



## I. Facts and Procedural History

{¶2} Pursuant to Civ.R. 53 and Section (M), Loc.R. 12 of the Tenth Appellate District, this matter was referred to a magistrate who issued a decision, including findings of fact and conclusions of law, appended to this decision. In her decision the magistrate concluded (1) the commission did not abuse its discretion with respect to relator's rehabilitation efforts, as the commission considered those efforts, and (2) the commission did not abuse its discretion in noting Dr. Ward was not relator's treating physician. Accordingly, the magistrate determined the requested writ should be denied.

## II. Objections

{¶3} Relator filed objections to the magistrate's findings of fact and conclusions of law:

1. THE MAGISTRATE'S DECISION MISREPRESENTS THE REHABILITATION FINDINGS REGARDING MS. GUTHRIE.

2. THE MAGISTRATE ERRED IN NOT FINDING THAT MS. GUTHRIE WAS CONGENITALLY DEAF.

[3.] THE MAGISTRATE ERRED IN FINDING THAT THE INDUSTRIAL COMMISSION NEED NOT CONSIDER MS. GUTHRIE'S FAILED REHABILITATION ATTEMPT AS A FACTOR IN FAVOR OF PTD.

[4.] THE MAGISTRATE ERRED IN PERMITTING THE INDUSTRIAL COMMISSION TO EXPLAIN AWAY MS. GUTHRIE'S INABILITY TO FIND REMUNERATIVE EMPLOYMENT UPON A "DOWN ECONOMY."

### A. Objections to Findings of Fact

{¶4} Relator's first objection to the magistrate's findings of fact asserts the magistrate failed to appropriately quote from relator's rehabilitation file but rather

selectively incorporated into the findings of fact portions of the rehabilitation report that supported the magistrate's legal conclusions.

{¶5} Without question, the rehabilitation report exceeds in length of the magistrate's summary of that report. Relator, however, points to no specific omitted portion of the rehabilitation report that relator finds particularly salient and dispositive of her permanent total disability application. Although the magistrate did not quote the report verbatim, the magistrate's excerpt portrayed the gist of the report and enabled us to fully analyze the relevance of the report to relator's permanent total disability application.

{¶6} Relator also points to the magistrate's suggestion that relator's rehabilitation efforts were not necessarily her best effort. The magistrate's findings of fact do not include that finding. Rather, in discussing relator's rehabilitation efforts in the context of the decision's conclusions of law, the magistrate noted both that relator's rehabilitation efforts were substantial but not always her best effort.

{¶7} In the end, the magistrate's summary of the rehabilitation report contained in the findings of fact includes both positive and negative factors regarding relator, none of which relator suggests an inaccurate portrayal of the rehabilitation report. We thus overrule relator's first objection to the magistrate's findings of fact.

{¶8} Relator's second objection to the magistrate's findings of fact asserts the magistrate erred in failing to find relator is congenitally deaf. According to relator, the magistrate simply noted the fact "as an aside within the rehabilitation report" but failed to acknowledge it is "a critical fact \* \* \* and the central basis" for relator's failed rehabilitation efforts. (Objections, 7.) Paragraph two of the magistrate's findings of fact states "[r]elator

is congenitally deaf." (Mag. Dec. ¶23.) While the magistrate's finding is contained within her summary of the rehabilitation report, it nonetheless is within the magistrate's findings of fact.

{¶9} To the extent relator contends the magistrate should have found the rehabilitation file was closed due to relator's congenital deafness, such a finding would not be supported in the record. The rehabilitation report states her deafness presents a significant barrier but falls short of stating the file was closed for that reason.

{¶10} Relator's second objection to the magistrate's findings of fact is overruled.

#### B. Objections to Conclusions of Law

{¶11} Relator's two objections to the magistrate's conclusions of law are interrelated, and we address them jointly. Both involve the weight the Industrial Commission should give to relator's rehabilitation efforts, reflected in the rehabilitation report included in the stipulated evidence. Citing this court's decision in *State ex rel. Ramsey v. Indus. Comm.* (Mar. 30, 2000), 10th Dist. No. 99AP-733, relator asserts her application for permanent total disability compensation should be granted since she made a substantial effort to be rehabilitated but remained unemployed. According to relator, the commission denied her application due to the economy.

