[Cite as *State ex rel. Radko v. Indus. Comm.*, 2011-Ohio-5363.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Gennadiy Radko,	:	
Relator,	:	
v.	:	No. 10AP-1015
Industrial Commission of Ohio and Plaskolite, Inc.,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on October 18, 2011

Agee, Clymer, Mitchell & Laret, and *Robert M. Robinson,* for relator.

Michael DeWine, Attorney General, and *Latawnda N. Moore,* for respondent Industrial Commission of Ohio.

Vorys, Sater, Seymour & Pease, LLP, Bradley K. Sinnott and *Michael J. Ball,* for respondent Plaskolite, Inc.

IN MANDAMUS
ON OBJECTION TO MAGISTRATE'S DECISION

BRYANT, P.J.

{¶1} Relator, Gennadiy Radko, commenced this original action requesting a writ of mandamus that orders respondent Industrial Commission of Ohio to vacate its order

denying his application for permanent total disability compensation and to find he is entitled to that compensation.

I. Facts and Procedural History

{¶2} Pursuant to Civ.R. 53 and Section (M), Loc.R. 12 of the Tenth Appellate District, this matter was referred to a magistrate who issued the appended decision, including findings of fact and conclusions of law. In her decision, she noted relator's arguments: (1) the medical factors alone preclude his future employment, but even if he can perform sedentary work, (2) the nonmedical disability factors demonstrate he is unable to perform sustained remunerative employment. In resolving those arguments, the magistrate decided the commission did not abuse its discretion in determining: (1) relator was capable of performing some sedentary work within the noted physicians' physical and psychological restrictions, and (2) an evaluation of the nonmedical disability factors reveals relator was capable of performing some sedentary employment. Accordingly, the magistrate determined the requested writ should be denied.

II. Objection

{¶3} Relator filed an objection to the magistrate's conclusions of law. Although relator does not specifically state the objection, relator generally contends the commission failed to appropriately assess the nonmedical factors, but in particular relator's inability to speak fluent English. Relator's contentions are not persuasive.

{¶4} The commission specifically addressed the nonmedical factors. The commission noted relator is 62 years of age, a factor the commission could consider positive in that relator had the potential to work a number of years. At the same time, the commission viewed relator's age as perhaps a negative factor with respect to his ability to

learn new work skills and adapt to a new work environment. The commission ultimately concluded relator's age, a neutral factor, was not in itself "a basis to grant an award of permanent total disability compensation." (Magistrate's Decision, ¶25.)

{¶5} In terms of education, the commission concluded relator has the equivalent of a high school education because he obtained it in a foreign country and in a foreign language. The commission considered how that factor affected his employment with the employer here and his ability to learn the duties of that employment, obtain an Ohio's driver's license, procure a certification to drive tow motors, and become a United States citizen. Although the commission might have considered those factors positive absent the language issue, the commission, acknowledging the limitations of relator's limited proficiency in English, found his education to be a neutral factor that provided "the same capacity to acquire skills as a high school education obtained in this country." (Magistrate's Decision, ¶25.)

{¶6} Similarly, the commission found relator's prior employment a neutral factor to re-employment. In reaching that conclusion, the commission recognized relator has no transferable skills. Even so, the commission noted relator's excellent attendance record, as well as his ability to learn and to perform all of the tasks necessary to his job and to his 20 years of employment as a seaman.

{¶7} Considering relator's age, education, and work history, the commission in the end determined language was the only barrier to sedentary re-employment and indicated the commission reasonably could expect an injured worker to participate in return-to-work efforts including, in this case, developing fluency in the English language.

{¶8} The commission's analysis reflects its evaluation of the relevant nonmedical factors, including the positive and negative aspects of each and relator's ability to improve his English language skills. The commission did not abuse its discretion in its assessing the nonmedical disability factors and in ultimately deciding those factors support relator's ability to achieve reemployment. Relator's objection is overruled.

III. Disposition

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

Objection overruled;
writ denied.

SADLER and FRENCH, JJ., concur.

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APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Gennadiy Radko,	:	
Relator,	:	No. 10AP-1015
v.	:	(REGULAR CALENDAR)
Industrial Commission of Ohio and Plaskolite, Inc.,	:	
Respondents.	:	

M A G I S T R A T E ' S D E C I S I O N

Rendered on May 23, 2011

Agee, Clymer, Mitchell & Laret, and *Robert M. Robinson,* for relator.

