

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, ex rel.  
ROBERT LOWE

Appellant

v.

CINCINNATI INC.

And

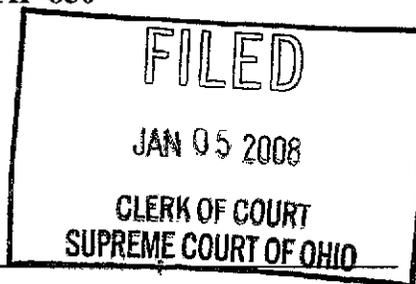
INDUSTRIAL COMMISSION  
OF OHIO

Appellees

CASE NO. 08-1954

ON APPEAL FROM THE  
FRANKLIN COUNTY COURT OF  
APPEALS, TENTH APPELLATE  
DISTRICT

Case No. 07AP-850



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**BRIEF OF RELATOR-APPELLANT, ROBERT LOWE**

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... iii

STATEMENT OF FACTS ..... 1

ARGUMENT..... 7

**First Proposition of Law:**

**THE INDUSTRIAL COMMISION OF OHIO ABUSES ITS  
DISCRETION WHEN IT EXERCISED CONTINUING  
JURISDICTION AS ITS DISCRETION IS NOT SUPPORTED  
BY ANY EVIDENCE IN THE RECORD AND IS CONTRARY  
TO LAW..... 7**

**Authorities Relied Upon In Support of First Proposition  
Of Law.**

O.R.C. 4123.52..... 7

*State ex rel. Nicholls v. Indus. Comm.*  
(1998), 81 Ohio St. 3d 454, 459, 692 N.E. 2d 188..... 7

*State ex rel. Foster v. Indus. Comm.*  
(1999), 85 Ohio St. 3d 320, 707 N.E. 2d 1122..... 7

*State ex rel. Gobich v. Indus. Comm.*  
(2004), 103 Ohio St. 3d 585, 817 N.E. 2d 398..... 7

*State ex rel. Kirby v. Indus. Comm.*  
(2002),97 Ohio St. 3d 427, 780 N.E. 2d 275..... 8

*State ex rel. Schultz v. Indus. Comm.*  
(2002), 96 Ohio St. 3d 27, 770 N.E. 2d 576..... 8

*State ex rel. Timmerman Truss, Inc. v. Indus. Comm.*  
(2004), 102 Ohio St. 3d 244, 809 N.E. 2d 15..... 8

*State ex rel. Royal v. Indus. Comm.*  
(2002), 95 Ohio St. 3d 97, 100, 766 N.E. 2d 135..... 8, 9

*State ex rel. International Truck & Engine Corp. v. Indus. Comm.*  
(2008), 119 Ohio St. 3d 402, 2008-Ohio-4494..... 9

**Second Proposition of Law:**

**THE INDUSTRIAL COMMISSION OF OHIO ABUSES ITS DISCRETION WHEN IT TERMINATED PERMANENT TOTAL DISABILITY AS ITS DISCRETION IS NOT SUPPORTED BY ANY EVIDENCE CONTAINED IN THE RECORD AND IS CONTRARY TO LAW..... 10**

**Authorities Relied Upon In Support of Second Proposition Of Law.**

*State ex rel. Lawson v. Mondie Forge*  
(2004), 104 Ohio St. 3d 39, 2004-Ohio-6086..... 10, 12,  
14, 15, 16

*State ex rel. Midmark Corp. v. Indus. Comm.*  
(1997), 78 Ohio St. 3d 2, 676 N.E. 2d 73..... 13

*State ex rel. Stettler v. Mid Atlantic Cannery Assoc. Inc.*  
2005-Ohio-5646..... 14

*State ex rel. Bentley v. Indus. Comm.*  
2005-Ohio-6755..... 14

*State ex rel. McDaniel v. Indus. Comm.*  
2007-Ohio-2009..... 14

CONCLUSION ..... 16

CERTIFICATE OF SERVICE ..... 17

## TABLE OF AUTHORITIES

<u>CASES:</u>	<u>PAGE</u>
<i>State ex rel. Bentley v. Indus. Comm.</i> 2005-Ohio-6755.....	14
<i>State ex rel. McDaniel v. Indus. Comm.</i> 2007-Ohio-2009.....	14
<i>State ex rel. Foster v. Indus. Comm.</i> (1999), 85 Ohio St. 3d 320, 707 N.E. 2d 1122.....	7
<i>State ex rel. Gobich v. Indus. Comm.</i> (2004), 103 Ohio St. 3d 585.....	7
<i>State ex rel. International Truck &amp; Engine Corp. v. Indus. Comm.</i> (2008), 119 Ohio St. 3d 402, 2008-Ohio-4494.....	9
<i>State ex rel. Kirby v. Indus. Comm.</i> (2002), 97 Ohio St. 3d 427, 780 N.E. 2d 275.....	8
<i>State ex rel. Lawson v. Mondie Forge</i> (2004), 104 Ohio St. 3d 39, 2004-Ohio-6086.....	9
<i>State ex rel. Midmark Corp. v. Indus. Comm.</i> (1997) 78 Ohio St. 3d 2.....	13
<i>State ex rel. Nicholls v. Indus. Comm.</i> (1998), 81 Ohio St. 3d 454, 459, 692 N.E. 2d 188.....	7
<i>State ex rel. Royal v. Indus. Comm.</i> (2002), 95 Ohio St. 3d 97, 100, 766 N.E. 2d 135.....	8, 9
<i>State ex rel. Schultz v. Indus. Comm.</i> (2002), 96 Ohio St. 3d 27, 770 N.E. 2d 576.....	8
<i>State ex rel. Stettler v. Mid Atlantic Cannery Assoc. Inc.</i> 2005-Ohio-5646.....	13
<i>State ex rel. Timmerman Truss, Inc. v. Indus. Comm.</i> (2004), 102 Ohio St. 3d 244, 809 N.E. 2d 15.....	8

**OHIO REVISED CODE:**

O.R.C. 4123.52..... 7

**APPENDIX**

**APPX. PAGE**

Notice of Appeal to Supreme Court filed October 6, 2008..... 1

Journal Entry of Judgment from Franklin County Court of Appeals filed September 25, 2008..... 4

Memorandum Decision of Franklin County Court of Appeals dated September 25, 2008..... 5

Magistrate’s Decision rendered on May 7, 2008 from Franklin County Court of Appeals..... 11

Pastor Greg Matthew’s letter dated January 5, 2006..... 30

Industrial Commission Order dated March 22, 2007..... 31

Request for Reconsideration filed October 16, 2006..... 33

Staff Hearing Officer’s order of the Industrial Commission dated September 28, 2006..... 36

Vocational Assessment of Dr. William T. Cody, M.D. dated July 10, 2006..... 40

Medical Report of Dr. Jim Swanson, M.D. dated May 24, 2006..... 46

Medical Report of Dr. Andrew Freeman, M.D. dated May 12, 2006..... 51

Staff Hearing Officer’s Interlocutory Order dated January 18, 2006..... 58

Pictures filed by Relator-Appellant January 24, 2006..... 60

Medical Report of Dr. Jim Swanson, M.D. dated January 30, 2008..... 66

Medical Report of Dr. Jim Swanson, M.D., dated December 20, 2005..... 69

Letter from Scott A. Wolf to Gary E. Becker dated November 11, 2005 ..... 70

Letter from Relator-Appellant to Dr. Jim Swanson, M.D. dated November 9, 2005..... 71

Letter from Relator-Appellant to Scott A. Wolf dated November 9, 2005..... 72

Letter from Relator-Appellant to Scott A. Wolf dated November 4, 2005..... 73

Motion filed by Employer on October 31, 2005.....	75
Addendum Report of Dr. Bernard Bacevich, M.D. dated October 5, 2005.....	80
Industrial Commission Decision on Request for Reconsideration Dated 4, 2003.....	83
Employer's Request for Reconsideration filed October 22, 2003.....	85
Staff Hearing Officer's Corrected Order dated October 1, 2003.....	92
Staff Hearing Officer's Decision dated October 1, 2003.....	94
Employability Assessment Report to the Industrial Commission Dated July 25, 2003.....	96
Employment Assessment by Penny Carr dated July 7, 2003.....	101
Vocational Assessment by Howard Caston, Ph.D. dated May 18, 2003.....	106
Medical Report of Dr. Steven Wunder, M.D. dated May 15, 2003.....	116
Medical Report of Dr. Bernard Bacevich, M.D. dated April 30, 2003.....	122
Statement of Facts filed June 20, 2003.....	128
Permanent Total Disability Application filed January 29, 2003.....	131
Letter from Relator-Appellant dated January 16, 2003.....	139
Medical Records from Dr. Jim Swanson, M.D. dated September 27, 2002.....	140
Medical Report from Dr. Jim Swanson, M.D. dated January 30, 2006.....	143
O.R.C. 4123.52.....	145

## **I. STATEMENT OF THE FACTS**

Relator-Appellant, Robert Lowe, (hereinafter referred to as Relator-Appellant) was employed as a machinist for Respondent, Cincinnati Inc., (hereinafter referred to as Employer) since January of 1989. On November 13, 1998, he incurred a severe injury to his left arm while in the course and scope of his employment. (Appx.36) His claim was allowed for the condition of sprain/strain of the left shoulder; rotator cuff tear of the left shoulder; and aggravation of pre-existing arthritis of the left glenohumeral joint. (Appx.36)

Between November 13, 1998 and October of 2003, Mr. Lowe underwent four separate surgical procedures to his shoulder. He briefly attempted to return to work as a security guard in 2002, but was physically unable to do so.

On January 29, 2003, Mr. Lowe applied for permanent total disability. In support of this permanent total disability application were medical records from his orthopaedic surgeon, Dr. Swanson. (Appx.31)

Mr. Lowe's permanent total disability application was heard by a Staff Hearing Officer of the Industrial Commission on October 1, 2003. The Staff Hearing Officer granted Mr. Lowe's permanent total disability application. (Appx.94)

In her order, the Staff Hearing Officer noted the worker's testimony that he experienced severe pain with regard to his left arm, which interfered with his ability to ambulate, as well as his ability to concentrate. She further referenced Mr. Lowe's testimony that he is unable to perform his activities of daily living and needed assistance from his wife with regard to dressing and feeding activities. (Appx.94-95)

The Staff Hearing Officer concluded that Mr. Lowe could not return to his former position of employment and was incapable of engaging in any other type of sustained remunerative employment as a result of his medical impairment. (Appx.95)

The Employer, Cincinnati Inc., filed a motion for reconsideration as to the decision granting Mr. Lowe permanent total disability. (Appx.85) This motion was unanimously overruled by the Industrial Commission. (Appx.83) Employer filed a Complaint in Mandamus from the decision granting permanent total disability. The request for writ of mandamus was denied by the Franklin County Court of Appeals. The decision of the Franklin County Court of Appeals was unanimously upheld by the Ohio Supreme Court.

On October 31, 2005, Employer filed a motion to terminate the claimant's permanent total disability based upon a videotape of Mr. Lowe performing yard work on August 3, 2004 and June 25, 2005. (Appx.75) Employer also submitted an addendum medical report from Dr. Bacevich, which stated that in light of the videotape, he felt that the claimant was capable of sustained remunerative employment. (Appx.80)

It must be noted that Mr. Lowe's counsel, requested from Employer's counsel a complete copy of the investigator's log/record to indicate all the days and hours in which the videotaping occurred. (Appx.70) This is for the simple reason that it is very easy for the investigator to conduct hours upon hours of surveillance and then selectively choose and edit the videotaping to show those parts of the taping which are most detrimental to Mr. Lowe. This request from Relator-Appellant's counsel to Employer's counsel was never responded to by Employer's counsel.

Employer's motion came for hearing before a Staff Hearing Officer of the Industrial Commission on January 3, 2006. In her initial order, the Staff Hearing Officer found that

the employer had presented sufficient evidence to demonstrate that there **may have been a change in circumstances** sufficient to warrant the stopping of the permanent total disability award. The Staff Hearing Officer referred the file to the Industrial Commission medical section for an examination on the issue **as to whether Mr. Lowe was capable of performing sustained remunerative employment.** The Staff Hearing Officer ordered the matter to be reset after this examination occurred. (Appx.58)

In the interim, Mr. Lowe submitted additional evidence in support of his permanent total disability. He submitted a letter from the Pastor of his church, which verified that Mr. Lowe had to resign from his activities as a meal server due to his inability to use his arm without causing pain and for fear of dropping plates or food. His Pastor further verified that Mr. Lowe was an honest, sincere individual. (Appx.30)

Mr. Lowe further submitted pictures of the gardening tools he was using in the videotape. (Appx.60) For example, the rake he was using weighed a total of three quarters of a pound. This is in contrast to the three pound weight which he was instructed to use for therapy on a ten repetition, three times per day basis. Mr. Lowe also submitted pictures of his other exercise tools, which included an aluminum stretch pole and a theraband stretch rope. In fact, the electric hedge trimmer he was using weighed a total of 3 ¾ pounds.

A medical report from Mr. Lowe's orthopaedic surgeon, Dr. Swanson, was also submitted. (Appx.143) This report, dated January 30, 2006 clearly indicated that the hedge clipper that Mr. Lowe was using was within the range of lifting that Dr. Swanson prescribed so that Mr. Lowe could try to strengthen his shoulder. Dr. Swanson stated, "I've always allowed Mr. Lowe to do limited lifting about his home and community, but

in no way does that void his disability. He has severe pain in his shoulder constantly and is barely keeping it controlled with Percocet and Neurontin. He has severe weakness in his shoulder and significant loss of usable motion. I have had the liberty of examining him every 3-6 months for nearly eight years and I can tell you for certain that he is worsening, not improving. Simply doing limited things about the home, with pain, is a far cry from doing any work with the shoulder for an eight hour day.”

In the final paragraph of Dr. Swanson’s report he stated, “Mr. Lowe has always complied with my instructions, has shown no history of drug diversion or overuse, has completed every course of therapy and has undergone four shoulder surgeries. Unfortunately, he has not had a result allowing him to be functional beyond activities of daily living. The whole situation has caused him to be severely depressed, and the continued harassment by his company only makes it worse. I recommend that benefits continue, and consideration be given to increasing them, not voiding them. I also strongly recommend that the actions of the company authorizing the videotaping be scrutinized carefully for evidence of illegal and unethical behavior.” (Appx.144)

Pursuant to the order of the Staff Hearing Officer, a medical evaluation was performed on May 12, 2006 by Dr. Freeman. Dr. Freeman concluded that Mr. Lowe is capable of sedentary work with the limitation of no reaching or overhead work with his left arm. (Appx.51)

Relator-Appellant submitted a vocational report from William Cody, a vocational expert, on July 11, 2006. (Appx.40) This report concluded that in light of Mr. Lowe’s physical restrictions and his age and work experience, that he was incapable of sustained remunerative employment.

On September 5, 2006, the Staff Hearing Officer of the Industrial Commission granted the employer's motion to terminate permanent total disability compensation. (Appx.36)The Staff Hearing Officer, in her decision, found that the injured worker's condition had changed and that he had greater functional capacity than he testified to at the original hearing. The Staff Hearing Officer specifically noted that Mr. Lowe had no specialized training or special vocational skills. She further concluded that his age of 60 years old was only a moderate barrier to return to work and that given his high school education and the ability to read, write and perform basic math well, that he could learn new work skills and re-enter the work force. The Staff Hearing Officer never referenced the report from Dr. Swanson, Mr. Lowe's orthopaedic surgeon. (Appx. 36)

The Relator-Appellant filed a motion for reconsideration of the decision of the Staff Hearing Officer, which was denied by the Industrial Commission by a two to one vote. (Appx.33) Relator-Appellant has now filed this request for writ of mandamus, asserting that the decision of the Staff Hearing Officer of the Industrial Commission in terminating Mr. Lowe's permanent total disability benefits is an abuse of discretion and should be reversed.

Challenging the Industrial Commission's decision, Relator-Appellant filed a complaint in mandamus with the Court of Appeals in Franklin County, Ohio. The Magistrate of the Tenth Appellant District of Ohio rendered a decision on May 7, 2008, recommending a denial of Relator-Appellant's request for a writ of mandamus. (Appx. 11)

In reaching his conclusion, the Magistrate found that the Commission made a finding of new and changed circumstances as the Relator-Appellant's activities disclosed by the

videotaped evidence are so medically inconsistent with the relied upon disability evidence that the activities impeach the medical evidence underlying the award. (Appx. 24)

The Magistrate further concluded that the videotaped evidence impeached the evidence underlying the PTD award, giving the Commission authority to have Relator-Appellant examined. (Appx.26)

However, this is not the case. The Staff Hearing Officer in her January 18, 2006 order exercising continuing jurisdiction stated that the videotape "**may have been a change in circumstances sufficient to warrant the stopping of the Permanent and Total Disability award.**" She then referred the file for an examination on the issue of whether Relator-Appellant was capable of sustained remunerative employment.

The Magistrate stated that the issue is whether the videotaped evidence shows activity consistent with Relator's testimony that his pain interferes with his ambulation, and that he is unable to perform activities of daily living. (Appx.29)

The Magistrate also went into an analysis of the medical submitted by the Industrial Commission and Employer on the issue of the Employer's motion to terminate PTD.

Objection to the Magistrate's decision was filed, however, this was overruled by the Court of Appeals Memorandum Decision rendered on September 25, 2008. The Court of Appeals adopted the Magistrate's decision and denied Relator-Appellant's request for a writ of mandamus. (Appx.5)

On September 25, 2008, a judgment entry was issued denying the requested writ of mandamus. (Appx.4) Relator-Appellant timely filed his Notice of Appeal from the order

of the Tenth Appellate District of Ohio to this court on October 6, 2008. (Appx.1) This matter is before this court as an appeal of right.

### ARGUMENT

#### First Proposition of Law:

THE INDUSTRIAL COMMISSION OF OHIO ABUSES ITS DISCRETION WHEN IT EXERCISED CONTINUING JURISDICTION AS ITS DISCRETION IS NOT SUPPORTED BY ANY EVIDENCE IN THE RECORD AND IS CONTRARY TO LAW.

The Industrial Commission derives its power to reconsider previous decisions from O.R.C. 4123.52.

O.R.C. 4123.52 states:

The jurisdiction of the industrial commission and the authority of the administrator of workers' compensation over each case is continuing, and the commission may make such modification or change with respect to former findings or orders with respect thereto, as, in its opinion is justified. (Appx.145)

Continuing jurisdiction can be invoked only when one of these preconditions exists:

(1) new and changed circumstances; (2) fraud; (3) clear mistake of fact; (4) clear mistake of law; or (5) error by an inferior tribunal. *State ex rel. Nicholls v. Indus. Comm.* (1998), 81 Ohio St.3d 454, 459, 692 N.E.2d 188.

The Industrial Commission must clearly articulate one of these prerequisites in seeking to exercise reconsideration jurisdiction. *State ex rel. Foster v. Indus. Comm.* (1999), 85 Ohio St.3d 320, 707 N.E.2d 1122, *State ex rel. Gobich v. Indus. Comm.* (2004), 103 Ohio St.3d. 585, 817 N.E. 2d 398.

Employer filed a motion requesting that the Industrial Commission terminate Relator-Appellant's PTD benefits based on the **19 minutes** of videotape attached to their motion. The issue then is whether the videotaped evidence constitutes new and changed circumstances to allow the Industrial Commission to reopen the issue of permanent total disability.

New and changed circumstances when considering payment of PTD can include: (1) actual sustained remunerative employment, *State ex rel. Kirby v. Indus. Comm.* (2002), 97 Ohio St.3d 427, 780 N.E.2d 275; (2) the physical ability to do sustained remunerative employment, *State ex rel. Schulz v. Indus. Comm.* (2002), 96 Ohio St.3d 27, 770 N.E.2d 576; or (3) activities so medically inconsistent with the disability evidence that they impeach the medical evidence underlying the award. *State ex rel. Timmerman Truss, Inc. v. Indus. Comm.*, (2004), 102 Ohio St.3d 244, 809 N.E. 2d 15. The Staff Hearing Officer of the Industrial Commission did not find any of these prior to her exercising continuing jurisdiction and requiring Relator-Appellant undergo another examination by an IC physician.

After the Staff Hearing Officer's review of the submitted videotaped evidence, she did not hold that it constituted new and changed circumstances to warrant continuing jurisdiction. What she stated in her order was that there **may have been** a change in circumstances sufficient to warrant the stopping of the PTD benefits.

Continuing jurisdiction cannot be exercised indiscriminately. Possibility of error is not an acceptable basis for exercising continuing jurisdiction. *State ex rel. Royal v. Indus. Comm.* (2002), 95 Ohio St. 3d 97, 100, 766 N.E. 2d 135.

This Court has stated that it has responded to the Industrial Commission's abuse of discretion in invoking continuing jurisdiction. "There are now strict requirements on what a continuing jurisdiction order must state." *State ex rel International Truck & Engine Corp. v. Indus. Comm.* (2008), 119 Ohio St. 3d 402, 2008-Ohio-4494.

"The reason for the exercise of continuing jurisdiction must be articulated contemporaneously with the exercise of continuing jurisdiction, not belatedly. *State ex rel. Royal v. Indus. Comm.* (2002), 95 Ohio St. 3d 97, 100, 766 N.E. 2d 135. An incomplete continuing jurisdiction order cannot be rehabilitated by a subsequent order. *Id.* *Gobich* described these three cases as "uncompromising in their demand that the basis for continuing jurisdiction be clearly articulated." 103 Ohio St. 3d 585, 2004-Ohio-5990, 817 N.E. 2d 398. This rule destroys any assertion that an informal or silent invocation of continuing jurisdiction can occur." *Id.*

This equivocal finding by the SHO does not rise to the level of meeting the pre-requisite of a change in circumstances to warrant the exercise of continuing jurisdiction. By her own conclusion, the SHO lacked the authority to exercise continuing jurisdiction, and authorize another examination of Relator-Appellant. The Staff Hearing Officer's subsequent determination that there was a change in circumstance to warrant the exercise of continuing jurisdiction was made after she exercised continuing jurisdiction.

By authorizing the examination, the Industrial Commission allowed the self-insured employer to re-litigate the issue of permanent total disability, previously decided in 2003.

If this Court allows the Industrial Commission to conduct ongoing examinations of injured workers, who are PTD, without satisfying the required criteria under which they are authorized to exercise continuing jurisdiction, the flood gates will open and this

Court will be asked to re-determine all claims in which injured workers' are receiving permanent and total disability.

Second Proposition of Law:

THE INDUSTRIAL COMMISSION OF OHIO ABUSES ITS DISCRETION WHEN IT TERMINATED PERMANENT TOTAL DISABILITY AS ITS DISCRETION IS NOT SUPPORTED BY ANY EVIDENCE CONTAINED IN THE RECORD AND IS CONTRARY TO LAW.

Regardless of the Industrial Commission's authority to reexamine the issue of PTD, the evidence relied upon by the SHO does not rise to the level to support the termination of PTD benefits. The test to be applied in determining whether the Industrial Commission abused its discretion in terminating permanent total disability compensation, which had been previously awarded, is set forth in the Ohio Supreme Court's decision in *State ex rel. Lawson v. Mondie Forge* (2004) 104 Ohio St. 3d 39, 817 N.E. 2d 880. In *Lawson*, the injured worker sustained a lower back injury in 1985. He was awarded permanent total disability in 1994. In 2001, the Bureau of Workers' Compensation filed a motion to terminate Mr. Lawson's permanent total disability compensation. In support of this motion, the Bureau of Workers' Compensation submitted an activity spreadsheet that contained 207 activities engaged in by Mr. Lawson from 1993 through 2001, almost all of which were for the benefit of the Village of West Elkton, Ohio. These activities included plowing snow, purchasing hardware and gas, truck and plow maintenance and hauling gravel.

The BWC also submitted a surveillance videotape approximately covering a period of time of 5 ½ hours which documented Mr. Lawson driving a dump truck and loading

unspecified items into the truck. There was also evidence submitted that Mr. Lawson occasionally did some lawn mowing with both a push and riding lawn mower.

The Industrial Commission terminated Mr. Lawson's permanent total disability compensation based upon the above referenced evidence. Mr. Lawson filed a complaint in mandamus in the Court of Appeals for Franklin County. The Court of Appeals found evidence supporting the Commission's order and denied the writ. Mr. Lawson then appealed to the Ohio Supreme Court.

The Ohio Supreme Court reversed the decision of the Franklin County Court of Appeals and reinstated Mr. Lawson's permanent total disability compensation. In doing so, the Ohio Supreme Court set forth a three part test to determine whether payment of permanent total disability compensation is inappropriate.

Initially, the Ohio Supreme Court correctly noted that permanent total disability compensation rests on a single question: Is the claimant **capable** of sustained remunerative employment? Id. The Court held that payment of PTD is inappropriate where there is evidence of (1) actual sustained remunerative employment; (2) the physical ability to do sustained remunerative employment; or (3) activities so medically inconsistent with the disability evidence that they impeach the medical evidence underlying the award. Id.

In the case at bar, there is no assertion that Mr. Lowe was engaged in actual sustained remunerative employment, or that Mr. Lowe had the physical ability to do sustained remunerative employment. Accordingly, the issue before this Court is whether there existed competent evidence by which a Staff Hearing Officer at the Industrial Commission could conclude that the activities shown on the videotape are so medically

inconsistent with the disability evidence that they impeach the medical evidence underlying the award.

The videotape in question is the central piece of evidence supporting the employer's motion to terminate permanent total disability compensation. The report of Dr. Bacevich, which the employer submitted with its motion to terminate PTD, was based upon a review of the videotape, not an examination of the claimant. The medical exam performed by Dr. Freeman incorporated the videotape into its findings at the direction of the Staff Hearing Officer. In looking at the videotape to determine what exactly it showed, one finds the videotape in question showed surveillance of Mr. Lowe on two dates, August 3, 2004 and June 25, 2005. The Staff Hearing Officer specifically relied upon surveillance conducted on June 25, 2005 in her decision to terminate PTD. It again must be emphasized that despite a written request by claimant's counsel, employer's counsel never submitted any evidence as to how many hours of surveillance were conducted and between what dates the surveillance was conducted.

The videotape of June 25, 2005 is 88 minutes long. During these 88 minutes, Mr. Lowe performs yard work for a total of 19 minutes. The tape shows him using an electric hedge trimmer, which by Mr. Lowe's own testimony weighs approximately 3 <sup>3</sup>/<sub>4</sub> pounds. It also shows Mr. Lowe using a rake with weighs three quarters of a pound.

It is clear under the analysis conducted in *Lawson* and the subsequent cases which have been decided by the Franklin County Court of Appeals and the Ohio Supreme Court, that the evidence in the videotape is not even close to sufficient so as to form an evidentiary basis to terminate permanent total disability benefits.

In *Lawson*, the Ohio Supreme Court stated, “One of the most enduring (though not often explicitly stated) misconceptions about PTD is that once it is granted, the recipient must thereafter remain virtually housebound. This is a fallacy. PTD exempts no one from life’s daily demands. Groceries must be purchased, meals cooked. Errands must be run and appointments kept. Yards must be tended and the dog walked. Where children are involved, there may be significant chauffeur time. For some, family and friends shoulder much of the burden. Others, on the other hand lack such support, leaving the onus of these choices on the PTD claimant.” Id.

In *Lawson*, the Ohio Supreme Court found that the great majority of activities of which Mr. Lawson had performed were within his medical restrictions. The Court noted, “This prohibition against viewing activities out of context applies even more forcefully here. Some of the randomly large activities were beyond claimant’s restrictions. The vast majority of the sighted activities, however, were not.” Id. The Ohio Supreme Court then criticized the report of Dr. Duncan, who reviewed the evidence submitted by the BWC and concluded that the claimant’s activities were outside the scope of his medical restrictions. The Court stated, “Dr. Duncan’s report derived from evidence documenting claimant’s activities on two days, and establishing only that on those two days claimant engaged in some physical activity inconsistent with his medical restrictions. That does not equate to establishing claimant’s ability to do so on a **sustained** basis, nor can that ability be inferred from the other evidence, most notably the spreadsheet.” (Emphasis added)

The *Lawson* case referenced the Ohio Supreme Court’s prior holding in *State ex rel. Midmark Corp v. Indus. Comm.* (1997), 78 Ohio St. 3d 2, 676 N.E. 2d 73, where the

employer challenged the claimant's PTD application with surveillance evidence of the claimant walking unassisted, raking leaves and doing minor house repairs. The Court noted in *Midmark*, that these documented activities do not establish that the claimant could do sustained remunerative employment, noting that the surveillance material simply showed the claimant walking unassisted or doing fairly un strenuous domestic chores.

The *Lawson* decision has been applied by this Court on several occasions with regard to the issue of termination of PTD benefits. For example, in *State ex rel. Stettler v. Mid Atlantic Cannery Assoc. Inc.*, 2005-Ohio-5646, this Court refused to terminate PTD benefits based upon evidence that an individual was working at a used car dealer on a limited basis answering the telephone. This Court applied *Lawson* in refusing to terminate permanent total disability benefits of a worker who was a van driver for a school and who drove the van for a total of 60 minutes per day with his left arm. *State ex rel. Bentley v. Indus. Comm.* 2005-Ohio-6755. This Court also refused to terminate PTD of an injured worker who engaged in a very limited lawn mowing service over a period of three years. *State ex rel. McDaniel v. Indus Comm.* (2008), 118 Ohio St. 3d 319.

The above referenced cases dealt not only with the issues as to whether the injured worker was employed on a sustained basis, but also dealt with whether the evidence supported a finding that the injured worker was capable of sustained remunerative employment. Again, it is abundantly clear that the videotaped evidence which exists in this case does not support such a finding that the claimant would be capable of engaging in sustained remunerative employment

Thus, the central issue in this case is whether the videotape activity of a PTD recipient doing yard work for 19 minutes, within his doctor's medical restrictions, constitutes new and changed circumstances so as to re-open the issue of further PTD compensation. It is clear under *Lawson* that such evidence is grossly insufficient in this regard. In *Lawson* the Ohio Supreme Court stated: "One of the most enduring (though not often exclusively stated) misconceptions about PTD is that once it is granted, the recipient must therefore remain virtually housebound. This is a fallacy. PTD exempts no one from life's daily demands. Groceries must be purchased, meals cooked. Errands must be run and appointments kept. Yards must be tended and the dog walked. Where children are involved, there may be significant chauffer time. For some, family and friends shoulder much of the burden. Others, on the other hand lack such support, leaving the onus of these choices on the PTD claimant. *Supra*, *Lawson*, 42.

The Magistrate's attempt to distinguish *Lawson* from the facts in this case is misplaced. The Magistrate would have this Court believe that *Lawson* is not controlling, insofar as in *Lawson*, the injured worker was capable of sedentary employment at the time he was awarded permanent total disability benefits, while in the instant case, the Industrial Commission had concluded that Mr. Lowe was medically incapable of any sustained remunerative employment at the time Mr. Lowe's permanent total disability application was granted.

In making this distinction, the Magistrate misconstrues the entire point of the *Lawson* holding. *Lawson* stands for the proposition that the Industrial Commission is not going to routinely re-visit awards granting PTD absent substantial and probative evidence that the injured worker is capable of sustained remunerative employment. The *Lawson* holding

specifically held that isolated videotape evidence of the claimant engaging in certain physical activities or for that matter, engaging in physical activities briefly outside his or her restrictions, would not meet this evidentiary threshold. In this case, the videotape evidence does not indicate that the Relator engaged in any activities outside his medical restrictions.

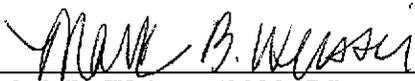
The *Lawson* case does not stand for the proposition that the termination of PTD benefits requires the Industrial Commission to re-visit the reasons why permanent total disability was granted in the first place. Once permanent total disability is granted, it is the burden of the party challenging the continuation of PTD benefits to produce substantial evidence of new and changed circumstances. A 19 minute videotape of the claimant performing yard work does not remotely meet the burden of proof required in *Lawson*. In fact, this self insured employer has consistently refused to provide Relator's counsel with surveillance logs indicating the time the Relator was put under surveillance. What is known, however, is that irrespective of the length of the surveillance, it is only 19 minutes of yard work, within the Relator's medical restrictions, which formed the basis of the Industrial Commission finding new and changed circumstances, so as to terminate Relator's permanent total disability compensation. This is simply not allowed under *Lawson* and accordingly a writ of mandamus should issue and the decision of the Magistrate should be reversed.

### CONCLUSION

The Industrial Commission's exercise of continuing jurisdiction and the subsequent termination of Relator-Appellant's permanent total disability is not supported by the evidence in the claim file and is contrary to law.

Based on the foregoing, it is clear that Relator-Appellant, Robert Lowe, is entitled to a writ of mandamus ordering the Industrial Commission to vacate its previous order terminating Relator-Appellant's permanent total disability and to reinstate Relator-Appellant's permanent total disability benefits.

Respectfully submitted,

  
\_\_\_\_\_  
Mark B. Weisser (0023676)  
Attorney for Relator-Appellant,  
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing document was sent to the following individual this the 2nd day of January, 2009 by ordinary U.S. mail service.

Gary Becker, Esq.  
Dinsmore & Shohl  
255 East Fifth Street, Suite 1900  
Cincinnati, Ohio 45202

Gerald H. Waterman, Esq.  
Office of the Attorney General  
150 East Gay Street, 22<sup>nd</sup> Floor  
Columbus, Ohio 43215-3130

  
\_\_\_\_\_  
Mark B. Weisser

# APPENDIX

IN THE SUPREME COURT

08-1954

State of Ohio ex rel. Robert Lowe, :  
 Appellant, : On Appeal From the Franklin  
 County Court of Appeals,  
 v. : Tenth Appellate District  
 Cincinnati, Inc., et al., : (oral argument requested)  
 Appellees. : Court of Appeals Case No. 07AP-850

NOTICE OF APPEAL OF APPELLANT ROBERT LOWE

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*Counsel for Appellee  
 Cincinnati, Inc.*

FILED  
 COURT OF APPEALS  
 FRANKLIN COUNTY, OHIO

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CLERK OF COURTS

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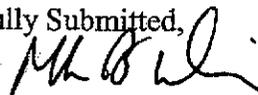
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**NOTICE OF APPEAL OF APPELLANT ROBERT LOWE  
AND REQUEST FOR ORAL ARGUMENT**

Appellant, Robert Lowe, hereby gives notice of appeal to the Supreme Court of Ohio from a judgment of the Franklin County Court of Appeals, Tenth Appellate District, entered in Court of Appeals Case No. 07AP-850 on September 25, 2008.

This case originated in the Court of Appeals.

Respectfully Submitted,



---

Mark B. Weisser  
Counsel for Appellant

**CERTIFICATION OF SERVICE**

I hereby certify that a copy of the Notice of Appeal was served upon the following individuals by ordinary U.S. mail, this the 3 day of October, 2008.

Gerald H. Waterman  
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Mark B. Weisser  
Counsel for Appellant

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

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FRANKLIN CO. OHIO

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State of Ohio ex rel. Robert Lowe, :

Relator, :

v. :

No. 07AP-850

Cincinnati, Inc. and  
Industrial Commission of Ohio, :

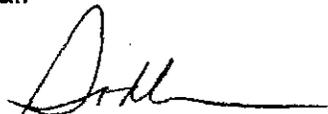
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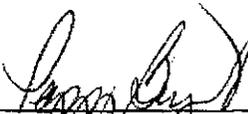
Respondents. :

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on September 25, 2008, the objections to the decision of the magistrate is overruled, the decision of the magistrate is approved and adopted by the court as its own, and it is the judgment and order of this court that the requested writ of mandamus is denied. Costs shall be assessed against relator.

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

  
\_\_\_\_\_  
Judge Lisa L. Sadler

  
\_\_\_\_\_  
Judge Peggy Bryant

  
\_\_\_\_\_  
Judge Susan Brown

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IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

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FRANKLIN CO. OHIO

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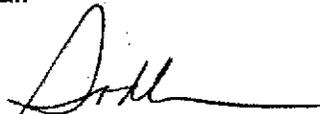
CLERK OF COURTS

State of Ohio ex rel. Robert Lowe, :  
Relator, :  
v. : No. 07AP-850  
Cincinnati, Inc. and : (REGULAR CALENDAR)  
Industrial Commission of Ohio, :  
Respondents. :

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on September 25, 2008, the objections to the decision of the magistrate is overruled, the decision of the magistrate is approved and adopted by the court as its own, and it is the judgment and order of this court that the requested writ of mandamus is denied. Costs shall be assessed against relator.

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

  
\_\_\_\_\_  
Judge Lisa L. Sadler

  
\_\_\_\_\_  
Judge Peggy Bryant

  
\_\_\_\_\_  
Judge Susan Brown

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FILED  
COURT OF APPEALS  
FRANKLIN CO. OHIO

IN THE COURT OF APPEALS OF OHIO 2008 SEP 25 PM 3:22

TENTH APPELLATE DISTRICT

CLERK OF COURTS

State of Ohio ex rel. Robert Lowe, :

Relator, :

v. :

No. 07AP-850

Cincinnati, Inc., and  
Industrial Commission of Ohio, :

(REGULAR CALENDAR)

Respondents. :

---

DECISION

Rendered on September 25, 2008

---

*Mark B. Weisser*, for relator.

*Dinsmore & Shohl*, and *Gary E. Becker*, for respondent  
Cincinnati, Inc.

*Nancy H. Rogers*, Attorney General, and *Gerald H.  
Waterman*, for respondent Industrial Commission of Ohio.

---

IN MANDAMUS  
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

SADLER, J.

{¶1} Relator, Robert Lowe ("relator"), filed this action seeking a writ of mandamus directing respondent, the Industrial Commission of Ohio ("respondent" or "the commission"), to vacate its order terminating permanent total disability ("PTD")

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compensation effective September 5, 2006, and to enter an order reinstating PTD compensation.

{¶2} We referred this case to a magistrate of this court pursuant to Loc.R. 12(M) and Civ.R. 53. On May 7, 2008, the magistrate issued a decision denying the writ of mandamus. Relator filed objections, and respondent filed a memorandum contra to the objections. For the reasons that follow, we overrule relator's objections and adopt the magistrate's decision.

