[Cite as *State ex rel. Jeld-Wen, Inc. v. Indus. Comm.*, 2023-Ohio-2593.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Jeld-Wen, Inc.,	:	
Relator,	:	No. 21AP-357
v.	:	(REGULAR CALENDAR)
Industrial Commission of Ohio et al.,	:	
Respondents.	:	

D E C I S I O N

Rendered on July 27, 2023

On brief: *Garvin & Hickey LLC*, *Niki K. Mitusev*, *Preston J. Garvin*, and *Michael J. Hickey*, for relator.

On brief: *Dave Yost,* Attorney General, and *Denise A. Gary,* for respondent Industrial Commission of Ohio.

On brief: *Nager, Romaine & Schneiberg Co. LPA*, *Jerald A. Schneiberg*, and *Erin E. Karsi*, for respondent Steven A. Totten.

IN MANDAMUS
ON OBJECTIONS TO MAGISTRATE'S DECISION

BEATTY BLUNT, P.J.

{¶ 1} Relator, Jeld-Wen, Inc. ("Jeld-Wen"), has filed this original action requesting that this court issue a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its April 7, 2020 order that granted the request of respondent, Steven A. Totten ("Totten"), for temporary total disability compensation.

{¶ 2} On May 13, 2019, respondent Totten injured his right hand in the course of his employment with relator. Jeld-Wen is a self-insured employer, and recognized Totten's claim for injuries. Subsequently, Totten sought continuing temporary total benefits for the

same injury from October 4, 2019 onward. After a hearing on February 11, 2020, the commission's district hearing officer issued an order granting Totten's temporary total benefits, and Jeld-Wen appealed. On April 2, 2020, the commission's reviewing staff hearing officer held a hearing, and by an order issued April 7, 2020 continued Totten's temporary total benefits. Jeld-Wen again appealed, but on April 24, 2020, the commission refused the appeal.

{¶ 3} Jeld-Wen subsequently filed the instant petition for writ of mandamus, and pursuant to Civ.R. 53 and Loc.R. 13(M) of the Tenth District Court of Appeals, this matter was referred to a magistrate. The magistrate considered the action on its merits and issued a decision, including findings of fact and conclusions of law, which is appended hereto. The magistrate concluded that the commission did not abuse its discretion by granting Totten temporary total disability compensation as there was some evidence to support that decision, and recommended this court deny Jeld-Wen's request for a writ of mandamus.

{¶ 4} The magistrate observed that Totten's May 13, 2019 injury was sustained "in the course of and arising out of his employment when his [right] hand was caught between a conveyor and outfeed table on a patio door cleaner." (Aug. 23, 2022 Mag.'s Decision Findings of Fact at ¶ 1.) After an absence, Totten returned to work on August 11, 2019 and was assigned "light-duty work pulling balances and/or bagging dust plug kits." (Findings of Fact at ¶ 3.) But after working less than one week, Totten "was experiencing throbbing pain in his right fourth finger and was examined by Dr. [Nancy] Rodway," who initially removed him from work entirely but then allowed him to return on August 15, 2019 "with a complete restriction from using his right hand." (Findings of Fact at ¶ 4.) The magistrate found (and Jeld-Wen has not disputed) that there is no evidence in the record that it changed Totten's light-duty job duties as a result of this restriction. *Id.* Dr. Rodway continued this restriction after an examination on October 3, 2019, but on October 5, 2019, Totten stopped working, because "the offered employment required him to use his right hand, which was contrary to Dr. Rodway's restrictions. (Findings of Fact at ¶ 7.) On October 31, 2019, Totten was examined by a new physician, Dr. Michael Novak, who completely removed Totten from work from October 4, 2019 through January 15, 2020, based on Totten's inability to perform the light-duty work that had been offered. On January 21, 2020, Totten was examined by Dr. Matthew McDaniel, who concluded that