Michael DeWine, Attorney General, and *Latawnda N. Moore,* for respondent Industrial Commission of Ohio.

Vorys, Sater, Seymour & Pease, LLP, Bradley K. Sinnott and *Michael J. Ball,* for respondent Plaskolite, Inc.

IN MANDAMUS

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

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

Findings of Fact:

{¶11} 1. Relator sustained a work-related injury on February 25, 2006, and his workers' compensation claim has been allowed for the following conditions: lumbar sprain; lumbosacral sprain; aggravation of pre-existing lumbar disc displacement at L4-5, L5-S1; major depression, severe, without psychotic features.

{¶12} 2. Relator submitted an application for PTD compensation on January 27, 2009.

{¶13} 3. According to his application, relator was 62 years of age when he filed his application, was currently receiving Social Security Disability benefits, completed the 11th grade in 1964 while living in Russia, had not obtained a GED, could read and write but not well, and could perform basic math. On his application relator indicated that he had not participated in vocational rehabilitation services, but that he was interested. Further, the application indicates that relator was employed as a line operator with the employer, Plaskolite, Inc. ("Plaskolite") for 11 years, and that he last worked in 2007.

{¶14} 4. In support of his application, relator submitted the October 29, 2008 report of his treating physician, William R. Fitz, M.D. In that letter, Dr. Fitz indicated:

> * * * I do believe he is disabled. As far as temporarily, at this point I think he is permanently disabled. He has not improved over quite a long period of time. * * *

{¶15} 5. With regard to the allowed physical conditions, relator was examined by Gerald S. Steiman, M.D. In his March 18, 2009 report, Dr. Steiman identified the medical records which he reviewed, provided physical findings upon examination, and concluded

that, based on the allowed physical conditions, relator had an eight percent permanent partial impairment and opined that he could sit, stand, and walk for three to five hours, and lift between 10 to 20 pounds for zero to three hours. Relator could push, pull, or otherwise move less than ten pounds for three to five hours, and 10 to 20 pounds for zero to three hours. Further, Dr. Steiman opined that relator could not climb stairs or ladders and that he could not crouch, stoop, bend, or kneel, nor could he reach at floor level.

{¶16} 6. William Reynolds, M.D. also examined relator for his allowed physical conditions. In his April 14, 2009 report, Dr. Reynolds identified the various medical records which he reviewed, provided physical findings upon examination, concluded that relator's allowed physical conditions had reached maximum medical improvement ("MMI"), assessed a 13 percent whole person impairment and concluded that relator was capable of performing at a sedentary work level.

{¶17} 7. Relator was examined for his psychological conditions by Lee Howard, Ph.D. In his March 6, 2009 report, Dr. Howard ultimately concluded that relator's psychological impairment would prevent him from returning to his former position of employment as a line operator; however, Dr. Howard also concluded that relator retained the capacity to engage in sustained remunerative employment when looking at his impairment due solely to the allowed conditions. As Dr. Howard noted, the etiology of relator's psychological problems indicates that the industrial accident is only one of three or four factors and probably not responsible for more than 25 percent to 33 percent of his overall impairment. Dr. Howard concluded relator could perform at the simple to moderate task range, but not the complex task range and that he could perform at the low to moderate stress range but not the high stress range. With regard to the percentage of

impairment, Dr. Howard opined that relator had a ten percent permanent partial impairment due to the allowed psychological condition as follows:

> There is a 30% permanent partial impairment secondary to major depressive disorder, one-third to one-fourth of that directly related to the industrial accident. Therefore, there is no more than a 10% permanent partial impairment secondary to the industrial accident per AMA Guides for Impairment, Edition IV.

{¶18} 8. Another psychological evaluation was conducted by Donald J. Tosi, Ph.D. In his April 14, 2009 report, Dr. Tosi noted that relator appeared to be a man of average intelligence. Dr. Tosi also indicated that psychological testing indicated that relator had severe depression; however, Dr. Tosi also noted that relator had had no formal psychological/psychiatric treatment following the injury. Dr. Tosi concluded that relator's allowed psychological condition had reached MMI and determined that relator had a Class II level of impairment as an 18 percent permanent impairment due to allowed psychological conditions. Dr. Tosi concluded that relator could return to work with no limitations.