{¶3} To summarize the facts of this case, which are amply set forth in the magistrate's decision, relator injured his shoulder while employed with respondent, Cincinnati, Inc. ("employer"), a self-insured employer under Ohio workers' compensation laws. Relator's claim is allowed for strain/sprain left shoulder, rotator cuff tear, and aggravation of pre-existing arthritis of left glenohumeral joint. Relator has undergone five shoulder surgeries, with the last surgery being a total joint arthroplasty of the left shoulder.

{¶4} Relator filed an application seeking PTD compensation on January 29, 2003. After a hearing, a staff hearing officer ("SHO") issued an order granting relator's application effective September 27, 2002. The employer's request for reconsideration of the SHO order was denied. We denied the employer's request for a writ of mandamus seeking vacation of the order awarding PTD compensation. *State ex rel. Cincinnati, Inc. v. Lowe*, Franklin App. No. 04AP-241, 2005-Ohio-516. The Supreme Court of Ohio affirmed. *State ex rel. Cincinnati, Inc. v. Lowe*, 109 Ohio St.3d 80, 2006-Ohio-1927, 846 N.E.2d 25.

{¶5} On November 1, 2005, the employer moved to terminate PTD compensation and for a declaration of overpayment. In support of this motion, the

employer offered videotapes of surveillance conducted on relator on August 3, 2004 and June 25, 2005. The videotape shows relator using a power mower, using a hedge trimmer with both his right and left arms, and holding the trimmer in his left hand while using a rake with his right arm to scrape cuttings off the trimmer.

{¶6} On October 5, 2005, Bernard B. Bacevich, M.D., reviewed the videotape at the employer's request. Dr. Bacevich had examined relator in 2003 as part of the initial application for PTD compensation, and had reported as his opinion that relator was capable of engaging in sustained remunerative employment at that time performing sedentary work using only his right arm. Upon his review of the videotape, Dr. Bacevich prepared an additional report stating his opinion that the videotape showed that relator had capabilities beyond that which had been shown in his 2003 examination, and that relator was capable of engaging in sustained remunerative employment performing light to medium work.

{¶7} On January 3, 2006, an SHO issued an interlocutory order finding that the videotape evidence offered by the employer was sufficient to demonstrate the possibility that there had been a change in circumstances that could warrant termination of PTD compensation. The SHO ordered an examination to include both a physical examination and a review of the videotaped evidence. That examination was conducted on May 12, 2006, by Andrew Freeman, M.D. Dr. Freeman concluded that the conditions allowed in the claim had reached maximum medical improvement ("MMI"), and that relator was capable of performing sedentary work with no reaching or overhead work using his left arm.

{¶8} After a September 5, 2006 hearing, an SHO issued an order granting the employer's motion to terminate PTD compensation. PTD compensation was terminated as of the date of the hearing, and no overpayment was declared. The SHO concluded that the videotape evidence was sufficient to find that a change in circumstances had occurred since the time of the PTD compensation finding, and that the videotape showed that relator had greater functional capacity than he had testified at the original hearing. The SHO then concluded that relator was capable of sustained remunerative employment, and thus termination of PTD compensation was warranted. On April 6, 2007, the commission, by a 2-1 vote, denied relator's request for reconsideration of the SHO's order. Relator then filed this action.

{¶9} In his decision, the magistrate concluded that the commission did not abuse its discretion in finding: (1) that a change in circumstances had occurred justifying the commission's exercise of continuing jurisdiction over relator's PTD claim, and (2) that based on the evidence, relator's PTD compensation should be terminated. Relator's objections to the magistrate's decision relate to the finding that a change in circumstances had occurred that allowed the commission to exercise continuing jurisdiction.

{¶10} The requirements for the commission to exercise continuing jurisdiction over a PTD claim are: (1) new and changed circumstances, (2) fraud, (3) clear mistake of fact, (4) clear mistake of law, or (5) error by an inferior tribunal. *State ex rel. Gobich v. Indus. Comm.*, 103 Ohio St.3d 585, 2004-Ohio-5990, 817 N.E.2d 398. Evidence arising after a PTD award that a claimant is engaged or can engage in sustained remunerative employment is a new and changed circumstance that can justify the commission's

exercise of continuing jurisdiction. *State ex rel. Alesci v. Indus. Comm.*, 97 Ohio St.3d 210, 2002-Ohio-5932, 777 N.E.2d 835.

{¶11} Evidence that a claimant is capable of sustained remunerative employment such that continued payment of PTD compensation is not appropriate includes: (1) actual sustained remunerative employment, (2) the physical ability to perform sustained remunerative employment, or (3) activities so medically inconsistent with the disability evidence that they impeach the medical evidence underlying the award. *State ex rel. Lawson v. Mondie Forge*, 104 Ohio St.3d 39, 2004-Ohio-6086, 817 N.E.2d 880.

{¶12} The magistrate concluded that the commission's finding was based on the third factor in *Lawson* – that the evidence from the videotape was so medically inconsistent with the evidence offered in support of the initial PTD award as to impeach the credibility of the medical evidence underlying the award. The magistrate examined the SHO's order, in which the SHO cited evidence that had been provided in support of the initial PTD award, specifically relator's testimony that the pain he was experiencing was so severe that it interfered with his ability to ambulate, and that he required assistance with activities of daily living, including dressing and feeding. The SHO's order then discussed the videotape evidence and concluded that it showed that relator was not suffering from pain so severe that it interfered with his ambulation and with his ability to perform activities of daily living. Thus, the magistrate concluded that the SHO order properly cited some evidence to support the conclusion that a change in circumstances had occurred that justified the commission's exercise of continuing jurisdiction.

{¶13} In his objections, relator disagrees with the magistrate's conclusion that the videotape evidence showed change circumstances supporting the exercise of continuing

jurisdiction. Relator argues that the activities shown on the videotape were within the medical restrictions that had been placed on him by his physician, and therefore could not form the basis for the conclusion that a change in circumstances had occurred. See, e.g., *Lawson*, supra, in which the court held that surveillance showing a claimant engaging in limited activities that were arguably inconsistent with his medical restrictions was not sufficient to terminate PTD compensation.

{¶14} However, the magistrate's decision was not based on the conclusion that the videotape evidence showed relator engaging in activities that were inconsistent with his medical restrictions. Rather, the magistrate's decision was based on the conclusion that the videotape showed relator engaging in activities that were inconsistent with his testimony in support of his initial claim for PTD compensation, in which he testified that he was experiencing pain so severe that it interfered with his ambulation and with his performance of activities of daily living. Having reviewed the evidence, we agree with the magistrate's decision that there was some evidence to support the conclusion that there had been a change in circumstances justifying the commission's exercise of continuing jurisdiction.

{¶15} Consequently, having considered relator's objections, and having independently reviewed the magistrate's decision, we overrule relator's objections to the magistrate's decision, and adopt the magistrate's decision as our own.

*Objections overruled;  
writ denied.*

BRYANT and BROWN, JJ., concur.

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ORIGINAL

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

State of Ohio ex rel. Robert Lowe, :  
Relator, :  
v. :  
Cincinnati, Inc. and Industrial :  
Commission of Ohio, :  
Respondents. :

No. 07AP-850

(REGULAR CALENDAR)

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MAGISTRATE'S DECISION

Rendered on May 7, 2008

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*Mark B. Weisser*, for relator.

*Dinsmore & Shohl*, and *Gary E. Becker*, for respondent Cincinnati, Inc.

*Marc Dann*, Attorney General, and *Gerald H. Waterman*, for respondent Industrial Commission of Ohio.

---

IN MANDAMUS

In this original action, relator, Robert Lowe, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order terminating permanent total disability ("PTD") compensation effective September 5, 2006, and to enter an order reinstating PTD compensation.

Findings of Fact:

1. On November 13, 1998, relator injured his left shoulder while employed as a "laser assembler" for respondent Cincinnati, Inc. ("employer"), a self-insured employer under Ohio's workers' compensation laws.

2. The industrial claim is allowed for "strain/sprain left shoulder; rotator cuff tear; aggravation of pre-existing arthritis of left glenohumeral joint," and is assigned claim number 98-593871.

3. Relator has undergone five left shoulder surgeries. The first four surgeries were performed by orthopedic surgeon Jim Swanson, M.D. The fifth surgery was a total joint arthroplasty of the left shoulder performed on August 21, 2001, by a Dr. Kim.

4. On September 27, 2002, relator was seen and examined by Dr. Swanson who took over relator's care after Dr. Kim moved to a new location.

5. In his September 27, 2002 office note, Dr. Swanson stated:

The left shoulder continues to be painful and stiff despite the arthroplasty. \* \* \* Mr. Lowe doesn't feel he is capable of working with his shoulder. He can do a few light things around the house, but once he starts anything involving repetition or lifting his pain worsens. He still uses pain medicine intermittently. \* \* \*

\* \* \*

\* \* \* HE MEETS THE CRITERIA OF CHRONIC INTRACTABLE PAIN REQUIRING NARCOTICS FOR CONTROL. \* \* \*

I do not recommend ever returning to work. MMI status has been achieved effective 9-27-02. 28% Upper Extremity Permanent Partial Impairment is present according to the AMA Guides to Impairment, 5<sup>th</sup> edition. (Equivalent to 17% whole person). \* \* \* He will require twice yearly visits to me

to refill pain medication and monitor for signs of prosthetic loosening or infection. The total joint will need to be routinely followed with yearly x-rays of the shoulder.

(Emphasis sic.)

6. On January 29, 2003, relator filed an application for PTD compensation. In support, relator submitted Dr. Swanson's September 27, 2002 office note.

7. On April 30, 2003, at the employer's request, relator was examined by Bernard B. Bacevich, M.D., who reported:

It is my opinion that the allowed conditions in this claim do not preclude this man from engaging in any sustained remunerative employment. It is my opinion that this man is capable of performing work in a sedentary level but only with use of his right arm. It is my opinion that he has to be in a position where he does not use his left arm. \* \* \*

Based upon the Fifth Edition of the AMA Guides to the Evaluation of Permanent Impairment. This man would have a 47% impairment of the left shoulder which equates to a 28% impairment of the whole person. \* \* \*

8. On May 15, 2003, at the commission's request, relator was examined by Steven S. Wunder, M.D., who reported:

Based upon the AMA Guides to the Evaluation of Permanent Improvement [sic], fourth edition, for the diagnoses of left shoulder sprain/strain, rotator cuff tear, and aggravation of pre-existing arthritis of the left glenohumeral joint, he would have a 27% impairment to the whole person. The rationale behind this would be a 22% upper extremity impairment from the range of motion tables. The range of motion was less than noted by Dr. Swanson, but I could not tell if this was due to pain or more contractures since his last visit. He would have a 30% upper extremity impairment from Table 27, page 61 for an implant arthroplasty. The 30% combines with the 22% using the Combined Values Table for a 45% upper extremity impairment, which equates to a 27% impairment to the whole person.

\* \* \* He would have functional capacities using the right arm only in the realm of sedentary to light. He could use the left

arm for no more than 2 to 3 pounds of lifting and primarily as a helper. He has no functional restrictions with the right arm, axial skeleton or lower extremities. \* \* \*

9. Dr. Wunder also completed the physical strength rating form on May 15, 2003. On the form, Dr. Wunder indicated that relator is capable of performing sedentary work.

10. Following an October 1, 2003 hearing, a staff hearing officer ("SHO") issued an order granting PTD compensation starting September 27, 2002, the date of Dr. Swanson's office note. The SHO explained:

The injured worker was examined by Dr. Wunder at the request of the Industrial Commission with respect to the allowed orthopedic conditions in the claim. Dr. Wunder opined that the injured worker has reached maximum medical improvement and has a resulting 27% whole person permanent impairment. Dr. Wunder completed a physical strength rating form which he attached to his medical report wherein he indicated that the injured worker is capable of physical work activity at a sedentary level.

The employer submitted the medical report of Dr. Bacevich for consideration. Dr. Bacevich essentially agreed with the opinion of Dr. Wunder and opined that the injured worker has a 28% whole person permanent impairment considering the allowed conditions. He also opined that the injured worker would be capable of performing sedentary employment provided that he not perform any work activity with the left upper extremity.

The injured worker testified at hearing that he continues to suffer from pain despite four surgical procedures on his left shoulder. The injured worker testified that the pain that he experiences is so severe that it interferes with his ability to ambulate as well as his ability to concentrate. The injured worker further testified that he is unable to take care of his activities of daily living and needs help from his wife in dressing and feeding. The injured worker further testified that he attempted a return to work in July, 2002 as a security guard, but was unable to continue to perform the job duties as a result of his difficulty with walking and pain.

The injured worker submitted the office notes of his treating physician, Dr. Swanson, for consideration. Dr. Swanson opined on 09/27/2002 that the injured worker is unable to perform employment as a result of the allowed conditions.

The Staff Hearing Officer finds that the injured worker is unable to return to his former position of employment and is incapable of engaging in any other form of sustained remunerative employment considering the severity of his medical impairment in combination with the resulting pain from which he suffers as a result of the allowed conditions. Therefore, the injured worker's application for permanent and total disability compensation is granted.

This order is based on the office note of Dr. Swanson dated 09/27/2002 and the injured worker's testimony at hearing.

11. On December 17, 2003, the commission mailed an order denying the employer's request for reconsideration of the SHO's order of October 1, 2003.

12. On November 1, 2005, the employer moved to terminate PTD compensation and for a declaration of an overpayment beginning August 3, 2004. In support of its motion, the employer submitted surveillance videotapes of relator performing yard work at his residence on August 3, 2004 and June 25, 2005.

13. Earlier, on October 5, 2005, at the employer's request, Dr. Bacevich reviewed the videotaped evidence and issued an "Addendum Report," stating:

I had initially performed an Independent Medical Examination on Robert Lowe on April 30, 2003 and have now been sent a videotape of Robert Lowe dated 08/03/04 and 06/25/05. My review of the videotape shows that on 08/03/04 he was at an ATM machine and then walked over to his car but could easily open and close the door using his left arm. The tape then showed him using a power mower which had to be pushed and pulled and he was using this with both arms, again without any visible signs of difficulty in using his arms. He would push and pull this repetitively, move it around trees, and not show any evidence of difficulty. At times he would use a single arm and pull the mower backwards with his right arm but he would be swinging his

left arm, again, without any evidence of difficulty. At the end of the grass cutting session he did put his mower away in to a garage area. He appeared to be very hot and sweaty. The video ended when he walked up and was talking with an older man and went down to sit on a porch. The next section of the video was from 06/25/05 when it begins with him picking up a hedge clipper with his left arm and not showing any signs of difficulty. The video, at times, would show him using the hedge cutter with his right arm and other times he would use it in both arms. He would then use a rake to clear the debris from the top of the bushes. He would have his right arm at the proximal part of the handle and his left arm down lower and would be pulling backwards quite forcefully and vigorously and, again, this showed no evidence of any difficulty or pain. During these maneuvers his left arm would be raised forward to the 90-degree position. At other times, he was seen holding the trimmer in his left arm using the rake in his right arm to scrape off the cuttings and other times he would use both arms on the rake. There were several episodes where he could easily pick up the hedge clippers with his left arm. During all of these movements [t]here is no evidence to indicate that he was experiencing pain. This video demonstrated that he had full normal motion of the shoulder in various positions with the arm at or below shoulder level. The video did not demonstrate any activities where he had to reach in the completely overhead position.

#### SUMMARY AND OPINIONS:

Based upon reviewing this video, this man demonstrated physical capabilities that were much different than the \* \* \* findings on my examination on April 30, 2003. On my examination he had exquisite pain in the shoulder on attempts at range of motion and had very severe guarding. His pain was also aggravated by even bending the elbow whereas in the video he did not have any apparent difficulty with the shoulder even with bending activities at the elbow, lifting a hedge clipper, or using a hedge clipper or a rake. Based upon review of this video, this man has either had a miraculous recovery between 04/30/03 and the first portion of the video dated 08/03/04 or that he was demonstrating marked symptom magnification during my examination. Based upon the recent video of 06/25/05, this man can certainly use his left arm for many activities which are fairly strenuous in that he could use it for pushing and pulling a lawn mower and also use it in cutting hedges and using a

rake. Based upon this video, it is certainly my opinion that this man is capable of gainful sustained remunerative employment and my opinions rendered in my report are no longer valid. This man is capable of using his left arm for repetitive activities certainly below the shoulder level. He is capable of cutting grass, capable of using a hedge trimmer, and capable of raking. This video does not support the fact that this man has been granted permanent total disability benefits. This man can perform light to medium work.

14. On January 3, 2006, an SHO issued an interlocutory order stating:

The Staff Hearing Officer finds that the employer has presented sufficient evidence to demonstrate that there may have been a change in circumstances sufficient to warrant the stopping of the Permanent and Total Disability award. Therefore[,] the Staff Hearing Officer refers the file to the medical section for an examination on the issue of whether the injured worker is capable of performing sustained remunerative employment. The examining physician is instructed to examine the injured worker and to review the video tape evidence submitted by the employer.

After the completion of the examination[,] the matter is to be reset before a Staff Hearing Officer on the employer's motion filed 11/01/2005.

15. On May 12, 2006, at the commission's request, relator was examined

by Andrew Freeman, M.D., who reported:

HISTORY OF PRESENT ILLNESS: \* \* \*

He is right-hand dominant. He is unlimited in terms of sitting and standing and walking, but he can only drive using his right hand only and only uses his left hand and arm to steady the wheel. He states that he can only lift 3 to 5 pounds with the left hand and arm and can lift up to 20 pounds with the right arm. He states that he is unable to do dishes, cook, and make a bed. This is because of his left shoulder symptoms. He is able to dress himself and perform personal hygiene tasks. At this point, he made a point of stating that he does have occasional days where he can do this such as the day when he was filmed without his knowledge in June of 2005.

\* \* \*

PHYSICAL EXAMINATION:

\*\*\*

LEFT SHOULDER: There was no visible swelling or deformity in the shoulder joint. The drop arm test could not be performed. There was diffuse tenderness over the AC joint, deltoid, biceps tendon insertion and all other areas tested in the shoulder region. There was mild crepitus with active motion. There was a 17 cm healed anterior scar from a prior shoulder surgery. The Jobe's test and the anterior drawer test could not be performed due to pain.

\*\*\*

DISCUSSION: Robert Lowe has allowed conditions from a single claim being evaluated in this report. The left shoulder conditions are still symptomatic.

OPINION: Based solely on the allowed conditions listed in the claims reviewed, and considering only the physical conditions allowed:

1. These allowed conditions have reached MMI.
2. Based on the American Medical Association's *Guides to the Evaluation of Permanent Impairment – 5<sup>th</sup> Edition*, the whole person impairment for the allowed physical conditions in the claim is 20%. \*\*\*

16. On May 12, 2006, Dr. Freeman completed a physical strength rating form. On the form, Dr. Freeman indicated that relator can perform "sedentary work." He added "no reaching or overhead work with the left arm."

17. Following a September 5, 2006 hearing, an SHO issued an order granting the employer's November 1, 2005 motion to terminate PTD compensation to the extent that PTD compensation was terminated as of the September 5, 2006 hearing date and no overpayment was declared. The SHO's order explains:

It is the order of the Staff Hearing Officer that the employer's motion, filed 11/01/2005, is granted. The employer's motion requests that the payment of permanent and total disability

compensation be terminated due to a change in circumstances subsequent to the order granting permanent and total disability that demonstrate that the injured worker is capable of sustained remunerative employment.

The Staff Hearing Officer finds that by Industrial Commission order dated 10/01/2003 the injured worker was awarded benefits for permanent and total disability. In granting permanent and total disability the Staff Hearing Officer stated:

"The injured worker testified at hearing that he continues to suffer from pain despite four surgical procedures on his left shoulder. The injured worker testified that the pain that he experiences is so severe that it interferes with his ability to ambulate as well as his ability to concentrate. The injured worker further testified that he is unable to take care of his activities of daily living and needs help from his wife in dressing and feeding. The injured worker further testified that he attempted to return to work in July, 2002 as a security guard, but was unable to continue to perform the job duties as a result of his difficulty with walking and pain."

The employer has submitted videotape evidence of the injured worker performing yard work outside of his home. The videotape evidence is compiled on two dates. The Staff Hearing Officer finds that the activities recorded on 06/25/2005 are the most compelling. The videotape on 06/25/2005 shows the injured worker using both arms and hands to trim bushes using hedge clippers. The videotape on that date also shows the injured worker using both hands and arms to hold a rake which he is rapidly and forcefully moving back and forth to remove debris from the tops of bushes.

The Staff Hearing Officer finds that the videotape evidence is sufficient evidence to demonstrate that a change in circumstances has occurred since the time of the initial permanent and total disability finding. The original permanent and total disability order memorialized the injured worker's testimony that his pain is so severe that it interferes with his ability to ambulate. The order further recorded the injured worker's testimony that he is not able to take care of his activities of daily living and that the injured worker needs help from his wife in dressing and feeding. The Staff Hearing Officer finds that the videotape evidence clearly demonstrates that the allowed conditions in this claim would not so severely restrict the injured worker's functional capacity as to limit his abilities

to participate in the activities of daily living or to prevent the injured worker from performing the activities of dressing and feeding. The Staff Hearing Officer finds that the Staff Hearing Officer relied upon the injured worker's testimony that he was not able to perform the activities of daily living, including dressing and feeding and that he had a limited ability to walk due to pain in finding that the injured worker was permanently and totally disabled. The Staff Hearing Officer finds that the videotape demonstrates that the injured worker's condition has changed since the original Permanent and Total Disability hearing and that the injured worker has greater functional capacities than he testified to at the original hearing.

The Staff Hearing Officer therefore finds that the change in circumstances makes it appropriate to reconsider the issue of permanent and total disability in this claim.

The employer submitted the 10/05/2005 report of Bernard Bacevich, orthopedic surgeon. Dr. Bacevich's report is an addendum report to his report dated 04/30/2003. Dr. Bacevich reviewed the videotape evidence compiled on 08/03/2004 and 06/25/2005. In his report[,] Dr. Bacevich recounts the activity viewed in the videotape. Dr. Bacevich advised that the video showed the injured worker walking, pushing and pulling a lawn mower, picking up a hedge clipper with the left arm, using the hedge clipper with the right arm or with both arms, using a rake to clear debris from the tops of bushes, and pulling backwards quite forcefully and vigorously. Dr. Bacevich advised that the injured worker performed these activities with no indication that he was experiencing pain. Dr. Bacevich opined, based upon the video of 06/25/2005, that the injured worker can use his left arm for many activities which are fairly strenuous. He further opined, based upon the video, that the injured worker is capable of gainful sustained remunerative employment. Dr. Bacevich opined, based upon the video that the injured worker is capable of performing light to medium work.

Dr. Andrew Freeman, occupational medicine, evaluated the injured worker on 05/12/2006 at the request of the Industrial Commission. Dr. Freeman reviewed medical evidence on file, took a history from the injured worker, examined the injured worker and reviewed the videotape evidence. Dr. Freeman noted that the injured worker is right hand dominant. The injured worker advised Dr. Freeman that he is

unlimited in terms of sitting, standing and walking. The injured worker further advised that he is able to drive with his right hand, using his left hand and arm only to steady the wheel. He further advised that he is able to lift only three to five pounds with the left hand. The injured worker further advised that he is not able to do dishes, cook or make a bed because of his left shoulder symptoms. The injured worker further advised that [he] is able to dress himself and perform personal hygiene tasks.

Dr. Freeman reviewed the 06/25/2005 videotape. Dr. Freeman advised that during the segment of video the injured worker was seen to use both hands to operate a hedge clipper; was seen to move both arms in a rapid fashion; was seen using a rake in his yard; and was seen to reach to connect and disconnect his hose. Dr. Freeman advised that the injured worker performed these activities with no physical evidence of pain such as grimacing. Dr. Freeman's examination findings are contained in his report. Dr. Freeman advised that the injured worker has reached maximum medical improvement for each of the conditions that are recognized in his industrial claim. On the physical strength rating form that is attached to his report[,] Dr. Freeman indicated that the injured worker is capable of sedentary work with no reaching or overhead work with the left arm.

The Staff Hearing Officer finds the injured worker has reached maximum medical improvement for each of the conditions that are recognized in his industrial claim. The Staff Hearing Officer further finds, based upon the reports of Dr. Bacevich and Dr. Freeman, that the injured worker retains the physical functional capacity to perform employment activities that are sedentary in nature.

The Staff Hearing Officer finds that the injured worker is 60 years of age with a high school education and work history which involved employment as an assembler, a machine operator, an inspector and an administrative assistant. The Staff Hearing Officer further finds that the injured worker is able to read, write and perform basic math well. The Staff Hearing Officer further finds that the injured worker has no specialized training or special vocational skills.

The Staff Hearing Officer finds that the injured worker's age of 60 years is a moderate barrier to the injured worker with regard to his ability to return to and compete in the work

force. The Staff Hearing Officer further finds, however, that age alone is not a factor which absolutely prevents any person from returning to work. The Staff Hearing Officer further finds that the injured worker's high school education and ability to read, write and perform basic math well are assets to the injured worker with regard to his ability to return to work. The Staff Hearing Officer further finds that these same factors would be assets to the injured worker with regard to his ability to learn the new work skills, work rules and work procedures necessary to perform some other type of employment. The Staff Hearing Officer further finds that the injured worker's skilled work history, which involves employment as a machine builder and an extruder operator, is evidence that the injured worker has the intellectual capacity to learn to perform at least unskilled and semiskilled employment in the future. The Staff Hearing Officer further finds that the injured worker's twelfth grade education and ability to read, write and perform basic math well should provide the injured worker with academic levels that are sufficient for the performance of many entry level occupations. The Staff Hearing Officer, accepting the opinions of Dr. Bacevich and Dr. Freeman and relying upon the videotape evidence, finds that the injured worker retains the physical functional capacity to perform employment activities that are sedentary in nature with no reaching or overhead work with the left arm. The Staff Hearing Officer finds that the injured worker can perform employment activities which require exerting up to ten pounds of force occasionally and/or a negligible amount of force frequently to lift, carry, push, pull or otherwise move objects. The Staff Hearing Officer further finds that the injured worker is able to perform work which requires sitting most of the time but may involve walking or standing for brief periods of time as long as this work does not require reaching or overhead work with the left arm.

The Staff Hearing Officer therefore finds that the injured worker is capable of performing sustained remunerative employment and is not permanently and totally disabled. The Staff Hearing Officer finds that facts and circumstances have changed since the 10/01/2003 [order] which awarded permanent and total disability. The Staff Hearing Officer finds that the injured worker is no longer permanently and totally disabled. Therefore[,] the payment of benefits for permanent and total disability, is terminated effective 09/05/2006, the date of this hearing.

This order is based upon Industrial Commission order dated 10/01/2003, the report of Dr. Bacevich dated 10/05/2005, the report of Dr. Freeman dated 05/12/2006 and the videotape evidence on file.

18. On April 6, 2007, the three-member commission, one member dissenting, mailed an order denying relator's request for reconsideration of the SHO's order of September 5, 2006.

19. On October 16, 2007, relator, Robert Lowe, filed this mandamus action.

Conclusions of Law:

The main issue is whether the commission abused its discretion in finding a change of circumstances justifying the exercise of its continuing jurisdiction over its prior PTD award.

Finding that the commission did not abuse its discretion in finding a change of circumstances justifying the exercise of its continuing jurisdiction over its prior PTD award, it is the magistrate's decision that this court deny relator's request for a writ of mandamus, as more fully explained below.

The lifetime nature of a PTD award does not mean that it is immune from later review. *State ex rel. Smothers v. Mihm* (1994), 69 Ohio St.3d 566, 567-568. If, for example, the commission learns that the claimant is working or engaging in activity inconsistent with his PTD status, the commission can use its continuing jurisdiction under R.C. 4123.52 to reopen the matter. *Id.*

Continuing jurisdiction is not unlimited. Its prerequisites are: (1) new and changed circumstances; (2) fraud; (3) clear mistake of fact; (4) clear mistake of law; and

(5) error by an inferior tribunal. *State ex rel. Gobich v. Indus. Comm.*, 103 Ohio St.3d 585, 2004-Ohio-5990.

Discovery of evidence subsequent to a PTD award that a claimant is or can engage in sustained remunerative employment is a new and changed circumstance warranting the exercise of continuing jurisdiction. *State ex rel. Alesci v. Indus. Comm.*, 97 Ohio St.3d 210, 2002-Ohio-5932, citing *Smothers*.

In *State ex rel. Lawson v. Mondie Forge*, 104 Ohio St.3d 39, 41, 2004-Ohio-6086, a case heavily discussed by the parties, the court states:

PTD pivots on a single question: Is the claimant *capable* of sustained remunerative employment? *State ex rel. Stephenson v. Indus. Comm.* (1987), 31 Ohio St.3d 167, 31 OBR 369, 509 N.E.2d 946. Payment of PTD is inappropriate where there is evidence of (1) actual sustained remunerative employment, *State ex rel. Kirby v. Indus. Comm.*, 97 Ohio St.3d 427, 2002-Ohio-6668, 780 N.E.2d 275; (2) the physical ability to do sustained remunerative employment, *State ex rel. Schultz v. Indus. Comm.*, 96 Ohio St.3d 27, 2002-Ohio-3316, 770 N.E.2d 576; or (3) activities so medically inconsistent with the disability evidence that they impeach the medical evidence underlying the award. See *State ex rel. Timmerman Truss, Inc. v. Indus. Comm.*, 102 Ohio St.3d 244, 2004-Ohio-2589, 809 N.E.2d 15, ¶ 26.

Id. at ¶16. (Emphasis sic.)

Here, the commission's finding of a new and changed circumstance is premised upon *Lawson's* third criteria—that relator's activities disclosed by the videotaped evidence are so medically inconsistent with the relied upon disability evidence that they impeach the medical evidence underlying the PTD award.

The SHO's order of October 1, 2003 awards PTD compensation based upon a finding that the industrial injury alone prohibits a return to any sustained remunerative employment without reference to the nonmedical factors. See Ohio

Adm.Code 4121-3-34(D)(2)(a). The SHO's order states reliance upon Dr. Swanson's September 27, 2002 office note and relator's hearing testimony.

In her order of September 5, 2006, the SHO found that the June 25, 2005 videotape impeaches relator's October 1, 2003 hearing testimony as memorialized by the SHO's order of October 1, 2003. The SHO quoted that portion of the SHO's order of October 1, 2003 that memorializes relator's hearing testimony that was found to have been impeached:

"The injured worker testified at hearing that he continues to suffer from pain despite four surgical procedures on his left shoulder. The injured worker testified that the pain that he experiences is so severe that it interferes with his ability to ambulate as well as his ability to concentrate. The injured worker further testified that he is unable to take care of his activities of daily living and needs help from his wife in dressing and feeding. \* \* \*

Following the quotation, the SHO explains how the June 25, 2005 videotape impeaches relator's hearing testimony. The SHO found that the videotape shows that relator no longer suffers a pain so severe that it interferes with ambulation and he is no longer unable to perform activities of daily living such that he needs help from his wife in dressing and feeding. Thus, the SHO found a change of circumstances indicating relator now has greater functional capacities than he testified to at the original hearing.

The SHO's order of September 5, 2006 specifically identifies what the June 25, 2005 videotape shows that impeaches relator's testimony underlying the PTD award. The videotape shows relator "using both arms and hands to trim bushes using hedge clippers." It shows relator "using both hands and arms to hold a rake which he is rapidly and forcefully moving back and forth to remove debris from the tops of bushes."

Significantly, relator does not claim that the SHO's order of June 25, 2005 inaccurately describes what the videotape shows. Moreover, having independently reviewed the videotaped evidence, this magistrate finds that the SHO's order accurately describes what the videotape shows.

This magistrate concludes that the videotaped evidence is indeed some evidence supporting the SHO's finding that relator's hearing testimony is impeached by the videotaped evidence.

Contrary to what relator suggests here, concluding that the videotaped evidence impeaches relator's hearing testimony, thus giving rise to continuing jurisdiction, is not tantamount to stating that relator's performance of yard work is the some evidence that relator is capable of performing sustained remunerative employment.

The videotaped evidence impeaching the underlying evidence supporting the PTD award gave the commission authority to have relator examined by Dr. Freeman to determine relator's current status.

Following the commission's finding of change of circumstances, it evaluated the current medical evidence and analyzed the nonmedical factors. Relying upon Dr. Bacevich's October 5, 2005 addendum report and Dr. Freeman's report, the SHO concluded that relator retains the physical functional capacity to perform sedentary work. Parenthetically, this finding contrasts with the commission's previous finding that the industrial injury alone produced PTD. The commission then analyzed the non-medical factors.

Other than his challenge to the exercise of continuing jurisdiction, relator does not challenge here the commission's determination of his current PTD status, i.e., its reliance upon the October 5, 2005 report of Dr. Bacevich and the May 12, 2006 report of Dr. Freeman. Nor does relator challenge the commission's analysis of the non-medical factors in determining current PTD status. Clearly, the commission's continuing jurisdiction gave it authority to adjudicate relator's current status resulting in the termination of PTD compensation effective the date of the hearing.

While the *Lawson* case explains many of the legal concepts pertinent here, relator's reliance upon *Lawson* to compel a writ of mandamus is misplaced.

In *Lawson*, Donald E. Lawson was awarded PTD effective in 1994 after the commission concluded that the low-stress sedentary jobs to which his conditions limited him were foreclosed to anyone with his lack of skills and education. Thereafter, in 2001, the Ohio Bureau of Workers' Compensation ("bureau") conducted an investigation which produced an "activity spreadsheet" that contained 207 activities engaged in by Lawson from 1993 through 2001. The bureau also produced video surveillance.

In *Lawson*, the court observed that none of the 207 confirmed activities on the activity spreadsheet contain sufficient information to conclusively establish that any of them conflicted with Lawson's restrictions. *Id.* at ¶24.

While the predominant activity on the spreadsheet was refuse disposal, there was no evidence that Lawson did anything other than drive a truck—an activity within his sedentary restrictions.

Regarding the videotape, surveillance log, and resident affidavits, while that evidence did show some activity inconsistent with Lawson's medical restrictions, it was deemed irrelevant by the court absent evidence that Lawson could do it on a sustained basis. *Id.* at ¶27.

The *Lawson* court was also critical of Dr. Dunkin's report that was premised upon Lawson's activities on two days demonstrating some physical activity inconsistent with his medical restrictions. The court found that the activity did not equate to establishing Lawson's ability to do so on a sustained basis.

Given the court's conclusion that the evidence failed to show that Lawson engaged in significant activity inconsistent with his medical restrictions, the *Lawson* court issued a writ of mandamus ordering the commission to reinstate Lawson's PTD award.

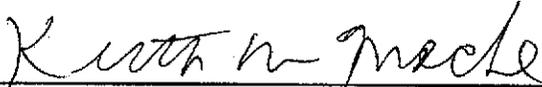
Two things distinguish this case from the *Lawson* case: (1) the commission's initial determination that the industrial injury prohibits all sustained remunerative employment, and (2) the commission's reliance upon relator's hearing testimony. Of the two, relator's hearing testimony, as memorialized in the order, is the most significant.

Apparently, it was relator's hearing testimony that persuaded the commission to rely upon Dr. Swanson's September 27, 2002 opinion that relator was precluded from any sustained remunerative employment and to reject the reports of Drs. Wunder and Bacevich who opined that relator was capable of sedentary employment. That is, relator's hearing testimony that his pain interfered with ambulation and that he was unable to perform activities of daily living without assistance from his

wife persuaded the commission to rely upon Dr. Swanson's opinion that the industrial injury precludes all sustained remunerative employment.

In *Lawson*, the issue for the court was whether the listed spreadsheet activities were inconsistent with the underlying medical determination that Lawson was medically able to perform sedentary employment. Here, the issue is whether the videotaped evidence shows activity inconsistent with relator's testimony that his pain interferes with ambulation and that he is unable to perform activities of daily living. That is, relator's claim to PTD status is premised upon alleged restrictions much greater in severity than the sedentary limitations sustained by Lawson.

Accordingly, for all the above reasons, it is the magistrate's decision that this court deny relator's request for a writ of mandamus.

  
\_\_\_\_\_  
KENNETH W. MACKE  
MAGISTRATE

#### NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).

# Rising Sun Church of Christ

430 FIFTH STREET • RISING SUN, INDIANA 47040 • (812) 438-3805

*Robert Lowe 98-593871*

**Scott Wolf  
Attorney-at-Law  
Kroger Building  
1014 Vine Street/Suite 1650  
Cincinnati, Ohio 45202**

January 5, 2006

**Mr. Wolf,**

I am writing on behalf of Robert Lowe. My name is Greg Matthew and I am his Pastor at Rising Sun Church of Christ in Rising Sun, Indiana. I share this information for a character reference.

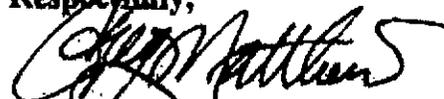
I have known Robert Lowe for three years. He is an active attending member of the Church and at one time was involved in serving meals in the program for grieving families after a funeral service, but had to resign due to the inability to use his arm without causing pain and for fear of dropping plates or food. Robert has also wanted to serve communion and receive offering but because of his disability has feared dropping the emblems or offering plate.

In my association with Robert I have never known him to tell a falsehood or lie. He has always been a person who spoke truth, especially about his physical condition. Robert has desired to be a part of more projects around the church requiring physical labor but has been unable to do so because of his disability and heart condition.

I am also aware of the fact that his Physician has asked him to try and use his damaged arm in order to exercise it so it will not atrophy and Robert has tried to comply but it has been painful.

I can attest to the fact that Robert has a disability and a heart condition that does not stop his activities, but greatly limits them.

