

[Cite as *State ex rel. Crawford v. Hydracrete Pumping Co.*, 2009-Ohio-5333.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

| | | |
|--------------------------------------|---|--------------------|
| State of Ohio ex rel. Jack Crawford, | : | |
| Relator, | : | |
| v. | : | No. 08AP-739 |
| Hydracrete Pumping Company | : | (REGULAR CALENDAR) |
| and | : | |
| Industrial Commission of Ohio, | : | |
| Respondents. | : | |

D E C I S I O N

Rendered on October 6, 2009

Regas & Haag, Ltd., and John S. Regas, for relator.

Richard Cordray, Attorney General, and Colleen C. Erdman, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

FRENCH, P.J.

{¶1} Relator, Jack Crawford, filed an original action in mandamus requesting this court to issue a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its order that denied relator permanent total disability ("PTD") compensation, and to enter an order granting that compensation.

{¶2} This court referred this matter to a magistrate pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate issued a decision, which includes findings of fact and conclusions of law and is appended to this decision, recommending that this court deny the requested writ.

{¶3} Relator filed objections to the magistrate's decision. He argues that the magistrate erred by not concluding that the commission improperly weighed relator's vocational factors. We disagree. As the magistrate noted, the commission is the expert on non-medical factors. This court will not reweigh the evidence.

{¶4} Relator also asserts that the magistrate mischaracterized his arguments concerning the staff hearing officer's ("SHO") finding that relator had not enrolled in vocational rehabilitation. Relator argues that extenuating circumstances prevented him from enrolling in rehabilitation, so his failure to enroll should not be used as a basis for denying PTD benefits. We conclude, however, that relator's failure to enroll in vocational rehabilitation was a proper factor for the SHO to consider in denying PTD benefits and, even if improper, was only one factor supporting the denial.

{¶5} In his decision following a June 2008 hearing, the SHO concluded that relator had "the ability to obtain or be re-trained to obtain entry-level light or sedentary work" within his restrictions. The SHO noted that relator had last worked in May 2005. Since that time, relator had "made no effort to obtain vocational rehabilitation, and indicated in his IC-2 Application that he is not interested in such services." The SHO concluded that relator had presented "[n]o persuasive explanation" for this lack of effort. In support of his request for reconsideration of the SHO's decision, relator offered the July 15, 2008 letter from University CompCare, which concluded that he was "not

feasible for services as there is no reasonable probability that services would result in a return to work." To reach this conclusion, University CompCare relied on the vocational evaluation of Mark Anderson, who had concluded that relator had no return-to-work potential. Although relator thereafter agreed to undergo vocational rehabilitation, it was not improper for the SHO to consider relator's prior failure to make rehabilitative efforts, particularly because the SHO's assessment of relator's employability was contrary to Mr. Anderson's assessment. Finally, we note that this refusal to engage in rehabilitation was only one among many factors the SHO relied on to deny PTD benefits. Therefore, we overrule relator's objections.

{¶6} Having conducted an independent review of the record, we adopt the magistrate's decision, including the findings of fact and conclusions of law contained in it. We deny the requested writ.

*Objections overruled,
writ of mandamus denied.*

KLATT and McGRATH, JJ., concur.

A P P E N D I X

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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| State of Ohio ex rel. Jack Crawford, | : | |
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| Relator, | : | |
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| v. | : | No. 08AP-739 |
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| Hydracrete Pumping Company and | : | (REGULAR CALENDAR) |
| Industrial Commission of Ohio, | : | |
| | : | |
| Respondents. | : | |
| | : | |

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

Rendered on June 19, 2009

Regas & Haag, Ltd., and John S. Regas, for relator.

McDonald Hopkins LLC, and Adrienne L. Stemen, for respondent Hydracrete Pumping Company.

Richard Cordray, Attorney General, and Colleen C. Erdman, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶7} In this original action, relator, Jack Crawford, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order denying him permanent total disability ("PTD") compensation, and to enter an order granting said compensation.

