, the adjudicator is required to engage in further evaluation by reviewing the non-medical "Stephenson" disability factors to determine whether claimant is permanently and totally disabled. Ohio Adm. Code 4121-3-34(D)(2)(b), and *Stephenson,* 31 Ohio St. 3d 167, *supra* at 173. Since this evaluation is not contained within the order that awarded permanent total disability, a remand is necessary in order for the required assessment to be completed.

The commission asserts that Dr. Rutherford's statement that claimant "is not capable of doing occasional standing or walking for work activity" removes him from consideration of all sedentary work. There are two flaws with this assessment. First, it ignores the fact that Mr. Bisdorf did perform sedentary work for the gun store up until the shop closed. Whether his conditions subsequently worsened, causing further restriction, is irrelevant. He was not permanently and totally impaired at the time he left the workforce because there is no medical evidence of impairment at that time. Second, not all sedentary jobs require occasional work-related standing and walking. An assessment of what jobs would fit Mr. Bisdorf's restrictions is still required if he otherwise meets the sedentary criteria for work. Ohio Adm. Code 4121-3-34(D)(2)(b).

The Court of Appeals erred by not rendering an opinion on this issue, finding that the subject of Dr. Rutherford's report was a moot issue because *Bonnlander* entitled the commission to cite Dr. Grunstein's opinion (finding capability of a four-hour work day) as conclusive proof of PTD.

CONCLUSION

Critical to the commission's analysis of a PTD application is the requirement that the hearing officer consider evidence presented of claimant's non-disability retirement under by Ohio Admin. Code §4121-3-34(D)(1)(d). The commission may not circumvent its obligation by claiming the issue "wasn't properly raised" when both documentary evidence and testimony were presented on the subject. Similarly, the absence of a "bright line test" standard for sustained remunerative employment under *Bonnlander* doesn't permit the commission to write an order which relies upon a conclusory statement of disability, rather than the physician's evaluation of impairment, combined with the commission's further inquiry into the non-medical *Stephenson*

factors under 4121-3-34(D)(2)(b). Appellant, Navistar, Inc. respectfully requests that the Court reverse the judgment of the Court of Appeals.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Merit Brief of Appellant Relator was served via e-mail this 22nd day of March, 2019, upon the following:

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APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

The State ex rel. Navistar, Inc.,	:	
Relator,	:	
v.	:	No. 16AP-776
The Industrial Commission of Ohio and Gary E. Bisdorf,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on August 23, 2018

On brief: *Vorys, Sater, Seymour and Pease LLP,* and *Corrine S. Carman,* for relator.

On brief: *Michael DeWine,* Attorney General, and *Kevin J. Reis,* for respondent Industrial Commission of Ohio. **Argued:** *Kevin J. Reis.*

On brief: *Stanley R. Jurus Law Office,* and *Michael J. Muldoon,* for respondent Gary E. Bisdorf. **Argued:** *Michael J. Muldoon.*

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

LUPER SCHUSTER, J.

{¶ 1} Relator, Navistar, Inc. ("Navistar"), initiated this original action requesting this court issue a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate the May 10, 2016 order of its staff hearing officer ("SHO") awarding respondent, Gary E. Bisdorf, compensation for permanent total disability ("PTD"), and to enter an order denying the requested compensation.

{¶ 2} This matter was referred to a magistrate of this court pursuant to Civ.R. 53(C) and Loc.R. 13(M) of the Tenth District Court of Appeals. In June 2017, the magistrate recommended this court issue a writ of mandamus ordering the commission to vacate the May 10, 2016 order of its SHO awarding PTD compensation, and to enter an order that determines whether Bisdorf voluntarily abandoned the workforce. In December 2017, this court adopted the magistrate's findings of fact but rejected his conclusions of law. *State ex rel. Navistar, Inc. v. Indus. Comm.*, 10th Dist. No. 16AP-776, 2017-Ohio-8976. This court denied Navistar's request for a writ of mandamus on the voluntary abandonment issue and remanded the matter to the magistrate to rule on the remainder of Navistar's complaint. *Id.*

{¶ 3} In March 2018, the magistrate issued his second decision in this matter, identifying the central issue presented as whether the reports of Drs. James H. Rutherford and David M. Grunstein constituted some evidence on which the commission relied in determining residual functional capacity. The magistrate found that the reports of these two doctors separately provide some evidence that the allowed conditions prohibit all sustained remunerative employment. The magistrate thus concluded the commission's granting of PTD compensation was not an abuse of discretion.

{¶ 4} Navistar has filed three objections to the magistrate's second decision. First, Navistar argues that Dr. Rutherford's opinion regarding Bisdorf's residual functional capacity is not some evidence because his reports are contradictory and conclusory. Second, Navistar contends the magistrate erroneously applied *State ex rel. Bonnlander v. Hamon*, 150 Ohio St.3d 567, 2017-Ohio-4003, in his analysis of whether Dr. Grunstein's reports constitute some evidence in support of PTD compensation. Third, Navistar argues the magistrate erroneously disregarded certain facts that demonstrate the reports of Drs. Grunstein and Rutherford are not some evidence on which the commission could rely in determining Bisdorf's ability to engage in sustained remunerative employment.

{¶ 5} For ease of analysis, we first address Navistar's third objection to the magistrate's decision. Navistar argues that the magistrate "overlooked essential facts which prove that the reports of Drs. Grunstein and Rutherford are not 'some evidence' " on which to base its decision to grant PTD compensation. (Apr. 4, 2018 Objs. to Mag.'s Decision at 11.) In particular, Navistar asserts the magistrate's second decision omits certain facts

pertaining to Bisdorf's work at a gunshop until 2010. Bisdorf's November 2015 PTD compensation application indicates that he worked part-time at a gunshop from 2004 until 2010 when the shop closed. The application further indicates that, during a typical day, Bisdorf spent two hours walking, four hours standing, and two hours sitting. Navistar argues the reports of Drs. Grunstein and Rutherford do not properly account for Bisdorf's ability to work at the gunshop until 2010. This argument is unpersuasive, however, because evidence that Bisdorf worked at a gunshop from 2004 until 2010 does not invalidate the reports that were based on examinations of Bisdorf in 2015 and 2016. Therefore, the magistrate did not err in not discounting the reports based on Bisdorf's work at the gunshop. Accordingly, we overrule Navistar's third objection to the magistrate's decision.

{¶ 6} Next we address Navistar's second objection to the magistrate's decision. Navistar argues the magistrate erroneously applied *Bonnlander* to the facts of this case. We disagree.

{¶ 7} In *State ex rel. Bonnlander v. Hamon*, 10th Dist. No. 14AP-855, 2015-Ohio-4038, this court concluded the commission did not abuse its discretion in denying PTD compensation to the claimant, Timothy Bonnlander, because psychologist Dr. Debjani Sinha's opinion that Bonnlander could work "up to 4 hours a day" met the standard for determining one's capability to perform sustained remunerative employment on a part-time basis, and because the non-medical disability factors did not otherwise preclude such employment. On appeal, the Supreme Court of Ohio observed that there is "no statutory or administrative authority for [this court's] interpretation that four or more hours of work a day is the standard for sustained remunerative employment." *Bonnlander*, 2017-Ohio-4003, at ¶ 17. The Supreme Court "has specifically rejected applying a numerical analysis" in PTD compensation cases, and "generally discourage[s] bright-line rules in workers' compensation matters." *Id.* at ¶ 18-19. Consequently, Supreme Court held that "there is no hourly standard for determining one's capability to perform sustained remunerative employment on a part-time basis. The commission decides whether a claimant is capable of sustained remunerative employment on a case-by-case basis." *Id.* at ¶ 20. In view of these principles, the Supreme Court reasoned that it was within the commission's discretion to rely on Dr. Sinha's report as evidence that Bonnlander was medically capable of sustained remunerative employment. Thus, in rejecting this court's implicit adoption of

a numerical hourly standard for sustained remunerative employment, the Supreme Court emphasized the commission's discretion in deciding a claimant's work capability based on the particular facts presented.

{¶ 8} Here, Dr. Grunstein's October 10, 2015 "Functional Capacities Evaluation" states that Bisdorf can "stand/walk" for one hour in an eight-hour workday, and he can sit for two to three hours in an eight-hour workday. As the magistrate noted, these findings reasonably support a conclusion that Dr. Grunstein limits Bisdorf to three to four hours of work in an eight-hour day. In view of these limitations, the magistrate concluded that "[a]pplying the *Bonnlander* case, these work limitations can be viewed by the commission as preventing all sustained remunerative employment." (App'x at ¶ 58.) Navistar challenges this conclusion, arguing it is contrary to the Supreme Court's holding in *Bonnlander*. This argument is unpersuasive. As set forth above, the central tenants of the *Bonnlander* Supreme Court decision is that the commission has discretion in evaluating a claimant's ability to perform sustained remunerative employment, and that there is no bright-line hourly standard for determining that capability. That the commission, based on its review of the medical reports, reached a different disability conclusion in *Bonnlander* than in this case, does not negate the applicability of the reasoning of that case to this case. Thus, the magistrate properly applied *Bonnlander*. Accordingly, we overrule Navistar's second objection to the magistrate's decision.

{¶ 9} Our disposition of Navistar's second objection renders moot its first objection insofar as it is unnecessary to resolve the issue of whether Dr. Rutherford's reports also provide some evidence on which the commission could rely in determining Bisdorf's ability to perform sustained remunerative employment. Consequently, we decline to adopt the magistrate's conclusions of law concerning Dr. Rutherford's reports. Navistar's first objection is overruled as moot.

{¶ 10} Following our independent review of the record pursuant to Civ.R. 53, we find the magistrate correctly concluded that Navistar is not entitled to the requested writ of mandamus. The magistrate correctly determined that the commission's decision granting Bisdorf's request for PTD compensation was supported by some evidence and therefore not an abuse of discretion. Accordingly, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein, except the

magistrate's conclusions regarding Dr. Rutherford's reports. We therefore overrule Navistar's objections to the magistrate's decision and deny its request for a writ of mandamus.

Objections overruled;
writ of mandamus denied.

BROWN, P.J., and TYACK, J., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

The State ex rel. Navistar, Inc.,	:	
Relator,	:	
v.	:	No. 16AP-776
The Industrial Commission of Ohio and Gary E. Bisdorf,	:	(REGULAR CALENDAR)
Respondents.	:	

MAGISTRATE'S DECISION

Rendered on March 21, 2018

Vorys, Sater, Seymour and Pease LLP, and *Corrine S. Carman,* for relator.

Michael DeWine, Attorney General, and *Kevin J. Reis,* for respondent Industrial Commission of Ohio.

Stanley R. Jurus Law Office, and *Michael J. Muldoon,* for respondent Gary E. Bisdorf.

IN MANDAMUS

{¶ 11} In this original action, relator, Navistar, Inc. ("Navistar"), requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate the May 10, 2016 order of its staff hearing officer ("SHO") awarding respondent Gary E. Bisdorf ("claimant") compensation for permanent total disability ("PTD"), and to enter an order denying the compensation.

{¶ 12} This is the second magistrate's decision in this action. In his first decision filed June 22, 2017, the magistrate recommended this court issue a writ of mandamus ordering the commission to vacate the May 10, 2016 order of its SHO awarding PTD compensation, and to enter an order that determines whether claimant voluntarily abandoned the workforce. In its decision issued December 12, 2017, this court adopted the magistrate's findings of fact but rejected the magistrate's conclusions of law. This court denied Navistar's request for a writ of mandamus on the question of voluntary abandonment of the workforce and remanded the matter to this magistrate in order for him to rule on the remainder of Navistar's complaint.

{¶ 13} Here, the magistrate shall reiterate some but not all of the findings of fact that this court adopted as its own in its December 12, 2017 decision.

Findings of Fact:

{¶ 14} 1. Claimant has two industrial claims arising from his employment as an assembler for Navistar, a self-insured employer under Ohio's workers' compensation laws.

{¶ 15} 2. On November 7, 1971, claimant injured his left knee when a gas tank slipped and hit his left knee. The industrial claim (No. 493424-22) is allowed for "bruise left knee lower patella area; degenerative arthritis left knee; chondromalacia patella left knee."

{¶ 16} 3. On December 19, 2001, claimant injured his right shoulder when a tool broke while he was pulling down. The claim (No. 01-880461) is allowed for "right shoulder strain; partial rotator cuff tear right shoulder; right shoulder disorder."

{¶ 17} 4. Claimant had right shoulder surgery in March 2002. This included an arthroscopic rotator cuff repair. Later that same year, claimant underwent further right shoulder surgery.

{¶ 18} 5. Claimant has had several surgeries to his left knee. In July 2007, he had a left total knee arthroplasty.

{¶ 19} 6. On August 30, 2007, claimant moved for temporary total disability ("TTD") compensation beginning July 23, 2007 which is the date of the left knee arthroplasty.

{¶ 20} 7. Following a September 28, 2007 hearing, a district hearing officer ("DHO") issued an order awarding TTD compensation beginning July 23, 2007.

{¶ 21} 8. Navistar administratively appealed the DHO's order of September 28, 2007.

{¶ 22} 9. Following a November 6, 2007 hearing, an SHO issued an order affirming the DHO's order of September 28, 2007.

{¶ 23} 10. On October 10, 2015, at claimant's request, he was examined by chiropractic physician David M. Grunstein. Following the examination, Dr. Grunstein issued a one-page report captioned "Functional Capacities Evaluation." The report states:

> [One] In an 8 hour workday this person can stand/walk: 1 hour
>
> [Two] This person can stand at one time for 4-5 minutes
> This person can walk at one time for 3-4 minutes
>
> [Three] In an 8 hour workday this person can sit for 2-3 hours
>
> [Four] This person can sit at one time for 20-30 minutes
>
> [Five] Lifting/Carrying limitations:
> A.) Up to 10 pounds: occasionally
> B.) 11-20 pounds: occasionally, with difficulty and increased pain
> C.) 21-50 pounds: not at all
> D.) 51-100 pounds: not at all
>
> [Six] Hands can be used for repetitive actions such as:
> Simple grasping: Right hand yes Left hand yes
> Fine manipulation: Right hand yes Left hand yes
>
> [Seven] Feet can be used for repetitive movement as in operating foot controls:
> Right foot: Yes Left foot: No
>
> [Eight] Patient is able to:
> A.) Work above the shoulder level: never
> B.) Bend/twist turn [at] waist: occasional and limited
> C.) Squat: never
> D.) Crawl: never
> E.) Climb: never
> F.) Push/pull: occasional and limited

> [Nine] Other restrictions or limitations this person has: This injury has resulted in this person suffering with sleep deprivation.

