

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF OHIO

State of Ohio ex rel.
Marlon R. Ferguson,

Appellant,

v.

Industrial Commission of
Ohio

&

National Machinery &
Farmland Foods, Inc.

Appellees

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

Supreme Court
Case No. 09-2359

MERIT BRIEF OF APPELLANT, MARLON R. FERGUSON

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TABLE OF CONTENTS

TABLE OF CONTENTS.....2

TABLE OF AUTHORITIES3

STATEMENT OF FACTS4

ARGUMENT9

I. PROPOSITION OF LAW #1: An Industrial Commission order which explicitly relies on two reports whose findings and opinions regarding the impairment caused by the allowed conditions contradict one another fails to make clear what the Commission’s findings were and fails to provide a sufficient explanation of the rationale for its decision. 11

II. PROPOSITION OF LAW #2: A vocational expert’s opinion regarding transferable skills which is based solely on work activities the injured worker performed prior to his injury, and which conflicts with medical or psychological evidence relied on by the commission which shows that the injured worker has significant impairments directly affecting his ability to perform the skills involved in his pre-injury employment, is not ‘some evidence’ to support denial of PTD. 17

III. PROPOSITION OF LAW #3: A report which attempts to exclude a pre-injury baseline impairment, even when one does not exist, cannot constitute ‘some evidence’ upon which the commission may rely to deny PTD. 20

CONCLUSION.....22

CERTIFICATION23

APPENDICES

Notice of Appeal1-3

Tenth District Court of Appeals Judgment Entry4

Tenth District Court of Appeals Decision5-10

Tenth District Court of Appeals Magistrate’s Decision11-35

Order of the Industrial Commission of Ohio36

Order of the Staff Hearing Officer.....37-41



TABLE OF AUTHORITIES

Cases

Hamilton v. Keller, 11 Ohio App. 2d 121 (3rd App. Dist. 1967) 21

Schell v. Globe Trucking, Inc., 48 Ohio St. 3d 1, 4 (1990)..... 21

State, ex rel. Autozone, Inc. v. Indus. Comm., 117 Ohio St. 3d 186 (2008) 11

State, ex rel Elliott v. Indus Comm., 26 Ohio St. 3d 76 (1986). 11

State, ex rel. Frigidaire Div., General Motors Corp. v. Indus. Comm., 35 Ohio St. 3d 105
(1988)..... 11, 12

State, ex rel. Hudson, v. Indus. Comm., 12 Ohio St. 3d 169, 170 (1984)..... 11

State, ex rel. Lance, v. Indus. Comm. (Feb. 23, 1988), Franklin App. No. 87AP-24
(Memorandum Decision) 14, 16

State, ex rel. Lopez v. Indus. Comm., 69 Ohio St. 3d 445 (1994)..... 14, 15

State, ex rel. Milburn, v. Indus. Comm., 26 Ohio St. 3d 119, 120 (1986) 11

State, ex rel., Mitchell, v. Robbins & Myers, Inc. (1983), 6 Ohio St. 3d 481, 484. ... passim

State, ex rel. Noll v. Indus. Comm., 57 Ohio St. 3d 203 (1991). 13, 15, 16, 19

State, ex rel. Republic Rubber Div., v. Morse, 157 Ohio St. 288, 293 (1952)..... 21

State, ex rel. Zollner v. Industrial Com. of Ohio, 1989 Ohio App. LEXIS 3985 (Ohio Ct.
App., Franklin County Oct. 19, 1989) 13, 14, 16



STATEMENT OF FACTS

Marlon R. Ferguson, Appellant, sustained his first industrial injury in July 7, 1991, when he lifted a box off of a cart, set it down on the floor and fell. (Appendix p.37). Appellant filed an application for workers' compensation benefits which was assigned claim number L80479-22 and allowed for the conditions of "lumbar strain and aggravation of pre-existing spondylolisthesis and spondylolisthesis of L5-S1." (*Id.*) Appellant received conservative treatment for the allowed conditions under that claim. (*Id.*)

Appellant suffered a second industrial injury on October 5, 1999, when he was lifting a box at work and felt a sharp pain in his right back. (Supplement "Supp." p.2). Appellant filed an application for workers' compensation benefits with the BWC, which was assigned claim number 99-540008 and allowed for the condition of "lumbosacral sprain." (*Id.*) On September 24, 2002, Appellant filed a motion to amend the claim for "aggravation of L3-4, L4-5 and L5-S1 spondylolisthesis and disc degeneration." (Supp. p.6). A District Hearing Officer additionally allowed the claim for "Degenerative Disc Disease in L3-4, L4-5 and L5-S1." (Supp. p.28). In November 2002, Appellant's symptoms became so severe that he was taken off work and has not returned to work since. (Supp. p.57).

As a result of his workplace injuries, Appellant has undergone two surgeries. The first surgery was performed on February 14, 2003, and consisted of lumbar laminectomy of L5 with Ray cage fusion and interbody fusion at the L5-S1 level. (Supp. p.8). The second surgery took place November 21, 2005, and consisted of anterior lumbar interbody fusion at L3-4 and L4-5, placement of infuse at L3-4 and L4-5, as well as



placement of Cougar cages at L3-4 and L4-5. (Supp. p.56). Appellant has undergone further pain management and receives epidural steroid injections for management of the allowed conditions of lumbosacral sprain, aggravation of spondylolisthesis at L3-4, L4-5 & L5-S1; aggravation of disc degeneration at L3-4, L4-5 & L5-S1; and L1-2 disc displacement. (Appendix p.38).

In the intervening time between surgeries, Appellant began seeing Marcia Ward, Ph.D. and, on February 27, 2004, Appellant filed a C-86 for an additional allowance of "Dysthymic Disorder¹". (Supp. p.28). In an Administrative Order dated March, 13, 2004, Appellant's request for additional allowance for the psychological condition of Dysthymic Disorder was granted. (*Id.*). Appellant's request was reviewed by David S. Doane, Ph.D., and Joan A. Lawrence, Ph.D., who similarly found that Appellant suffered from dysthymic disorder which caused compromises and problems with his ability to socialize, cognitively function and adapt to vocational environments. (Supp. p.35, 47).

On December 12, 2007, Appellant filed an IC-2 application for Permanent Total Disability ("PTD") compensation. (Supp. p.100-8). In support of his application, Appellant submitted reports addressing both his physical and psychological impairments. (Supp. p.95-9). Jeffrey F. Wirebaugh, M.D. concluded Appellant would be limited to sedentary activities based solely on the physical conditions allowed in the claim. (Supp. p.95). Specifically, in his report dated March 17, 2008, Dr. Wirebaugh opined that Appellant could lift a maximum of 10 pounds, but not on a frequent or repetitive basis.

¹ 'Dysthymic disorder' is defined as a "chronically depressed mood that is present more than 50% of the time for at least 2 years in adults...." Symptoms of dysthymic disorder include poor concentration, insomnia, feelings of hopelessness and difficulty making decisions. *Taber's Cyclopedic Medical Dictionary* (19th Ed. 2001) 628.

(*Id.*). Furthermore, Dr. Wirebaugh opined that Appellant cannot do any activity that requires bending, twisting or turning, nor can he squat, kneel, crawl or climb. (*Id.*). Dr. Wirebaugh additionally restricted Appellant to no more than a half an hour of work without being allowed to change positions and completely ruled out operation of any foot pedals or controls with his lower extremities. (*Id.*).

The September 14, 2007, report of Dr. Marcia Ward was submitted in reference to his psychological condition. (Supp. p.97). Dr. Ward's report concluded that Appellant was permanently and totally disabled based upon his allowed psychological condition. (Supp. p.99). Dr. Ward explains her conclusion of Appellant's PTSD status by noting that Appellant's "depression significantly affects his ability to tolerate frustration, prevents him from interacting consistently and appropriately with others[,]...further eats away at the minimal amount of self-worth he still possesses...[,] prevents him from consistently carrying out any type of work duties and thus interferes significantly with his daily life." (*Id.*).

After filing his application for PTSD, Appellant was examined by Joseph Marino, M.D. and Paul J. Eby, M.D. in reference to his allowed physical conditions. (Supp. p.109-17, 130-6). In his report from January 24, 2008, Dr. Marino noted that Appellant has "substantially limited physical capabilities," but opined he was capable of sedentary work with extensive restrictions including lifting no more than 10 pounds, no repetitive twisting and freedom to sit or stand and change positions as needed. (Supp. p.114-5). Dr. Eby opined in his report of March 17, 2008, that Appellant was only capable of "sedentary level activity with occasional walking of short distances with a cane, being able to sit and stand ad lib, and no climbing of stairs." (Supp. p.134). Further, Dr. Eby



opined that, based on his allowed physical conditions, Appellant had a whole person impairment of 27%. (*Id.*).

Appellant was also examined by Mark Query, Ph.D. and Raymond D. Richetta, Ph.D. regarding his allowed psychological conditions and his PTD application. (Supp. p.118-29, 137-44). Following an evaluation on February 16, 2008, Dr. Query opined that Appellant was capable of sustained remunerative employment. (Supp. p.128). Dr. Query opined that “while [Appellant] reported strained concentration when bored, this is an artifact of something other than his claim, even though it may be a safety liability in general. Other than that, his energy level, motivation, *social skills*, memory functioning, *cognitive processing* and *decision-making* are adequate for remunerative employment.” (*Id.*) (Emphasis added). Dr. Query found that the Appellant’s total percentage of whole person impairment based upon the allowed psychological condition in this claim is 3%. (Supp. p.125-6). Dr. Query found that *no restrictions* were necessary relative to the allowed psychological condition. (Supp. p.128) (Emphasis added).

On March 21, 2008, Appellant was evaluated by Dr. Richetta who opined that Appellant “can work in a setting with *few social demands*, and where he would *not have to engage in rapid decision making*. His depression *reduces his ability to process information quickly*.” (Supp. p.144) (Emphasis added). Based on his evaluation of Appellant, Dr. Richetta found that he has mild impairment in activities of daily living, and a moderate impairment in *social functioning*, concentration, persistence, pace and *adaptation to stress in work-like settings* based on the allowed psychological conditions. (Supp. p.142) (Emphasis added). Dr. Richetta found that the Appellant’s whole person impairment based upon the allowed psychological condition in this claim is 30%. (Supp.

p.143).

Additionally, two vocational evaluations were performed. The first evaluation was performed by Barbara Gearhart, M.Ed., on May 9, 2008, who found that “given the severe and chronic nature of his back pain, Mr. Ferguson would not be able to maintain even sedentary work.” (Supp. p.150). Gearhart also found that Appellant has “significant limitations and chronic pain from his back injury. In addition, he is further limited by his depression with its concomitant and ongoing symptoms of irritability, tendency toward withdrawal and volatile outburst.” (*Id.*). Gearhart further found that, “he does not have a high school diploma and the severity of his conditions make him a poor candidate for retraining.” (*Id.*). Subsequently, the vocational report concluded that Appellant is not capable of sustained remunerative employment. (*Id.*).

