

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

State of Ohio ex rel. Elizabeth Shambaugh, :	
Relator, :	
v. :	No. 10AP-139
The Industrial Commission of Ohio :	(REGULAR CALENDAR)
and Kingston Healthcare Company, :	
Respondents. :	

---

D E C I S I O N

Rendered on July 19, 2011

---

*Shapiro, Shapiro & Shapiro Co., LPA, Alan J. Shapiro and Harold Ticktin*, for relator.

*Michael DeWine*, Attorney General, and *Allan K. Showalter*, for respondent Industrial Commission of Ohio.

---

IN MANDAMUS  
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

DORRIAN, J.

{¶1} Relator, Elizabeth Shambaugh, commenced this original action requesting a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission"), to vacate its order denying relator permanent total disability ("PTD") compensation and to enter an order granting the same. In addition, relator requests that the writ order the commission to vacate its order awarding her permanent partial disability ("PPD")

compensation and to enter a new award of PPD compensation following new medical examinations.

{¶2} On August 31, 2002, relator was injured while working as a cook at a nursing home. (See Magistrate's Decision, ¶35.) As a result, the commission allowed claim No. 02-419889 for:

Sprain lumbosacral; contusion of back, lumbosacral;  
aggravation of pre-existing degenerative disc disease at L4-5;  
aggravation of pre-existing spinal stenosis at L4-5.

Subsequently, the commission additionally allowed claim No. 02-419889 for "post laminectomy lumbar syndrome and dysthymic disorder." (See Magistrate's Decision, ¶43.) We note that the stipulation of evidence in this matter does not contain the relator's motion requesting the commission allow the conditions of post laminectomy lumbar syndrome and dysthymic disorder in claim No. 02-419889, nor does it contain the district hearing officer's ("DHO") June 22, 2006, order granting these additional claim allowances.

{¶3} On February 26, 2008, relator filed a PTD application, and in a decision mailed on March 6, 2009, a staff hearing officer ("SHO") denied relator's PTD application. In denying relator's PTD application, the SHO relied upon the medical reports of Dr. Paul T. Scheatzle ("Dr. Scheatzle") and Dr. James M. Lyall ("Dr. Lyall"). According to the SHO's order, Dr. Scheatzle examined relator "on all of the physical conditions in all of the claims at issue." (See SHO order, 2.) Dr. Scheatzle opined that relator has a combined permanent partial impairment of 28 percent and, as such, could perform both light and sedentary work on the basis of all the allowed conditions in all claims. Further, Dr. Lyall examined relator for the allowed psychological condition of dysthymic disorder. Dr. Lyall

opined that relator has a five percent permanent partial impairment and, as such, has no work limitations.

{¶4} On March 20, 2009, relator also filed an application to determine the initial percentage of PPD in claim No. 02-419889. On August 4, 2009, the commission issued a tentative order awarding 25 percent PPD for a period of 50 weeks. On August 20, 2009, relator filed an objection to the tentative order and a C-86 motion to determine whether the commission's doctors examined her for all allowed conditions in claim No. 02-419889. On October 21, 2009, a DHO issued an order denying the C-86 motion and awarding 22 percent PPD for a period of 44 weeks. In awarding 22 percent PPD for a period of 44 weeks, the DHO relied upon the medical reports of Drs. Marshall, Bartos, Litwin, Murphy, Scheatzle, Lyall, and Welsh.

{¶5} The DHO also denied relator's C-86 motion. In denying relator's C-86 motion, the DHO noted relator's position that post laminectomy lumbar syndrome is a combination of physical and psychological conditions and also noted relator's contention that the Bureau of Worker's Compensation ("BWC") should perform new examinations because prior examinations did not consider post laminectomy lumbar syndrome in this regard. In rejecting relator's request for new examinations, the DHO agreed with counsel for the BWC that this issue had been previously raised and resolved at the March 2, 2009, PTD hearing. Summarizing the findings from the March 2, 2009, hearing, the DHO noted the SHO's finding that post laminectomy lumbar syndrome was reviewed by the commission's Chief Medical Advisor, Dr. Welsh, and that Dr. Welsh indicated that Dr. Scheatzle properly evaluated the condition of post laminectomy lumbar syndrome. The DHO then found that post laminectomy lumbar syndrome had been properly considered.

{¶6} On November 3, 2009, relator filed for reconsideration. On December 8, 2009, an SHO issued an order modifying the DHO's order to 25 percent PPD for a period of 50 weeks. In modifying the DHO's order to 25 percent PPD for a period of 50 weeks, the SHO relied upon the medical reports of Drs. Marshall, Bartos, Bernie, Scheatzle, Litwin, Murphy, Lyall, and Marikis. On May 14, 2010, relator filed an original complaint in mandamus with this court.

{¶7} This court referred the matter to a magistrate of this court pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate issued a decision, including findings of fact and conclusions of law, which is appended to this decision. In his decision, the magistrate recommended that this court deny relator's request for a writ of mandamus.

{¶8} Here, we note that no party has filed objections to the magistrate's findings of fact. Therefore, we adopt the magistrate's findings of fact with the exception that ¶68 of the Magistrate's Decision should reflect the date of August 20, 2009, as the date relator filed her C-86 motion.

{¶9} The relator has timely filed objections with respect to the magistrate's conclusions of law:

[1.] THE MAGISTRATE DID NOT ADDRESS THE REAL ISSUE IN THIS CASE, RATHER THE ONE HE CREATED.

[2.] THE FAILURE OF THE MAGISTRATE TO READ THE RECORD CAREFULLY CAUSES HIM TO FALL INTO PROCEDURAL MISTAKES THAT FURTHER DEFEAT HIS REASONING.

[3.] THE MAGISTRATE'S OPINION, LIKE THAT OF THE SHO, CONTAINS "GLARING OMISSIONS" OF HIGHLY RELEVANT PROOF ON FILE, WHICH HE CHOSE TO IGNORE.

{¶10} Pursuant to Civ.R. 53(D)(4)(d), we undertake an independent review of the objected matter "to ascertain that the magistrate has properly \* \* \* applied the law."

{¶11} In order to be entitled to a writ of mandamus, a relator must establish "[1] a clear legal right to the requested relief, [2] a clear legal duty on the part of the commission to provide the relief, and [3] the lack of an adequate remedy in the ordinary course of the law." *State ex rel. General Motors Corp. v. Indus. Comm.*, 117 Ohio St.3d 480, 481, 2008-Ohio-1593. Further, "[s]uch a clear legal right exists when relator shows that the commission abused its discretion by entering an order which is not supported by any evidence in the record." *State ex rel. Brown v. Indus. Comm.* (1983), 13 Ohio App.3d 178. Therefore, "when the record contains some evidence to support the commission's finding, there has been no abuse of discretion by the commission, and mandamus will not lie." *Id.*

{¶12} In her first objection, relator contends that the magistrate failed to address the "real" issue in this matter by combining the allowed conditions of post laminectomy lumbar syndrome and dysthymic disorder in his discussion regarding whether the commission's doctors properly considered post laminectomy lumbar syndrome. For the following reasons, we disagree. According to relator, the "real" issue is whether the commission abused its discretion in not having relator examined for both physical and psychological components of the allowed condition, post laminectomy lumbar syndrome. (See Objections at 3.) In his decision, the magistrate states that "[t]he main issue is whether the commission had a clear legal duty to have relator examined for an alleged psychological component of the allowed condition 'post laminectomy lumbar syndrome'

that is allegedly not described in the allowed dysthymic disorder." (See Magistrate's Decision, ¶78.)