{¶ 24} 11. On October 22, 2015, Dr. Grunstein issued a four-page report to claimant's counsel. The report states:

> ***History of the 12-19-01 injury:*** *In the course of employment this person was injured as above described when he was torqueing a fitting and the wrench broke and this resulted in right shoulder injury. He has undergone 2 shoulder surgeries, both arthroscopic and he has undergone post operative physical therapy with each surgery. He also notes that he took oral pain medications.*
>
> ***History of the 11-07-71 injury:*** *In the course of employment this person was injured when a stack of fuel tanks were bumped into by a forklift and the stack fell and struck his left leg. He states that he had undergone 8 knee surgeries, with the final surgery being a total knee replacement. He also notes that he partook in a lot of physical therapy and that he took oral pain medications.*
>
> ***Present complaints of the 12-19-01 injury:*** *He describes having constant right shoulder pain. Right shoulder weakness and crepitus. Limited movement of the shoulder and he also notes that following the second surgery, the shoulder quit dislocating, but still has a tendency towards subluxating. He notes increased pain with damp, cold weather. This pain disrupts sleep on a nightly basis.*
>
> ***Present complaints of the 11-07-71 injury:*** *[C]onstant moderate to severe knee pain. He notes that he cannot straighten the knee, and he cannot fully bend the knee. He cannot squat or kneel. Ambulation of stairs is difficult and limited and he notes increased pain with damp, cold weather. This pain disrupts sleep often.*
>
> ***Treatment:*** *He was taking oral NSAIDS, but they were irritating his stomach to the point that he had to stop taking them, and now he takes nothing for the pain and he notes that it is a struggle to deal with this amount of pain on an on going basis.*

(Emphasis sic.)

{¶ 25} Following the above statements, Dr. Grunstein explains how he determined that claimant suffers a 25 percent whole person impairment for the shoulder injuries, a 30 percent whole person impairment for the left knee injuries, and a 3 percent whole person impairment for "chronic intractable pain." He concludes that the impairments combine to equal a total whole person impairment of 50 percent.

{¶ 26} In the last paragraph of his report, Dr. Grunstein opines:

> *Based on the consultation and examination findings above stated and how these findings correlate with the A.M.A. Guides, it is my opinion that the above named presented in this office with a total whole person impairment of* ***50 percent whole person impairment****, on the above stated date, for the above stated conditions. Also note that when considering the above stated information and attached functional capacities evaluation, I am of the opinion that these injuries have resulted in this person being* ***permanently and totally disabled*** *from partaking in any type of sustained remunerative employment and is therefore* ***permanently and totally disabled****.*

(Emphasis sic.)

{¶ 27} 12. On November 25, 2015, claimant filed an application for PTD compensation. In support, claimant submitted the one-page report dated October 10, 2015 from Dr. Grunstein captioned "Functional Capacities Evaluation" and the four-page report dated October 22, 2015 from Dr. Grunstein.

{¶ 28} 13. On January 18, 2016, at Navistar's request, claimant was examined by Christopher D. Holzaeffel, M.D., who practices orthopedics.

{¶ 29} 14. Dr. Holzaeffel issued a five-page narrative report, stating:

> It is my medical opinion, based on the allowed conditions of right shoulder disorder (NOS); sprain, right shoulder; tear, right rotator cuff; arthritis, left knee; and chondromalacia, left knee, Mr. Bisdorf is capable of returning to sustained remunerative employment. The claimant has good function regarding his left knee, including the ability to sit for 2 hours at a time and walk for 20-30 minutes at a time. The claimant states he is taking no pain medication regarding his left knee. The claimant has a mild antalgic gait regarding his left lower extremity, but this is due to an injury to the left Achilles

> tendon. The claimant has only mild pain and loss of range of motion of the right shoulder associated with the objective findings noted on examination. He does have some mild weakness of forward flexion and abduction.
>
> * * *
>
> It is my medical opinion, the claimant is able to return to sustained remunerative employment with the following restrictions: It is my medical opinion, the claimant would be able to sit for no more than 2 hours at a time and walk for no more than 20-30 minutes at a time. He would be unable to ascend or descend stairs on a repetitive basis, and no stooping beyond 90 degrees of left knee flexion. He would also have a 10-pound lifting restriction, and restriction of his overhead activities to no more than 2 hours in an eight-hour work day.

{¶ 30} Furthermore, Dr. Holzaeffel opines that the right shoulder injuries produce an 8 percent whole person impairment, for a total of 28 percent whole person impairment for all the allowed conditions of the two industrial claims.

{¶ 31} 15. On March 4, 2016, at the commission's request, claimant was examined by James H. Rutherford, M.D. Dr. Rutherford examined for all the allowed conditions in the two industrial claims. In his six-page narrative report that he signed on March 15, 2016, he opined that claimant has reached maximum medical improvement ("MMI") concerning all of the allowed conditions in both claims.

{¶ 32} On the last page of his narrative report, Dr. Rutherford opines:

> Because the above described orthopedic impairments related to the claim allowances of the two claims under consideration, Mr. Bisdorf is not capable of doing work activity, or incapable of work activity, and I have indicated on the Physical Strength Rating Form, Mr. Bisdorf is not capable of doing occasional standing and walking for work activity. He can do no stooping, climbing, or crawling for work activity. Mr. Bisdorf also can do no above-shoulder work activity with his right upper extremity. He can do no repetitive pushing or pulling with his right upper extremity. Mr. Bisdorf can lift up to 5 lbs. maximum with his right upper extremity. He can only lift up to 10 lbs. maximum using both upper extremities. Because of his orthopedic impairments and the functional limitations of those impairments, Mr. Bisdorf is not capable of doing even

> sedentary work activities as defined by the Ohio Bureau of Workers' Compensation and the U.S. Department of Labor.
>
> It is thus my medical opinion that, based only on the orthopedic claim allowances of the two claims under consideration, that Mr. Gary Bisdorf is incapable of work, and I have indicated this on the Physical Strength Rating Form.

{¶ 33} 16. On a "Physical Strength Rating" form, Dr. Rutherford indicated by his mark "[t]his Injured Worker is incapable of work."

{¶ 34} 17. On May 10, 2016, the PTD application was heard by an SHO. The hearing was recorded and transcribed for the record.

{¶ 35} 18. Following the May 10, 2016 hearing, the SHO mailed an order on May 13, 2016 awarding PTD compensation beginning October 22, 2015 based on the medical reports of Drs. Grunstein and Rutherford. Based on those medical reports, the SHO found that claimant is unable to perform any sustained remunerative employment. Consequently, the SHO determined it was unnecessary to discuss or analyze the non-medical disability factors. The SHO's order of May 10, 2016 states:

> The start date for the award of Permanent Total Disability Compensation of 10/22/2015 is based upon the 10/22/2015 report of David Grunstein, D.C. who opined within a report of that date that the Injured Worker was permanently and totally disabled from partaking in any type of sustained gainful remunerative employment. The Staff Hearing Officer finds that the Injured Worker's allowed condition[s] [in] his claims have reached Maximum Medical Improvement based upon the 3/15/2016 report of Dr. Rutherford.
>
> * * *
>
> Particularly, Dr. Rutherford examined the Injured Worker on behalf of the Industrial Commission on 03/04/2016 and determined that the Injured Worker "is not capable of doing occasional standing and walking for work activity." The Staff Hearing Officer finds that Ohio Adm.Code 4121-3-34(B)(2)(a) provides specifically that:
>
> "Jobs are sedentary if walking and standing are required only occasionally and all other sedentary criteria are met."

> The Injured Worker's allowed conditions of his left leg are in claim 493424-22. Dr. Rutherford found that the Injured Worker was not capable of doing occasional standing and walking for work activity; he subsequently found that the Injured Worker was incapable of work.
>
> Based upon the reports of James Rutherford, M.D., dated 03/15/2016, and David Grunstein, D.C., dated 10/22/2015, it is found that the Injured Worker is unable to perform any sustained remunerative employment solely as a result of the medical impairment caused by the allowed physical conditions. Therefore, pursuant to State ex rel. Speelman v. Indus. Comm., 73 Ohio App.3d 757, 598 N.E.2d 192 (10th Dist. 1992), it is not necessary to discuss or analyze the Injured Worker's non-medical disability factors.

{¶ 36} 19. On May 27, 2016, Navistar moved for reconsideration of the SHO's order of May 10, 2016.

{¶ 37} 20. On July 1, 2016, the three-member commission mailed an order denying Navistar's motion for reconsideration.

{¶ 38} 21. On November 15, 2016, relator, Navistar, Inc., filed this mandamus action.

Conclusions of Law:

{¶ 39} Two issues are presented: (1) whether the reports of Dr. Rutherford provide some evidence on which the commission relied in determining residual functional capacity and, (2) whether the reports of Dr. Grunstein provide some evidence on which the commission relied in determining residual functional capacity. Ohio Adm.Code 4121-3-34(B)(4).

{¶ 40} The magistrate finds that the reports of Drs. Rutherford and Grunstein provide some evidence on which the commission relied in determining that the allowed conditions of the two industrial claims prohibit all sustained remunerative employment.

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

Basic Law

{¶ 42} Ohio Adm.Code 4121-3-34 sets forth the commission's rules for the adjudication of PTD applications. Ohio Adm.Code 4121-3-34(B) sets forth definitions.

{¶ 43} Ohio Adm.Code 4121-3-34(B)(2) is captioned "Classification of physical demands of work." Thereunder, the code provides:

> (a) "Sedentary work" means exerting up to ten pounds of force occasionally (occasionally: activity or condition exists up to one-third of the time) and/or a negligible amount of force frequently (frequently: activity or condition exists from one-third to two-thirds of the time) to lift, carry, push, pull, or otherwise move objects. Sedentary work involves sitting most of the time, but may involve walking or standing for brief periods of time. Jobs are sedentary if walking and standing are required only occasionally and all other sedentary criteria are met.
>
> (b) "Light work" means exerting up to twenty pounds of force occasionally, and/or up to ten pounds of force frequently, and/or a negligible amount of force constantly (constantly: activity or condition exists two-thirds or more of the time) to move objects. Physical demand may be only a negligible amount, a job should be rated light work: (i) when it requires walking or standing to a significant degree; or (ii) when it requires sitting most of the time but entails pushing and/or pulling or [sic] arm or leg controls; and/or (iii) when the job requires working at a production rate pace entailing the constant pushing and/or pulling of materials even though the weight of those materials is negligible.

{¶ 44} In *State ex rel. O'Brien v. Cincinnati Inc.*, 10th Dist. No. 07AP-825, 2008-Ohio-2841, at ¶ 9-10, the court summarized relevant case law:

> Initially, it is important to note that a medical report that identifies the worker's exertional category as defined in the Ohio Administrative Code and does not include additional opinions regarding specific restrictions on sitting, lifting, standing, and so forth is still sufficient to constitute some evidence. *State ex rel. Ace v. Toyota of Cincinnati Co.*, Franklin App. No. 03AP-517, 2004 Ohio 3971, at P30. Thus, a medical report may constitute evidence on which the commission may rely when the physician simply opines the claimant was limited to "sedentary work" and provides no further details of the claimant's various functional restrictions. *Id.*
>
> On the other hand, the commission cannot simply rely on a physician's "bottom line" identification of an exertional category without examining the specific restrictions imposed

> by the physician in the body of the report. See *State ex rel. Owens-Corning Fiberglas Corp. v. Indus. Comm.*, Franklin App. No. 03AP-684, 2004 Ohio 3841; and *State ex rel. Howard v. Millennium Inorganic Chemicals*, Franklin App. No. 03AP-637, 2004 Ohio 6603. In both *Owens-Corning* and *Howard*, the doctor indicated that the injured worker could perform at a certain strength level, and yet, the rest of the report indicated greater restrictions on the injured worker that would actually render him incapable of performing the strength level work that the doctor had indicated he could perform. This court held in *Owens-Corning* and *Howard* that the commission cannot simply rely upon a determination that an injured worker can perform at a certain strength level; rather, the commission must review the doctor's report and actually make certain that any physical restrictions the doctor listed correspond with an ability to actually perform at the exertional level indicated by the doctor.

Dr. Rutherford's Reports

{¶ 45} The issue with respect to Dr. Rutherford's reports is whether Dr. Rutherford's conclusion that claimant "is incapable of work" is consistent or supported by his findings regarding orthopedic impairments related to the allowed conditions of the two industrial claims.

{¶ 46} In his narrative report, second to the last paragraph, Dr. Rutherford finds that claimant "can do no repetitive pushing or pulling with his right upper extremity." In the definition, "sedentary work" means 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. Thus, by definition, sedentary work requires some repetitive pushing or pulling. Because claimant can do no repetitive pushing or pulling according to Dr. Rutherford, sedentary work is precluded. Under these circumstances, Dr. Rutherford can properly conclude that claimant "is incapable of work." Thus, Dr. Rutherford's reports provide some evidence that claimant is unable to perform sustained remunerative employment.

Dr. Grunstein's Reports

{¶ 47} In his October 22, 2015 report, Dr. Grunstein concludes "these injuries have resulted in this person being permanently and totally disabled from partaking in any type of sustained gainful renumerative [sic] employment." The issue is whether Dr.

Grunstein's conclusion is consistent or supported by his findings contained in his October 10, 2015 "Functional Capacities Evaluation."

{¶ 48} *State ex rel. Bonnlander v. Hamon*, 150 Ohio St.3d 567, 2017-Ohio-4003, is instructive.