{¶12} The commission's staff hearing officer found relator to be capable of sedentary employment with limitations. Having so determined, the staff hearing officer examined the nonmedical factors to determine relator's ability to engage in sustained remunerative employment. In that regard, the staff hearing officer noted relator was 50 years old at the time of hearing, graduated from high school, and could read, write, sign,

read lips, and perform basic math. The staff hearing officer further observed the Ohio Bureau of Vocational Rehabilitation sent relator to a four-year graphic arts program following high school, a program relator completed.

{¶13} In terms of relator's employment, the staff hearing officer noted relator had been variously employed, including at a printing business for three years, at a home daycare she operated for several years, as a nurse's aid for 12 years, and as a housekeeper. Although pointing out relator's pre-existing and severe hearing loss, the staff hearing officer concluded relator has the ability to secure employment. In an apparent reference to the rehabilitation report that noted relator remained unemployed due to the economy, the staff hearing officer stated relator's "ability to secure employment is difficult but it is because of the job market." (Mag. Dec. ¶27.) The staff hearing officer thus concluded relator's disability factors were not of such a magnitude to warrant a finding of permanent and total disability.

{¶14} With that premise, the magistrate addressed relator's rehabilitation efforts, stating "the commission considered relator's rehabilitation efforts but found that her inability to find a job was not related to the allowed conditions in the claim." (Mag. Dec. ¶30.) The magistrate's statement to some extent conflates two separate concepts, as the ability to secure a job generally is irrelevant to determining the merit of an application for permanent total disability compensation based on the allowed conditions of the claim. *State ex rel. Speelman v. Indus. Comm.* (1992), 73 Ohio App.3d 757, 763 (stating "[t]he issue is not whether a job is actually available, particularly within a specific geographical

area, but whether the claimant is reasonably qualified for sustained remunerative employment").

{¶15} The commission, on finding an injured worker is medically able to perform some form of sustained remunerative employment but is not able to return to his or her former position of employment, must consider the nonmedical factors discussed in *State ex rel. Stephenson v. Indus. Comm.* (1987), 31 Ohio St.3d 167, to determine "whether the claimant may return to the job market by using past employment skills or those skills which may be reasonably developed." *Speelman* at 762. See *State ex rel. Hopkins v. Indus. Comm.*, 70 Ohio St.3d 36, 1994-Ohio-175 (stating that where medical evidence establishes the claimant's permanent impairment due to industrial injuries is only partial, the commission must grant permanent total disability compensation when the claimant's age, work experience, education or all other relevant characteristics for sustained remunerative employment indicate the injured worker is not capable of such employment).

{¶16} An injured worker's rehabilitation efforts may be a factor in that analysis. The Supreme Court explained the commission properly may consider an injured worker's failure to pursue rehabilitation when the worker retains abilities that would be enhanced through rehabilitation efforts. *State ex rel. Wilson v. Indus. Comm.* (1997), 80 Ohio St.3d 250, 253 (noting "it is not unreasonable to expect a claimant to participate in return-to-work efforts to the best of his or her abilities or to take the initiative to improve reemployment potential"). In *Ramsey*, this court concluded that if the failure to pursue rehabilitation efforts may be deemed a negative factor in assessing permanent total

disability applications, an injured worker's pursuit of rehabilitation should be a positive factor supporting the application. *Id.* (stating that "[t]he situation where an injured workers [sic] has made serious efforts at rehabilitation but has not succeeded should be considered as a factor in favor of granting PTD compensation, especially where \* \* \* the Bureau of Workers' Compensation's own reports demonstrated a failure to be rehabilitated despite the injured worker's best efforts").