Totten could have performed the light-duty work as of October 4, 2019, in part because Totten had been performing that work between August 15 and October 4. (Findings of Fact at ¶ 12.) But after the hearing on February 11, 2020, the Industrial Commission's District Hearing Officer concluded both that Dr. Rodway had restricted Totten from using his right hand, and that the light-duty work offered by Jeld-Wen *required* Totten to use his right hand. (Findings of Fact at ¶ 13.) The commission's staff hearing officer similarly concluded that Totten's hearing testimony "was persuasive regarding his inability to continue to perform the light-duty job duties offered due to his ongoing pain and contractures," that Totten testified at the hearing "he had to use two hands to do the light-duty jobs and described the jobs," and that although Jeld-Wen "did provide light-duty work, it just could not be performed on a sustained basis due to the severity of [Totten's] injuries." (Findings of Fact at ¶ 14.)

{¶ 5} Jeld-Wen has now filed timely objections to the magistrate's decision, as follows:

> 1. The Magistrate Erred in Finding That Respondent Totten Stopped Working on October 5, 2019, Due to the Fact That the Offered Employment Required Him to use his Right Hand.
>
> 2. The Magistrate Erred in Finding That There was Some Evidence in the Record That the Light Duty Work Offered by the Employer was not Within the Physical Capabilities of Claimant as of October 4, 2019, and is Contrary to Law [sic].
>
> 3. The Magistrate Erred in Finding that "nowhere in Dr. Rodway's report does she indicate that claimant should be able to perform his offered job with only one hand."

{¶ 6} An employer seeking a writ of mandamus who contends that the commission's decision to grant benefits was not supported by sufficient evidence must demonstrate that the commission abused its discretion. "For more than fifty years, the 'some-evidence' rule, although not always referred to by that name, has been recognized as the rule to be applied in determining whether there has been an abuse of discretion with respect to factual matters." *E.g., State ex rel. Johnson v. Indus. Comm. of Ohio*, 11 Ohio App.3d 22, 23 (10th Dist.1983) (citing cases). "[T]he mandamus determination must be predicated upon a finding whether or not there is evidence to support the findings of the Industrial Commission, not whether this court agrees with those findings." *Id.*, citing *State*

ex rel. Questor Corp., v. Indus. Comm., 70 Ohio St.2d 240 (1982). The presence of contrary evidence is not dispositive, so long as the "some evidence" standard has been met. *State ex rel. Am. Std., Inc. v. Boehler*, 99 Ohio St.3d 39, 2003-Ohio-2457, ¶ 29. " 'Where there is no evidence upon which the commission could have based its factual conclusion an abuse of discretion is present and mandamus is appropriate.' " *State ex rel. Teece v. Indus. Comm.*, 68 Ohio St.2d 165, 167 (1981), quoting *State ex rel. Kramer v. Indus. Comm,* 59 Ohio St.2d 39, 42 (1979).

{¶ 7} Jeld-Wen argues that all of the doctors who reviewed Totten's injury indicated he was capable of performing certain light-duty work, that it offered Totten light-duty work as suggested, that the light-duty work offered was capable of being performed with one hand, and that the staff hearing officer and the magistrate therefore erred in concluding that Totten was incapable of sustained performance of the light-duty work that was offered. In its first objection, Jeld-Wen argues that the magistrate's factual finding that "on October 5, 2019, [Totten] stopped working due to the fact that the offered employment required him to use his right hand" was unsupported by any evidence. In its second objection, Jeld-Wen argues that there was no evidence to support the magistrate's finding that the light-duty work offered to him on October 4, 2019 was not within his medical restrictions. In its third objection, Jeld-Wen argues that the magistrate erred by concluding that "nowhere in Dr. Rodway's reports does she indicate that claimant should be able to perform his offered job with only one hand," as the record established that light-duty work was within the medical restrictions that had been ordered by Dr. Rodway. (Mag.'s Decision at ¶ 35.)