{¶ 49} Timothy Bonnlander applied for PTD compensation on February 28, 2014 following his industrial injury of October 13, 1992. The claim was allowed for numerous medical conditions and depressive disorder. At the commission's request, Bonnlander was examined by John J. Brannan, M.D., and Debjani Sinha, Ph.D.

{¶ 50} Dr. Brannan concluded that Bonnlander's medical conditions would not prevent him from performing sedentary work. Dr. Sinha evaluated Bonnlander's psychological condition and concluded that he was capable of working "part-time, up to 4 hours a day," with the following limitations: "accommodate for variable concentration; routine jobs are more appropriate; minimal new learning on an ongoing basis; multiple breaks." *Id.* ¶ 4.

{¶ 51} Following a hearing, an SHO issued an order denying Bonnlander's PTD application. Relying on the reports of Drs. Brannan and Sinha, the SHO concluded that Bonnlander "could engage [in] sedentary employment activity which involves part-time work, up to four hours a day and also involves routine employment and minimal new learning on an ongoing basis. The sedentary work should also avoid overhead use of the right arm and avoid excessive lifting, bending and twisting." *Id.* at ¶ 5.

{¶ 52} The SHO also analyzed the non-medical disability factors in reaching his decision to deny the application.

{¶ 53} Bonnlander then filed a complaint in mandamus in this court. A magistrate concluded that Dr. Sinha's report supported the commission's decision. The magistrate held that Dr. Sinha's opinion that Bonnlander can work "up to 4 hours a day" met the standard for part-time work set forth in *State ex rel. Sheller-Chiles v. Indus. Comm.*, 10th Dist. No. 13AP-245, 2014-Ohio-313, ¶ 15.

{¶ 54} This court adopted the magistrate's decision and denied the writ. Bonnlander appealed as of right to the Supreme Court of Ohio.

{¶ 55} As stated by the Supreme Court in its decision, the issue is whether Dr. Sinha's report constitutes some evidence supporting the commission's order denying the PTD application.

{¶ 56} While affirming the judgment of this court, the Supreme Court observed that "[t]here is no statutory or administrative authority for [this court's] interpretation that four or more hours of work a day is the standard for sustained remunerative employment." *Bonnlander* at ¶ 17. Furthermore, the court "generally discourages bright-line rules in workers' compensation matters." *Id.* at ¶ 19.

{¶ 57} In *Bonnlander,* the Supreme Court held:

> [T]here is no hourly standard for determining one's capability to perform sustained remunerative employment on a part-time basis. The commission decides whether a claimant is capable of sustained remunerative employment on a case-by-case basis. Here, Dr. Sinha opined that Bonnlander's psychological condition limited him to four hours of work a day with multiple breaks. It was within the commission's discretion to rely on Dr. Sinha's report as evidence to support the conclusion that Bonnlander was capable of up to four hours of sedentary work a day.

Id. at ¶ 20.

{¶ 58} In his October 10, 2015 "Functional Capacities Evaluation," Dr. Grunstein finds that claimant can "stand/walk" for one hour during an eight-hour workday. He also finds that claimant can sit for two to three hours. Adding these two findings, one can conclude that Dr. Grunstein limits claimant to three to four hours of work in an eight-hour day. Applying the *Bonnlander* case, these work limitations can be viewed by the commission as preventing all sustained remunerative employment. Given that analysis, the magistrate concludes here that Dr. Grunstein's reports provided the commission with some evidence on which it relied to enter a finding that claimant is unable to perform sustained remunerative employment.

{¶ 59} 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).

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

The State ex rel. Navistar, Inc.,	:	
Relator,	:	
v.	:	No. 16AP-776
The Industrial Commission of Ohio and Gary E. Bisdorf,	:	(REGULAR CALENDAR)
Respondents.	:	

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered on August 23, 2018, this court adopts the magistrate's decision as our own, including findings of fact and conclusions of law, except as noted in the decision. It is the judgment and order of this court that the requested writ of mandamus is denied. Costs assessed to relator.

Within three (3) days from the filing hereof, the clerk of this court is hereby ordered to serve upon all parties not in default for failure to appear notice of this judgment and its date of entry upon the journal.

LUPER SCHUSTER, J., BROWN, P.J., & TYACK, J.

By /S/ JUDGE
Judge Betsy Luper Schuster

Tenth District Court of Appeals

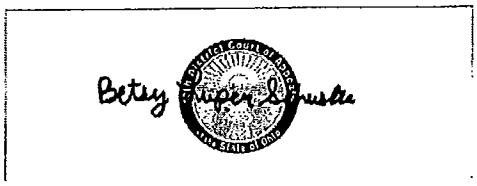
Date: 08-24-2018

Case Title: NAVISTAR INC -VS- INDUSTRIAL COMMISSION OF OHIO

Case Number: 16AP000776

Type: JEJ - JUDGMENT ENTRY

So Ordered



/s/ Judge Betsy L. Schuster

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Navistar, Inc.,	:	
Relator,	:	
v.	:	No. 16AP-776
Industrial Commission of Ohio and Gary E. Bisdorf,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on December 12, 2017

On brief: *Vorys, Sater, Seymour and Pease LLP,* and *Corrine S. Carman,* for relator. **Argued:** *Corrine S. Carman.*

On brief: *Michael DeWine,* Attorney General, and *Cheryl J. Nester,* for respondent Industrial Commission of Ohio. **Argued:** *Cheryl J. Nester.*

On brief: *Stanley R. Jurus Law Office,* and *Michael J. Muldoon,* for respondent Gary E. Bisdorf. **Argued:** *Michael J. Muldoon.*

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

SADLER, J.

{¶ 1} Relator, Navistar, Inc., commenced this original action requesting a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order granting permanent total disability ("PTD") compensation to Gary E. Bisdorf ("claimant") and to enter a new order denying the application for PTD or, in the alternative, remand the matter for further proceedings.

{¶ 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 issued the appended decision, including findings of fact and conclusions of law. The magistrate recommended we grant a limited writ ordering the commission to consider the issue of voluntary abandonment of the workforce prior to determining the merits of claimant's PTD application. Both the commission and claimant filed objections to the magistrate's decision. For the following reasons, we sustain the objection filed by the commission, overrule claimant's objection in part as moot and in part as premature, deny relator's request for a writ of mandamus as to the issue of voluntary abandonment of the workforce, and return the cause to the magistrate to consider the remainder of relator's complaint.

I. FACTS AND PROCEDURAL HISTORY

{¶ 3} None of the parties challenge the magistrate's findings of fact, and we adopt them as our own. A summary of pertinent facts, as more thoroughly set forth in the magistrate's decision, are as follows. Claimant sustained work-related injuries in 1971 and 2001 while employed as an assembler for relator. After each injury, claimant filed for workers' compensation benefits, and claims were allowed for both the 1971 and 2001 injuries.

{¶ 4} In 2007, claimant moved for and a district hearing officer ("DHO") granted claimant temporary total disability ("TTD") compensation. In doing so, the DHO found that claimant had voluntarily resigned his employment with relator in 2003 but had found other employment and was performing his other job when he again became temporarily and totally disabled.

{¶ 5} On November 25, 2015, claimant filed an application for PTD compensation with the commission based on the October 22, 2015 report of David Grunstein, D.C., which concluded that claimant's work-related injuries have resulted in claimant being permanently and totally disabled from any type of sustained remunerative employment. Claimant was then examined by physicians at the request of the commission and relator. Christopher Holzaeffel, M.D., issued a January 18, 2015 report concluding claimant is capable of returning to sustained remunerative employment. James Rutherford, M.D., issued a March 15, 2016 report concluding claimant reached maximum medical

improvement concerning all allowed conditions and that based on the orthopedic claim allowances under consideration, claimant is incapable of work.

{¶ 6} A hearing on the PTD application was held before a staff hearing officer ("SHO") of the commission on May 10, 2016. The hearing was recorded and transcribed for the record. Claimant was the sole witness to testify at the hearing. During direct examination, claimant testified he left relator's business after over 30 years of employment, then worked at a gun store for about six and one-half years until the store closed down. Claimant testified that at the gun store job he worked in sales and taught shooting classes, but he could not stand on his feet all day. On cross-examination, claimant agreed that after he worked for relator, he considered himself retired and was not actively looking for a job when he was approached about the job at the gun store and agreed that he left the gun store when it went out of business. Claimant testified he did not look for other similar work after the gun store closed because he was at the point that he could not stand anymore or sit for very long. Counsel for relator never directly asked the SHO to determine whether claimant voluntarily abandoned the workforce following the closing of the gun store.

{¶ 7} The SHO granted claimant's application for PTD compensation based on the March 15, 2016 report of Dr. Rutherford and the October 22, 2015 report of Dr. Grunstein. The order of the SHO does not mention voluntary abandonment of the workforce. Relator filed a request for reconsideration with the commission asserting the SHO failed to consider the facts of claimant's voluntary, non-disability retirement as required by Ohio Adm.Code 4121-3-34(D)(1)(d) and asserting challenges to the reports of Dr. Rutherford and Dr. Grunstein. A three-person panel of the commission denied reconsideration.

{¶ 8} On November 15, 2016, relator filed with this court a complaint for a writ of mandamus. In the complaint, relator asserted that "the [c]ommission abused its discretion by awarding PTD without first ruling on the issue of claimant's voluntary retirement, an issue raised by [relator], as required by Ohio Admin Code §4121-3-34(D)(1)(d)," because an employee who voluntarily retires is ineligible for PTD under R.C. 4123.58(D)(3). (Compl. for Writ of Mandamus at 4-5.) Relator alternatively asserted that the commission's reliance on the opinions of Dr. Rutherford and Dr. Grunstein is error

because the respective reports are "conclusory, contradictory," and "do not restrict the opinions therein to medical impairment." (Compl. for Writ of Mandamus at 5.) As a result, relator contended the reports of Dr. Rutherford and Dr. Grunstein are not "some evidence" to support the award of PTD compensation. (Compl. for Writ of Mandamus at 5.) Relator additionally asserted the SHO abused his discretion in not exploring certain factors or considering vocational evidence.

{¶ 9} The magistrate issued his decision on June 22, 2017. In it, the magistrate found that given relator's counsel elicited testimony from claimant that could support a finding he voluntarily abandoned the workforce following the closing of the gun store, and given the extensive body of developing case law regarding the defense of workforce abandonment that the commission is expected to be familiar with, relator clearly raised the issue of voluntary workforce abandonment. Therefore, the magistrate recommended this court issue a writ of mandamus ordering the commission to vacate its order awarding PTD compensation and to enter an order that determines whether claimant voluntarily abandoned the workforce following the closing of the gun store. The magistrate further specified that if the commission determines the claimant voluntarily abandoned the workforce, the commission should deny PTD compensation, and if the commission determines that claimant did not voluntarily abandon the workforce, it should address the merits of the PTD application.

{¶ 10} As previously indicated, both the commission and claimant filed objections to the magistrate's decision.

II. OBJECTIONS

{¶ 11} The commission sets forth the following objection:

> The magistrate erred in finding that the Industrial Commission of Ohio was under an legal obligation to address the issue of voluntary abandonment of the workforce when the employer failed to raise that issue as an affirmative defense at the administrative hearing.

{¶ 12} Claimant did not delineate specific objections but, rather, "strongly object[s] to the Magistrate's recommendation in this case." (Claimant's Objs. at 2.) In his memorandum in support of his objection, claimant asserts the commission did not abuse its discretion because relator waived the affirmative defense of voluntary abandonment,

the record did not support abandonment of the workforce, and the award of PTD compensation was proper.

III. DISCUSSION

A. Commission's Objection

{¶ 13} Under its sole objection, the commission contends the magistrate erred in finding the commission was under a legal obligation to address the issue of voluntary abandonment of the workforce when the employer failed to raise that issue as an affirmative defense at the administrative hearing.

{¶ 14} Pursuant to Civ.R. 53(D)(4)(d), we undertake an independent review of the objected matter " 'to ascertain that the magistrate has properly determined the factual issues and appropriately applied the law.' " *State ex rel. William E. v. Indus. Comm.*, 10th Dist. No. 12AP-205, 2013-Ohio-1017, ¶ 6, quoting Civ.R. 53(D)(4)(d). In order to be entitled to a writ of mandamus, relator must establish a clear legal right to the relief sought, a clear legal duty on the part of the respondent to perform the requested act, and the lack of an adequate remedy in the ordinary course of law. *Id.* at ¶ 9. This is a "heavy burden" that must be supported by proof that is "plain, clear, and convincing." *Id.* Thus, absent clear and convincing proof that relator raised the issue of voluntary abandonment of the workforce before the SHO, relator cannot establish the SHO had a clear legal duty to address that issue. *Id.* at ¶ 11.

{¶ 15} "A claimant's eligibility for permanent-total-disability compensation may be affected if the claimant has voluntarily retired or abandoned the job market for reasons not related to the industrial injury." *State ex rel Black v. Indus. Comm.*, 137 Ohio St.3d 75, 2013-Ohio-4550, ¶ 14. *State ex rel. Jenkins v. Indus. Comm.*, 10th Dist. No. 16AP-534, 2017-Ohio-7896, ¶ 4; Ohio Adm.Code 4121-3-34(D)(1)(d). "Thus, the character of the employee's retirement—whether voluntary or involuntary—is critical to the commission's analysis of a claimant's right to permanent-total-disability compensation." *Black* at ¶ 14, citing *State ex rel. Cinergy Corp./Duke Energy v. Heber*, 130 Ohio St.3d 194, 2011-Ohio-5027, ¶ 5.

{¶ 16} Pertinent administrative guidelines "expressly require the hearing officer to address the issue of voluntary abandonment." *State ex rel. Sheppard v. Indus. Comm.*, 139 Ohio St.3d 223, 2014-Ohio-1904, ¶ 20, citing Ohio Adm.Code 4121-3-34(D)(1)(d).

However, a hearing officer is only required to address issues that are properly raised. *Id.* at ¶ 21 (noting the failure to raise an argument to the hearing officer constitutes waiver), citing *State ex rel. Quarto Mining Co. v. Foreman*, 79 Ohio St.3d 78, 81-83 (1997); *Jenkins* at ¶ 3-5 (stating voluntary abandonment of the workforce is an affirmative defense and specifically rejecting the proposition that issue of voluntary abandonment is always a part of a PTD determination).