Respectfully,



Pastor Greg Matthew,  
Rising Sun Church of Christ



BRINGING GLORY TO GOD... BY REACHING... BY TEACHING... BY SERVING

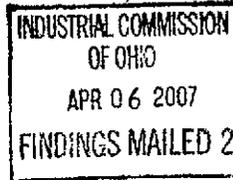
The Industrial Commission of Ohio

RECORD OF PROCEEDINGS

Claim Number: 98-593871  
LT-ACC-SI-COV  
PCN: 2070681 Robert W. Lowe

Claims Heard: 98-593871

ROBERT W. LOWE  
703 RIDGE AVE  
RISING SUN IN 47040-9128



Date of Injury: 11/13/1998

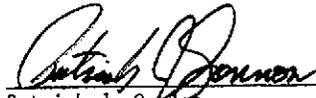
Risk Number: 20003333-0

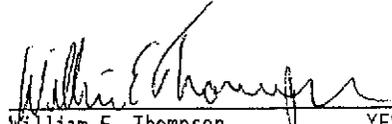
Request For Reconsideration filed by injured worker on 10/16/2006.  
Issue: 1) Continuing Jurisdiction Pursuant To R.C. 4123.52  
2) Terminate Permanent Total-Declare PTD Overpayment

The Request for Reconsideration filed 10/16/2006, by the injured worker from the findings mailed 10/04/2006, is denied for the reason that the request fails to meet the criteria of Industrial Commission Resolution No. R05-1-02 dated September 6, 2005.

Typed By: PD/bb  
Date Typed: 03/22/2007

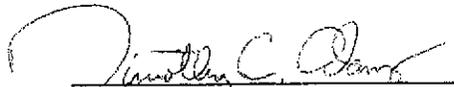
The above findings and order was approved and confirmed by the majority of the members.

  
Patrick J. Gannon NO  
Chairperson

  
William E. Thompson YES  
Commissioner

  
Kevin R. Abrams YES  
Commissioner

ATTESTED TO BY:

  
Executive Director

Findings Mailed:

The Industrial Commission of Ohio  
**RECORD OF PROCEEDINGS**

Claim Number: 98-593871

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

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98-593871  
Robert W. Lowe  
703 Ridge Ave  
Rising Sun IN 47040-9128

ID No: 14402-90  
Scott A. Wolf  
1014 Vine St Ste 2510  
Cincinnati OH 45202-1299

Risk No: 20003333-0  
Cincinnati, Inc  
Main Office  
7420 Kilby Rd  
Harrison OH 45030-9428

ID No: 120-80  
\*\*\*Frank Gates Service Co\*\*\*  
PO Box 182364  
Columbus OH 43218-2364

ID No: 20238-91  
Dinsmore & Shohl  
255 E 5th St Ste 1900  
Cincinnati OH 45202-4720

BWC, LAW DIRECTOR

Robert Lowe  
98-593871

**TRACKED ON IR**  
MOTION/APPEAL  
DATE 3-8-06  
INITIAL js

SECRET

**REQUEST FOR RECONSIDERATION**

Claimant, by and through counsel, hereby moves for Reconsideration of the Staff Hearing Order dated 9-28-06. The reasons for Reconsideration are stated in the Memorandum attached hereto.

  
Scott A. Wolf  
Weisser & Wolf, Attorney  
1014 Vine Street, Suite 2510  
Cincinnati, OH 45202

SECRET

**Memorandum**

On October 1, 2003, claimant was granted Permanent Total Disability.<sup>1</sup> In June, 2005, the Employer videotaped the claimant doing light yard work. Based on that tape and the Employers' physician opinions (also base on the tape), the Staff Hearing Officer terminated Claimant's Permanently Total Disability base on a "change of circumstances".<sup>2</sup>

This order is in direct conflict with the prior Ohio State Supreme Court Case of State ex. rel Lawson v. Mondie Forge, 104 Ohio St.3d 39 (2004) and the 10<sup>th</sup> District Court of Appeals case of State et rel. Stettler v. Mid Atlantic Cannery Association, Inc. (2005).<sup>3</sup>

Pursuant to 4123.511 (D) and R05-1-03 Commission Resolution, The Commission will hear appeals when the Commission determines the appeal presents issues for which the Commission desires to set policy or precedent or presents an unusual legal, medical, or factual question that Commission members desire to hear. In this case, precedent has been set that once PTD is granted, a claimant is not forced to remain virtually housebound. At no time was the Claimant found to be gainfully employed. In essence, Claimant was forced to relitigate his Permanent Total Disability Award a second time in clear violation of resjudicata principles in addition to prior case law. Furthermore, Claimant's own physician, stated that the type of activity viewed in

<sup>1</sup> See Exhibit A

<sup>2</sup> See Attached Exhibit B

<sup>3</sup> See Attached Cases Exhibit C

the videotape was within the Claimant's restrictions, and that no new change of circumstances of his condition has occurred, and hence, Claimant was still clearly permanently disabled.<sup>4</sup>

Nothing in the video tape is anything more than very light yard work. To terminate the Claimant's Permanent Total Disability base on this evidence clearly is in direct conflict with prior precedent as stated in the attached case law. The Claimant's request for Reconsideration should be granted.



Scott A. Wolf  
Weisser & Wolf, Attorney  
1014 Vine Street, Suite 2510  
Cincinnati, OH 45202

030707 1550 #011 P.005

<sup>4</sup>See Exhibit 4

030707 1550 #011 P.005

The Industrial Commission of Ohio

RECORD OF PROCEEDINGS

Claim Number: 98-593871  
LT-ACC-SI-COV  
PCN: 2053401 Robert W. Lowe

Claims Heard: 98-593871

ROBERT W. LOWE  
703 RIDGE AVE  
RISING SUN IN 47040

Date of Injury: 11/13/1998

Risk Number: 20003333-0

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This matter was heard on 09/05/2006, before Staff Hearing Officer Terri Crum, pursuant to the provisions of Ohio Revised Code Section 4121.35(B)(1) on:

C-86 Motion filed by Employer on 11/01/2005.  
Issue: 1) Terminate Permanent Total-Declare PTD Overpayment

Notices were mailed to the injured worker, the employer, their respective representatives and the Administrator of the Bureau of Workers' Compensation not less than 14 days prior to this date, and the following were present at the hearing:

APPEARANCE FOR THE INJURED WORKER: Injured Worker; S. Wolf  
APPEARANCE FOR THE EMPLOYER: G. Becker  
APPEARANCE FOR THE ADMINISTRATOR: No Appearance

It is the finding of the Staff Hearing Officer that this claim has been allowed for: STRAIN/SPRAIN LEFT SHOULDER; ROTATOR CUFF TEAR; AGGRAVATION OF PRE-EXISTING ARTHRITIS OF LEFT GLENOHUMERAL JOINT.

It is the order of the Staff Hearing Officer that the employer's motion, filed 11/01/2005, is granted. The employer's motion requests that the payment of permanent and total disability compensation be terminated due to a change in circumstances subsequent to the order granting permanent and total disability that demonstrate that the injured worker is capable of sustained remunerative employment.

The Staff Hearing Officer finds that by Industrial Commission order dated 10/01/2003 the injured worker was awarded benefits for permanent and total disability. In granting permanent and total disability the Staff Hearing Officer stated:

"The injured worker testified at hearing that he continues to suffer from pain despite four surgical procedures on his left shoulder. The injured worker testified that the pain that he experiences is so severe that it interferes with his ability to ambulate as well as his ability to concentrate. The injured worker further testified that he is unable to take care of his activities of daily living and needs help from his wife in dressing and feeding. The injured worker further testified that he attempted to return to work in July, 2002 as a security guard, but was unable to continue to perform the job duties as a result of his difficulty with walking and pain."

The employer has submitted videotape evidence of the injured worker performing yard work outside of his home. The videotape evidence is compiled on two dates. The Staff Hearing Officer finds that the activities recorded on 06/25/2005 are the most compelling. The videotape on 06/25/2005 shows the injured worker using both arms and hands to trim bushes using hedge clippers. The videotape on that date also shows the injured worker using both hands and arms to hold a rake which he is rapidly and forcefully

The Industrial Commission of Ohio

RECORD OF PROCEEDINGS

Claim Number: 98-593871

moving back and forth to remove debris from the tops of bushes.

The Staff Hearing Officer finds that the videotape evidence is sufficient evidence to demonstrate that a change in circumstances has occurred since the time of the initial permanent and total disability finding. The original permanent and total disability order memorialized the injured worker's testimony that his pain is so severe that it interferes with his ability to ambulate. The order further recorded the injured worker's testimony that he is not able to take care of his activities of daily living and that the injured worker needs help from his wife in dressing and feeding. The Staff Hearing Officer finds that the videotape evidence clearly demonstrates that the allowed conditions in this claim would not so severely restrict the injured worker's functional capacity as to limit his abilities to participate in the activities of daily living or to prevent the injured worker from performing the activities of dressing and feeding. The Staff Hearing Officer finds that the Staff Hearing Officer relied upon the injured worker's testimony that he was not able to perform the activities of daily living, including dressing and feeding and that he had a limited ability to walk due to pain in finding that the injured worker was permanently and totally disabled. The Staff Hearing Officer finds that the videotape demonstrates that the injured worker's condition has changed since the original Permanent and Total Disability hearing and that the injured worker has greater functional capacities than he testified to at the original hearing.

The Staff Hearing Officer therefore finds that the change in circumstances makes it appropriate to reconsider the issue of permanent and total disability in this claim.

The employer submitted the 10/05/2005 report of Bernard Bacevich, orthopedic surgeon. Dr. Bacevich's report is an addendum report to his report dated 04/30/2003. Dr. Bacevich reviewed the videotape evidence compiled on 08/03/2004 and 06/25/2005. In his report Dr. Bacevich recounts the activity viewed in the videotape. Dr. Bacevich advised that the video showed the injured worker walking, pushing and pulling a lawn mower, picking up a hedge clipper with the left arm, using the hedge clipper with the right arm or with both arms, using a rake to clear debris from the tops of bushes, and pulling backwards quite forcefully and vigorously. Dr. Bacevich advised that the injured worker performed these activities with no indication that he was experiencing pain. Dr. Bacevich opined, based upon the video of 06/25/2005, that the injured worker can use his left arm for many activities which are fairly strenuous. He further opined, based upon the video, that the injured worker is capable of gainful sustained remunerative employment. Dr. Bacevich opined, based upon the video that the injured worker is capable of performing light to medium work.

Dr. Andrew Freeman, occupational medicine, evaluated the injured worker on 05/12/2006 at the request of the Industrial Commission. Dr. Freeman reviewed medical evidence on file, took a history from the injured worker, examined the injured worker and reviewed the videotape evidence. Dr. Freeman noted that the injured worker is right hand dominant. The injured worker advised Dr. Freeman that he is unlimited in terms of sitting, standing and walking. The injured worker further advised that he is able to drive with his right hand, using his left hand and arm only to steady the wheel. He further advised that he is able to lift only three to five pounds with the left hand. The injured worker further advised that he is not able to do dishes, cook or make a bed because of his left shoulder symptoms. The injured worker further advised that is able to dress himself and perform personal hygiene tasks.

Dr. Freeman reviewed the 06/25/2005 videotape. Dr. Freeman advised that during the segment of video the injured worker was seen to use both hands to operate a hedge clipper; was seen to move both arms in a rapid fashion; was seen using a rake in his yard; and was seen to reach to connect and disconnect his hose. Dr. Freeman advised that the injured worker performed these activities with no physical evidence of pain such as grimacing. Dr.

00037

The Industrial Commission of Ohio

RECORD OF PROCEEDINGS

Claim Number: 98-593871

Freeman's examination findings are contained in his report. Dr. Freeman advised that the injured worker has reached maximum medical improvement for each of the conditions that are recognized in his industrial claim. On the physical strength rating form that is attached to his report Dr. Freeman indicated that the injured worker is capable of sedentary work with no reaching or overhead work with the left arm.

The Staff Hearing Officer finds the injured worker has reached maximum medical improvement for each of the conditions that are recognized in his industrial claim. The Staff Hearing Officer further finds, based upon the reports of Dr. Bacevich and Dr. Freeman, that the injured worker retains the physical functional capacity to perform employment activities that are sedentary in nature.

The Staff Hearing Officer finds that the injured worker is 60 years of age with a high school education and work history which involved employment as an assembler, a machine operator, an inspector and an administrative assistant. The Staff Hearing Officer further finds that the injured worker is able to read, write and perform basic math well. The Staff Hearing Officer further finds that the injured worker has no specialized training or special vocational skills.

The Staff Hearing Officer finds that the injured worker's age of 60 years is a moderate barrier to the injured worker with regard to his ability to return to and compete in the work force. The Staff Hearing Officer further finds, however, that age alone is not a factor which absolutely prevents any person from returning to work. The Staff Hearing Officer further finds that the injured worker's high school education and ability to read, write and perform basic math well are assets to the injured worker with regard to his ability to return to work. The Staff Hearing Officer further finds that these same factors would be assets to the injured worker with regard to his ability to learn the new work skills, work rules and work procedures necessary to perform some other type of employment. The Staff Hearing Officer further finds that the injured worker's skilled work history, which involves employment as a machine builder and an extruder operator, is evidence that the injured worker has the intellectual capacity to learn to perform at least unskilled and semiskilled employment in the future. The Staff Hearing Officer further finds that the injured worker's twelfth grade education and ability to read, write and perform basic math well should provide the injured worker with academic levels that are sufficient for the performance of many entry level occupations. The Staff Hearing Officer, accepting the opinions of Dr. Bacevich and Dr. Freeman and relying upon the videotape evidence, finds that the injured worker retains the physical functional capacity to perform employment activities that are sedentary in nature with no reaching or overhead work with the left arm. The Staff Hearing Officer finds that the injured worker can perform employment activities which require exerting up to ten pounds of force occasionally and/or a negligible amount of force frequently to lift, carry, push, pull or otherwise move objects. The Staff Hearing Officer further finds that the injured worker is able to perform work which requires sitting most of the time but may involve walking or standing for brief periods of time as long as this work does not require reaching or overhead work with the left arm.

The Staff Hearing Officer therefore finds that the injured worker is capable of performing sustained remunerative employment and is not permanently and totally disabled. The Staff Hearing Officer finds that facts and circumstances have changed since the 10/01/2003 which awarded permanent and total disability. The Staff Hearing Officer finds that the injured worker is no longer permanently and totally disabled. Therefore the payment of benefits for permanent and total disability, is terminated effective 09/05/2006, the date of this hearing.

This order is based upon Industrial Commission order dated 10/01/2003, the report of Dr. Bacevich dated 10/05/2005, the report of Dr. Freeman dated 05/12/2006 and the videotape evidence on file.

The Industrial Commission of Ohio  
**RECORD OF PROCEEDINGS**

Claim Number: 98-593871

Typed By: agm  
Date Typed: 09/28/2006  
Date Received: 03/22/2006  
Findings Mailed: 10/04/2006

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Terri Crum  
Staff Hearing Officer

Electronically signed by  
Terri Crum

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

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98-593871  
Robert W. Lowe  
703 Ridge Ave  
Rising Sun IN 47040

ID No: 14402-90  
Scott A. Wolf  
1014 Vine St Ste 2510  
Cincinnati OH 45202-1299

Risk No: 20003333-0  
Cincinnati, Inc  
Main Office  
7420 Kilby Rd  
Harrison OH 45030

ID No: 120-80  
\*\*\*Frank Gates Service Co\*\*\*  
PO Box 182364  
Columbus OH 43218-2364

ID No: 20238-91  
Dinsmore & Shohl  
255 E 5th St # 255  
Cincinnati OH 45202-4700

ID No: 2000-05  
\*\*\*BWC - Special Investigations Uni  
30 W Spring St. L-28  
Columbus OH 43266-0001

BWC, LAW DIRECTOR

00039

07/12/2006

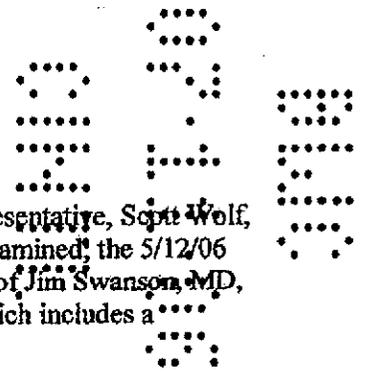
# Return To Work Rehabilitation Services

## William T. Cody, MS, CVE, CRC, CCM

9553 Carroll Ct.  
Loveland, Ohio 45140  
(513) 683-6036  
(513) 683-3151 fax

### VOCATIONAL ASSESSMENT

**Claimant:** Robert Lowe  
**Claim Number:** 98-593871  
**Date of Injury:** 4/13/98  
**Date Last Worked:** September 2002  
**Date of Birth:** 1/1/46  
**Age:** 60 years  
**Date of Assessment:** July 10, 2006



#### Introduction

This assessment has been prepared at the request of Mr. Lowe's legal representative, Scott Wolf, who supplied the information reviewed. The following documents were examined, the 5/12/06 occupational specialist report of Andrew Freeman, MD, the 5/24/06 letter of Jim Swanson, MD, and Mr. Lowe's application for permanent and total disability benefits, which includes a description of his educational and vocational histories.

Mr. Lowe's work related injury, claim number 98-593871, is recognized for sprain of his left shoulder, rotator cuff tear, and aggravation of pre-existing arthritis of his left glenohumeral joint. He has physical limitations as a result of these allowed conditions.

#### Interview

Mr. Lowe participated in a telephone interview on July 10, 2006. He seemed to be forthright during this interview and discussed his situation openly.

Mr. Lowe suffers from constant left arm pain that is controlled to some extent with the use of narcotic medication. He tried as best as he could to continue working after he was injured in 1998, but was required, because of the limitations stemming from his condition, including pain, to discontinue working after his injury. He attempted to return to work in 2002 in a lighter level job. He was unable to maintain this job for more than a couple of months. He was forced to terminate this employment because of his unrelenting pain.

Mr. Lowe has both good and bad days in terms of his physical condition. On good, days, which occur on an average of about two to three days a month, he is in less pain. On these days he is able to try a little more physical activity. On another twenty or more days per month, on the average, he is not physically able to do anything much. On these days his arm may lock up and he is not able to drive. These days represent his bad days. He tends to spend most of the time on his bad days in his recliner.

00041  
07/12/2006

His physician has suggested that he attempt to try to increase his level of activity. He tries this when he can.

Mr. Lowe identified his inability to do anything on a regular and consistent basis as a problem in performing even a simple sedentary job. Even if his only requirement was to have consistent attendance, he feared that he would not be able to attend any job on a consistent enough basis to be able to retain the position. Mr. Lowe reported that his painful condition would cause him to be absent from any job more often than would be tolerated by an employer.

Mr. Lowe makes plans involving one activity or another but subsequently is forced to cancel the plans that have been made due to his physical condition. This happens often.

**Education**

Mr. Lowe graduated from high school in 1963. He has not participated in any sort of formal vocational training. Mr. Lowe reports that he can read, write, and perform basic mathematical operations.

**Work History**

From 1984 until 2002, Mr. Lowe worked as a machine assembler. In this position he was responsible for assembling machines according to specifications with basic tools. He handled up to fifty pounds on an occasional basis. This semiskilled job was performed at the medium level of physical demand. The tool usage and equipment operation skills that he acquired through the performance of this position do not transfer to jobs performed at lighter levels of physical demand.

From 1972 until 1984, Mr. Lowe worked as a plastic extrusion machine operator. In this position he was responsible for setting up and operating an extrusion machine. He handled up to fifty pounds on an occasional basis. This semiskilled job was performed at the medium level of physical demand. The equipment operation skills that he acquired through the performance of this position do not transfer to jobs performed at lighter levels of physical demand.

From 1969 until 1972, Mr. Lowe worked as an inspector. In this position he was responsible for inspecting glass and cartons. He handled up to fifty pounds on an occasional basis. This unskilled job was performed at the medium level of physical demand.

**Medical Assessments**

Dr. Freeman, in his 5/12/06 occupational specialist report, finds that upon examination Mr. Lowe demonstrated reduced range of motion, crepitus, and pain in his left shoulder. Dr. Freeman concludes that Mr. Lowe's condition has reached maximum medical improvement and represents a twenty percent permanent impairment. He speculates that Mr. Lowe can perform restricted, sedentary, work despite the limitations extending from his work injury. Dr. Freeman did not consider Mr. Lowe's relevant vocational factors in developing his opinion that Mr. Lowe can

07/12/2006

work. Dr. Freeman warns that Mr. Lowe can perform "No reaching or overhead work with the left arm" (emphasis added).

In his 5/24/06 letter, Dr. Swanson indicates that Mr. Lowe suffers from limitations because of his work injury that preclude him from being able to perform work activities on a consistent basis. Dr. Swanson highlights that Mr. Lowe's ability to use his left upper extremity for functional purposes is severely limited. Dr. Swanson is Mr. Lowe's treating orthopedic surgeon.

Vocational Potential Analysis

There is disagreement between the medical evaluators who rendered opinions regarding Mr. Lowe's physical capacity. Dr. Swanson (2006), Mr. Lowe's treating physician, opines that he is permanently and totally disabled because of the limitations arising from his work injury. Dr. Freeman (2006), in his occupational medicine specialist report, says that his examination revealed reduced range of motion, crepitus, and pain in his left shoulder. He feels, however, that Mr. Lowe can perform restricted, sedentary, work activity in spite of the limitations present due to his work related injury.

Mr. Lowe has work experience in jobs performed at the medium level of physical demand. He has no experience in or skills that transfer to sedentary work. Therefore, only unskilled sedentary positions can be considered as appropriate for Mr. Lowe, according to the limitations offered by Dr. Freeman. His restricted work history is evidence of his inability to perform semiskilled or skilled work within his physical capacity.

Dr. Freeman highlights that Mr. Lowe is only able to work in positions that involve "No reaching or overhead work with the left arm" (emphasis added). This additional limitation precludes the unskilled work activity that could otherwise be considered as appropriate for Mr. Lowe as unskilled sedentary work always involves bilateral reaching. Only skilled work activity can accommodate a limitation of this kind. Mr. Lowe does not have skills of this kind.

If the assumption is made that there is sedentary work that fits within the parameters outlined by Dr. Freeman, the analysis must continue.

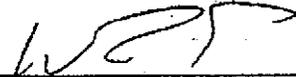
Mr. Lowe would be unable to adapt to a new kind of work activity when the following factors are taken into account; he is sixty years of age, has a limited work history, and has significant physical impairments, including a substantial level of pain, as cited by Dr. Freeman and Dr. Swanson. Under these circumstances Mr. Lowe could not be expected to adequately adapt to the new tools, tasks, procedures, and rules involved in performing a new type of work activity, a type of work that he has not performed in the past. This holds true even for unskilled work.

The Industrial Commission defines the age of sixty years as closely approaching advanced age. Being of this age presents obstacles in terms of adjusting to a new kind of work activity. When combined with significant physical impairments, a restricted work history, and a substantial level of pain being of this age clearly serves as a contributing factor to an inability to make vocational adjustments.

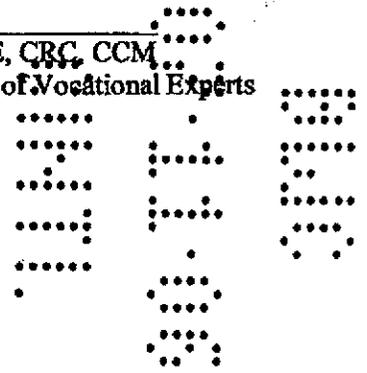
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Therefore, in the opinion of this vocational expert, Robert Lowe is permanently and totally occupationally disabled. That is, there are no jobs in the local or national economies that he is able to perform. This conclusion was reached considering his closely approaching advanced age, education, restricted work history, and the physical limitations that he has as a result of his allowed injury, claim number 98-593871.

It should be noted that Mr. Lowe's age is not the primary factor preventing him from working. The primary obstacles that he has are the physical restrictions arising from his work injury. If not for his work injury he could still be working. Considering Mr. Lowe's age and the limitations from which he suffers because of his work injury, he is not appropriate to participate in a vocational rehabilitation program.



William T. Cody, MS, CVE, CRC, CCM  
Diplomat, American Board of Vocational Experts



### William T. Cody, MS, CVE, CRC, CCM

9553 Carroll Ct.  
Loveland, Ohio 45140  
(513) 683-6036  
FAX (513) 683-3151

#### SUMMARY

William T. Cody has diverse occupational experiences and a strong educational background in the field of vocational rehabilitation. He is able to provide consultative services in the areas of vocational case management, vocational evaluation, life care planning, and vocational rehabilitation. He has experience in offering opinions for use in forensic situations and has been certified as a vocational expert in Ohio Common Pleas and in Federal Court.

#### WORK HISTORY

1991- present *Owner/ Sole proprietor, Return To Work Rehabilitation Services - Loveland, Ohio.*

Offers a wide array of vocational services including case management of injured workers, vocational evaluation, calculation of lost earning capacity, the development of reports reflecting expert opinion of vocational capacity, and expert testimony in this professional consulting business.

1991-1995 *Vocational Specialist, St. Elizabeth Medical Center - Dayton, Ohio.*

Responsible for assisting appropriate patients in the transition from inpatient hospitalization to returning to active employment. Also responsible for industrial case management, vocational consultation, and vocational evaluation.

1988-1991 *Case manager, Ohio Bureau of Workers' Compensation, Rehabilitation Division Cincinnati, Ohio.*

Responsible for all aspects of the vocational case management of injured workers as they progressed through the comprehensive vocational rehabilitation program. In 1991 lead the Cincinnati Rehabilitation Division office as the case manager with the most injured workers returned to active employment.

1983-1988 *Career Counselor/Vocational Evaluator, Great Oaks Joint Vocational School District - Cincinnati, Ohio.*

Responsible for the planning, executing, and reporting of the vocational assessment of disabled adults and children. Also performed assessment and counseling of non disabled adults.

1981-1983 *Vocational Evaluator, Elwyn Institutes National Rehabilitation Center - Philadelphia, Pennsylvania.*

Responsible for the planning, executing, and reporting of the vocational assessment of disabled individuals being served by the rehabilitation facility. Also performed case management duties for clients in the evaluation phase of the program.

#### EDUCATION

1996 *Rehabilitation Training Institute  
Life Care Planning - introduction seminar & assessment in Life Care Planning seminar*

1982 *Master of Science degree - Southern Illinois University at Carbondale - Carbondale, Illinois. Rehabilitation Administration and Services. Specialized in Vocational*

Evaluation and Rehabilitation Administration.

1979 Bachelors of Arts degree - Thomas More College - Crestview Hills, Kentucky.  
Psychology and Business Administration.

**CERTIFICATIONS**

2004 Qualified as a vocational expert in Fayette County (Kentucky) Circuit Court.  
Provided vocational expert testimony.

2003 Qualified as a vocational expert in Hamilton County (Ohio) Court of Common Pleas.  
Provided vocational expert testimony.

2001 Qualified as a vocational expert in Montgomery County (Ohio) Court of Common  
Pleas. Provided vocational expert testimony.

1999 Qualified as a vocational expert in Fairfield County (Ohio) Court of Common Pleas.  
In these proceedings gave testimony as to vocational issues and the present value of  
lost earning capacity.

1998 Certified as a Diplomat by the American Board of Vocational Experts after forensic  
work product was reviewed and approved by a committee of peers and passing a  
certification examination.

1997 Qualified as a vocational expert in Hamilton County (Ohio) Court of Common Pleas,  
Provided vocational expert testimony.

1996 Qualified as a vocational expert in US District Court, Southern District of Ohio -  
Western Division. Provided vocational expert testimony.

1994 Certified as an Employability Assessor by the Industrial Commission of Ohio.

1993 Certified Case Manager (CCM) - Granted by the Commission on Case Manager  
Certification after demonstrating appropriate educational and vocational experience.

1991 Certified as a Vocational Expert by the Secretary of the United States Department of  
Health and Human Resources for the purpose of providing expert testimony at Social  
Security Administrative hearings.

1988 Certified Rehabilitation Counselor (CRC) - Granted by the Commission on  
Rehabilitation Counselor Certification after passing a certification examination.

1984 Certified Vocational Evaluator (CVE) - Granted by the Commission on Certification  
of Work Adjustment and Vocational Evaluation Specialists after demonstrating  
appropriate educational and vocational experience.

**Affiliations**

2000 Diplomat in the American Board of Vocational Experts

2002 Appointed by Ohio Governor Robert Taft to the Ohio Independent Living Council

2002 Ohio University Rehabilitation Counseling Advisory Board - member

07/12/2006

**JIM SWANSON, M.D.**  
**SWANSON ORTHOPEDIC SURGERY**  
**AND SPORTS MEDICINE**  
600 WILSON CREEK ROAD  
LAWRENCEBURG, IN 47025  
Office 812-537-8402 Fax 812-537-8425  
SwansonOrtho@aol.com

05/24/2006

Veterans Administration

Dear Sir:

Mr. Robert Lowe asked me to forward to you a report of his orthopedic treatment. Mr. Lowe was last seen in my office on 01/30/2006 with history of left shoulder pain resulting from an injury on the job in 1998.

Attached please find the patient's current medical evaluation:

**CC:**

Mr. Lowe is a 60-year-old male presents today for a worker's compensation follow-up visit. The date of injury was 11/13/98. The employer was Cincinnati Incorporated. Status Post left shoulder pain.

**HPI:**

He presents with shoulder symptoms. The symptoms are on the left side. Symptoms location is diffuse. Symptoms include pain, stiffness, weakness, giving way, night pain, popping, numbness and tingling, but not redness. The patient is right handed. It radiates to the arm, elbow, forearm, neck, and chest. He describes it as sharp, aching, and stabbing. Pain intensity described as 2-9/10. Symptoms are constant, worse at night, worse with activity, and worsening. The pain initially started 11-13-98. Related symptoms include Night pain, shoulder stiffness, swelling, crepitus, numbness (over the upper chest and upper arm) and weakness, but not warmth, erythema, a sensation of shoulder instability, locking of his shoulder in a fixed position, a loose body sensation, arthralgias, fever, chills, rash or genitourinary discharge. Previous treatments include OTC pain medications, NSAID's, , formal Physical Therapy, home exercise program, modified work/activities, work excuse, rest, sling, ice, heat, injections - corticosteroid and viscosupplementation, surgery to include: arthroscopy and shoulder replacement. Localized injections, and TENS unit. no fevers, no chills, redness, weight loss, paralysis Present functional level is sedentary. The current work status is: Disabled. I EXAMINED HIM TODAY, AND I SEE NO IMPROVEMENT OR CHANGE IN HIS CONDITION. WITH EFFORT HE CAN RAISE HIS ARM, BUT IT CAUSES PAIN. HE HAS NO MORE THAN GRADE 3-4/5 LEFT SHOULDER STRENGTH, AND HE HAS LIMITED RANGE OF MOTION. HE STILL TAKES PERCOET AND NEURONTIN FOR PAIN, VALIUM FOR ANXIETY AND INSOMNIA, AND CELEXA FOR DEPRESSION. HE STILL GETS HIS MEDICATION THROUGH THE VA.

**Past Medical History / Family History / Social History:**

**Tobacco/Alcohol/Supplements:**

Tobacco: Past history of cigarette smoking, but has quit.

Alcohol: Denies current alcohol use (regular or infrequent).

**Legacy Data:**

**PAST MEDICAL HISTORY:**

Coronary Artery Disease  
Hyperlipidemia

06 JUN - 8 AM 10:49  
CINCINNATI DISTRICT OFFICE  
FEDERAL BUREAU OF INVESTIGATION  
U.S. DEPARTMENT OF JUSTICE

**JIM SWANSON, M.D.**  
**SWANSON ORTHOPEDIC SURGERY**  
**AND SPORTS MEDICINE**  
600 WILSON CREEK ROAD  
LAWRENCEBURG, IN 47025  
Office 812-537-8402 Fax 812-537-8425  
SwansonOrtho@aol.com

Hypertension  
Depression

**SURGICAL HISTORY:**

Appendectomy  
Tonsillectomy  
4 prior shoulder surgeries including a left total shoulder arthroplasty;

**FAMILY MEDICAL HISTORY:**

Positive for Coronary Artery Disease and Hypertension.

**SOCIAL HISTORY:**

Machine Builders;  
Marital status: married;

**HABITS:**

Nonsmoker (never smoked);

**Exams:**

**LEFT**

**SHOULDER EXAM:** . Inspection: Surgical wound - superior wound ( healed ); no erythema; Edema - over the rotator cuff; Deformity - ( He tends to hold the arm suspended and forward flexed. ); Muscle Atrophy - paraspinous muscles, deltoid, and **ROTATOR CUFF MUSCLES;**

Palpation: pain elicited over the lateral clavicle, at the greater tuberosity, bicipital groove, and proximal of the humerus, anteriorly, and posteriorly; no warmth; crepitus palpable over the anterior and lateral acromion and over the subacromial bursa; no masses; Lymphadenopathy is absent. ;

Neurovascular: normal sensory exam of axillary, musculocutaneous, median radial and ulnar nerves distally to light touch or pain; normal pulse and capillary refill noted distally;

Muscular Strength: 3/5 flexors; 4/5 extensors; 3/5 abductors; 4/5 adductors; 3/5 external rotators; 4/5 internal rotators; Range of Motion: Limited active ROM with extension to ( +15 ) degrees, gleno-humeral flexion to 50 degrees, combined shoulder joint flexion to 70 degrees, gleno-humeral abduction to 60 degrees, combined shoulder joint abduction to 70 degrees, external rotation in the neutral position to 0 degrees, adduction to 20 degrees, and internal rotation in the neutral position to 10 degrees; Active equal passive motion; generalized pain with ROM;

**Maneuvers:**

(+) Yergason test; (+) Speed's test; +/- drop arm test; (+) Supraspinatus pain with resistance; (+) Subscapular tendon pain with resistance; (+) Infraspinatus pain with resistance

**Lab/Test Results:**

X-RAY INTERPRETATION: Radiographs: NONE TODAY.

**ASSESSMENT:**

719.41 Left shoulder pain  
716.11 Post-traumatic left shoulder arthritis  
840.9 Sprains and strains of shoulder and upper arm (Severe)  
V43.61 Artificial joint replacement, Left Shoulder

ADULT AND PEDIATRIC CARE - ARTHROSCOPY AND SPORTS MEDICINE - FRACTURE TREATMENT  
RECONSTRUCTIVE SURGERY AND JOINT REPLACEMENT  
05 JUN -8 AM 10:49  
CINCINNATI DISTRICT OFFICE

ADULT AND PEDIATRIC CARE - ARTHROSCOPY AND SPORTS MEDICINE - FRACTURE TREATMENT  
RECONSTRUCTIVE SURGERY AND JOINT REPLACEMENT

00047

**JIM SWANSON, M.D.**  
**SWANSON ORTHOPEDIC SURGERY**  
**AND SPORTS MEDICINE**  
600 WILSON CREEK ROAD  
LAWRENCEBURG, IN 47025  
Office 812-537-8402 Fax 812-537-8425  
SwansonOrtho@aol.com

**PLAN:**

**MEDICATIONS:** (no change to current medication regimen). I recommend continuing the following medication: Percocet 5-325 mg, 1-2 po q 4-6 hours pm pain.. Narcotic risks and precautions were discussed, Valium (as a muscle relaxant), and Neurontin 300 mg TID. Over-the-counter medications recommended include ibuprofen, Tylenol Extra Strength or Tylenol Arthritis TID, Glucosamine and Chondroitin, Topical arthritis creams, Calcium with Vit D, and Multivitamins. . We had a long discussion about the risks and benefits of NSAID's. We discussed the alternatives to treatment, as well as the proper use and monitoring of the medication. The patient agrees to keep me informed of any suspected side effects.

**RECOMMENDATIONS** given include: ice therapy, no work/school, Modify activities as pain allows, limited activities with affected extremity, Home stretching program (instructions were given), ROM program (Office instruction), Codman exercises, Home strengthening program (instructions were given), and SLING FOR COMFORT.

HE CONTINUES TO BE COMPLETELY AND PERMANENTLY DISABLED. NOTHING HAS CHANGED WITH REGARD TO HIS EXAMINATION OR RECOMMENDATIONS. I HAVE ALLOWED HIM TO DO VERY LIMITED ACTIVITIES AS HE CAN TOLERATE AROUND THE HOME, AND LIMITED HOME REPAIR AND LAWN CARE IS WITHIN THOSE RESTRICTIONS. WORK: I do not recommend ever returning to work.

Please call if you need further information.

Sincerely,



Jim Swanson, MD

INDUSTRIAL CONC. OF OHIO  
06 JUN -8 AM 10:49  
CINCINNATI DISTRICT OFFICE

**Lowe, Robert W. 01/01/1946**

1 of 2

Office/Outpatient Visit

Visit Date: Fri, Jul 28, 2006 09:40 am

Provider: Jim Swanson, MD

Location: Swanson Orthopaedic Surgery & Sports Medicine

Electronically signed by provider on 07/28/2006 Printed on 07/28/2006 at 10:25 am.

**SUBJECTIVE:**

CC:

Mr. Lowe is a 60-year-old male presents today for a worker's compensation follow-up visit. The date of injury was 11/13/98. The employer was Cincinnati Incorporated. Status Post left shoulder pain.