{¶19} 9. Two employability assessment reports are in the record. First, there is a June 12, 2009 report of Beal D. Lowe, Ph.D., who noted that relator indicated that he is not able to read or write English, but that he can perform math. Dr. Lowe noted that relator was apparently able to function as an employee at Plaskolite for ten years because of the limited requirements for English language and because he received assistance from several Russian-speaking co-workers or supervisors. Dr. Lowe concluded that relator was precluded from successful vocational or educational rehabilitation and that he is permanently and totally disabled.

{¶20} 10. The second vocational assessment was conducted by William T. Darling, Ph.D. In his June 30, 2009 report, Dr. Darling concluded that relator's age of 61 would not be an asset to reemployment efforts; however, he noted that there are employers specifically looking to hire employees in this age range. Dr. Darling also concluded that relator's educational level could not be a barrier to reemployment as he should retain the ability to perform entry-level unskilled and semi-skilled tasks. Because his only work history was with Plaskolite, Dr. Darling opined that relator would likely require a period of adjustment or on-the-job training for any new position. Subsequently, Dr. Darling concluded that, if so motivated, relator was capable of sustained remunerative employment in positions commensurate with his current capabilities and within his restrictions.

{¶21} 11. Relator's application was heard before a staff hearing officer ("SHO") on August 28, 2009, and was denied. The SHO relied on the medical reports of Drs. Reynolds and Steiman and concluded that, from a physical standpoint, relator was capable of engaging in sedentary work activities. Further, the SHO relied on the reports of Drs. Tosi and Howard and concluded that, from a psychological standpoint, relator was capable of performing some sustained remunerative employment. With regard to relator's ability to speak English, and the comments noted in the psychological reports, the SHO noted as follows:

> The Injured Worker had previously been examined at the direction of the employer on 03/06/2009 by Lee Howard, Ph.D., a psychologist, with respect to his allowed psychological condition. Dr. Howard found the Injured Worker to have a 30% permanent partial impairment secondary to major depressive disorder, but no more than a 10% permanent partial impairment secondary to the

> industrial accident. Dr. Howard concluded that the Injured Worker can perform at the simple to moderate task range but not the complex task range. He further concluded the Injured Worker can perform at the low to moderate stress range but not the high stress range. Both Dr. Howard and Dr. Tosi commented that the Injured Worker is not fluent in English. Dr. Tosi did observe that the Injured Worker is of average intelligence. At this hearing, the Injured Worker testified that he was significantly more fluent in English at the time he successfully sought United States Citizenship, but that this fluency has declined in recent years. It may be significant that the Injured Worker sustained a cerebral vascular accident in 2007. No physician has directly commented on the significance of his 2007 stroke with respect to its impact on the Injured Worker's psychological status or cognitive function.

{¶22} After finding that relator is capable of performing sedentary work and that his psychological condition did not preclude employment, the SHO addressed the nonmedical disability factors and stated as follows:

> The Injured Worker has the equivalent of a high school education, but in a foreign country and a foreign language. He has work experience in recent times of a semi-skilled to skilled nature, but which has physical demands which he can no longer meet, and which consequently does not provide significant transferable skills. He has some minor psychological limitations. He is 62 years old.
>
> The Injured Worker's age is a slightly negative factor in evaluating his re-employment potential, as it would, to a minor degree, interfere with his ability to acquire new skills.
>
> The Injured Worker's education is significant but incomplete. An individual of average intelligence, able to complete high school, has certainly demonstrated basic skills and basic capacity to acquire skills, however, the Injured Worker is not fluent in English. The Injured Worker was able to demonstrate the capacity to become more fluent in the English language in recent years. To the extent that his decline in this fluency may be due to an unrelated medical condition, it is not a proper consideration. In light of these factors, the Staff hearing Officer concludes that, for purposes

of his permanent total application, there is no reason to conclude that he could not reasonably acquire the ability to fluently use the English language. On this basis the Injured Worker's prior education is a neutral factor in evaluating his re-employment potential.

The Injured Worker's prior work experience shows that he had an excellent attendance record at a position which required significant skill, but which he can no longer perform because of its physical requirements. His prior work experience is, on this basis, a neutral factor in evaluating his re-employment potential.

The Injured Worker is physically able to engage in sedentary work, and has, at worst, mild psychological restrictions.

