



("commission") to vacate its order denying him permanent total disability ("PTD") compensation and to enter an order granting said compensation.

{¶2} This matter was referred to a magistrate of this court pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate examined the evidence and issued a decision, including findings of fact and conclusions of law, which is appended to this decision. Therein, the magistrate concluded the commission did not abuse its discretion in denying relator's request for PTD compensation. Therefore, the magistrate recommended that this court deny the requested writ of mandamus.

{¶3} Relator filed objections to the magistrate's report, but, upon review, the arguments contained in relator's objections are essentially the same issues raised to and addressed by the magistrate. For the reasons set forth in the magistrate's decision, we do not find relator's objections to be well-taken.

{¶4} Following an independent review of this matter, we find that the magistrate has properly determined the facts and applied the appropriate law. Therefore, relator's objections to the magistrate's decision are overruled, and we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein. In accordance with the magistrate's decision, we deny the requested writ of mandamus.

*Objections overruled; writ of mandamus denied.*

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

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**APPENDIX**

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Thomas L. Shepard,	:	
	:	
Relator,	:	
	:	
v.	:	No. 09AP-675
	:	
Industrial Commission of Ohio and	:	(REGULAR CALENDAR)
Siemens Energy & Automation, Inc.,	:	
	:	
Respondents.	:	
	:	

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MAGISTRATE'S DECISION

Rendered on January 14, 2010

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*Roeller & Roeller, LLC, and Robert K. Roeller, for relator.*

*Richard Cordray, Attorney General, and LaTawnda N. Moore, for respondent Industrial Commission of Ohio.*

*Scheuer Mackin & Breslin LLC, Edna Scheuer, Michael A. Moskowitz and Nicole R. Hunter, for respondent Siemens Energy and Automation, Inc.*

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IN MANDAMUS

{¶5} Relator, Thomas L. Shepard, has filed this original action requesting that this court issue a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order which denied his application for permanent total

disability ("PTD") compensation and ordering the commission to find that he is entitled to that compensation.

Findings of Fact:

{¶6} 1. Relator sustained a work-related injury on August 18, 1987, and his workers' compensation claim has been allowed for the following conditions: "strain low back; chronic herniated lumbar disc syndrome and chronic pain syndrome."

{¶7} 2. According to his PTD application, relator has not worked since 1993.

{¶8} 3. On July 3, 2000, John P. Kilcher prepared an employability assessment report for the commission. At the time, relator's treating physician, Gary A. Shearer, M.D., was already opining that relator was permanently and totally disabled. Arnold R. Penix, M.D., examined relator and submitted a report indicating that relator was capable of engaging in light-duty work on a sustained remunerative basis. Mr. Kilcher ultimately concluded that relator could perform entry-level jobs that would be within his reduced residual functional capacity and did not require writing.

{¶9} 4. Relator was examined by Benjamin M. Hayek, M.D., to determine whether or not the continued use of medications was medically necessary and causally related to the work injury. Dr. Hayek provided a synopsis of the medical records he reviewed beginning in September 1987: (1) In November 1987, Dr. Thomas Maynard indicated that there was either malingering from a previous industrial injury or that relator's pains were psychotropic in nature; (2) In February 1988, Dr. James Sammarco noted that relator only gets pain when sitting for prolonged periods of time or when he moves too quickly; (3) A CT scan was normal and a lumbar corset was recommended. It was also noted that, at times, relator was taking three psychotropic drugs and that, in