{¶17} Here, the staff hearing officer recognized relator's rehabilitation efforts but explained why those efforts were not sufficient to support a finding of permanent and total disability. The staff hearing officer noted relator stopped looking for employment despite rehabilitation's recommendation she not only continue to search for a job but contact the State Bureau of Vocational Rehabilitation for further services, given its assistance to her in the past. The staff hearing officer further noted relator's difficulties in securing employment were due to the job market, a factor the rehabilitation report cited. Thus, unlike those injured workers who, despite rehabilitative efforts, are unemployed because they remain unfit for employment, relator, according to the rehabilitation report, is capable of sustained remunerative employment but remains unemployed due to the economy.

{¶18} As a result, relator errs to the extent she suggests the commission denied her application due to the economy. Rather, the staff hearing officer considered the economy only to partially explain why relator's rehabilitation efforts were not a positive factor in assessing the nonmedical factors. As with all nonmedical factors, valuation of relator's rehabilitation efforts lies within the discretion of the commission. Here, the commission explained its consideration of relator's rehabilitation efforts, explained why it

did not find relator's inability to find a job to be compelling, and further delineated why the remaining nonmedical factors supported its conclusion that relator is not permanently and totally disabled. We cannot say the staff hearing officer abused its discretion in so concluding.

{¶19} In the final analysis, the commission did not deny relator's application for permanent total disability compensation due to the economy, but due to relator's ability to perform sedentary work, coupled with the positive nonmedical factors the commission cited. Accordingly, relator's two objections to the magistrate's conclusions of law are overruled.

### **III. Disposition**

{¶20} Following independent review pursuant to Civ.R. 53, we find the magistrate has properly determined the pertinent facts and applied the salient law, with the modification and additions noted in this decision. Accordingly, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained in it, as modified and supplemented in this decision. In accordance with the magistrate's decision, we deny the requested writ of mandamus.

*Objections overruled;  
writ denied.*

KLATT and FRENCH, JJ., concur.

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# APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Pamela Guthrie,	:	
	:	
Relator,	:	
	:	
v.	:	No. 10AP-171
	:	
Industrial Commission of Ohio	:	(REGULAR CALENDAR)
and Arv Assisted Living Inc.,	:	
	:	
Respondents.	:	
	:	

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## MAGISTRATE'S DECISION

Rendered on October 22, 2010

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*Philip J. Fulton Law Office, and Ross R. Fulton, for relator.*

*Richard Cordray, Attorney General, and Allan Showalter, for respondent Industrial Commission of Ohio.*

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### IN MANDAMUS

{¶21} Relator, Pamela Guthrie, 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 relator's application for permanent total disability ("PTD") compensation and ordering the commission to find that she is entitled to that compensation.

Findings of Fact:

{¶22} 1. Relator sustained a work-related injury on December 19, 2003 and her workers' compensation claim has been allowed for the following conditions: "sprain right elbow; sprain of right knee; right tear medial meniscus knee; chondromalacia patella right knee by aggravation and arthropathy/arthritis right knee by aggravation."

{¶23} 2. As a result of her injuries, relator ultimately had total right knee replacement surgery. Following her knee surgery and because she could not return to her former position of employment as a nurse's aide, relator was referred for vocational rehabilitation on January 24, 2008. At the time of the initial evaluation, it was determined that relator had no transferable skills. The plan began with several weeks of work conditioning "from 3-31-08 thru 5-11-08 in which the client participated and progressed but did not meet all of her functional goals." The original goal was that relator would find work as a sales attendant. Additional weeks of work conditioning were provided and job search and job placement services were delayed until a more realistic job goal could be determined. After several weeks of career counseling, a revised goal of work as an administrative clerk-typist was determined. Relator continued to participate in NovaCare physical therapy as well as in an unsupervised conditioning program. Additional weeks of career counseling were provided to "address return to work ambivalence issues, frustration over perceived failed kneed [sic] surgery and career options at this point in time." Relator continued to participate in the unsupervised conditioning program and "steadfastly supported an attempt to return to work as a companion to an elderly patient. Pam truly believed if she is matched with the [sic] a suitable patient, given her limitations,