The second vocational evaluation was performed on May 19, 2008, by Denise O’Conner, MA. (Supp. p.151). Ms. O’Conner *did not* meet with or personally evaluate Appellant regarding his vocational capabilities; instead, Ms. O’Conner performed a file review of the available medical, psychological and vocational reports. (Supp. p.152, 160). Ms. O’Conner concluded that “based on the claimant’s education, physical abilities, skills, age and *prior work* experience, that claimant is capable of sustained remunerative employment.” (Supp. p.160) (Emphasis added). Significantly, O’Conner’s opinion regarding Appellant’s transferable skills was based entirely on the skills demonstrated by his pre-injury employment. (Supp. p.157-8). Given the work he had performed prior to his injury, O’Conner opined that Appellant has transferable skills including ability to drive, stable work history, ability to secure employment, ability to perform repetitive work, *deal with people*, obtain precise limits and tolerance, follow



specific instructions and *perform under stress*, and *make judgments*. (*Id.*). The vocational evaluation also stated that Appellant could perform such unskilled and semi-skilled tasks such as telephone solicitor, appointment setter, information clerk, cashier, and bench assembly. (*Id.*).

Appellant's application for PTD was heard on June 9, 2008, before Staff Hearing Officer Mara Lanzinger Spidel. (Appendix p.37). The Staff Hearing Officer denied the Appellant's application, based on the reports of Drs. Marino, Eby, Wirebaugh, Popovich, Query and Richetta, finding Appellant not to be permanently and totally disabled and, thus, able to perform sustained remunerative employment. (*Id.*). Appellant's appeal from the SHO order of June 9, 2008, was refused by the Industrial Commission ("commission"). (Appendix, p.36).

On October 14, 2008, Appellant requested that the Tenth District Court of Appeals issue a Writ of Mandamus to the Industrial Commission of Ohio on the basis that the commission abused its discretion when it failed to cite competent evidence upon which it could rely. (Appendix p.29). The case was heard before Magistrate Macke who, on July 30, 2009, issued a decision denying Appellant's request for the writ. (Appendix p.35). On November 24, 2009, the Court of Appeals overruled Appellant's objections to the Magistrate's decision and upheld the denial of the writ. (Appendix p.4). On or about December 31, 2009, Appellant filed a Notice of Appeal of Right of Appellant with this Court. (Appendix p.1).

ARGUMENT

The commission relied on two psychological reports which clearly contradict

each other regarding the severity of Appellant's disability. The discussion below will demonstrate the opinions of Drs. Query and Richetta regarding Appellant's psychological condition – opinions which Judge Tyack stated in his dissent below appeared to be describing two different people – differ so completely that it is not possible to accept one without rejecting the other. Moreover, the report of Dr. Query was in and of itself internally flawed as it purported to exclude a nonexistent baseline impairment, thereby suggesting that Dr. Query may have believed that the actual impairment was greater than stated in his report. Finally, the commission relied on a vocational rehabilitation report which purported to find that Appellant, based on his pre-injury work activities, has transferable skills including the ability deal with people, perform under stress, and make judgments. This conclusion is plainly at odds with the opinion of Dr. Richetta on which the commission claims to have particularly relied. Dr. Richetta reported that Appellant's psychological condition resulted in a mild impairment of daily living activities, as well as moderate impairment of Appellant's social functioning, concentration, persistence, pace and ability to cope with stress in work-like settings. Just as one cannot reasonably rely on the mutually exclusive opinions of Drs. Query and Richetta, acceptance of Dr. Richetta's assessment of Appellant's psychological limitations would logically preclude acceptance of a vocational report which identifies as transferable skills functions which Dr. Richetta finds to be significantly impaired.

Standard of Review

In order for this court to issue a writ of mandamus, the Appellant must show that he has a clear legal right to the relief sought and that the commission has the clear legal

duty to provide such relief. *State, ex rel. Autozone, Inc. v. Indus. Comm.*, 117 Ohio St. 3d 186, 187 (2008). In order to find such a right to a writ of mandamus, this Court must find that the commission abused its discretion by entering an order not supported by the evidence on record. *State, ex rel. Elliott v. Indus. Comm.*, 26 Ohio St. 3d 76 (1986). It is well-settled that the determination of disputed facts and the weighing of evidence are exclusively within the jurisdiction and authority of the commission. See, e.g., *State, ex rel. Milburn, v. Indus. Comm.*, 26 Ohio St. 3d 119, 120 (1986); *State, ex rel. Hudson, v. Indus. Comm.*, 12 Ohio St. 3d 169, 170 (1984). Accordingly, it is not the court's duty to search the record for some evidence to support a decision by the commission. *State, ex rel. Mitchell, v. Robbins & Myers, Inc.*, 6 Ohio St. 3d 481, 484 (1983). The court is limited to searching the face of the commission's order for some evidence to support its decision. *State, ex rel. Frigidaire Div., General Motors Corp. v. Indus. Comm.*, 35 Ohio St. 3d 105, 107 (1988). As a result, the commission must briefly explain its reasoning when granting or denying the benefits requested by the claimant, and must specifically state which evidence, in particular, the commission relied upon in reaching its decision. *Mitchell*, 6 Ohio St. 3d at 483-4.

I. PROPOSITION OF LAW #1: An Industrial Commission order which explicitly relies on two reports whose findings and opinions regarding the impairment caused by the allowed conditions contradict one another fails to make clear what the Commission's findings were and fails to provide a sufficient explanation of the rationale for its decision.

Since this Court's decision in *State, ex rel. Mitchell v. Robbins & Myers, Inc.* more than a quarter of a century ago, it has been settled law that Industrial Commission orders "must specifically state which evidence...has been relied upon to reach their

conclusion and contain a brief explanation stating why the claimant is or is not entitled to the benefits requested.” *Mitchell*, 6 Ohio St. 3d at 483-4. As this Court noted, commission orders must clearly identify the evidence relied upon and the rationale underlying its decision in order to permit reviewing courts “to readily discern the specific grounds relied upon and whether the record supports such a finding.” *Id.*

Subsequent holdings, moreover, have made clear that it is not enough for the commission to broadly proclaim that it has relied on multiple reports, particularly where inconsistencies between the reports relied on make it impossible to discern the commission’s actual conclusion regarding the claimant’s injuries. In *State, ex rel. Frigidaire Div., General Motors Corp. v. Industrial Commission*, this Court issued a limited writ ordering the commission to specifically state the basis of its decision. *Frigidaire*, 35 Ohio St. 3d. 105. The commission in *Frigidaire* relied upon two doctors’ reports, one which addressed the claimant’s degree of impairment due to the allowed medical conditions, while the other addressed the claimant’s degree of impairment on both an allowed psychological condition and a nonallowed psychological condition. *Id.* at 107. The court reasoned that *Mitchell* was violated because the commission failed to include an explanation of what evidence in particular it relied upon and how it arrived at its decision. *Id.* Thus, the ultimate findings of the commission could have been improperly based upon the unallowed condition. *Id.* This court held that the commission’s failure to state the evidence upon which it relied and to provide an explanation of how it arrived at its decision constituted an abuse of discretion. *Id.*

In *State, ex rel. Noll v. Industrial Commission*, this Court acknowledged that the commission continued to forgo following the requirements set out in *Mitchell* and



Frigidaire, and reiterated what is required of commission orders when granting or denying benefits to a claimant. *State, ex rel. Noll v. Indus. Comm.*, 57 Ohio St. 3d 203 (1991). In *Noll*, the commission denied a claimant's application for PTD by citing a doctor's report and some non-medical factors, but failed to provide a sufficient explanation of how those factors were applied to support the denial of the claimant's application. *Id.* This Court held that "an order of the commission should make it readily apparent from the four corners of the decision that there is some evidence supporting it." *Id.* at 206. Further, this Court held:

"a meaningful review can be accomplished only if the commission prepares orders on a case-by-case basis which are fact specific and which contain reasons explaining its decisions...Such order[s] must specifically state what evidence has been relied upon to reach its conclusion and, most important, briefly explain the basis of its decision."

Id. This Court issued a limited writ to the commission to vacate its order denying the claimant's application. *Id.*

In *State, ex rel. Zollner v. Industrial Commission*, the commission relied upon four reports in denying an application for PTD. *State, ex rel. Zollner v. Industrial Com. of Ohio*, 1989 Ohio App. LEXIS 3985 (10th App. Dist. 1989). One of the reports relied on was "completely contrary" to the commission's findings. *Id.* at 2. The referee, and the Court of Appeals in adopting the referee's decision, found that because "there was a direct substantive conflict in the reports, upon which the commission 'particularly' based its decision,...relator was not informed of the reason for his denial of benefits, which is the rationale of the *Mitchell* analysis." *Id.* The court and referee both cited to *State, ex rel. Lance, v. Industrial Commission*, another case in which the commission relied on



contradictory reports. *Id.* at 2-3. (citing *State, ex rel. Lance, v. Indus. Comm.* (Feb. 23, 1988), Franklin App. No. 87AP-24 (Memorandum Decision)). In *Lance*, the court issued a limited writ of mandamus when the commission relied upon two reports: one which found the claimant was permanently and totally disabled and the other which found the claimant was *not* permanently and totally disabled. *State, ex rel. Zollner*, 1989 Ohio App. LEXIS 3985 at 3. The court in *Lance* held that “by citing contradictory reports as the evidence it particularly relied upon for its decision, the commission has in effect failed to submit a reason or basis for its decision.” *Id.* The court in *Zollner* held that, since its case was similar to that in *Lance*, *Lance*’s holding was controlling. *Id.* at 4. Further, the court in *Zollner* performed an analysis of applicable Supreme Court case law and found that this Court “will not sanction the commission’s mere citation of doctor’s reports as justification for its decision if those reports are in conflict.” *Id.* at 8. The court held that there must be an explanation citing the basis of the commission’s decision and the evidence it relied upon to be in compliance with *Mitchell, supra. Id.*

Though not relying on two contradictory reports, the commission in *State, ex rel. Lopez v. Industrial Commission* did rely on an internally inconsistent report when it found the claimant to be capable of remunerative employment. *State, ex rel. Lopez v. Indus. Comm.*, 69 Ohio St. 3d 445 (1994). The claimant in *Lopez* was a former foundry worker who suffered a work-related back injury. *Id.* In reference to his application for PTD, the commission had the claimant examined by a Dr. Katz who wrote a report which found no objective findings so as to preclude the claimant from “gainful employment” based on the injury and that claimant could return to heavy labor, but then assessed a 50% permanent partial impairment “in view of the findings at this time.” *Id.* at 449. This



Court found the report to be “so internally inconsistent that it cannot be ‘some evidence’ supporting the commission’s decision.” *Id.* Further, this Court held that “being unable to reconcile these seeming contradictions, we find the report is not ‘some evidence’ on which to predicate a denial of permanent total disability compensation.” *Id.*

It should, given the foregoing authorities, be clear that the commission does not satisfy the requirements of *Mitchell* and *Noll* merely by naming one or more reports as the ostensible basis for its decision. If a report is found to be internally inconsistent, or if two or more reports purportedly relied upon contradict each other, the order fails to afford the requisite explanation for the commission’s decision.

This, Appellant submits, is precisely what happened in the case at bar. In his report dated February 16, 2008, Dr. Query stated that the Appellant’s whole person impairment is 3% and further opined that no work restrictions were necessary based on the allowed psychological condition. (Emphasis added).

In contrast, Dr. Richetta, in his report of March 21, 2008, found Appellant’s whole person impairment based upon the allowed psychological condition to be 30%. Dr. Richetta found that Appellant suffers mild impairment of activities of daily living and moderate impairment of his *social functioning*, concentration, persistence, pace and *adaptation to stress in work-like settings* based on the allowed psychological condition. Dr. Richetta further opined that the Appellant would be limited to “work in a setting with *few social demands* where he would *not have to engage in rapid decision making*.” (Emphasis added). Dr. Richetta explained that this limitation would be necessary because “[Appellant’s] depression *reduces his ability to process information quickly*”. (Emphasis added).