1990, he was placed on Darvocet and Restoril; (4) A June 1990 CT scan of the lumbar spine showed right lateral extrusion of the L5-S1 disc; however, because relator's complaints of pain were on the left, there was no clinical correlation between the symptoms and the CT findings; (5) An MRI of the lumbar spine indicated focal right paramedian L4-L5 subligamentous disc protrusion, but no evidence of neural impingement; (6) Relator was seen by Dr. Ray in December 1990 and he could not document any objective evidence of an abnormality of relator's lumbosacral spine and could not ascertain the etiology of relator's left lower quadrant pain; (7) A clinical examination by Dr. Michael Kramer in April 1991 was normal and he was unable to find any clear-cut evidence of a nerve root problem. Dr. Kramer recommended an MRI scan of the thoracic spine which did show degenerative disc disease at T7 and T8, but was otherwise negative; (8) A specialist report from Dr. Arthur Hughes from October 1993 indicated that relator should have a lifting restriction of 50 pounds occasionally and 35 pounds regularly. Further, Dr. Hughes noted that there was evidence of symptom magnification and that other examiners had also noted substantial discrepancies between relator's complaints and lack of significant findings on examination; and (9) In March 1994, Dr. Steven Wunder examined relator and concluded that, from an orthopedic standpoint, relator could return to the essential job functions of his prior job; however, from a mental or psychological standpoint, he concluded that the various psychotropic medications and analgesics, including narcotics, rendered him unfit for duty.

{¶10} Ultimately, Dr. Hayek concluded that relator's continued use of narcotics was not causally related to nor justified by the allowed conditions in the claim.

{¶11} 5. Relator was examined on October 12, 2007 by Thomas A. Bender, M.D., who authored a report dated February 20, 2008. In his report, Dr. Bender noted that relator had been a diabetic for ten years; was diagnosed with poor circulation; suffered migraine headaches; had right shoulder dysfunction; and had symptoms suggestive of carpal tunnel syndrome. Dr. Bender also noted the results of several other medical examinations as Dr. Hayek had done. Further, noting that the most recent record available from Dr. Shearer was from October 2007, Dr. Bender noted that, at that time, Dr. Shearer diagnosed lumbar disc herniation, insomnia, anxiety, bilateral sacroiliitis, chronic lumbar myositis, and chronic spondylitis. Dr. Bender also noted that the most recent MRI showed bulges at L4-L5 without nerve root impairment and that, at L5-S1, there was lateralization towards the right, displacing the right S1 nerve root. Dr. Bender indicated that these results did not explain relator's left lower leg complaints. Dr. Bender provided his physical findings upon examination and concluded that relator no longer suffered from herniated lumbar disc syndrome, but, obviously, he had dysfunction in his cervical spine, lumbar spine, and right shoulder. He also concluded that continued use of Duragesic patches was neither reasonable nor medically necessary and that long-term narcotic preparations were inappropriate. He agreed with Drs. Feibel, Kramer, Wunder, Hughes, and Kissel who found a lack of correlation in relator's physical findings, symptom magnification, or maladaptive pain responses.

{¶12} 6. On March 31, 2008, Dr. Shearer prepared a one-paragraph report indicating that relator was permanently and totally disabled and that both the Duragesic patches and narcotic pain medication were necessary to control his pain.

{¶13} 7. On April 8, 2008, relator filed an application for PTD compensation.

{¶14} 8. A May 30, 2008 office note from Dr. Shearer indicated that relator spends most of his time in bed, his pain level is an eight out of ten, and he gets 100 percent pain relief with his pain medication.

{¶15} 9. Relator was again examined by Dr. Bender on July 18, 2008 and his report is dated August 20, 2008. Dr. Bender indicated that, at this time, relator described back pain, left leg irritability, right buttock irritability, neck discomfort, bilateral shoulder dysfunction, paraesthesias into the right arm, and bilateral knee dysfunction. Dr. Bender noted that the most recent record from Dr. Shearer was dated May 30, 2008 and indicated diagnoses of lumbar spondylosis, anxiety and depression. Considering relator's most recent MRI, relator no longer had evidence of a chronic herniated lumbar disc but, at most, a bulging disc at L4-L5 and L5-S1 existed. Dr. Bender indicated that relator's low back strain had long since resolved and that relator's conditions were now at maximum medical improvement ("MMI"). Dr. Bender opined that relator was not permanently removed from all forms of sustained gainful employment and that he could return to a medium demand level of physical involvement provided he not be required to lift greater than 25 pounds or reach below thigh or above shoulder level more than 6 times per hour. Dr. Bender also opined that, in his opinion, relator no longer required ongoing treatment for his allowed conditions.