she will be able to control her work hours, walking, standing and sitting and work in a field she loves. She is aware this type of work falls on the light weight category, however, in many cases the physical activities the [injured worker] may need to perform depends upon the client." Relator participated in a situational assessment to determine if she could handle the physical duties of assisting clients with mental disabilities and in teaching them sign language. It was determined that relator was able to tolerate part-time work as an attendant doing light and sedentary activities. Forward progress with relator's plan was hampered by her need for surgery, scheduling issues with Goodwill, intermittent electronic communication issues, and the replacement of the Care Specialist at Care Works. Job seeking skills training and job placement services were recommended; however, due to communication issues and the fact that relator scheduled other appointments, the start date was delayed and relator was cautioned regarding scheduling personal appointments while participating in a job search. Relator was reminded that job search was a full-time activity and that her behavior could be viewed as uncooperative and her rehabilitation file may be closed. Several more weeks of job search and job development services at Goodwill were provided. Relator had several interviews and participated in the development meetings. However, it was noted that relator was having trouble using the phone to follow-up with job contacts and to make initial calls because the hearing in her "good" ear had worsened. Relator is congenitally deaf. The required number of contacts was reduced and relator continued with her job search. It was further noted that relator "has significant barriers due to her deafness combined with her restrictions and the economy. Average job search last year for able bodied individuals

was 17 weeks. It has grown worse since then." Relator's job search began on "10-13-2008." Ultimately, relator's rehabilitation file was closed and the final report provides, in part:

Pam was referred to Goodwill for Job Development starting 9-15-08. She is legally deaf and was referred by Case Coordinator Steve Phillips of MedVoPro. She was a BWC case resulting from a back injury. She would not attend Networking Group but met with her ESS weekly, and her last report period she agreed to meet twice each week. Pam is reluctant to change routines and habits even when they are unproductive or counterproductive. She tended to contact many employers regarding jobs for which she is not qualified. Her training and experience is limited, and there are limited jobs she can perform partially because of her physical limitations. She discards many suggestions and harbors many self-defeating attitudes. However, her strong will and determination also work for her at times. She was highly motivated in her search and did everything required of her. During her last Staffing, she was informed by her team that she would need to alter her approach, try different things, invest more time in her search, and broaden job considerations and possibilities. Her case was closed by BWC on 1-30-09. \* \* \*

\* \* \*

\* \* \* Pamela's job development program will not be extended past 2/1/09. The team encouraged Pamela to apply to positions that will help her obtain some recent work experience, rather than search for a "perfect" job and to search for a sedentary position that will accommodate her physical limitations. Pamela reported that this is "frustrating" but that she realizes that this is the "reality" of the situation.

{¶24} 3. Thereafter, relator applied for PTD compensation and her application was supported by the May 7, 2009 report of Richard M. Ward, M.D. In his report, Dr. Ward noted that relator has a range of motion from zero degrees extension to 80 degrees of flexion accompanied by crepitus and pain. He noted that she wears a knee brace and

that all of her prior work experience required her to be on her feet. Thereafter, Dr. Ward opined as follows:

\* \* \* [I]t is my opinion, based upon a reasonable medical probability that as a direct result of the injury to her right knee she is not capable of returning to any substantial gainful employment. I base this opinion upon the fact that she has marked limitation in her ability to be up on her feet. She also has marked limitation in her ability to sit with her knee bent. She also [has] marked limitation in her ability to lift and carry. I did fill out a physical capacities evaluation to the best of my ability, again taking into account the specific allowances from the injury that occurred on the 19th of December, 2003 and my physical findings. To reiterate, based upon all the above and in my opinion and based upon a medical probability that as a direct result of these specific allowances she is not capable of returning to gainful employment and should in my opinion be awarded permanent total disability.

{¶25} 4. Relator was also examined by Andrew Freeman, M.D. In his July 14, 2009 report, Dr. Freeman provided a history of relator's injuries, identified the medical records provided to him, gave his physical findings upon examination, opined that relator's allowed physical conditions had reached maximum medical improvement and indicated that relator had a 20 percent whole person impairment. Thereafter, Dr. Freeman indicated that relator was capable of performing sedentary work provided there was no squatting or kneeling.