{¶13} In response, the commission asserted that (1) the magistrate understood relator's argument that the commission did not properly consider the psychological component of the allowed condition of post laminectomy syndrome, and (2) it properly relied upon the report of Dr. Scheatzle, a board-certified physical medicine and rehabilitation specialist, in denying relator's PTD application.

{¶14} The magistrate found that the commission did not have a legal duty to have relator examined for both physical and psychological components of post laminectomy lumbar syndrome and, as such, did not abuse its discretion. (See Magistrate's Decision, ¶79.) Also, the magistrate noted that the medical sources relator cites, such as the Journal of Neurosurgery, Lancet, and the Archives of General Psychiatry, "were not submitted to the SHO at the hearing" and "are not contained in the stipulation of evidence before this court." (See Magistrate's Decision, ¶84.)

{¶15} It is well-settled that the commission has the exclusive authority to determine disputed facts, the weight of the evidence and credibility. Ohio Adm.Code 4121-3-34(D)(3)(c). Therefore, "questions of credibility and the weight to be given evidence are *clearly* within the discretion of the commission as fact finder." *State ex rel. Hutchins v. Indus. Comm.*, 10th Dist. No. 01AP-1239, 2002-Ohio-3256, ¶16. (Emphasis added.) Further, in *State ex rel. Noll v. Indus. Comm.* (1991), 57 Ohio St.3d 203, the Supreme Court of Ohio reiterated the requirement that the commission " 'must specifically state which evidence and only that evidence which has been relied upon to reach their conclusion, and a brief explanation stating why the claimant is or is not entitled to the

benefits requested.' " Id. at 204, quoting *State ex rel. Mitchell v. Robbins & Myers, Inc.* (1983), 6 Ohio St.3d 481, 483-84.

{¶16} Here, in compliance with *Noll*, the commission indicated that it denied relator's PTD application based upon the medical reports of Drs. Scheatzle and Lyall. In *State ex. rel. Roy v. Indus. Comm.*, 74 Ohio St.3d 259, 1996-Ohio-141, the Supreme Court of Ohio stated that once a condition is "allowed" by the commission, it must be considered prior to the denial of PTD. Dr. Scheatzle's report lists post laminectomy lumbar syndrome and also states that he reviewed Dr. Wolfe's note regarding the same. Dr. Scheatzle treated relator's post laminectomy lumbar syndrome as a physical condition. In addition, Dr. Welsh, Chief Medical Advisor to the commission, stated that Dr. Scheatzle properly evaluated relator's post laminectomy lumbar syndrome.

{¶17} The commission twice considered and rejected relator's request to be examined for both physical and psychological components of post laminectomy lumbar syndrome. (See Mar. 6, 2009, decision and Oct. 21, 2009, decision.) Therefore, it is reasonable to believe that, in weighing the evidence noted above, the commission placed more weight upon the medical reports and opinions of Drs. Scheatzle and Welsh, than on other evidence in the stipulated record, such as a two-paragraph abstract from the Merck Manual of Medical Information regarding pain related to psychogenic disorders, which does not even reference the condition of post laminectomy lumbar syndrome.

{¶18} Also, the commission relied upon the reports of Drs. Scheatzle and Lyall in denying relator's PTD application. As stated above, the commission abuses its discretion by entering an order which is not supported by "some evidence." In this regard, we do not

find that the commission abused its discretion because its decision denying relator's PTD application is supported by some evidence.

{¶19} Finally, in awarding 25 percent PPD compensation for a period of 50 weeks, the SHO relied upon the reports of Drs. Marshall, Bartos, Bernie, Scheatzle, Litwin, Murphy, Lyall, and Marikis. As stated above, Dr. Scheatzle's report properly considered the condition of post laminectomy lumbar syndrome. In addition, Dr. Bartos' report dated July 16, 2009, and subsequent addendums dated September 2, 2009, and October 12, 2009, indicate that he considered all conditions, including post laminectomy lumbar syndrome. Therefore, we find that the commission's decision granting 25 percent PPD compensation for a period of 50 weeks is supported by "some evidence" and that Drs. Scheatzle and Bartos properly considered relator's post laminectomy lumbar syndrome.

{¶20} In arguendo, even if the magistrate incorrectly combined the conditions of post laminectomy lumbar syndrome and dysthymic disorder in his conclusions of law, his error is harmless because the commission relied upon some evidence that considered the condition of post laminectomy lumbar syndrome.

{¶21} Relator's first objection is not well-taken.

{¶22} In her second objection, relator contends that the magistrate failed to "read the record carefully," causing him to make procedural errors. (See Objections, at 4.) We find nothing in the magistrate's decision indicating that he carelessly reviewed the record or made procedural errors. In support of her second objection, relator referenced a C-86 motion, filed on April 6, 2006, Dr. Menassa's report, dated May 8, 2006, and the DHO's

order allowing the conditions of post laminectomy lumbar syndrome and dysthymic disorder, dated June 22, 2006.

{¶23} Pursuant to Section (G), Loc. R. 12 of the Tenth District Court of Appeals:

When the evidence to be considered consists of all or part of an official record or the record of proceedings before an administrative agency, such as the Industrial Commission claim file, a stipulated or certified copy, rather than the original, must be submitted pursuant to Civ.R. 44, and Evid.R. 902 and 1005. Unless the parties enter into a stipulation concerning the evidence to be submitted to the Court and attach to the stipulation legible copies of such evidentiary materials relevant to the determination of the action, each party shall file with the Court legible certified copies of evidentiary materials the party feels relevant to the issues before the Court. An original public record will not be accepted for filing as evidence.

{¶24} Here, the C-86 motion, filed on April 6, 2006, Dr. Menassa's report, dated May 8, 2006, and the DHO's order allowing the conditions of post laminectomy lumbar syndrome and dysthymic disorder, dated June 22, 2006, are not part of the stipulated record, and certified copies have not been filed with this court. Relator merely attached uncertified copies of the documents as appendices A, B, and C to her objections to the magistrate's decision. Therefore, the magistrate correctly noted that this evidence was not part of the stipulated record.

{¶25} Further, relator argues that the medical reports of Drs. Wolfe, Stretanski, and Marikis were "available all along to the hearing officers at their various hearings," including the hearing regarding relator's PTD application. (See Objections, at 6.) However, in denying relator's PTD application, the SHO relied only upon the medical reports of Drs. Scheatzle and Lyall. Because the commission has the exclusive authority to determine disputed facts, the weight of the evidence and credibility, it is not within this

court's discretion to reweigh evidence in the stipulated record. See Ohio Adm.Code 4121-3-34(D)(3)(c).

{¶26} Relator's second objection is not well-taken.