{¶ 8} We have reviewed the record provided and have reached the inescapable conclusion that there is "some evidence" in the record to support the commission's orders. Jeld-Wen's essential argument in all three objections boils down to the unspoken claim that Totten should have been able to perform the light-duty work it offered him on a sustained basis with a single hand. The record clearly establishes that following her evaluation of Totten on October 3, 2019, Dr. Rodway concluded that she was "unable to advance the restrictions of this injured worker as he continues to have contractures and he has not received any therapy. *I will continue him on 'no use of right hand.*' " (Emphasis added.) (Oct. 3, 2019 Report of Dr. Rodway at 2; Oct. 18, 2021 Stipulation of Evidence at 37.) Dr.

Novak's October 31, 2019 report indicated that "[d]ue to current allowed conditions [Totten] is unable to work at this time even light duty * * * [Totten] was trying to work under conditions outlined above light duty but over the past few weeks due to pain and type of work was unable to perform due to pain and worsening of contractures." (Oct. 31, 2019 Report of Dr. Novak at 2; Stipulation of Evidence at 45). Notably, Jeld-Wen did not provide any evidence—such as testimony from an occupational specialist—that its light-duty work could be performed with a single hand, and it is undisputed that Totten himself testified that the light-duty work required him to use his right hand. Although Dr. McDaniel disagreed with Dr. Rodway's "no use of right hand" restriction, the record is clear that both Dr. Rodway and Dr. Novak believed that restriction was appropriate. In light of this other evidence, the district hearing officer and staff hearing officer were free to give Dr. McDaniel's conclusion that Totten could perform light-duty work appropriate weight in view of Totten's testimony and the other evidence in the record.

{¶ 9} For these reasons, there is undoubtedly "some evidence" supporting the findings of the commission, and we have found no error in the magistrate's findings of fact or conclusions of law. Therefore, we overrule all three of Jeld-Wen's objections to the magistrate's decision and adopt that decision as our own, including the findings of fact and the conclusions of law therein. Jeld-Wen has failed to demonstrate it is entitled to extraordinary relief, and in accordance with the magistrate's decision, the requested writ of mandamus is denied.

Objections overruled;
writ of mandamus denied.

LUPER SCHUSTER and EDELSTEIN, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Jeld-Wen, Inc.,	:	
Relator,	:	
v.	:	No. 21AP-357
Industrial Commission of Ohio et al.,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on August 23, 2022

Garvin & Hickey LLC, Niki K. Mitusev, Preston J. Garvin, and *Michael J. Hickey,* for relator.

Dave Yost, Attorney General, and *Denise A. Gary,* for respondent Industrial Commission of Ohio.

Nager, Romaine & Schneiberg Co. LPA, Jerald A. Schneiberg, and *Erin E. Karski,* for respondent Steven A. Totten.

IN MANDAMUS

{¶ 10} Relator, Jeld-Wen, Inc. ("employer"), has filed this original action requesting this court issue a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its April 7, 2020, order that granted the request of respondent, Steven A. Totten ("claimant"), for temporary total disability ("TTD") compensation.

Findings of Fact:

{¶ 11} 1. On May 13, 2019, claimant sustained an injury in the course of and arising out of his employment when his hand was caught between a conveyor and outfeed table on a patio door cleaner. His workers' compensation claim was allowed for the following conditions: right hand and wrist sprain; right hand crush injury; right hand open wound with complications; denuded skin; right ring finger abrasion; right little finger abrasion; boutonniere deformity right fourth and fifth fingers; strain of extensor tendon right four and fifth; central slip injury right ring finger; and PIP flexion contracture right small finger.

{¶ 12} 2. Claimant was initially off work. In an August 8, 2019, MEDCO-14, Nancy Rodway, M.D., indicated that claimant could perform light-duty work commencing August 9, 2019, with restrictions on his right hand of no lifting greater than seven pounds and no "power grip."

{¶ 13} 3. Claimant returned to work on or about August 11, 2019, and was assigned light-duty work pulling balances and/or bagging dust plug kits.