Two principles in evaluating a permanent total disability application must be kept in mind: First, that non-allowed conditions are not proper considerations in evaluating the Injured Worker'[s] application, and [s]econd, that an Injured Worker has an obligation to seek to improve his skill level in order to make himself employable, within the reasonable limitations of his intelligence and other similar factors.

Taking all of these factors together, the Injured Worker has failed to demonstrate that he has lost the entirety of his capacity to engage i[n] sustained remunerative employment. The Injured Worker has a number of positions of employment which would be within his physical psychological and intellectual capacities, but for his lack of facility with English. He has not demonstrated that he cannot learn to use the English language successfully, indeed, he has successfully functioned in an English speaking city for over 10 years. Typical examples of positions of employment within the capacities of an individual who can do physically sedentary work, and can perform in moderately complex and moderately stressful task ranges, would be entry level clerical positions, lot attendant positions, self-service cashier positions, monitoring type security positions and generally other sedentary entry level work. On the facts of this claim, the Injured Worker's lack of facility with the English language is not a bar to his re-employment potential, and consequently the application is properly denied.

{¶23} 12. Relator filed a motion for reconsideration arguing that the SHO made a mistake of law in fact in denying his application for PTD compensation.

{¶24} 13. The commission issued an interlocutory order mailed October 23, 2009 and granted relator's request that it exercise its continuing jurisdiction under R.C. 4123.52. The commission stated as follows:

> It is the finding of the Industrial Commission that the Injured Worker has presented evidence of sufficient probative value to warrant adjudication of the request for reconsideration regarding the alleged presence of a clear mistake of fact in the order from which reconsideration is sought, and a clear mistake of law of such character that remedial action would clearly follow.
>
> Specifically, it is alleged that the Staff Hearing Officer mistakenly found that the injured worker previously performed semi-skilled to skilled work as a lathe operator when he was employed as an unskilled line operator.
>
> Based on these findings, the Industrial Commission directs that the Injured Worker's request for reconsideration, filed 09/16/2009, is to be set for hearing to determine whether the alleged mistakes of fact and law as noted herein are sufficient for the Industrial Commission to invoke its continuing jurisdiction.

{¶25} 14. A hearing was held before the commission on January 7, 2010. Ultimately, the commission determined that relator was not entitled to an award of PTD compensation. The commission relied on the reports of Drs. Reynolds and Steiman and concluded that relator was capable of performing at a sedentary work level. The commission also relied on the reports of Drs. Tosi and Howard and concluded that relator's allowed psychological condition would not prevent him from engaging in sustained remunerative employment in spite of the fact that his psychological conditions would interfere with his ability to perform work in psychologically stressful or complex

environments. The commission did note that both Drs. Tosi and Howard acknowledged that relator was not fluent in English; however, the commission noted that Dr. Tosi indicated that he was of average intelligence. Thereafter, the commission addressed the nonmedical disability factors as follows:

> The Injured Worker is sixty-two (62) years old. The Commission finds this is a neutral factor toward re-employment. At age sixty-two (62), the Injured Worker has a number of potential work yeas available to him. His age may, however, be a negative factor in learning new work skills and adapting to new work environments. Age alone, however, is not a basis to award permanent total disability compensation.
>
> The Injured Worker has the equivalent of a high school education, albeit in a foreign country and a foreign language. As noted, Dr. Tosi found the Injured Worker was of average intelligence. Again, the Commission notes the Injured Worker is not fluent in English. However, that lack of fluency did not prevent the Injured Worker from learning the duties of a line operator, to maintain employment in an English speaking shop for eleven years, from obtaining an Ohio driver's license or his certification to drive tow motors or from obtaining United States citizenship. The Injured Worker's education is found to be a neutral factor due to the fact that his education was obtained in a foreign country and in a foreign language. The Injured Worker testified at hearing that he has the ability to count, add, measure; he merely does it in Russian instead of English. The Commission finds the Injured Worker's education does provide the same capacity to acquire skills as a high school education obtained in this country; the Injured Worker is limited only by his limited proficiency in English.
>
> The Commission further finds that the Injured Worker's prior employment is a neutral factor toward re-employment. The Injured Worker has no transferrable skills from his employment as a line operator. However, the Injured Worker had an excellent attendance record, learned and performed all the tasks necessary for his job, and has demonstrated the ability to learn a variety of work tasks both with the instant employer and for twenty years as a seaman. He has further

> demonstrated his ability to work in a variety of work settings and to adapt to difficult work situations, especially by working in a country foreign to him and in a foreign language. These qualities are positive factors toward re-employment.
>
> Based on the Injured Worker's age, education, and work history, the Commission finds the Injured Worker is capable of learning and performing unskilled entry-level sedentary work. Examples of jobs within the Injured Worker's capability are entry-level clerical positions, lot attendant positions, self-service cashier positions, and monitoring type security positions.