{¶ 17} If the issue of voluntary retirement or abandonment of the workforce is raised, a hearing officer's failure to address the issue constitutes a mistake of law justifying the commission's decision to reconsider the matter. *State ex rel. Stevens v. Indus. Comm.*, 142 Ohio St.3d 313, 2015-Ohio-1352, ¶ 17, citing Ohio Adm.Code 4121-3-34(D)(1)(d); *State ex rel. Mackey v. Ohio Dept. of Edn.*, 130 Ohio St.3d 108, 2011-Ohio-4910, ¶ 5; *State ex rel. Hayes v. Indus. Comm.*, 10th Dist. No. 01AP-1087, 2002-Ohio-3675, ¶ 4.

{¶ 18} Conversely, if the issue of voluntary retirement or abandonment of the workforce is not raised, and the SHO nonetheless addresses the issue for the first time in its order, the commission abuses its discretion and may violate due process protections afforded to the parties. *See Jenkins* at ¶ 5 (holding the commission violated claimant's due process rights by denying his PTD application on the basis of voluntary workforce abandonment where the issue was not raised at the hearing). In this context, due process demands a claimant have sufficient notice an issue has been raised and an opportunity to present evidence on that issue. *Id.*

{¶ 19} Resolution of this case centers on what actions sufficiently raise the issue of voluntary retirement or abandonment of the workforce when contesting a claimant's request for PTD compensation. Relator implies that under Ohio Adm.Code 4121-3-34(D)(1)(d) and the commission's "obligation to know and apply the relevant case law," relator sufficiently raised the issue by producing evidence that may support claimant's voluntary departure from the workforce prior to his application for PTD compensation. (Relator's Memo. in Opp. to Commission's Objs. at 3.) Ohio Adm.Code 4121-3-34(D)(1)(d) provides:

> If, after hearing, the adjudicator finds that the injured worker voluntarily removed himself or herself from the work force,

> the injured worker shall be found not to be permanently and totally disabled. *If evidence of voluntary removal or retirement is brought into issue, the adjudicator shall consider evidence that is submitted of the injured worker's medical condition at or near the time of removal/retirement.*

(Emphasis added.)

{¶ 20} First, as previously discussed, the issue of whether the injured worker voluntarily removed himself or herself from the workforce must be raised and is subject to waiver. *Jenkins* at ¶ 3-5. Furthermore, the second sentence of Ohio Adm.Code 4121-3-34(D)(1)(d) plainly guides the hearing officer to consider certain specific medical evidence that is submitted if evidence of voluntary removal or retirement is brought into issue. It does not state a standard to decide whether the defense of voluntary abandonment is raised before the SHO. We decline to read more into the rule than it states.

{¶ 21} Second, case law suggests that while counsel for the employer need not state "magic words" to raise voluntary retirement or workforce abandonment as an issue, the issue is not considered raised simply because evidence that may support a finding of voluntarily workforce abandonment exists in the record. (Memo. Contra Commission's Objs. at 5.) *See, e.g., State ex rel. Mackey v. Dept. of Edn. & Indus. Comm.*, 10th Dist. No. 09AP-966, 2010-Ohio-3522, ¶ 8, 16, *aff'd*, 2011-Ohio-4910 (considering the issue of voluntary retirement to be sufficiently raised where, at the hearing, the parties discussed claimant's retirement, her employer argued the retirement was voluntary, and evidence was presented on the issue); *Quarto Mining* at 81-82 (finding even though the record contained evidence of retirement, the commission did not abuse its discretion by not addressing a claimant's possible voluntary retirement where the employer had failed to raise the issue in the administrative hearing); *State ex rel. Garrison v. Indus. Comm.*, 10th Dist. No. 08AP-419, 2009-Ohio-2898, ¶ 44.

{¶ 22} In this case, it is undisputed that until its motion for reconsideration, relator did not argue claimant voluntarily retired after the gun store closed and abandoned the workforce, did not ask the SHO to determine whether claimant had voluntarily retired or removed himself from the workforce, or otherwise invoked the administrative statute corresponding to this issue. At the hearing, counsel for relator did elicit testimony from claimant about his work history after retiring from relator's business and why claimant

did not look for work after the gun store closed. The commission, faced with relator's request for reconsideration contending claimant's voluntary retirement should have been addressed, denied relator's motion for reconsideration. The magistrate, on the other hand, believed claimant's testimony, in the context of pervasive case law discussing workforce abandonment, "clearly raised" the issue, and, therefore, the commission had a duty to address the issue. (Mag.'s Decision at ¶ 77.)

{¶ 23} We disagree with the magistrate. As previously stated, relator has the burden to show, by clear and convincing evidence, its entitlement to the writ, including a clear legal right to the relief sought and a clear legal duty on the part of the commission to perform the requested act. *William E.* at ¶ 9. We do not find the evidence in this case *clearly* shows that voluntary retirement was "brought into issue," pursuant to Adm.Code 4121-3-34(D)(1)(d), to support a writ of mandamus. Absent clear and convincing proof that relator raised the issue before the SHO, relator cannot establish that the SHO's failure to address the issue in her opinion constituted an abuse of discretion. *Id.* at ¶ 11. Moreover, in this close case, relator has not met its heightened burden to show the commission had a clear legal duty to reopen the matter on relator's motion for reconsideration or that relator has a clear legal right to the relief sought. Therefore, we find relator is not entitled to the extraordinary remedy of mandamus on this issue. *State ex rel. Taylor v. Glasser*, 50 Ohio St.2d 165, 166 (1977) (warning mandamus is an extraordinary remedy, "to be issued with great caution and discretion and only when the way is clear").

{¶ 24} Accordingly, we sustain the commission's objection.

B. Claimant's Objections

{¶ 25} As a preliminary issue, we note claimant has not delineated specific objections pursuant to Civ.R. 53(D)(3)(b)(ii). In the interest of justice, we will address claimant's objections as gleaned from the body of his memorandum in support of objections. *State ex rel. Turner v. Bunting*, 10th Dist. No. 15AP-605, 2016-Ohio-1325, ¶ 3. Claimant essentially contends there is no basis to find an abuse of discretion occurred in this case because relator waived the affirmative defense of voluntary abandonment of the workforce, the record did not support abandonment of the workforce, and because the commission's decision to grant claimant PTD compensation is proper.

{¶ 26} First, we sustained the commission's objection concerning voluntary abandonment of the workforce. Therefore, claimant's objections to the magistrate's conclusions regarding this issue are moot.

{¶ 27} Second, we find claimant's general allusion to the SHO's proper conclusion on the merits of the PTD compensation application to be premature at this time. The magistrate only considered whether voluntary workforce abandonment was raised and did not consider the remainder of relator's complaint for mandamus, which included claims of error related to the evidence in support of claimant's PTD compensation award. Therefore, pursuant to Civ.R. 53(D)(4)(b), we return the matter to the magistrate to consider the remainder of relator's complaint in the first instance.

{¶ 28} Accordingly, we overrule claimant's objection in part as moot and in part as premature.

IV. CONCLUSION

{¶ 29} Following review of the magistrate's decision, an independent review of the record, and due consideration of the objections, we adopt the magistrate's findings of fact as our own but reject the magistrate's conclusions of law. We sustain the commission's sole objection and overrule claimant's objections in part as moot and in part as premature. We deny relator's request for a writ of mandamus on the question of voluntary abandonment of the workforce and remand the matter to the magistrate, pursuant to Civ.R. 53(D)(4)(b), in order for the magistrate to rule on the remainder of relator's complaint.

Objection sustained;
cause remanded.

TYACK, P.J., and LUPER SCHUSTER, J., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

The State ex rel. Navistar, Inc.,	:	
Relator,	:	
v.	:	No. 16AP-776
The Industrial Commission of Ohio and Gary E. Bisdorf,	:	(REGULAR CALENDAR)
Respondents.	:	

MAGISTRATE'S DECISION

Rendered on June 22, 2017

Vorys, Sater, Seymour and Peace LLP, and *Corrine S. Carman,* for relator.

Michael DeWine, Attorney General, and *Cheryl J. Nester,* for respondent Industrial Commission of Ohio.

Stanley R. Jurus Law Office, and *Michael J. Muldoon,* for respondent Gary E. Bisdorf.

IN MANDAMUS

{¶ 30} In this original action, relator, Navistar, Inc. ("Navistar"), requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate the May 10, 2016 order of its staff hearing officer ("SHO") awarding to respondent Gary E. Bisdorf ("claimant") compensation for permanent total disability ("PTD"), and to enter an order determining that claimant voluntarily abandoned the workforce, and is thus ineligible for PTD compensation. In the alternative, Navistar requests that the writ order the commission to vacate the SHO's order of May 10, 2016 on

grounds that the relied upon medical reports provide no evidence that the allowed medical conditions alone prohibit sustained remunerative employment.

Findings of Fact:

{¶ 31} 1. Claimant has two industrial claims arising from his employment as an assembler for Navistar, a self-insured employer under Ohio's workers' compensation laws.

{¶ 32} 2. On November 7, 1971, claimant injured his left knee when a gas tank slipped and hit his left knee. The industrial claim (No. 493424-22) is allowed for "bruise left knee lower patella area; degenerative arthritis left knee; chondromalacia patella left knee."

{¶ 33} 3. On December 19, 2001, claimant injured his right shoulder when a tool broke while he was pulling down. The claim (No. 01-880461) is allowed for "right shoulder strain; partial rotator cuff tear right shoulder; right shoulder disorder."

{¶ 34} 4. Claimant had right shoulder surgery in March 2002. This included an arthroscopic rotator cuff repair. Later that same year, claimant underwent further right shoulder surgery.

{¶ 35} 5. Claimant has had several surgeries to his left knee. In July 2007, he had a left total knee arthroplasty.

{¶ 36} 6. On August 30, 2007, claimant moved for temporary total disability ("TTD") compensation beginning July 23, 2007 which is the date of the left knee arthroplasty.

{¶ 37} 7. On September 21, 2007, Navistar filed with the commission a Navistar document captioned "Application For Non-Contributory Retirement Benefits." The application is signed by claimant as the applicant. It presents February 28, 2003 as the "Retirement Date." A monthly life income benefit is explained.

{¶ 38} 8. Also on September 21, 2007, Navistar filed another document captioned "Supplemental Information Form." This form was completed by claimant on January 9, 2003.

{¶ 39} 9. Following a September 28, 2007 hearing, a district hearing officer ("DHO") issued an order awarding TTD compensation beginning July 23, 2007.

Although the DHO found that claimant had voluntarily resigned his employment with Navistar during 2003, he further found that claimant "subsequently obtained other employment and was performing his other job when he again became temporarily and totally disabled."

{¶ 40} 10. Navistar administratively appealed the DHO's order of September 28, 2007.

{¶ 41} 11. Following a November 6, 2007 hearing, an SHO issued an order affirming the DHO's order of September 28, 2007. The SHO's order explains:

> The Injured Worker did retire from the employer of record, but he returned to work with a new employer. He was working at the time that he became unable to work related to the allowed conditions in this claim.

{¶ 42} 12. On October 10, 2015, at claimant's request, he was examined by chiropractic physician David M. Grunstein. Following the examination, Dr. Grunstein issued a one-page report captioned "Functional Capacities Evaluation." The report states:

> [One] In an 8 hour workday this person can stand/walk: 1 hour
>
> [Two] This person can stand at one time for 4-5 minutes
> This person can walk at one time for 3-4 minutes
>
> [Three] In an 8 hour workday this person can sit for 2-3 hours
>
> [Four] This person can sit at one time for 20-30 minutes
>
> [Five] Lifting/Carrying limitations:
> A.) Up to 10 pounds: occasionally
> B.) 11-20 pounds: occasionally, with difficulty and increased pain
> C.) 21-50 pounds: not at all
> D.) 51-100 pounds: not at all
>
> [Six] Hands can be used for repetitive actions such as:
> Simple grasping: Right hand yes Left hand yes
> Fine manipulation: Right hand yes Left hand yes
>
> [Seven] Feet can be used for repetitive movement as in operating foot controls:

Right foot: Yes Left foot: No

[Eight] Patient is able to:
A.) Work above the shoulder level: never
B.) Bend/twist turn [at] waist: occasional and limited
C.) Squat: never
D.) Crawl: never
E.) Climb: never
F.) Push/pull: occasional and limited

[Nine] Other restrictions or limitations this person has: This injury has resulted in this person suffering with sleep deprivation.

{¶ 43} 13. On October 22, 2015, Dr. Grunstein issued a four-page report to claimant's counsel. The report states:

> ***History of the 12-19-01 injury:*** *In the course of employment this person was injured as above described when he was torqueing a fitting and the wrench broke and this resulted in right shoulder injury. He has undergone 2 shoulder surgeries, both arthroscopic and he has undergone post operative physical therapy with each surgery. He also notes that he took oral pain medications.*
>
> ***History of the 11-07-71 injury:*** *In the course of employment this person was injured when a stack of fuel tanks were bumped into by a forklift and the stack fell and struck his left leg. He states that he had undergone 8 knee surgeries, with the final surgery being a total knee replacement. He also notes that he partook in a lot of physical therapy and that he took oral pain medications.*
>
> ***Present complaints of the 12-19-01 injury:*** *He describes having constant right shoulder pain. Right shoulder weakness and crepitus. Limited movement of the shoulder and he also notes that following the second surgery, the shoulder quit dislocating, but still has a tendency towards subluxating. He notes increased pain with damp, cold weather. This pain disrupts sleep on a nightly basis.*
>
> ***Present complaints of the 11-07-71 injury:*** *[C]onstant moderate to severe knee pain. He notes that he cannot straighten the knee, and he cannot fully bend the knee. He cannot squat or kneel. Ambulation of stairs is difficult and*

> *limited and he notes increased pain with damp, cold weather. This pain disrupts sleep often.*
>
> ***Treatment:*** *He was taking oral NSAIDS, but they were irritating his stomach to the point that he had to stop taking them, and now he takes nothing for the pain and he notes that it is a struggle to deal with this amount of pain on an on going basis.*

(Emphasis sic.)