The commission cannot rely 'particularly' upon the reports of both Dr. Query and Dr. Richetta, as their respective opinions regarding the Appellant's degree of impairment and functional limitations resulting from the allowed psychological condition are so inconsistent that acceptance of either opinion necessarily precludes acceptance of the other. Much like *Lance* and *Zollner*, the commission in the case at bar has attempted to rely 'particularly' upon multiple reports, not all of which are consistent with its decision: the Query report supports the commission's findings while the Richetta report does not. The Query report finds no psychological impairments of Appellant's functional capabilities, while the Richetta report finds significant functional limitations based on his allowed conditions, including impairment of activities of daily living, social functioning, concentration, pace, persistence, information processing, decision making and stress tolerance. The commission's purported reliance on the contradictory opinions of Drs. Query and Richetta renders the commission's factual findings regarding the extent of Appellant's psychological impairment unclear. The result of this lack of clarity is that neither Appellant nor this court can determine from the four corners of the commission's order the basis for its decision as required by *Mitchell* and *Noll*.

Appellant respectfully suggests that Judge Tyack's dissenting opinion succinctly identified the fundamental flaw in the commission's order: "Drs. Richetta and Query seem to be describing two different people. Only one can be right. The commission should have made a factual determination as to who was credible." (Appendix p. 10).

Even if it is assumed, *arguendo*, that these obviously contradictory reports could be reconciled, nothing in the order of the SHO serves to resolve the manifest conflict between the reports. Therefore, without further explanation of the evidence relied on and

the basis for its decision, the commission abused its discretion by relying on contradictory and conflicting reports, and the court below erred in denying mandamus relief.

II. PROPOSITION OF LAW #2: A vocational expert's opinion regarding transferable skills which is based solely on work activities which the injured worker performed prior to his injury, and which conflicts with medical or psychological evidence relied on by the commission which shows that the injured worker has significant impairments directly affecting his ability to perform the skills involved in his pre-injury employment, is not 'some evidence' to support denial of PTD.

When reviewing applications for PTD, the commission is required to consider not only medical evidence concerning the permanent physical and psychological impairments resulting from a claimant's work-related injury, but also a variety of non-medical factors which relate to the issue of whether the claimant is, from a vocational perspective, able to perform remunerative employment. In *State, ex rel. Stephenson v. Industrial Commission*, this Court held that the commission, in adjudicating the issue of PTD, must consider the claimant's ability to re-enter the workforce in light of medical reports demonstrating the nature and extent of his or her abilities and limitations as well as such non-medical factors as age, education, work history, sociological data and "any other relevant factors." *Stephenson*, 31 Ohio St. 3d at 170.

In the instant case, the Staff Hearing Officer relied on the Vocational Assessment Report of Denise O'Conner, MA, dated May 19, 2008. This report was completed without a personal evaluation, interview or testing of Appellant by Ms. O'Conner. Ms. O'Conner found that the Appellant had transferable skills, including the ability to drive, secure employment, perform repetitive work, *deal with people*, obtain precise limits and

tolerances, follow specific instructions, *perform under stress*, *make judgments* and a stable work history. This opinion, however, was based entirely on the abilities Appellant demonstrated in his *pre-injury* work activity and directly conflicts with Dr. Richetta's report which indicates that Appellant's most significant impairments are in the very areas which Ms. O'Conner identified as "transferable skills".

As the Court noted in *Stephenson*, the vocational assessment must consider the Appellant's ability to re-enter the workforce *in light of medical reports*. *Id.* Ms. O'Conner opined that Appellant has transferable skills, based on his *pre-injury* work activity, which include the ability to deal with people, perform under stress, and make judgments. The vocational evaluation further states that with these skills Appellant could rejoin the workforce as a telemarketer, security guard or dispatcher, all of which require performance under pressure, dealing with social situations and the ability to make rapid judgments.

The vocational evaluation of Ms. O'Conner is clearly inconsistent with, and contrary to, the psychological report of Dr. Richetta. Dr. Richetta's report – which the commission claims to have particularly relied on – finds that Appellant is impaired in his social functioning, concentration, persistence, pace, stress tolerance, information processing and decision making based on his *post-injury* allowed psychological condition. Further, Dr. Richetta finds that Appellant can only work in a setting with few social demands and where he would not need to engage in rapid decision-making as his ability to process information quickly has been reduced by his allowed psychological condition.

By professing particular reliance upon the reports of both Ms. O'Conner and Dr.

Richetta, the commission's order suggests that Appellant can deal with people, though he has impairment of social functioning; perform under stress while suffering an impairment of his ability to adapt to stress in work-like settings; make judgments though the information processing and decision making abilities he once demonstrated are now significantly impaired; and work to precise tolerances, though suffering from impaired concentration and persistence to task. Much as Judge Tyack observed regarding the inconsistent doctors' reports, the O'Conner and Richetta reports seem to be describing two completely different people.

Appellant does not dispute that, before his injury and the resultant psychological impairments, he did demonstrate many of the skills and traits discussed in the O'Conner report. The report of Dr. Richetta, however, clearly indicates that Appellant's psychological condition has left him cognitively and emotionally unable to function as he did before. The purpose of vocational assessment is to evaluate the claimant's present or future potential for sustained remunerative employment. An opinion regarding transferable skills which is based solely on what the injured worker was able to do before he was injured cannot be relied upon as an accurate indicator of present or future capabilities where, as here, psychological evidence expressly found to be reliable demonstrates that the allowed condition has significantly diminished the claimant's pre-injury emotional or cognitive capabilities. The commission's reliance on a vocational assessment and a psychological evaluation which are in direct conflict renders the factual finding regarding the impact of Appellant's psychological condition on his potential for employment unclear, and its order deficient under *Mitchell* and *Noll*.



III. PROPOSITION OF LAW #3: A report which attempts to exclude a pre-injury baseline impairment, even when one does not exist, cannot constitute 'some evidence' upon which the commission may rely to deny PTD.

The Staff Hearing Order dated June 9, 2008, found that the primary focus of Appellant's PTD application concerned the allowed psychological conditions. (Appendix p.37-40). In that regard, the SHO found Dr. Query's report, as well as that of Dr. Richetta, to be persuasive. As previously discussed, Dr. Query found Appellant's whole person impairment based upon the allowed psychological condition to be 3% and opined that no work restrictions were needed. (Supp. p.126). This opinion, however, was accompanied by a highly problematic explanation concerning how it was arrived at. Specifically, Dr. Query stated in his report dated February 18, 2008,:

"The reader should keep in mind that the intent of an evaluation of this nature is *not* to base the impairment on the severity of the allowed condition(s) themselves, but instead to derive the percentage of impairment relative to the effects on aspects of adaptive daily functioning as the result of the allowed condition(s). *Pre-injury baseline impairment of daily functioning has been attempted to be excluded* from consideration of estimates of impairment from a psychological point of view and hence, the net effect of his psychological impairment is addressed, based solely on his industrial injury.

(Supp. p.125) (Emphasis added).

Dr. Query's report is internally flawed for two reasons. First, there is no evidence that Appellant had any "pre-injury baseline impairment" psychologically. However, Dr. Query talks about *excluding* such an impairment. This suggests that Dr.

Query may have believed Appellant has a greater degree of impairment, or that his psychological functioning is in fact impaired, but that the doctor adjusted his impairment rating and his opinion regarding work restrictions so as to exclude that portion of the psychological condition which he attributed to "pre-injury baseline impairment." Indeed, one is hard-pressed to imagine any reason for Dr. Query's comments in this regard if such is not the case. Therefore, his opinion regarding Appellant's whole person impairment based upon the allowed psychological condition is unclear and any order based on this report is equally unclear.

Second, Dr. Query's report is flawed in that there is no authority for the exclusion of a pre-injury baseline, even where the claim has been allowed on the basis of aggravation of a pre-existing condition. In *Hamilton v. Keller*, the court determined that "[e]mployers take their workmen as they find them and assume the risk of having a weakened condition aggravated by some injury which might not hurt or bother a perfectly normal, healthy person." *Hamilton v. Keller*, 11 Ohio App. 2d 121 (3rd App. Dist. 1967). Moreover, as this Court pointed out in *Schell v. Globe Trucking, Inc.*, there is no provision in the Worker's Compensation Act which authorizes the commission to exclude what Dr. Query refers to as "pre-existing baseline impairment" and base compensation awards solely on the additional increment of impairment felt to be attributable to the aggravation. *Schell v. Globe Trucking, Inc.*, 48 Ohio St. 3d 1, 4 (1990); *See also State, ex rel. Republic Rubber Div., v. Morse*, 157 Ohio St. 288, 293 (1952).

There is no evidence of Appellant ever suffering from a pre-existing psychological condition or impairment and Dr. Query's report fails to identify any such



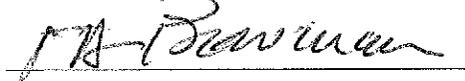
pre-existing disorder. This, coupled with the fact that the psychological allowance was not based on an aggravation theory, renders Dr. Querry's discussion regarding exclusion of "pre-existing baseline impairment" virtually incomprehensible. Moreover, the attempt to exclude "pre-existing baseline impairment" would be legally improper even if this case involved aggravation of a pre-existing condition. Despite the lack of factual or legal foundation, however, Dr. Querry clearly stated in his report that he sought to exclude "pre-existing baseline impairment" and the commission and court below erred in concluding that this did not affect the validity of his opinion. Dr. Querry's report is doubly flawed and is not competent evidence upon which the commission can rely to deny Appellant's request for PTD.

CONCLUSION

For the above reasons, Appellant respectfully submits that he has sustained his burden of proof demonstrating an abuse of discretion for which a writ of mandamus will lie. Appellant submits that this Court should issue a writ of mandamus compelling the Commission to vacate the June 9, 2008, order and to issue in its place an order granting Appellant's application for PTD compensation. In the alternative, and at a minimum, this Court should issue a limited writ directing the Commission to vacate the June 9, 2008, order and to conduct further proceedings to determine Appellant's entitlement to Permanent Total Disability Compensation.



Respectfully submitted,



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CERTIFICATION

This is to certify that the foregoing was served upon Attorney for Respondent, Industrial Commission of Ohio, John R. Smart, Assistant Attorney General, 150 East Gay Street, 22nd Floor, Columbus, Ohio 43215-3130; and upon Respondent Employer, Farmland Foods, Inc., 27 South Perry Street, New Riegel, Ohio 44853-9778 by regular U.S. Mail this 24th day of May, 2010.



Theodore A. Bowman
Attorney for Appellant,
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APPENDIX

Notice of Appeal	1-3
Tenth District Court of Appeals Judgment Entry	4
Tenth District Court of Appeals Decision	5-10
Tenth District Court of Appeals Magistrate's Decision	11-35
Order of the Industrial Commission of Ohio	36
Order of the Staff Hearing Officer	37-41



IN THE SUPREME COURT OF THE STATE OF OHIO

State of Ohio ex rel.
Marlon R. Ferguson,

Appellant,

v.

National Machinery

and

Farmland Foods, Inc.

and

Industrial Commission of Ohio

Appellees.

* 09-2359

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

* Court of Appeals
* 08 APD 10902

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NOTICE OF APPEAL OF RIGHT OF APPELLANT, MARLON R. FERGUSON

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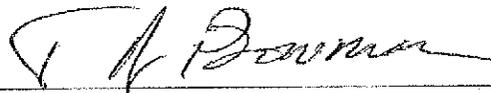
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**NOTICE OF APPEAL OF RIGHT
OF APPELLANT, MARLON R. FERGUSON**

Now comes the Appellant, Marlon R. Ferguson, by and through counsel, and, pursuant to Rule II of the Supreme Court Practice Rules, hereby gives notice of appeal to the Supreme Court of Ohio from the Judgment of the Franklin County Court of Appeals, Tenth Appellate District, entered in Court of Appeals case number 08 APD 10902 on November 24, 2009, in accordance with its Decision filed on that same date. Copies of both the Judgment Entry and the Decision are attached.