Findings of Fact:

{¶8} 1. On May 9, 2005, relator sustained an industrial injury while employed as a concrete mixing truck operator for respondent Hydrocrete Pumping Company ("Hydrocrete"), a state-fund employer. On that date, relator fell while carrying a heavy pipe. He has not worked since May 2005.

{¶9} 2. The industrial claim (No. 05-344653) is allowed for "sprain lumbar region; sprain right shoulder/arm; aggravation of pre-existing lumbar degenerative disc disease L1-2 through L5-S1."

{¶10} 3. On February 23, 2006, following termination of temporary total disability ("TTD") compensation, relator filed his first application for PTD compensation. Following a September 26, 2006 hearing, a staff hearing officer ("SHO") issued an order denying the application. Relator then moved the three-member commission for reconsideration of the SHO's order of September 26, 2006. Following a February 22, 2007 hearing, the commission granted reconsideration but then denied the PTD application. That commission order is not at issue here.

{¶11} 4. On July 31, 2007, relator filed his second PTD application, the denial of which is at issue here.

{¶12} Under the "Education" section of the application form, relator indicated that he is a high school graduate. Graduation occurred in 1961. Among other information sought, the application form posed three questions to the applicant: (1) "Can you read?" (2) "Can you write?" and (3) "Can you do basic math?" Given a choice of "yes," "no," and "not well," relator selected the "yes" response to all three queries.

{¶13} Under a section captioned "Rehabilitation History," the application form asks: "Have you ever participated in rehabilitation services?" In response, relator marked the "no" box. The next question asks: "If you have not sought or participated in rehabilitation services, are you interested in rehabilitation services offered by the employer or the Bureau of Workers' Compensation and do you desire to undergo rehabilitation evaluation?" In response to the query, relator marked the "no" box.

{¶14} The application form also asks the applicant to provide information about his or her work history. Relator states that he was employed as a "Laborer" for "Hydrocrete Pumping" from 1992 to 2005. He also worked as a "Laborer" for "Northeast Cement" from the 1980s to 1992. Before that, he worked as a "Laborer" for "Joe Marks Concrete" during the 1980s.

{¶15} The application form poses six questions with respect to each job worked. For the job at Hydrocrete, the six questions and relator's responses are as follows:

1. Your basis duties: I was a concrete pump operator. I was in charge of pumping cement from the cement truck to the location designatated [sic] for the cement. I was in charge of maintainin [sic] the pump rig and changing the pipes, up to 500 pounds (with help from others) and tubes needed for daily operations of the cement pump. Driving long distances to reach the job site.
2. Machines, tools equipment you used: Concrete pump (crane type rig). I would use misc. tools required to operate, maintain and change pipes on the rig.
3. Exact operations you performed: See #1
4. Technical knowledge and skills you used: Operation of the concrete pump.
5. Reading / Writing you did: I was in charge of processing the daily paperwork for the operations of the rig. This would include billing, time, maintainence [sic] and operation logs that were kept.

6. Number of people you supervised: I worked in the field alone.

{¶16} For the job at Northeast Cement, the six questions and relator's responses are as follows:

1. Your basic duties: I was a cement finisher. I was in charge of finishing all cement layout jobs. We did primarily commercial work such as parking decks and garages, stadiums, and large commercial buildings.

2. Machines, tools equipment you used: Cement equipment. Misc. tools and equipment needed to lay the cement in the area designated in the smoothest possible way.

3. Exact operations you performed: See #1

4. Technical knowledge and skills you used: Skills as cement finisher.

5. Reading / Writing you did: daily logs of operation, billing and crew hours.

6. Number of people you supervised: 8-12 people, sometimes more.

{¶17} For the job at Joe Marks Concrete, the six questions and relator's responses are as follows:

1. Your basic duties: I was a cement finisher. I was in charge of finishing all cement layout jobs. We did primarily commercial work such as parking decks and garages, stadiums, and large commercial buildings.

2. Machines, tools equipment you used: Cement equipment. Misc. tools and equipment needed to lay the cement in the area designated in the smoothest possible way.