{¶ 44} Following the above statements, Dr. Grunstein explains how he determined that claimant suffers a 25 percent whole person impairment for the shoulder injuries, a 30 percent whole person impairment for the left knee injuries, and a 3 percent whole person impairment for "chronic intractable pain." He concludes that the impairments combine to equal a total whole person impairment of 50 percent.

{¶ 45} In the last paragraph of his report, Dr. Grunstein opines:

> *Based on the consultation and examination findings above stated and how these findings correlate with the A.M.A. Guides, it is my opinion that the above named presented in this office with a total whole person impairment of* ***50 percent whole person impairment****, on the above stated date, for the above stated conditions. Also note that when considering the above stated information and attached functional capacities evaluation, I am of the opinion that these injuries have resulted in this person being* ***permanently and totally disabled*** *from partaking in any type of sustained remunerative employment and is therefore* ***permanently and totally disabled****.*

(Emphasis sic.)

{¶ 46} 14. On November 25, 2015, claimant filed an application for PTD compensation. In support, claimant submitted the one-page report dated October 10, 2015 from Dr. Grunstein captioned "Functional Capacities Evaluation" and the four-page report dated October 22, 2015 from Dr. Grunstein.

{¶ 47} 15. On January 18, 2016, at Navistar's request, claimant was examined by Christopher D. Holzaeffel, M.D., who practices orthopedics.

{¶ 48} 16. Dr. Holzaeffel issued a five-page narrative report, stating:

> It is my medical opinion, based on the allowed conditions of right shoulder disorder (NOS); sprain, right shoulder; tear, right rotator cuff; arthritis, left knee; and chondromalacia, left knee, Mr. Bisdorf is capable of returning to sustained remunerative employment. The claimant has good function regarding his left knee, including the ability to sit for 2 hours at a time and walk for 20-30 minutes at a time. The claimant states he is taking no pain medication regarding his left knee. The claimant has a mild antalgic gait regarding his left lower extremity, but this is due to an injury to the left Achilles tendon. The claimant has only mild pain and loss of range of motion of the right shoulder associated with the objective findings noted on examination. He does have some mild weakness of forward flexion and abduction.
>
> * * *
>
> It is my medical opinion, the claimant is able to return to sustained remunerative employment with the following restrictions: It is my medical opinion, the claimant would be able to sit for no more than 2 hours at a time and walk for no more than 20-30 minutes at a time. He would be unable to ascend or descend stairs on a repetitive basis, and no stooping beyond 90 degrees of left knee flexion. He would also have a 10-pound lifting restriction, and restriction of his overhead activities to no more than 2 hours in an eight-hour work day.

{¶ 49} Furthermore, Dr. Holzaeffel opines that the right shoulder injuries produce an 8 percent whole person impairment, for a total of 28 percent whole person impairment for all the allowed conditions of the two industrial claims.

{¶ 50} 17. On March 4, 2016, at the commission's request, claimant was examined by James H. Rutherford, M.D. Dr. Rutherford examined for all the allowed conditions in the two industrial claims. In his six-page narrative report that he signed on March 15, 2016, he opined that claimant has reached maximum medical improvement ("MMI") concerning all of the allowed conditions in both claims.

{¶ 51} On the last page of his narrative report, Dr. Rutherford opines:

> Because the above described orthopedic impairments related to the claim allowances of the two claims under consideration, Mr. Bisdorf is not capable of doing work activity, or incapable of work activity, and I have indicated

> on the Physical Strength Rating Form, Mr. Bisdorf is not capable of doing occasional standing and walking for work activity. He can do no stooping, climbing, or crawling for work activity. Mr. Bisdorf also can do no above-shoulder work activity with his right upper extremity. He can do no repetitive pushing or pulling with his right upper extremity. Mr. Bisdorf can lift up to 5 lbs. maximum with his right upper extremity. He can only lift up to 10 lbs. maximum using both upper extremities. Because of his orthopedic impairments and the functional limitations of those impairments, Mr. Bisdorf is not capable of doing even sedentary work activities as defined by the Ohio Bureau of Workers' Compensation and the U.S. Department of Labor.
>
> It is thus my medical opinion that, based only on the orthopedic claim allowances of the two claims under consideration, that Mr. Gary Bisdorf is incapable of work, and I have indicated this on the Physical Strength Rating Form.

{¶ 52} 18. On a "Physical Strength Rating" form, Dr. Rutherford indicated by his mark "[t]his Injured Worker is incapable of work."

{¶ 53} 19. On May 10, 2016, the PTD application was heard by an SHO. The hearing was recorded and transcribed for the record. Claimant appeared at the hearing and testified, first on direct examination by his counsel, and then on cross-examination by Navistar's counsel. No other witnesses appeared for the hearing.

{¶ 54} 20. During direct examination, the following exchange occurred:

> **Q. And you left Navistar, what, after 32 years?**
>
> A. 30.2 years.
>
> **Q. Okay. You could have continued working?**
>
> A. Yes, I could continue working. I was only 52 years old.
>
> **Q. It became too difficult for you?**
>
> A. Yeah, yeah. I was spending more time on the table getting operated on than I was working.
>
> **Q. Okay. And then you did go get another job afterwards?**

> A. Yes, I did. I wasn't really looking for another job, but a gentleman that I knew from working at International, Barry Laughlin, had talked me into coming and working in a gun store because they knew that I used to shoot years ago and they wanted somebody to teach CCW classes for them. So I went and did that for about six and a half years until they closed the store down.
>
> You know, they put me over in sales for a while, but I couldn't do that. I can't stand around on my feet all day, and teaching the shooting classes, I was on my feet at the range. I just couldn't do it anymore.

(Emphasis sic.) (Tr. at 8-9.)

{¶ 55} 21. During cross-examination, the following exchange occurred:

> **Q. Just a couple of questions for you, sir. Are you right-handed or left?**
>
> A. I'm right-handed.
>
> **Q. You indicated that after you left Navistar you went to become a certified instructor. You said --**
>
> A. I already was a certified instructor.
>
> **Q. You went to go work in that capacity?**
>
> A. Yes.
>
> **Q. You mentioned you weren't really looking for a job. Why not?**
>
> A. Because I just retired. Just done 30 years in a factory.
>
> **Q. You considered yourself retired?**
>
> A. Yeah, I considered myself retired.
>
> **Q. Why did you leave that job in 2010?**
>
> A. At the gun store?
>
> **Q. Yeah.**

> A. They closed the store. They went out of business.
>
> **Q. All right. Did you look for any other similar work?**
>
> A. No.
>
> **Q. Why not?**
>
> A. I was to the point I couldn't stand anymore, I couldn't sit very long so -- I taught a lot of CCW classes and a lot of people started teaching them and they were doing a hundred students at a time and I couldn't do that.

(Emphasis sic.) (Tr. at 10-12.)

{¶ 56} Following the cross-examination of claimant, Navistar's counsel launched into a lengthy discussion of the medical and vocational reports before the SHO. Early in that discussion, Navistar's counsel argues:

> Chiropractor Grunstein renders the claimant medically [incapable] of all work. Claimant took a regular retirement from Navistar in 2003. He went on to work for six years doing gun sales and handgun instruction and indicated on the PTD application that he never lifted more than ten pounds in that job.

(Tr. at 14-15.)

{¶ 57} Notwithstanding the above transcript evidence, Navistar's counsel never directly asked the SHO to determine whether claimant had voluntarily removed himself from the workforce following the closing of the gunshop. Navistar's counsel did not verbally invoke Ohio Adm.Code 4121-3-34(D)(1)(d) relating to voluntary workforce removal during the May 10, 2016 hearing.

{¶ 58} Also, there is no indication in the hearing transcript that Navistar's counsel made any reference to the Navistar retirement documents that were filed September 21, 2007 in defense of claimant's August 30, 2007 motion for TTD compensation beginning the date of the left knee surgery.

{¶ 59} 22. Following the May 10, 2016 hearing, the SHO mailed an order on May 13, 2016 awarding PTD compensation beginning October 22, 2015 based on the medical reports of Drs. Grunstein and Rutherford. Based on those medical reports, the SHO found that claimant is unable to perform any sustained remunerative employment. Consequently, the SHO determined it was unnecessary to discuss or analyze the non-medical disability factors. The SHO's order does not address or mention whether claimant may be ineligible for PTD compensation because allegedly he voluntarily abandoned the workforce. The SHO's order of May 10, 2016 states:

> The start date for the award of Permanent Total Disability Compensation of 10/22/2015 is based upon the 10/22/2015 report of David Grunstein, D.C. who opined within a report of that date that the Injured Worker was permanently and totally disabled from partaking in any type of sustained gainful remunerative employment. The Staff Hearing Officer finds that the Injured Worker's allowed condition[s] [in] his claims have reached Maximum Medical Improvement based upon the 3/15/2016 report of Dr. Rutherford.
>
> * * *
>
> Particularly, Dr. Rutherford examined the Injured Worker on behalf of the Industrial Commission on 03/04/2016 and determined that the Injured Worker "is not capable of doing occasional standing and walking for work activity." The Staff Hearing Officer finds that Ohio Adm.Code 4121-3-34(B)(2)(a) provides specifically that:
>
> "Jobs are sedentary if walking and standing are required only occasionally and all other sedentary criteria are met."
>
> The Injured Worker's allowed conditions of his left leg are in claim 493424-22. Dr. Rutherford found that the Injured Worker was not capable of doing occasional standing and walking for work activity; he subsequently found that the Injured Worker was incapable of work.
>
> Based upon the reports of James Rutherford, M.D., dated 03/15/2016, and David Grunstein, D.C., dated 10/22/2015, it is found that the Injured Worker is unable to perform any sustained remunerative employment solely as a result of the medical impairment caused by the allowed physical conditions. Therefore, pursuant to State ex rel. Speelman v.

> Indus. Comm., 73 Ohio App.3d 757, 598 N.E.2d 192 (10th Dist. 1992), it is not necessary to discuss or analyze the Injured Worker's non-medical disability factors.

{¶ 60} 23. On May 27, 2016, Navistar moved for reconsideration of the SHO's order of May 10, 2016.

{¶ 61} The memorandum in support of the motion sets forth three grounds in support of reconsideration. The first ground is captioned:

> The order awarding PTD failed to consider the fact of claimant's voluntary, non-disability retirement as required by Ohio Admin Code 4121-3-34(D)(1)(d).

(Emphasis omitted.)

{¶ 62} The second ground challenges the report of Dr. Rutherford. The third ground challenges the report of Dr. Grunstein. The second and third grounds will not be presented here.

{¶ 63} In support of the first ground as above captioned, Navistar's memorandum argues:

> An employee who voluntarily retires for reasons unrelated to the allowed injury prior to becoming permanently and totally disabled, is ineligible for PTD compensation. Ohio Rev. Code §4123.58(D)(3). Where a claimant initiates retirement for reasons other than his * * * industrial injury [he] is considered to have voluntarily retired. *State ex rel. Rockwell Internatl. v. Indus. Comm.* (1988), 40 Ohio St.3d 44. An election of regular retirement and not disability, i.e. Social Security, demonstrates claimant's intent to leave the labor force at the time of retirement which precludes permanent total disability compensation. [*State ex rel. McAtee v. Indus. Comm.*, 76 Ohio St.3d 648, 650 (1996)].
>
> Where evidence of voluntary retirement is brought into issue;
>
> [T]he adjudicator shall consider evidence that is submitted of the injured worker's medical condition at or near the time of removal/retirement. Ohio Admin.Code §4121-3-34(D)(1)(d), "Guidelines for adjudication of applications for permanent total disability compensation."

The consideration of voluntary retirement is mandated in the introductory paragraph to the rule which directs that the guidelines contained within the rule "shall be followed by the adjudicator." Id. There can be no mistake that voluntary retirement was an issue at the staff hearing. Both written evidence and testimony were presented on the subject. Claimant's injuries occurred in 1971 (493424-22) and 2001 (01-880461). He continued to work for more than thirty years after his left knee injury and two years after his right shoulder injury, taking regular retirement in 2003. The record includes claimant's January 9, 2003 application for non-contributory retirement benefits through the employer's pension plan (Attached hereto as Exhibit "A.") Included with the form is claimant's completed supplemental information form which verifies that he was not receiving social security disability benefits at the time of his retirement on February 28, 2003.

After retiring, he abandoned the workforce, and wasn't looking for work elsewhere because "I just retired. Just done 30 years in a factory." Transcript of SHO hearing at P.11, Lines 6-11. The testimony continued;

Q. You considered yourself retired?

A. Yeah, I considered myself retired. Trans. at p.11, lines 10-11.

He did not apply for Social Security Disability, only Social Security retirement. See, IC-2 (PTD Application), page 3, and Trans. at p.3, lines 12-22.

A few years into his retirement, a former coworker "talked me into" working in a gun store and teaching classes, which he did until the store closed in 2010. Trans. at p.9, line 4. This closed period of employment does not alter the fact that at the time of his retirement, he intended to leave the workforce. Claimant conceded that he was not looking for work at the time, and he did not search for work when the store closed. Trans. p.9, line 1.

Claimant does not dispute the voluntary nature of his departure from the workforce. The Staff Hearing Officer simply overlooked it. Despite the foregoing testimony and documentation provided to the hearing officer, the PTD order is silent on the subject of claimant's retirement. A clear

> mistake of law was committed by the failure to comply with the Commission's rule that the adjudicator of PTD "shall" consider evidence of claimant's retirement. Ohio Admin.Code § 4121-3-34(D)(1)(d). As a result, the order should be vacated and the matter remanded for a new hearing and decision which considers evidence of claimant's retirement.

(Emphasis sic.)

{¶ 64} 24. As indicated in Navistar's memorandum in support of reconsideration, attached thereto as exhibit A, are the Navistar documents captioned "Application for Non-Contributing Retirement Benefits" and "Supplemental Information Form" that were filed by Navistar on September 21, 2007 in defense of claimant's August 30, 2007 motion for TTD compensation.