{¶26} 5. Thereafter, relator's application was heard before a staff hearing officer ("SHO") on October 21, 2009 and was denied. The SHO relied on the medical report of Dr. Freeman and concluded that relator was capable of performing sedentary work with no squatting or kneeling. Thereafter, the SHO discussed the medical evidence relator submitted and stated:

The Injured Worker sustained an injury 12/19/2003, when she fell lifting a patient. The claim is allowed for the conditions noted in the claim. The Injured Worker has had total right knee replacement. The last record from her attending physician, Dr. Steenson, is dated 05/29/2008. He opines that the Injured Worker could return to sedentary employment. He also completed a MEDCO-14 which document restrictions for sedentary employment. There is no record of further treatment on file from her doctor. (The Staff Hearing Officer notes that the Injured Worker submitted a medical report of Dr. Ward, M.D., to support her application for permanent total disability but he does not provide treatment for the Injured Worker.)

{¶27} Thereafter, the SHO addressed the nonmedical disability factors, including relator's participation in vocational rehabilitation, and stated:

The Injured Worker is a 50 year old woman who graduated from high school. She can read and write, sign and read lips. She also has the ability to perform basic math. The record reveals that the Injured Worker has a severe hearing loss and after school, Ohio Bureau of Vocational Rehabilitation sent the Injured Worker to a 4 year graphic arts program. The Injured Worker completed the program and returned to Columbus.

Prior to leaving the work force at age 44, the Injured Worker had been employed in various positions. She testified after graduation from the graphic design school, she was employed with a printing business for three years. She then opened a home day care which she ran for several years. The Injured Worker has also been employed as a nurse's aide for 12 years with the employer and a house keeper.

\* \* \*

The Staff Hearing Officer notes that the injured Worker has physical limitation that is not part of the claim. She has a severe hearing loss. At hearing, she testified that her hearing loss has increased over the last several years. She has applied for Social Security Disability and receives disability from the Federal Government.

\* \* \*

The Injured Worker is a 50 year old woman who graduated from high school and attended a 4 year graphic art program. She has the ability to read, write, and perform basic math. The Injured Worker has had experience as a housekeeper, daycare provider and health aide.

\* \* \*

The Staff Hearing Officer notes that the Injured Worker has a pre-existing condition that impacts upon some employment opportunities. She has severe hearing loss. However, the Injured Worker can read lips. The record reflects that the Injured Worker was involved in a rehabilitation for job search. She was not able to find employment. They closed her file. After the closure of the file, the Injured Worker stopped looking for employment even though rehabilitation had recommended that she continue to look for employment. A review of the rehabilitation file indicates that they recommended to the Injured Worker to contact State of Ohio Bureau of Vocational Rehabilitation for further services as this agency helped her with training the past.

The Staff Hearing Officer finds that the Injured Worker has the ability to secure employment notwithstanding her pre-existing condition. She has applied for positions at the Ohio School for the Deaf; however, there is no indication what was the outcome. The Injured Worker has also had some computer training in order to enhance her ability to secure employment. The Staff hearing officer acknowledges that the Injured Worker's ability to secure employment is difficult but it is because of the job market. Her disability factors are not of such magnitude that would warrant a finding of permanent and total disability. The Injured Worker could look for sedentary employment.

(Sic passim.)

{¶28} 6. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶29} Relator asserts that the commission abused its discretion in the following ways: (1) by giving no weight to relator's rehabilitation efforts, and (2) by refusing to consider Dr. Ward's report.

{¶30} As will be explained hereinafter, it is this magistrate's decision that the commission did not abuse its discretion. Specifically, the commission considered relator's rehabilitation efforts but found that her inability to find a job was not related to the allowed conditions in the claim. Further, the magistrate finds that the commission did consider Dr. Ward's report; however, the commission did not give it any weight.