3. Exact operations you performed: See #1

4. Technical knowledge and skills you used: Skills as cement finisher.

5. Reading / Writing you did: daily logs of operation, billing and crew hours.

6. Number of people you supervised: 8-12 people, sometimes more.

{¶18} 5. On December 10, 2007, at the commission's request, relator was examined by Paul T. Scheatzle, D.O. In his three-page narrative report, Dr. Scheatzle opined that the allowed conditions of the industrial claim produced a "total combined impairment of 13% whole person impairment."

{¶19} 6. On December 10, 2007, Dr. Scheatzle also completed a physical strength rating form. On the form, Dr. Scheatzle indicated by checkmark that relator is capable of "light work." Under further limitations, he wrote: "No overhead lifting [right] arm." "No climbing [or] crawling."

{¶20} 7. Earlier, at relator's request, Mark A. Anderson prepared a four-page vocational report dated June 14, 2006. This report was submitted by relator in support of his first PTD application. The June 14, 2006 report states:

III. EDUCATION AND TRAINING

Mr. Jack A. Crawford graduated from Hoover High School in 1961. He reported no additional education or special training.

This counselor administered the SRA clerical, math and reading indexes to the claimant as part of the June 9, 2006 Vocational Evaluation. Mr. Crawford's SRA clerical aptitudes placed below the 1st percentile, indicating a lack of clerical aptitude. He reported that he has no typing or computer skills. His reading placed at the mid-4th Grade Level while his math placed at the 5th Grade Level. This counselor attempted to administer the Purdue Pegboard manual dexterity test. However, testing was stopped when Mr. Crawford reported a pulling sensation in his low back.

IV. WORK HISTORY EXPERIENCE

Mr. Crawford was employed as a Concrete Mixing Truck Operator at Hydrocrete Pumping Co. at the time of both of his work related injuries. All jobs in the U.S. Economy are

listed in the Dictionary of Occupational Titles, (DOT). Accordingly, Mr. Jack A. Crawford's work history would be classified as follows:

| <u>JOB TITLES</u> | <u>DOT CODE</u> | <u>SKILL LEVEL</u> | <u>STRENGTH LEVEL</u> |
|-----------------------------------|-----------------|--------------------|-----------------------|
| Concrete Mixing Truck Operator | 900.683-010 | SEMI-SKILLED | MEDIUM |

There would be no transferable skills developed from any of his past work activities to the sedentary/light levels of exertion.

V. DEMONSTRATED CAPACITIES FROM PREVIOUS WORK/TESTING

Based on Mr. Crawford's previous work history, the following levels of performance have been demonstrated, and modifications made based on the Vocational Assessment conducted June 9, 2006 by Mark A. Anderson, L.P.C., CDMS, DABVE.

| <u>APTITUDES</u> | <u>DEMONSTRATED PERFORMANCE LEVEL</u> |
|----------------------------|---------------------------------------|
| Intelligence | AVERAGE |
| Verbal | BELOW AVERAGE |
| Numerical | BELOW AVERAGE |
| Spatial | AVERAGE |
| Form Perception | BELOW AVERAGE |
| Clerical Perception | MINIMAL ABILITY |
| Motor Coordination | MINIMAL ABILITY |
| Finger Dexterity | MINIMAL ABILITY |
| Manual Dexterity | MINIMAL ABILITY |
| Eye/Hand/Foot Coordination | AVERAGE |
| Color Discrimination | BELOW AVERAGE |

DEMONSTRATED CAPABILITIES

| <u>Reasoning</u> | <u>Math</u> | <u>Language</u> |
|-------------------|-----------------|---------------------|
| 7-8th Grade Level | 5th Grade Level | Mid-4th Grade Level |

Vocational Training: No.
 ICO Educational Classification: Limited Level based on testing. * (SRA clerical, math, and reading indicate current aptitudes below the high school level).

{¶21} Under "VII. Summary and Conclusions," Anderson opines:

Dr. Pinsky concluded that Mr. Crawford has a permanent restriction that would prohibit him from lifting, pushing and pulling more than 20 lbs. and from performing repetitive bending. Dr. Metz concludes that Mr. Crawford has permanent restrictions of no lifting over 50 lbs. and occasional bending, twisting, reaching below the knee, pushing, pulling, squatting, kneeling, sitting and lifting above shoulders.