This case originated in the Franklin County Court of Appeals, Tenth Appellate District, thus making this an appeal of right pursuant to Rule II, Section 1(A)(1) of the Supreme Court Practice Rules.

Respectfully submitted,



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CERTIFICATION

This is to certify that the foregoing *Notice of Appeal of Right of Appellant, Marlon R. Ferguson* was served upon Attorney for Appellee, Industrial Commission of Ohio, John R. Smart, Assistant Attorney General, 150 East Gay Street, 22nd Floor, Columbus, Ohio 43215-3130 and upon Attorney for Appellee, Farmland Foods Inc., Vincent S. Mezinko, 709 Madison Ave., Suite 301, Toledo Oh 43604, by regular U.S. Mail this 22 day of December, 2009.



Theodore A. Bowman



16x

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. Marlon R. Ferguson, :

Relator, :

v. :

No. 08AP-902

National Machinery, Farmland Foods, Inc., :
and Industrial Commission of Ohio, :

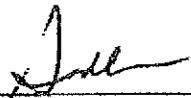
(REGULAR CALENDAR)

Respondents. :

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on November 24, 2009, the objections to the decision of the magistrate are 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 Susan Brown

IN THE COURT OF APPEALS OF OHIO 2009 NOV 24 PM 12:10
TENTH APPELLATE DISTRICT CLERK OF COURTS

State of Ohio ex rel. Marlon R. Ferguson, :
Relator, :
v. : No. 08AP-902
National Machinery, Farmland Foods, Inc., : (REGULAR CALENDAR)
and Industrial Commission of Ohio, :
Respondents. :

D E C I S I O N

Rendered on November 24, 2009

Gallon, Takacs, Boissoneault & Schaffer Co., L.P.A., and Theodore A. Bowman, for relator.

Law Offices of Margelefsky & Mezinko, LLC, and Vincent S. Mezinko, for respondent Farmland Foods, Inc.

Richard Cordray, Attorney General, and John R. Smart, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

SADLER, J.

{¶1} Relator, Marlon R. Ferguson ("relator"), has filed this original action requesting that this court issue a writ of mandamus ordering respondent Industrial

Commission of Ohio ("commission") to vacate its order denying him permanent total disability ("PTD") compensation, and to enter a new order granting that compensation.

{¶2} Pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth Appellate District, this matter was referred to a magistrate who issued a decision including findings of fact and conclusions of law, which is appended to this decision. Therein, the magistrate concluded that the commission did not abuse its discretion and that we should deny the requested writ. Relator filed objections to the magistrate's decision and the commission filed a memorandum opposing those objections. This cause is now before the court for a full review.

{¶3} In his first objection, relator argues that the magistrate erred in rejecting his argument that the commission abused its discretion in relying on the Query and Richetta reports because the two reports are contradictory with respect to relator's whole-person impairment percentage and restrictions. The magistrate reasoned that the commission had not abused its discretion because it was appropriate to rely upon the Query report for relator's functional capacity percentage and upon the Richetta report for relator's psychosocial employment restrictions.

{¶4} Relator argues that the magistrate is merely speculating as to the manner in which the commission used the two reports because the commission's order does not so specify. Relator cites the case of *State ex rel. Mitchell v. Robbins & Myers, Inc.* (1983), 6 Ohio St.3d 481, in which the Supreme Court of Ohio refused to consider a reason for the commission's action other than the reason the commission actually gave in its order. We disagree with relator's contention that the commission did not give adequate indication of how it was relying on the Query and Richetta reports.

{¶5} In her 4-page order, the staff hearing officer ("SHO") detailed all of the findings in each professional report, and concluded that "the injured worker has the residual functional capacity to perform sedentary work activity, as described by Doctors Richetta, Querry, Marino, Eby, and Wirebaugh, when only the impairment arising from the allowed conditions is considered." (7/8/08 Record of Proceedings, 4.) It is clear that the SHO relied on those experts' reports to determine that relator possessed residual functional capacity for sedentary work and, on this point, both Querry and Richetta had agreed.

{¶6} Separately, the SHO found that "the injured worker is currently vocationally qualified to obtain and perform employment activity within the injury-related physical and psychological limitations set forth by the above-mentioned doctors. *The vocational assessment report of Denise O'Conner from VocWorks is relied upon in making this finding.*" (Emphasis added.) *Id.* Review of the VocWorks report reveals that, in performing her assessment, O'Conner took into account the most severe psychological restrictions found in the professional reports, to wit: the Richetta restrictions related to working under few social demands and without having to engage in rapid decision-making. (See pages 5 and 8 of VocWorks report.) It is clear that the SHO relied on the *vocational report* in determining that, even when the most severe psychological restrictions are considered, there were jobs in the labor market in which relator was capable of working.

{¶7} The SHO made two separate findings in denying the PTD application. First, she found that relator has residual functional capacity. For this she relied on, *inter alia*, the Querry and Richetta reports, and upon this point both of those professionals were in

agreement. Second, she found that relator is capable of obtaining and performing employment activity within his limitations, given his work history, transferable skills, age and education, and given factors pertaining to job availability; upon this point the SHO relied upon the vocational expert report.

{¶8} Upon a thorough review of the record and consideration of the parties' arguments, we agree that the commission did not abuse its discretion in relying on the Query and Richetta reports, and we disagree with relator's contention that the magistrate impermissibly attributed certain reasoning to the commission that the commission itself did not explain in its order. For these reasons, relator's first objection is overruled.

{¶9} In his second objection, relator argues that the magistrate made a mistake of law in concluding that the Richetta report and the O'Conner vocational report are compatible and constitute some evidence to support the commission's order. Relator argues that while O'Conner stated that relator has transferable skills, this is incorrect because Richetta found that relator's moderate psychological impairment impairs his social functioning, concentration, and ability to perform under stress. Relator contends that the vocational report impermissibly relies upon transferable skills that relator no longer retains. However, neither Richetta nor any other professional stated that relator *no longer retains* any transferable skills; Richetta merely opined that certain skills – social functioning, concentration, and performance under stress – have been diminished. O'Conner took this fully into account in performing her analysis. The vocational report is "some evidence" upon which the commission could rely; therefore, we find no error in the magistrate's analysis of this point and overrule relator's second objection.

{¶10} In his third objection, relator argues that the magistrate erred in finding that the Query report constitutes some evidence. According to relator, the Query report is ambiguous because in it Query states that he ignored any pre-injury baseline impairment when, in fact, there is no evidence that relator had any pre-injury baseline impairment. The magistrate concluded that when an expert states that he is ignoring something that does not in fact exist, this does not make the report ambiguous, nor does it call into question the reliability of the report. We agree. Relator makes no new argument on this point. Relator does not explain, and we are unable to divine, how an expert's ignoring a fact that turns out not to be present anyway constitutes an ambiguity or other defect in the report. Accordingly, we overrule relator's third objection.

{¶11} Having undertaken an independent review of the record, we find that the magistrate has properly determined the facts and the applicable law. Accordingly, we overrule relator's objections, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein, and we deny the requested writ of mandamus.

*Objections overruled,
writ of mandamus denied.*

BROWN, J., concurs.
TYACK, J., dissents.

TYACK, J., dissenting.

{¶12} I respectfully dissent.

{¶13} I do not see how the commission can rely upon both a report which finds a claimant to be 30 percent impaired (Richetta report of March 27, 2008) and a report which finds a claimant to be only three percent impaired (Query report of February 19, 2008).

The Query report finds no work restrictions. The Richetta report finds that significant restrictions exist, namely that Marlon Ferguson "can work only in a setting with few social demands and where he would not have to engage in rapid decision making. His depression reduces his ability to process information quickly."

{¶14} Drs. Richetta and Query seem to be describing two different people. Only one can be right. The commission should have made a factual determination as to who was credible.

{¶15} If the report deemed credible is that of Dr. Richetta, then a more detailed analysis of the vocational factors, commonly called *Stephenson* factors, should be made. *State ex rel. Stephenson v. Indus. Comm.* (1987), 31 Ohio St.3d 167. I would grant a limited writ of mandamus to compel the commission to make the determination as to credibility and then to adjudicate the merits of Marlon Ferguson's application in light of that determination. Because the majority does not do so, I respectfully dissent.

APPENDIX
IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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CLERK OF COURTS

State of Ohio ex rel. Marlon R. Ferguson, :

Relator, :

v. :

National Machinery, Farmland Foods, Inc., :
and Industrial Commission of Ohio, :

Respondents. :

No. 08AP-902

(REGULAR CALENDAR)

MAGISTRATE'S DECISION

Rendered on July 30, 2009

Gallon, Takacs, Boissoneault & Schaffer Co., L.P.A., and Theodore A. Bowman, for relator.

Law Offices of Margelefsky & Mezinko, LLC, and Vincent S. Mezinko, for respondent Farmland Foods, Inc.

Richard Cordray, Attorney General, and John R. Smart, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶12} In this original action, relator, Marlon R. Ferguson, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to

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

Findings of Fact:

{¶13} 1. On July 7, 1991, relator injured his lower back. The industrial claim (No. L80479-22) is allowed for "lumbar strain; aggravation of pre-existing spondylolysis and spondylolisthesis of L5-S1." On October 5, 1999, relator again injured his lower back. The industrial claim (No. 99-540008) is allowed for "sprain lumbosacral; aggravation of L3-4, L4-5, L5-S1 spondylolisthesis; aggravation of L3-4, L4-5, L5-S1 disc degeneration; dysthymic disorder; L1-L2 displacement."

{¶14} 2. On December 12, 2007, relator filed an application for PTD compensation. In support of his application, relator submitted a report dated September 14, 2007 from treating psychologist Marcia Ward, Ph.D. In her report, Dr. Ward opined:

With regards solely to the severity of psychological symptoms, specifically his depression, it is my opinion that his depression is intertwined and linked to his physical limitations and the chronic pain that stems from his work injury on October 5, 1999. As long as his pain continues and his physical abilities remain impaired (and worsening), Mr. Ferguson's depression will persist. At times I would expect his depression to be more severe that [sic] at other times given his pain levels and limitations. His depression significantly affects his ability to tolerate frustration, prevents him from interacting consistently and appropriately with others (even his own wife and family) and further eats away at the minimal amount of self-worth he still possesses. Finally, the depression Mr. Ferguson experiences prevents him from consistently carrying out any type of work duties and thus interferes significantly with his daily life. It is therefore my opinion that Mr. Ferguson's dysthymia renders him permanently and totally disabled.

{¶15} 3. In further support of his application, relator submitted a report dated August 23, 2007 from Jeffrey F. Wirebaugh, M.D., which stated:

Marion [sic] R. Ferguson was evaluated on August 23, 2007 for an opinion as to whether he is permanently removed from his former job as a laborer in a meat packing factory and what his physical restrictions and functional limitations are. The claimant was working for Farmland Foods when he was injured. He tells me that this is a meat packing facility. He did a variety of jobs all very physical. He lifted boxes of hams weighing 60 to 80 pounds and did other tasks that involved lifting, squatting, climbing and being on his feet all day.