{¶ 65} 25. On July 1, 2016, the three-member commission mailed an order denying Navistar's motion for reconsideration.

{¶ 66} 26. On November 15, 2016, relator, Navistar, Inc., filed this mandamus action.

Conclusions of Law:

{¶ 67} The issue is whether the commission abused its discretion by failing to determine whether claimant voluntarily removed himself from the workforce and, thus, is ineligible for PTD compensation.

{¶ 68} Finding that the commission abused its discretion, it is the magistrate's decision that this court issue a writ of mandamus, as more fully explained below.

The Issue Must Be Raised

{¶ 69} In *State ex rel. Quarto Mining Co. v. Foreman*, 79 Ohio St.3d 78 (1997), the Supreme Court of Ohio succinctly explained the rule that an issue must be administratively raised before the commission has the duty to address and determine the issue in its order. The *Quarto* court states:

> "Ordinarily, reviewing courts do not consider questions not presented to the court whose judgment is sought to be reversed." * * * Nor do appellate courts have to consider an error which the complaining party "could have called, but did not call, to the trial court's attention at a time when such

> error could have been avoided or corrected by the trial court."
>
> These rules are deeply embedded in a just regard for the fair administration of justice. They are designed to afford the opposing party a meaningful opportunity to respond to issues or errors that may affect or vitiate his or her cause. Thus, they do not permit a party to sit idly by until he or she loses on one ground only to avail himself or herself of another on appeal. In addition, they protect the role of the courts and the dignity of the proceedings before them by imposing upon counsel the duty to exercise diligence in his or her own cause and to aid the court rather than silently mislead it into the commission of error.

Id. at 81. (Citations omitted.)

Basic Law—PTD—Workforce Abandonment

{¶ 70} Ohio Adm.Code 4121-3-34 provides the commission's rules for the adjudication of PTD applications.

{¶ 71} Thereunder, Ohio Adm.Code 4121-3-34(D) provides guidelines for the adjudication of PTD applications.

{¶ 72} Ohio Adm.Code 4121-3-34(D)(1)(d) currently provides:

> If, after hearing, the adjudicator finds that the injured worker voluntarily removed himself or herself from the work force, the injured worker shall be found not to be permanently and totally disabled. If evidence of voluntary removal or retirement is brought into issue, the adjudicator shall consider evidence that is submitted of the injured worker's medical condition at or near the time of removal/retirement.

{¶ 73} Paragraphs two and three of the syllabus of *State ex rel. Baker Material Handling Corp. v. Indus. Comm.*, 69 Ohio St.3d 202 (1994), state:

> An employee who retires prior to becoming permanently and totally disabled is precluded from eligibility for permanent total disability compensation only if the retirement is voluntary and constitutes an abandonment of the entire job market.
>
> An employee who retires subsequent to becoming permanently and totally disabled is not precluded from

> eligibility for permanent total disability compensation regardless of the nature or extent of the retirement.

Analysis

{¶ 74} A claimant who is medically able to work voluntarily removes himself from the workforce when he fails to return to other employment or search for other employment for an extended period of time following a voluntary or involuntary termination of employment. The voluntary abandonment of the workforce renders the claimant ineligible for both TTD and PTD compensation; *State ex rel. Pierron v. Indus. Comm.*, 120 Ohio St.3d 40, 2008-Ohio-5245 (regarding TTD compensation); *State ex rel. Black v. Indus. Comm.*, 137 Ohio St.3d 75, 2013-Ohio-4550 (regarding PTD compensation).

{¶ 75} Here, Navistar's counsel elicited testimony from claimant that he failed to look for work (or to find work) following the closing of the gunshop in 2010. Although claimant testified that he was becoming physically unable to perform the duties of gunshop instructor at the time of the gunshop's closing, medical evidence is lacking as to claimant's actual ability to work at the time of the gunshop's closing.

{¶ 76} Given that Navistar's counsel elicited testimony from claimant that could support a finding that he voluntarily abandoned the workforce following the closing of the gunshop, the issue of workforce abandonment was clearly raised by the testimony notwithstanding that Navistar's counsel failed to directly ask the SHO to find a voluntary abandonment of the workforce.

{¶ 77} *Pierron* is a seminal case in the law of workers' compensation. It's progeny has created extensive law regarding the defense of workforce abandonment in PTD proceedings at the commission. *Black*. Ordinarily, the commission and its hearing officers are expected to have some familiarity with developing case law on important issues. Here, given the clarity of the testimony, the issue was clearly raised, and the commission had the duty to address the issue. Because it failed to do so, it abused its discretion.

The Navistar Retirement Papers

{¶ 78} The magistrate disagrees with Navistar's suggestion that the Navistar retirement papers must be viewed as evidence before the SHO who issued his order of May 10, 2016 awarding PTD compensation. In its reply brief, Navistar argues:

> Here, it is indisputable that evidence of voluntary retirement was raised both in front of the SHO through Mr. Bisdorf's testimony and in Navistar's Motion for Reconsideration.

(Navistar's Reply Brief at 4-5.)

{¶ 79} As earlier noted, the Navistar retirement papers were attached to Navistar's motion for reconsideration as an exhibit. However, the commission denied Navistar's motion for reconsideration by an order mailed July 1, 2016.

{¶ 80} Clearly, Navistar's belated presentation of the Navistar retirement papers with its motion for reconsideration cannot be viewed as evidence before the SHO that somehow raised the issue of a voluntary workforce abandonment. Thus, Navistar is incorrect in stating that "voluntary retirement was raised" by filing the motion for reconsideration. *See State ex rel. Cordray v. Indus. Comm.*, 54 Ohio St.3d 99 (1990) (The commission has the discretion to accept or reject evidence submitted after the hearing on the merits.).

{¶ 81} At oral argument before the magistrate, Navistar's counsel further suggested that the Navistar retirement papers must be viewed as evidence before the SHO at the May 10, 2016 hearing because the papers were filed with the commission on September 21, 2007 in defense of claimant's August 30, 2007 motion for TTD compensation. But the transcript of the May 10, 2016 hearing does not show that Navistar's counsel, or anyone else, referred the SHO to those papers. Clearly, the SHO was under no duty to search the industrial commission claim file for possible evidence of workforce abandonment that might exist regarding an earlier motion for another type of compensation.

{¶ 82} Notwithstanding that the Navistar retirement papers were not submitted to the SHO for consideration at the May 10, 2016 hearing, the magistrate nevertheless finds that the issue of a voluntary workforce abandonment was raised during claimant's hearing testimony as previously explained. That claimant voluntarily retired from his employment with Navistar in early 2003 is not a prerequisite for finding that claimant voluntarily abandoned the workforce in 2010 when the gunshop closed and he failed to look for other employment.

Conclusion

{¶ 83} Accordingly, based on the above analysis, it is the magistrate's decision that this court issue a writ of mandamus ordering the commission to vacate the May 10, 2016 order of its SHO awarding PTD compensation, and to enter an order that determines whether claimant voluntarily abandoned the workforce following the closing of the gunshop. If the commission determines that claimant voluntarily abandoned the workforce, it shall enter an order denying PTD compensation on grounds that claimant is ineligible for the compensation. If the commission determines that claimant did not voluntarily abandoned the workforce, it shall address the merits of the PTD application.

/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).

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Navistar, Inc.,	:	
Relator,	:	
v.	:	No. 16AP-776
Industrial Commission of Ohio and Gary E. Bisdorf,	:	(REGULAR CALENDAR)
Respondents.	:	

JOURNAL ENTRY

For the reasons stated in the decision of this court rendered on December 12, 2017, the Industrial Commission of Ohio's objection is sustained, claimant's objections are overruled, and this matter is remanded to the magistrate for further proceedings. Pursuant to Rule 13(M) of this court, Kenneth W. Macke, an attorney admitted to practice in Ohio, is hereby re-appointed magistrate in this cause without limitation of authority specified in Civ.R. 53(C). Civ.R. 53 shall govern the proceedings and the decision of the magistrate.

SADLER, J., TYACK, P.J., LUPER SCHUSTER, J.

/S/ JUDGE

Tenth District Court of Appeals

Date: 12-13-2017

Case Title: NAVISTAR INC -VS- INDUSTRIAL COMMISSION OF OHIO

Case Number: 16AP000776

Type: JOURNAL ENTRY

So Ordered

/s/ Judge Lisa L. Sadler

Ohio Industrial Commission

RECORD OF PROCEEDINGS

Claim Number: 493424-22
LT-ACC-SI-COV
PCN: 2161521 Gary E. Bisdorf

Claims Heard: 01-880461

493424-22

VORYS SATER SEYMOUR PEASE
PO BOX 1008
COLUMBUS OH 43216-1008

Date of Injury: 11/07/1971

Risk Number: 20000597-0

Request For Reconsideration filed by Employer on 05/27/2016
Issue: 1) Continuing Jurisdiction Pursuant To R.C. 4123.52
2) Permanent Total Disability

The Employer's Request for Reconsideration, filed 05/27/2016, from the order issued 05/13/2016, is denied for the reason that the request fails to meet the criteria of Industrial Commission Resolution R08-1-01 dated 11/01/2008.

Typed By: jl/CA
Date Typed: 06/22/2016

The above findings and order was approved and confirmed by the majority of the members.

Thomas H. Bainbridge Yes
Chairman

Electronically signed by Thomas H. Bainbridge

Jodie M. Taylor Yes
Commissioner

Electronically signed by Jodie M. Taylor

Karen L. Gillmor, Ph.D. Yes
Commissioner

Electronically signed by Karen L. Gillmor, Ph.D.

Ohio Industrial Commission

RECORD OF PROCEEDINGS

Claim Number: 493424-22

ATTESTED TO BY:

Executive Director

Findings Mailed: 07/01/2016

Electronically signed by
Tim Adams

The parties and representatives listed below have been sent this record of proceedings. If you are not an authorized representative of one of the parties, please notify the Industrial Commission.

493424-22
Gary E. Bisdorf
337 Forest Drive
Springfield OH 45505

Risk No: 20000597-0
International Truck And Engine Corp
6125 Urbana Rd
Springfield OH 45502-9279

ID No: 10017-90
Stanley Jurus
1375 Dublin Rd
Columbus OH 43215-1074

ID No: 20462-91
Vorys Sater Seymour Pease
PO Box 1008
Columbus OH 43216-1008

BWC, LAW DIRECTOR

NOTE: INJURED WORKERS, EMPLOYERS, AND THEIR AUTHORIZED REPRESENTATIVES MAY REVIEW THEIR ACTIVE CLAIMS INFORMATION THROUGH THE INDUSTRIAL COMMISSION WEB SITE AT www.ic.ohio.gov. ONCE ON THE HOME PAGE OF THE WEB SITE, PLEASE CLICK I.C.O.N. AND FOLLOW THE INSTRUCTIONS FOR OBTAINING A PASSWORD. ONCE YOU HAVE OBTAINED A PASSWORD, YOU SHOULD BE ABLE TO ACCESS YOUR ACTIVE CLAIM(S).

Ohio Industrial Commission

RECORD OF PROCEEDINGS

Claim Number: 01-880461 LT-ACC-SI-COV
PCN: 2153341 Gary E. Bisdorf

Claims Heard: 01-880461
493424-22

VORYS SATER SEYMOUR PEASE
PO BOX 1008
COLUMBUS OH 43216-1008

Date of Injury: 12/19/2001

Risk Number: 20000597-1

This matter was heard on 05/10/2016, before Staff Hearing Officer J. Crump, pursuant to the provisions of R.C. 4121.35(B)(1) on:

IC-2 App For Comp For Permanent Total Disability filed by Injured Worker on 11/25/2015.
Issue: 1) Permanent Total Disability

Notices were mailed to the Injured Worker, the Employer, their respective representatives and the Administrator of the Bureau of Workers' Compensation not less than 14 days prior to this date, and the following were present for the hearing:

APPEARANCE FOR THE INJURED WORKER: Mr. Muldoon and Mr. Bisdorf
APPEARANCE FOR THE EMPLOYER: Mr. Mattis, Ms. Ground, and Court Reporter
APPEARANCE FOR THE ADMINISTRATOR: No Appearance

It is the finding of the Staff Hearing Officer that these claims have been allowed for:

Claim Number 01-880461: RIGHT SHOULDER STRAIN; PARTIAL ROTATOR CUFF TEAR RIGHT SHOULDER; RIGHT SHOULDER DISORDER.
DISALLOWED: DYSTHYMIC DISORDER.

Claim Number 493424-22: BRUISE LEFT KNEE LOWER PATELLA AREA; DEGENERATIVE ARTHRITIS LEFT KNEE; CHONDROMALACIA PATELLA LEFT KNEE.
DISALLOWED: ADJUSTMENT DISORDER WITH ANXIETY.

After full consideration of the issue, it is the order of the Staff Hearing Officer that the Injured Worker's IC-2 Application for Compensation for Permanent Total Disability filed 11/25/2015 is granted. Permanent total disability compensation is awarded from 10/22/2015 (less any compensation that previously may have been awarded over the same period), and is to continue without suspension unless future facts or circumstances should warrant the stopping of the award. Such payments are to be made in accordance with R.C. 4123.58(A).

The start date for the award of Permanent Total Disability Compensation of 10/22/2015 is based upon the 10/22/2015 report of David Grunstein, D.C. who opined within a report of that date that the Injured Worker was permanently and totally disabled from partaking in any type of sustained gainful remunerative employment. The Staff Hearing Officer finds that the Injured Worker's allowed condition is his claims have reached Maximum Medical Improvement based upon the 3/15/2016 report of Dr. Rutherford.

The cost of this award is apportioned as follows: 20% in claim #01-880461 and 80% in claim #493424-22. This apportionment is based upon comparison of the severity of the Injured Worker's impairments as described within the report of James Rutherford, M.D., dated 03/15/2016.