{¶16} 10. Relator was examined by Andrew Freeman, M.D., on September 8, 2008. In his report, Dr. Freeman provided a brief synopsis of relator's previous care and identified the medical records he reviewed. During his physical examination, Dr. Freeman observed three out of five Waddell's signs which can indicate symptom exaggeration. Further, the Patrick's (Faber) test was equivocal on the left. Dr. Freeman provided his

physical findings upon examination, concluded that relator's allowed conditions had reached MMI, assessed an eight percent whole person impairment, and opined that relator was capable of performing at a sedentary work level.

{¶17} 11. Respondent Siemens Energy & Automation, Inc. ("employer"), contacted the Expediter Corporation ("Expediter") to assist relator in a return to gainful employment. In a letter dated November 3, 2008, relator was notified that a telephone interview would take place for a home based position. The letter described the job as follows:

**JOB DUTIES AND RESPONSIBILITIES:** The Customer Service / Surveyor job is an entry level, home-based position defined as unskilled and sub-sedentary. It requires no prior work experience, specialized educations or transferable skills. The position requires business to business and customer service telephone calls to gather and verify information. The position requires no sales or solicitation. The employee will forward completed paperwork to the employer on a bi-weekly basis. Full training will be provided for this position. **Writing required:** Intermittent writing over an 8 hour period includes completing a minimum of 5 surveys per hour. Completion of survey involves name & address verification as well as completion of several short questions. Employee also required to track number of calls on a daily log sheet, which involves circling numbers and making hash marks[.] **Hourly qualifier:** 30 minutes of contacts for each hour worked which will result in the completion of a minimum of 5 surveys for each hour worked. **This position is working 8-hour shifts, 40 hours per week. Employee is not to exceed 8 hours in any one day or 40 hours in any one week. Flextime schedules are available for all employees.**

**Accommodations:** Cordless telephone with a headset provided to all employees. Accommodations are available as medically required for any physical limitation including quadriplegia. **Please contact Expediter for a complete list of accommodations that may be available. The employer**

**is aware of and willing to accommodate physical limitations.**

**LIFTING/CARRYING MAXIMUM POUNDS: less than 5 pounds occasionally (0-33%)**[.]

(Emphases sic.)

{¶18} 12. In a supplemental report, Dr. Bender reviewed the above job description and concluded that relator could perform the job.

{¶19} 13. On November 6, 2008, Dr. Shearer indicated that relator's condition had remained unchanged, that he suffers from chronic pain syndrome, strain low back, and chronic herniated lumbar disc syndrome. He provided physical findings upon examination, stated that relator was unable to sit or stand for more than 10 to 15 minutes at a time, and was basically bedridden and unable to perform any type of work.

{¶20} 14. In a letter dated November 7, 2008, counsel for the employer formerly offered relator the home based position as a Customer Service/Surveyor and indicated that the position was entirely sub-sedentary, and that no standing, walking, lifting, bending, carrying, or any other physical labor was required. The letter further indicated that the job was being offered because both Drs. Bender and Freeman concluded that relator was capable of performing at least at a sedentary work level.

{¶21} 15. Expediter again contacted relator in a letter dated December 2, 2008 in response to a letter from relator's counsel. Expediter indicated that the job being offered was considered "at will" employment, that Expediter could not provide a list of other individuals currently performing this job but that numerous employees with and without physical disabilities were performing similar positions to the one being offered. Expediter also indicated that flextime scheduling was available and that any further medical

accommodations would be provided. In response to an inquiry regarding a "trial period of work," Expediter indicated that relator could begin on a reduced schedule and gradually increase his hours.

{¶22} 16. On December 4, 2008, relator filed a motion withdrawing his PTD application so that he could "look into a 'Trial Period of Work' in a 'home' shelter workshop being offered by the Employer."