HPI:

He complains of shoulder symptoms. He complains of left shoulder pain. The location of the pain is diffuse. Symptoms include pain, stiffness, weakness, giving way, night pain, popping, numbness and tingling, but not redness. The patient is right handed. It radiates to the arm, elbow, forearm, neck, and chest. The pain intensity described as 2-9/10. The symptoms are constant, worse at night, worse with activity, and worsening. The pain initially started 11-13-98 years ago. Related symptoms include genitourinary discharge, rash, chills, fever, arthralgias, a loose body sensation, locking of his shoulder in a fixed position, a sensation of shoulder instability, erythema, warmth, Night pain, shoulder stiffness, swelling, crepitus, numbness (over the upper chest and upper arm), and weakness. He describes it as sharp, aching, and stabbing. Present functional level is sedentary. Previous treatments include OTC pain medications, NSAID's, narcotic anesthetic medication Oxycodone, formal Physical Therapy, home exercise program, modified work/activities, work excuse, rest, sling, ice, heat, injections - corticosteroid and viscosupplementation, surgery to include: arthroscopy and shoulder replacement, Localized injections, and TENS unit. no fevers, no chills, redness, weight loss and paralysis. The current work status is: Disabled. He is on Klonopin for spasms and it helps his spasms a lot. **X-RAYS TODAY SUGGEST THE HUMERAL HEAD IS RISING UP AND ROTATING OVER THE TOP OF THE GLENOID COMPONENT. RECOMMEND AN EVALUATION BY DR. LIM, THE SURGEON WHO PUT THE PROSTHESIS IN PLACE.**

**OBJECTIVE:**

Exams:

LEFT

**SHOULDER EXAM:** . Inspection: Surgical wound - superior wound ( healed ); no erythema; Edema - over the rotator cuff; Deformity - ( He tends to hold the arm suspended and forward flexed. ); Muscle Atrophy - paraspinous muscles, deltoid, and ROTATOR CUFF MUSCLE BELLIES;

Palpation: pain elicited over the lateral clavicle, at the greater tuberosity, bicipital groove, and proximal of the humerus, anteriorly, and posteriorly; no warmth; crepitus palpable over the anterior and lateral acromion and over the subacromial bursa; no masses; Lymphadenopathy is absent. ;

Neurovascular: normal sensory exam of axillary, musculocutaneous, median radial and ulnar nerves distally to light touch or pain; normal pulse and capillary refill noted distally;

Muscular Strength: 3/5 flexors; 4/5 extensors; 3/5 abductors; 4/5 adductors; 3/5 external rotators; 4/5 internal rotators;

Range of Motion: Limited active ROM with extension to ( +15 ) degrees, gleno-humeral flexion to 50 degrees, combined shoulder joint flexion to 70 degrees, gleno-humeral abduction to 60 degrees, combined shoulder joint abduction to 70 degrees, external rotation in the neutral position to 0 degrees, adduction to 20 degrees, and internal rotation in the neutral position to 10 degrees; Active equal passive motion; generalized pain with ROM;

Maneuvers:

(+) Yergason test; (+) Speed's test; +/- drop arm test; (+) Supraspinatus pain with resistance; (+) Subscapular tendon pain with resistance; (+) Infraspinatus pain with resistance

Lab/Test Results:

X-RAY INTERPRETATION: Radiographs: Shoulder - left 3 views

Results: No gross sign of loosening. THE HUMERAL HEAD APPEARS TO RIDE UP OVER THE GLENOID, THOUGH. I have reviewed the x-rays and the report from the radiologist, and I agree with the findings. See the radiologist's report for details.

**ASSESSMENT:**

840.9 Sprains and strains of shoulder and upper arm (Severe)

**Lowe, Robert W.** 01/01/1946

2 of 2

Office/Outpatient Visit

Visit Date: Fri, Jul 28, 2006 09:40 am

Provider: Jim Swanson, MD

Location: Swanson Orthopaedic Surgery & Sports Medicine

Electronically signed by provider on 07/28/2006 Printed on 07/28/2006 at 10:26 am.

V43.61 Artificial joint replacement, Shoulder  
DDx

**PLAN:**

**Sprains and strains of shoulder and upper arm**

**MEDICATIONS:** (no change to current medication regimen). (see today's med list). I recommend continuing the following medication: Percocet 5-325 mg, 1-2 po q 4-6 hours prn pain.. Narcotic risks and precautions were discussed.. Flexeril 10 mg, 1 po q8-10 hours prn muscle spasm.. Neurontin 300 mg TID. Over-the-counter medications recommended include ibuprofen, Tylenol Extra Strength or Tylenol Arthritis TID, Glucosamine and Chondroitin, Topical arthritis creams, Calcium with Vit D, and Multivitamins. We had a long discussion about the risks and benefits of NSAID's. We discussed the alternatives to treatment, as well as the proper use and monitoring of the medication. The patient agrees to keep me informed of any suspected side effects.

**RECOMMENDATIONS** given include: ice therapy, no work/school, Modify activities as pain allows, limited activities with affected extremity, Home stretching program (instructions were given), ROM program (Office instruction), Codman exercises, Home strengthening program (instructions were given), and SLING FOR COMFORT.

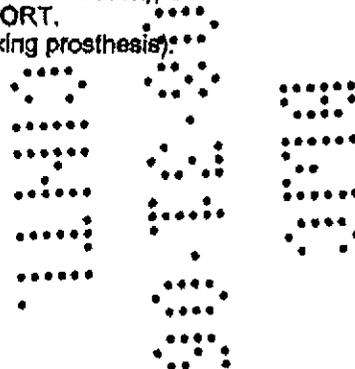
**REFERRAL:** Referral Initiated to: DR. LIM, SHOULDER SURGEON (to evaluate the subluxing prosthesis).

**FOLLOW-UP:** Schedule a follow-up visit in 6 months.

**HE CONTINUES TO BE COMPLETELY AND PERMANENTLY DISABLED.**

**WORK:** I do not recommend ever returning to work.

**CC:** Patient's attorney, Ohio BWC, Dr. Barkdoll



CINCINNATI DISTRICT  
MAY 25 2006  
REPORT  
Healing • Teaching • Leading

**The Center for Occupational Health**

University of Cincinnati Medical Center  
3223 Eden Ave. ML# 0458  
Cincinnati, OH 45267-0458  
Phone: (513)558-1234 Fax: (513)558-6272

RECEIVED  
INDUSTRIAL COMMISSION  
MAY 26 2006  
SPECIALIST EXAM  
CINCINNATI MEDICAL

MEDICAL EVALUATION AND EXAMINATION

RE: Robert Lowe  
Date of Birth: 1/1/46  
BWC Claim #s: 98-593871 and HW: None  
Referral Source: The Industrial Commission of Ohio.  
Historian: The injured worker  
Date of Evaluation: 5/12/06  
Employer of Record: Cincinnati, Inc.

COPY TO:  
Claimant   
Employer   
Claimant Rep   
Employer Rep   
Other \_\_\_\_\_

MEDICAL SECTION  
by [Signature]  
Date 5/26/06

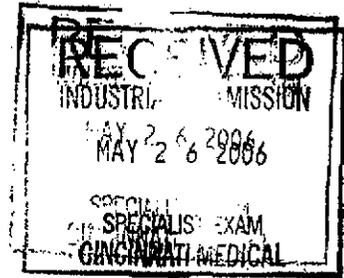
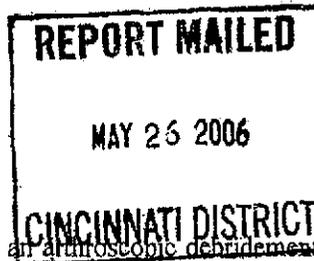
**ALLOWED CONDITIONS IN THE CLAIM:** Left shoulder sprain, rotator cuff tear, aggravation of preexisting arthritis to the left glenohumeral joint.

It was explained to the injured worker the nature of this evaluation, which was not to establish a physician-patient relationship, but rather to conduct a one-time impairment evaluation only. The injured worker understands the Industrial Commission will be receiving a copy of this report. I have also reviewed the records supplied by the Industrial Commission regarding the injured worker and accept each of the allowed conditions in this claim.

Only the physical conditions in the claim will be addressed and rated in this report, and any allowed mental health conditions will be addressed in a separate evaluation by a mental health professional.

**HISTORY OF PRESENT ILLNESS:** Mr. Lowe is a 60-year-old male who was employed by Cincinnati Incorporated of Harrison, Ohio on the date of injury, November 13, 1998. He was working as a machine builder/laser assembler when while trying to install a cylinder weighing 60 pounds; the cylinder slipped causing a severe strain on his left arm. He states that as the cylinder dropped it caught his left arm and he dislocated his left arm. He states that while he is certain that his shoulder dislocated, the x-rays performed at the emergency room did not show this. He states that he relocated his shoulder after the emergency room visit when it spontaneously relocated when he was at home. He had continued left shoulder pain even after the shoulder dislocation was reduced. On November 24, 1998 had a MRI of his left shoulder was performed, and it was reported as being normal. Mr. Lowe stated that he had no previous left shoulder injuries. He initially treated with Dr. Swanson, an orthopedist. Dr. Swanson performed a left shoulder diagnostic arthroscopy on

Injured Worker: Robert Lowe  
Page 2 of 8



February 02, 1999. This included an arthroscopic debridement of a biceps tendon tear and an arthroscopic intra-articular reconstruction of the labrum. Mr. Lowe states that this surgery did not help and on August 02, 1999, he underwent left shoulder arthroscopic release of the biceps tendon with the debridement of intra-articular scar tissue and sutures. This was also not successful and on April 10, 2000, Dr. Swanson performed a close manipulation of the shoulder. This was not successful in terms of relieving symptoms and on August 21, 2000 there was another arthroscopic left shoulder debridement of scar tissue and manipulation of the shoulder. This did not help Mr. Lowe's symptoms. On August 09, 2001, Dr. Swanson performed a left shoulder replacement. Mr. Lowe states that this also did not help his symptoms and actually made his range of motion worse.

He underwent physical therapy pre- and post-operatively for each of the procedures mentioned above and in no case did the physical therapy improved his pain or his range of motion. He states he has never had vocational rehabilitation including job retraining or work hardening. He has been in a pain management program for few months three to four years ago and medications "doped him up" and he stopped the pain management program. He has had cortisone injections of the shoulders and Synvisc as well. These did not help. He states that currently he has shoulder pain radiating down his arm intermittently in all five fingers. He states that nothing improves the shoulder pain but damp weather and any movement make the shoulder pain worse. He states that the shoulder pain is 6/10 at best and 10/10 at worse. He has trouble sleeping because of the pain. He states that he has had this level of symptomatology and pain with the inability to lift his arm more than 60 degrees in forward flexion or more than 60 degrees in abduction since his shoulder replacement surgery in 2001. Over the last six to last 12 months the symptoms have stated the same. He denies any problem with bladder or bowel control.

He is right-hand dominant. He is unlimited in terms of sitting and standing and walking, but he can only drive using his right hand only and only uses his left hand and arm to steady the wheel. He states that he can only lift 3 to 5 pounds with the left hand and arm and can lift up to 20 pounds with the right arm. He states that he is unable to do dishes, cook, and make a bed. This is because of his left shoulder symptoms. He is able to dress himself and perform personal hygiene tasks. At this point, he made a point of stating that he does have occasional days where he can do this such as the day when he was filmed without his knowledge in June of 2005.

He states that currently he does not know of any new treatments or medical evaluations that his physicians have planned for him at this point. If he were offered surgery with a reasonable chance of success, he would agree to it.

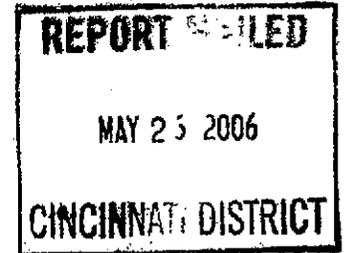
**PAST SURGICAL HISTORY:** He has had five shoulder surgeries as mentioned above as well as an appendectomy and a coronary artery bypass grafting.

**PAST MEDICAL HISTORY:** Includes heart disease and the shoulder symptoms, hyperlipidemia, hypertension, and coronary artery disease.

**CURRENT MEDICATIONS:** Oxycodone 5/325 mg four to five a day, gabapentin 300 mg up to 12 a day, clonazepam 4 mg a day usually in divided doses, Simvastatin 80 mg q.d., ranitidine 150 mg b.i.d., citalopram 60 mg a day, BuSpar 90 mg a day, Ecotrin 81 mg a day, and metoprolol 25 mg

Injured Worker: Robert Lowe  
Page 3 of 8

b.i.d.



**SOCIAL HISTORY:** He lives with his wife and two other people. He has social security disability status for the last two years.

**HABITS:** He is an ex-smoker having quit in 1989. He does not drink alcohol containing beverages and states he has never drank too excess. He denies illegal drug use.

**FAMILY HISTORY:** He denies any history of arthritis, neck pain, or low back pain in the family.

**EDUCATIONAL HISTORY:** He completed the 12<sup>th</sup> grade.

**OCCUPATIONAL HISTORY:** He has not worked since 1999. He states that he was doing light duty at this point and has not really worked in his regular jobs since 1998. He was technically employed from 1998 till 2002 for Cincinnati Incorporated although he states he did not work after 1999. He was a laser assembler and machine assembler in this job. Prior to that, he worked for 16 years as a plastic machine operator operating a plastic extrusion machine.

**REVIEW OF MEDICAL RECORDS PROVIDED:**

Mr. Lowe handed me a letter from Dr. Jim Swanson expressing his disagreement with the filming of Mr. Lowe outside his home. Dr. Swanson refers to the hedge clipper that Mr. Lowe was using in the video and opines that it weighed no more than 3 to 5 pounds.

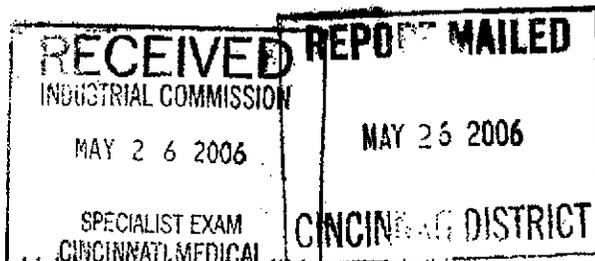
June 25, 2005 – Date on the videotape supplied to me by the industrial commission of Ohio. This videotape shows a gentleman who appears to be Mr. Lowe by my recollection, walking around a yard using a hedge clipper. During this approximately 10 minute segment of video Mr. Lowe is seen to use both hands to operate a hedge clipper. He is seen to move both arms in a rapid fashion. There is no physical evidence of pain such as grimacing. Mr. Lowe is seen to move the hedge clipper, use a rake in his yard, and reach to connect and disconnect his hose. He also moves the hose during this period of time. His range of motion in the left shoulder is observed to be at least 30 degrees of extension, at least 20 degrees of adduction, at least 90 degrees of abduction, and at least 100 degrees of forward flexion. He is observed at one point during the video to throw a hose with his left arm rapidly going from a point of 0 degrees of forward flexion to 100 degrees of forward flexion in the active tossing of the hose. It was difficult to estimate the degree of internal and external rotation.

February 02, 1999 – An operative report from Dr. J. Swanson. The operation was diagnostic arthroscopy with an arthroscopic debridement of the biceps tendon tear with an arthroscopic intra-articular labral reconstruction.

November 27, 1998 – An MRI of the left shoulder showing mild hypertrophic spurring at the AC joint but no rotator cuff impingement. The rotator cuff is intact and there are no joint or bursal fluid collections. The glenoid labrum is normal in appearance.

March 03, 1999 – A follow-up visit with Dr. "JDS". The left shoulder was still sore at this point and

Injured Worker: Robert Lowe  
Page 4 of 8



there was a squeaking sensation in the shoulder, which is palpable and audible. Dr. JDS opined that this was due to the head rubbing on the sutures in the labrum.

October 05, 2005 – An independent medical specialist examination by Dr. Bacevich. He had view the videotape of Robert Lowe dated August 03, 2004 and June 25, 2005.

August 23, 2004 – The videotape while he was at an ATM machine and opened and closed his card all using his left arm. He then used a powered miller pushing and pulling with both arm without any apparent difficulty. He opined that the physical capacities on the taper are much different than the findings on Dr. Bacevich's exam of April 30, 2003 in which Mr. Lowe reported exquisite pain in the shoulder on attempts at range of motion and very severe guarding.

April 05, 2002 – An independent medical evaluation by Dr. Malcolm Meyn. He opined that Mr. Lowe's left shoulder loss of strength and crepitation were consistent with subjective complaints. On examination there was only a "slight amount of flexion and abduction." He reported at the time that it was difficult to walk because when his left arm would swing it would cause him pain.

October 11, 2000 – An independent medical evaluation by Dr. Kohlhaas. He opined that Mr. Lowe is at maximum medical improvement.

May 15, 2003 – An independent medical evaluation for the Industrial Commission of Ohio by Dr. Steven Wunder. He found that there was a 27% whole person impairment due to the shoulder with 70 degrees of forward flexion and 70 degrees of abduction.

#### PHYSICAL EXAMINATION:

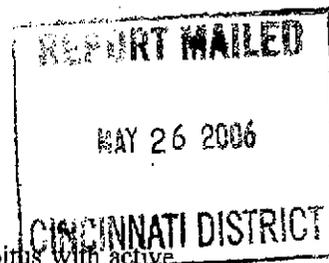
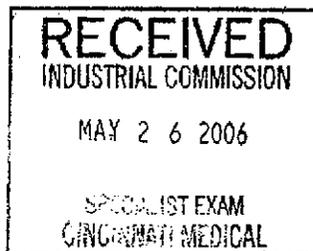
His wife was present during this examination.

General: Mr. Lowe was an intermittently cooperative male who sat through the interview with his left arm at his side without apparent distress or the need to change positions. He tried several times to voice his displeasure at being videotaped previously, and he had difficulty answering my questions without proceeding in a tangential fashion. He expressed his displeasure at being redirected to answer the questions. He was able to transfer to the exam table without apparent difficulty.

UPPER EXTREMITY NEUROLOGIC: Muscle strength testing showed 5 out of 5 in all muscle groups of the upper extremities, except left shoulder flexion, abduction, and internal and external rotation, which were 4/5, 4/5, 4+/5, and 4+/5 respectively. Reflexes were 2+ and equal at the biceps, brachioradialis and triceps. Sensory was intact to light touch in both arms down to the fingers. No tremor or other involuntary movements present. There was no left atrophy (comparing the right and left sides) in the upper arm (right 31.5, left 32.5) or the forearm (right 30.5 and left 30.5) measuring at the point of maximal circumference.

LEFT SHOULDER: There was no visible swelling or deformity in the shoulder joint. The drop arm test could not be performed. There was diffuse tenderness over the AC joint, deltoid, biceps tendon

Injured Worker: Robert Lowe  
Page 5 of 8



insertion and all other areas tested in the shoulder region. There was mild crepitus with active motion. There was a 17 cm healed anterior scar from a prior shoulder surgery. The Jobe's test and the anterior drawer test could not be performed due to pain.

Range of motion testing (in degrees) was highly variable and showed:

Abduction: 34 to 50 (impaired if < 165 degrees) – moving slowly with grimacing

Adduction: 0 (impaired if < 35 degrees)

Internal rotation with arm at his side: 41 to 62 (impaired if < 75 degrees)

External rotation with arm at his side: 30 to 42 (impaired if < 55 degrees)

Flexion: 35 to 68 degrees (impaired if < 175 degrees) – moving slowly with grimacing

Extension: 10 (impaired if < 45 degrees)

**DISCUSSION:** Robert Lowe has allowed conditions from a single claim being evaluated in this report. The left shoulder conditions are still symptomatic.

**OPINION:** Based solely on the allowed conditions listed in the claims reviewed, and considering only the physical conditions allowed:

1. These allowed conditions have reached MMI.
2. Based on the American Medical Association's *Guides to the Evaluation of Permanent Impairment – 5<sup>th</sup> Edition*, the whole person impairment for the allowed physical conditions in the claim is 20 %. This figure was calculated based on the table below.

Chap-Tab./Fig., pg#	Body Part	Comment	Whole person Impairment %, except where indicated
16- T. 27 p506	Arthroplasty / Resection	shoulder	24 %UE
16- F. 40 p476	Shoulder ROM – Flex/Ext.	Based on best observed	5+2 % UE
16- F. 43 p477	Shoulder ROM - Abd/Add	Based on best observed	4+2 % UE
16- F. 46 p478	Shoulder ROM – IR / ER	Too variable to rate	0 % UE
	33% UE impairment = 20% whole person impairment		20 %
	Total -		20 % WPI

The amount of pain was not disproportionate for what is expected with the allowed conditions in the claim and their associated impairment as calculated above, so no additional impairment % for pain was combined into the impairment rating.

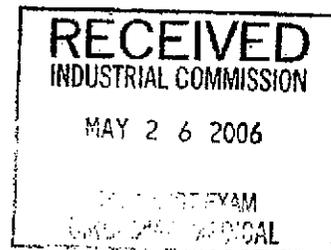
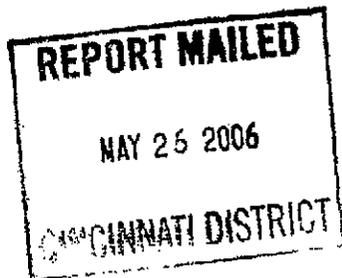
Injured Worker: Robert Lowe  
Page 6 of 8

3. The physical strength rating form was completed based only on the allowed physical conditions evaluated in this report and not considering the worker's age, education, and work history. This rating form is enclosed with this report.

Respectively submitted,

*Andrew Freeman, MD*

Andrew Freeman, MD, MS  
Director, Center for Occupational Health  
University of Cincinnati  
Assistant Professor, Division of Occupational and Environmental Medicine  
Board Certified, Occupational Medicine



00056

PHYSICAL STRENGTH RATING

INJURED WORKER: Robert Lowe

CLAIM NUMBER(S): 98-593871

HW: None

Based solely on impairment due to the allowed condition(s) in the claim(s) within my specialty and with no consideration of the injured worker's age, education, or work training:

- This injured worker has no work limitations.
- This injured worker is incapable of work.
- This injured worker is capable of work as indicated below.

"SEDENTARY WORK"

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

FURTHER limitations, if indicated: No reaching or overhead work with the left arm

"LIGHT WORK"

Light Work means exerting up to twenty pounds of force occasionally, and/or up to ten pounds of force frequently, and/or a negligible amount of force constantly (constantly: activity or condition exists two-thirds or more of the time) to move objects. Physical demand may be only a negligible amount, a job should be rated light work: (1) when it requires walking or standing to a significant degree; or (2) when it requires sitting most of the time but entails pushing and/or pulling or arm or leg controls; and/or 3) when the job requires working at a production rate pace entailing the constant pushing and/or pulling of materials even though the weight of those materials is negligible.

FURTHER limitations, if indicated: \_\_\_\_\_

"MEDIUM WORK"

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

"HEAVY WORK"

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

"VERY HEAVY WORK"

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

*Andrew Freeman, MD*

PHYSICIAN'S SIGNATURE: \_\_\_\_\_

DATE: 5/12/06

PHYSICIAN'S NAME: Andrew Freeman, MD



The Industrial Commission of Ohio  
**RECORD OF PROCEEDINGS**

Claim Number: 98-593871  
LT-ACC-SI-COV  
PCN: 2053401 Robert W. Lowe

Claims Heard: 98-593871

ROBERT W. LOWE  
703 RIDGE AVE  
RISING SUN IN. 47040

**FINDINGS MAILED**  
JAN 21 2006

Date of Injury: 11/13/1998

Risk Number: 20003333-0

**INTERLOCUTORY ORDER**

This claim has been previously allowed for: STRAIN/SPRAIN LEFT SHOULDER ROTATOR CUFF TEAR; AGGRAVATION OF PRE-EXISTING ARTHRITIS OF LEFT GLENOHUMERAL JOINTS.

This matter was heard on 01/03/2006 before Staff Hearing Officer Terri Crum pursuant to the provisions of Ohio Revised Code Section 4121.35(B) and 4123.511(D) on the following:

C-86 Motion filed by Employer on 11/01/2005.  
Issue: 1) Terminate Permanent Total-Declare PTD Overpayment

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

APPEARANCE FOR THE INJURED WORKER: INJURED WORKER AND S. WOLF  
APPEARANCE FOR THE EMPLOYER: G. BECKER  
APPEARANCE FOR THE ADMINISTRATOR: NO APPEARANCE

The Staff Hearing Officer finds that the employer has presented sufficient evidence to demonstrate that there may have been a change in circumstances sufficient to warrant the stopping of the Permanent and Total Disability award. Therefore the Staff Hearing Officer refers the file to the medical section for an examination on the issue of whether the injured worker is capable of performing sustained remunerative employment. The examining physician is instructed to examine the injured worker and to review the video tape evidence submitted by the employer.

After the completion of the examination the matter is to be reset before a Staff Hearing Officer on the employer's motion filed 11/01/2005.

This order is interlocutory in nature and not subject to appeal pursuant to the Ohio Administrative Code Rule 4121-3-09.

Typed By: jb  
Date Typed: 01/18/2006

  
Terri Crum  
Staff Hearing Officer

The Industrial Commission of Ohio

RECORD OF PROCEEDINGS

Claim Number: 98-593871

Findings Mailed:

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

98-593871  
Robert W. Lowe  
703 Ridge Ave  
Rising Sun IN 47040

Risk No: 20003333-0  
Cincinnati, Inc  
Main Office  
7420 Kilby Rd  
Harrison OH 45030

ID No: 14402-90  
Scott A. Wolf  
1014 Vine St Ste 1650  
Cincinnati OH 45202

ID No: 120-80  
\*\*\*Frank Gates Service Co\*\*\*  
PO Box 182364  
Columbus OH 43218-2364

ID No: 20238-91  
Dinsmore & Shohl  
255 E. Fifth St.  
1900 Chemed Center  
Cincinnati OH 45202

ID No: 2000-05  
\*\*\*BWC - Special Investigations Uni  
30 W Spring St. L-28  
Columbus OH 43266-0581

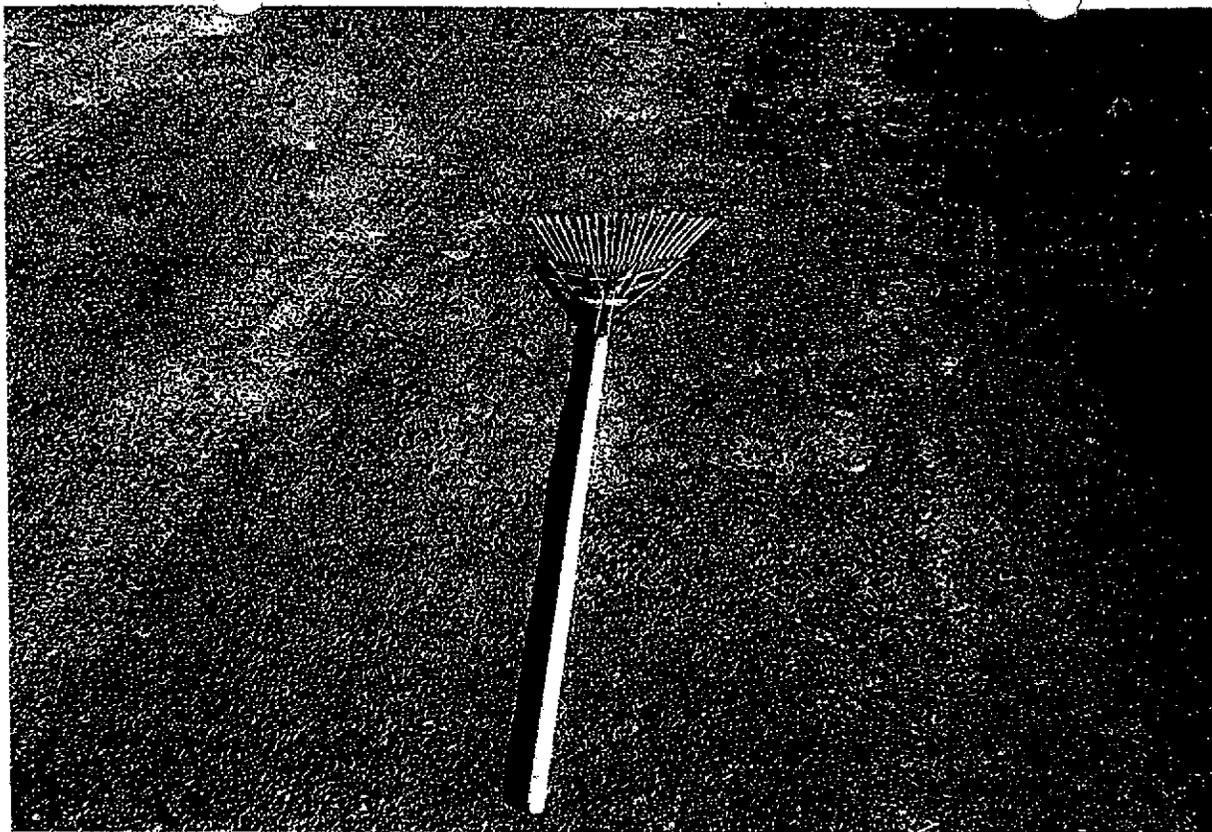
BWC, LAW DIRECTOR

**FINDINGS MAILED**  
**JAN 21 2006**

01/23/2006

RARE AS SEEN IN TAPE  
FOR PULLING & STRETCHING  
10 REPETITIONS WITH  
USING FOR LEAVES.  
JUST USED IT ONE TIME  
WEIGHTS  $\frac{3}{4}$  LB.

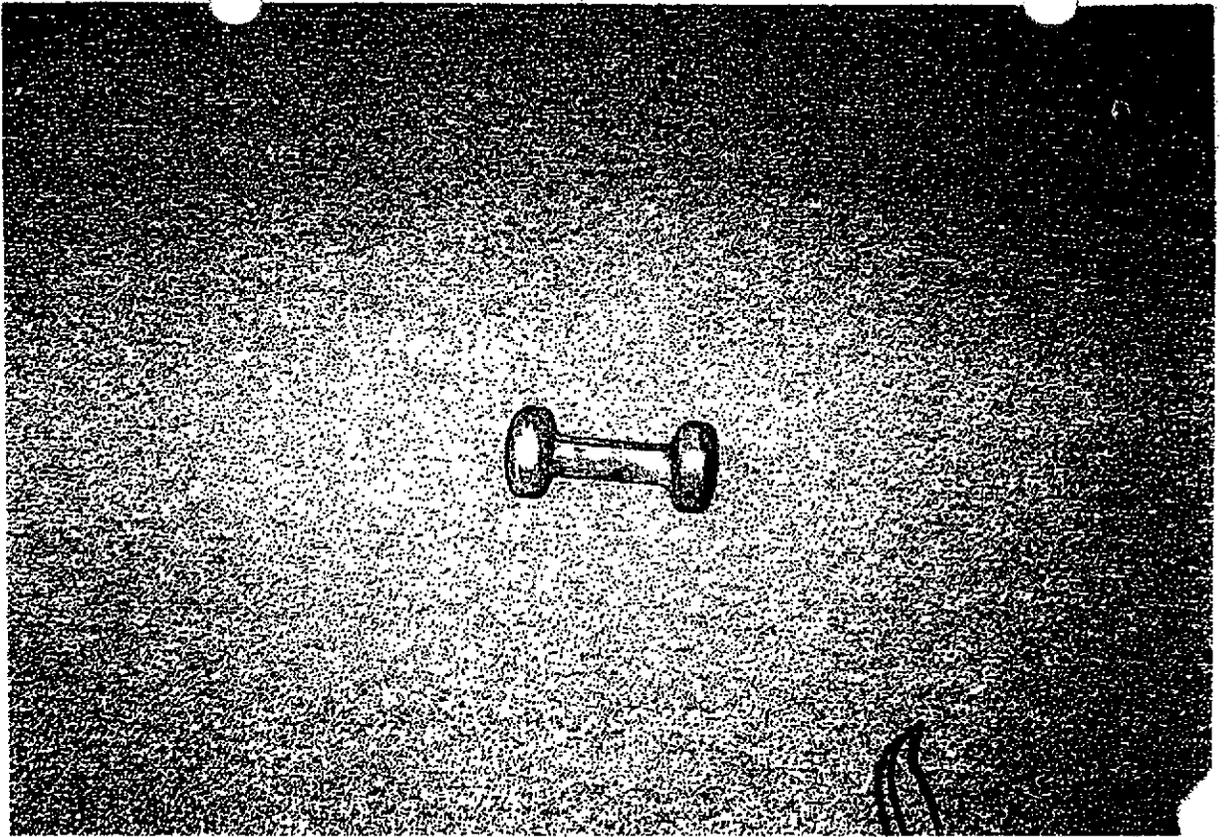
00000  
IT WAS THE FIRST TIME I USED  
IT.



1140  
904270  
378

3 LB Weight

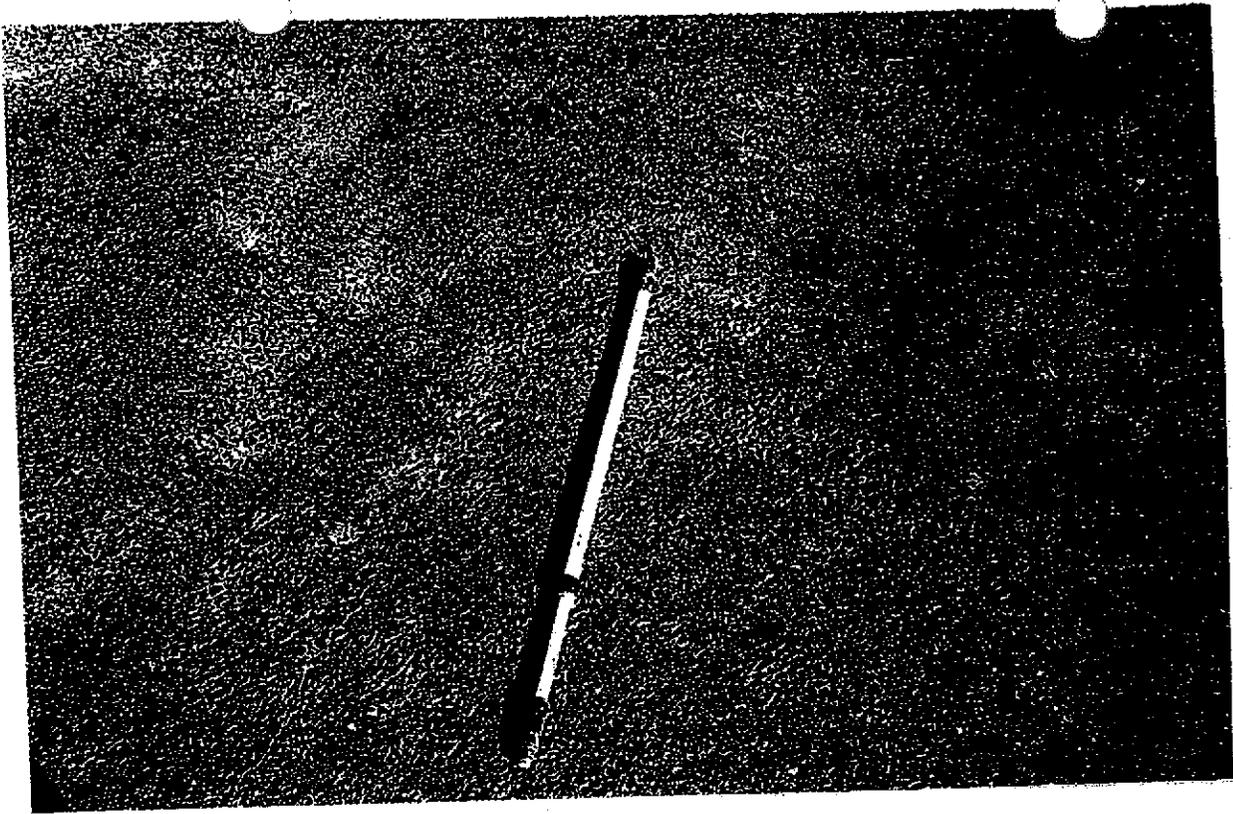
10 Repetitions 3X daily



00061

1.1410  
99.42.10  
0114

ALuminum stretch  
Pole For stretching Purposes  
10 Repetitions 3x daily

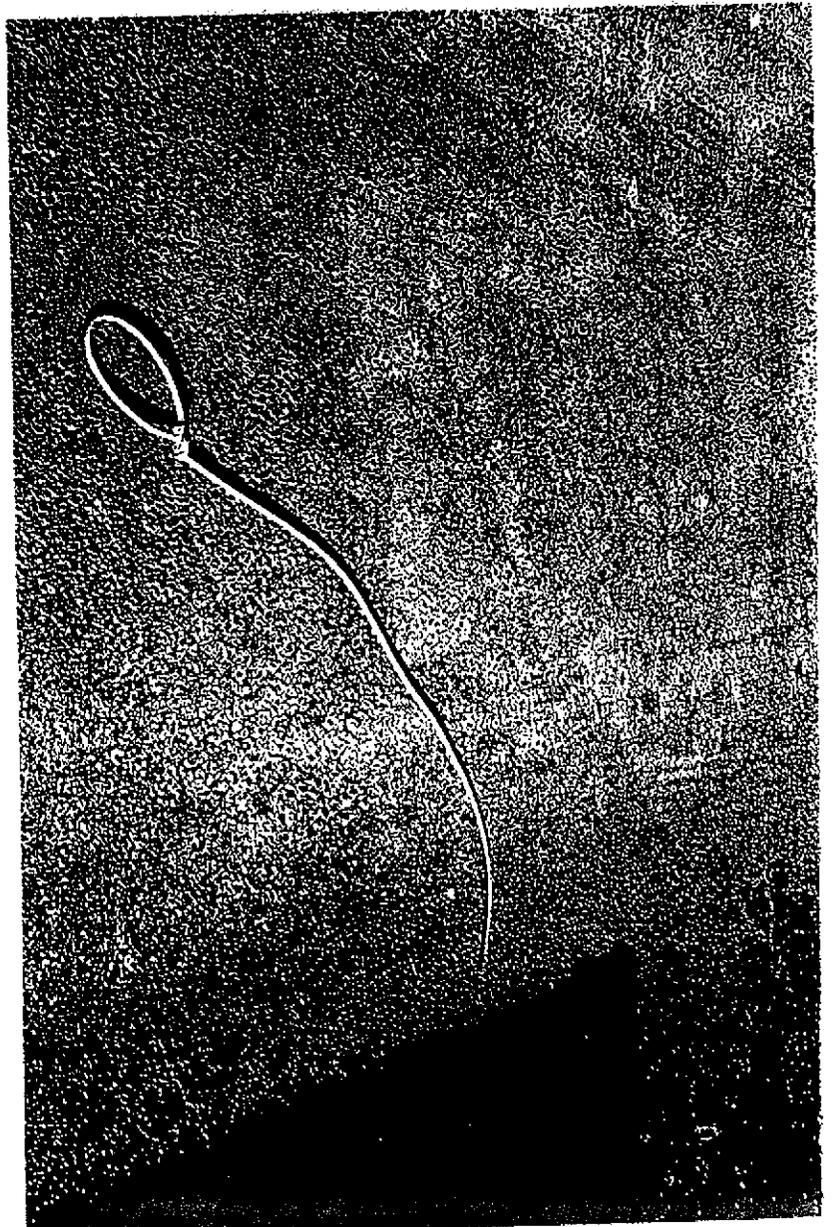
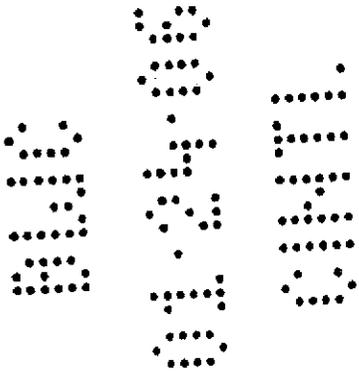


00062

1140  
9042 70  
3718

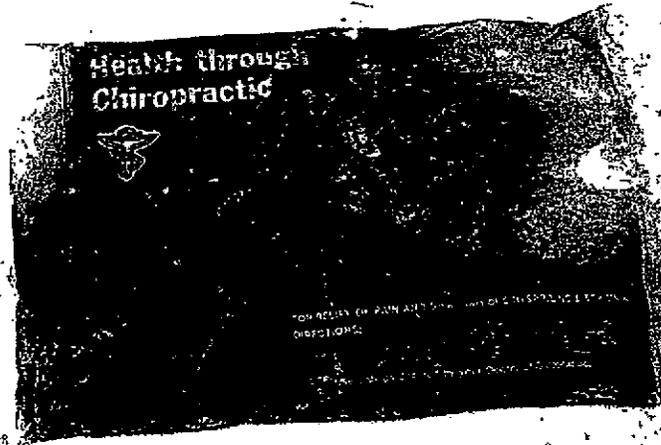
1/2" THERABAND FOR EXERCISING TENNIS ELBOW MUSCLE &  
SHOULDER

10 Repetitions 3x Daily



00063

ICE PACK USED TO  
ELIMINATE PAIN 5-8 X'S  
daily.