Particularly, Dr. Rutherford examined the Injured Worker on behalf of the Industrial Commission on 03/04/2016 and determined that the Injured Worker "is not capable of doing occasional standing and walking for work activity". The Staff Hearing Officer finds that Ohio Adm.Code 4121-3-34(B)(2)(a) provides specifically that:

> "Jobs are sedentary if walking and standing are required only occasionally and all other sedentary criteria are met."

The Injured Worker's allowed conditions of his left leg are in claim 493424-22. Dr. Rutherford found that the Injured Worker was not capable of doing occasional standing and walking for work activity; he subsequently found that the Injured Worker was incapable of work.

Based upon the reports of James Rutherford, M.D., dated 03/15/2016, and David Grunstein, D.C., dated 10/22/2015, it is found that the Injured Worker is unable to perform any sustained remunerative employment solely as a result of the medical impairment caused by the allowed physical conditions. Therefore, pursuant to State ex rel. Speelman v. Indus. Comm., 73 Ohio App.3d 757, 598 N.E.2d 192 (10th Dist. 1992), it is not necessary to discuss or analyze the Injured Worker's non-medical disability factors.

All evidence contained in the record and discussed by the parties at this hearing has been reviewed and considered.The Self-Insuring Employer is hereby ordered to comply with the above findings.

Typed By: ad
Date Typed: 05/11/2016

J. Crump
Staff Hearing Officer

Findings Mailed: 05/13/2016

Electronically signed by J. Crump

The parties and representatives listed below have been sent this record of proceedings. If you are not an authorized representative of one of the parties, please notify the Industrial Commission.

01-880461
Gary E. Bisdorf
337 Forest Drive
Springfield OH 45505

Risk No: 20000597-1
Navistar International Transportat
6125 Urbana Rd
Springfield OH 45502-9279

ID No: 10017-90
Stanley Jurus
1375 Dublin Rd
Columbus OH 43215-1074

ID No: 20462-91
Vorys Sater Seymour Pease
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ID No: 4000-05
BWC - DWRF Section
30 W Spring St
Columbus OH 43215-2216

BWC, LAW DIRECTOR

Ohio Industrial Commission

RECORD OF PROCEEDINGS

Claim Number: 01-880461

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4121-3-34 Permanent total disability.

(A) Purpose

The purpose of this rule is to ensure that applications for compensation for permanent total disability are processed and adjudicated in a fair and timely manner. This rule applies to the adjudication of all applications for compensation for permanent total disability filed on or after the effective date of this rule.

(B) Definitions

The following definitions shall apply to the adjudication of all applications for permanent total disability:

(1) "Permanent total disability" means the inability to perform sustained remunerative employment due to the allowed conditions in the claim.

The purpose of permanent total disability benefits is to compensate an injured worker for impairment of earning capacity.

The term "permanent" as applied to disability under the workers' compensation law does not mean that such disability must necessarily continue for the life of the injured worker but that it will, within reasonable probability, continue for an indefinite period of time without any present indication of recovery therefrom.

(2) Classification of physical demands of work:

(a) "Sedentary work" means exerting up to ten pounds of force occasionally (occasionally: activity or condition exists up to one-third of the time) and/or a negligible amount of force frequently (frequently: activity or condition exists from one-third to two-thirds of the time) to lift, carry, push, pull, or otherwise move objects. Sedentary work involves sitting most of the time, but may involve walking or standing for brief periods of time. Jobs are sedentary if walking and standing are required only occasionally and all other sedentary criteria are met.

(b) "Light work" means exerting up to twenty pounds of force occasionally, and/or up to ten pounds of force frequently, and/or a negligible amount of force constantly (constantly: activity or condition exists two-thirds or more of the time) to move objects. Physical demand may be only a negligible amount, a job should be rated light work:

(i) when it requires walking or standing to a significant degree; or

(ii) when it requires sitting most of the time but entails pushing and/or pulling or arm or leg controls; and/or

(iii) when the job requires working at a production rate pace entailing the constant pushing and/or pulling of materials even though the weight of those materials is negligible.

(c) "Medium work" means exerting twenty to fifty pounds of force occasionally, and/or ten to twenty-five pounds of force frequently, and/or greater than negligible up to ten pounds of force constantly to move objects. Physical demand requirements are in excess of those for light work.

(d) "Heavy work" means exerting fifty to one hundred pounds of force occasionaliy, and/or twenty to fifty pounds of force frequently and/or ten to twenty pounds of force constantly to move objects. Physical demand requirements are in excess of those for medium work.

(e) "Very heavy work" means exerting in excess of one hundred pounds of force occasionally, and/or in excess of fifty pounds of force frequently, and/or in excess of twenty pounds of force constantly to move objects. Physical demand requirements are in excess of those for heavy work.

(3) Vocational factors:

(a) "Age" shall be determined at time of the adjudication of the application for permanent 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.

(b) "Education" is primarily used to mean formal schooling or other training which contributes to the ability to meet vocational requirements. The numerical grade level may not represent one's actual educational abilities. If there is no other evidence to contradict it, the numerical grade level will be used to determine educational abilities.

(i) "Illiteracy" is the inability to read or write. An injured worker is considered illiterate if the injured worker cannot read or write a simple message, such as instructions or an inventory list, even though the person can sign his or her name.

(ii) "Marginal education" means sixth grade level or less. An injured worker will have ability in reasoning, arithmetic, and language skills which are needed to do simple unskilled types of work. Generally, formal schooling at sixth grade level or less is marginal education.

(iii) "Limited education" means seventh grade level through eleventh grade level. Limited education means ability in reasoning, arithmetic and language skills but not enough to allow an injured worker with these educational qualifications to do most of the more complex job duties needed in semi-skilled or skilled jobs. Generally, seventh grade through eleventh grade formal education is limited education.

(iv) "High school education or above" means twelfth grade level or above. The G.E.D. is equivalent to high school education. High school education or above means ability in reasoning, arithmetic, and language skills acquired through formal schooling at twelfth grade education or above. Generally an individual with these educational abilities can perform semi-skilled through skilled work.

(c) "Work experience":

(i) "Unskilled work" is work that needs little or no judgment to do simple duties that can be learned on the job in a short period of time. The job may or may not require considerable strength. Jobs are unskilled if the primary work duties are handling, feeding, and off bearing (placing or removing materials from machines which are automatic or operated by others), or machine tending and a person can usually learn to do the job in thirty days and little specific vocational preparation and judgment are needed.

(ii) "Semi-skilled work" is work that needs some skills but does not require doing the more complex work duties. Semi-skilled jobs may require close attention to watching machine processes or inspecting, testing, or otherwise looking for irregularities or tending or guarding equipment, property, material, or persons against loss, damage, or injury and other types of activities which are similarly less complex than skilled work but more complex than unskilled work. A job may be classified as semi-

skilled where coordination and dexterity are necessary, as when hands or feet must be moved quickly in a repetitive task.

(iii) "Skilled work" is work that requires qualifications in which a person uses judgment or involves dealing with people, factors or figures or substantial ideas at a high level of complexity. Skilled work may require qualifications in which a person uses judgment to determine the machine and manual operations to be performed in order to obtain the proper form, quality, or quantity to be produced. Skilled work may require laying out work, estimating quality, determine the suitability and needed quantities of materials, making precise measurements, reading blue prints or other specifications, or making necessary computations or mechanical adjustments or control or regulate the work.

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

(v) "Previous work experience" is to include the injured worker's usual occupation, other past occupations, and the skills and abilities acquired through past employment which demonstrate the type of work the injured worker may be able to perform. Evidence may show that an injured worker has the training or past work experience which enables the injured worker to engage in sustained remunerative employment in another occupation. The relevance and transferability of previous work skills are to be addressed by the adjudicator.

(4) "Residual functional capacity" means the maximum degree to which the injured worker has the capacity for sustained performance of the physical-mental requirements of jobs as these relate to the allowed conditions in the claim(s).

(5) "Maximum medical improvement" is a treatment plateau (static or well-stabilized) at which no fundamental functional or physiological change can be expected within reasonable medical probability in spite of continuing medical or rehabilitative procedures. An injured worker may need supportive treatment to maintain this level of function.

(C) Processing of applications for permanent total disability

The following procedures shall apply to applications for permanent total disability that are filed on or after the effective date of this rule.

(1) 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 examination upon which the report is based must be performed within twenty-four months prior to the date of filing of the 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). Medical evidence which provides an opinion addressing such limitations, but which also contains a conclusion as to whether an injured worker is permanently and totally disabled, may be considered by a hearing officer. A vocational expert's opinion, by itself, is insufficient to support an application for permanent total disability compensation. If an application for permanent total disability compensation is filed that does not meet the filing requirements of this rule, or if proper medical evidence is not identified within the

claim file, the application shall be dismissed without hearing. Where it is determined at the time the application for permanent total disability compensation is filed that the claim file contains the required medical evidence, the application for permanent total disability compensation shall be adjudicated on its merits as provided in this rule absent withdrawal of the application for permanent total disability compensation.

(2) At the time the application for permanent total disability compensation is filed with the industrial commission, the industrial commission shall serve a copy of the application together with copies of supporting documents to the employer's representative (if the employer is represented), or to the employer (if the employer is not represented) along with a letter acknowledging the receipt of the permanent total disability application.

(3) A claims examiner shall initially review the application for permanent total disability.

(a) If it is determined there is a written agreement to award permanent total disability compensation entered into between the injured worker, the employer, and the administrator in claims involving state fund employers, the application shall be adjudicated, and an order issued, without a hearing.

(b) If it is determined that the injured worker is requesting an award of permanent total disability compensation under division (C) of section 4123.58 of the Revised Code (statutory permanent total disability), the application shall be adjudicated in accordance with paragraph (E) of this rule.

(c) If a motion requesting recognition of additional conditions is filed on or prior to the date of filing for permanent total disability compensation, such motion(s) shall be processed prior to the processing of the application for permanent total disability compensation. However, if a motion for recognition of an additional condition is filed subsequent to the date of filing of the application of permanent total disability, the motions shall be processed subsequent to the determination of the application for permanent total disability compensation.

(4)

(a) The injured worker shall ensure that copies of medical records, information, and reports that the injured worker intends to introduce and rely on that are relevant to the adjudication of the application for permanent total disability compensation from physicians who treated or consulted the injured worker that may or may not have been previously filed in the workers' compensation claim files, are contained within the file at the time of filing an application for permanent total disability.

(b) The employer shall be provided fourteen days after the date of the industrial commission acknowledgment letter provided for in paragraph (C)(2) of this rule to notify the commission if the employer intends to submit medical evidence relating to the issue of permanent total disability compensation to the commission. Should the employer make such written notification the employer shall submit such medical evidence to the commission within sixty days after the date of the commission acknowledgment letter unless relief is provided to the employer under paragraph (C)(4)(d) of this rule. Should the employer fail to make such written notification within fourteen days after the date of the commission acknowledgment letter, the employer shall be provided sixty days after the date of the commission acknowledgment letter to submit medical evidence relating to the issue of permanent total disability compensation to the commission, but the scheduling of the injured worker for appropriate medical examinations by physicians selected by the commission under paragraph (C)(5)(a)(iii) of this rule will proceed without delay.

(c) If the injured worker or the employer has made a good faith effort to obtain medical evidence described in paragraph (C)(4)(a) or (C)(4)(b) of this rule and has been unable to obtain such evidence, the injured worker or the employer may request that the hearing administrator issue a subpoena to obtain such evidence. Prior to the issuance of a subpoena, the hearing administrator shall review the evidence submitted by the injured worker or the employer that demonstrates the good faith effort to obtain medical evidence. Should a subpoena be issued, it shall be served by the party requesting the issuance of a subpoena.

(d) Upon the request of either the injured worker or the employer and upon good cause shown, the hearing administrator may provide an extension of time, to obtain the medical evidence described in paragraphs (C)(4)(a) and (C)(4)(b) of this rule. Thereafter, no further medical evidence will be admissible other than additional medical evidence approved by a hearing administrator that is found to be newly discovered medical evidence that is relevant to the issue of permanent total disability and which, by due diligence, could not have been obtained under paragraph (C)(4)(a) or (C)(4)(b) of this rule.

(5)

(a) Following the date of filing of the permanent total disability application, the claims examiner shall perform the following activities:

(i) Obtain all the claim files identified by the injured worker on the permanent total disability application and any additional claim files involving the same body part(s) as those claims identified on the permanent total disability application.

(ii) Copy all relevant documents as deemed pertinent by the commission including evidence provided under paragraphs (C)(1) and (C)(4) of this rule and submit the same to an examining physician to be selected by the claims examiner.

(iii) Schedule appropriate medical examination(s) by physician(s) to be selected by the commission provided that the scheduling of said exams shall not be delayed where the employer fails to notify the commission within fourteen days after the date of the commission acknowledgment letter that it intends to submit medical evidence to the commission relating to the issue of permanent total disability compensation.

(iv) Prepare a statement of facts. A copy of the statement of facts shall be mailed to the parties and their representatives by the commission.

(6)

(a) After the reports of the commission medical examinations have been received, the hearing administrator may refer the claim to an adjudicator to consider the issuance of a tentative order, without a hearing.

(i) Within fourteen days of the receipt of the tentative order adjudicating the merits of an application for compensation for permanent total disability, a party may file a written objection to the order. Unless the party notifies the commission in writing of the objection to the tentative order within fourteen days after the date of receipt of the tentative order, the tentative order shall become final with regard to the award of permanent total disability compensation. A party may file a written request to change the start date or allocation of permanent total disability compensation within thirty days of

the receipt of the tentative order adjudicating the merits of an application for compensation for permanent total disability.

(ii) In the event a party makes written notification to the industrial commission of an objection within fourteen days of the date of the receipt of the notice of findings of the tentative order, the application for compensation for permanent total disability shall be set for hearing and adjudicated on its merits.

(b) If the hearing administrator determines that the case should not be referred for consideration of issuance of a tentative order by an adjudicator, the hearing administrator shall notify the parties to the claim that a party has fourteen days from the date that copies of reports of the commission medical examinations are submitted to the parties within which to make written notification to the commission of a party's intent to submit additional vocational information to the commission that is relevant to the adjudication of the application for permanent total disability compensation.