Additionally there are multiple non-exertional restrictions including:

- A) Demonstrated poor manual dexterity (Purdue Pegboard);
- B) No clerical aptitude;
- C) Math aptitude at the 5th Grade Level/Reading aptitude at the mid-4th Grade Level;
- D) Chronic pain in back which makes prolonged sitting, standing and walking difficult;
- E) Difficulty climbing stairs/Inability to stoop, bend or kneel;
- F) No transferable skills from previous work experience;
- G) Difficulty with balance at times;
- H) Limited to driving a car for short distances only due to pain and problems sitting;
- I) Advancing age (62).

Based on the exertional and non-exertional limitations listed above, it is my opinion that Mr. Jack A. Crawford has no return to work potential. The medical reports and testing indicate that Mr. Crawford is not capable of performing alternative work.

The Vocational Diagnosis and Assessment of Residual Employability confirms that Mr. Crawford is not employable in the local, state or national economies. Based on his age, physical limitations and difficulties with reading and math comprehension, Mr. Crawford is not a viable candidate for vocational rehabilitation.

{¶22} 8. On March 25, 2008, after reviewing Dr. Scheatzle's December 10, 2007 report and other medical records not previously reviewed, Anderson wrote: "[I]t remains this counselor's opinion that Mr. Jack Crawford has no return to work potential and that Mr. Crawford is not employable in the local, state or national economies."

{¶23} 9. Following a June 26, 2008 hearing, an SHO mailed an order on July 1, 2008 denying relator's PTD application filed July 31, 2007. The SHO's order of June 26, 2008 explains:

* * * This decision is based upon the following findings.

The Claimant was examined on 12/10/2007 by Dr. Scheatzle on behalf of the Industrial Commission. Dr. Scheatzle found that the allowed conditions in this claim have reached maximum medical improvement and opined a 13 percent whole person impairment due to these conditions. Dr. Scheatzle concluded that the Claimant was capable of performing light work with the additional restrictions of no overhead lifting with the right arm and no climbing or crawling.

"Light work" is defined as 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 of [sic] more of the time) to move objects. Physical demand may be only a negligible amount, a job should be rated light work: (1) when it requires walking or standing to a significant degree; or (2) when it requires sitting most of the time but entails pushing and/or pulling or arm or leg controls; and/or (3) 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.

The Hearing Officer finds the 12/10/2007 report of Dr. Scheatzle to be persuasive.

As the Claimant has been found to have the residual functional capacity for some work, a discussion of the non-medical disability factors is necessary.

State ex rel. Stephenson v. Indus. Comm. (1987), 31 Ohio St. 3d 161.

The Claimant is currently sixty four years old, a person closely approaching advanced age. In general, age refers to one's chronological years and the extent to which one's age affects the ability to adapt to new work situations and to do work in competition with others.

The Hearing Officer finds the Claimant's age to be a neutral vocational factor. While some employers prefer younger employees with more work life remaining over the course of employment, others prefer more mature employees with past work and life experiences.

The Claimant completed the twelfth grade, graduating from high school in 1961. Individuals with this educational background are considered to have a "high school education or above", which 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.

The Claimant indicated in his IC-2 Application that he can read, write, and do basic math. The Claimant's work history reflects many years of skilled work, consistent with his educational background.

Based on this educational background, the Hearing Officer finds that the Claimant possesses the necessary skills to obtain or be trained to obtain basic, entry level light or sedentary work within the restrictions outlined by Dr. Scheatzle. Thus, the Hearing Officer finds the Claimant's education to be a positive vocational factor.

The Claimant's IC-2 Application describes the Claimant's vocational history beginning only in the 1980's. However, the Claimant testified at hearing to supplement the information contained in the IC-2 Application.

From 1959 to 1968, the Claimant worked as a cement finisher. In this position, the Claimant laid and finished cement with a variety of tools, lifting over fifty pounds frequently and over one hundred pounds occasionally.