{¶31} Citing this court's decision in *State ex rel. Ramsey v. Indus. Comm.* (Mar. 30, 2000), 10th Dist. No. 99AP-733, relator asserts that the evidence clearly demonstrates that she was unable to be rehabilitated and unable to find a job in spite of her "best efforts" to do so. According to relator, because the evidence demonstrates that she made every effort to be rehabilitated and to find work, the commission must award her PTD compensation.

{¶32} Relator cites this court's decision in *Ramsey*. In that case, Robert Ramsey sustained certain injuries and ultimately filed an application for PTD compensation. Ramsey had submitted himself to a series of evaluations at the J. Leonard Camera Rehabilitation Center and it was noted that several of the evaluations concluded that Ramsey's prospects for future employment were not good.

{¶33} In denying Ramsey PTD compensation, the SHO did not appear to give *any* weight to Ramsey's efforts at rehabilitation; instead, it appeared that the SHO relied solely

upon the objective medical findings of an unbiased examiner. Because the commission's order did not reflect *any* consideration of the vocational reports, but relied almost exclusively on the objective medical findings of an unbiased medical examiner, this court found that neither the spirit nor the letter of the law announced in *State ex rel. Fultz v. Indus. Comm.*, 69 Ohio St.3d 327, 1994-Ohio-426, was honored and returned the matter to the commission for further proceedings which would reflect appropriate consideration of the vocational reports.

{¶34} In making her argument here, relator points to the following portion of this court's decision in *Ramsey*:

We do not believe that reeducation and retraining efforts can only be used as a means to punish injured workers on those occasions when a hearing officer feels that the injured worker has failed to exercise his or her best efforts at rehabilitation. The situation where an injured workers [sic] has made serious efforts at rehabilitation but has not succeeded should be considered as a factor in favor of granting PTD compensation, especially where, as here, the Bureau of Workers' Compensation's own reports demonstrated a failure to be rehabilitated despite the injured worker's best efforts. Since the record before us indicates that the staff hearing officer did not give appropriate weight to Mr. Ramsey's unsuccessful rehabilitation efforts and the reports from the J. Leonard Camera Rehabilitation Center, a writ of mandamus shall issue.

{¶35} Relator asserts that, just as this court issued a writ of mandamus in *Ramsey*, this court should likewise issue a writ of mandamus here.

{¶36} The magistrate finds that relator's reliance upon *Ramsey* is misplaced. In *Ramsey*, this court determined that the commission's order denying PTD compensation did not reflect any consideration of the vocational reports. In the present case, there is

evidence that the commission considered relator's attempts at rehabilitation. As such, relator's situation does not fall squarely within the fact pattern from *Ramsey*.

{¶37} Taking relator's argument one step further, relator also argues that the commission did not give proper weight to her attempts at vocational rehabilitation. Relator contends that any time a claimant gives their "best efforts" at rehabilitation, PTD should be awarded.

{¶38} The vocational efforts of relator were substantial. Relator's file was opened on January 24, 2008 and was closed one year later on February 2, 2009. During that year, relator participated in work conditioning, career counseling, job seeking skills training and a job search. While relator's efforts appear to be consistent, there are certain notations in the vocational rehabilitation closure report that indicate that relator's rehabilitation efforts were not necessarily her best effort. Specifically, relator participated and progressed in the initial work conditioning; however, she did not meet all her functional goals; additional time was necessary to address relator's return to work ambivalence issues, frustration over perceived failed knee surgery and career options; relator steadfastly wanted to attempt to return to nursing duties similar to her former position of employment with the hope that she could control the situation and work within her limitations; and relator had scheduling issues with Goodwill which prompted the evaluators to remind her that job search is a full-time activity and that her scheduling personal appointments could be viewed as uncooperative and the rehabilitation file may be closed. Ultimately, it was noted that relator has "significant barriers due to her deafness combined with her restrictions and the economy. Average job search last year

for able bodied individuals was 17 weeks. It has grown worse since then." Relator began her job search on October 13, 2008 and the file was closed on February 2, 2009. This reflects an actual job search of less than 17 weeks. Further, as noted in the findings of fact, it was determined that relator was:

\* \* \* [R]eluctant to change routines and habits even when they are unproductive or counterproductive. She tended to contact many employers regarding jobs for which she is not qualified. \* \* \* She discards many suggestions and harbors many self-defeating attitudes. \* \* \* She was highly motivated in her search and did everything required of her. During her last Staffing, she was informed by her team that she would need to alter her approach, try different things, invest more time in her search, and broaden job considerations and possibilities. \* \* \*

{¶39} In addressing relator's rehabilitation efforts, and contrary to the situation in *Ramsey*, the SHO did address the vocational evidence and relator's efforts. The SHO noted relator's earlier participation with the Ohio Bureau of Vocational Rehabilitation and the fact that, thereafter, she attended a four-year graphic arts program. The SHO then discussed relator's rehabilitation file and noted that, after her file was closed, she stopped looking for employment even though the rehabilitation department had recommended that she continue to look for employment. Further, the SHO noted that it was recommended that relator contact the Ohio Bureau of Vocational Rehabilitation for further services because they were able to help her with training in the past. With regards to her deafness, the commission noted that relator had been able to secure employment in the past notwithstanding her preexisting condition. The SHO noted that relator had applied for positions at the Ohio School for the Deaf; however, the SHO did not know the outcome of those applications. The SHO noted further that relator had some computer

training. Ultimately, the commission determined that relator's difficulties finding work were not related to the allowed conditions or her limitations, but that her inability to find employment at this time was due to the current economic conditions and job market. This is consistent with the statement that, during the last year, the average job search lasted 17 weeks and that the current state of the economy only made it more difficult. Relator's job search lasted approximately 15 weeks, part of which extended over the Thanksgiving and Christmas holidays. It appears that the vocational evaluators recognized the effect the current economic conditions were already having on the ability of any individual to secure employment regardless of their efforts.

{¶40} Unlike the situation in *Ramsey* where there was no indication that the commission considered any of Ramsey's rehabilitation efforts, it is clear here that the commission did consider relator's efforts at rehabilitation. However, ultimately, the commission determined that relator's inability to secure employment was due to the current economic conditions and not her allowed conditions or any limitations she had. Given that the commission did consider the vocational evidence, the magistrate finds that the commission did not abuse its discretion in finding that the state of the current labor market was the main factor which prevented relator from being able to secure employment. The magistrate finds that relator has not demonstrated that this was an abuse of discretion.

{¶41} Relator also contends that the commission refused to consider Dr. Ward's report. In making this argument, relator points to the following portion of the commission's order:

\* \* \* The last record from her attending physician, Dr. Steenson, is dated 05/29/2008. He opines that the Injured Worker could return to sedentary employment. He also completed a MEDCO-14 which document restrictions for sedentary employment. There is no record of further treatment on file from her doctor. (The Staff Hearing Officer notes that the Injured Worker submitted a medical report of Dr. Ward, M.D., to support her application for permanent total disability but he does not provide treatment for the Injured Worker.)

{¶42} In the above paragraph, the commission first noted that relator's treating physician, Dr. Steenson, had released her to return to work with restrictions for sedentary employment. By comparison, Dr. Ward, who did not treat relator, opined that she was permanently and totally disabled. The magistrate finds that the commission's statement does not mean, as relator implies, that the commission discounted his report simply because he was a non-treating physician. Instead, it appears that the commission was comparing Dr. Ward's report with Dr. Steenson's report and the fact that Dr. Ward had not provided any treatment for relator during the year preceding her filing of the application for PTD compensation. This was a credibility issue and the commission determined that Dr. Ward's report was not entitled to the same weight to which Dr. Freeman's report was entitled. 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. Further, it is immaterial whether other evidence, even if greater in quality and/or quantity, supports the decision contrary to the commission's. *State ex rel. Pass v. C.S.T. Extraction Co.* (1996), 74 Ohio St.3d 373. Here, the commission found Dr. Freeman's report to be more persuasive and discounted Dr. Ward's report in light of the report of relator's treating physician.

{¶43} Based on the foregoing, it is this magistrate's conclusion that relator has not demonstrated that the commission abused its discretion in denying her 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).