{¶23} 17. A vocational report was prepared by Kenneth J. Manges, Ph.D., dated December 6, 2008. Dr. Manges stated that physically, relator "cannot perform other than sedentary work \* \* \* for a limited amount of time on an intermittent (less than 3 hour), amount of time." Additionally, he "requires an alternate sit-stand activity and over the course of a day his stamina diminishes so that he cannot perform a full 8 hour work day or a five day work week." However, due to relator's overall level of functioning, Dr. Manges concluded that remunerative employment was outside the scope of realistic possibilities for relator and that he had a 95 percent vocational disability. Dr. Manges also stated as follows with regard to the job being offered to relator: "[T]his job, if accurate and real, would be beyond Mr. Shepard's capacity to perform."

{¶24} 18. On February 2, 2009, relator refiled his application for PTD compensation.

{¶25} 19. In a letter dated February 17, 2009, the employer notified relator that the previously offered job was still available.

{¶26} 20. A vocational assessment was prepared by Howard L. Caston, Ph.D., on March 15, 2009. According to the report, the interview lasted three hours. During that time, relator did not appear to be in any discomfort and remained seated for most of the

interview. Relator stood up briefly three times and walked around the table once. Relator reported that, following the injury in 1987, he was off work for approximately two years and then returned to work for approximately one year. Relator last worked in 1990. Relator also reported that: he has a disability in his right shoulder that needs surgery; his right hand is useless; he is bedridden; he has knee problems and cannot get up and down; and he has heart problems, high cholesterol, is a diabetic, and suffers from migraine headaches. Relator is currently taking 21 medications and spends his day watching television, sleeping, bathing in a hot tub, and walking. Relator indicated that he had no vocational interest; was unable to work; has had no involvement with a vocational case manager; and has not sought employment or attempted to obtain a GED. Relator is currently receiving Social Security Disability. Dr. Caston performed various tests and indicated that relator's vocational testing demonstrated aptitudes below his attained education and prior work. However, Dr. Caston noted:

There were several inconsistencies noted in his response pattern that would indicate a possible lack of attention to detail or motivation to perform well. For example, he scored correctly on some of the complex questions and missed the easier items. This pattern of inconsistency was noted on spelling subtest. For example[,] [he] correctly obtained the right answer for complex words such as lucidity, anxiety, and stationary[,] however[,] he incorrectly answered less complex words such as brief, character, and quantity. \* \* \*

{¶27} Based on these inconsistencies, Dr. Caston opined that relator was capable of functioning at a higher level and, further, that this opinion was supported by the test scores obtained by Dr. Manges. In response to Dr. Shearer's opinion that relator is permanently and totally disabled, Dr. Caston noted that this opinion is not consistent with many of the other medical examinations contained in the record. Further, the statement

that relator is unable to sit or stand for more than 10 to 15 minutes at a time was not observed during the evaluation as relator was able to sit quite comfortably for more than an hour. Dr. Caston noted that there is no indication based on other medical examinations that relator is required to be bedridden and that this is based on the subjective reporting by relator and not on any objective findings. Dr. Caston concluded that relator had obtained skills related to his production work, assembly, welding, and machine operating from his work with his employer and that he obtained clerical skills from his work in the United States Army. Dr. Caston noted that recent independent medical examinations indicate that relator is capable of working at least at a sedentary level. He noted further that there are indications of symptom exaggeration and positive Waddell's signs, that numerous diagnostic testing indicates no physical pathology or minimal medical pathology, and that there simply are no clear objective findings to rule out employment. Dr. Caston noted that relator does have many serious nonindustrial medical conditions. He stated that relator has adopted a passive lifestyle; has demonstrated no real motivation to return to work; has not attempted to use the Ohio Department of Job and Family Services resources; has not taken advantage of any vocational rehabilitation services offered through the Ohio Bureau of Workers' Compensation; has not attempted to obtain any upgrade training or education; has not attempted to obtain a GED; and has not sought or attempted any vocational rehabilitation.