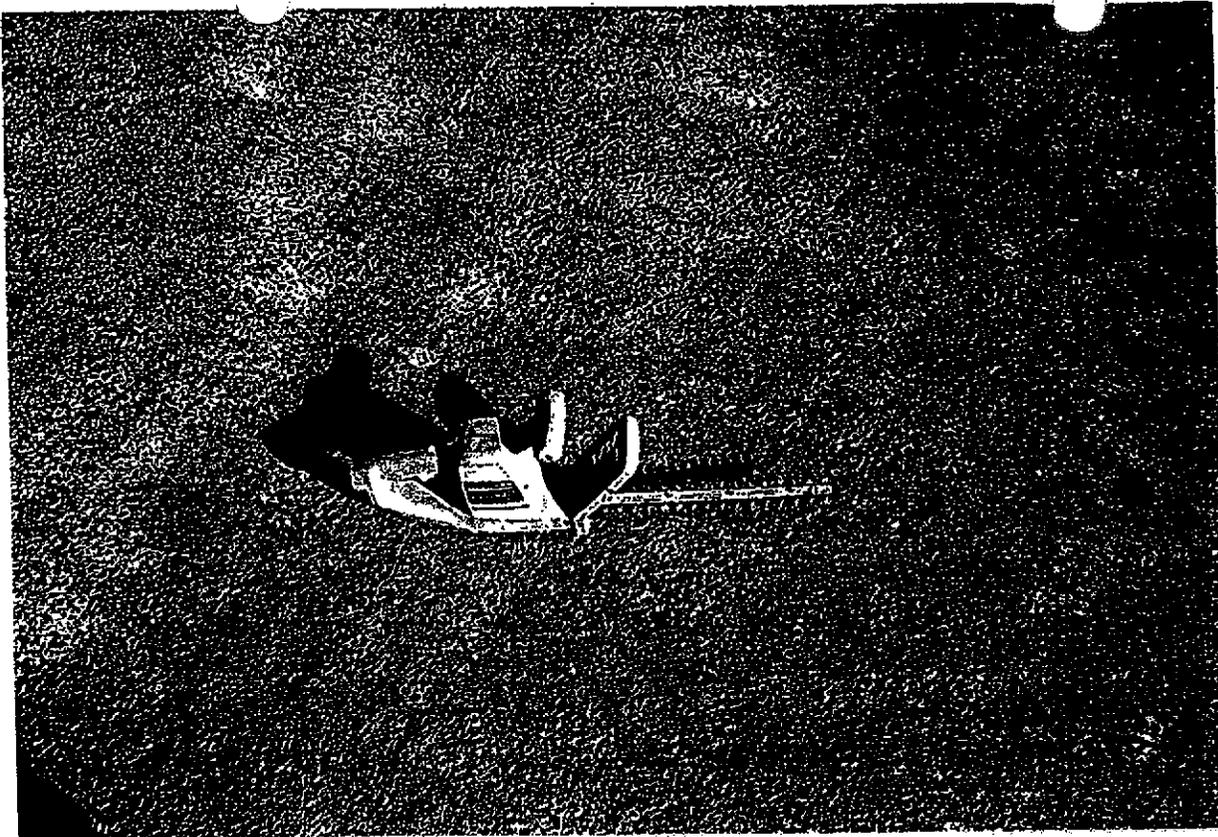
00064

0110  
004210  
0110

Electric Hedge

Wgt 3 <sup>3</sup>/<sub>4</sub> lbs.

Plastic - Steel Blade 13" Long



00065

11410  
90-42-10  
0714

**Lowe, Robert W.** 01/01/1946

Office/Outpatient Visit

Visit Date: Mon, Jan 30, 2006 04:30 pm

Provider: Jim Swanson, MD

Location: Swanson Orthopaedic Surgery & Sports Medicine

Electronically signed by provider on 01/30/2006 Printed on 01/30/2006 at 6:38 pm.

**SUBJECTIVE:**

**CC:**

Mr. Lowe is a 60-year-old male presents today for a worker's compensation follow-up visit. The date of injury was 11/13/98. The employer was Cincinnati Incorporated. Status Post left shoulder pain.

**HPI:**

He presents with shoulder symptoms. The symptoms are on the left side. Symptoms location is diffuse. Symptoms include pain, stiffness, weakness, giving way, night pain, popping, numbness and tingling, but not redness. The patient is right handed. It radiates to the arm, elbow, forearm, neck, and chest. He describes it as sharp, aching, and stabbing. Pain intensity described as 2-9 /10. Symptoms are constant, worse at night, worse with activity, and worsening. The pain initially started 11-13-98 years ago. Related symptoms include Night pain, shoulder stiffness, swelling, crepitus, numbness (over the upper chest and upper arm ) and weakness, but not warmth, erythema, sensation of shoulder instability, locking of his shoulder in a fixed position, a loose body sensation, arthralgias, fever, chills, rash or genitourinary discharge. Previous treatments include OTC pain medications, NSAID's, , formal Physical Therapy, home exercise program, modified work/activities, work excuse, rest, sling, ice, heat, injections - corticosteroid and viscosupplementation, surgery to include: arthroscopy and shoulder replacement, Localized injections, and TENS unit. no fevers, no chills, redness, weight loss, paralysis Present functional level is sedentary. The current work status is Disabled. I EXAMINED HIM TODAY, AND I SEE NO IMPROVEMENT OR CHANGE IN HIS CONDITION. WITH EFFORT HE CAN RAISE HIS ARM, BUT IT CAUSES PAIN. HE HAS NO MORE THAN GRADE 3-4/5 LEFT SHOULDER STRENGTH, AND HE HAS LIMITED RANGE OF MOTION. HE STILL TAKES PERCOCET AND NEURONTIN FOR PAIN, VALIUM FOR ANXIETY AND INSOMNIA, AND CELEXA FOR DEPRESSION. HE STILL GETS HIS MEDICATION THROUGH THE VA, BECAUSE IT IS LESS EXPENSIVE.

HE BROUGHT TO MY ATTENTION THAT HE WAS VIDEOTAPED BY THE WORKERS COMPENSATION INSURANCE COMPANY WHILE ATTEMPTING TO DO SOME YARD WORK AT HIS HOUSE, AND WHILE OPENING HIS DOOR. I EXAMINED THE HEDGE TRIMMER HE WAS APPARENTLY TRYING TO USE, AND IT WEIGHTED ONLY 3.75 LBS, AND WAS WELL BALANCED. THE TRIMMER WEIGHS LESS THAN THE EXERCISE EQUIPMENT I ENCOURAGED HIM TO USE ON A DAILY BASIS. THE COMPANY IS NOW TRYING TO CANCEL HIS BENEFITS AND DISABILITY COMPLAINTS ON THE BASIS OF THE TAPE. I HAD A LONG DISCUSSION WITH THE PATIENT AND HIS WIFE TODAY. WE DISCUSSED HIS INJURY, DISABILITY, AND THE RECOMMENDATIONS THAT I HAD PROVIDED TO HIM.

Past Medical History / Family History / Social History:

Surgical History:

Coronary Artery Bypass Graft  
Joint Replacement

Tobacco/Alcohol/Supplements:

Tobacco: Past history of cigarette smoking, but has quit.

Alcohol: Denies current alcohol use (regular or infrequent).

Legacy Data:

PAST MEDICAL HISTORY:

- Coronary Artery Disease
- Hyperlipidemia
- Hypertension
- Depression

SURGICAL HISTORY:

**Lowe, Robert W. 01/01/1946**

2 of 3

Office/Outpatient Visit

Visit Date: Mon, Jan 30, 2006 04:30 pm

Provider: Jim Swanson, MD

Location: Swanson Orthopaedic Surgery & Sports Medicine

Electronically signed by provider on 01/30/2006 Printed on 01/30/2006 at 6:36 pm.

Appendectomy  
Tonsillectomy  
4 prior shoulder surgeries;

**FAMILY MEDICAL HISTORY:**

Positive for Coronary Artery Disease and Hypertension.

**SOCIAL HISTORY:**

Machine Builders;  
Marital status: married;

**HABITS:**

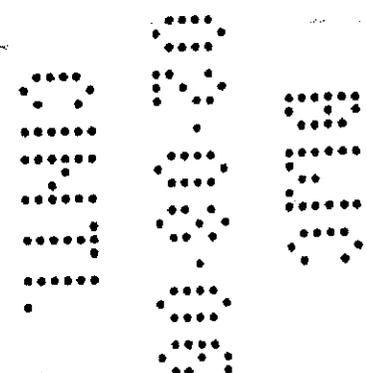
Nonsmoker (never smoked);

**Allergies:**

Percodan;  
Oxycontin;  
Codeine;  
Morphine;

**Current Medications:**

Neurontin  
Percocet  
Lopressor  
Celexa 20mg Tablets 1 tab(s) po qd  
Ecotrin  
Zocor 20mg Tablet 1 tab(s) po hs



**OBJECTIVE:**

**Exams:**

**LEFT**

**SHOULDER EXAM:** . Inspection: Surgical wound - superior wound ( healed ); no erythema; Edema - over the rotator cuff; Deformity - ( He tends to hold the arm suspended and forward flexed. ); Muscle Atrophy - paraspinous muscles, deltoid, and ROTATOR CUFF MUSCLE BELLIES;

Palpation: pain elicited over the lateral clavicle, at the greater tuberosity, bicipital groove, and proximal of the humerus, anteriorly, and posteriorly; no warmth; crepitus palpable over the anterior and lateral acromion and over the subacromial bursa; no masses; Lymphadenopathy is absent. ;

Neurovascular: normal sensory exam of axillary, musculocutaneous, median radial and ulnar nerves distally to light touch or pain; normal pulse and capillary refill noted distally;

Muscular Strength: 3/5 flexors; 4/5 extensors; 3/5 abductors; 4/5 adductors; 3/5 external rotators; 4/5 internal rotators;

Range of Motion: Limited active ROM with extension to ( +15 ) degrees, gleno-humeral flexion to 50 degrees, combined shoulder joint flexion to 70 degrees, gleno-humeral abduction to 60 degrees, combined shoulder joint abduction to 70 degrees, external rotation in the neutral position to 0 degrees, adduction to 20 degrees, and internal rotation in the neutral position to 10 degrees; Active equal passive motion; generalized pain with ROM;

**Maneuvers:**

(+) Yergason test; (+) Speed's test; +/- drop arm test; (+) Supraspinatus pain with resistance; (+) Subscapular tendon pain with resistance; (+) Infraspinatus pain with resistance

**Lab/Test Results:**

X-RAY INTERPRETATION: Radiographs: NONE TODAY.

**ASSESSMENT:**

**Lowe, Robert W. 01/01/1948**

Office/Outpatient Visit

Visit Date: Mon, Jan 30, 2006 04:30 pm

Provider: Jim Swanson, MD

Location: Swanson Orthopaedic Surgery & Sports Medicine

Electronically signed by provider on 01/30/2006 Printed on 01/30/2006 at 6:38 pm.

840.9 Sprains and strains of shoulder and upper arm (Severe)

V43.01 Artificial joint replacement, Shoulder

DDx:

**PLAN:**

**Sprains and strains of shoulder and upper arm**

**TESTS/PROCEDURES:** Tests or procedures ordered to be performed at the next visit include: Shoulder X-ray - left - 2v (A-P and Y-scapular).

**MEDICATIONS:** (no change to current medication regimen). (see today's med list). I recommend continuing the following medication: Percocet 5-325 mg, 1-2 po q 4-6 hours prn pain.. Narcotic risks and precautions were discussed.. Valium (as a muscle relaxant). Neurontin 300 mg TID. Over-the-counter medications recommended include Ibuprofen, Tylenol Extra Strength or Tylenol Arthritis TID, Glucosamine and Chondroitin, Topical arthritis creams, Calcium with Vit D, and Multivitamins. We had a long discussion about the risks and benefits of NSAID's. We discussed the alternatives to treatment, as well as the proper use and monitoring of the medication. The patient agrees to keep me informed of any suspected side effects.

**RECOMMENDATIONS** given include: ice therapy, no work/school, Modify activities as pain allows, limited activities with affected extremity, Home stretching program (instructions were given), ROM program (Office instruction), Cogman exercises, Home strengthening program (instructions were given), and SLING FOR COMFORT.

**FOLLOW-UP:** Schedule a follow-up visit in 6 months.

HE CONTINUES TO BE COMPLETELY AND PERMANENTLY DISABLED. NOTHING HAS CHANGED WITH REGARD TO HIS EXAMINATION OR RECOMMENDATIONS. I HAVE ALLOWED HIM TO DO VERY LIMITED ACTIVITIES AS HE CAN TOLERATE AROUND THE HOME, AND LIMITED HOME REPAIR AND LAWN CARE IS WITHIN THOSE RESTRICTIONS. I FIND THE VIDEOTAPING OF THE PATIENT WHO HAS A LONG STANDING DISABILITY AS DOCUMENTED BY MULTIPLE PHYSICIANS TO BE REPREHENSIBLE AT BEST, AND SHOULD BE PUNISHED UNDER THE FULL LIMITS OF THE LAW.

**WORK:** I do not recommend ever returning to work.

**CC:** Patient's attorney, Ohio BWC, Dr. Barkdoll



**Jim Swanson, M.D.**  
ORTHOPAEDIC SURGEON

ORTHOPAEDIC SUITE  
DEARBORN COUNTY HOSPITAL  
800 WILSON CREEK ROAD  
LAWRENCEBURG, IN 47025  
TELEPHONE (812) 537-8402  
FAX (812) 537-8425

December 20, 2005

Mr. Scott Wolf  
Weisser & Wolf, Attorneys At Law  
Kroger Building  
1014 Vine Street, Suite 1650  
Cincinnati, OH 45202

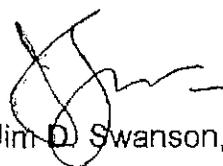
**RE: Mr. Robert Lowe**  
**703 Ridge Ave.**  
**Rising Sun, IN 47040**

**Claim No.: BWC 98-593871**

Dear Mr. Wolf,

As you know, Mr. Lowe sustained an injury to his left shoulder in November 1998. He had undergone a left shoulder hemiarthroplasty, yet continues to have shoulder pain due to the injury. With his condition, I recommend that he perform stretching, strengthening and range of motion exercises at home, *on a daily basis*. He may apply ice therapy and modify his activities as pain allows, but it is recommended that he never return to work.

Sincerely,



Jim D. Swanson, M.D.

JDS/mt

Cc: Mr. Robert Lowe



\* O.S.B.A. BOARD CERTIFIED  
SPECIALISTS IN OHIO  
WORKERS' COMPENSATION

**WEISSER & WOLF**  
ATTORNEYS AT LAW

KROGER BUILDING  
1014 VINE STREET / SUITE 1650  
CINCINNATI, OHIO 45202  
(513) 721-3236  
FAX (513) 721-2733

MARK B. WEISSER \* \*\*  
SCOTT A. WOLF \*  
LISA M. CLARK

\*\* ALSO LICENSED TO  
PRACTICE LAW IN  
KENTUCKY

November 11, 2005

Gary E. Becker  
Dinsmore & Shohl  
255 E. Fifth St.  
Suite 1900  
Cincinnati, OH 45202

RE: Cincinnati, Inc. v. Lowe, et al.

Dear Mr. Becker:

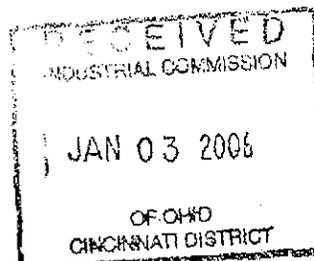
Please be advised that I received your October 5, 2005 motion regarding Robert Lowe. At this time, I am requesting a complete copy of your investigator's log/records or notes indicating all of the days and hours in which this investigation took place both before and after August 3, 2004.

If you have any questions, please feel free to contact me at (513)721-3236.

Sincerely,

Scott A. Wolf

SAW/jc



00070

November 9, 2005

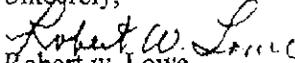
Jim Swanson, M.D.  
Orthopedic Suite  
600 Wilson Creek Road  
Lawrenceburg, IN 47025

Dear Dr. Swanson,

I'm writing to you to let you that Cincinnati Incorporated and their lawyers have hired an individual to film me on tape. They did however film me as I was trying to cut my hedge with a electric trimmer which weighs four (4) lbs. And I was trying to stretch my arm with the rake to brush off the clippings. They also filmed at the ATM getting money to which I opened my car door with the left hand. Dr. Swanson just after I take pain medicine I feel that I can do things I shouldn't and if I do then I suffer from it. It's just by habit that occurs and per the physical therapist, that I do occasional open my car door with my left arm and hand. It hurts to do so but I'm almost 60 years old and old habits just don't go away. The therapists told me to lift a (3) lb weight 10 lifts 3 times daily. I have been accused of magnifying my injury or having had a miraculous recovery in their words. You and the physical therapist have always told or tried to encourage me to use my arm as much as possible, and when it hurts in doing anything stop at my limitation. This may not be your exact wording but the thought is there. I have never magnified my injury, I know that my pain tolerance is not like other people but my injury is real. I wanted to return to work, but Dr. Lim advised me to consider disability. It was hard to accept, I accepted it and now their telling me that I have faked my injury and I know that I have not, nor would I ever do something like that. I do my thera-band exercises every day, with the arm stretches that Rick and the other therapist taught me, it helps sometimes to take some pain away and sometimes bring on more.

Just wanted to advise you of what they are doing to me, and on my last visit, I forgot to ask you about surgery on the nerves going down my arm to relieve some of my pain going to my hand. You and Dr. Lim are the only two Doctors that have seen my shoulder from the inside and I can't explain where my pain actually comes from, all I know that the pain is real and they (Cincinnati Inc, and their Attorney) should feel my pain for a 24 hour period. I have tried to do what you told me to do and it's not to their satisfaction.

Sincerely,

  
Robert w. Lowe

Christina Lowe for Robert Lowe

00071

November 9, 2005

Honorable Scott A. Wolf  
Attorney At Law  
Kroger Building  
1014 Vine Street/Suite 1650  
Cincinnati, Ohio 45202

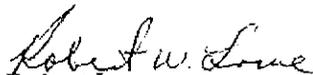
Dear Mr. Wolf:

I am not feeling safe now and it's because of the stalking that Cincinnati Incorporated and their Attorney have displayed on two or more occurrences. They have intentionally followed me from my house to the ATM, in order to film me doing something that doesn't agree to them. I have notified the local Police Chief, and he has expressed to me, that he and his staff of Police Officers will be watching for anyone on my street filming myself or anyone because this is stalking a person or family.

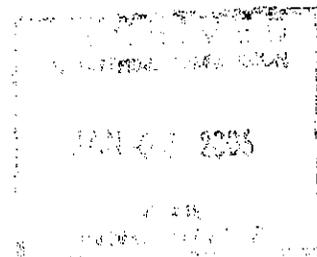
Mr. Wolf I still believe I have done nothing wrong to be treated by Mr. Becker as if I am a liar and a fraud. I am truthful and do have problems with chronic pain regardless of Mr. Becker and Dr. Bacevich's assumption of me.

Please find a letter to Dr. Swanson explaining some of the things they filmed me doing with the exception of they said I pushed my self-propelled lawn mower. I would hope that there is a way that I could challenge Mr. Becker and or Cincinnati Incorporated in litigation for these different times of intentional following me. I stand on your advice and await confirmation from you.

Thanks very much

  
Robert Lowe

Christina Lowe for Robert Lowe



00072

November 4, 2005

Weisser & Wolf  
Honorable Scott A. Wolf  
Attorney At Law  
Kroger Building  
1014 Vine Street/Suite 1650  
Cincinnati, Ohio 45202

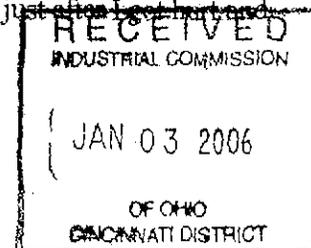
Dear Mr. Wolf:

I am receipt of the letter from Cincinnati Incorporated Attorney and their observation tape of me. I remember back at the time when it occurred and I knew they filming down the street, but I thought I was doing nothing wrong. I couldn't finish the job because my shoulder was hurting so badly, this is why I told you that my friend cut my hedges. he actually did finish them up. Also they have filmed me trimming grass which is what they say was a push mower. I don't own a push- mower, I have a self- propelled mower because of limitations with my arm.

Dr. Swanson has encouraged me to try to move my arm and shoulder so that it won't freeze up. The physical therapist has asked me to continue to try to lift a (3) pound weight and stretch rubber hoses with different strengths to keep my arm from locking up or freezing. I really don't care for them filming me without my permission as I do nothing wrong and I have to get out of the house for mental reasons. Should we go to court , I would like to bring in my hedge trimmer and show the court that it actually weighs (4) pounds. I worry now they might enter my home at a time when we are not at home and place a camera in my home against my approval or my family's approval.

I have been encouraged to try to do the dishes, which is very difficult to do and there are lots of times I pass on it because of the constant pain. I'll admit to you that when under the influence of the medicine I take, I try to do things that I can't then I suffer from do that. I knew Cincinnati Incorporated would film me some day, as they have been know to do this sort of thing with others. As for Dr. Bacevich, I believe he is one of the Doctors that is paid by employer's to totally destroy a person who has a legitimate disability.

I am a Christian man, I never asked for total Disability ever, I was told by Doctor Lim that he seen my shoulder from the inside, and that I should give up and accept disability. I did just that and for mental reasons I can't live my life as a disabled person because I have Cincinnati Incorporated taping me from distances in my own yard. I am very upset and they have done this sort of thing, since my accident. They have told me that they would get me come hell or high water. I have lived with their threats long enough and if you have any attorney that can help me under a civil situation, please advise me and I will go that way. Also, Mr. Wolf, I have found out that they fired me just after I got hurt and I have learned that under federal law this cannot be done.



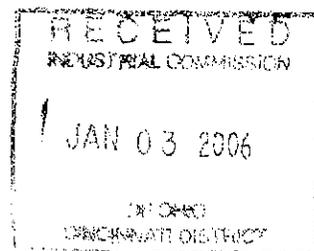
00073

I have also been told that I have to walk (1) mile a day because of my Heart-by- pass from my heart doctors, and that's another way they may film me. I really am upset and its very depressing knowing that one cannot try to something without being filmed. When I was awarded (PTD) I didn't know that I would be followed as if I am committing a fraudulent act. I did not inflate or magnify my disability, it is real and I am looking at another surgery soon according to Dr. Swanson because of the spur growth around the socket the prosthesis sits in.

Thanks for your encouragement but they are out to get me, no matter the costs..

CL/RL

Robert W. Lowe



00074

BWC Bureau of Workers' Compensation MOTION

**Instructions:**

- This form is to be used by the injured worker or employer and/or their authorized representatives to request a decision by the Bureau of Workers' Compensation or the Industrial Commission that cannot be accomplished through any other form or application.
- This form is **NOT TO BE USED BY HEALTH CARE PROVIDERS OR MANAGED CARE ORGANIZATIONS**. Health Care Providers or Managed Care Organizations must use form C-9, *Physician's Report/Treatment Plan for Industrial Injury or Occupational Disease*.
- Proof must be submitted with this form.
- The applicant must mail a copy of the Motion to the opposite party and/or their authorized representative and shall indicate that a copy has been mailed by signing Certificate of Service below.

Claimant: Mr. Robert Lowe	Claim Number: 98-593871		
Street Address: 703 Ridge Ave.	City: Rising Sun	State: Indiana	Zip Code: 47046

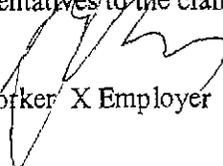
This MOTION is a request to consider the following:

Employer requests that the claimant's permanent total disability compensation be terminated due to new and changed circumstances that have occurred subsequent to the initial order that show he is capable of sustained remunerative employment.

In support of this MOTION, the following evidence is included: (identify affidavits, medical records or other documents)

Memorandum of law in support, surveillance video of claimant, and Bernard B. Bacevich, M.D.'s IME report dated October 5, 2005.

**CERTIFICATE OF SERVICE:** I certify that I have served a copy of this Motion on all parties and representatives to the claim.

Signed:  Date signed: 10-28-05  
 Injured worker  Employer  Authorized Representative CEO/Administrator of Bureau of Workers' Compensation

Distribution: Original - Claim File      Copies - as needed  
 BWC-1208 (Rev. 10/21/98)  
 C-86

CEN SCEN 11/21/2005

INDUSTRIAL COMMISSION OF OHIO

Claimant: Robert Lowe  
Employer: Cincinnati, Inc.  
Claim No.: 98-593871

EMPLOYER'S MEMORANDUM IN  
SUPPORT OF TERMINATION OF  
CLAIMANT'S PERMANENT TOTAL  
DISABILITY COMPENSATION

Claimant's Permanent Total Disability ("PTD") compensation should be terminated because new and changed circumstances have occurred subsequent to the initial order which demonstrate that Robert Lowe ("Claimant") is capable of engaging in sustained remunerative employment. Claimant was hired by Cincinnati, Inc., in 1989 as a Machine Assembler. He was injured at work on November 13, 1998 when a bushing pin fell out of a housing and jerked and pulled his shoulder to the side. This claim is allowed for strain/sprain left shoulder, rotator cuff tear, and aggravation of pre-existing arthritis of left glenohumeral joint. Claimant underwent several surgeries to his shoulder and filed his application for PTD compensation on January 29, 2003. On October 1, 2003, the Staff Hearing Officer granted Claimant's application for PTD benefits, concluding that Claimant was unable to return to his former position of employment and was incapable of engaging in any other sustained remunerative employment.

However, on August 3, 2004, Claimant was observed using a power mower which had to be pushed and pulled and on June 25, 2005, he was observed using hedge clippers. The attached surveillance video shows him using both arms to move the mower around trees and to use the clippers. Furthermore, it shows him raking the debris from the top of bushes using both arms to pull the clippers. There are also several instances where he picks up the hedge clippers with his left arm.

Cir Scan 11/11/2005

Bernard B. Bacevich, M.D., who initially performed an IME on Claimant on April 30, 2003, reviewed the surveillance video and issued a report dated October 5, 2005, in which he opines that the "video demonstrated that he had full normal motion of the shoulder in various positions," that he is able to "perform light to medium work," and that he is "capable of sustained of gainful sustained remunerative employment."

The Ohio Supreme Court has consistently ruled that payment of PTD benefits is inappropriate when there is evidence that claimant is physically able "to do sustained remunerative employment." *State ex rel. Lawson v. Mondie Forge* (2004), 104 Ohio St. 3d 39, 2004 Ohio 6086, ¶16. Furthermore, "a claimant who performs sustained remunerative activity without pay demonstrates that he or she is capable of doing that same work for remuneration." *State ex. rel Schultz v. Indus. Comm.* (2002), 96 Ohio St.3d 27, 2002 Ohio 3316, ¶61. "What matters is whether claimant is medically capable of performing sustained remunerative work, and capability is not dependent on the claimant's status as a current employee." *State ex. rel. Jerdo v. Pride Cast Metals, Inc.* (2002), 95 Ohio St.3d 18, 19, 2002 Ohio 1491.

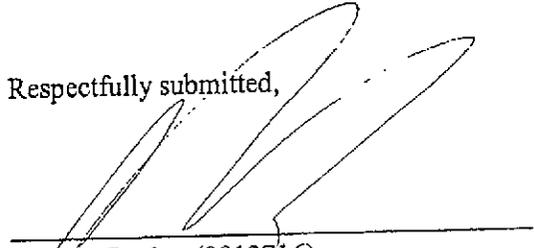
Ohio Revised Code § 4123.52 authorizes the Industrial Commission to exercise continuing jurisdiction over an award of PTD compensation when new and changed circumstances occur "subsequent to the initial order." *State ex rel. Alesci v. Indus. Comm.* (2002), 97 Ohio St. 3d 210, 2002 Ohio 5932, ¶23. An example of a new and changed circumstance includes "discovery of evidence subsequent to a PTD award that claimant is or can engage in sustained remunerative employment." *Id.* at ¶25. When such circumstances occur, the commission is entitled to reopen the prior award, terminate benefits, and declare an overpayment. *Id.*

Case No. 21-0112085

The new and changed circumstances in this case mandate that the Industrial Commission reopen Claimant's PTD award. The surveillance video and Dr. Bacevich's report constitute new evidence of circumstances of changes that have occurred subsequent to Claimant's PTD award. Dr. Bacevich states that Claimant "demonstrate[s] physical capabilities that [are] much different than the findings" in his examination on April 30, 2003. He states that Claimant "has either had a miraculous recovery between 4/30/03 and the first portion of the video dated 8/03/04 or that he was demonstrating marked symptom magnification during [his] examination." He finds that Claimant currently is able to "use his left arm for many activities which are fairly strenuous in that he could use it for pushing and pulling a lawn mower and also use it in cutting hedges and using a rake."

The surveillance video and Dr. Bacevich's report demonstrate that Claimant is clearly medically *capable* of performing sustained remunerative employment. Therefore, the employer requests the Industrial Commission exercise its continuing jurisdiction and issue an order terminating Claimant's PTD benefits, and declare an overpayment of benefits from August 3, 2004 forward.

Respectfully submitted,



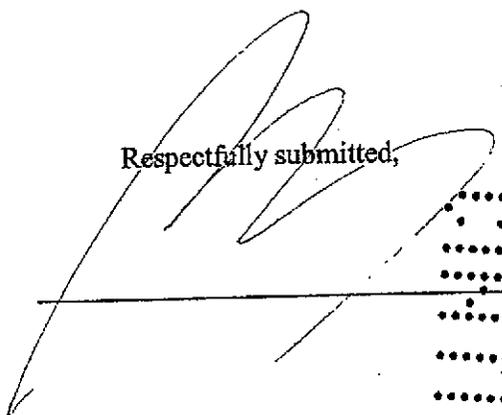
Gary E. Becker (0012716)  
Dinsmore & Shohl LLP  
1900 Chemed Center  
255 East Fifth Street  
Cincinnati, Ohio 45202  
Telephone: (513) 977-8179  
Counsel for Employer

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing has been served via U.S. mail upon the following this 28<sup>th</sup> day of October, 2005:

**Lisa Clark, Esq.**  
1014 Vine Street  
Suite 1650  
Cincinnati, Ohio 45202  
Telephone: (513) 721-3236  
Counsel for Claimant

Respectfully submitted,



2005  
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28

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# I.M.S.E.

## INDEPENDENT MEDICAL SPECIALIST EXAMS

3830-C WOODBRIDGE BLVD.  
WOODBRIDGE PROFESSIONAL PARK

(513) 942-1904  
FAX: (513) 942-2312

FAIRFIELD, OH 45014

BERNARD B. BACEVICH, M.D.

October 5, 2005

Gary E. Becker, Attorney  
Dinsmore & Shohl, LLP  
255 East Fifth Street, Suite 1900  
Cincinnati, Ohio 45202-4720

RE: Robert Lowe  
Claim No: 98-593871 (Ref 97-585228;  
L19830-22; L201824-22)  
Date of Injury: 11/15/98

### ADDENDUM REPORT

Dear Mr. Becker:

I had initially performed an Independent Medical Examination on Robert Lowe on April 30, 2003 and have now been sent a videotape of Robert Lowe dated 08/03/04 and 06/25/05. My review of the videotape shows that on 08/03/04 he was at an ATM machine and then walked over to his car but could easily open and close the door using his left arm. The tape then showed him using a power mower which had to be pushed and pulled and he was using this with both arms, again without any visible signs of difficulty in using his arms. He would push and pull this repetitively, move it around trees, and not show any evidence of difficulty. At times he would use a single arm and pull the mower backwards with his right arm but he would be swinging his left arm, again, without any evidence of difficulty. At the end of the grass cutting session he did put his mower away in to a garage area. He appeared to be very hot and sweaty. The video ended when he walked up and was talking with an older man and went down to sit on a porch. The next section of the video was from 06/25/05 when it begins with him picking up a hedge clipper with his left arm and not showing any signs of difficulty. The video, at times, would show him using the hedge cutter with his right arm and other times he would use it in both arms. He would then use a rake to clear the debris from the top of the bushes. He would have his right arm at the proximal part of the handle and his left arm down lower and would be pulling backwards quite forcefully and vigorously and, again, this showed no evidence of any difficulty or pain. During these maneuvers his left arm would be raised forward to the 90-degree position. At other times, he was seen holding the trimmer in his left arm using the rake in his right arm to scrape off the cuttings and other times he would use both arms on the rake. There were several episodes where he could easily pick up the hedge clippers with his left arm. During all

02

Gary E. Becker, Attorney  
Re Robert Lowe  
10-05-05

of these movements. There is no evidence to indicate that he was experiencing pain. This video demonstrated that he had full normal motion of the shoulder in various positions with the arm at or below shoulder level. The video did not demonstrate any activities where he had to reach in the completely overhead position.

#### **SUMMARY AND OPINIONS:**

Based upon reviewing this video, this man demonstrated physical capabilities that were much different than the findings on that were much different than the findings on my examination on April 30, 2003. On my examination he had exquisite pain in the shoulder on attempts at range of motion and had very severe guarding. His pain was also aggravated by even bending the elbow, whereas in the video he did not have any apparent difficulty with the shoulder even with bending activities at the elbow, lifting a hedge clipper, or using a hedge clipper or a rake. Based upon review of this video, this man has either had a miraculous recovery between 04/30/03 and the first portion of the video dated 08/03/04 or that he was demonstrating marked symptom magnification during my examination. Based upon the recent video of 06/25/05, this man can certainly use his left arm for many activities which are fairly strenuous in that he could use it for pushing and pulling a lawn mower and also use it in cutting hedges and using a rake. Based upon this video, it is certainly my opinion that this man is capable of gainful sustained remunerative employment and my opinions rendered in my report are no longer valid. This man is capable of using his left arm for repetitive activities certainly below the shoulder level. He is capable of cutting grass, capable of using a hedge trimmer, and capable of raking. This video does not support the fact that this man has been granted permanent total disability benefits. This man can perform light to medium work.

**DISCLOSURE:** The above analysis is based upon the medical records that were provided at this time. It is assumed that the information provided to me is correct. If more information becomes available at a later time, an additional report may be requested. Such information may or may not change the opinions rendered in the File Review Evaluation. My opinions have been based upon reasonable medical probability and certainty.

P.S. The videotape is being returned to your office.

BBB/leh

Disability Evaluating Physicians

Fellow of American Academy of

Examiner ABIME

Board Certified Independent Medical

Surgeon ABOS

Board Certified Orthopaedic

Bernard B. Bacevich, M.D.



Sincerely,

If you have any further questions, please do not hesitate to contact me. The time for the review of the records and preparation of this addendum is 1 hour.

Gary E. Becker, Attorney  
Re: Robert Lowe  
10-05-05

# RECORD OF PROCEEDINGS

Claim Number: 97-585228  
MO-ACC-SI-COV  
PCN: 2033251 Robert W. Lowe

Claims Heard: 98-593871

L19830-22  
L201624-22  
97-585228

DINSMORE & SHOHL  
255 E. FIFTH ST.  
1900 CHEMED CENTER  
CINCINNATI OH 45202

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DINSMORE & SHOHL

Date of Injury: 11/04/1997

Risk Number: 20003333-0

Request For Reconsideration filed by Employer on 10/22/2003.  
Issue: 1) Continuing Jurisdiction Pursuant To Ohio Revised Code 4123.52  
2) Permanent Total Disability

The Request for Reconsideration filed 10/22/2003, by the Employer from the findings mailed 10/08/2003, is denied for the reason that the request fails to meet the criteria of Industrial Commission Resolution No. R98-1-3 Dated May 6, 1998.

Typed By: JH/kd  
Date Typed: 12/04/2003

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

William E. Thompson Chairperson	YES	Patrick J. Gannon Commissioner	YES
------------------------------------	-----	-----------------------------------	-----

NOT PRESENT

Donna Owens Commissioner	YES
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ATTESTED TO BY:

Executive Director

Findings Mailed: 12/17/2003

Signed copy contained in claim file.