{¶ 14} 4. On August 13, 2019, after working less than one week, claimant was experiencing throbbing pain in his right fourth finger and was examined by Dr. Rodway, who issued a MEDCO-14 and changed the restrictions on his right hand. Dr. Rodway removed him completely from work on August 14, 2019, but allowed him to return to work on August 15, 2019, with a complete restriction from using his right hand. This new restriction was e-mailed to the employer, but there was no evidence that the employer changed claimant's light-duty job duties.

{¶ 15} 5. Claimant returned to work on August 15, 2019.

{¶ 16} 6. On October 3, 2019, Dr. Rodway examined claimant and issued a MEDCO-14 on the same date, in which she continued claimant's restrictions through November 3, 2019, and allowed him to continue light-duty work, with a restriction from using his right hand. Dr. Rodway noted claimant had further finger contracture and some swelling in his right hand. In her office report of the same date, Dr. Rodway indicated she was unable to advance the restrictions because he continued to have contractures. He did not see Dr. Rodway again.

{¶ 17} 7. Claimant worked his light-duty assignment on October 3 and 4, 2019. However, on October 5, 2019, claimant stopped working due to the fact that the offered

employment required him to use his right hand, which was contrary to Dr. Rodway's restrictions.

{¶ 18} 8. On October 31, 2019, claimant filed a notice of change physician of record, in which he changed his physician of record from Dr. Rodway to Michael Novak, D.C.

{¶ 19} 9. On October 31, 2019, Dr. Novak examined claimant. Dr. Novak noted that claimant had been performing light-duty work that included repetitive use of fine motor skills with his right hand, but he had been unable to perform the work over the prior few weeks due to worsening pain and contractures. On November 5, 2019, Dr. Novak issued a MEDCO-14, in which he completely removed claimant from work from October 4, 2019, through January 15, 2020, based upon claimant's inability to perform the light-duty work.

{¶ 20} 10. On November 11, 2019, claimant filed a C-86 motion, requesting TTD compensation from October 4, 2019, and continuing.

{¶ 21} 11. On January 10, 2020, Dr. Novak issued a MEDCO-14, in which he continued claimant's inability to work until April 15, 2020.

{¶ 22} 12. On January 21, 2020, claimant underwent an independent medical examination by Matthew McDaniel, M.D. In his January 23, 2020, report, Dr. McDaniel found the following: (1) claimant could have continued to work the light-duty position as of October 4, 2019; (2) an isolated hand injury would not preclude a person from working with restrictions; (3) he was working prior to October 4, 2019; (4) the restrictions outlined in the August 8, 2019, light-duty offer were appropriate; (5) the October 16, 2019, hand surgery evaluation encouraged use of the upper extremities as part of the recovery process; (6) why the chiropractor took claimant off work is not explained; (7) because the hand surgeon recommended use of the hand as part of rehabilitation, it is difficult to justify not performing light-duty work; (8) the presentation of the claim allowances would preclude full-duty work and returning to his former position of employment; (9) claimant can perform light-duty work; and (10) the claim allowances are not at maximum medical improvement ("MMI") and should be assessed after consultation with the hand surgeon.

{¶ 23} 13. On February 11, 2020, a hearing was held before the district hearing officer ("DHO") on claimant's motion for TTD compensation. In a February 14, 2020, order, the DHO granted TTD compensation from October 4, 2019, through February 11, 2020, and to continue with submission of supporting medical proof, finding the following:

(1) Dr. McDaniel indicated in his January 23, 2020, report that claimant is precluded from returning to full duty work and has not reach MMI; (2) claimant did not voluntarily abandon his light-duty job when he stopped working on October 4, 2019, because claimant was medically precluded from performing the light-duty job offered by the employer due to its being outside of his medical restriction; (3) Dr. Rodway's October 3, 2019, MEDCO-14 and office record indicates claimant cannot use his right hand; (4) the evidence in the record and presented at the hearing indicate that the light-duty job offered required the use of claimant's right hand; (5) the light-duty job description filed February 11, 2020, clearly contemplates the use of the right hand; (6) claimant testified at the hearing that the light-duty job required use of his right hand, and his injured fingers began swelling; and (7) the order is based on the October 3, 2019, MEDCO-14. The employer appealed.