* * *

Due to the impairments from his allowed conditions the claimant is limited to sedentary activity. He can lift a maximum of 10 pounds. He cannot lift this on a frequent or repetitive basis. He can do no activity that requires bending, twisting or turning. He cannot squat, kneel, crawl or climb. He cannot maintain any one position for more than half an hour without being allowed to change positions. He cannot operate any foot pedals or controls with his lower extremities.

The limitations and restrictions in the claimant's activity is based on the impairments which result from his allowed physical conditions of lumbosacral sprain, aggravation of spondylolisthesis at L3-4, L4-5, and L5-S1, aggravation of disc degeneration at L3-4, L4-5 and L5-S1 and L1-2 displacement. We did not consider the allowed psychological conditions in our opinion.

In my opinion the significant restrictions and limitations cause him to be unable to return to his former position as a laborer at Farmland Foods. This was a job that required him to be able to do heavy and unrestricted physical labor.

{¶16} 4. Under the education section of the PTD application, relator indicated that the 11th grade was the highest grade of school he completed and this occurred in

1973. He has not received a certificate for passing the General Educational Development (GED) test. He has not been to a trade or vocational school.

{¶17} Among other information sought, the application form posed three questions: (1) "Can you read?" (2) "Can you write?" and (3) "Can you do basic math?" Given the choice of "yes," "no" and "not well," relator selected the "yes" response to all three queries.

{¶18} 5. The PTD application form also asks the applicant to provide information regarding his work history. Relator stated that he was employed as a "laborer" for respondent Farmland Foods, Inc. ("employer"), from October 1999 to November 2002.

{¶19} From April 1994 to November 1998 and July 1988 to January 1992, relator was employed as a "laborer" for a company that performs "machine manufacturing." He was employed as a "security guard" during 1999. He was self-employed as an "auto mechanic/wrecker operator" from 1973 to 1999.

{¶20} The application form also asks the applicant to describe the basic duties of each job he has listed. Relator completed this information on the application.

{¶21} 6. On January 24, 2008, at the request of the employer, relator was examined by Joseph Marino, M.D. In his eight-page narrative report, Dr. Marino opined:

* * * [B]ased on the patient's account of activities and observations made during my assessment, it is also apparent that Mr. Ferguson retains physical capabilities. He can drive a vehicle for at least 40 minutes, ambulate up to 20 minutes with a cane, and sit at least 30 minutes in a standard chair. He has full use of his upper extremities and communication abilities. It is, therefore, my professional medical opinion that Mr. Ferguson is not permanently and

totally disabled as a result of the allowed conditions of his workers' compensation injury claim.

* * *

* * * Mr. Ferguson is capable of doing sedentary work with appropriate restrictions. Restrictions should include no lifting more than 10 pounds, no work below hip level or above shoulder level, no pushing/pulling with greater than 10 pounds of force, no reaching beyond arms length, no climbing steps or ladders, and no repetitive twisting to his right or left. In addition, Mr. Ferguson should have freedom to sit or stand and change position as needed. Without additional conditioning, Mr. Ferguson's workday should be limited to 4 hours per day and 20 hours per week.

* * *

In my opinion, for Mr. Ferguson to successfully return to the work place, I believe he would benefit from a conditioning program to improve endurance and ability to perform positional transfers.

{¶22} 7. On February 16, 2008, at the request of the employer, relator was examined by psychologist Mark Query, Ph.D. In his 12-page narrative report, Dr. Query wrote:

Impairment Percent: Under the AMA Guide Fifth Edition, Table-4 classification of impairment due to mental and behavioral disorders, the classes of impairment percentages have been noted above. The impairment percent of mental health functioning is presented below. This opinion is limited to impairment factors only and are stated in a whole number as impairment to the whole body.

The reader should keep in mind that the intent of an evaluation of this nature is *not* to base the impairment on the severity of the allowed condition(s) themselves, but instead to derive the percentage of impairment relative to the effects on aspects of adaptive daily functioning as the result of the allowed condition(s). Pre-injury baseline impairment of daily functioning has been attempted to be excluded from consideration of estimates of impairment from a

psychological point of view and hence, the *net* effect of his psychological impairment is addressed, based solely on his industrial injury.

Overall, the total percentage of whole person impairment based on the allowed psychological condition in this claim from a purely psychological point of view is 3% at this point in time. His overall functioning from a psychological point of view, based upon the indices above, is relatively good. What the injured worker outwardly presents, and is easily observed, is frustration from not being able to work. Fortunately though, he is able to be employed.

* * *

No work restrictions, relative to his claim allowance, are recommended. While he reported strained concentration when bored, this is an artifact of something other than his claim, even though it may be a safety liability in general. Other than that, his energy level, motivation, social skills, memory functioning, cognitive processing and decision-making are adequate for remunerative employment. This gentleman has a very strong and well developed work ethic.

(Emphases sic.)

{¶23} 8. On March 17, 2008, at the commission's request, relator was examined by Paul J. Eby, M.D. In his five-page narrative report, Dr. Eby opined:

* * * [T]he whole person impairment rating for all of the allowed physical conditions in both of his claims is 27%.

* * * Mr. Ferguson is capable of only sedentary level activity, with occasional walking of short distances with a cane, being able to sit and stand ad lib, and no climbing of stairs.

{¶24} 9. On March 17, 2008, Dr. Eby completed a physical strength rating form. On the form, Dr. Eby indicated by his mark that relator is capable of "sedentary" work. For further limitations, Dr. Eby wrote: "Intermittent sit/stand as tolerated, limited walking with a cane[,] no climbing."

{¶25} 10. On March 21, 2008, at the commission's request, relator was examined by psychologist Raymond D. Richetta, Ph.D. In his seven-page narrative report, Dr. Richetta opined:

Discussion

The following is a summary of the Claimant's functional capacity in various domains of behavior:

* * *

B) Social functioning: He socializes with two friends but is otherwise not social. He is not involved in community groups. He has lost most of his social interest. The Claimant has a moderate impairment in social functioning due to the allowed psychological condition alone.

C) Concentration, persistence and pace: He described his concentration as mildly reduced. He tried to build model cars, started three, finishing none. He has difficulty focusing on television programs. He said he makes an effort while he is driving. He has a moderate impairment in concentration, persistence, and pace due to the allowed psychological condition alone.

D) Adaptation to stress in work/work-like settings: He feels stressed most of the time. He said he can be irritable easily. He feels "cranky and short-tempered." He sometimes verbalizes his opinion to the television, when watching a program. The Claimant has a moderate impairment in adaptation to stress in work-like settings due to the allowed psychological condition alone.

* * *

Opinion

* * *

The evaluation finds the allowed psychological condition, Dysthymic Disorder, to have reached maximum medical improvement. This opinion is based on the following evidence:

- The Claimant has had psychological/psychiatric treatment including individual psychotherapy since 2004; he also takes psychotropic medication
- The Claimant's psychological symptoms continue, including mild to moderate depressive symptoms
- The Claimant's psychological symptoms are likely to continue at current levels for the foreseeable future in spite of continued psychological/psychiatric intervention

**** What is the percentage of permanent impairment arising from each of the highlighted allowed conditions in each claim? If there is none, please indicate.*

The evaluation finds the allowed psychological condition, Dysthymic Disorder, to be a Class 3, Moderate impairment, corresponding to a 30% impairment of the whole person (AMA #4, Chapter 14, text, page 301; AMA #5, Chapter 14).

(Emphasis sic.)

{¶26} 11. On March 21, 2008, Dr. Richetta completed a form captioned "Occupational Activity Assessment[,] Mental & Behavioral Examination." On the form, Dr. Richetta indicated by his mark: "This injured worker is capable of work with the limitation(s) / modification(s) noted below."

{¶27} Below the above language, in his own hand, Dr. Richetta wrote:

He can work only in a setting with few social demands, and where he would not have to engage in rapid decision making. His depression reduces his ability to process information quickly.

{¶28} 12. Much earlier, on August 31, 2006, some 15 months prior to the filing of the PTD application, relator was examined by psychologist Anthony M. Alfano, Ph.D.,

at the request of the Ohio Bureau of Workers' Compensation ("bureau"). In his five-page narrative report, Dr. Alfano opined:

[One] QUESTION: Has the injured worker reached a treatment plateau that is static or well stabilized, at which no fundamental, functional or psychological change can be expected within reasonable medical probability in spite of continuing medical or rehabilitation procedures (maximum medical improvement)? Include rationale for your decisions.

ANSWER: One of the reasons given why he is depressed is that he is no longer able to engage in his pre-injury activities. The patient informed me that he wants to return to work. He and his psychologist, Dr. Ward, have begun to discuss vocational alternatives. However, as these discussions take place, it would be my hope that over the next six months he may identify a job in which he can engage and return to work[.] Since he desires to return to work, I feel that he has not yet reached MMI.

[Two] QUESTION: Can the injured worker return to his former position of employment? If yes, are there any restrictions or modifications?

ANSWER: No. This patient has had a lifting injury. He has had two surgeries and he still has pain in the lumbar area. He has had a fusion with rods and has two cages and can no longer bend the way he did in the past. So physically, he can not perform the type of labor that he has done in the past when he was working. Because of his inability to engage in this type of work, he became depressed.

[Three] QUESTION: Please provide a summary of any functional limitations solely due to the psychological condition (s) in this claim(s). In other words, please indicate the type of work the injured worker can perform and supportive rationale for your opinion.

ANSWER: The patient is depressed. The depression stems from the fact that he can no longer engage in pre-injury activities. He and his wife do not even sleep together and have not had normal sexual activity for four to five years. It is my hope that he and his psychologist will be able to identify a job which he can do, and that after he returns to work, he

will feel better about himself and the depression level will lower. Also, working will increase his mood because he will begin to feel that he has a purpose in life, and this will also lessen his depressive feelings.

{¶29} 13. On March 29, 2007, some eight months prior to the filing of the PTD application, relator was examined by Harvey A. Popovich, M.D., at the bureau's request. Dr. Popovich did not examine relator for the dysthymic disorder. In his five-page narrative report, Dr. Popovich opined:

I accept the allowed conditions of this claim and in response to your specific questions it is my independent medical opinion, based upon the history Mr[.] Ferguson provides of his injury and subsequent treatment as well as his current physical examination and review of the medical records made available that he has, with respect to the allowed physical conditions in this claim, reached maximum medical improvement[.] More than seven years have elapsed since the date of injury and it has been more than 15 months since his most recent back surgery[.] Consequently, it is my opinion that he has reached a treatment plateau that is well stabilized[.] No fundamental functional or physiologic change is anticipated with reasonable medical probability in spite of continuing medical, surgical, or rehabilitative procedures[.]

It is my independent medical opinion that Mr[.] Ferguson is unable to return to his former position of employment, which he describes as heavy and manual in nature[.] It is my opinion that he is capable of returning to work with restrictions[.]

{¶30} 14. The employer requested a vocational evaluation from VocWorks. Vocational expert Denise O'Conner prepared a ten-page narrative report dated May 19, 2008. The O'Conner report stated in part:

Transferable Skills Analysis:

The Oasys was used to analyze the claimant's transferable skills. The Oasys is a computerized tool that produces a

sample of jobs in which a person has transferable skills based on their education, work history, and capabilities.