Dr. Caston also noted:

There were many comments made by Mr. Shepard that are simply not true. For example, he said his right hand is useless but he was able to write well enough to take numerous test items and his handwriting is legible. He has indicated that he is bedridden but he is able to walk, stand,

sit, and attend numerous medical appointments. The fact that there are Waddell Signs referenced is another indication that his self reports are disingenuous.

{¶28} Dr. Caston concluded:

Given the fact that he has made virtually no effort to obtain employment since 1990 it is clear that Mr. Shepard has no interest at all in returning to work even though some of the independent examiners have placed minimal or no restrictions on his functional capacities as a result of his allowed claim. He could have located employment or taken advantage of vocational rehabilitation over the years if he had been in [sic] interested in working. He has developed some non-related problems that could affect his ability to work, but the effects of his allowed claim do not prevent him from working.

{¶29} 21. Theodore Good, a licensed professional clinical counselor, submitted a letter dated May 18, 2009. Mr. Good had seen relator for seven sessions since February 15, 2009. Mr. Good concluded that relator was unable to perform any substantial gainful employment and that he cannot be retrained for any other work.

{¶30} 22. Relator's application for PTD compensation was heard before a staff hearing officer ("SHO") on May 26, 2009 and was denied. The SHO relied on the medical reports of Drs. Bender and Freeman and concluded that relator could engage in at least sedentary work activity. The SHO also adopted the vocational conclusions of Dr. Caston. Thereafter, the SHO noted that the employer had made a written job offer to relator in a position that was sub-sedentary, entry-level, home based, unskilled, and requiring no prior experience, specialized education, or transferable skills. The SHO noted that relator failed to accept this bona fide job offer. Thereafter, the SHO analyzed the nonmedical disability factors and, relying extensively on Dr. Caston's vocational report, found that relator's age of 56 years was not a barrier to return to entry-level sedentary employment;

his tenth grade education and the testing results indicated an educational level which was sufficient to engage in entry-level sedentary work activities or engage in retraining; and his prior work history provided him with transferable skills. As such, given that relator could perform at a sedentary work level and after considering his age, education and work history, the SHO concluded that relator was not entitled to PTD compensation.

{¶31} 23. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶32} In order for this court to issue a writ of mandamus as a remedy from a determination of the commission, relator must show a clear legal right to the relief sought and that the commission has a clear legal duty to provide such relief. *State ex rel. Pressley v. Indus. Comm.* (1967), 11 Ohio St.2d 141. A clear legal right to a writ of mandamus exists where the relator shows that the commission abused its discretion by entering an order which is not supported by any evidence in the record. *State ex rel. Elliott v. Indus. Comm.* (1986), 26 Ohio St.3d 76. 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.* (1987), 29 Ohio St.3d 56. 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.* (1981), 68 Ohio St.2d 165.

{¶33} The relevant inquiry in a determination of permanent total disability is the claimant's ability to do any sustained remunerative employment. *State ex rel. Domjancic v. Indus. Comm.* (1994), 69 Ohio St.3d 693. Generally, in making this determination, the commission must consider not only medical impairments, but also the claimant's age,

education, work record and other relevant nonmedical factors. *State ex rel. Stephenson v. Indus. Comm.* (1987), 31 Ohio St.3d 167. Thus, a claimant's medical capacity to work is not dispositive if the claimant's nonmedical factors foreclose employability. *State ex rel. Gay v. Mihm* (1994), 68 Ohio St.3d 315. The commission must also specify in its order what evidence has been relied upon and briefly explain the reasoning for its decision. *State ex rel. Noll v. Indus. Comm.* (1991), 57 Ohio St.3d 203.

{¶34} Relator raises two issues in this mandamus action. First, relator contends that the commission abused its discretion by denying him PTD compensation without addressing his treating doctor's evidence and the vocational report which he submitted. Second, relator contends that the commission abused its discretion by finding that he refused a bona fide job offer when his treating physician stated that he could not perform any sustained remunerative employment and that his request for a written contract of employment does not constitute a refusal of that job offer. For the reasons that follow, the magistrate finds that relator's arguments lack merit.