In closing, the commission noted that relator's only barrier to reemployment in a sedentary setting was his difficulty with the English language. However, the commission noted that relator had never undergone any vocational retraining or educational training to enhance his ability to learn English and become reemployed. Specifically, the commission stated:

> The only barrier to sedentary re-employment is the Injured Worker's difficulty with the English language. The Commission, as does the Court, demands certain accountability of an injured worker, who, despite the time and medical ability to do so, never tried to further his education or learn new skills when there was ample opportunity to do so. State ex rel. Bowling v. National Can Corp. (1996), 77 Ohio St.3d 148. It is not unreasonable to expect an injured worker to participate in return-to-work efforts to the best of his or her abilities, or to take the initiative to improve re-employment potential. While extenuating circumstances can excuse an injured worker's participation in re-education or retraining efforts, injured workers should no longer assume that a participatory role or lack thereof will go unscrutinized. State ex rel. Wilson v. Indus. Comm. (1997), 80 Ohio St.3d 250. Accordingly, the Commission finds that the Injured Worker has an obligation to attempt to improve his skill level in order to enhance his employment options. As there is no evidence that the Injured Worker lacks the ability to learn, the Commission finds that the Injured Worker has not met his obligation to attempt to improve his employment potential.

> The Commission finds that, based on the Injured Worker's age, education and work history, and, taking in account his limited English language skills, the Injured Worker is capable of engaging in unskilled entry-level sedentary work. Therefore, the IC-2 Application for Compensation of Permanent Total Disability, filed 01/27/2009, is denied.

{¶26} 15. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶27} Relator argues that the commission abused its discretion when it determined that he was not entitled to an award of PTD compensation. Specifically, relator argues that (1) the medical factors alone preclude employment, and (2) even if he could perform sedentary work, the nonmedical disability factors demonstrate that he is unable to perform any sustained remunerative employment. According to relator, virtually no jobs exist for someone with his restrictions and, the commission abused its discretion when it determined that his age, education, and prior work history were neutral factors when, in reality, they were all negative factors.

{¶28} It is this magistrate's decision that the commission did not abuse its discretion by finding that (1) relator was capable of performing some sedentary work within the physical and psychological restrictions noted by the physicians, and (2) evaluating the nonmedical disability factors and concluding that relator was capable of performing some sedentary employment.

{¶29} The relevant inquiry in a determination of permanent total disability is claimant's ability to do any sustained remunerative employment. *State ex rel. Domjancic v. Indus. Comm.*, 69 Ohio St.3d 693, 1994-Ohio-95. Generally, in making this determination, the commission must consider not only medical impairments but also the

claimant's age, education, work record and other relevant nonmedical factors. *State ex rel. Stephenson v. Indus. Comm.* (1987), 31 Ohio St.3d 167. Thus, a claimant's medical capacity to work is not dispositive if the claimant's nonmedical factors foreclose employability. *State ex rel. Gay v. Mihm*, 68 Ohio St.3d 315, 1994-Ohio-296. The commission must also specify in its order what evidence has been relied upon and briefly explain the reasoning for its decision. *State ex rel. Noll v. Indus. Comm.* (1991), 57 Ohio St.3d 203.

{¶30} Relator's first argument is that the commission abused its discretion by concluding that he could perform at a sedentary work level within the restrictions set forth by the physicians. Specifically, when considering the physical and psychological restrictions, relator argues that he is limited to sedentary to light duty employment in an environment where there is low stress work involving only simple to moderate tasks.

{¶31} In making this argument, relator does not challenge the medical evidence upon which the commission relied; instead, he argues that, because there are virtually no job opportunities available to a person with those physical and psychological limitations, the commission should have found that he was permanently and totally disabled based solely on the medical evidence.