From 1969 to 1992, the Claimant worked as both a cement finisher and as a concrete pump operator/operating engineer. In addition to the cement finishing duties described above, the Claimant also operated and maintained a concrete pumping rig, changed pipes and tubes used to pump concrete, and drove the truck hauling the rig. Again, in this position the Claimant lifted over fifty pounds frequently and over one hundred pounds occasionally.

The Claimant's IC-2 Application indicates that his work for two employers, Joe Marks Concrete in the 1980's and Northeast Cement from the 1980's to 1992, also involved completion of daily logs of operations, billing, and crew hours. Further, the Claimant's IC-2 Application indicates that for both of these employers the Claimant supervised eight to twelve people, "sometimes more."

From 1992 to 2005, the Claimant worked for the employer of record in this claim and performed only the duties associated with a concrete pump operator/operating engineer. In addition to the physical requirements of this job, the Claimant indicated that he also processed daily paperwork including billing, time logs, maintenance logs, and operation logs. The Claimant further testified that this position involved working independently, as he was the only one operating the rig.

Based on the Claimant's description of his work history, the Hearing Officer finds that each of these positions reflect very heavy, skilled work.

The Claimant's vocational history demonstrates an ability to perform complex, skilled work. The Claimant has also demonstrated the ability to work independently, to use machinery, and to supervise others. The Claimant has further demonstrated the ability to perform at least some clerical work as demonstrated by the paperwork he had to complete in his former position of employment. Thus, the Hearing Officer finds that the Claimant's work experience is a positive vocational factor.

The Claimant's former position of employment in this claim, as well as each of his previous positions of employment, exceed the residual functional capacity as found by Dr. Scheatzle. Therefore, the Hearing Officer finds that the Claimant cannot return to work at his former position of employment. However, based on the Claimant's positive

educational history and positive vocational history the Hearing Officer finds that the Claimant has the ability to obtain or be re-trained to obtain entry-level light or sedentary work within the restrictions outlined by Dr. Scheatzle. The Claimant last worked in May, 2005. Since that time the Claimant has made no effort to obtain vocational rehabilitation, and indicated in his IC-2 Application that he is not interested in such services. No persuasive explanation has been presented regarding the Claimant's lack of effort to obtain vocational rehabilitation services.

Based on the above listed physical capacities and non-medical disability factors, the Hearing Officer finds that the Claimant's disability is not total, and that the Claimant is capable of engaging in sustained remunerative employment, or being retrained to engage in sustained remunerative employment. Therefore, the Claimant's request for an award of permanent total disability benefits is denied.

{¶24} 10. On July 14, 2008, relator moved for reconsideration of the SHO's order of June 26, 2008. In support of reconsideration, relator submitted his affidavit stating:

1. I gave detailed testimony at my permanent total disability hearing as follows:
2. My entire work history consists of work as either a cement finisher or a [sic] as a concrete pump operator.
3. I testified that my supervisory duties were, at most, considered minimal. I was a lead worker on a few jobs. I had no hiring or firing duties, nor did I have the ability to reprimand other workers. I did not complete any reports regarding other workers.
4. My completion of paperwork was also minimal. It comprised less than 1% of my total work time. It simply involved completion of work logs. I never operated a computer. I never read blue-prints. I never performed any work within an office setting.
5. I never operated my own business.
6. Affiant further sayeth naught.

{¶25} In further support of reconsideration, relator's counsel submitted a memorandum in which counsel asserts:

* * * [I]t should be noted that the undersigned was precluded from setting forth live vocational expert testimony from Mr. Mark Anderson. Mr. Anderson had submitted two vocational reports to the file. The undersigned wanted to have his testimony in order [to] explain his conclusions and to answer any questions of the SHO. The undersigned gave notice of such attendance at the hearing; however, he was approached by Hearing Administrator, Ann Lischner, prior to the hearing and asked to give an explanation as to why Mr. Anderson's testimony would be needed. The undersigned provided such by letter dated June 13, 2008 * * *. Although no written determination was made by the Industrial Commission, on June 23, 2008, the undersigned received a phone call from Ann Lischner indicating that Mr. Anderson would not be allowed to testify by determination of the Industrial Commission.