{¶ 24} 14. On April 2, 2020, a hearing was held before a staff hearing officer ("SHO"). In an April 7, 2020, order, the SHO modified the DHO's order, finding the following: (1) only Dr. Rodway's August 8, 2019, MEDCO-14 restrictions were in place when the employer made its light-duty offer; (2) claimant returned to work, pulling balances and bagging dust-plug kits; (3) Dr. Rodway's August 13, 2019, office record indicates that, after less than one week of working the light-duty job, claimant's right finger was throbbing in pain, prompting Dr. Rodway to take claimant off work that night and release him to work the next day with no use of his right hand; (4) Dr. Rodway's August 13, 2019, office note indicates that the change of restriction was emailed to the employer; (5) there is no contemporaneous MEDCO-14 with this restriction and no paperwork from the employer indicating any change to claimant's light-duty job duties; (6) per the testimony of a representative of the employer, both light-duty jobs could be performed with one hand; (7) although claimant testified that he could not do the work with one hand, the fact is that the employer was providing this work for use with only one hand; (8) Dr. Rodway's October 3, 2019, office note indicates that claimant was performing light-duty, one-handed work; (9) thus, claimant was working employer-provided light-duty work within the restrictions outlined by Dr. Rodway's August 13, 2019, office note; (10) Dr. Rodway stated in her October 3, 2019, note that claimant was missing work a lot in September due to pain, and she could not advance the restrictions due to claimant's contractures, noting that his grip strength has weakened significantly; (11) on the next day, October 4, 2019, claimant stopped showing up for work, with no call-in; (12) claimant never saw Dr. Rodway again

and changed to Dr. Novak, seeing him for the first time on October 31, 2019; (13) Dr. Novak's record on that date indicated claimant could not perform the light-duty work without using his right hand and experiencing pain, and he testified at the hearing to the same; (14) Dr. Novak took claimant completely off work at that point; (15) the offered jobs could be worked using one hand starting after August 13, 2019, and claimant continued working this light-duty capacity, thereby accepting this offered work through October 3, 2019; (16) claimant's testimony established entitlement to TTD compensation as of October 4, 2019; (17) Dr. Rodway did not remove claimant from work on October 3, 2019, but she did extend his restrictions through November 13, 2019; it was claimant who removed himself from work; (18) claimant did not see Dr. Novak until October 31, 2019; (19) claimant's testimony was persuasive regarding his inability to continue to perform the light-duty job duties offered due to his ongoing pain and contractures; (20) claimant testified that he had to use two hands to do the offered light-duty jobs and described the jobs; (21) because claimant could no longer physical perform the light-duty work under the restrictions from Dr. Rodway, he is entitled to TTD compensation; (22) the employer did provide light-duty work, it just could not be performed on a sustained basis due to the severity of the claimant's injuries; and (23) TTD compensation is to be paid from October 4, 2019, to October 30, 2019, based on Dr. Rodway's October 3, 2019, MEDCO-14 and from October 31, 2019, to April 2, 2020, based on Dr. Novak's November 5, 2019, and January 10, 2020, MEDCO-14s. The employer appealed.

{¶ 25} 15. On April 24, 2020, the commission issued an order refusing the employer's appeal.

{¶ 26} 16. On July 20, 2021, the employer filed a complaint for writ of mandamus, requesting that this court vacate the commission's order that granted claimant TTD compensation.

Conclusions of Law and Discussion:

{¶ 27} The magistrate recommends that this court deny the employer's writ of mandamus.