{¶32} This magistrate disagrees. Drs. Reynolds, Steiman, Howard, and Tosi all opined that relator's allowed conditions would not prevent him from returning to some sustained remunerative employment. Those reports constitute some evidence upon which the commission could rely and nothing in the statute or case law required that a certain number of job opportunities must be available before the commission can determine that a claimant can perform some sustained remunerative employment. The

issue is not how many low stress and noncomplex jobs are available but whether or not relator can perform what jobs exist. Relator simply has not demonstrated the commission abused its discretion by finding that he could perform some sustained work activity within these restrictions.

{¶33} Relator's next argument is that the commission abused its discretion by considering the nonmedical disability factors and concluding that those factors, in combination with his medical restrictions, enabled him to perform some sustained remunerative employment.

{¶34} With regard to relator's age, the record reflects that he was 59 years old at the time of his injury and 62 years old at the time of the hearing on his PTD application. The commission determined that relator's age was a neutral factor towards reemployment because he had a number of potential years remaining in which he could work. In *State ex rel. Ellis v. McGraw Edison Co.*, 66 Ohio St.3d 92, 1993-Ohio-209, the Supreme Court of Ohio stated that the determination of whether age is an asset is within the sound discretion of the Industrial Commission. However, the court has stated that there is not an age, ever, at which reemployment is held to be a virtual impossibility as a matter of law. *State ex rel. Pass v. C.S.T. Extraction Co.*, 74 Ohio St.3d 373, 1996-Ohio-126 (claimant 64 years old); *State ex rel. DeZarn v. Indus. Comm.*, 74 Ohio St.3d 461, 1996-Ohio-143 (claimant 71 years old); *State ex rel. Moss v. Indus. Comm.*, 75 Ohio St.3d 414, 1996-Ohio-306 (claimant 78 years old); and *State ex rel. Bryant v. Indus. Comm.*, 74 Ohio St.3d 458, 1996-Ohio-67 (claimant 79 years old). The commission did acknowledge, however, that relator's age may be a negative factor in his ability to learn new work skills and his

ability to adapt to new work environments. The magistrate finds that this was not an abuse of discretion.

{¶35} The commission found that relator's education was also a neutral factor because, although he had a high school education, he obtained that degree in a foreign country and in a foreign language. Ordinarily a high school education is seen as a positive vocational factor. Specifically, Ohio Adm.Code 4121-3-34(B)(3)(b)(iv) provides:

> "High school education or above" means twelfth grade level or above. The G.E.D. is equivalent to high school education. High school education or above means ability in reasoning, arithmetic, and language skills acquired through formal schooling at twelfth grade education or above. Generally an individual with these educational abilities can perform semi-skilled through skilled work.

Here it is clear that the commission acknowledged that relator's high school education in Russia was not equivalent to a high school education in the United States. Specifically, the commission noted:

> * * * As noted, Dr. Tosi found the Injured Worker was of average intelligence. Again, the Commission notes the Injured Worker is not fluent in English. However, that lack of fluency did not prevent the Injured Worker from learning the duties of a line operator, to maintain employment in an English speaking shop for eleven years, from obtaining an Ohio driver's license or his certification to drive tow motors or from obtaining United States citizenship. The Injured Worker's education is found to be a neutral factor due to the fact that his education was obtained in a foreign country and in a foreign language. The Injured Worker testified at hearing that he has the ability to count, add, measure; he merely does it in Russian instead of English. The Commission finds the Injured Worker's education does provide the same capacity to acquire skills as a high school education obtained in this country; the Injured Worker is limited only by his limited proficiency in English.

Relator contends that the commission abused its discretion by finding that his education was a neutral factor when, in fact, his education is a negative factor towards his ability to become reemployed. Relator asserts that "his lack of fluency did prevent him from learning the duties of a line operator and maintaining employment in an English speaking shop for eleven years. As Mr. Radko testified, he '… learned his job like a monkey would, and he did everything mechanically and he never had to read anything.' *Stip at 153.* Thus, he did not use English when training for his job."

{¶36} The commission did not find relator's education to be a positive factor; instead, the commission found it to be a neutral factor. This magistrate cannot say that it was an abuse of discretion for the commission to determine that his education was a neutral factor in spite of his lack of fluency in English and the fact that his job had not required him to read in English. As the commission stated, relator had learned enough English to obtain an Ohio driver's license, his certification to drive a tow motor, and United States citizenship.