{¶35} Relator first contends that the commission was required to discuss the medical and vocational evidence he provided and either accept or reject it in the final order. Relator cites *State ex rel. Fultz v. Indus. Comm.* (1994), 69 Ohio St.3d 327, in support. In *Fultz*, the court found an abuse of discretion when the commission lists all the evidence considered but omits a particular document from that recitation and then states that all the evidence was considered. If this occurs and a document not discussed in the order could influence the outcome of the matter in question, the matter will be returned to the commission for further consideration. See also *State ex rel. Scouler v. Indus. Comm.*, 119 Ohio St.3d 276, 2008-Ohio-3915. In the present case, the commission did not

attempt to list all the evidence considered and, as such, the commission was only required to list that evidence upon which it relied. Contrary to relator's assertions, the failure of the commission to discuss Dr. Shearer's office notes is not evidence that the commission ignored those documents. Relator's first argument is rejected.

{¶36} Relator next argues that the commission abused its discretion when it found that he had refused a bona fide job offer and then used that refusal to deny him PTD compensation. Part of relator's argument focuses on his assertions that the job offered by his employer was "made up" and that, once he withdrew his first application for PTD compensation, the " 'made up' job disappeared and neither the employer nor Expeditor Corporation was willing to provide a written contract of hire." (Relator's brief, at 6.) In the alternative, relator contends that any refusal on his part to accept a job offer should not be used to deny him PTD compensation when his treating physician opined that he was unable to perform any sustained remunerative employment.

{¶37} Counsel for relator argued at oral argument that relator did indeed accept the job offered but that the employer withdrew the offer when he dismissed his PTD application. Counsel points to the reason given for dismissing the application on December 4, 2008: need time to "look into a 'Trial Period of Work' in a 'home' shelter workshop being offered by the Employer." However, there is no evidence in the record that relator actually accepted this job and no evidence that the employer ever withdrew the offer. The evidence does show that, on December 6, 2008, relator obtained a vocational evaluation from Dr. Manges who reviewed the job offered and opined that it would be beyond relator's capacity to perform.

{¶38} Thereafter, on February 2, 2009, relator refiled his PTD application and, on February 17, 2009, the employer notified relator that the job was still available. Again, there is no evidence that relator ever accepted the job nor that the employer ever withdrew the offer. Further, it was not until February 9, 2009 that Dr. Shearer rendered an opinion as to relator's ability to perform the job. Even still, it is not apparent whether Dr. Shearer ever actually reviewed the job description provided by the employer since his office note merely states, in part:

He is not able to perform even any phone kind of work, even in bed, because the amount of pain medicine that is required to control his pain alters his mental status, rendering him unable to even do phone-type of work lying in bed. He is just absolutely just totally and permanently disabled and cannot perform any type of gainful employment.

{¶39} The magistrate finds that the commission did not abuse its discretion by finding that relator rejected a bona fide offer of employment made by the employer.

{¶40} The commission also provided an additional basis for denying relator's PTD application. Specifically, the commission relied on the reports of Drs. Bender and Freeman and concluded that relator could perform at a sedentary work level. Thereafter, the commission relied on the vocational report provided by Dr. Caston and found that, based on relator's age, education, and work experience, he could perform some sustained remunerative employment. Because there is some evidence in the stipulated record upon which the commission relied and the commission specifically cited the evidence upon which it relied, and the commission provided a brief explanation of its rationale, it is this magistrate's decision that relator has not demonstrated that the commission abused its discretion.

{¶41} Based on the foregoing, it is this magistrate's conclusion that relator has not demonstrated that the commission abused its discretion in denying his application for PTD compensation and this court should deny relator's request for a writ of mandamus.

/s/ *Stephanie Bisca Brooks*  
STEPHANIE BISCA BROOKS  
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).