**RECORD OF PROCEEDINGS**

Claim Number: 97-585228

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

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97-585228  
Robert W. Lowe  
703 Ridge Ave  
Rising Sun IN 47040

Risk No: 20003333-0  
Cincinnati, Inc  
Main Office  
7420 Kilby Rd  
Harrison OH 45030

ID No: 120-80  
\*\*\*Frank Gates Service Co\*\*\*  
PO Box 182364  
Columbus OH 43218-2364

ID No: 20238-91  
Dinsmore & Shohl  
255 E. Fifth St.  
1900 Chemed Center  
Cincinnati OH 45202

BWC, LAW DIRECTOR

(ICRECON2 - Commission Recon Denied/Clerical Error 5/01)

BEFORE THE INDUSTRIAL COMMISSION OF OHIO

Claimant: Robert Lowe

Employer: Cincinnati, Inc.

Employer, Cincinnati, Inc.'s,  
Motion for Reconsideration

Claim No.: 98-593871

The employer, Cincinnati, Inc., hereby requests reconsideration by the Industrial Commission of the Staff Hearing Officer's order awarding permanent total disability (PTD) in the captioned workers' compensation claim. The employer's request for reconsideration is made pursuant to Industrial Commission resolution R98-1-03, and is based upon clear mistakes of fact and law contained in the Staff Hearing Officer's order. For the Industrial Commission's convenience, the Staff Hearing Officer's order is attached hereto. This order was mailed October 8, 2003, and was received by the employer October 10, 2003.

BACKGROUND

This claim involves a left shoulder injury which Mr. Lowe sustained on November 13, 1998. The claim has previously been recognized for sprain/strain left shoulder; rotator cuff tear; and aggravation of pre-existing arthritis of left glenohumeral joint. The claimant also has significant medical conditions unrelated to the industrial injury consisting of serious heart problems which required double bypass surgery in 1996 and depression which the claimant testified at the hearing began after his bypass surgery.

MEDICAL ANALYSIS

The Staff Hearing Officer discussed three medical opinions in her PTD order. Dr. Steven Wunder examined the claimant at the request of the Industrial Commission, and issued a report dated May 15, 2003 (copy attached). Dr. Wunder assessed a 27% whole

person impairment and found that, when considering the allowed conditions, the claimant remained capable of performing sedentary to light work, mainly with use of his dominant, uninjured right arm. Dr. Wunder also noted that conditions unrelated to the workers' compensation claim, namely the coronary artery disease and severe anxiety/depression, might affect the claimant's ability to work. Based upon the allowed conditions, however, he found Mr. Lowe capable of employment.

The Staff Hearing Officer next discussed the independent medical examination report of Bernard Bacevich, M.D. dated April 30, 2003 (copy attached). Dr. Bacevich assessed a 28% whole person impairment, and likewise concluded that the claimant remains capable of sustained remunerative employment. Dr. Bacevich recommended that Mr. Lowe perform sedentary work, again using his dominant, uninjured right arm. Dr. Bacevich also noted in the "occupational history" portion of his report:

Last year he attempted to do a security job position at Argosy Casino but he states that the standing and walking caused him to have left shoulder pain. Picking up bags of chips with the right arm also caused left shoulder pain and then he had problems with swelling of his right lower leg and ankle where he had previous cardiac bypass surgery. In addition, the smoky environment was bothersome and with his cardiac condition he wanted to avoid such a smoke environment.

The final report discussed by the Staff Hearing Officer was the office note of the claimant's treating physician, Dr. James Swanson, dated September 27, 2002 (copy attached). That office note was cited by the Staff Hearing Officer as the basis for her decision. In reality, however, Dr. Swanson assesses an even lower whole person impairment of only 17%,

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and provides no analysis whatsoever of the restrictions which would be required by virtue of the allowed conditions.

### VOCATIONAL ANALYSIS

The claimant's vocational profile is quite favorable. As detailed on claimant's PTD application, he possesses a 12th grade education, as well as experience in the United States Air Force as an Administrative Specialist. In addition, the claimant's employment at Cincinnati, Inc. was a skilled position as a machine assembler. As detailed in the claimant's Vocational Questionnaire, in this position he built machines based upon blueprints. Other pertinent vocational history included work as a plastic extrusion machine operator, as well as a quality control inspector. Moreover, Mr. Lowe is only 57 years old.

The Industrial Commission vocational review was performed by Nancy Borgeson, Ph.D. whose report is attached. Based upon Dr. Wunder's Industrial Commission specialist examination report, Dr. Borgeson opined that the claimant was capable of working in positions such as order clerk, charge account clerk, film inspector, cashier, information clerk, surveillance system monitor, checker and receptionist.

The report of vocational expert Howard Caston, Ph.D. dated May 18, 2003 (copy attached) is even more explicit. Dr. Caston administered testing which demonstrated that the claimant functions at a college level in both reading and spelling, and at a high school graduate level in arithmetic. Dr. Caston found the claimant capable of performing jobs such as telephone answering, message taking, file clerk and security systems monitor. He attached to his report explicit examples of such jobs which had been advertised in the local newspapers.

ANALYSIS OF EVIDENCE

The Staff Hearing Officer's order is legally incorrect because she fails to apply the correct legal standard. In order to obtain PTD benefits, it is incumbent upon the claimant to establish by a preponderance of the evidence that he is permanently and totally disabled, and that his inability to work is causally related to the allowed conditions in his claim. O.A.C. 4121-3-34(D)(3). PTD compensation "should be reserved for the most severely disabled workers and should be allowed only when there is no possibility for reemployment." *State, ex rel. B.F. Goodrich Co. v. Indus. Comm.* (1995), 73 Ohio St.3d 525. Even the ability to do part-time work precludes an award of PTD benefits. *State, ex rel. Underwood v. Indus. Comm.* (2001), 93 Ohio St.3d 249.

The Ohio Supreme Court has commented:

We view permanent total disability compensation as compensation of last resort, to be awarded only when all reasonable avenues of accomplishing a return to sustained remunerative employment have failed. As such, 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 approve re-employment potential.

*State, ex rel. Wilson v. Indus. Comm.* (1997), 80 Ohio St.3d 250.

The Staff Hearing Officer's analysis fails to meet this stringent standard. In this claim, we have a gentleman with a high school degree; with a skilled employment history; with the ability to read and spell at a college level and to perform arithmetic at a high school level; with an impairment ranging between 17%-29% based upon allowed conditions limited exclusively to the left shoulder. Certainly, within those parameters, sustained remunerative employment is available to the claimant. The key issue which the Staff Hearing Officer

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CLAIMANT DISTRICT OFFICE

failed to adequately address is the fact that the claimant did, in fact, return to work within the last year as a security guard at the Argosy Casino. The Staff Hearing Officer notes that the claimant stated that he was unable to continue performing that job after approximately 90 days due to the walking required. It should be recalled that this issue was explicitly addressed in the report of Dr. Bacevich wherein he indicated that the walking in that job caused swelling of the claimant's right lower leg and ankle where he had previously undergone surgery in connection with this cardiac bypass. In addition, the smoky environment of the casino was problematic for his heart condition.

The claimant's work at the casino in 2002 proves the point made by the vocational assessors, Drs. Caston and Borgeson, as well as by Drs. Bacevich and Wunder: Mr. Lowe is fully capable of working in a sedentary position with the use of his dominant right arm. The vocational experts, Drs. Borgeson and Caston, identified several specific examples of such positions. Nowhere in the record is there any proof that the claimant is incapable of performing any of the jobs identified by Drs. Borgeson and Caston. The Staff Hearing Officer's order fails to address this critical issue.

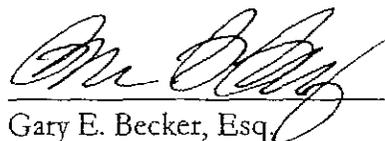
Moreover, to the extent that Mr. Lowe was unable to continue performing the security guard position at Argosy Casino, it was mainly due to problems unrelated to the allowed conditions in his claim. In particular, the walking required in that position caused swelling in his leg due to his pre-existing cardiac bypass. Likewise, the smoky environment was likewise problematic due to his heart condition. The claimant's heart condition has nothing whatsoever to do with the allowed conditions in this claim. It is axiomatic that PTSD

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compensation cannot be awarded based upon non-allowed conditions. *State, ex rel. Waddle v. Indus. Comm.* (1993), 67 Ohio St.3d 452).

Overall, a careful review of the evidence in this claim establishes that Mr. Lowe was and is capable of returning to sustained remunerative employment, but failed in his effort to return to work as a casino security guard due to the walking required in that position, as well as the smoky environment. Those issues were problematic not due to the allowed left shoulder condition, but rather to the claimant's pre-existing heart problems. Based upon the claimant's excellent vocational profile, he would clearly be capable of performing a security position with less walking, and which was not in a smoky environment. This is exactly the position (surveillance monitor) identified by the vocational experts. As such, the employer, Cincinnati, Inc., respectfully requests that the Industrial Commission grant reconsideration of the Staff Hearing Officer's order.

Respectfully submitted,



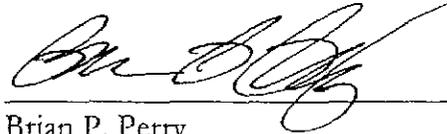
Gary E. Becker, Esq.  
Brian P. Perry, Esq.  
Dinsmore & Shohl LLP  
1900 Chemed Center  
255 East Fifth Street  
Cincinnati, OH 45202  
(513) 977-8200

Attorneys for Employer,  
Cincinnati, Inc.

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CINCINNATI DISTRICT OFFICE

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served upon Scott A. Wolf, Esq., Attorney for Claimant, 1014 Vine Street, Suite 1650, Cincinnati, Ohio 45202, by ordinary US Mail, postage pre-paid, this 22 day of October, 2003.



Brian P. Perry

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CINCINNATI DISTRICT OFFICE

The Industrial Commission of Ohio

RECORD OF PROCEEDINGS

Claim Number: 98-593871  
LT-ACC-SI-COV  
PCN: 2030311 Robert W. Lowe

Claims Heard: 98-593871

L19830-22 - Ref  
L201624-22 - Ref  
97-585228 - Ref

ROBERT W. LOWE  
703 RIDGE AVE  
RISING SUN IN 47040

Date of Injury: 11/13/1998

Risk Number: 20003333-0

CORRECTED ORDER

On October 28, 2003, the injured worker requested a correction of the Staff Hearing Officer order dated 10/01/2003.

The injured worker contends that the Staff Hearing Officer order contains a clerical error in that it ordered the payment of permanent total disability compensation beginning 09/27/2003 instead of 09/27/2002.

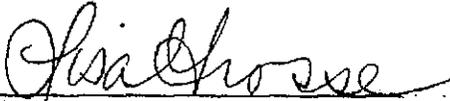
After reviewing the claim file, the Staff Hearing Officer finds that there was a clerical error in the order. Therefore, the injured worker's request for a corrected order is granted.

Pursuant to the continuing provision of ORC 4123.52 the Staff Hearing Officer order is corrected as follows:

Permanent Total Disability Compensation is ordered paid beginning 09/27/2002, based on the medical report of Dr. Swanson dated 09/27/2002.

In all other respects, the Staff Hearing Officer order dated 10/01/2003 remains as originally published.

Typed By: th  
Date Typed: 10/01/2003  
Date Corrected: 11/04/2003  
Date Received: 02/04/2003  
Corrected: 10/06/2003  
Findings Mailed:

  
\_\_\_\_\_  
Lisa Grosse  
Staff Hearing Officer

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

98-593871  
Robert W. Lowe  
703 Ridge Ave  
Rising Sun IN 47040

ID No: 14402-90  
Scott A. Wolf  
1014 Vine St Ste 1650  
Cincinnati OH 45202

Risk No: 20003333-0  
Cincinnati, Inc  
Main Office  
7420 Kilby Rd  
Harrison OH 45030

ID No: 120-80  
\*\*\*Frank Gates Service Co\*\*\*  
PO Box 182364  
Columbus OH 43218-2364

The Industrial Commission of Ohio

# RECORD OF PROCEEDINGS

Claim Number: 98-593871

ID No: 20238-91  
Dinsmore & Shohl  
255 E. Fifth St.  
1900 Chemed Center  
Cincinnati OH 45202

ID No: 4000-05  
\*\*\*BWC - DWRP Section\*\*\*  
30 West Spring Street  
Level 10  
Columbus OH 43266-0581

BWC, LAW DIRECTOR

00092

The Industrial Commission of Ohio  
**RECORD OF PROCEEDINGS**

Claim Number: 98-593871  
 LT-ACC-SI-CDV  
 PCN: 2030311 Robert W. Lowe

Claims Heard: 98-593871

L19830-22 - Ref  
 L201624-22 - Ref  
 97-585228 - Ref

SCOTT A. WOLF  
 1014 VINE ST STE 1650  
 CINCINNATI OH 45202

Date of Injury: 11/13/1998

Risk Number: 20003333-0

This matter was heard on 10/01/2003, before Staff Hearing Officer Lisa Grosse, pursuant to the provisions of Ohio Revised Code Section 4121.35(B)(1) on:

IC-2 App For Compensation Of Permanent Total Disability filed by Injured Worker on 01/29/2003.  
 Issue: 1) Permanent Total Disability

Notices were mailed to the injured worker, the employer, their respective representatives and the Administrator of the Bureau of Workers' Compensation not less than 14 days prior to this date, and the following were present at the hearing:

APPEARANCE FOR THE INJURED WORKER: Injured Worker; Wolf  
 APPEARANCE FOR THE EMPLOYER: Perry  
 APPEARANCE FOR THE ADMINISTRATOR: n/a

It is the finding of the Staff Hearing Officer that this claim has been allowed for: STRAIN/SPRAIN LEFT SHOULDER ROTATOR CUFF TEAR; AGGRAVATION OF PRE-EXISTING ARTHRITIS OF LEFT GLENOHUMERAL JOINTS.

After full consideration of the issue it is the order of the Staff Hearing Officer that the Application filed 01/29/2003, for Permanent and Total Disability Compensation, be granted to the following extent:

Permanent and total disability compensation is hereby awarded from 09/27/2003 (less any compensation which may have been previously awarded from said date) and to continue without suspension unless future facts or circumstances should warrant the stopping of the award; and that payment be made pursuant to Ohio Revised Code Section 4123.58(A).

The injured worker was examined by Dr. Wunder at the request of the Industrial Commission with respect to the allowed orthopedic conditions in the claim. Dr. Wunder opined that the injured worker has reached maximum medical improvement and has a resulting 27% whole person permanent impairment. Dr. Wunder completed a physical strength rating form which he attached to his medical report wherein he indicated that the injured worker is capable of physical work activity at a sedentary level.

The employer submitted the medical report of Dr. Bacevich for consideration. Dr. Bacevich essentially agreed with the opinion of Dr. Wunder and opined that the injured worker has a 28% whole person permanent impairment considering the allowed conditions. He also opined that the injured worker would be capable of performing sedentary employment provided that he not perform any work activity with the left upper extremity.

The injured worker testified at hearing that he continues to suffer from pain despite four surgical procedures on his left shoulder. The injured

The Industrial Commission of Ohio  
**RECORD OF PROCEEDINGS**

Claim Number: 98-593871

worker testified that the pain that he experiences is so severe that it interferes with his ability to ambulate as well as his ability to concentrate. The injured worker further testified that he is unable to take care of his activities of daily living and needs help from his wife in dressing and feeding. The injured worker further testified that he attempted a return to work in July, 2002 as a security guard, but was unable to continue to perform the job duties as a result of his difficulty with walking and pain.

The injured worker submitted the office notes of his treating physician, Dr. Swanson, for consideration. Dr. Swanson opined on 09/27/2002 that the injured worker is unable to perform employment as a result of the allowed conditions.

The Staff Hearing Officer finds that the injured worker is unable to return to his former position of employment and is incapable of engaging in any other form of sustained remunerative employment considering the severity of his medical impairment in combination with the resulting pain from which he suffers as a result of the allowed conditions. Therefore, the injured worker's application for permanent and total disability compensation is granted.

This order is based on the office note of Dr. Swanson dated 09/27/2002 and the injured worker's testimony at hearing.

Typed By: th  
 Date Typed: 10/01/2003  
 Date Received: 02/04/2003  
 Corrected: 10/06/2003  
 Findings Mailed: 10/08/2003

Lisa Grosse  
 Staff Hearing Officer

Signed copy contained in claim file.

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

98-593871  
 Robert W. Lowe  
 703 Ridge Ave  
 Rising Sun IN 47040

ID No: 14402-90  
 Scott A. Wolf  
 1014 Vine St Ste 1650  
 Cincinnati OH 45202

Risk No: 20003333-0  
 Cincinnati, Inc  
 Main Office  
 7420 Kilby Rd  
 Harrison OH 45030

ID No: 120-80  
 \*\*\*Frank Gates Service Co\*\*\*  
 PO Box 182364  
 Columbus OH 43218-2364

ID No: 20238-91  
 Dinsmore & Shohl  
 255 E. Fifth St.  
 1900 Chemed Center  
 Cincinnati OH 45202

ID No: 4000-05  
 \*\*\*BWC - DWRP Section\*\*\*  
 30 West Spring Street  
 Level 10  
 Columbus OH 43266-0581

BORGESON AND ASSOCIATES  
28000 Bassett Road, Westlake, Ohio 44145  
(440) 892-9152: (440) 892-5113

EMPLOYABILITY ASSESSMENT REPORT TO  
THE INDUSTRIAL COMMISSION OF OHIO

COPY TO  
CLAIMANT ✓  
EMPLOYER sent 7/25/03  
CLAIMANT REP ✓  
EMPLOYER REP Frank Mako (2)  
BY \_\_\_\_\_  
DATE \_\_\_\_\_

I. INTRODUCTORY INFORMATION:

Claimant Name: Robert W. Lowe  
Claim Number: 98-593871  
Date of Birth: 1/1/46  
Age: 57  
ICO Age Category: Person of Middle Age  
Date of Last Employment: 9/7/02  
Allowed Conditions: Strain/sprain left shoulder; rotator cuff tear.  
Aggravation of pre-existing arthritis of left  
glenohumeral joints.

II. EMPLOYABILITY OPINIONS

ques. Based on your separate consideration of reviewed medical and psychological opinions regarding functional limitations which arise from the allowed conditions, identify occupations which the claimant may reasonably be expected to perform, (A) immediately and/or (B) following appropriate academic remediation, or brief skill training.

ans. RESIDUAL FUNCTIONAL CAPACITIES - EMPLOYMENT OPTIONS

- 1) Dr. S. Wunder, PM&R 5/03  
- Claimant could do sedentary to light work using the right arm only. He could use the left arm for no more than 3 pounds lifting and as a helper. Claimant has a 27% impairment of the whole person.
- 1A) Order Clerk, food & bev. #209567014  
Charge Account Clerk #205367014  
Inspector, film #726684050  
Cashier II #211462010  
Information Clerk #237367018  
Surveillance System Monitor #379367010
- 1B) With brief training:  
Clerk, general #209562010  
Referral and Information Aide #237367042  
Checker #209687022  
Receptionist #237367038

JUL - 3 03  
10:11 AM

Gate Guard #372667030  
Sales Clerk #290447014

- 2) Dr. M. Meyn, Orthopedics 4/02      2A) Not capable of employment.  
- Claimant has an impairment of the left shoulder which causes him to be totally disabled at the present time. He can do nothing with the left shoulder that doesn't cause pain. Even walking is painful because of the movement it causes to the left arm. His shoulder will probably never be without pain.
- 3) J. Swensen, Orthopedics 9/2702      3A) Not capable of employment.  
- Claimant's shoulder continues to be painful and stiff despite arthroplasty. I do not recommend he ever return to work.  
- Impairment is 17% of the whole person.

### III. EFFECTS OF OTHER EMPLOYABILITY FACTORS

1.

ques. How, if at all, do the claimant's age, education, work history or other factors (physical, psychological and sociological) effect his ability to meet basic demands of entry level occupations?

ans. Age:                      Not necessarily a factor. Claimant is a person of Middle Age at 57.

Education:                      Not a factor. Claimant completed high school.

Work History:                      Not necessarily a factor. Claimant has experience in several factory jobs. He might have difficulty adjusting to office or service work settings.

Other:                              Claimant still complains of severe pain in his left shoulder. He also reports numbness and tingling of the left arm. He has had at least four surgeries on the left shoulder. He claims he is unable to use the left arm except for minimal support. Medical history includes a coronary bypass in 1996, coronary artery disease, anxiety and depression. His

wife helps him with activities of daily living. He states he has participated in rehabilitation services off and on for three years.

2.

ques. Does your review of background data indicate whether the claimant may reasonably develop academic or other skills required to perform entry level Sedentary or Light jobs?

ans. There is no basis in the file for finding the claimant incapable in this regard.

3.

ques. Are there significant issues regarding potential employability limitations or strengths which you wish to call to the SHO's attention?

ans. Claimant is receiving Social Security Disability benefits since 9/02. He also receives a pension from the V.A. These benefits could be disincentives to work return at this time.

#### IV. EMPLOYABILITY ASSESSMENT DATABASE

##### A. DOCUMENTS REVIEWED:

<u>Reporter</u>	<u>Date</u>	<u>Type of Report</u>
S. Wunder, M.D., PM&R	5/15/03	ICO Specialist Report
L. Porter, Claims Examiner	1/23/03	Statement of Facts re. Application for PTD.
Claimant	1/16/03	Application for PTD.
J. Swensen, M.D., Orthopedics	9/27/02	Report of Office Visit
M. Meyn, Jr., M.D., Orthopedics	4/5/02	Letter to Gateway Inc.

##### B. WORK HISTORY:

<u>Job Title</u>	<u>DOT Code</u>	<u>Skill Level</u>	<u>Strength Level</u>	<u>Dates</u>
Machine Builder	600281022	Skilled	Medium	1/88-9/02
Extruder Operator	557382010	Skilled	Medium	10/72-9/88
Quality Control Inspector, glass	579367010	Semi-skilled	Light	6/69-7/72

##### C. EDUCATIONAL HISTORY:

Highest Grade Completed: 12th  
 Date of Last Attendance: 1963  
 High School Graduate: Yes  
 GED: No  
 Vocational Training: On-the-job  
 ICO Educational Classification: High School

D. TESTED APTITUDES AND ACADEMIC ABILITIES:

There is no academic or aptitude testing reports in the file.

E. ADJUSTED WORKER TRAIT PROFILE:

General Educational Development: (GED)

	<u>Grade Level</u>	<u>USDOL Level</u>
(R) Reasoning	High School	4
(M) Math	High School	4
(L) Language	7-8	3

<u>Aptitudes:</u>	<u>USDOL Level</u>	<u>Key for Rating Aptitudes</u>	
	1	S	Top 10%
	2	AA	Above Average
	3	A	Average
	4	BA	Below Average
	5	N	Bottom 10%

	<u>Rating</u>	<u>USDOL Level</u>
(G) General Learning Ability	A	3
(V) Verbal Aptitude	A	3
(N) Numerical Aptitude	A	3
(S) Spatial Aptitude	AA	2
(P) Form Perception	A	3
(Q) Clerical Perception	BA	4
(K) Motor Coordination	A	3
(F) Finger Dexterity	A	3
(M) Manual Dexterity	A	3
(E) Eye/Hand/Foot Coordination	N	5
(C) Color Discrimination	N	5

**Temperaments Demonstrated During Work History**

- Varied duties, changing tasks often

00-9 03  
 1991-01-19

- Making judgments and decisions
- Doing precise work, to close tolerances

E. RATIONALE FOR ADJUSTING WORKER TRAIT PROFILE

The Worker Trait Profile above has not been adjusted.

	Nancy J. Borgeson, Ph.D. CRC., ABVE
Employability Assessor Signature and Date	Printed Name

JUL 11 2003  
10:41 AM  
JUL 11 2003

# Case Management Associates

513-677-3038 • Fax: 583-0910

8260 Creek Woods Place • Maineville, Ohio 45039

## EMPLOYABILITY ASSESSMENT

Claimant: Robert Lowe  
 Claim Numbers: 98-593871(Ref:97-585228;L19830-22;L201824-22)  
 Age: 57 years old  
 IOC Category: Person of Middle Age  
 Date of Evaluation: 07/03/03  
 Evaluator: Penny Carr

**ALLOWED CONDITIONS:** 98-593871(11/13/98) Strain/sprain left shoulder and rotator cuff tear; aggravation of pre-existing arthritis of the left glenohumeral joint.

### INTRODUCTION:

This evaluation was prepared for the purpose of assessing the employability potential of Mr. Robert Lowe

The following documents were used in the preparation of this report: the 04/30/03 Independent Medical Specialist Exam of Dr. Bernard Bacevich; the 05/15/03 report of Dr. Ron Koppenhoeffter; the 9/27/02 report of Dr. Jim Swanson ; the Application for Permanent and Total Disability and an Interview and testing with this vocational expert on 7/02/03.

### EDUCATION:

Mr. Lowe reports that he left school in the 12<sup>th</sup> grade in 1963 in order to join the United States Air Force. He received a GED through the service. He worked as an administrative specialist but was given no specific training for this job. He has had no additional education or skills training.

### WORK HISTORY:

1969-1972

#### Inspector/Tester for Thatcher Glass

The claimant worked in a factory performing quality control on the glass and the shipping cartons. He was able to perform simple alkalinity testing and used thickness gages. He wrote simple test reports but he mainly used check-lists. He lifted packed cartons weighing up to 50 pounds. This work was performed at a Medium physical demand level and is considered Semiskilled.

Robert Lowe  
Page 2  
1972-1988

Plastic Extrusion Machine Operator for Capsonic Industries

The claimant was responsible for adjusting and operating a plastics extrusion machine. He was responsible for reading customer specifications. He did this job standing with frequent lifting and bending to load the machine with raw materials. The IC-2 is in error as it indicates he did sitting of 6 hours per day. This work was performed at a Medium physical demand level and is considered Semiskilled.

1/89-11/98

Machine Assembler

The claimant helped to build large laser machines that would be used in heavy industry. He used grinders, boring equipment and cutting machines to assure parts of required thickness. He was required to read blueprints and test the assembled machine for accuracy. This work performed at a Medium physical demand level and is considered Semiskilled.

**HISTORY OF INJURY:**

Mr. Lowe was injured at his job on November 13, 1998 when he tried to place a pin in a housing but it fell out injuring his shoulder. He had a total of four surgical procedures by Dr. Swanson without success. He then had a total shoulder replacement by Dr. Lim in August of 2001. Despite all these procedures, he has not had relief of his pain. There was a great deal of soft tissue damage which has not healed properly causing the intense

therapy and continues to do home exercises prescribed for him. Mr. Lowe's left shoulder is noticeably small and lower than his right shoulder. He has no strength and very limited voluntary movement of the shoulder and arm. Doctors have suggest removal of the arm or total fusion of the shoulder joint as possible ways to relieve the pain. He is reluctant to have these radical surgeries due to the lack of success of previous surgeries.

Mr. Lowe attempted to return to work in 1999. He was supposed to have a light-duty job but the company was not able to arrange that, so they returned him to his regular job. He was required to lift 50 pounds or more. He was only able to work for a couple of weeks before the pain became too intense to continue. Last year he attempted to work as a security guard at the Argosy Casino. He was not required to do any lifting. The standing and walking caused him to have left shoulder pain so intense that he was not able to focus on his work and had to take additional pain medication. If he takes less medication, the pain becomes overwhelming. He was only able to maintain the job for a couple months. He missed many days of work.

Mr. Lowe has not been contacted about vocational rehabilitation by his MCO or the Industrial Commission. His age and chronic disability would make him a poor candidate for vocational rehabilitation services.

He has complained of constant, very intense left shoulder pain. His physicians have done all they can and have given him little hope of improvement. The claimant has become depressed about his situation.

Robert Lowe  
Page 3

In addition to the shoulder pain the Mr. Lowe describes that he has numbness going from the top of his shoulder down the arm to the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> finger. Due to pain and depression, he takes the following medication daily: Celexa 40mg, Buspar 60 mg. daily and 1/2 tablet 4 times a day, Percocet 325mg tablets 3 times a day, Neurontin 300mgs. 3 times and Vallium 10 mg before bed for sleep. The medication is helpful in relieving pain but causes him to have "brain fog" and to be drowsy and forgetful.

### Functional Limitations.

Mr. Lowe relate that as a result of his shoulder and arm pain, he is very functionally limited in his activities. The left arm is functionally useless for any activity. He keeps the left thumb tucked into the waistband of his pants as much as possible. This supports the arm and keeps it close to his body for protection. Any bumping of the shoulder or upper arm is excruciatingly painful. He avoids crowded places like ball-games and community events where his arm might be bumped. He is able to sit for about 10 minutes before his shoulder and arms become painful and stiff and he needs to move around. He is able to stand for about 10 minutes. Any lifting is done with his right hand/arm only so that is limited to about 8 pounds. He is not able to do repetitive lifting of any weight. The claimant shifted and moved constantly during our one hour interview. He took 3 breaks to stand and walk into the hall. He rubbed his arm and stretched his shoulder to relieve the pain. He seldom drives as he is only able to hold the wheel with the right hand. He can walk 1/4 mile. He tries to walk every day for exercise. Mr. Lowe states twisting, turning movements of the upper torso exaggerate his shoulder pain. Movement of the upper extremities such as reaching or grasping even with the right hand causes movement and pain of there left shoulder region. He is not able to bend over, or squat as he becomes out of balance.

The claimant is not able to do much to help his wife around the house. Prior to injury, he was helpful with the chores and some cooking. During the day he does some reading and watches TV. His memory is poor due to constant pain and pain medication. He is frustrated because he can't remember what he has read or watched on TV. He needs help with dressing as he is unable to button clothes or tie shoes. He wears pullover shirts but his wife needs to help him slip them on. His wife has to help him shower and shampoo his hair.

The claimant describes his most severe problem as the chronic pain. He has no interests, no initiative and no energy to do anything as every movement is painful. He states, "My life is ruined. I can't do anything that is useful. I can't even be intimate with my wife." He feels guilty because his wife must work to support the family and do all the housework also. He loses patience easily because his nerves are "on end". He avoids talking on the phone or dealing with strangers because he tends to become upset and yell easily. Mr. Lowe is unable to sleep even with all the pain medication. He wakes up 25 times per night. He is groggy during the day and may cat-nap in his recliner.

Robert Lowe  
Page 4

His condition has not improved despite treatment and medication. He has become more socially isolated, more forgetful, and more fearful of leaving home for fear of re-injuring the arm.

Prior to injury, Mr. Lowe was an active, healthy individual. He enjoyed his job and his co-workers. The work was challenging and he loved it. He enjoyed woodworking and golf. He had a complete set of tools and was able to turn out picture frames and furniture.

Now the claimant is unable to participate in the activities that he formerly found pleasurable and profitable.

**VOCATIONAL TESTING:**

The following vocational tests were administered to Mr. Lowe on 7/03/03. He understood the testing directions and invested maximum effort in each situation.

**PURDUE PEG BOARD** This test measures a person's fine dexterity and gross motor skills with the right and left hand separately, as well as when used simultaneously. The Purdue Peg Board is a well-researched test which is frequently used in the selection of employees for industrial jobs.

Mr. Lowe's scores were compared to male and female applicants for assembly jobs. He achieved the following scores:

- Right Hand - 20th percentile - dominant hand
- Left Hand - Not able to use at all

When Mr. Lowe attempted to pick up the pegs with his left hand, he had to use his right hand to guide it into place. He experienced a spasm of shoulder pain that "took his breath away" from attempting this simple movement. Dr. Bacevich's report is correct in describing no work activity with the left arm. It is also obvious that Mr. Lowe is unable to use his left hand even as an assist to the right hand. This inability would prevent him... from working in competitive employment which involves production line work, assembly work, hand packing work or work where any type of quota or production schedule must be met.

He is unable to perform any clerical work because his left hand is not available to hold papers in place while he writes. I had to hold the paper in place while he performed a writing sample during this testing session.

**VOCATIONAL ANALYSIS:**

Mr. Collier is a 57 year-old individual who has sustained industrial injuries to his shoulder as a result of an industrial accident in 1998. He has had five shoulder surgeries. The last in August of 2001 was a shoulder replacement. None of the surgeries or therapies have resulted in a reduction of the intense chronic pain. Mr. Lowe has no use of his left arm or hand due to the pain resulting from any movement. Likewise, any twisting or turning of his upper torso results in pain. He attempted to return to work as a Security Guard with Argosy Casino but the standing and walking exaggerated his shoulder condition. He needs help for dressing and other activities of daily living.

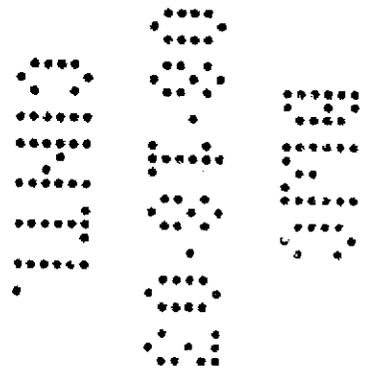
Robert Lowe  
Page 5

He previously worked at the Semiskilled, Medium physical demand jobs of Inspector/Tester, Machine Operator and Assembler. The skills he acquired were particular to the job he was performing and do not transfer to Light or Sedentary work. He read blue prints in his last job but these were unique to the large machines he was assembling.

Dr. Bacevich opines that he can do Sedentary but no work activity with the left arm. Mr. Lowe has no skills or knowledge that can transfer to Sedentary work. Almost all jobs of a Sedentary, unskilled nature require the bimanual dexterity to do activities like assembly or packing. The claimant would be competing in the labor market with younger, individuals who have the use of both arms and hands. The *Classification of Jobs Manual of 1998* gives a list of Worker Trait Frequencies based on the research conducted by US Department of Labor surveys. The table shows that 99.1% of all jobs in the economy involve often (O) to constant (C) Reaching; 99.2% require often to constant Handling and 86% of all jobs require often to constant Fingering. Mr. Lowe is unable to perform any of these activities with his left upper extremity virtually eliminating any opportunity for work activity. When consideration is given to the problems of concentration, persistence and pace he describes as resulting from chronic pain and the use of heavy pain medications, it becomes obvious that Mr. Lowe is unable to perform any work activity and should be considered permanently and totally disabled. For the same reasons, he would be considered a poor candidate for vocational rehabilitation.

Jenny Carr 7/7/03

Certified Case Manager,  
SSA Vocational Expert,  
I.C. Vocational Assessor



# CASTON & ASSOCIATES

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Reply to:  
Cincinnati

May 18, 2003

Gary Becker  
Dinsmore & Shoal  
1900 Chemed Center  
255 East Fifth Street, Suite 1900  
Cincinnati, OH 45202

## VOCATIONAL ASSESSMENT

### IDENTIFYING INFORMATION:

<b>Re:</b>	Robert Lowe
<b>Claim #:</b>	98-593871; Ref 97-585228; L19830-22; L201824-22
<b>Date of Injury:</b>	11/13/98
<b>Date of Evaluation:</b>	5/12/03

Mr. Lowe was seen in my office on May 12, 2003, for a Vocational Assessment. He had previously been scheduled several times, on March 24, 2003 and March 3, 2003 of this year. Those appointments were cancelled. Mr. Lowe reports that he has a twelfth grade education.

### BACKGROUND INFORMATION:

Mr. Lowe reports that he had an accident on November 11, 1998, and has essentially not worked in a permanent job since that time. He did reference an attempt at security work and some light duty work but stated that his last full-time, regular, continuous employment was in November of 1998. He reports having had five surgeries on his left shoulder area. The most recent surgery was a complete prosthetic replacement. He also reports depression. He reports his medications include Lopressor for blood pressure, Zocor for cholesterol, Celexia for depression, Buspar for anxiety, Pepcid, Aspirin, Percocet, Neurotin, and Valium. He sees Dr. Foster for psychiatric treatment. He said that he cannot move his left arm.

He basically immobilized his left arm by keeping his hand in his pocket. He reports receiving Social Security of \$1200.00 a month and a ten percent VA service connected pension of approximately \$100.00 a month. He reports his pain treatment consists of some exercise and medication. He has no hobbies at this time. He reports other medical conditions of a two way bypass in 1996. The distal joint of his right middle finger is fused in downward position. This is a military service connected injury for which he receives ten percent disability. He does not have a vocational goal. He feels he is totally disabled and unable to work. He reports that he has lost his house and has a great deal of difficulty with the Worker's Compensation system.

Additional information was received on 5/14/03 and 6/4/03. The following additional documents were received: Industrial Commission of Ohio Permanent Total Application Acknowledgment letter, PTD Application, Letter by attorney Scott A. Wolf, Statement by Robert W. Lowe, dated 1/16/03, report by Jim Swanson, M.D., and report by Steven Wunder dated 5/15/03.

DOCUMENTS REVIEWED

VOCATIONAL SIGNIFICANCE

<p>Bernard Bacevich, M.D. – Report dated 4/30/03.</p> <p>Documents medical history and surgeries. States can perform sedentary work lifting up to ten pounds and no activity with left arm. He is not removed from all employment but can only use his right arm.</p>	<p>Can perform sedentary work using only his right, dominant, upper extremity.</p>
<p>Jim Swanson, M.D. 10/27/02 report.</p> <p>Does not recommend that he return to work.</p>	<p>Appears that he is unable to engage in employment but he did not consider transferable skills, education, retraining, or vocational rehabilitation.</p>
<p>Steven Wunder, M.D. 5/15/03 report.</p> <p>Would have functional capacities using right arm only in the realm of sedentary to light. He could use the left arm for no more than two to three pounds of lifting primarily as a helper. There are no functional restrictions of the right arm. He has other non-allowed conditions of coronary artery disease and anxiety and depression.</p>	<p>Is able to perform sedentary to light work activity with restrictions of using his left arm.</p>

**WORK HISTORY AND TRANSFERABLE SKILLS:**

DATES	JOB TITLE	JOB DUTIES	SIGNIFICANCE
Not given	Security guard for 90 days.	Performed security work.	Said he could not perform the work as he was at risk and was unable to do that work.
1/26/89 – 11/11/98	Cincinnati, Inc.	He was a machine assembler. He earned \$18.00 an hour, plus.	Can perform assembly work. He states he is still considered an employee.
14 years	Capsonic Group in Elgin, IL.	His duties were to operate a plastic extrusion machine.	Can operate production machinery.
3 years	Thacker Manufacturing.	This is a glass bottle manufacturing company. He was involved in quality control checking the bottles and the work.	Can perform some quality control and inspection work.
6 ½ years 1963 – 1969	US Air Force.	Was an administrative specialist. He served at several duty stations and was stationed in Vietnam. He said he attained the rank of E-5. He received an honorable discharge but he did not complete his second enlistment.	Has developed some office administrative skills.