{¶37} Relator next challenges the commission's determination his prior work history was also a neutral factor to his ability to become reemployed. In its order, the commission acknowledged that relator had no transferrable skills from his employment as a line operator. However, the commission did acknowledge that relator had an excellent attendance record, that he learned and performed all the tasks necessary for his job, and that he had demonstrated the ability to learn a variety of work tasks, both with the instant employer and for 20 years as a seaman. The commission noted further that relator had demonstrated the ability to work in a variety of work settings and the ability to adapt to

different work situations especially when one considers his ability to work in this country and in a foreign language.

{¶38} Relator argues that he was not required to speak or understand English in order to perform his job with Plaskolite and that he did not have to perform a variety of tasks at Plaskolite. Relator contends that, in his job as a line operator, he packed acceptable sheets and sent unacceptable sheets to the grinder. Further, his only other duty was to clean up his area. As such, relator asserts that he did not perform a variety of tasks at Plaskolite.

{¶39} The magistrate finds that relator is taking the commission's order out of context. What the commission said was that relator had "demonstrated the ability to learn a variety of work tasks both with the instant employer and for twenty years as a seaman." Clearly, the commission was including relator's military service when it determined that he had demonstrated the ability to learn a variety of tasks. On numerous occasions, this court has upheld commission orders denying PTD compensation to claimants based, in part, upon a finding that their military service was a positive factor when looking at their work experience as a whole. See, e.g., *State ex rel. Felty v. Gen. Motors,* 10th Dist. No. 08AP-156, 2008-Ohio-5694; *State ex rel. Shepard v. Indus. Comm.,* 10th Dist. No. 09AP-675, 2010-Ohio-3742; *State ex rel. Scarborough v. Indus. Comm.,* 10th Dist. No. 09AP-1041, 2010-Ohio-4020. Relator has not stated that his military service in Russia differed from and was significantly inferior to military service in the United States. In this case, the commission did not find relator's prior work history to be a positive factor; instead, the commission considered it to be a neutral factor. Relator simply has not demonstrated that this was an abuse of discretion.

{¶40} Relator also objects to the commission's statement that the "only barrier to sedentary re-employment is [his] difficulty with the English language" and argues that he has many barriers. For example, relator argues that physical and psychological limitations are significant barriers. The magistrate finds that the commission's statement does not indicate that the commission did not recognize his limitations. Instead, the statement reflects the determination that his age, education, and work history were neutral factors and that his difficulty with English was the only negative factor or barrier.

{¶41} Relator also challenges the commission's determination that his failure to participate in any vocational rehabilitation provided an alternative reason for denying his application for PTD compensation. While relator acknowledges that the commission and courts demand a certain accountability of an injured worker who, despite the time and medical ability to do so, never tries to further his education to learn new skills, relator argues that those cases do not apply here. *State ex rel. Bowling v. Natl. Can Corp.,* 77 Ohio St.3d 148, 1996-Ohio-200*.* The reason relator believes those cases should not be applied here is because of the short period of time between relator's injury and his filing for PTD compensation. In the majority cases where the failure to pursue vocational rehabilitation has been held against the claimant, many years have passed between the claimant's date of injury and the filing of their application for PTD compensation. Relator contends that his failure to pursue any vocational or educational rehabilitation in the three and one-half years between his date of injury and the filing of his PTD application cannot be held against him.

{¶42} While the facts of this case are not as obvious and egregious as the facts in many other cases, the magistrate cannot say that the commission abused its discretion

by noting that relator had time to improve his English skills and that, had he done so, he could have improved his opportunity to become reemployed. It is not an abuse of discretion for the commission to provide an alternative reason for denying an application for PTD compensation. See, for example, *State ex rel. Smith v. Indus. Comm.,* 10th Dist. No. 09AP-214, 2009-Ohio-6661. Even if this court did find an abuse of discretion here, a writ of mandamus would not be appropriate because the commission's determination that relator was capable of performing some sustained remunerative employment stands independently as a reason to deny his application for PTD compensation.

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

/s/ Stephanie Bisca Brooks
STEPHANIE BISCA BROOKS
MAGISTRATE

NOTICE TO THE PARTIES

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