The undersigned has subsequently learned that Mr. Anderson has been allowed to testify at multiple occasions at permanent total disability hearings with no objection from either the Industrial Commission or employer's counsel. * * * Therefore, the undersigned it [is] at a loss as to why vocational expert testimony was not allowed in Mr. Crawford's case, but was allowed in previous Industrial Commission hearings. The undersigned submits that this constitutes reversible error.

{¶26} 11. On August 5, 2008, the three-member commission mailed an order denying relator's request for reconsideration of the SHO's order of June 26, 2008.

{¶27} 12. Earlier, in July 2008, relator moved for vocational rehabilitation services and for payment of living maintenance benefits.

{¶28} 13. By letter dated July 15, 2008, the managed care organization ("MCO") informed relator that his rehabilitation file was being closed effective July 15, 2008.

{¶29} 14. By letter dated July 21, 2008, relator's counsel administratively appealed the MCO's denial of vocational rehabilitation.

{¶30} 15. The MCO then requested a "peer review" from Micha Daoud, CRC, CLCP, RN. On August 6, 2008, Daoud reported:

Further file notes continue to offer this same information; the IW can lift/carry weight that places him in the sedentary to light range of work, but the IW cannot sit, stand or walk sufficiently for work. The most recent documentation in the file is noted on 3-25-08; vocational summary states that "it remains this counselor's opinion that Mr. Jack Crawford has no return to work potential and that Mr. Crawford is not employable in the local, state or national economies."

According to BWC Guidelines, an IW may be eligible for rehabilitation services, but not feasible for rehabilitation services. This is the case for Mr. Crawford. Although he was found eligible by BWC, he is not feasible, as per BWC Guidelines. These regulations require that there needs to be an expectation that the IW will benefit from services in order to be considered "feasible" for services.

Per BWC Guidelines, Chapter 4, Section F; Item # 2:

"Feasibility for vocational services means that there is a *reasonable probability* that the injured worker will benefit from services at this time and *return to work as a result of the services*. An injured worker may be determined eligible for services but may not be feasible to participate."

Based on this definition of feasibility, the IW is not feasible for rehabilitation services because his limitations of sit, stand and walk do not allow for work, as documented in the file. As a result, since the IW does not have the physical ability to work, there is no "*reasonable probability*" that he will "*return to work as a result of services*." Accordingly, the IW is not feasible for rehab services and the rehab file should remain closed.

In conclusion, although the IW is eligible for rehab services, file documents support that the IW does not have capability for work and will not return to work as a result of services. As a result, according to BWC Guidelines, the IW is not feasible for services and the file should remain closed.

(Emphases sic.)

{¶31} 16. On August 20, 2008, the Ohio Bureau of Workers' Compensation ("bureau") mailed an order indicating that the MCO had referred the dispute over vocational rehabilitation services to the bureau for a determination.

{¶32} Citing Daoud's August 6, 2008 report, the bureau's order denies relator's request for rehabilitation services and holds that the rehabilitation file should remain closed.

{¶33} 17. Relator administratively appealed the bureau's August 20, 2008 order.

{¶34} 18. Following a September 16, 2008 hearing, a district hearing officer ("DHO") issued an order affirming the bureau's order of August 20, 2008. The DHO's order states in part: "The District Hearing Officer relies upon the rehabilitation peer review report of Ms. Daoud dated 08/06/2008 as support for this decision."

{¶35} 19. Relator administratively appealed the DHO's order of September 16, 2008.

{¶36} 20. Following an October 20, 2008 hearing, an SHO issued an order affirming the DHO's order of September 16, 2008. The SHO's order of October 20, 2008 explains:

Therefore, it is the order of the Staff Hearing Officer that the closure of the vocational rehabilitation file was appropriate due to the fact that the Claimant was not feasible for rehabilitation services as he had no return to work potential based upon a comprehensive vocational evaluation dated 03/25/2008.

Accordingly, the decision to close the vocational rehabilitation file is affirmed.

This order is based on the 08/06/2008 report of Ms. Daoud.

{¶37} Earlier, on August 25, 2008, relator, Jack Crawford, filed this mandamus action.