**TESTING:**

Mr. Lowe was administered the Wide Range Achievement Test and the OASIS Aptitude Survey.

**WRAT - 3 Wide Range Achievement Test (Third Revision)**

Purpose: This is a standardized, highly used test that measures achievement levels in the areas of reading, arithmetic, and spelling. The item difficulties are increased as the test progresses. The scores are represented by both grade levels and percentiles. Fifty percentile is considered average. This test is divided into three parts.

<b>SUBTEST PARTS &amp; DESCRIPTION</b>	<b>SCORE<sup>1</sup></b>	<b>VOCATIONAL SIGNIFICANCE</b>
Reading - This requires the client to read and correctly pronounce words that vary in difficulty. It is not a reading comprehension but a reading word recognition or measure of written decoding as defined by the authors of the test. Items vary from simple to more complex words.	63/HS+	An average score indicates this individual could perform routine reading tasks and word recognition in a job setting. A lower score would indicate this individual would have difficulty in performing jobs that require reading manuals or written instructions.
Spelling - This is a spelling test administered by the examiner. Examples of words vary in difficulty from simple items such as "and", "make", and "cook" to very complex words such as "belligerent", "camouflage" and "pusillanimous".	63/HS+	This score is related to clerical tasks. It has little significance to manual, industrial, or related jobs.
Arithmetic - This consists of adding, subtracting, multiplying, dividing, fraction, percent, and algebra problems.	61/HS	This is related to jobs that require math abilities and the ability to use fractions, perform long division, multiplication, and some algebra. A high score would indicate this individual could perform jobs that require those abilities such as machinist, setter, craft trades, engineering, and others.

<sup>1</sup> The scores are reported in percentiles. This is a scoring system that means 50% is average. The Wide Range Achievement test is also reported in grade level such as HS equals high school, 5<sup>th</sup> equals 5<sup>th</sup> grade, etc.

**The OASIS - Occupational Aptitude Survey and Interest Schedule**

Purpose: This is an aptitude test that measures six basic aptitudes that relate to the Dictionary of Occupational Titles. These include general, verbal, numerical, spatial, clerical, and motor coordination.

SUBTEST PARTS & DESCRIPTION	SCORE	VOCATIONAL SIGNIFICANCE
General – This is not a subtest, but a combination of math and verbal scores and is related to the general aptitude.	54	This is related to general learning ability. A high score would indicate this individual could learn entry level, unskilled and semi-skilled occupations with a minimal amount of difficulty. A lower score would indicate this individual may have trouble or difficulty learning new skills in any work setting.
Verbal - The test items consist of identifying two words out of a selection of four possible choices. Two words selected must either be the same or opposite.	60	This is related to general and verbal aptitudes. This is related to ability to read written instructions and to work in jobs that require word uses and interpretation of written knowledge. A high score would indicate an aptitude for office and possibly academic training.
Computational - This consists of multiple-choice task that contain five possible answers and none of the above.	33	This is related to general and numerical aptitudes. This is related to jobs that require the use of math-adding, subtracting, multiplying, and dividing. This would be related to jobs that include measuring, set-up, bookkeeping, accounting, and other jobs that require the use of math.
Spatial Relations - This requires the examinee to properly inspect a two dimensional figure. The task is to determine which of four, three-dimensional figures can be constructed from the two dimensional object. This subtest has twenty items and an eight minute time limit.	80	This is related to spatial and form perception aptitude. This involves visualizing objects, planning, organizing and related tasks. It is related to management jobs, drafting, computer science, and others.

**The OASIS - Occupational Aptitude Survey and Interest Schedule (Continued)**

SUBTEST PARTS & DESCRIPTION	SCORE	VOCATIONAL SIGNIFICANCE
Word Comparison - This requires the examinee to inspect two sets of symbols to determine whether the two sets of words, numbers, or syllables are the same or different. This is similar to items found in the Minnesota Clerical Test.	1	This is related to verbal and general aptitudes. Specific jobs would be routine inspecting and routine clerical jobs. This is also related to any job that requires word usage and written communications.

<b>Significance of Testing:</b>	Mr. Lowe is functioning at a college level in both reading and spelling and at his attained level of education in arithmetic. His clerical perception score was below that of expectation given his employment, background, and achievement levels.
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## SUMMARY AND RECOMMENDATIONS:

In summary, this individual has sustained an injury to his left, non-dominant, upper extremity. The most recent Independent Medical indicates he is restricted to sedentary work and has limited use of his left arm. His work history as an assembler, machine operator, and quality control worker as described by him in the vocational interview portion of the assessment has given him minimal skills that are transferable to other sedentary one-handed jobs. Apparently his security guard job was not successful due to his inability to tolerate the type of work. His administrative work in the Air Force was over thirty years ago. This means that the skills such as computer knowledge are not up to date. He did however obtain some administrative skills as an administrative specialist in the Air Force. He reports that he has minimal computer skills and has no familiarity with programs such as Excel and others. The distal joint of his right middle finger is fused in a downward position as a result of a service-connected military injury. He is unable to type at a competitive level or to perform word processing because of that, as well as the impairment to his left extremity which is related to his allowed claim. Jobs such as his prior machine and factory work are eliminated because of his allowed industrial claim.

On the work history portion of the PTD Application, there was some significant differences and changes from the information given to me during his vocational evaluation. On this form, Mr. Lowe indicated that he was able to read blue prints and built machines from reading blue prints. This places his abilities at a higher skill level than I was lead to believe during the evaluation. This skill is related to drafting/design jobs that exist. The job duties for the plastic extrusion machine operation involved reading customer specifications. The quality control job involved using gauges, and writing test procedures. These activities give Mr. Lowe additional skills that could be used in the job market. Therefore, the occupational base of jobs would increase. Specific additional jobs include entry level drafting, quality control, customer service, and others. His education, which he reports is high school with some on-the-job-training, has given him minimal skills that are related to other office or clerical occupations. He does have the ability to perform some modified office clerical jobs that do not require typing. He has the ability to answer a telephone and take messages. He does not have the ability to perform retail cashiering or related work without job site modification. Telemarketing would be difficult because there is extensive typing in most of those types of jobs. Those jobs could be modified using voice recognition software and other technologies. Security guard work does not seem to be appropriate because those are not sedentary jobs plus he would be at risk for re-injury. Security systems monitor could possibly be feasible if that job could be located. Given his age, which is fifty-seven, he does not appear to be a good candidate for vocational retraining.

Vocational Evaluation  
Re: Robert Lowe  
May 18, 2003  
Page Eight

It is, therefore, my opinion that this individual has some basic employability. He has skills related to design, drafting, supervision, troubleshooting, inspecting, and related jobs. There may be some occupations that could be located that could be modified. These could include: telephone answering, message taking, file clerk, and security systems monitor. Attached to this narrative is a sample of those jobs.

Thank you for this referral. If you have any questions, feel free to contact my office.

RECEIVED  
MAY 20 2003  
09:00 AM

Howard L. Caston, Ph.D., LPC, CRC, ABVE  
Licensed Professional Counselor  
Certified Rehabilitation Counselor  
HLC/sls

Vocational Evaluation  
 Re: Robert Lowe  
 May 18, 2003  
 Page Nine

JOB LEADS

CLIENT Robert Lowe  
 DATE OF CONTACT 5/13/03

Title	City	Phone #/Code #	Description
N/A	Lawrenceburg, In	(800)747-9582 extension 173 visit <a href="http://www.ncim.com">www.ncim.com</a>	DEMONSTRATORS NEEDED NCim has immediate need for people in Lawrenceburg area to work Fridays & weekends in local grocery sampling new products to consumers. Pay is minimum \$8 per hour. Hours are generally 11 a.m. to 5 p.m. or visit our website and click on demonstrators needed.
N/A	Lawrenceburg, In	(812)926-0830	Part time help wanted. Marina/office clerk. Must work weekends. Call and ask for Rachel
Kirkwood Sweeper	Erlanger, Ky.,	(859)341-0900, of fax: (859)578-5493	SALES Kirkwood Sweeper is looking for enthusiastic, fun, friendly people who are dependable, confident and outgoing who enjoy making MONEY
Pharmco Attn Heather	9875 Redhill Dr. Cinti, OH 45242	Fax 513- 699-2123	FRONT DESK FT M-F position. 8 30am -5 00pm. In Blue Ash. Various duties incl. switchboard, filing, typing, etc. Word & Excel a plus but no exp. nec, we will train. Fax resume to Attn Heather or mail
Clean Cut Treatment	Anderson, Ohio	Fax 513-233-0587	CLERICAL- Home based business. Filing, answering phones, scheduling, etc. M-F, 8am-2 30pm. Anderson Twp. N/S. Inquiries fax resume & salary requirements to 513-233-0587 or email to <a href="mailto:ccts@fuse.net">ccts@fuse.net</a>
The Stone Zone	Loveland, Ohio	513-965-0150	ADMIN ASST--Needed, Seasonal/Summer position. Greeting customers, covering phones, filing and other clerical duties, 7 30AM -5 30PM, 1 hr lunch. \$8.00/Hr Start. Call
The Cincinnati Enquirer	Cincinnati, OH	Fax 513-768-8210	The Classified Department has an immediate opening for a full-time Telephone Sales Representative. This individual will answer single sell calls in order to sell and service advertising over the phone. You will be handling a variety of calls in our real estate, automotive, and general classified section. You will be responsible for generating revenue by selling the full-line of Enquirer products to the customers, ordering the ad requests free of errors, and answering general information questions. This position requires at least one year of previous telephone sales experience. An individual must meet the typing speed minimum of 20 WPM corrected, good spelling and clerical skills, excellent communication skills.

Vocational Evaluation  
 Re: Robert Lowe  
 May 18, 2003  
 Page Ten

JOB LEADS

CLIENT Robert Lowe  
 DATE OF CONTACT 5/18/03

Title	City	Phone #	Description
WCI (Wine Cellar Industries)	4575 Eastern Ave, Cinti, OH 45226	fax to 513-979-5282	AUTO CAD DESIGNER Auto Cad designer entry level position. Salary in the mid to high twenties. Send resume
The Yoh Company	Batavia, OH	<a href="http://www.J22GC6B2WX1VRYWIFYCBJB@apply.ca_reerbuilder.com">www.J22GC6B2WX1VRYWIFYCBJB@apply.ca_reerbuilder.com</a>	The Yoh Company is currently seeking Supplier Quality Technicians for contract-to-hire positions in Batavia, OH. Individuals will be responsible for inspections of supplier parts, as well as insuring quality standards. Qualified candidates must possess the following: * Working knowledge of Blueprint Reading and GD&T * Demonstrated ability to establish Open Set Up Techniques as required. * Mechanical Inspection experience using calipers, Micrometers, Granite Surface Plate, Gauge Blocks, Pin Gauges, Spring Tension Testers, Height Gauges, Go-No Go Gauges, Fixtures, Optical Comparator is required. * Basic PC skills as well as excellent written and verbal communication skills. Interested candidates may forward resumes and salary requirements
Onsite Commercial <sup>SM</sup>	Cincinnati, OH	<a href="mailto:dstiles@onsitecompanies.com">dstiles@onsitecompanies.com</a> 513-229-2004 fax 513-229-2102	A leading manufacturing company in the Cincinnati area now has a Quality Inspection position available. Job duties consist of performing inspections and tests for all production parts, purchased parts and finished products. Candidates must understand and apply all ISO 9001 inspection and test procedures as applicable to each inspection station. Candidate must also be able to use calipers, micrometers, and functional gauges. For more information, email or call Dan Stiles \$10/Hour Join Onsite Commercial <sup>SM</sup> . We employ people in light industrial, light technical and support positions within the manufacturing and distribution industries across the nation. If you are looking for a competitive wage, solid opportunity, and a career path to success, contact us now! We offer comprehensive benefits including medical, dental, optical, and optional 401k
Goodwill	10600 Springfield Pike, Ohio	N/A	Quality Control Inspectors Our fast paced clothing department is seeking a few hard working, honest People for QC Inspections of clothes. The position starts at \$9.50p/hr, with an increase of .50 after 90 days and opportunity for advancement. Excellent Benefit package. Apply in person.
ISS Industrial	12080 Best Place Sharonville, OH 45241	N/A	Quality Control Inspectors Wanted P/T Starting pay \$10 hr Apply in person
Benda-Lutz Corp	Northern Ky	Fax 859-525-3012; tel. 859-746-0392	Quality QA/QC Manager Excellent Opportunity, Great benefits, Florence area. Color matching or ISO 9001 experience a plus, Tech deg preferred. Fax resume with Salary requirements

MEDICAL 06/20/2003

# KOPPENHOEFER, WUNDER & WUNDER, M.D.'s INC.

Physical Medicine & Rehabilitation  
Electromyography

Steven S. Wunder, M.D. • Jeffrey A. Wunder, M.D.  
415 Straight Street, Suite 208 • Cincinnati, Ohio 45219 • (513) 559-3355 • Fax (513) 559-3359

May 15, 2003

COPY TO:

Claimant \_\_\_\_\_ ✓

Employer \_\_\_\_\_ ✓

Claimant Rep \_\_\_\_\_ ✓

Employer Rep \_\_\_\_\_ ✓

Other \_\_\_\_\_

MEDICAL SECTION

by \_\_\_\_\_

Date 5/15/03

The Industrial Commission of Ohio  
Cincinnati Regional Office  
125 East Court Street, Suite 700  
Cincinnati, OH 45202-1211

Re: Robert W. Lowe  
Cl#: 305-44-5200

DOB: January 1, 1946

**Claim Allowances:**

Cl#: 98-593871 11/13/1998 Strain/sprain left shoulder and rotator cuff  
aggravation of pre-existing arthritis of left glenohumeral joint.

Place of Exam: Industrial Commission Office, Cincinnati, OH

Date of Exam: May 15, 2003

Examiner's Name: Steven S. Wunder, M.D.

**Purpose of Exam:** To determine if the claimant has reached maximum medical improvement with regard to each specified allowed condition; provide the estimated percentage of whole person impairment arising from each allowed condition based on AMA Guides, 4<sup>th</sup> edition; complete the Physical Strength Rating form.

This 57-year-old male is being evaluated today for the chief complaint of left shoulder pain. He was injured at work on November 13, 1998. He denied any prior injury, treatment or trauma. On the date of injury he indicated that he was on a job that he usually did not work. He had placed a 60- to 70-pound pin in a housing. He still had a hold of it when it fell out. It grabbed his arm and pulled him down. He had the onset of left shoulder pain. Initially he thought it was just a strained muscle. However, the pain seemed to become worse. Tylenol did not seem to help. He went to the PAC Center in Harrison. He was sent to an orthopedic physician, who sent him for a MRI scan. The MRI scan appeared to be normal. He went to Dr. Swanson for a second opinion. He had arthroscopic surgery, and a labral tear and biceps tendon tear were found to be present. He had several different surgeries with Dr. Swanson. He had a tenodesis. He was found

**REPORT MAILED**  
MAY 28 2003  
CINCINNATI DISTRICT

**RECEIVED**  
INDUSTRIAL COMMISSION  
MAY 28 2003  
SPECIALIST EXAM  
CINCINNATI MEDICAL

415 Straight Street, Suite 208  
Cincinnati, Ohio 45219  
(513) 559-3355  
Fax (513) 559-3359

The Cincinnati  
Sportsmedicine Center  
311 Straight Street  
Cincinnati, Ohio 45219  
(513) 559-3355

Financial South Building  
5335 Far Hills Avenue, Suite 104  
Dayton, Ohio 45429  
(937) 433-8818  
Fax (937) 433-9772

Good Samaritan  
Outpatient Center  
6350 Glenway Avenue  
Cincinnati, Ohio 45211  
(513) 559-3355

8333 Montgomery Road  
Cincinnati, Ohio 45236  
(513) 792-5600

MEDICAL 06/28/2003

**Report to The Industrial Commission of Ohio**

**Re: Robert W. Lowe**

**May 15, 2003**

**Page 2**

to have advanced glenohumeral arthritis. He was sent to Dr. Lim. His final surgery was that of a total joint arthroplasty for the left shoulder. He did not report any benefit from that procedure. He was returned to Dr. Swanson. He sees Dr. Swanson about every 6 months. He was put on Neurontin 3 months ago since he was having some numbness and tingling in the arm. He does use ice on the arm. He notes decreased range of motion. He keeps his thumb in his belt when he walks to keep the pressure off his shoulder from hanging down during the gait cycle. The pain in his shoulder is pretty constant, and he rates it as a 9 on a scale of 1 to 10. The ice seems to help for 20 to 30 minutes. Pain medicine seems to take the edge off, and he takes Percocet 3 times a day 4 to 5 days a week. Sometimes he may notice a little popping in the shoulder. He indicated he really does not have any problems with the right arm. He did have a prior injury to the right long finger with a DIP contracture. He estimates he can lift and carry 10 to 20 pounds with the right arm. He is independent with bathing, dressing and personal hygiene but occasionally may need some help since there are some areas he cannot reach when bathing. He is able to drive short distances, but the belt across the shoulder bothers him.

His medications include Celexa 40 mg per day, BuSpar 30 mg 3 times a day, Neurontin 300 mg 3 times a day, Percocet 3 times per day 4 or 5 days a week, Zocor 40 mg per day, Lopressor 50 mg per day, Ecotrin 81 mg per day, and Pepcid 40 mg per day.

He indicated that at the time of the injury his job was that of an assembler. He helped build machines. He indicated it was fairly heavy relative to lifting, pushing and pulling. He has a twelfth-grade education.

Past Medical History: Coronary artery disease; anxiety and depression.

Past Surgical History: Coronary bypass in 1996.

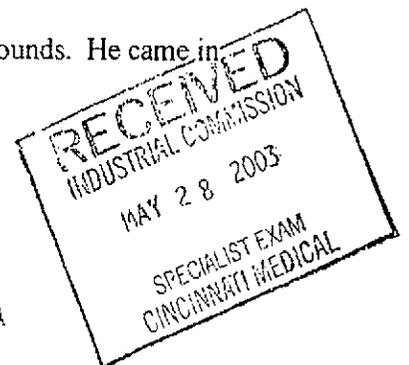
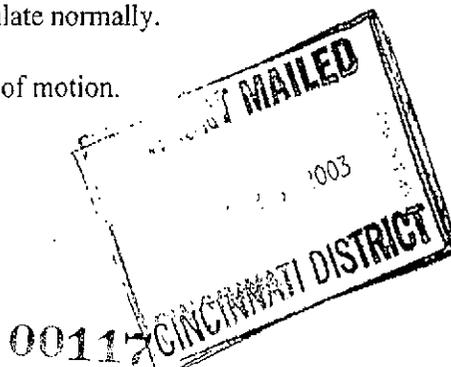
Allergies: Percodan.

Habits: He does not smoke. He denied the use of alcohol.

Review of Systems: He did report he is seeing a psychiatrist now. He did report that from a functional standpoint he is able to ride a lawnmower but has increased pain with it and it is slow.

Physical examination revealed him to be 5'10" and he weighed 206 pounds. He came in with his wife. He could ambulate normally.

He had normal cervical range of motion.



MEDICAL 06/28/2003

**Report to The Industrial Commission of Ohio**

**Re: Robert W. Lowe**

**May 15, 2003**

**Page 3**

His right upper extremity range of motion was normal at the shoulder. He lacked 10° of full extension at the elbow but had no complaints of pain. He lacked 10° of extension of the wrist on the right without complaints of pain. He had a flexion contracture with ankylosis at the DIP of the long finger. Motor, sensory and reflex examination of the right upper extremity was intact.

Examination of the left shoulder revealed an 8-inch scar from the prior arthroplasty. His range of motion was through 70° of forward flexion (7% upper extremity impairment), 20° of extension (2% upper extremity impairment), 70° of abduction (5% upper extremity impairment), 20° of adduction (1% upper extremity impairment), 0° of external rotation (2% upper extremity impairment), and 10° of internal rotation (5% upper extremity impairment). He was tender to palpation around the right shoulder region anteriorly and posteriorly.

His reflexes were 1+ and symmetric at the biceps, tricep and brachioradialis.

Sensation was normal in the upper extremities.

His power grasp was 90 pounds on the dominant right side and 20 pounds on the left.

His mid biceps circumferences were 34 cm on the right and 33 cm on the left.

He had normal reflexes, sensation and strength in the lower extremities on the right side, and left-sided straight leg raise was normal. In the right leg he indicated he had some tingling intermittently from where the vein had been harvested for the bypass graft.

The patient's medical records were reviewed. He was injured on November 13, 1998. His claim has been allowed for a sprain/strain of the left shoulder, rotator cuff tear and aggravation of pre-existing arthritis of the left glenohumeral joint.

Diagnostic tests include a November 24, 1998, MRI scan of the left shoulder that was normal. A July 7, 2000, exam of the left shoulder showed pannus formation with erosion into the superior aspect of the glenoid process related to chronic inflammation.

He had surgery on February 2, 1999, for a diagnostic arthroscopic procedure. He had a debridement of the biceps tendon and intra-articular labrum reconstruction. He had surgery again on August 2, 1999, for release of the biceps tendon and debridement of the intra-articular scar. On April 10, 2000, he had manipulation under anesthesia. He had a third surgery on August 21, 2000, for left shoulder debridement of scar and manipulation of the shoulder.

**REPORT MAILED**  
MAY 28 2003  
**CINCINNATI DISTRICT**

**RECEIVED**  
INDUSTRIAL COMMISSION  
MAY 28 2003  
SPECIALIST EXAM  
CINCINNATI DISTRICT

MEDICAL 86/28/2803

**Report to The Industrial Commission of Ohio**

**Re: Robert W. Lowe**

**May 15, 2003**

**Page 4**

Dr. James Swanson noted the patient was on multiple medications including Celexa, Ecotrin, Zocor, Talwin, Lopressor, Pepcid and Percocet. He had a history of coronary artery disease, hyperlipidemia, hypertension and depression. He had had 4 prior shoulder surgeries. He advised the patient not to return to work on September 27, 2002, and thought he had reached maximum medical improvement. He opined a 20% upper extremity impairment and a 17% impairment to the whole person. He advised twice yearly evaluations.

He was evaluated by Dr. Malcolm Meyn on April 5, 2002. He noted that plain x-rays showed advanced glenohumeral arthritis. Dr. Edward Lim advised an arthroplasty to the left shoulder. He thought he was maximally improved and totally disabled.

He was seen by Dr. Kohlhaas. He thought there was aggravation of pre-existing arthritis. His October 11, 2000, evaluation was noted.

Dr. Swanson indicated in several office visits that initially there was a good response to Synvisc and then later it did not help. On July 6, 2001, the arthroplasty with Dr. Lim was being advised.

This information was taken into consideration.

For each specified allowed condition he has reached maximum medical improvement.

Based upon the AMA Guides to the Evaluation of Permanent Improvement, fourth edition, for the diagnoses of left shoulder sprain/strain, rotator cuff tear, and aggravation of pre-existing arthritis of the left glenohumeral joint, he would have a 27% impairment to the whole person. The rationale behind this would be a 22% upper extremity impairment from the range of motion tables. The range of motion was less than noted by Dr. Swanson, but I could not tell if this was due to pain or more contractures since his last visit. He would have a 30% upper extremity impairment from Table 27, page 61 for an implant arthroplasty. The 30% combines with the 22% using the Combined Values Table for a 45% upper extremity impairment, which equates to a 27% impairment to the whole person.

The Physical Strength Rating form has been completed. He would have functional capacities using the right arm only in the realm of sedentary to light. He could use the left arm for no more than 2 to 3 pounds of lifting and primarily as a helper. He has no functional restrictions with the right arm, axial skeleton or lower extremities. There appear to be other extenuating circumstances that may affect his ability to work relative

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**REPORT MAILED**  
MAY  
CINCINNATI DISTRICT

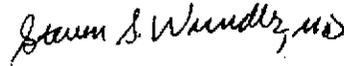
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INDUSTRIAL COMMISSION  
MAY 28 2003  
SPECIALIST EXAM  
CINCINNATI, OHIO

MEDICAL 06/20/2003

Report to The Industrial Commission of Ohio  
Re: Robert W. Lowe  
May 15, 2003  
Page 5

to non-allowed conditions with coronary artery disease and a history of severe anxiety and depression.

Sincerely,



Steven S. Wunder, M.D.

SSW:jl

001  
REPORT MAILED  
MAY 23 2003  
CINCINNATI DISTRICT

MAY 23 2003  
SPECIALIST EXAM  
CINCINNATI MEDICAL

PHYSICAL STRENGTH RATING

INJURED WORKER: Robert W. Lowe

CLAIM NUMBER(S): 98-593871

MEDICAL 06/28/2003

My opinion of this injured worker's physical strength is indicated below and is based solely on the allowed condition(s) that falls within my specialty. The medical evidence supporting this opinion is presented in the narrative portion of my report. The injured worker's age, education, and work history are not considered in this estimate.

( ) This injured worker is capable of physical work activity as indicated below.

(X) SEDENTARY WORK\*

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

( ) "LIGHT WORK"

Light work means exerting up to twenty pounds of force occasionally, and/or up to ten pounds of force frequently, and/or a negligible amount of force constantly (constantly: activity or condition exists two-thirds or more of the time) to move objects. Physical demand may be only a negligible amount, a job should be rated light work: (1) when it requires walking or standing to a significant degree; or (2) when it requires sitting most of the time but entails pushing and/or pulling or arm or leg controls; and/or (3) when the job requires working at a production rate pace entailing the constant pushing and/or pulling of materials even though the weight of those materials is negligible.

( ) "MEDIUM WORK"

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

( ) "HEAVY WORK"

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

( ) "VERY HEAVY WORK"

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

( ) This injured worker is not capable of physical work activity.

PHYSICIAN'S SIGNATURE Steven S. Wunder, MD

DATE 5/15/03

PHYSICIAN'S NAME Steven S Wunder, MD

REPORT  
MAY 20 2003  
GRANDHART DISTRICT

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INDUSTRIAL COMMISSION  
MAY 20 2003

00121

# I.M.S.E.

## INDEPENDENT MEDICAL SPECIALIST EXAMS

3830-C WOODBRIDGE BLVD.  
WOODBRIDGE PROFESSIONAL PARK

(513) 942-1904  
FAX: (513) 942-2312

FAIRFIELD, OH 45014

BERNARD B. BACEVICH, M.D.

April 30, 2003

Gary E. Becker, Attorney  
Dinsmore & Shohl, LLP  
255 East Fifth Street, Suite 1900  
Cincinnati, Ohio 45202-4720

RE: **Robert Lowe**  
**Claim No: 98-593871 (Ref. 97-585228;**  
**L19830-22; L201824-22)**  
**Date of Injury: 11/13/98**

Dear Mr. Becker:

Robert Lowe is a 57-year-old man who underwent an Independent Medical Examination on April 30, 2003 in relationship to an injury to his left shoulder which occurred 11/13/98. The purpose of this examination is to evaluate him in relationship to permanent total disability and whether he has the physical capacity to engage in any form of sustained remunerative employment.

This report was prepared and dictated on April 30, 2003.

### **HISTORY OF INJURY AND MEDICAL COURSE AS DESCRIBED BY THE CLAIMANT:**

At the time of his injury he was employed as a machine builder for Cincinnati Incorporated. A bushing pin had fallen out of a housing and jerked and pulled his shoulder to the side. He initially sought medical care the next day. He does not recall the name of the initial physician that he saw but does recall not being satisfied so he changed to Dr. Jim Swanson. Since then, he's undergone four surgical procedures by Dr. Swanson and then he had a fifth surgical procedure which was a total shoulder replacement carried out by Dr. Lim. Despite this last shoulder surgery, he has not had any relief of his pain. He has been through extensive physical therapy and describes that he is currently still doing some home thera-band exercises. He does take Percocet for his pain. Approximately two months ago he was placed on Neurontin and finds that it only helps a small amount.

### **CURRENT COMPLAINTS:**

He describes his left shoulder pain as being constant and present all the time. He rates it today as a level of 7 out of 10 but it does go up to a level of 10. He had taken both Neurontin and Percocet.

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RULE 4121-3-34  
REGIONAL HEARING ADMINISTRATOR

MAY 7 2003

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00122

02

Gary E. Becker, Attorney

Re: **Robert Lowe**

04-30-03

before today's examination. In addition to the shoulder pain, he describes that he has numbness going from the top of the shoulder down the arm to the 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> fingers. He describes that even moving the elbow and forearm cause him to have severe shoulder pain. At times if he tries to lift even a coffee cup, his arm will give out so he avoids trying to lift anything with his left hand. Although he is able to drive the car himself. He does this using his right arm and he notes that even the seat belt crossing the shoulder area is painful. He describes that he has to have his wife assist him with dressing activities. To alleviate some of the shoulder pain when he is standing and walking, he will put his thumb inside his pants or belt area to support the shoulder. He cannot use a sling because he cannot position the arm forward enough to place it into the sling. Although he is able to ride his riding lawnmower and cut the grass, he has to use his right arm for all the shifting activities and he notes that his shoulder will be more painful after he is done riding the mower. He no longer is able to participate in golf activities.

**OCCUPATIONAL HISTORY:**

This man had been employed as a machine builder for Cincinnati Incorporated for 10 years before this injury. Prior to that, he states that he did similar type work for a company in Illinois. Since his injury he did attempt to go back to what was supposed to be light duty but turned out to be his regular job duties around June of 1999 and he could not do that work. Last year he attempted to do a security job position at Argosy Casino but he states that the standing and walking caused him to have left shoulder pain. Picking up bags of chips with the right arm also caused left shoulder pain and then he had problems with swelling of his right lower leg and ankle where he had previous cardiac bypass surgery. In addition, the smoky environment was bothersome and with his cardiac condition he wanted to avoid such a smoke environment. He apparently only did that job for a couple months. Currently he is not employed.

**PAST MEDICAL HISTORY:**

He describes having a right third finger injury while in the military service and this resulted in a fusion of the distal joint of the middle finger and it is fused in the flexed position. Due to that position, he finds that he has difficulty with some of the fine finger movement activities. He had his cardiac bypass surgery in 1996. He describes that he also has problems with depression and anxiety and currently takes Celexa and Buspar. These initially were prescribed by a Dr. Foster but currently he receives them through the V.A. Hospital.

**PHYSICAL EXAMINATION:**

He is 5 feet, 8 inches tall, and weighs 208 pounds. He sits with his arm on his lap and does not move the arm or shoulder. He has a well-healed anterior deltopectoral incision. He has well-healed

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03

Gary E. Becker, Attorney

Re: **Robert Lowe**

04-30-03

arthroscopic scars. Inspection of the scapular and deltoid areas shows that he has mild to moderate muscle atrophy. He complains of exquisite pain in the shoulder area on any attempts at range of motion of the shoulder and he also complains of shoulder pain with both flexion and extension of the elbow and pronation and supination of the forearm. He has severe guarding on attempts to do range of motion and will only allow 30 degrees of forward elevation and 10 degrees of backward extension and only allows 10 degrees of abduction and 10 degrees of adduction. With the arm at the side he has zero degrees of external rotation and only 10 degrees of internal rotation. (These range of motions are significantly different from those recorded by Dr. Swanson on 09/27/02).

**LIST OF MEDICAL RECORDS:**

1. Application for permanent total disability
2. First Report of Injury
3. Records of Dr. Swanson
4. MRI of the left shoulder - 11/24/98
5. Operative Report - 02/02/99
6. Operative Report - 08/02/99
7. Operative Report - 04/10/00
8. Records of Dr. Donersbach
9. Operative Report - 08/21/00
10. C-86 Request to allow left shoulder traumatic arthritis and Synvisc injections
11. X-ray reports left shoulder
12. Evaluation by Dr. Swanson with permanent partial impairment rating dated 09/27/02
13. Records of Dr. Haverkos

In addition, the patient brought in operative photographs from the surgeries in February 99, August 99, and August of 2000. In addition, he brought in a photograph of the total shoulder prosthesis and a post/operative X-ray photograph.

**SUMMARY OF MEDICAL RECORDS:**

This injury occurred on 11/13/98 and this man first presented to Dr. Haverkos, Orthopaedic Surgeon, on 11/16/98. His findings at that time were very painful active and passive range of motion of the left shoulder. A rotator cuff tear was suspected and Dr. Haverkos ordered an MRI which was done 11/24/98 and that showed no evidence of a rotator cuff tear and showed only some mild arthritis of the AC joint. There was no arthritis described at the glenohumeral joint. This man then began seeing Dr. Swanson, another Orthopaedic Surgeon, and underwent the initial arthroscopic procedure on 02/02/99. He was found to have a partial tear of the biceps tendon and a superior labral tear. He underwent a labral reconstruction and débridement of the biceps tendon. I reviewed the operative

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04

Gary E. Becker, Attorney

Re: **Robert Lowe**

04-30-03

photographs and agree that he has degenerative fraying of both the labrum and the biceps tendon but visualization of the articular surface of the humeral head and glenoid showed no evidence of arthritis. This man's second procedure was done 08/02/99 and this was performed for a biceps tendinitis and he underwent a biceps tenodesis as well as an acromioplasty procedure and coracoacromial ligament resection. Photographs were reviewed from that procedure and, again, the important aspect is that there's no evidence of arthritis of the glenohumeral joint. When this man failed to regain motion, he underwent a closed manipulation of the shoulder on 04/10/00. On 05/11/00 he was evaluated by Dr. Donersbach and it was suggested that he try a Duragesic patch to help with his pain but this caused an adverse reaction and had to be stopped. The next procedure was carried out on 08/21/00 where he underwent an arthroscopic débridement of scar tissue and further manipulation of the shoulder. The operative report describes that he now has arthrofibrosis and Grade III and IV chondromalacia of the humeral head and glenoid. Photographs from that procedure were reviewed and they now do confirm the advanced degenerative changes of the articular cartilage consistent with arthritis.

The claim was then amended to allow for aggravation of pre-existent arthritis. He did undergo one Synvisc injection but not the full series. Dr. Lim evaluated him in May of 2001 and his review of the X-rays demonstrated advanced degenerative arthritis of the glenohumeral joint and he recommended total shoulder replacement surgery. This surgery was carried out 08/21/01. The photographs brought in by the patient include a photograph of the prosthesis and a single X-ray. The X-ray shows a well-aligned prosthesis where the humeral head and glenoid have been replaced.

This man appears to have worked at Argosy as a Security Guard from July of 2002 until approximately September of 2002.

Dr. Swanson did an evaluation for a permanent partial impairment on 09/27/02 and he describes finding a much better range of motion than was evident on my examination today. On his examination this man could flex forward 90 degrees, extend 30 degrees, abduct 80 degrees, and adduct 30 degrees but he had zero degrees of internal and external rotation. Combing the range of motion deficit with strength lost, he estimated that this man had a 28% impairment of the left upper extremity which equated to a 17% impairment of the whole person.

#### SUMMARY AND OPINIONS:

It is my opinion that the allowed conditions in this claim do not preclude this man from engaging in any sustained remunerative employment. It is my opinion that this man is capable of performing work in a sedentary level but only with use of his right arm. It is my opinion that he has to be in a position where he does not use his left arm. Attached is the physical strength rating form.

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MAY 7 2003

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MAY 12 2003

REGIONAL HEARING ADMINISTRATOR

CINCINNATI HEARING ADMINISTRATOR

00125

05

Gary E. Becker, Attorney

Re: Robert Lowe

04-30-03

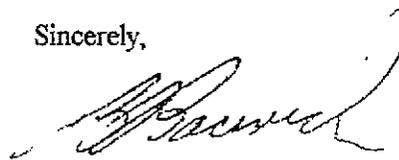
Based upon the Fifth Edition of the AMA Guides to the Evaluation of Permanent Impairment. This man would have a 47% impairment of the left shoulder which equates to a 28% impairment of the whole person. The Guides state on page 505 that one should consider the impairment rating for an arthroplasty with the impairment for loss of motion. Total shoulder arthroplasty, according to Table 16-27, page 506, equates to a 24% impairment of the upper extremity. Using the range of motion tables, this man would have an additional 30% impairment of the upper extremity. Using the Combined Values Table for 30% and 24%, one comes to a total 47% of the upper extremity which equates to 28% of the whole person.

**DISCLOSURE:** The above analysis is based upon the available information at this time including the history given by the examinee, the medical records and tests provided, and the physical findings. It is assumed that the information provided to me is correct. If more information becomes available at a later date, an additional report may be requested. Such information may or may not change the opinions rendered in the evaluation. My opinions have been based upon reasonable medical probability and certainty.

I declare that the information contained within this documentation was prepared and is the work product of the undersigned and it is true to the best of my knowledge and information.

Thank you for asking me to see this examinee in consultation. If you have any further questions, please do not hesitate to contact me. The entire process, inclusive of the record review, evaluation and preparation of this report took approximately 1 1/2 hrs 45 min

Sincerely,



Bernard B. Bacevich, M.D.  
Board of Certified Orthopaedic  
Surgeon, ABOS  
Board Certified Independent Medical  
Examiner, ABIME  
Fellow of American Academy of  
Disability Evaluating Physicians

BBB/leh

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00126

PHYSICAL STRENGTH RATING

CLAIMANT: Robert Lowe CLAIM NUMBER(S): 98-593871 (Ref. 97-585228; L19830-22; L201824-22)

My opinion of this claimant's physical strength is indicated below and is based solely on the allowed condition(s) that falls within my specialty. The medical evidence supporting this opinion is presented in the narrative portion of my report. The claimant's age, education, and work history are not considered in this estimate.