{¶27} Lastly, in her third objection, relator again contends that the magistrate, like the SHO, ignored relevant proof on file regarding the commission's alleged failure to evaluate relator's post laminectomy lumbar syndrome in both a physical and psychological context. In support of this argument, relator presents excerpts from several doctors' medical reports upon which the commission *did not rely upon* in reaching its decision to deny relator's PTD application.

{¶28} As previously stated, the commission has the exclusive authority to determine disputed facts, the weight of the evidence and credibility. Ohio Adm.Code 4121-3-34(D)(3)(c). In *State ex rel. Consolidation Coal Co. v. Indus. Comm.*, 78 Ohio St.3d 176, 1997-Ohio-46, citing *State ex rel. Burley v. Coil Packing, Inc.* (1987), 31 Ohio St.3d 18, 20, the Supreme Court of Ohio stated that "this court's review of a commission's order pursuant to a complaint for a writ of mandamus should be limited to determining whether there is some evidence to support the commission's order." Therefore, we must not do the commission's job of assessing the weight and credibility of the evidence. *Id.*

{¶29} Here, the commission relied upon the reports of Drs. Scheatzle and Lyall in denying relator's PTD, and the reports of Drs. Marshall, Bartos, Bernie, Scheatzle, Litwin, Murphy, Lyall, and Marikis in awarding 25 percent PPD compensation for a period of 50 weeks. As stated above, Drs. Scheatzle and Bartos considered post laminectomy lumbar syndrome in their medical reports.

{¶30} Relator also argues that her "objections to the SHO order other than the PLS issue were completely ignored." (See Objections, 9.) However, in her objections to the magistrate's decision, relator does not expound upon this argument or indicate which "objections" the magistrate allegedly ignored. Therefore, because relator failed to specifically raise additional objections to the magistrate's conclusions of law, we decline to further address this matter.

{¶31} Relator's third objection is not well-taken.

{¶32} Following an independent review pursuant to Civ.R. 53, we find the magistrate has properly determined the pertinent facts and applied the appropriate law. As such, relator's objections to the magistrate's conclusions of law are overruled, and we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein. Therefore, we deny the requested writ of mandamus.

*Objections overruled; writ denied.*

BROWN and SADLER, JJ., concur.

---

**APPENDIX**

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Elizabeth Shambaugh, :

Relator, :

v. :

No. 10AP-139

The Industrial Commission of Ohio :  
and Kingston Healthcare Company, :

(REGULAR CALENDAR)

Respondents. :

:

---

MAGISTRATE'S DECISION

Rendered on March 14, 2011

---

*Shapiro, Shapiro & Shapiro Co., LPA, Alan J. Shapiro and Harold Ticktin, for relator.*

*Michael DeWine, Attorney General, and Allan K. Showalter, for respondent Industrial Commission of Ohio.*

---

IN MANDAMUS

{¶33} In this original action, relator, Elizabeth Shambaugh, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order denying her permanent total disability ("PTD") compensation, and to enter an order granting said compensation. Relator also requests that the writ order the commission

to vacate its order awarding her permanent partial disability ("PPD") compensation, and to enter a new award of PPD compensation following new medical examinations.

Findings of Fact:

{¶34} 1. Relator has five industrial claims that recognize injuries in the course of and arising out of her employment.

{¶35} 2. Her most recent injury occurred on August 31, 2002 while she was employed as a cook at a nursing home. On that date, relator slipped on a dining room floor.

That industrial claim (No. 02-419889) is allowed for:

Sprain lumbosacral; contusion of back, lumbosacral; aggravation of pre-existing degenerative disc disease at L4-5; aggravation of pre-existing spinal stenosis at L4-5; post laminectomy lumbar syndrome; and dysthymic disorder.

{¶36} 3. In descending chronological order, her next industrial injury occurred January 1, 2001 also while she was employed as a cook at a nursing home. That industrial claim (No. 01-300115) is allowed for: "Right hand contusion; nondisplaced fracture of the distal head of the right index finger."

{¶37} 4. Her next injury occurred on September 19, 1999 also while she was employed as a cook at a nursing home. That industrial claim (No. 99-520647) is allowed for: "Sprain of left wrist; fracture distal left side."

{¶38} 5. Her next injury occurred on November 6, 1997 while she was employed as a convenience store clerk. That industrial claim (No. 97-611886) is allowed for: "Right knee sprain and lumbar strain."

{¶39} 6. Her earliest injury occurred on April 13, 1991 while she was employed as a "nurse's aid." That industrial claim (No. 91-106775) is allowed for:

Fracture left wrist; navicular fracture left wrist; de quervains tendonitis left wrist; radial styloid tenosynovitis, left wrist; neuromas of the lateral anterbrachial cutaneous and radial sensory nerves; and left carpal tunnel syndrome.

{¶40} 7. Relator last worked on June 13, 2003.

{¶41} 8. In November 2003, relator underwent back surgery related to claim No. 02-419889. In the April 4, 2008 report of Dr. Richard N. Kepple (see below), the surgery is described as "decompression laminectomy at L4-5, anterior column reconstruction by PLIF procedure at L5-S1, Brantigan cages times 2, posterolateral instrumentation, spinal fusion, and right iliac crest bone graft."

{¶42} 9. On March 4, 2005, relator underwent a second back surgery related to claim No. 02-419889. According to Dr. Kepple's report, the second surgery involved removal of the hardware that had been placed at the time of the first surgery.

{¶43} 10. Following a June 22, 2006 hearing before a commission district hearing officer ("DHO"), claim No. 02-419889 was additionally allowed for "post laminectomy lumbar syndrome and dysthymic disorder<sup>1</sup>." Unfortunately, the stipulation of evidence filed in this action fails to contain the DHO's order of June 22, 2006 or any of the medical reports upon which the DHO presumably relied in granting the additional claim allowance.

{¶44} 11. On January 23, 2008, at the request of relator's counsel, treating psychologist Dennis A. Marikis, Ph.D., issued a report regarding claim No. 02-419889:

In reviewing both report and information related to Ms. Shambaugh's case, it is evident that the primary issues associated with her concerns relate to Post Laminectomy Syndrome and clearly less so for the Dysthymic Disorder. Dysthymic Disorder is a long standing depression that clearly preceded, in its origin, Ms. Shambaugh's situation

---

<sup>1</sup>See the commission's "Statement of Facts" prepared for the hearing on relator's application for PTD compensation. (Stipulation of Evidence, at 11.) The actual DHO order of June 22, 2006 is not contained in the stipulated record.

relative to her injury. However, it clearly has significantly aggravated the Dysthymic Disorder. \* \* \*

\* \* \*

\* \* \* [I]t is; therefore, my strong recommendation that she has not reached [maximum medical improvement] in the psychological arena and clearly has progressed more dramatically in a negative area, which may actually prompt us to consider more significant intervention rather than examining this from a situation in which she has not shown significant progress though she has reached a stability in her condition.

\* \* \*

Treatment goals will be focused on stabilizing the severity of the emotional condition, possible reduction of those primary symptoms associated with the more severe depression and, at that particular juncture, re-evaluating whether indeed Ms. Shambaugh is in a condition [sic] in which she can pursue forward, either towards permanent disability or the very unlikely prospects of a return to work. Condition has proceeded for such a length of time that it would probably be more realistic to suggest that Ms. Shambaugh should be applying for permanent disability.