{¶ 28} In order for this court to issue a writ of mandamus, a relator must ordinarily show a clear legal right to the relief sought, a clear legal duty on the part of the respondent

to provide such relief, and the lack of an adequate remedy in the ordinary course of the law. *State ex rel. Pressley v. Indus. Comm.*, 11 Ohio St.2d 141 (1967).

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

{¶ 30} TTD compensation awarded pursuant to R.C. 4123.56 is compensation for wages lost when a claimant's injury prevents a return to the former position of employment. Upon that predicate, TTD compensation shall be paid to a claimant until one of four things occurs: (1) the claimant has returned to work; (2) the claimant's treating physician provides a written statement that the claimant is able to return to the former position of employment; (3) work within the physical capabilities of the claimant is made available by the employer or another employer; or (4) the claimant has reached maximum medical improvement. R.C. 4123.56(A); *State ex rel. Ramirez v. Indus. Comm.*, 69 Ohio St.2d 630 (1982).

{¶ 31} Ohio Adm.Code 4121-3-32(B) provides, in pertinent part:

> (B)
>
> (1) Temporary total disability may be terminated by a self-insured employer or the bureau of workers' compensation in the event of any of the following:
>
> (a) The employee returns to work.
>
> (b) The employee's treating physician finds that the employee is capable of returning to his former position of employment or other available suitable employment.
>
> (c) The employee's treating physician finds the employee has reached maximum medical improvement.

{¶ 32} Ohio Adm. Code 4123-5-18, entitled Medical Proof Required for Payment of Compensation, provides, in pertinent part:

> (A) Except as provided in paragraph (E) of this rule and paragraph (B)(1)(b) of rule 4123-3-09 of the Administrative Code, no payment of compensation shall be approved by the bureau of workers' compensation in a claim unless supported by a report of a physician duly licensed to render the treatment.
>
> (B) When evaluating the sufficiency of medical proof, the following criteria shall be considered:
>
> (1) The nature and type of injury or occupational disease;
>
> (2) The consistency of the diagnosis with the description of events resulting in the injury or occupational disease, as shown by proof of record;
>
> (3) Whether the disability is based solely on the condition or conditions for which the claim is recognized;
>
> (4) Whether the disability is based on objective symptoms of disability as a direct result of the injury or occupational disease in the respective claim; "objective symptoms" means those signs and indications which are discovered from an examination of the claimant, as distinguished from subjective symptoms which are reported by the claimant;
>
> (5) Whether a reason or reasons for the medical opinion are stated.
>
> * * *
>
> (E) Notwithstanding paragraph (A) of this rule:
>
> (1) During the first six weeks after the date of injury, medical reports on form MEDCO-14 or equivalent completed and signed by a physician, certified nurse practitioner, clinical nurse specialist, or physician assistant who has examined the claimant may be considered sufficient medical proof to support payment or non-payment of disability for no more than six weeks of disability.

{¶ 33} In the present case, the employer argues that the commission's order awarding TTD compensation based upon claimant's opinion rather than the contrary

opinion of his physician was an abuse of discretion and violated Ohio law. The employer asserts that it is clear from R.C. 4123.56(A) that the treating physician should make the determination of whether an employee is capable of performing the work that was offered by the employer. The employer points to the October 3, 2019, report of Dr. Rodway, in which Dr. Rodway acknowledged that claimant had been working light-duty, one-handed work and continued to restrict him to no use of the right hand. The employer points out that, pursuant to Ohio Adm.Code 4121-3-32(B), it could unilaterally terminate TTD upon a finding by the treating physician that the worker is capable of performing the work offered, which is what Dr. Rodway found. The employer contends the commission could not ignore the opinion of Dr. Rodway and rely upon claimant's unsubstantiated testimony that he could not perform the job offered by the employer. The employer argues that Ohio Adm.Code 4123-5-18 becomes meaningless if a claimant, without supporting medical proof, can decide that he is not capable of performing the offered job, and, here, there is no supporting medical proof from an examining physical finding that claimant could not perform the one-handed work offered by the employer.