The claimant's jobs were coded by the Dictionary of Occupational Titles as follows:

<u>Work Title</u>	<u>DOT Titles</u>	<u>* * *</u>
Security Guard	Security Guard	* * *
Tow Truck Operator	Warehouse	* * *
Production Machine Tender	Machine Operator	* * *
Engine-Lathe Operator	Engine Lathe Operator	* * *
Hand Packager	Meat Packer	* * *
Wrecker Operator	Wrecker Operator	* * *

The determination of the DOT code is based on a combination of the job title and the listed job tasks. Not all jobs will have a direct translation to DOT job titles. In this case, the coding is based on the job tasks and job title. Physical demand of the job can also be included if the physical demand of the job is an essential function of the job.

The claimant's work history is categorized as semi-skilled in nature. The majority of the medical report [sic] were of the opinion, Mr. Ferguson was capable of work which falls in the sedentary range for worker strength. Therefore, the TSA was performed using sedentary strength based on Mr. Ferguson's past work.

* * *

The Oasys provides several levels of transferability. The first level of transferability, closest match/closest transferability level, is defined as jobs that include the same work activities in the same industries that a person has performed in the past.

The good match/good transferability category would include jobs that are similar in work activities and similar industries of jobs that a person has performed in the past. In this category, a person would have most of the skills to do the job and may or may not need some training to master the job.

The fair match/fair transferability category is defined as the work activities and industries being less similar than the

good match. In this category, the person will need some training to master the job.

The potential match/potential transferability category is defined as a person having little to no skills to do the job, but based on their past experiences would be a good candidate to be trained for the job which is usually accomplished with on-the-job training.

In the claimant's case the TSA produced 11 matches in the good category, 61 position presented in the fair category and 62 potential positions.

Transferability skills include:

- Ability to drive
- Stable work history
- Ability to learn new skills based on past work history
- Ability to secure employment
- Ability to:

- Perform repetitive work
- Dealing with people
- Attain precise limit and tolerances
- Follow specific instruction
- Performing Under Stress
- Making Judgments and Decisions

Additionally, the claimant would be capable of unskilled and semiskilled work. Unskilled and semiskilled work does not necessarily require a person to have prior experience or transferable skills to be considered a candidate for the job. The job is learned through short-term on-the-job training. Short-term is defined as 1 to 90 days. Examples of these types of jobs would be telephone solicitor, appointment setter, information clerk, cashier, and bench assembly.

Discussion:

The majority of the medical and psychological reports review opined Mr. Ferguson was capable of employment. The medical reports documented he could become employed in a sedentary capacity for worker strength. The majority of psychological report also indicated he could become employed and that his psychological condition did not

preclude employment. His Therapist, Marcia Ward, Ph.D., opined he would not be employable based on his Dysthymia.

Mr. Ferguson did not graduated [sic] from high school. His PTD documented he can read, write and compute basic math. Mr. Ferguson reported in a case management initial report dated 11/12/03, he did not find a need for obtaining his GED. In a vocational plan dated 12/31/03, the writer documented Mr. Ferguson was willing to obtain his GED. But, his case was later closed as he decided he did not want to participate in job search services.

Mr. Ferguson participated in a vocational evaluation on 11/04/03. The testing completed indicated he has a high school reading level. Mr. Ferguson's academic scores indicated he would very likely be successful in short-term training.

In order to increase his ability to obtain employment, Mr. Ferguson would benefit from completing his GED and possibly short-term computer training. This type of training can be obtained in many state and local agencies and would increase the claimant's employment option in the sedentary range for worker strength.

* * *

Ohio Labor Market Information

According to the Ohio Department of Job and Family Services Bureau of Labor Market Information, the following positions within Mr. Ferguson's labor market, shows growth through the year 2010.

Telemarketers show an annual growth of 16% through the year 2010.

Security Guard/Monitor shows an annual growth of 36% through the year 2008[.]

Dispatcher shows an annual growth of 15% through the year 2110 [sic][.]

Opinion:

Based on the information available to this specialist, and considering the allowed conditions of the claims, it is this specialist's opinion, based on the claimant's education, physical abilities, skills, age and prior work experience, that the claimant is capable of sustained remunerative employment.

{¶31} 15. Following a June 9, 2008 hearing, a staff hearing officer ("SHO") issued an order denying relator's PTD application. The SHO's order explained:

All medical reports and evidence contained in the Industrial Commission file, as well as the evidence and arguments presented at hearing, were reviewed, considered and evaluated. This is based particularly upon the reports of Dr. Marino (01/24/2008), Dr. Eby (03/17/2008), Dr. Wirebaugh (08/23/2007), Dr. Popovich (03/29/2007), Dr. Querry (02/16/2008), and Dr. Richetta (03/21/2008).

The injured worker is a 52 year old male with an 11th grade education and a work history consisting of work as a laborer, security guard and work as an auto mechanic wrecker operator.

His first industrial injury occurred on 07/07/1991 when he was lifting a tote box off of a cart, setting it down on the floor and he fell. The injured worker received conservative treatment for the allowed condition in that claim.

The second industrial injury occurred on 10/05/1999 when he was lifting a box at work and felt a twinge in his right back. This claim has been treated with two surgeries consisting of a ray and cage and transverse process fusion at L5-S1 on 02/14/2003 and a discectomy and anterior lumbar interbody fusion with Cougar cages at L3-4 and L4-5 and posterior instrumentation to further stabilize the spine on 11/21/2005. He has also undergone Pain Management and receives epidural steroid injections for management of the allowed conditions in his claim. Injured worker has not worked since November 25, 2002.

Injured worker has been examined by a number of doctors regarding the allowed physical conditions in his claim. The most recent examination was performed by Dr. Marino on January 24, 2008. Dr. Marino recorded injured worker's work

history, as well as history of injury and performed an examination of injured worker. He noted injured worker's ongoing complaints and that injured worker's symptoms increase with walking, bending, squatting and sitting and that he uses a cane while walking about eighty percent of [the] time. Dr. Marino noted injured worker's daily activity which included dressing on his own, feeding his four Great Danes, putting corn out in tree cages for squirrels. He also noted that in warmer weather, injured worker is able to pick up after his dog with a long handled pooper scooper. He is able to mow his lawn on a sit-down mower in increments of about 20 to 30 minutes. Injured worker was recently able to build models but had recently lost interest. Dr. Marino noted that injured worker was able to get out of the house a couple of times a week and drive about three times a month to see his psychologist. Injured worker visits with Dr. Lakshmipathy, his Pain Management Specialist, two times per month and goes approximately two times a month to the pharmacy. His [sic] visits friends for 15 to 30 minutes a couple of times per week and injured worker indicated to Dr. Marino that he can drive for about forty minutes, walk for about 20 minutes and sit in a comfortable chair for about 30 minutes.

Dr. Marino opined, based upon the history, examination and review of medical records, that although injured worker is substantially limited in his physical capabilities as a result of chronic leg and back pain related to the allowed conditions in this claim, he is capable of doing sedentary work with restrictions. Said restrictions include no lifting more than 10 pounds, no work below hip level or above shoulder level, no pushing, pulling with greater than 10 pounds of force, no reaching beyond arm length, no climbing steps or ladders and no repetitive twisting to his right or left. He should also have the freedom to sit or stand and change position as needed. Dr. Marino also indicated that without additional conditioning his work day should be limited to four hours per day and 20 hours per week. Dr. Marino further indicated that injured worker would benefit from a conditioning program to improve his endurance and ability to perform positional transfers. Therefore, based upon the report of Dr. Marino, which is found persuasive, the Staff Hearing Officer finds that when only the impairment from the allowed physical conditions is considered, the injured worker is capable of returning to sedentary-type employment.

Pursuant to the finding York v. Industrial Commission (2002), Ohio 6101, the Staff Hearing Officer finds that injured worker's requirement that there be a sit/stand option and that he be limited to part-time work is not preclusive of his ability to perform sustained remunerative employment. The Court has found that part-time work still consists of sustained remunerative employment (See also State ex rel. Toth v. Industrial Commission (1997), 80 Ohio St. 3d 360).

The findings of Dr. Marino are echoed in the report of Dr. Eby, dated 03/17/2008, in which he found that injured worker would be capable of performing sedentary level activity with occasional walking of short distances with [a] cane, able to sit/stand and limited or no climbing of stairs. Dr. Wirebaugh's report, dated 08/23/2007, also indicated that injured worker's activity would be limited to sedentary activity when the allowed conditions in his claim were considered. Therefore, based upon the reports of Doctors Marino, Eby and Wirebaugh, which are found persuasive, this Staff Hearing Officer finds that when only the impairment arising from the allowed physical conditions is considered, the injured worker is capable of returning to work in a sedentary capacity.

In regard to the allowed psychological condition in this claim, Dr. Query performed an examination of the injured worker on 02/16/2008. Dr. Query noted injured worker's daily activities and indicated that he had a daily impairment between zero and five percent. His impairment in terms of concentration was found to be in between a zero to five percent. He was able to maintain focus and conversation. His mental pace and persistence when cognitively processing were very good. In terms of adaptation, Dr. Query found a level of impairment between zero and five percent. In terms of social functioning, Dr. Query found that injured worker was able to tolerate groups of people and crowds without emotional distress. He found a zero to five percent impairment in that function. Dr. Query opined given the allowed conditions in this claim, that injured worker has no work restrictions relative to the psychological condition in this claim. He found injured worker's energy level, motivation, social skills, memory functioning, cognitive processing and decision making adequate for remunerative employment. Injured worker was found to have a very strong and well-developed work ethic.

Dr. Richetta also examined injured worker on 03/21/2008 regarding the allowed psychological conditions in this claim. Dr. Richetta recorded many of the same activities of daily living and also pointed out that injured worker's ability to engage in household tasks is reduced by his physical limitations, not his psychological conditions. He, too, found a mild impairment in terms of injured worker's activities of daily living due to the allowed psychological conditions alone. Dr. Richetta found a moderate impairment in regard to injured worker's ability to socially function, concentrate and adapt to stress and work-like setting. Dr. Richetta found injured worker's ability to return to work was limited by a need to work only in a setting with few social demands and where he would not have to engage in rapid decision making. His depression was found to reduce his ability to process information quickly.

Also found persuasive is the report of Dr. Alfano [sic], dated 08/31/2006, to the extent that he found that injured worker's depression stems from the fact that he can no longer engage in pre-injury activities. He noted "it is my hope that he and his psychologist will be able to identify [a] job which he can do, and that after he returns to work, he will feel better about himself and the depression level will lower. Also, working will increase his mood because he will begin [sic] to feel that he has a purpose in life, and this will also lessen his depressive feeling."

Therefore, based upon the reports of Doctors Richetta, Query and Alfano [sic], which are found persuasive, the Staff Hearing Officer finds when only the impairment from the allowed psychological conditions is considered, the injured worker is capable of returning to work consistent with the restrictions.

The Staff Hearing Officer finds that when injured worker's level of medical impairment is considered in conjunction with his non-medical disability factors, the injured worker is capable of sustained remunerative employment and is not permanently and totally disabled.

The Staff Hearing Officer finds that the injured worker's age of 52 is found to be a vocational asset regarding his potential for return to work. Individuals of the injured worker's age generally continue to be productive in the workforce for

many years, they have more than sufficient time to acquire new skills at least on an informal basis, such as through short-term or on-the-job training which could enhance his re-employment potential. While the injured worker does not possess a high school diploma or its equivalent, he did complete the 11th grade and according to his IC-2 Application is able to read, write and perform basic math functions. The Staff Hearing Officer notes that any deficiency [illegible] level of formal education that injured worker has had did not [illegible] injured worker from obtaining and successfully performing the jobs [illegible] up his work history.