{¶45} 12. On February 26, 2008, relator filed an application for PTD compensation. In support, relator submitted the January 23, 2008 report of Dr. Marikis.

{¶46} 13. On June 5, 2008, at the commission's request, relator was examined by psychologist James M. Lyall, Ph.D. In his six-page narrative report, Dr. Lyall correctly listed the allowed conditions for all five of relator's industrial claims. Dr. Lyall concluded:

It appears that we have a fifty-one year old female who has worked somewhat successfully, over the years, as a factory worker and in a nursing home. Unfortunately, she injured her back in 2002 and has been unable to return to work since 2003. She has had two back surgeries, by her own report, and has been in mental health counseling since about August 2006 with Dr. Marikis. The claimant has also been taking Xanax and Celexa as well. The claimant currently admits to only minimal or mild symptoms of depression on

the Beck Depression Inventory and shows no obvious signs of malingering on the SIMS profile. She admits to slightly more symptoms of depression on the Mental Status Examination but also points out that her boyfriend has cancer and this has been upsetting to her, as well as her industrial injury. Taking these factors into account, we see only mild impairment due exclusively to the Dysthymic Disorder, which is the claimant's allowed psychological condition.

Generally, individuals make the bulk of their improvement in Depressive Disorders within a period of six months to one year after the onset of appropriate mental health care. The claimant has had about two years of appropriate mental health treatment with Dr. Marikis and, as such, it is this examiner's opinion to a reasonable degree of psychological certainty that she has reached maximum psychological improvement for her allowed condition of Dysthymic Disorder.

Based on the AMA Guidelines for Impairment Due to Mental and Behavioral Disorders, Fifth Edition, we see mild impairment due exclusively to the claimant's allowed psychological condition of Dysthymic Disorder. This would fall at Class 2 and yield five percent (5%) impairment due exclusively to the Dysthymic Disorder to the whole body. This is taking into account the claimant's responses to the Beck Depression Inventory, in which she scored within the mild range, and her indication that there are other factors related to her depression along with her back injury to include her boyfriend's rather serious illness.

{¶47} 14. On June 5, 2008, Dr. Lyall completed a form captioned "Occupational Activity Assessment[,] Mental & Behavioral Examination." On the form, Dr. Lyall indicated by checkmark his agreement with the following pre-printed statement: "This injured worker has no work limitations." Below, Dr. Lyall wrote in his own hand: "The claimant's impairment due only to her Dysthymic disorder is mild at 5% and as such would not inhibit a return to work."

{¶48} 15. On June 16, 2008, at the commission's request, relator was examined by Paul T. Scheatzle, D.O. Dr. Scheatzle examined for all allowed conditions of the five industrial claims except for "dysthymic disorder." In his six-page narrative report, Dr. Scheatzle stated:

With regards to claim #02-419889, she complains of low back pain. She states that she fell on vanilla ice cream. She was washing a dining room floor and fell landing on her back. She has been off work from 6/12/03 following this injury. She worked light duty until that point. Regarding this claim she has had epidural injections. She had a spinal fusion performed in 2003 with removal of hardware in 2005, pain medications including methadone and Lyrica and continues with pain management.

\* \* \*

[Two] Based on AMA Guides, 5th Edition, provide the estimated percentage of whole person impairment arising from each allowed condition. Based on AMA Guides, 5th Edition, I will now provide the estimated percentage of whole person impairment arising from each specified allowed condition:

A. With regards to claim #02-419889, this results in a DRE category IV with loss of motion segment due to successful surgical arthrodesis in conjunction with chronic low back with bilateral leg radiculitis. This results in a 21% whole person impairment.

\* \* \*

Combining the 21% for the low back injury with the 7% for the left upper extremity and the 1% for the right middle finger results in a combined value of 28% whole person impairment.

{¶49} 16. On a Physical Strength Rating form dated June 16, 2008, Dr. Scheatzle indicated by his checkmark that relator is capable of "light work."

{¶50} 17. On August 28, 2008, treating physician James R. Wolfe, M.D., wrote to relator's counsel regarding claim No. 02-419889:

Elizabeth Shambaugh has been under my care since March 2003[.] She underwent an unsuccessful lumbar spine surgery for L4-5 spinal stenosis and L 4-5 degenerative disk disease[.] She subsequently developed a lumbar post-laminectomy syndrome[.]

Ms[.] Shambaugh continues to suffer from chronic back and leg pain as the result of her allowed conditions[.] I have been only modestly successful at treating these with opioids[.] Further treatment has been denied and, at this time, we are abandoning further efforts to obtain authorization for a trial of spinal cord stimulation[.] Her continued symptoms and findings result in significant impairment of her functional capacity[.] She cannot stand, walk or even sit in a fixed position for any reasonable length of time, certainly not more than 15 minutes[.] She cannot lift, carry, push or pull more than 10 pounds on more than an occasional basis[.] She cannot use her legs or feet in any repetitive activity[.] Indeed, she has difficulty driving[.] She also suffers from a dysthymic disorder which has had a further negative impact on her level of functioning and mental state[.] \* \* \*

It is my professional medical opinion that my patient, Elizabeth Shambaugh is incapable of sustained gainful employment as the direct result of the allowed conditions of this claim[.] Further, it is my professional medical opinion that Elizabeth Shambaugh is permanently and totally disabled as a result of the allowed conditions of this claim[.] \* \* \*

{¶51} 18. Earlier, on April 24, 2008, at the request of respondent-employer Kingston Healthcare Company ("Kingston"), relator was examined by Richard N. Kepple, M.D. Dr. Kepple conducted a physical examination for the allowed physical conditions in claim No. 02-419889. In his three-page narrative report, Dr. Kepple concluded:

Based on my evaluation of Ms. Shambaugh, it is my opinion that she is not permanently and totally disabled based solely on the allowed physical conditions of this claim. Her lumbar

spine is compromised, but it does not render her incapable of sustained remunerative employment.

Ms. Shambaugh is capable of sedentary work that is upper extremity oriented. Lifting and carrying should be limited to 15 pounds or less. She should be permitted to stand or walk as needed for comfort. If restrictions are appropriately accommodated, she should be able to work a full eight-hour day.

The newly-allowed condition of lumbar post-laminectomy syndrome does not alter this conclusion as this condition was already present in May 2005 when Ms. Shambaugh was found to be capable of sedentary work. There has been no significant change in the condition of her lumbar spine since then that would change her disability status. This opinion is based solely on the allowed physical conditions in this claim.

{¶52} 19. On September 6, 2008, relator's counsel wrote to the commission's hearing administrator:

\* \* \* Not least of my concerns is the allowed condition of a Post-Laminectomy Syndrome which was not commented upon by either the IC mandated exams. I assume that this can be discussed at the pre-hearing conference which you indicated would soon be scheduled.

{¶53} 20. Apparently, on November 19, 2008, the Akron Regional Hearing Administrator ("Akron administrator") conducted a pre-hearing conference with relator's counsel and counsel for Kingston.