{¶ 34} After a review of the commission's orders and the evidence presented to the commission, the magistrate finds there was some evidence to support the commission's orders, and the commission did not abuse its discretion when it granted TTD compensation. Although R.C. 4123.56(A) does provide that TTD may be paid until the treating physician provides a written statement that the claimant is able to return to the former position of employment, here, it is undisputed that claimant could not return to his former position of employment, but alternative light-duty work was offered. In such a case, R.C. 4123.56(A) also provides that that TTD may be paid until work within the physical capabilities of the claimant is made available by the employer. Here, there was some evidence in the record that the light-duty work offered by the employer was not within the physical capabilities of claimant as of October 4, 2019. Initially, Dr. Novak's October 31, 2019, report supported the commission's determination. Dr. Novak noted in his report that claimant had been performing light-duty work that included repetitive use of fine motor skills with his right hand, but he had been unable to perform the work over the prior few weeks due to worsening pain and contractures. Dr. Novak then issued November 5, 2019, and January 10, 2020, MEDCO-14s, in which he completely removed claimant from work starting October 4, 2019, through April 15, 2020, based upon claimant's inability to perform

the offered light-duty work. Thus, there was some evidence in the medical record to support the commission's determination.

{¶ 35} Notwithstanding, the employer's argument in mandamus focuses on the commission's reliance on claimant's testimony regarding his inability to perform the offered light-duty work with one hand. Although, initially, claimant was able to perform the light-duty requirements, he testified that the job actually required two hands, and Dr. Rodway had specifically restricted his use to one hand. Dr. Rodway noted claimant's increasing pain in his right hand while performing the offered light-duty job, and the record is clear that claimant was experiencing increasing difficulty in performing his offered work. Noteworthy is that nowhere in Dr. Rodway's reports does she indicate that claimant should be able to perform his offered job with only one hand. No other physician made such a finding either. Dr. Rodway merely indicated in her October 3, 2019, report that claimant could continue to perform tasks that required only one hand. Thus, claimant's testimony that he could not perform the offered job with just one hand did not conflict with any medical evidence. Given the state of the record, the commission was well within its discretion to rely upon claimant's testimony that the offered employment required the use of his injured right hand, and he was not able to perform it. It is well-established that it is not an abuse of discretion for the commission to rely on claimant's testimony and to find it both credible and persuasive. Questions of credibility and the weight to be given evidence are clearly within the discretion of the commission as fact finder, *State ex rel. Teece v. Indus. Comm.*, 68 Ohio St.2d 165 (1981), and the commission is the exclusive evaluator of the weight and credibility of the evidence. *State ex rel. LTV Steel Co. v. Indus. Comm.*, 88 Ohio St.3d 284, 287 (2000). Furthermore, it is immaterial whether other evidence, even if greater in quality and/or quantity, supports a decision contrary to the commission's decision. *State ex rel. Pass v. C.S.T. Extraction Co.*, 74 Ohio St.3d 373, 1996-Ohio-126 (1996). Thus, even if claimant's testimony conflicted with Dr. Rodway's report, which is not the magistrate's finding, the commission could rely on claimant's testimony. See *State ex rel. Mobley v. Indus. Comm.*, 78 Ohio St.3d 579, 584 (1997) (finding when an order is adequately explained and based on some evidence, even if other evidence of record may contradict it, there is no abuse of discretion, and a reviewing court must not disturb the order).

{¶ 36} As explained above, pursuant to R.C. 4123.56(A), when an employer is unable or unwilling to offer employment within the worker's physical restrictions, TTD compensation may be awarded. The commission found such was the case here, based upon claimant's testimony and Dr. Novak's reports. Thus, there was some evidence to support the commission's determination granting TTD compensation, and the commission's order was not an abuse of discretion.

{¶ 37} Accordingly, it is the magistrate's recommendation that this court should deny the employer's complaint for writ of mandamus.

/S/ MAGISTRATE
THOMAS W. SCHOLL III

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).