Furthermore, a vocational evaluation was performed on 05/19/2008 of injured worker's file. The Oasys computerized tool was used to analyze injured worker's transferable skills based upon his previous work history and activities performing those jobs. Injured worker's work history was categorized as semi-skilled in nature. The vocational evaluation indicated that injured worker has transferable skills, including ability to drive, stable work history, ability to learn new skills based on past work history, ability to secure employment, ability to perform repetitive work, deal with people, obtain precise limits and tolerance, follow specific instruction and perform under stress, and make judgements and decisions. According to the vocational evaluation, it also indicated that injured worker would be capable of unskilled and semi-skilled work. Examples of such jobs would be telephone solicitor, appointment setter, information clerk, cashier and bench assembly. The injured worker previously participated in a vocational evaluation on November 4, 2003 at which time testing was completed and indicated that [the] injured worker had a high school reading level and his academic scores indicated he would be very successful in terms of short term training. VocWorks evaluation indicated that injured worker would benefit from completing his GED and possible short term computer training. Other positions available to injured worker given restrictions in his claim include telemarketing, security guard monitor and dispatcher.

The Staff Hearing Officer notes that injured worker was recently referred for a vocational rehabilitation program through the Bureau of Workers' Compensation. At the time, injured worker was found not feasible, in part due to injured

worker's motivation being "unclear". Dr. Ward, the injured worker's treating psychologist, also did not feel that injured worker would benefit from vocational rehabilitation services. However, the Staff Hearing Officer finds that the injured worker is currently vocationally qualified to obtain and perform employment activity within the injury-related physical and psychological limitations set forth by the above-mentioned doctors. The vocational assessment report of Denise O'Conner from VocWorks is relied upon in making this finding. In addition, the Staff Hearing Officer finds that when injured worker's age and education are considered, the injured worker has had the capacity and retains the capacity to acquire new news [sic] skills, at least informally, that could widen the scope of employment options available to him and still could.

Therefore, the injured worker has the residual functional capacity to perform sedentary work activity, as described by Doctors Richetta, Query, Marino, Eby, and Wirebaugh, when only the impairment arising from the allowed conditions is considered, because he had the capacity for the years since his departure from the workforce to acquire new skills, at least informally, had he so desired and because he retains the capacity when his age, education and intellect are considered, the Staff Hearing Officer finds that the injured worker is capable of sustained remunerative employment and is not permanently and totally disabled. Accordingly, the IC-2 Application, filed 12/12/2007, is DENIED.

(Emphasis sic.)

{¶32} 16. On August 14, 2008, the three-member commission mailed an order refusing relator's request for reconsideration of the SHO's order of June 9, 2008.

{¶33} 17. On October 14, 2008, relator, Marlon R. Ferguson, filed this mandamus action.

Conclusions of Law:

{¶34} Three issues are presented: (1) whether the report of Dr. Query constitutes some evidence upon which the commission can and did rely; (2) whether it

was an abuse of discretion for the commission to rely upon the reports of Drs. Querry and Richetta because allegedly the reports are so inconsistent that the acceptance of one necessarily precludes the acceptance of the other; and (3) whether the commission's reliance upon the vocational report of Denise O'Conner is allegedly "incompatible" with commission reliance upon Dr. Richetta's report.

{¶35} The magistrate finds: (1) the report of Dr. Querry constitutes some evidence upon which the commission can and did rely; (2) it was not an abuse of discretion for the commission to rely upon the reports of Drs. Querry and Richetta; and (3) the commission's reliance upon the vocational report of Denise O'Conner is not "incompatible" with commission reliance upon Dr. Richetta's report.

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

{¶37} Turning to the first issue, the syllabus of *Schell v. Globe Trucking, Inc.* (1990), 48 Ohio St.3d 1, states:

A workers' compensation claimant who has proven a work-related aggravation of a pre-existing condition is not required to prove that the aggravation is substantial in order to be entitled to a determination of the extent of his participation in the State Insurance Fund.

{¶38} In *Schell*, the court states:

The [Ohio Manufacturers Association] argues that it would be unfair to permit even a relatively minor work-related aggravation of a pre-existing condition to entitle a claimant to participation in the fund, since the claimant would then be entitled to payments based on the full extent of his disability, including not only the component of his disability corresponding to the work-related aggravation, but also the component corresponding to his pre-existing condition. See *State, ex rel. Republic Rubber Div., v. Morse* (1952), 157

Ohio St. 288, 47 O.O. 176, 105 N.E.2d 251, a case involving acceleration of death as a result of a work-related injury.

Because a disability must result from a work-related injury to be compensable, R.C. 4123.54, we entertain some doubt as to whether a compensable disability necessarily includes not only the component of disability attributable to the aggravation, but also the component of disability corresponding to the pre-existing condition. However, that question is not before us in this appeal, and must await resolution another day.

But even if it is assumed that the statute provides compensation for both components of disability, and if it is further assumed that, as the [Ohio Manufacturers Association] argues, that result is unfair to the employer, then the appropriate remedy would be the amendment of the statute by the General Assembly. An injured worker, entitled to *some* compensation as a result of a work-related aggravation of a pre-existing condition, should not, by judicial fiat, be deprived of *any* compensation for that aggravation simply because the General Assembly, in our view, may have been overly generous in determining the amount of compensation.

Id. at 4. (Emphases sic.)

{¶39} In *Mead Digital Sys. v. Jones* (1996), 77 Ohio St.3d 30, the Supreme Court of Ohio refused to revisit its holding in *Schell*.

{¶40} Here, citing *Schell*, relator argues that Dr. Query erred when he stated: "Pre-injury baseline impairment of daily functioning has been attempted to be excluded from consideration of estimates of impairment." However, relator then points out that Dr. Query "fails to identify any such pre-existing disorder." (Relator's brief, at 11.) Relator further asserts, "at no point in the record is there evidence of Relator ever suffering from a pre-existing psychological or [sic] condition or impairment." Id. According to relator, Dr. Query's report is thus "doubly flawed." Id.

{¶41} Here, the commission easily answers relator's argument. Given that Dr. Query "identified no adverse psychological history" predating the injury "[t]here is no negative 'pre-injury baseline' to ignore." (Respondent's brief, at 8.)

{¶42} Whether or not Dr. Query has correctly stated the law in his report is largely irrelevant given that the alleged legal proposition being challenged by relator here had no impact on Dr. Query's evaluation of relator.

{¶43} In short, contrary to relator's argument, Dr. Query's report does constitute some evidence upon which the commission can and did rely.

{¶44} Turning to the second issue, in *State ex rel. Frigidaire Div., Gen. Motors Corp. v. Indus. Comm.* (1988), 35 Ohio St.3d 105, the commission's order at issue simply stated that the decision was based upon the reports of Drs. Kackley and Cherry. That order granted the claimant an increase in his percentage of permanent partial disability. In *Frigidaire*, the court noted that Dr. Cherry's opinion as to the degree of psychiatric impairment was premised upon both the allowed condition and the nonallowed condition. However, there was no problem with Dr. Kackley's report which evaluated for the allowed physical conditions.

{¶45} Citing *State ex rel. Mitchell v. Robbins & Myers, Inc.* (1983), 6 Ohio St.3d 481, the *Frigidaire* court issued a writ of mandamus ordering the commission to issue an amended order stating the specific basis for its decision. The *Frigidaire* court explained:

* * * If it relied unconditionally on the medical report of Dr. Cherry, the commission may have abused its discretion. Thus, the commission's order should have included an explanation of what evidence, in particular, it relied upon and of how it arrived at its decision in this case. We would then

have been able to tell whether the commission had abused its discretion by relying on improper evidence, namely, the evidence of "Major Depression, Recurrent" contained in Dr. Cherry's report.

Id. at 107.

{¶46} Citing *Frigidaire*, relator argues that the commission abused its discretion by relying upon the reports of Drs. Querry and Richetta. It is difficult to see how *Frigidaire* supports relator's position here. There is no contention that either Dr. Querry or Dr. Richetta considered a nonallowed condition in rendering their opinions.

{¶47} Moreover, the *Frigidaire* case is not about the consistency of relied-upon reports. Thus, *Frigidaire* cannot support relator's claim here that the reports of Drs. Querry and Richetta are so inconsistent that they cannot both be reasonably relied upon.

{¶48} Dr. Querry opined that the allowed condition "dysthymic disorder" produced a three percent impairment and that the condition requires no work restrictions. Dr. Richetta opined that the "dysthymic disorder" produced a 30 percent whole person impairment, but did not render relator incapable of work. Dr. Richetta set forth work restrictions—that the work occur in a "setting with few social demands, and where he would not have to engage in rapid decision making."

{¶49} Again, relator claims that the two reports "are so inconsistent that the acceptance of either opinion necessarily precludes acceptance of the other." (Relator's brief, at 14.)

{¶50} It should be noted that the commission, through its SHO, found both reports "persuasive" and further found that relator "is capable of returning to work consistent with the restrictions."

{¶51} In the magistrate's view, the SHO can accept both reports as persuasive as long as Dr. Richetta's restrictions are considered to be limiting factors of the determination of residual functional capacity.

{¶52} Accordingly, relator has failed to show that the commission abused its discretion by its reliance upon both reports.

{¶53} The third issue, as noted previously, is whether the commission's reliance upon the vocational report of Denise O'Conner is allegedly "incompatible" with its reliance upon Dr. Richetta's report. Relator contends that O'Conner's identification of "transferable skills" from his work history cannot be relied upon in the nonmedical analysis because allegedly, based upon Dr. Richetta's restrictions, his skills can no longer be viewed as viable. This argument lacks merit.

{¶54} To begin, Dr. Richetta never stated in his report that the dysthymic disorder has eliminated the viability of the work skills relator has demonstrated. Dr. Richetta did say that relator "has a moderate impairment in adaptation to stress in work-like settings due to the allowed psychological condition alone." Clearly, that assessment does not require the commission to conclude, as relator does here, that the work skills relator has demonstrated are no longer viable.

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

/s/ Kenneth W. Macke

KENNETH W. MACKE
MAGISTRATE

NOTICE TO THE PARTIES

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

8/4

BAK

The Industrial Commission of Ohio

RECORD OF PROCEEDINGS

Claim Number: 99-540008 Claims Heard: 99-540008
LT-ACC-OSIE-COV
PCN: 2073461 Marion R. Ferguson L80479-22



GALLON TAKACS BOISSONEAULT & SCHAFF
3516 GRANITE CIR
TOLEDO OH 43617-1172

Date of Injury: 10/05/1999 Risk Number: 1040140-0

This matter was heard on 06/09/2008, before Staff Hearing Officer Mara Lanzinger Spidel, 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 12/12/2007.
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: Mr. Takacs; Injured Worker; Mrs. Ferguson, spouse
- APPEARANCE FOR THE EMPLOYER: Ms. Belot Norton (for National Machinery); Mr. Mezinko (for Farmland Food)
- APPEARANCE FOR THE ADMINISTRATOR: Mr. Szuch

It is the finding of the Staff Hearing Officer that this claim has been ALLOWED for:

- CLAIM NUMBER 99-540008: SPRAIN LUMBOSACRAL; AGGRAVATION OF L3-4, L4-5, L5-S1 SPONDYLOLISTHESIS; AGGRAVATION OF L3-4, L4-5, L5-S1 DISC DEGENERATION; DYSTHYMIC DISORDER; L1-L2 DISPLACEMENT.
- CLAIM NUMBER L80479-22: LUMBAR STRAIN; AGGRAVATION OF PRE-EXISTING SPONDYLOLYSIS AND SPONDYLOLISTHESIS OF L5-S1.

After full consideration of the issue, it is the order of the Staff Hearing Officer that the Application filed 12/12/2007, for Permanent and Total Disability Compensation, be DENIED.