{¶54} 21. On or about November 20, 2008, Kingston's counsel wrote to the Akron administrator:

I respectfully, disagree with [relator's counsel] assessment that "a major allowance has not been addressed". Both Dr. Lyall and Dr. Scheatzle reference all of the allowed conditions in their reports. Clearly, both doctors referenced and accepted all of the conditions allowed in all of the involved claims.

I agree with [relator's counsel] that Post Laminectomy Syndrome does have psychological components. However, I submit that the condition is primarily a physical condition. As such, I believe it was proper for Dr. Lyall to base his opinion on the one truly psychological condition allowed in the claim, (i.e., Dysthymic Disorder).

Therefore, I object to [relator's counsel]'s suggestion that a new exam be performed. The Industrial Commission has addressed each and every condition allowed in all of Ms. Shambaugh's worker's compensation claims. I do not believe the claim should be referred back for yet another round of examinations. The reports should either be accepted as written or at the most, addendums should be requested from Dr. Lyall and Dr. Scheatzle. I agree that the issue should be referred to the BWC medical section and will abide by their decision.

{¶55} 22. The record contains a December 29, 2008 e-mail from the Akron administrator to Wanda Mullins, the commission's "Manager of Medical Services":

I need your help with this pending [permanent total disability]. At issue is the allowed condition of post lumbar laminectomy syndrome. [Counsel] for the Injured [W]orker asserts this condition was not properly addressed. He indicates the literature consistently describes this as a mixed diagnosis with both physical and psychological components. Dr. Scheatzle opined a 21% for this claim but it is unclear if this includes an assessment of the physical [sic] aspect of the laminectomy syndrome.

Dr. Lyall only issued a report and assessment of the dysthymic disorder, but not the psychological aspect of the laminectomy syndrome.

I am not sure if we can rehabilitate these reports. [Injured Worker's] counsel suggested we find someone (such as a psychiatrist) who could look at both components of the syndrome and render an opinion of this condition.

Let me know what you think – any help would certainly be welcomed.

{¶56} 23. Ultimately, the Akron administrator's concern was put to Terrence B. Welsh, M.D., the commission's Chief Medical Advisor. In a December 30, 2008 e-mail, Dr. Welsh stated:

[One] A board-certified PMR specialist is well-qualified by training and experience to provide an expert opinion on post-laminectomy syndrome. By educational tradition and practice, physiatrists embrace a multi disciplinary approach.

[Two] Dr. Scheatzle (a board-certified PMR specialist) applied the appropriate AMA Guides principles in evaluation of post-laminectomy syndrome (Table 15-3, page 384), and this, by nature of the AMA Guides principles, also accounts for all impairment related to all of the allowed conditions in claim #02-41[9]889 involving this body part (lumbar/low back). I should note that the claim is allowed for disease at one level, L4-5.

[Three] I disagree with the notion that the nature of post-laminectomy syndrome is such that [the] impairment rating needs to [be] separated into physical and psychological components. I do not believe there is sound literature to support this.

{¶57} 24. Following a March 2, 2009 hearing, a staff hearing officer ("SHO") issued an order denying relator's PTD application. The order states in part:

The Staff Hearing Officer relies on the medical reports of Dr. Paul T. Scheatzle, and Dr. James M. Lyall, in finding the Injured Worker is not permanently and totally disabled.

The Injured Worker was examined on behalf of the Industrial Commission with regard to the allowed psychological condition in claim #02-419889, by Dr. James Lyall, on 06/05/2008. Dr. Lyall rendered his opinion in a report dated 06/05/2008. Dr. Lyall examined the Injured Worker and opined that her dysthymic disorder was mild, giving her a 5% permanent partial impairment. Dr. Lyall indicated that this condition did not inhibit a return to work. Dr. Lyall opined that the condition had reached maximum medical improvement and that the Injured Worker has had two years of treatment for that condition. In an Occupational Activity Assessment, Dr. Lyall indicated the Injured Worker had no work

limitations. The Staff Hearing Officer notes that Dr. Lyall's report appears to be consistent with the Bureau of Workers' Compensation exam report of Dr. April L. Mancuso dated 12/18/2007. Dr. Mancuso also found that the Injured Worker's dysthymic disorder was at maximum medical improvement and Dr. Mancuso opines that the Injured Worker would be capable of returning to her former position of employment as a cook solely on the basis of the allowed psychological condition in claim #02-419889.

The Injured Worker was examined on behalf of the Industrial Commission with regard to the allowed physical conditions in the claim by Dr. Paul T. Scheatzle, on 06/16/2008. Dr. Scheatzle rendered his opinion in a report dated 06/16/2008. Dr. Scheatzle examined the Injured Worker on all of the physical conditions in all of the claims at issue. Dr. Scheatzle opined the Injured Worker has a 21% permanent partial impairment related to claim #02-419889 and a 7% permanent partial impairment related to claim #91-106775, for a total combined impairment of 28%. Dr. Scheatzle opined that all of the allowed physical conditions in all claims had reached maximum medical improvement. Dr. Scheatzle completed a Physical Strength Rating Form on 06/16/2008. On that form, Dr. Scheatzle indicated that the Injured Worker would be capable of performing both light and sedentary work on the basis of all the allowed conditions in all claims.

The Injured Workers' representative's argument at hearing that the commission's Physicians did not properly consider the condition of "post laminectomy lumbar syndrome" is rejected. The Staff Hearing Officer notes that that condition has been consistently treated in this claim by Dr. Wolfe, who is a pain management physician. Dr. Scheatzle who examined the Injured Worker on all of the allowed physical conditions clearly indicates in his report that he was aware that that was an allowed condition in the 2002 claim as he clearly lists that condition in the body of his report. Following a pre-hearing conference, the issue of post laminectomy syndrome was reviewed by the Chief Medical Advisor of the Industrial Commission, Dr. Terrence Welsh. In a response dated 12/30/2008, Dr. Welsh indicated that Dr. Scheatzle properly evaluated the condition of post laminectomy syndrome.

Based on the reports of Dr. Lyall and Dr. Scheatzle, which are found to be persuasive, the Staff Hearing Officer finds

that the allowed psychological condition in the 2002 claim does not preclude a return to either the former position of employment as a cook or to any other sustained remunerative employment. Based upon the report of Dr. Scheatzle, the Staff Hearing Officer finds the Injured Worker remains physically capable of performing both light and sedentary work. When the Injured Worker's level of injury-related medical impairment is considered in conjunction with her non-medical disability factors, the Staff Hearing Officer concludes that the Injured Worker is capable of sustained remunerative employment and is not permanently and totally disabled.

(Emphasis sic.)

{¶58} 25. On April 3, 2009, the commission mailed an order denying relator's motion for reconsideration of the SHO's order of March 2, 2009.

{¶59} 26. Earlier, on March 20, 2009, relator filed an application for the determination of the initial percentage of PPD in claim No. 02-419889.