(i) Unless a party notifies the commission within the aforementioned fourteen-day period of the party's intent to submit additional vocational information to the commission, a party will be deemed to have waived its ability to submit additional vocational information to the commission that is relevant to the adjudication of the application for permanent total disability.

(ii) Should a party provide timely notification to the commission of its intent to submit additional vocational information, the additional vocational information shall be submitted to the commission within forty-five days from the date the copies of the reports of commission medical examinations are submitted to the parties. Upon expiration of the forty-five day period no further vocational information will be accepted without prior approval from the hearing administrator.

(7) If the employer or the injured worker request, for good cause shown, that a pre-hearing conference be scheduled, a pre-hearing conference shall be set. The request for a pre-hearing conference shall include the identification of the issues that the requesting party desires to be considered at the pre-hearing conference. The hearing administrator may also schedule a pre-hearing conference when deemed necessary on any matter concerning the processing of an application for permanent total disability, including but not limited to, motions that are filed subsequent to the filing of the application for permanent total disability.

Notice of a pre-hearing conference is to be provided to the parties and their representatives no less than fourteen days prior to the pre-hearing conference. The pre-hearing conference may be by telephone conference call, or in-person at the discretion of the hearing administrator and is to be conducted by a hearing administrator.

The failure of a party to request a pre-hearing conference or to raise an issue at a pre-hearing conference held under paragraph (C)(8) of this rule, does not act to waive any assertion, argument, or defense that may be raised at a hearing held under paragraphs (D) and (E) of this rule.

(8) Should a pre-hearing conference be held, the hearing administrator is not limited to the consideration of the issues set forth in paragraphs (C)(8)(a) to (C)(8)(l) of this rule, but may also address any other matter concerning the processing of an application for permanent total disability. At a pre-hearing conference the parties should be prepared to discuss the following issues:

(a) Evidence of retirement issues.

(b) Evidence of refusal to work or evidence of refusal or failure to respond to written job offers of sustained remunerative employment.

(c) Evidence of job description.

(d) Evidence of rehabilitation efforts.

(e) Exchange of accurate medical history, including surgical history.

(f) Agreement as to allowed condition(s) in the claim.

(g) Scheduling of additional medical examinations, if necessary.

(h) Ensure that deposition requests that have been granted pursuant to industrial commission rules are completed and transcripts submitted.

(I) Settlement status.

(9) At the conclusion of the pre-hearing conference, a date for hearing before a staff hearing officer shall be scheduled no earlier than fourteen days subsequent to the date of a pre-hearing conference. After the pre-hearing conference, unless authorized by the hearing administrator, no additional evidence on the issue of permanent total disability shall be submitted to the claim file. If the parties attempt to submit additional evidence on the issue of permanent total disability, the evidence will not be admissible on the adjudication of permanent total disability compensation.

(10) The time frames established herein in paragraph (C) of this rule can be waived by mutual agreement of the parties by motion to a hearing administrator, except where otherwise specified.

(11) The applicant may dismiss the application for permanent total disability any time up to the determination of the hearing on the merits of the application. Should a party dismiss an application prior to its adjudication, the commission's medical evidence obtained will be valid twenty-four months from the date of dismissal.

(D) Guidelines for adjudication of applications for permanent total disability

The following guidelines shall be followed by the adjudicator in the sequential evaluation of applications for permanent total disability compensation:

(1)

(a) If the adjudicator finds that the injured worker meets the definition of statutory permanent total disability pursuant to division (C) of section 4123.58 of the Revised Code, due to the loss or loss of use of both hands or both arms, or both feet or both legs, or both eyes, or any two thereof, the injured worker shall be found permanently and totally disabled, and a tentative order shall be issued.

Should an objection be filed from a tentative order, a hearing shall be scheduled. (Reference paragraph (E) of this rule).

(b) If, after hearing, the adjudicator finds that the injured worker is engaged in sustained remunerative employment, the injured worker's application for permanent total disability shall be denied, unless an injured worker qualifies for an award under division (C) of section 4123.58 of the Revised Code.

(c) If, after hearing, the adjudicator finds that the injured worker is medically able to return to the former position of employment, the injured worker shall be found not to be permanently and totally disabled.

(d) If, after hearing, the adjudicator finds that the injured worker voluntarily removed himself or herself from the work force, the injured worker shall be found not to be permanently and totally disabled. If evidence of voluntary removal or retirement is brought into issue, the adjudicator shall consider evidence that is submitted of the injured worker's medical condition at or near the time of removal/retirement.

(e) If, after hearing, the adjudicator finds that the injured worker is offered and refuses and/or fails to accept a good-faith offer of sustained remunerative employment that is made prior to the pre-hearing conference described in paragraph (C)(9) of this rule where there is a written job offer detailing the specific physical/mental requirements and duties of the job that are within the physical/mental capabilities of the injured worker, the injured worker shall be found not to be permanently and totally disabled.

(f) If, after hearing, the adjudicator finds that the injured worker's allowed medical condition(s) is temporary and has not reached maximum medical improvement, the injured worker shall be found not to be permanently and totally disabled because the condition remains temporary. In claims involving state fund employers, the claim shall be referred to the administrator to consider the issuance of an order on the question of entitlement to temporary total disability compensation. In claims involving self-insuring employers, the self-insuring employer shall be notified to consider the question of the injured worker's entitlement to temporary total disability compensation.

(g) If, after hearing, the adjudicator determines that there is appropriate evidence which indicates the injured worker's age is the sole cause or primary obstacle which serves as a significant impediment to reemployment, permanent total disability compensation shall be denied. However, a decision based upon age must always involve a case-by-case analysis. The injured worker's age should also be considered in conjunction with other relevant and appropriate aspects of the injured worker's nonmedical profile.

(h) If, after hearing, the adjudicator finds that the allowed condition(s) is the proximate cause of the injured worker's inability to perform sustained remunerative employment, the adjudicator is to proceed in the sequential evaluation of the application for permanent total disability compensation in accordance with the provisions of paragraph (D) of this rule. However, should the adjudicator finds that non-allowed conditions are the proximate cause of the injured worker's inability to perform sustained remunerative employment, the injured worker shall be found not to be permanently and totally disabled.

(i) If, after hearing, the adjudicator finds that injured worker's inability to perform sustained remunerative employment is the result of a pre-existing condition(s) allowed by aggravation, the adjudicator is to continue in the sequential evaluation of the application for permanent total disability compensation in accordance with the provisions of paragraph (D) of this rule. However, should the adjudicator find that the non-allowed pre-existing condition(s) are the proximate cause of the injured worker's inability to perform sustained remunerative employment, the injured worker shall be found not to be permanently and totally disabled.

(2)

(a) 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.

(b) If, after hearing, the adjudicator finds that the injured worker, based on the medical impairment resulting from the allowed conditions is unable to return to the former position of employment but may be able to engage in sustained remunerative employment, the non-medical factors shall be considered by the adjudicator.

The non-medical factors that are to be reviewed are the injured worker's age, education, work record, and all other factors, such as physical, psychological, and sociological, that are contained within the record that might be important to the determination as to whether the injured worker may return to the job market by using past employment skills or those skills which may be reasonably developed. (Vocational factors are defined in paragraph (B) of this rule).

(c) If, after hearing and review of relevant vocational evidence and non-medical disability factors, as described in paragraph (D)(2)(b) of this rule the adjudicator finds that the injured worker can return to sustained remunerative employment by using past employment skills or those skills which may be reasonably developed through retraining or through rehabilitation, the injured worker shall be found not to be permanently and totally disabled.

(3) Factors considered in the adjudication of all applications for permanent total disability:

(a) The burden of proof shall be on the injured worker to establish a case of permanent total disability. The burden of proof is by preponderance of the evidence. The injured worker must establish that the disability is permanent and that the inability to work is causally related to the allowed conditions.

(b) In adjudicating an application for permanent total disability, the adjudicator must determine that the disability is permanent, the inability to work is due to the allowed conditions in the claim, and the injured worker is not capable of sustained remunerative employment.

(c) The industrial commission has the exclusive authority to determine disputed facts, the weight of the evidence, and credibility.

(d) All medical evidence of impairment shall be based on objective findings reasonably demonstrable and medical reports that are submitted shall be in conformity with the industrial commission medical examination manual.

(e) If the adjudicator concludes from evidence that there is no proximate causal relationship between the industrial injury and the inability to work, the order shall clearly explain the reasoning and basis for the decision.

(f) The adjudicator shall not consider the injured worker's percentage of permanent partial impairment as the sole basis for adjudicating an application for permanent total disability.

(g) The adjudicator is to review all relevant factors in the record that may affect the injured worker's ability to work.

(h) The adjudicator shall prepare orders on a case by case basis which are fact specific and which contain the reasons explaining the decision. The orders must specifically state what evidence has been relied upon in reaching the conclusion and explain the basis for the decision. In orders that are issued under paragraphs (D)(2)(b) and (D)(2)(c) of this rule the adjudicator is to specifically list the non-

medical disability factors within the order and state how such factors interact with the medical impairment resulting from the allowed injuries in the claim in reaching the decision.

(I) In claims in which a psychiatric condition has been allowed and the injured worker retains the physical ability to engage in some sustained remunerative employment, the adjudicator shall consider whether the allowed psychiatric condition in combination with the allowed physical condition prevents the injured worker from engaging in sustained remunerative employment.

(E) Statutory permanent total disability

Division (C) of section 4123.58 of the Revised Code provides that the loss or loss of use of both hands or both arms, or both feet or both legs, or both eyes, or any two thereof, constitutes total and permanent disability.

(1) In all claims where the evidence on file clearly demonstrates actual physical loss, or the permanent and total loss of use occurring at the time of injury secondary to a traumatic spinal cord injury or head injury, of both hands or both arms, or both feet or both legs, or both eyes, or any two thereof, the claim shall be referred to be reviewed by a staff hearing officer of the commission. Subsequent to review, the staff hearing officer shall, without hearing, enter a tentative order finding the injured worker to be entitled to compensation for permanent total disability under division (C) of section 4123.58 of the Revised Code. If an objection is made, the claim shall be scheduled for hearing.

(a) Within thirty days of the receipt of the tentative order adjudicating the merits of an application for compensation for permanent total disability, a party may file a written objection to the order. Unless the party notifies the industrial commission in writing of the objection to the tentative order within thirty days after the date of receipt of notice of the findings of the tentative order, the tentative order shall become final.

(b) In the event a party makes written notification to the industrial commission of an objection within thirty days of the date of the receipt of the notice of findings of the tentative order, the application for compensation for permanent total disability shall be set for hearing and adjudicated on its merits.

(2) In all other cases filed under division (C) of section 4123.58 of the Revised Code, if the staff hearing officer finds that the injured worker meets the definition of statutory permanent and total disability pursuant to division (C) of section 4123.58 of the Revised Code, due to the loss of use of both hands or both arms, or both feet or both legs, or both eyes, or any two thereof, the staff hearing officer, without a hearing, is to issue a tentative order finding the injured worker to be permanently and totally disabled under division (C) of section 4123.58 of the Revised Code. An objection to the tentative order may be made pursuant to paragraphs (E)(1)(a) and (E)(1)(b) of this rule.

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4123.58 Compensation for permanent total disability.

(A) In cases of permanent total disability, the employee shall receive an award to continue until the employee's death in the amount of sixty-six and two-thirds per cent of the employee's average weekly wage, but, except as otherwise provided in division (B) of this section, not more than a maximum amount of weekly compensation which is equal to sixty-six and two-thirds per cent of the statewide average weekly wage as defined in division (C) of section 4123.62 of the Revised Code in effect on the date of injury or on the date the disability due to the occupational disease begins, nor not less than a minimum amount of weekly compensation which is equal to fifty per cent of the statewide average weekly wage as defined in division (C) of section 4123.62 of the Revised Code in effect on the date of injury or on the date the disability due to the occupational disease begins, unless the employee's average weekly wage is less than fifty per cent of the statewide average weekly wage at the time of the injury, in which event the employee shall receive compensation in an amount equal to the employee's average weekly wage.

(B) In the event the weekly workers' compensation amount when combined with disability benefits received pursuant to the Social Security Act is less than the statewide average weekly wage as defined in division (C) of section 4123.62 of the Revised Code, then the maximum amount of weekly compensation shall be the statewide average weekly wage as defined in division (C) of section 4123.62 of the Revised Code. At any time that social security disability benefits terminate or are reduced, the workers' compensation award shall be recomputed to pay the maximum amount permitted under this division.

(C) Permanent total disability shall be compensated according to this section only when at least one of the following applies to the claimant:

(1) The claimant has lost, or lost the use of both hands or both arms, or both feet or both legs, or both eyes, or of any two thereof; however, the loss or loss of use of one limb does not constitute the loss or loss of use of two body parts;

(2) The impairment resulting from the employee's injury or occupational disease prevents the employee from engaging in sustained remunerative employment utilizing the employment skills that the employee has or may reasonably be expected to develop.

(D) Permanent total disability shall not be compensated when the reason the employee is unable to engage in sustained remunerative employment is due to any of the following reasons, whether individually or in combination:

(1) Impairments of the employee that are not the result of an allowed injury or occupational disease;

(2) Solely the employee's age or aging;

(3) The employee retired or otherwise voluntarily abandoned the workforce for reasons unrelated to the allowed injury or occupational disease.

(4) The employee has not engaged in educational or rehabilitative efforts to enhance the employee's employability, unless such efforts are determined to be in vain.

(E) Compensation payable under this section for permanent total disability is in addition to benefits payable under division (B) of section 4123.57 of the Revised Code.

(F) If an employee is awarded compensation for permanent total disability under this section because the employee sustained a traumatic brain injury, the employee is entitled to that compensation regardless of the employee's employment in a sheltered workshop subsequent to the award, on the condition that the employee does not receive income, compensation, or remuneration from that employment in excess of two thousand dollars in any calendar quarter. As used in this division, "sheltered workshop" means a state agency or nonprofit organization established to carry out a program of rehabilitation for handicapped individuals or to provide these individuals with remunerative employment or other occupational rehabilitating activity.

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