All medical reports and evidence contained in the Industrial Commission file, as well as the evidence and arguments presented at hearing, were reviewed, considered and evaluated. This is based particularly upon the reports of Dr. Marino (01/24/2008), Dr. Eby (03/17/2008), Dr. Wirebaugh (08/23/2007), Dr. Popovich (03/29/2007), Dr. Querry (02/16/2008), and Dr. Richetta (03/21/2008).

The injured worker is a 52 year old male with an 11th grade education and a work history consisting of work as a laborer, security guard and work as an auto mechanic wrecker operator.

His first industrial injury occurred on 07/07/1991 when he was lifting a tote box off of a cart, setting it down on the floor and he fell. The

The Industrial Commission of Ohio
RECORD OF PROCEEDINGS



Claim Number: 99-540008

injured worker received conservative treatment for the allowed conditions in that claim.

The second industrial injury occurred on 10/05/1999 when he was lifting a box at work and felt a twinge in his right back. This claim has been treated with two surgeries consisting of a ray and cage and transverse process fusion at L5-S1 on 02/14/2003 and a discectomy and anterior lumbar interbody fusion with Cougar cages at L3-4 and L4-5 and posterior instrumentation to further stabilize the spine on 11/21/2005. He has also undergone Pain Management and receives epidural steroid injections for management of the allowed conditions in his claim. Injured worker has not worked since November 25, 2002.

Injured worker has been examined by a number of doctors regarding the allowed physical conditions in his claim. The most recent examination was performed by Dr. Marino on January 24, 2008. Dr. Marino recorded injured worker's work history, as well as history of injury and performed an examination of injured worker. He noted injured worker's ongoing complaints and that injured worker's symptoms increase with walking, bending, squatting and sitting and that he uses a cane while walking about eighty percent of time. Dr. Marino noted injured worker's daily activity which included dressing on his own, feeding his four Great Danes, putting corn out in tree cages for squirrels. He also noted that in warmer weather, injured worker is able to pick up after his dog with a long handled pooper scooper. He is able to mow his lawn on a sit-down mower in increments of about 20 to 30 minutes. Injured worker was recently able to build models but had recently lost interest. Dr. Marino noted that injured worker was able to get out of the house a couple of times a week and drive about three times a month to see his psychologist. Injured worker visits with Dr. Lakshmiopathy, his Pain Management Specialist, two times per month and goes approximately two times a month to the pharmacy. His visits friends for 15 to 30 minutes a couple of times per week and injured worker indicated to Dr. Marino that he can drive for about forty minutes, walk for about 20 minutes and sit in a comfortable chair for about 30 minutes.

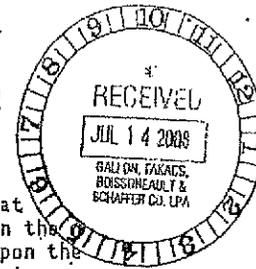
Dr. Marino opined, based upon the history, examination and review of medical records, that although injured worker is substantially limited in his physical capabilities as a result of chronic leg and back pain related to the allowed conditions in this claim, he is capable of doing sedentary work with restrictions. Said restrictions include no lifting more than 10 pounds, no work below hip level or above shoulder level, no pushing, pulling with greater than 10 pounds of force, no reaching beyond arm length, no climbing steps or ladders and no repetitive twisting to his right or left. He should also have the freedom to sit or stand and change position as needed. Dr. Marino also indicated that without additional conditioning his work day should be limited to four hours per day and 20 hours per week. Dr. Marino further indicated that injured worker would benefit from a conditioning program to improve his endurance and ability to perform positional transfers. Therefore, based upon the report of Dr. Marino, which is found persuasive, the Staff Hearing Officer finds that when only the impairment from the allowed physical conditions is considered, the injured worker is capable of returning to sedentary-type employment.

Pursuant to the finding York v. Industrial Commission (2002), Ohio 6101, the Staff Hearing Officer finds that injured worker's requirement that there be a sit/stand option and that he be limited to part-time work is not preclusive of his ability to perform sustained remunerative employment. The Court has found that part-time work still consists of sustained remunerative employment (See also State ex rel. Toth v. Industrial Commission (1997), 80 Ohio St. 3d 360).

The findings of Dr. Marino are echoed in the report of Dr. Eby, dated 03/17/2008, in which he found that injured worker would be capable of performing sedentary level activity with occasional walking of short distances with cane, able to sit/stand and limited or no climbing of

RECORD OF PROCEEDINGS

Claim Number: 99-540008



stairs. Dr. Wirebaugh's report, dated 08/23/2007, also indicated that injured worker's activity would be limited to sedentary activity when the allowed conditions in his claim were considered. Therefore, based upon the reports of Doctors Marino, Eby and Wirebaugh, which are found persuasive, this Staff Hearing Officer finds that when only the impairment arising from the allowed physical conditions is considered, the injured worker is capable of returning to work in a sedentary capacity.

In regard to the allowed psychological condition in this claim, Dr. Querry performed an examination of the injured worker on 02/16/2008. Dr. Querry noted injured worker's daily activities and indicated that he had a daily impairment between zero and five percent. His impairment in terms of concentration was found to be in between a zero to five percent. He was able to maintain focus and conversation. His mental pace and persistence when cognitively processing were very good. In terms of adaptation, Dr. Querry found a level of impairment between zero and five percent. In terms of social functioning, Dr. Querry found that injured worker was able to tolerate groups of people and crowds without emotional distress. He found a zero to five percent impairment in that function. Dr. Querry opined given the allowed conditions in this claim, that injured worker has no work restrictions relative to the psychological condition in this claim. He found injured worker's energy level, motivation, social skills, memory functioning, cognitive processing and decision making adequate for remunerative employment. Injured worker was found to have a very strong and well-developed work ethic.

Dr. Richetta also examined injured worker on 03/21/2008 regarding the allowed psychological conditions in this claim. Dr. Richetta recorded many of the same activities of daily living and also pointed out that injured worker's ability to engage in household tasks is reduced by his physical limitations, not his psychological conditions. He, too, found a mild impairment in terms of injured worker's activities of daily living due to the allowed psychological conditions alone. Dr. Richetta found a moderate impairment in regard to injured worker's ability to socially function, concentrate and adapt to stress and work-like setting. Dr. Richetta found injured worker's ability to return to work was limited by a need to work only in a setting with few social demands and where he would not have to engage in rapid decision making. His depression was found to reduce his ability to process information quickly.

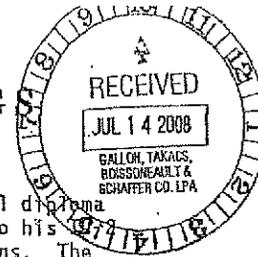
Also found persuasive is the report of Dr. Alfano, dated 08/31/2006, to the extent that he found that injured worker's depression stems from the fact that he can no longer engage in pre-injury activities. He noted "it is my hope that he and his psychologist will be able to identify job which he can do, and that after he returns to work, he will feel better about himself and the depression level will lower. Also, working will increase his mood because he will begin to feel that he has a purpose in life, and this will also lessen his depressive feeling."

Therefore, based upon the reports of Doctors Richetta, Querry and Alfano, which are found persuasive, the Staff Hearing Officer finds when only the impairment from the allowed psychological conditions is considered, the injured worker is capable of returning to work consistent with the restrictions.

The Staff Hearing Officer finds that when injured worker's level of medical impairment is considered in conjunction with his non-medical disability factors, the injured worker is capable of sustained remunerative employment and is not permanently and totally disabled.

The Staff Hearing Officer finds that the injured worker's age of 52 is found to be a vocational asset regarding his potential for return to work. Individuals of the injured worker's age generally continue to be productive in the workforce for many years, they have more than sufficient time to acquire new skills at least on an informal basis, such as through short-term or on-the-job training which could enhance his re-employment

RECORD OF PROCEEDING



Claim Number: 99-540008

potential. While the injured worker does not possess a high school diploma or its equivalent, he did complete the 11th grade and according to his Application is able to read, write and perform basic math functions. The Staff Hearing Officer notes that any deficiency in the level of formal education that injured worker has had did not prevent the injured worker from obtaining and successfully performing the jobs that are up his work history.

Furthermore, a vocational evaluation was performed on 05/19/2008 of injured worker's file. The Oasys computerized tool was used to analyze injured worker's transferable skills based upon his previous work history and activities performing those jobs. Injured worker's work history was categorized as semi-skilled in nature. The vocational evaluation indicated that injured worker has transferable skills, including ability to drive, stable work history, ability to learn new skills based on past work history, ability to secure employment, ability to perform repetitive work, deal with people, obtain precise limits and tolerance, follow specific instruction and perform under stress, and make judgements and decisions. According to the vocational evaluation, it also indicated that injured worker would be capable of unskilled and semi-skilled work. Examples of such jobs would be telephone solicitor, appointment setter, information clerk, cashier and bench assembly. The injured worker previously participated in a vocational evaluation on November 4, 2003 at which time testing was completed and indicated that injured worker had a high school reading level and his academic scores indicated he would be very successful in terms of short term training. VocWorks evaluation indicated that injured worker would benefit from completing his GED and possible short term computer training. Other positions available to injured worker given restrictions in his claim include telemarketing, security guard monitor and dispatcher.

The Staff Hearing Officer notes that injured worker was recently referred for a vocational rehabilitation program through the Bureau of Workers' Compensation. At the time, injured worker was found not feasible, in part due to injured worker's motivation being "unclear". Dr. Ward, the injured worker's treating psychologist, also did not feel that injured worker would benefit from vocational rehabilitation services. However, the Staff Hearing Officer finds that the injured worker is currently vocationally qualified to obtain and perform employment activity within the injury-related physical and psychological limitations set forth by the above-mentioned doctors. The vocational assessment report of Denise O'Conner from VocWorks is relied upon in making this finding. In addition, the Staff Hearing Officer finds that when injured worker's age and education are considered, the injured worker has had the capacity and retains the capacity to acquire new skills, at least informally, that could widen the scope of employment options available to him and still could.

Therefore, the injured worker has the residual functional capacity to perform sedentary work activity, as described by Doctors Richetta, Querry, Marino, Eby, and Wirebaugh, when only the impairment arising from the allowed conditions is considered, because he had the capacity for the years since his departure from the workforce to acquire new skills, at least informally, had he so desired and because he retains the capacity when his age, education and intellect are considered, the Staff Hearing Officer finds that the injured worker is capable of sustained remunerative employment and is not permanently and totally disabled. Accordingly, the IC-2 Application, filed 12/12/2007, is DENIED.

The Industrial Commission of Ohio
RECORD OF PROCEEDINGS

Claim Number: 99-540008



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Date Received: 12/14/2007
Findings Mailed: 07/11/2008

Mara Lanzinger Spidel
Staff Hearing Officer

Electronically signed by
Mara Lanzinger Spidel

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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NOTE: INJURED WORKERS, EMPLOYERS, AND THEIR AUTHORIZED REPRESENTATIVES MAY REVIEW THEIR ACTIVE CLAIMS INFORMATION THROUGH THE INDUSTRIAL COMMISSION WEB SITE AT www.ohioic.com. ONCE ON THE HOME PAGE OF THE WEB SITE, PLEASE CLICK I.C.O.N. AND FOLLOW THE INSTRUCTIONS FOR OBTAINING A PASSWORD. ONCE YOU HAVE OBTAINED A PASSWORD; YOU SHOULD BE ABLE TO ACCESS YOUR ACTIVE CLAIM(S).