{¶60} 27. On June 1, 2009, at the commission's request, relator was examined by psychologist Richard Litwin, Ph.D., for the allowed condition of dysthymic disorder in claim No. 02-419889. In his three-page narrative report, Dr. Litwin opined:

Impairment Categories\*:

Activities of Daily Living	No Impairment	(0%)
Social Functioning	No Impairment	(0%)
Concentration, Persist, Pace	No Impairment	(0%)
Adaptation to Stress	No Impairment	(0%)

\* Impairment categories are based on the 5th Edition, Guides to the Evaluation for Permanent Impairment, American Medical Association.

Best Estimate of Whole Person Impairment Percent for the allowed psychological condition of Dysthymic Disorder (300.4) in this Claim:

0 Percent (%).

(Emphasis sic.)

{¶61} 28. On July 15, 2009, at the commission's request, relator was examined by Cyril Marshall, M.D., who issued a two-page narrative report. At the beginning of his report, Dr. Marshall correctly lists all the allowed conditions of claim No. 02-419889. However, Dr. Marshall only conducted a physical examination. He wrote:

PRESENT COMPLAINTS: Presently the patient complains of "major pain in lower back and legs." She rates her pain as a 9-10 on a 0-10 pain scale and she states that the pain is constant in nature. She reports limitations in standing, sitting, walking, pushing, pulling, climbing, feeling, grasping, holding, pinching, riding, sexual function ("none"), sleep and participating in activities, sports and hobbies.

EXAMINATION: The claimant's file was reviewed and examination of the Lumbar Spine shows the clinical history and exam findings are compatible with a specific injury; findings include significant muscle guarding observed and moderate tenderness is present. Toe and heel walking is abnormal and gait is markedly stiff. Reflexes are diminished into the bilateral knees and ankles. The range of motion is limited in flexion and extension to 0%. Motor shows no weakness and sensation is intact. There is radiculopathy present bilaterally. This patient falls into Category IV. Using the AMA Guidelines Fifth Edition, Page 384, Table 15-3, the Total [whole person impairment] for this patient is found to be 25%.

PERCENTAGE OF IMPAIRMENT: Based upon the AMA Guidelines Fifth Edition Revised, the total [whole person impairment] for this claim is opined at 25% [whole person impairment]. The claimant had a previous award in claim 97-611886 for lumbar and right knee injury of 15% [whole person impairment]. Taking this into consideration, an award of 10% [whole person impairment] is granted in this claim.

It was requested that a combined effects be done, based upon Dr. Litwin's psychological findings of 0% [whole person impairment]. Taking this into consideration and using the AMA Guidelines Fifth Edition Combined Values Chart page 604, the total [whole person impairment] for this claim is 10%.

{¶62} 29. Although "post laminectomy lumbar syndrome" is listed as an allowed condition in the claim, there is no further mention of this allowed condition in Dr. Marshall's report.

{¶63} 30. On August 4, 2009, relator's counsel wrote to the commission about Dr. Marshall's report:

\* \* \* I wish to register my protest and exception to the medical examination performed by Dr[.] Cyril Marshall MD, for the simple reason that neither his examination, nor the examinations by the various psychologists thus far have seen fit to evaluate one of the allowed conditions in this claim, namely post-laminectomy syndrome[.] \* \* \*

{¶64} 31. Earlier, on June 5, 2009, at Kingston's request, relator was examined by psychologist Michael A. Murphy, Ph.D. In his seven-page narrative report, Dr. Murphy opined:

In my opinion, based solely on the allowed diagnosis of Neurotic Depression [sic] and utilizing the AMA Guidelines to the Evaluation of Permanent Impairment, 5th edition, I find a 2% impairment associated with this injury (8/31/02).

{¶65} 32. On July 11, 2009, at Kingston's request, relator was examined by Paul B. Bartos, M.D., who conducted a physical examination for the allowed conditions of claim No. 02-419889. In his four-page narrative report dated July 16, 2009, Dr. Bartos opined:

In response to the questions of your letter:

[One] What, if any, percentage of permanent partial disability does claimant suffer from as it relates to the physical conditions of this claim? Please also comment on the combined effects percentage of permanent partial disability compensation as it relates to the physical and psychological conditions of this claim.

Based upon the history and physical examination, the claimant exhibits a lumbosacral impairment consistent with a

DRE IV, equaling 23% whole person impairment. The claimant clearly fits into this category due to the presence of a lumbar fusion. She has also been awarded 2% whole person impairment due to the psychiatric allowed conditions in this claim.

Using the Table of Combined Values in the American Medical Association's Guides to the Evaluation of Permanent Impairment, Fifth Edition, the psychological and physical impairments combine for a total 25% whole person impairment as a result of this injury.

(Emphasis omitted.)

{¶66} 33. On August 4, 2009, the Ohio Bureau of Workers' Compensation ("bureau") mailed a tentative order awarding relator 25 percent PPD. The order states reliance upon the reports of Drs. Marshall and Litwin<sup>2</sup>.

{¶67} 34. Relator objected to the bureau's August 4, 2009 tentative order.

{¶68} 35. On August 25, 2009, relator filed a C-86 motion asking for a determination of whether all allowed conditions in claim No. 02-419889 had been examined by commission doctors.

{¶69} 36. On August 25, 2009, Dr. Marshall issued an addendum to his July 15, 2009 report. The addendum stated:

In response to the addendum request for Elizabeth M[.] Shambaugh (02-419889) it was brought to my attention that the claimant had a prior [whole person impairment] award of 15% in a previous claim, for same body part (lumbar). Taking this into consideration and review of my examination findings, I would opine an additional award of 10% [whole person impairment] in the 2002 claim being evaluated.

{¶70} 37. On September 2, 2009, Dr. Bartos issued an addendum to his July 16, 2009 report:

---

<sup>2</sup>Obviously, the reports of Drs. Marshall and Litwin do not support 25 percent PPD. However, the report of Dr. Bartos would support the award.

In response to the critique of my determination of permanent partial impairment by [relator's counsel] \* \* \*, please consider the following. Pain behaviors are not used in the determination of permanent partial impairment. They are abnormal, exaggerated responses to pain as demonstrated by the claimant at the time of examination. I opined that the claimant fits into category DRE IV equaling 23% whole person impairment. Being specifically and intensively trained on the appropriate use of the American Medical Association's Guides to the Evaluation of Permanent Impairment, Fourth Edition, Fifth Edition, and Sixth Edition, as well as being a Board Certified Independent Medical Examiner, it is clear to anyone in the field that the claimant definitely fits into this DRE category.

The diagnosis of post-laminectomy syndrome is simply that, it is a syndrome. A syndrome is a constellation of symptoms. It is not related to a specific structural change or abnormality. This was the result of an unsuccessful fusion.

\* \* \* [T]he post-laminectomy syndrome, as correctly stated by the attorney, is characterized by ongoing pain. The DRE IV category gives the examiner the option of adding 3% whole person impairment for pain. That is the essence of the range of 20 - 23% whole person impairment. Also, if the description of DRE Category IV is read on Page 384, Table 15-3, it clearly states that a claimant with a spinal fusion, whether successful or unsuccessful, fits into this category. A post-laminectomy syndrome with ongoing pain suggests that the fusion was unsuccessful. This still fits the criteria for DRE Category IV.