Conclusions of Law:

{¶38} Three issues are presented: (1) whether the commission abused its discretion in its evaluation of relator's work history; (2) whether the commission abused its discretion in addressing relator's efforts, or lack thereof, to obtain vocational rehabilitation; and (3) whether the commission abused its discretion in denying relator's request to permit Mark Anderson to testify at the June 26, 2008 hearing on relator's PTD application.

{¶39} The magistrate finds: (1) the commission did not abuse its discretion in its evaluation of relator's work history; (2) the commission did not abuse its discretion in addressing relator's efforts, or lack thereof, to obtain vocational rehabilitation; and (3) the commission did not abuse its discretion in denying a request to permit Mark Anderson to testify at the June 26, 2008 hearing on relator's PTD application.

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

{¶41} Analysis begins by noting that relator does not here challenge the commission's determination of residual functional capacity. Relator does not challenge the commission's exclusive reliance upon Dr. Scheatzle's reports nor the commission's determination that the industrial injury permits the performance of light and sedentary employment within the restrictions set forth by Dr. Scheatzle in his physical strength rating form. Accordingly, there is no dispute here that relator can perform light work with no overhead lifting with the right arm and no climbing and crawling.

{¶42} Turning to the first issue regarding relator's work history, Ohio Adm.Code 4121-3-34 sets forth the commission's rules applicable to the adjudication of PTD applications. Ohio Adm.Code 4121-3-34(B) sets forth applicable definitions. Ohio Adm.Code 4121-3-34(B)(3) is captioned "Vocational factors." Ohio Adm.Code 4121-3-34(B)(3)(c) is captioned "Work experience." Thereunder are the following definitions:

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

(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.

{¶43} In *State ex rel. Ewart v. Indus. Comm.* (1996), 76 Ohio St.3d 139, 142, the court points out that nonmedical factors are often subject to different interpretations. The court also points out that a claimant's lack of transferable skills does not mandate a PTD award.

{¶44} Here, relator asserts that the commission did a "complete mis-characterization of his past work." (Relator's brief, at 7.)

{¶45} According to relator:

* * * At the risk of over simplifying the matter, Crawford was simply a laborer who had some supervisory responsibilities on occasion. He spent his entire career working outdoors at job sites pumping concrete. The work was extremely heavy

and he was not involved with any of the clerical or non-labor aspects of the job aside from very minimal completion of work logs. To attempt to classify Crawford as something different is complete[ly] contrary to all evidence of record and cannot constitute some evidence as a basis to deny permanent total disability benefits.

Id. at 7-8.

{¶46} To begin, the SHO's order of June 26, 2008 does not find, as relator perhaps suggests, that relator held a clerical job or even that relator actually performed clerical work. Rather, the SHO's order states that claimant has "demonstrated the ability to perform at least some clerical work as demonstrated by the paperwork he had to complete in his former position of employment." Demonstrating an ability to perform clerical work is not the same as working a clerical job. The SHO's statement or finding is as valid a conclusion to draw from the work history as relator's characterization of the work history. *Ewart*.

{¶47} Moreover, contrary to relator's suggestion, the SHO's order of June 26, 2008 does not find that relator possesses skills transferable to light or sedentary work. Rather, the SHO finds the work history to be a "positive vocational factor" because it demonstrates relator's "*ability* to obtain or be re-trained to obtain entry-level light or sedentary work." (Emphasis added.)

{¶48} The SHO also finds that relator "possesses the *necessary* skills to obtain or be trained to obtain basic, entry level light or sedentary work." (Emphasis added.) This finding is made in the paragraph in which relator's education is found to be a "positive vocational factor." The SHO's reference to "necessary skills" need not be read as a reference to "transferability of skills" as defined at Ohio Adm.Code 4121-3-34(B)(3)(c)(iv).

{¶49} Based on the foregoing analysis, the commission clearly did not abuse its discretion in its evaluation of relator's work history.

{¶50} The second issue, as noted earlier, is whether the commission abused its discretion in addressing relator's efforts, or lack thereof, to obtain vocational rehabilitation. The relevant portion of the SHO's order states:

* * * The Claimant last worked in May, 2005. Since that time the Claimant has made no effort to obtain vocational rehabilitation, and indicated in his IC-2 Application that he is not interested in such services. No persuasive explanation has been presented regarding the Claimant's lack of effort to obtain vocational rehabilitation services.