This claimant is capable of physical work activity as indicated below.

"SEDENTARY WORK"

Sedentary work means exerting up to ten pounds of force occasionally, (occasionally: activity or condition exists up to one-third of the time), and/or a negligible amount of force frequently (frequently: activity or condition exists from one-third to two-thirds of the time) to lift, carry, push, pull or otherwise move objects. Sedentary work involves sitting most of the time, but may involve walking or standing for brief periods of time. Jobs are sedentary if walking and standing are required only occasionally and all other sedentary criteria are met. *No work activity with left arm.*

"LIGHT WORK"

Light work means exerting up to twenty pounds of force occasionally, and/or up to ten pounds of force frequently, and/or a negligible amount of force constantly; (constantly: activity or condition exists two-thirds or more of the time) to move objects. Physical demand may be only a negligible amount, a job should be rated light work: (1) when it requires walking or standing to a significant degree; or (2) when it requires sitting most of the time but entails pushing and/or pulling or arm or leg controls; and/or (3) when the job requires working at a production rate pace entailing the constant pushing and/or pulling of materials even though the weight of those materials is negligible.

"MEDIUM WORK"

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

"HEAVY WORK"

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

"VERY HEAVY WORK"

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

This claimant is not capable of physical work activity.

PHYSICIAN'S SIGNATURE *B. Bacevich*  
Bernard B. Bacevich

DATE *4/30/03*

PHYSICIAN'S NAME: ROBERT LOWE

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RULE

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MEDICAL 06/28/2003

STATEMENT OF FACTS

CLAIMANT

Robert W. Lowe  
703 Ridge Ave.  
Rising Sun, IN 47040

CLAIM NUMBER(S)

1) 98-593871  
Ref: L19830-22 -  
Statute of  
Limitation  
Ref: L201624-22 -  
Statute of  
Limitation  
Ref: 97-585228 -  
Statute of  
Limitation

ISSUE: APPLICATION FOR PERMANENT AND TOTAL DISABILITY, FILED 1/29/03

1) CLAIM NUMBER: 98-593871 EMPLOYER: Cincinnati, Inc.  
Main Office  
ADDRESS: 7420 Kilby Rd.  
Harrison, OH 45030

ALLOWED CONDITION(S): Strain/sprain left shoulder Rotator cuff tear (Emp letter Cert 12/8/98) Aggravation of pre-existing arthritis of left glenohumeral joints (DHO 3/26/01).

DISALLOWED CONDITION(S): None

DATE OF INJURY: 11/13/98

OCCUPATION AT THE TIME OF INJURY: Laser Assembler

DESCRIPTION OF INJURY: "Trying to install cylinder from 350 CB2 housing, slipping causing severe strain on left arm."

DIAGNOSTIC TESTS:

1. 11/24/98 - MRI of the left shoulder. IMPRESSION: Normal MR Scans of the left shoulder.
2. 7/7/00 - MRI of the left shoulder - IMPRESSION: Pannus formation with erosion into the superior aspect of the glenoid process, probably related to chronic inflammation.

SURGERIES:

1. 2/2/99 - Left shoulder diagnostic arthroscopy with arthroscopic debridement of biceps tendon tear and arthroscopic intra-articular labrum reconstruction.
2. 8/2/99 - Left shoulder arthroscopic release of biceps tendon, debridement of intra-articular scar tissue and sutures.
3. 4/10/00 - Closed Manipulation left shoulder under anesthesia.
4. 8/21/00 - Left shoulder debridement of scar tissue and manipulation of shoulder.

FWW: N/A  
AWW: N/A

PAID: TOTAL INDEMNITY	.....	N/A
TOTAL MEDICAL	.....	N/A

continued on next page

Injured Worker: Robert W. Lowe  
Claim No: 98-593871, Ref:L19830-22-Statute of limitation,  
Ref: L201624-22-Statute of limitation,  
Ref: 97-585228-Statute of limitation.

Page #2

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CLAIMANT'S MEDICAL EVIDENCE (Report{s} Attached):

1. 9/27/02 - Jim Swanson, M.D.

EMPLOYER'S MEDICAL EVIDENCE (Report{s} Attached):

1. None

EVIDENCE OBTAINED BY THE BWC (Report{s} Attached):

1. 4/5/02 - Malcolm A. Mayn, Jr, M.D.

EVIDENCE OBTAINED BY IC (Report{s} Attached):

1. None

DISABILITY FACTORS:

1. Age: 57 D.O.B.: 1/1/46 Date Last Worked: 9/7/02
2. Education: 12th grade (1963) (Rising Sun High School (graduated) in Rising Sun, Indiana). "After graduating from school. I was transferred Over Seas - United States Air Force."
3. Previous Occupations and Work Experience:  
Laser Assembler (1989-2002)  
Machine Operator (1972-1988)  
Factory Worker - Glass Manufacture (1969-1972)  
USAF - Administrative Spec. (1963-1969).
4. Special Training and/or Special Vocational Skills: None
5. Other Relevant Factors: (e.g., sociological, physical, psychological). Past medical history includes medical treatment for his heart. He had double by pass surgery in May 2, 1996 and a appendectomy in the past. Also includes Hyperlipidermia, hypertension, and depression.

There is also a family history of coronary artery disease and hypertension. Current medication: Celexa, Ecotrin, Zocor, Talwin, Lopressor; Pepcid, and Percocet.

Drug allergies: Percodan, Oxycontin, Codeine, and Morphine. He is a non smoker.

Injured worker is receiving Social Security Disability benefits of \$1210.00 per month since September, 2002. He also receives a pension from the VA. The amount is not indicated. Injured workers activities are very limited. He has to have help from his wife to dress him, help him take a shower, etc.

Recreational Activities and hobbies include, None.

continued on next page

MEDICAL 06/20/2003

Injured Worker: Robert W. Lowe  
Claim No: 98-593871, Ref:L19830-22-Statute of limitation,  
Ref: L201624-22-Statute of limitation,  
Ref: 97-585228-Statute of limitation.

Page #3

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REHABILITATION:

Injured worker states that he has participated in rehabilitation services such as physical therapy off and on for 3 years.

Respectfully submitted,

*Laura Porter / pgh 2-19-03*  
Statement Prepared By  
Laura M. Porter, Claims Examiner  
Claims Management

LMP/flb  
2/14/03

(SOFSH01) Revised 4/95



The Industrial Commission of Ohio

APPLICATION FOR COMPENSATION FOR PERMANENT TOTAL DISABILITY

\*Please type or print clearly and answer all questions to the best of your ability.
Your cooperation in completing this form will aid in processing this application on a timely basis.
\*To assure prompt processing, this application should be filed directly with:

The Industrial Commission of Ohio
Claims Management
30 W. Spring St. 5th floor
Columbus, Ohio 43215-2233

Form with fields for Claimant's Name (Robert Lowe), Social Security Number (305-44-5200), Date of Birth (1-1-46), Address (703 Ridge Ave.), City (Rising Sun), State (TN), Telephone Number ((812) 458-3179), and Zip Code (47040).

All Claims (If you check this box, list only your most recent claim number below)

Claim Number 98-593871 Date of Injury 11-13-98 Employer CINCINNATI INCORPORATED 7420 KILBY RD CINCINNATI, OH 45211

Medical examinations will only be conducted for conditions allowed in the above listed claims.

I am permanently and totally disabled as the result of the injuries sustained in the foregoing claim(s) and request that the Industrial Commission grant compensation for such disability. I further state that Dr. JIM SWANSON has certified that I will never be able to return to my former position of employment and attached to this form is a copy of the doctor's report. When was the last date you worked anywhere? Jul - SEPT 2002

OTHER DISABILITY BENEFITS

Have you ever filed for Social Security Disability benefits? [X] yes [ ] no

If you are now, or ever have, received Social Security Disability payments, complete the following section.

\*This does not apply to Social Security Retirement\*

Table with columns: STARTING DATE (Sept 2002), TERMINATION DATE AND REASON FOR TERMINATION, RATE PER MONTH (\$1,100.00)

Do you receive disability benefits other than Social Security? (i.e., VA, Fireman & Police Officer Disability, etc.) [X] yes [ ] no

EDUCATION

What is the highest grade of school you completed? 12 When? 1963

Where? RISING SUN HIGH SCHOOL RISING SUN, IN

Did you graduate from high school? [X] yes [ ] no

If no, did you receive a certificate for passing the General Educational Development test (GED)? [ ] yes [ ] no

Why did you end your schooling? I WAS TRANSFERRED OVERSEAS UNITED STATES AIR

Have you gone to trade or vocational school or had any type of special training? [ ] yes [X] no

Notice: Use ONLY Upon report of the physician... The Industrial Commission of Ohio, Claims Management at the address indicated above.

RECEIVED stamp with date DEC 30 2002

If yes, what type of trade school or special training have you received and when?  
\_\_\_\_\_  
\_\_\_\_\_

How has this schooling or training been used in any of the work you have done?  
\_\_\_\_\_  
\_\_\_\_\_

Can you read?  yes  not well  no  
Can you write?  yes  not well  no  
Can you do basic math?  yes  not well  no

**MEDICAL HISTORY**

Doctor's Name JIM SWANSON Address 600 WILSON CREEK ROAD  
Date first seen NOV 1998 Date last seen LAWRENCEBURG, IN 47025  
Reason SHOULDER PAIN Post OPERATIVE FOLLOWUP

Doctor's Name DR. EDWARD LIM Address 222 PIEDMONT AVE, CINCINNATI, OHIO  
Date first seen \_\_\_\_\_ Date last seen \_\_\_\_\_  
Reason \_\_\_\_\_

Doctor's Name DR. MVID WHANG Address 4760 E. GALBRAITH RD. #205  
Date first seen 1996 Date last seen 1-24-2003 Cinti OH 45236  
Reason Cardiologist

List all operations and surgical procedures you have undergone, beginning with the most recent.

Date AUGUST 2001 Name of surgical procedure SHOULDER REPLACEMENT  
Date APRIL 2000 Name of surgical procedure CLOSED MANIPULATION UNDER ANESTHESIA  
Date AUGUST 2000 Name of surgical procedure TENDONECES ON LEFT SHOULDER  
Date FEB 1999 Name of surgical procedure TRIED TO REPAIR SHOULDER UNITAL SURGERY  
Date MAY 1996 Name of surgical procedure 2-WAY HEART BY-PASS

Do you use a cane, brace, TENS unit, traction device, oxygen machine, or any other appliance or device on a regular basis?  yes  no  
If yes, please specify SHOULDER PROSTHESIS

What other medical conditions prevent you from working? PAIN, NO STRENGTH IN LEFT ARM, LOSS OF RANGE OF MOTION, CAN'T LIFT OR REACH. 2-WAY HEART BY-PASS MEDICATIONS

**REHABILITATION HISTORY**

Have you ever participated in rehabilitation services?  yes  no Please explain WENT THROUGH ONGOING PHYSICAL THERAPY OFF AND ON FOR 3 YEARS.

If you have not sought or participated in rehabilitation services, are you interested in rehabilitation services offered by the employer or the Bureau of Workers' Compensation and do you desire to undergo rehabilitation evaluation?  yes  no

Describe other limitations or changes in your lifestyle. HAVE TO HAVE MY WIFE DRESS ME, SHE GIVES ME HELP TAKING SHOWER, TIEING SHOES SOMETIMES WHEN I WEAR SHOES WITH STRAPS, LIFTS BOWLS FOR ME TO EAT. CUTS MEAT ON MY PLATE.

**DAILY ACTIVITIES**

Has your treating physician told you to cut back or limit your activities in any way?  Yes  No  
 If yes, give the name of the doctor and tell below what he told you about cutting back or limiting your activities.

Can you drive a car?  Yes  No BUT UNCOMFORTABLE WITH SEAT BELT AND PLACEMENT OF ARM SO I CAN LIMIT PAIN.

DR. JIM SWANSON 9-27-02 STATED: I DO NOT RECOMMEND EVER RETURNING TO WORK AFTER I HAD SHOULDER REPLACEMENT.

---

Describe your daily activities in the following areas and how much you do of each and how often.  
 Housekeeping Chores: (meal preparation, laundry, home repairs, etc.) NONE

---

Recreational Activities and Hobbies: (bowling, hunting, etc.) GOLF WOODWORKING NONE

CAN'T DO ANY OF THESE ANYMORE.

Describe other limitations or changes in your life style, if any, resulting from the allowed conditions in your claim.  
I CAN'T PLAY GOLF ANYMORE, I CAN'T PLAY WITH MY DAUGHTER WITH SPORTS OR GRAND CHILDREN. LOT'S OF THINGS I DID BEFORE I CAN'T DO NOW.

**WORK HISTORY**

**Part 1 INFORMATION ABOUT YOUR WORK HISTORY**

List all the jobs you have had. Start with your most recent job first and then work backwards to the first job you ever held.  
 List SELF-EMPLOYMENT as you would any other job.

Job Title (Be sure to begin with your most recent job)	Type of Business or Industry (Example: auto, insurance, construction, etc.)	Dates Worked (Month and Year)		Days Per Week	Specify Rate of Pay (per hour; day, week, month or year)
		From	To		
1 LASER ASSEMBLER	MACHINE INDUSTRY	JAN 89	PRESENT	5-7	\$19.50 per hr.
2 CASING GROUP	PLASTICS MACHINE	OCT 88	SEP 88	5	\$14.50 per hr.
3 MATCHER GLASS MFG	GLASS MANUFACTURE	JUN 69	JULY 72	5	\$8.50 per hr.
4 USAF	ADMINISTRATIVE SPEC.	JUL 63	JUN 69	5	\$600. MONTHLY
5					
6					
7					
8					

Do you have military experience?

yes  no

If yes, provide dates of service,

positions held and description of duties

ADMINISTRATIVE SPECIALIST - PERSONNEL  
DEPARTMENT. TYPED PERSONNEL RECORDS AND TYPED  
DEPARTMENTAL ORDERS, TRANSFERS, etc.

Job Title No. 1 (from Part 1) LASER ASSEMBLER

**A**

Describe your basic duties - what you did and how you did it. Please provide as much detail as possible.

1. Your basic duties:

MACHINE ASSEMBLER - BUILT MACHINE PER  
BLUE PRINTS. LASER MACHINE THAT CUT MILD STEEL, STAINLESS  
STEEL & OTHER METALS. I HAD TO LIFT, DRILL HOLES, TAP  
HOLES, FABRICATE MATERIAL TO FIT. ALIGN LASER BEAMS  
USING ARMS FOR OVERHEAD REMELTING AND ASSEMBLY  
MOVED O<sub>2</sub>, HE, NITROGEN GAS TANKS

2. Machines, tools, equipment you used:

GRINDERS, PENCIL GRINDERS,  
USE OF DIAL INDICATORS, TEST MACHINE POST ASSEMBLY  
FOR ACCURACY, BARRING EQUIPMENT

3. Exact operations you performed:

MACHINE ASSEMBLY OF  
MANUFACTURED PARTS

4. Technical knowledge and skills you used:

BLUE PRINT READING &  
MECHANICAL SKILLS, CHANGE PROGRAMS TO CUT  
DIFFERENT METAL THICKNESSES

5. Reading / Writing you did:

BLUE PRINTS, WRITE ON TESTS  
FOR ACCURACY & PERFORMANCE. FILL OUT SHIPPING LIST.

6. Number of people you supervised: NONE

Walking (circle the number of hours a day spent walking) 0 1 2 3 4 5 6 7 ⑧  
Standing (circle the number of hours a day spent standing) 0 1 2 3 4 5 ⑥ 7 8  
Sitting (circle the number of hours a day spent sitting) 0 1 ② 3 4 5 ⑦ 7 8  
Bending (circle how often a day you had to bend) Never - Occasionally - Frequently - Constantly

Check below the heaviest weight lifted, weight frequently lifted and / or carried.

Heaviest weight lifted:		Weight frequently lifted / carried:	
<input type="checkbox"/> 10 lbs.	<input type="checkbox"/> 100 lbs.	<input type="checkbox"/> Up to 10 lbs.	<input checked="" type="checkbox"/> Up to 50 lbs.
<input type="checkbox"/> 20 lbs.	<input type="checkbox"/> Over 100 lbs.	<input type="checkbox"/> Up to 25 lbs.	<input type="checkbox"/> Over 50 lbs.
<input checked="" type="checkbox"/> 50 lbs.			

Job Title No. 2 (from Part 1) Capsonic Group



Describe your basic duties - what you did and how you did it. Please provide as much detail as possible.

1. Your basic duties: OPERATED PLASTIC EXTRUSION MACHINE  
MANUFACTURES OF DIP SWITCHES

2. Machines, tools, equipment you used: WRENCHES TO ADJUST MACHINE  
COMPRESSION AND STAMPING PROCESS.

3. Exact operations you performed: OPERATED PLASTIC EXTRUSION  
MACHINE

4. Technical knowledge and skills you used: LEARNED HOW TO OPERATED  
MACHINE FOR MAXIMUM PERFORMANCE - BONUS  
SITUATION MORE YOU PRODUCED TO MORE MONEY YOU WOULD MAKE

5. Reading / Writing you did: READ CUSTOMER SPECIFICATIONS

6. Number of people you supervised: NONE

**B** Describe the kind and amount of physical activity this job involved during a typical day in terms of:

*Somedays*

Walking (circle the number of hours a day spent walking) 0 1 2 3 4 5 6 7 8  
 Standing (circle the number of hours a day spent standing) 0 1 2 3 4 5 6 7 8  
 Sitting (circle the number of hours a day spent sitting) 0 1 2 3 4 5 6 7 8  
 Bending (circle how often a day you had to bend) Never - Occasionally - Frequently - Constantly

Check below the heaviest weight lifted, weight frequently lifted and / or carried.

Heaviest weight lifted:                      Weight frequently lifted / carried:

10 lbs.                       100 lbs.                       Up to 10 lbs.                       Up to 50 lbs.  
 20 lbs.                       Over 100 lbs.                       Up to 25 lbs.                       Over 50 lbs.  
 50 lbs.

Job Title No. 3 (from Part 1) Glass Manufacturer

**A** Describe your basic duties - what you did and how you did it. Please provide as much detail as possible.

1. Your basic duties: Quality Control - Carton Inspector  
AND GLASS QUALITY INSPECTOR

2. Machines, tools, equipment you used: THICKNESS GAUGES, FILL  
POINT GAUGES, ALKALINITY TESTING, GLASS COLOR  
SAMPLING, WAREHOUSE STACKABILITY TESTING.

3. Exact operations you performed: ASSURED COMPANY THEY WERE  
BUYING QUALITY CARTON TO PACK GLASS IN FOR  
CUSTOMER CHECKED CARTON FLUTING A, B, C, BC FLUTES

4. Technical knowledge and skills you used: READ TEST PROCEDURES.

5. Reading / Writing you did: WROTE TEST REPORTS AND ANALYZED.

6. Number of people you supervised: NONE

**B** Describe the kind and amount of physical activity this job involved during a typical day in terms of:

Walking (circle the number of hours a day spent walking) 0 1 2 3 4 5 6 7 8  
 Standing (circle the number of hours a day spent standing) 0 1 2 3 4 5 6 7 8  
 Sitting (circle the number of hours a day spent sitting) 0 1 2 3 4 5 6 7 8  
 Bending (circle how often a day you had to bend) Never - Occasionally - Frequently - Constantly

Check below the heaviest weight lifted, weight frequently lifted and / or carried.

- |   |  |   |  |
|---|--|---|--|
| Heaviest weight lifted:                     |  | Weight frequently lifted / carried:               |  |
| <input type="checkbox"/> 10 lbs.            | <input type="checkbox"/> 100 lbs.      | <input checked="" type="checkbox"/> Up to 10 lbs. | <input type="checkbox"/> Up to 50 lbs. |
| <input type="checkbox"/> 20 lbs.            | <input type="checkbox"/> Over 100 lbs. | <input type="checkbox"/> Up to 25 lbs.            | <input type="checkbox"/> Over 50 lbs.  |
| <input checked="" type="checkbox"/> 50 lbs. |  |   |  |

Job Title No. 4 (from Part 1) USAF - Admin. Specialist

**A** Describe your basic duties - what you did and how you did it. Please provide as much detail as possible.

1. Your basic duties: ADMINISTRATIVE SPECIALIST.

2. Machines, tools, equipment you used: TYPEWRITER

3. Exact operations you performed: WORKED IN PERSONNEL, TYPED PERSONNEL RECORDS

4. Technical knowledge and skills you used: KNOW HOW TO TYPE

5. Reading / Writing you did: READ TRANSFER ORDERS and HUMAN RESOURCE RECORDS.

6. Number of people you supervised: NONE

**B** Describe the kind and amount of physical activity this job involved during a typical day in terms of:

- |  |   |
|--|---|
| Walking (circle the number of hours a day spent walking)   | 0 1 2 <b>3</b> 4 5 6 7 8                              |
| Standing (circle the number of hours a day spent standing) | 0 1 2 3 <b>4</b> 5 6 7 8                              |
| Sitting (circle the number of hours a day spent sitting)   | 0 1 2 3 <b>4</b> 5 6 7 8                              |
| Bending (circle how often a day you had to bend)           | Never - Occasionally - <b>Frequently</b> - Constantly |

Check below the heaviest weight lifted, weight frequently lifted and / or carried.

- |   |  |   |  |
|---|--|---|--|
| Heaviest weight lifted:                     |  | Weight frequently lifted / carried:               |  |
| <input checked="" type="checkbox"/> 10 lbs. | <input type="checkbox"/> 100 lbs.      | <input checked="" type="checkbox"/> Up to 10 lbs. | <input type="checkbox"/> Up to 50 lbs. |
| <input type="checkbox"/> 20 lbs.            | <input type="checkbox"/> Over 100 lbs. | <input type="checkbox"/> Up to 25 lbs.            | <input type="checkbox"/> Over 50 lbs.  |
| <input type="checkbox"/> 50 lbs.            |  |   |  |

**SPECIAL FACTORS**

Please use this space for comments, explanations or special factors you wish to add to support your application. (social, economic, psychological)

SINCE I HAD MY ACCIDENT AT WORK I HAD TIMES OF DEPRESSION, ANXIETY, BECAUSE I HAVE LOSSED ONE ARM COMPLETELY, LOSSED MY JOB. I HAVE TO TAKE VICOCET FOR PAIN BUT SOMETIME FUNCTIONS WITH PAIN IS MOST DIFFICULT. 2-WAY HEARD BY-PASS IN 1996. HAS CHANGED MY LIFE SIGNIFICANTLY.

I certify that the information on this page and the preceding pages are true to the best of my knowledge.

By signing this application, I expressly waive all provisions of law which forbid any person, persons or medical facility who has medically attended, treated, or examined me, or who may have medical information of any kind which may be used to render a decision in my claim, from disclosing such knowledge or information to the Industrial Commission or employer(s) in my claim(s).

Attached to this application is medical evidence in support of the application.

Scott A. Wolf, Attorney for Claimant

Robert W. Lowe  
Person Completing This Form

x Robert W. Lowe  
Claimant's Signature

x 1-16-2003  
Date

**DO NOT** submit this application without the following:

- \* Supporting medical evidence signed by the physician.
- \* Your signature on this application. (above)

**ATTENTION**

This application will be dismissed if medical evidence supporting the request for Permanent Total Disability is not attached.

To assure prompt processing, this application should be filed directly with:

The Industrial Commission of Ohio  
Claims Management  
30 W. Spring St. 5th floor  
Columbus, Ohio 43215-2233

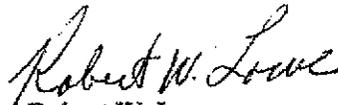
Help Us Help You!

Please take a minute to give us your correct address in the space provided on the first page of this application.

Mr. Scott Wolf,

1-16-2003

My entry of " the last date you worked anywhere" needs my explanation". In July of 2002 Cincinnati Incorporated cut me off of workman compensation because of my status of being MMI. I was desperate for my family to have income so we wouldn't lose our home. I took a position with Argosy casino as a security guard. We discussed my physical problem of not being able to lift, reach, and just the pain I receive from my arm just hanging while walking. This position was not good for me, as I was physically unable to do this job. I had an appointment already scheduled with Dr. Jim Swanson what physical problems I was having on that job and he suggested that I'm just making my condition worse and that is time for you to stop working at anything. Attached is a copy of that post appointment.

  
Robert W. Lowe

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OFFICE

00139

**Lowe, Robert W.** 01/01/1946  
Visit Date: Fri, Sep 27, 2002 10:23 am  
Provider: Jim Swanson, M.D.  
Location: Swanson Orthopedic Surgery And Sports

1 of 2

Electronically signed by provider on 10/27/2002

**Subjective:**

CC: 56-year-old male presents for follow-up concerning his left shoulder.

HPI:

The left shoulder continues to be painful and stiff despite the arthroplasty. Dr. Kim has left town for another practice location, and wishes me to continue care. Mr. Lowe doesn't feel he is capable of working with his shoulder. He can do a few light things around the house, but once he starts anything involving repetition or lifting his pain worsens. He still uses pain medicine intermittently. He recently had an examination by Dr. Meyn. I reviewed that report. He feels he has reached MMI and has PPI.

Past Medical History / Family History / Social History:

Legacy Data:

**PAST MEDICAL HISTORY:**

- Coronary Artery Disease
- Hyperlipidemia
- Hypertension
- Depression

**SURGICAL HISTORY:**

- Appendectomy
- Tonsillectomy
- 4 prior shoulder surgeries;

**FAMILY MEDICAL HISTORY:**

Positive for Coronary Artery Disease and Hypertension.

**SOCIAL HISTORY:**

- Machine Builders;
- Marital status: married;

**HABITS:**

Nonsmoker (never smoked);

Drug Allergies/Adverse Reactions

- Percodan:
- Oxycontin:
- Codeine:
- Morphine:

Current Medications:

- Celexa 20mg Tablets 1 tab(s) po qd
- Ecotrin
- Zocor 20mg Tablet 1 tab(s) po hs
- Talwin
- Lopressor
- Pepcid
- Percocet

**Objective:**

Current Vitals: 9/27/2002 10:46:01 AM

Ht: 70 inch(es); Wt: 200 lbs;

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SEP 29 PM 1:53  
PHYSICIAN OFFICE

**Lowe, Robert W.** 01/01/1946  
Visit Date: Fri, Sep 27, 2002 10:23 am  
Provider: Jim Swanson, M.D.  
Location: Swanson Orthopedic Surgery And Sports

Electronically signed by provider on 10/27/2002

**Exam:**

**LEFT**

**SHOULDER** examination: Inspection: surgical wound - superior wound (healed); no erythema; no edema; visible atrophy of the paraspinous muscles, deltoid;  
Palpation: pain elicited over the lateral clavicle, at the greater tuberosity and proximal of the humerus, anteriorly, and posteriorly; no warmth; crepitus palpable over the anterior and lateral acromion and over the subacromial bursa; no masses;  
Neurovascular: normal sensory exam of axillary, musculocutaneous, median radial and ulnar nerves distally to light touch or pain; sensory deficit noted; normal pulse and capillary refill noted distally;  
Muscular Strength: 4/5 flexors; 4/5 extensors; 4/5 abductors; 4/5 adductors; 4/5 external rotators; 4/5 internal rotators;  
Range of Motion: limited active ROM with external rotation in neutral (to 0 degrees), internal rotation with hand to hip, glenohumeral abduction (to 60 degrees), extension (to 30 degrees), flexion (to 90 degrees), abduction (to 80 degrees), adduction (to 30 degrees), internal rotation at 90 degrees (to 0 degrees), and external rotation at 90 degrees (to 0 degrees); limited passive ROM; end ROM pain is present;  
Maneuvers:  
(+) Yergason test; (+) Speed's test; (+) drop arm test; negative Anterior Drawer; negative Posterior Drawer; (-) scapular winging test; The shoulder joint is reduced.

**Assessment:**

840.9 Sprains and strains of shoulder and upper arm (Severe)

**Plan:**

Sprains and strains of shoulder and upper arm

**TESTS/PROCEDURES:** Tests and/or procedures which may be ordered/performed in the future include: joint injection corticosteroid and Bursal injection subacromial.

**MEDICATIONS:** I have prescribed the following medication. Percocet 5/325 mg, 1-2 po q 4-6 hr pm pain, # 60 and WITH INTERMITTENT REFILLS MONTHLY OR BI-MONTHLY TO CONTROL CHRONIC PAIN. HE MEETS THE CRITERIA OF CHRONIC INTRACTABLE PAIN REQUIRING NARCOTICS FOR CONTROL. Narcotic risks and precautions were discussed. Over-the-counter medications recommended include Tylenol Extra Strength or Tylenol Arthritis TID, Glucosamine and Chondroitin, Topical arthritis creams, Multivitamins, and Vitamin E cream to skin BID. **RECOMMENDATIONS** given include: ice therapy, heat therapy, Advance activities as tolerated, Stretching program (Office instruction), Strengthening program (Office instruction), ROM program (Office instruction), and Sling for comfort. **FOLLOW-UP:** Schedule a follow-up visit in 6 months.

**WORK:**

I do not recommend ever returning to work. MMI status has been achieved effective 9-27-02. 25% Upper Extremity Permanent Partial Impairment is present according to the AMA Guides to Impairment, 5th edition. (Equivalent to 17 % whole person). See Attached worksheet. He will require twice yearly visits to me to refill pain medication and monitor for signs of prosthetic loosening or infection. The total joint will need to be routinely followed with yearly x-rays of the shoulder.

**CC:**

Frank Gates Service Co., Dr. Barkdoll

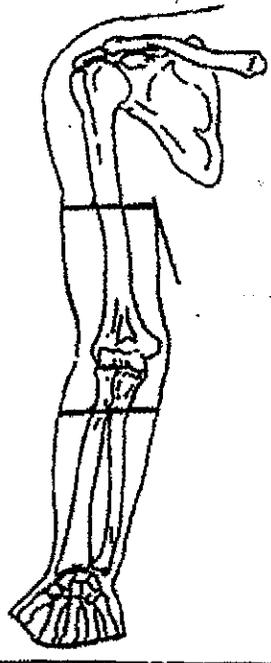
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PHYSICIAN OFFICE

437

Upper Extremity Impairment Evaluation Record - Part 2 (Wrist, Elbow, and Shoulder) - Side: **RIGHT**

Name: Robert Loux Age: 56 Sex: M Race: W Dominant hand: R Date: 9-27-02  
 Occupation: Mechanic Diagnosis: (C) Shoulder Surgery

Abnormal Motion					Other Disorders	Regional Impairment % + Combine (1) + (2)	Amputation	
Record motion or ankylosis angles and impairment %								
Wrist	Flexion	Extension	Ankylosis	Imp %	Ø			
	Angle°							
	Imp %							
		AD	UD	Ankylosis				Imp %
Elbow	Flexion	Extension	Ankylosis	Imp %	Ø			
	Angle°							
	Imp %							
		Pronation	Supination	Ankylosis				Imp %
Shoulder	Flexion	Extension	Ankylosis	Imp %	T-6/6 L4-5/5 Loss of strength 60-75% Per. 6 Ext 2 Add 3 Int 2 IR 2 27% + 10% = 37%	28%		
	Angle°	90	30					
	Imp %	6	1					7
		Adduction	Abduction	Ankylosis				Imp %
	Angle°	30	20					
	Imp %	1	5					6
		Int Rot	Ext Rot	Ankylosis				Imp %
	Angle°	0	0					
Imp %	5	2		7				
Add Imp % Flex/Ext + AD/UD = [1]					Imp % = [2]			
Add Imp % Flex/Ext + Pro/Sup = [1]					Imp % = [2]			
Add Imp % Flex/Ext + Add/Abd + Int Rot/Ext Rot = [1]					Imp % = [2]	28%		



I. Amputation impairment (other than digits)	=	%
II. Regional impairment of upper extremity • (Combine hand _____ % + wrist _____ % + elbow _____ % + shoulder <u>28</u> %)	=	28 %
III. Peripheral nerve system impairment	=	%
IV. Peripheral vascular system impairment	=	%
V. Other disorders (not included in regional impairment)	=	%
<b>Total upper extremity impairment (+ Combine I, II, III, IV, and V)</b>	=	<b>28%</b>
<b>Impairment of the whole person (Use Table 16-3)</b>	=	<b>17% if needed</b>

\* Combined Values Chart (p. 604).  
 If both limbs are involved, calculate the whole person impairment for each on a separate chart and combine the percents (Combined Values Chart).  
 Date: 10/28/02 1:53  
 Signature: [Handwritten Signature]



**Jim Swanson, M.D.**  
ORTHOPAEDIC SURGEON

ORTHOPAEDIC SUITE  
DEARBORN COUNTY HOSPITAL  
600 WILSON CREEK ROAD  
LAWRENCEBURG, IN 47025  
TELEPHONE (812) 537-8402  
FAX (812) 537-8426

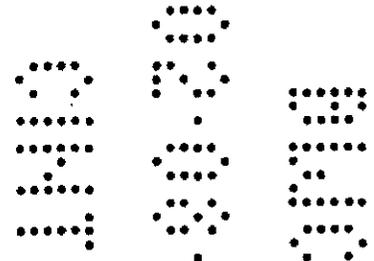
02/07/2006 10:29 81.25378425

January 30, 2006

Scott Wolf  
Weisser and Wolf, Attorneys at Law  
Kroger Building  
1014 Vine Street, Suite 1650  
Cincinnati, OH 45202

RE: Robert W. Lowe  
DOB: 01/01/1946  
DOI: 11/13/1998

Dear Mr. Wolf:



I examined Mr. Lowe on January 30, 2006. I completed a history and a physical examination of the patient, and I can find no evidence of improvement of his condition that would warrant terminating his disability. I have enclosed my office notes for your use. Mr. Lowe informed me that he was surreptitiously videotaped doing some work about his home. I even examined the hedge clipper he was using, and it weighed no more than 3 1/2 pounds. This was well within the range of lifting I had allowed him to try to strengthen his shoulder. Based on this reprehensible action on the part of the insurance company, I am told that he is to appear at a hearing to void his disability.

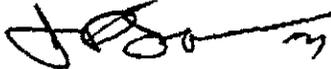
I have always allowed Mr. Lowe to do limited lifting about his home and community, but in no way does that void his disability. He has severe pain in the shoulder constantly, and is barely keeping it controlled with Percocet and Neurontin. He has severe weakness in the shoulder and a significant loss of usable motion. I have had the liberty of examining him every 3-6 months for nearly 8 years, and I can tell you for certain that he is worsening, not improving. Simply doing limited things about the home, WITH PAIN, is a far cry from doing any work with the shoulder for an 8-hour day.

I find that the act of videotaping a man at his home, doing acts of daily living, and then extrapolating that to suggest he is no longer disabled is unacceptable. Rather than authorizing a functional capacity exam performed by a competent physical therapist or physiatrist, the company sent someone skulking around his home with a camera. I would suggest to you that this constitutes fraud on the part of the company authorizing the videotaping, and should be punished under the full weight of the law.

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Mr. Lowe has always complied with my instructions, has shown no history of drug diversion or overuse, has completed every course of therapy, and has undergone 4 shoulder surgeries. Unfortunately, he has not had a result allowing him to be functional beyond activities of daily living. The whole situation has caused him to be severely depressed, and the continued harassment by his company only makes it worse. I recommend his benefits continue, and consideration be given to increasing them, not voiding them. I also strongly recommend that the actions of the company authorizing the videotaping be scrutinized carefully for evidence of illegal or unethical behavior.

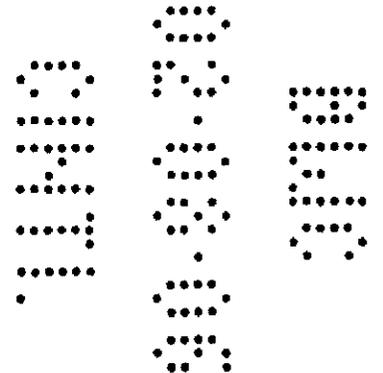
Sincerely,



Jim Swanson, M.D.

JS

CC: Robert Lowe



## **4123.52 Continuing jurisdiction of commission.**

The jurisdiction of the industrial commission and the authority of the administrator of workers' compensation over each case is continuing, and the commission may make such modification or change with respect to former findings or orders with respect thereto, as, in its opinion is justified. No modification or change nor any finding or award in respect of any claim shall be made with respect to disability, compensation, dependency, or benefits, after five years from the date of injury in the absence of the payment of medical benefits under this chapter or in the absence of payment of compensation under section 4123.57, 4123.58, or division (A) or (B) of section 4123.56 of the Revised Code or wages in lieu of compensation in a manner so as to satisfy the requirements of section 4123.84 of the Revised Code, in which event the modification, change, finding, or award shall be made within five years from the date of the last payment of compensation or from the date of death, nor unless written notice of claim for the specific part or parts of the body injured or disabled has been given as provided in section 4123.84 or 4123.85 of the Revised Code. The commission shall not make any modification, change, finding, or award which shall award compensation for a back period in excess of two years prior to the date of filing application therefor. This section does not affect the right of a claimant to compensation accruing subsequent to the filing of any such application, provided the application is filed within the time limit provided in this section.

This section does not deprive the commission of its continuing jurisdiction to determine the questions raised by any application for modification of award which has been filed with the commission after June 1, 1932, and prior to the expiration of the applicable period but in respect to which no award has been granted or denied during the applicable period.

The commission may, by general rules, provide for the destruction of files of cases in which no further action may be taken.

The commission and administrator of workers' compensation each may, by general rules, provide for the retention and destruction of all other records in their possession or under their control pursuant to section 121.211 and sections 149.34 to 149.36 of the Revised Code. The bureau of workers' compensation may purchase or rent required equipment for the document retention media, as determined necessary to preserve the records. Photographs, microphotographs, microfilm, films, or other direct document retention media, when properly identified, have the same effect as the original record and may be offered in like manner and may be received as evidence in proceedings before the industrial commission, staff hearing officers, and district hearing officers, and in any court where the original record could have been introduced.

Effective Date: 06-14-2000; (SB 7) 10-11-2006