Based upon the history and physical examination, review of medical documentation, review of mechanism of injury, treatment received and response to treatment, and based solely on the correct and appropriate use of the American Medical Association's Guides to the Evaluation of Permanent Impairment, Fifth Edition, the claimant clearly fits into Category IV. My opinion of the determination of her whole person impairment remains unchanged.

{¶71} 38. On October 12, 2009, Dr. Bartos issued a second addendum to his July

16, 2009 report:

In my Independent Medical Examination, I opined the claimant is entitled to a 25% whole person impairment due to the allowed conditions regarding the lumbosacral spine. It has been noted that the claimant has previously been awarded 15% whole person impairment for claim #97-611886 and is therefore 10% whole person impairment for the allowed conditions in this claim.

My original Independent Medical Examination failed to take into consideration the previous award for the same body parts.

{¶72} 39. On September 25, 2009, at relator's own request, she was examined by Stephen R. Bernie, M.D., for the allowed conditions in claim No. 02-419889. In his two-page narrative report, Dr. Bernie opined:

IMPRESSION: Based on history, physical examination and according to the AMA Guidelines Fifth Edition, citing tables 15-711F, 8, 9, and 17-5[.] The following findings are exclusive of any award given for dysthymic disorder. These findings are also exclusive of percentages already given for her variety of other specific spinal disorders that was awarded 23% [whole person impairment].

The only issue not individually addressed at this time is the post-laminectomy syndrome (PLS) at the lumbar spine, which was specifically allowed in 2006. PLS has a name and a code that designates a collective group of symptoms. This term and code of "post-laminectomy syndrome" is often used by medical professionals to indicate the same condition as "failed back syndrome[.]" In this particular claim, her allowed conditions have been superseded by additional symptoms acquired following two spinal surgeries that are characterized by persistent spinal pain and lower extremity pain from the surgeries. Her surgeries were medically indicated, though technically did not achieve the intended result. Additionally, it is possible that her surgery was inadequate and did not get to the underlying pathology[.] Post-surgically, it is not easy to identify the anatomical structure responsible for the ongoing pain. In theory it is known that all failed back patients have some sort of nerve injury or damage which leads to a persistence of symptoms after a reasonable healing time.

It is therefore concluded with a reasonable degree of medical certainty that Ms. Shambaugh has an additional 19% permanent partial impairment characterized by the intractable pain and varying degrees of functional incapacitation that occurred following her spinal surgeries. Unfortunately, it is a common though complex problem and has a right to be addressed as a specific condition that is the criteria for rating whole person impairment. The prior value of 23% and the additional value of 19% equals a permanent partial impairment of 42% of the whole person.

{¶73} 40. On September 29, 2009, at relator's request, treating psychologist Dr.

Marikis issued a report:

Based on the Guides to the Evaluation of Permanent Impairment, Volume 5, particularly as we deal with mental health conditions, in terms of classes of impairments, Ms. Shambaugh does have permanent impairment percentages.

In examining her activities of daily living, in general regarding self-care, travel and sleep concerns, she continues to have a mild to moderate impairment, Class II to III. In terms of social functioning, she has a mild impairment relative to her ability to respond to the challenges in her social world. In terms of concentration, persistence and pace, she has a mild impairment and in deterioration and decompensation in [a] work-like setting she has a moderate impairment. This leads to a 12 percent permanent partial disability relative to her psychological condition.

{¶74} 41. On October 21, 2009, a DHO heard relator's objection to the bureau's tentative order and also heard relator's August 25, 2009 motion. Following the hearing, the DHO issued an order that vacates the bureau's August 4, 2009 tentative order and addresses relator's August 25, 2009 motion:

At the onset of hearing and prior to a discussion on the merits, counsel for the Injured Worker requested that this matter be referred to the Bureau of Workers' Compensation in which to properly address the allowed condition in this claim of "post laminectomy lumbar syndrome." Counsel for the Injured Worker argued that neither Dr. Marshall nor Dr. Litwin specifically addressed "post laminectomy lumbar

syndrome" as an allowed condition in this claim, in their respective C-92 examinations. The District Hearing Officer notes that it is Injured Worker's counsel's position that post laminectomy lumbar syndrome is a combination of physical and psychological conditions and as such, new examinations needed to be performed by the Bureau of Workers' Compensation based on his assertion they did not properly consider this allowed condition in regard to this claim. Counsel argued that the mere listing of this condition on the respective medical reports was not sufficient consideration by the State doctors of said condition.

The District Hearing Officer notes that both counsel for the Employer and Administrator objected to the remand for new examinations.

The District Hearing Officer denies the request in which to refer this matter to the Bureau of Workers' Compensation in which to schedule a new physical and psychological examination in regard to this claim based on the allowance of "post laminectomy lumbar syndrome."

\* \* \* [T]he appropriate allowed conditions in this claim have been cited by Drs. Marshall, Litwin, Murphy and Bartos.

Counsel for the Bureau of Workers' Compensation further argued that Injured Workers' counsel raised this issue at a permanent total disability hearing which was adjudicated on 3/2/2009. Counsel for the Bureau of Workers' Compensation argued that the matter of post laminectomy lumbar syndrome was moot and this also was a matter of issue preclusion based on the fact that [relator's counsel] previously raised this argument at the permanent total disability hearing. The District Hearing Officer concurs with this argument.

At that time, the Staff Hearing Officer found that the condition of post laminectomy lumbar syndrome was properly considered by the Industrial Commission and that this condition was reviewed by the Chief Medical Advisor of the Industrial Commission, Dr. Welsh. The Staff Hearing Officer further noted that Dr. Welsh indicated that Dr. Scheatzle properly evaluated the condition of post laminectomy lumbar syndrome.

The District Hearing Officer further finds that at a Staff Hearing Officer decision rendered on 2/1/2007, benefits were reinstated based on the newly allowed physical condition of post laminectomy lumbar syndrome.

Based on the totality of evidence in file, the District Hearing Officer does not find the argument well-taken in which to refer this matter to the Bureau of Workers' Compensation in which to schedule two new examinations and further finds that the condition of post laminectomy lumbar syndrome has been properly considered by the Bureau of Workers' Compensation in rendering its opinions in regard to the C-92 examinations and further finds this issue has previously been adjudicated by the Industrial Commission.

Therefore, the order of the Administrator, issued 08/04/2009, is vacated.

The Application is granted. The District Hearing Officer finds from proof of record that the Injured Worker has a permanent partial disability of 22 percent, which entitles Injured Worker to an award of compensation for a period of 44 weeks. This award is to be paid in accordance with the applicable provisions of the Ohio Revised Code, including Section 4123.57. The Application for a percentage of permanent partial disability, filed 4/7/2009, is granted to the extent of this order.

This order is based upon the report(s) of Dr(s). Marshall, Bartos, Litwin, Murphy, Scheatzle, Lyall, Welsh.

**SPECIAL FINDINGS:** The District Hearing Officer notes that the medical report of Dr. Bernie, submitted at today's hearing, is unsigned and as such is not some evidence upon which the Industrial Commission may rely in rendering its decision. Likewise, the District Hearing Officer notes that the report of Dr. Marikis, dated 09/29/2009, fails to list the allowed psychological condition in this claim. As such, the District Hearing Officer does not find his report to be some evidence upon which the Industrial Commission may rely in rendering its decision.