{¶51} In support of relator's claim to a commission abuse of discretion in addressing the absence of an effort to obtain vocational rehabilitation, relator points out that he did seek vocational rehabilitation subsequent to the commission's denial of his PTD application. But there is no evidence in the record showing that relator ever sought vocational rehabilitation until his second PTD application was denied. Obviously, that relator sought vocational rehabilitation subsequent to the denial of his PTD application is not germane to the commission's adjudication of that PTD application. Accordingly, relator's argument lacks merit.

{¶52} The third issue, as earlier noted, is whether the commission abused its discretion in denying relator's request to permit Anderson to testify at the June 26, 2008 hearing.

{¶53} Ohio Adm.Code 4121-3-34(C) provides the commission's rules for the processing of PTD applications. Thereunder, Ohio Adm.Code 4121-3-34(C)(6) provides in part:

(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.

{¶54} Ohio Adm.Code 4121-3-34(C)(7) provides:

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 and total disability, including but not limited to, motions that are filed subsequent to the filing of the application for permanent and 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.

{¶55} Ohio Adm.Code 4121-3-34(C)(8) provides:

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) through (C)(8)(i) 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.

{¶56} Ohio Adm.Code 4121-3-34(C)(9) provides:

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 and total disability shall be submitted to the claim file. If the parties attempt to submit

additional evidence on the issue of permanent and total disability, the evidence will not be admissible on the adjudication of permanent total disability compensation.

{¶57} According to relator, because Anderson has been permitted to testify on behalf of other PTD applicants at their PTD hearings, it was an abuse of discretion for the commission, through its hearing administrator, to deny relator's request to have Anderson testify at relator's PTD hearing. (Relator's brief, at 9.)

{¶58} The commission counters by referring to the provisions of Ohio Adm.Code 4121-3-34(C) quoted above.

{¶59} The commission points out that, under the rules, unless a party notifies the commission within the 14-day period of the party's intent to submit additional vocational information, a party will be deemed to have waived its ability to submit additional vocational information.

{¶60} Apparently, the commission is suggesting that relator failed to timely notify the commission under the rule of his request to have Anderson testify.

{¶61} The commission further points out that, under the rules, relator could have requested a prehearing conference at which his request to have Anderson testify could have been addressed. Relator does not contend that he ever sought a prehearing conference to address his request to have Anderson testify.

{¶62} In his reply brief, relator points out that he did comply with the rule's deadlines for submitting the Anderson reports. Relator argues that he did not intend to submit "new evidence" (or "additional vocational information"), but merely wanted Anderson to be present at the hearing to answer any questions the SHO might have. Id. at 4.

{¶63} Relator claims that it is "inherently unfair" for the commission to permit Anderson to testify at hearings regarding other applicants but to deny his request. Id.

{¶64} Analysis begins with the observation that the commission's rules for the processing of PTD applications, i.e., Ohio Adm.Code 4121-3-34(C), do not directly address a potential request for live testimony at a PTD hearing. The rules do provide for an orderly and timely scheduling of medical examinations and the filing of the medical reports generated by examinations. The rules provide for an orderly and timely submission of vocational reports and information. While Ohio Adm.Code 4121-3-34(C)(8)(h) addresses "deposition requests," there is no rule provision directly addressing a potential request for live testimony at a hearing.

{¶65} It can be safely stated that no statute or rule provides an applicant the absolute right to submit live testimony from a vocational expert at a PTD hearing. Only the provision for a prehearing conference potentially offers an administrative vehicle for addressing a request for leave to submit live testimony at a hearing.

{¶66} Given that relator failed to seek a prehearing conference under Ohio Adm.Code 4121-3-34(C)(7) to address his request to submit live testimony from Anderson at the hearing, it cannot be successfully argued that the commission abused its discretion in denying the request under the circumstances here.

{¶67} 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/ Kenneth W. Macke
KENNETH W. MACKE
MAGISTRATE

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).