The District Hearing Officer is granting a 19% permanent partial disability award based on the physical conditions in this claim and a 3% permanent partial disability award based

on the psychological allowance in this claim, thereby totaling a 22% permanent partial disability award to date.

(Emphasis sic.)

{¶75} 42. Relator moved for reconsideration of the DHO's order of October 21, 2009.

{¶76} 43. Following a December 8, 2009 hearing, an SHO issued an order stating:

The Staff Hearing Officer orders that the District Hearing Officer's decision is modified to the following extent. The Staff Hearing Officer finds that the Injured Worker had a permanent partial disability. The Staff Hearing Officer awards the Injured Worker 25%, therefore, an award of compensation for a period of 50 weeks will be paid. The Staff Hearing Officer awards 20% for the allowed physical conditions in this claim and 5% for the allowed psychological condition in this claim, thus totally a 25% permanent partial impairment award.

This decision is based on the report of Drs. Marshall, Bartos, Bernie, Scheatzle, Litwin, Murphy, Lyall, and Marikis. The Staff Hearing Officer notes that the Injured Worker has cured the defects in Dr. Bernie's and Dr. Marikis' reports as noted in the District Hearing Officer order.

{¶77} 44. On February 17, 2010, relator, Elizabeth Shambaugh, filed this mandamus action.

Conclusions of Law:

{¶78} The main issue is whether the commission had a clear legal duty to have relator examined for an alleged psychological component of the allowed condition "post laminectomy lumbar syndrome" that is allegedly not described in the allowed dysthymic disorder.

{¶79} Finding that the commission had no such legal duty, it is the magistrate's decision that this court deny relator's request for a writ of mandamus, as more fully explained below.

{¶80} In asserting that the commission was required to have relator examined for an alleged psychological component of the allowed condition "post laminectomy lumbar syndrome" that is allegedly not described in the dysthymic disorder, relator heavily relies upon the so-called medical literature.

{¶81} At the March 2, 2009 hearing before the SHO on the application for PTD compensation, relator's counsel submitted a two-paragraph document said to be an abstract of the "Merck Manual of Medical Information – Pain Related to Psychogenic Disorders":

...Many others have a degree of pain and disability out of proportion to what most people with a similar injury or disease experience. Psychologic processes often account for at least part of these complaints. The perceived pain may be predominately psychogenic in origin or it may be caused by a physical disorder and exaggerated in degree or duration because of psychologic stresses. Most often psychologically produced pain appears as a headache, low back pain, ...or pelvic pain.

The fact that the pain stems (in part or entirely) from psychologic causes does not mean that it is not real. Psychogenic pain requires treatment, sometimes by a psychiatrist. As with other kinds of treatment for chronic pain, the treatment for this type of pain varies from person to person, and a doctor will try to match the treatment with the person's needs.

During the March 2, 2009 hearing, relator's counsel told the SHO:

\* \* \* And I want to submit - - and this (indicating) is not medical, you can take this or not, but Dr. Welsh could have looked in the Merck Manual for the definition of psychogenic

pain. I'll just throw that on the table and I gave you a copy of it, it's only a definition. \* \* \*

(Tr. 6.)

{¶82} It is difficult for this magistrate to see how this medical abstract supports relator's position, and it seems that relator has not made much effort to explain.

{¶83} Also at the hearing, relator's counsel argued to the SHO:

\* \* \* [Dr. Welch] doesn't think there was quote/unquote sound literature for the proposition that a postlaminectomy syndrome is a combination of physical and psychological elements. There's a phrase in medical parlance called WNL, within normal limits, it can also be stated as we never looked. If he had looked, he would see that the literature that I submitted years ago on the subject is clearly in the Record and the notion that this is a combined physical and psychological entity is supported by a number of sources that are pretty first rate, including the Journal of Neurosurgery, Lancet, the archives of general psychiatry, they're all in there and I have to say I think that WNL in this case is we never looked.

(Tr. 5.)

{¶84} The so-called medical sources from the "Journal of Neurosurgery, Lancet, the Archives of General Psychiatry" were not submitted to the SHO at the hearing and they are not contained in the stipulation of evidence before this court. So this court does not have those medical sources to review for support of relator's argument.

{¶85} A review of case law regarding claim allowances may be helpful to understanding the issue here.

{¶86} It is well-settled that the commission must consider all the claimant's allowed conditions in deciding his or her application for PTD. *State ex rel. Johnson v. Indus. Comm.* (1988), 40 Ohio St.3d 339; *State ex rel. Cupp v. Indus. Comm.* (1991), 58 Ohio St.3d 129; *State ex rel. Zamora v. Indus. Comm.* (1989), 45 Ohio St.3d 17; *State ex*

*rel. Didiano v. Beshara* (1995), 72 Ohio St.3d 255; *State ex rel. Roy v. Indus. Comm.* (1996), 74 Ohio St.3d 259.

{¶87} Additionally identified conditions that may be related to an industrial injury must be formally recognized in the claim if they are to become the basis for compensation. *State ex rel. Jackson Tube Servs., Inc. v. Indus. Comm.*, 99 Ohio St.3d 1, 2003-Ohio-2259.

{¶88} Moreover, the Supreme Court of Ohio has repeatedly rejected the proposition that a medical condition is implicitly allowed when a self-insured employer authorizes and pays for surgery performed to treat the condition. *State ex rel. Schrichten v. Indus. Comm.* (2000), 90 Ohio St.3d 436, quoting *State ex rel. Griffith v. Indus. Comm.* (1999), 87 Ohio St.3d 154, 156.

{¶89} Generally speaking, when the commission adjudicates a motion for the allowance of additional conditions in the claim, it describes the additional allowance in its order. That commission adjudication must be based upon medical evidence or reports upon which it relies. The official description of the claim allowance contained in the commission order must then be placed on subsequent orders of the commission and its hearing officers, R.C. 4121.36(B)(4). Conceivably, a review of the medical evidence upon which the commission relied in determining the additional claim allowance might clarify any lack of clarity that arguably exists in the commission's official description of the claim allowance that is carried on subsequent commission orders.

{¶90} Here, we do not have in the stipulation of evidence the commission's order adjudicating the additional allowance of "post laminectomy lumbar syndrome and dys-

thymic disorder," nor any of the medical reports upon which the commission relied in adjudicating the additional allowance.

{¶91} We do know, however, that to be compensable, psychiatric conditions must have arisen from an injury or occupational disease. R.C. 4123.01(C). Thus, the allowance for dysthymic disorder here must be connected to a physical injury.

{¶92} Given the scenario, it is certainly conceivable that any psychiatric component of the post laminectomy lumbar syndrome is, in fact, already described in the allowed dysthymic disorder. Relator's argument here simply fails to address this concern.

{¶93} In short, relator has failed to show that the commission abused its discretion in its examination of relator for the claim allowance "post laminectomy lumbar syndrome and dysthymic disorder."

{¶94} 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).