[Cite as *State ex rel. Vansickle v. Indus. Comm.*, 2011-Ohio-4982.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Rodney L. Vansickle,	:	
Relator,	:	
v.	:	No. 10AP-852
Industrial Commission of Ohio et al.,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on September 29, 2011

Connor, Evans & Hafenstein, *LLP*, and *Katie W. Kimmet*, for relator.

Michael DeWine, Attorney General, and *Robert Eskridge, III*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

BROWN, J.

{¶1} Relator, Rodney L. Vansickle, has filed an original action requesting that this court issue a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its order denying him permanent total disability ("PTD") compensation, and to enter an order granting said compensation.

{¶2} This matter was referred 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 which is appended to this decision, including findings of fact and conclusions of law, recommending that this court issue a writ of mandamus ordering the commission to

vacate the order of its staff hearing officer, dated February 3, 2010, and to enter a new order that adjudicates the PTD application. No objections have been filed to that decision.

{¶3} Finding no error of law or other defect on the face of the magistrate's decision, this court adopts the magistrate's decision as our own, including the findings of fact and conclusions of law. In accordance with the magistrate's recommendation, we grant relator's request for a writ of mandamus to the extent the commission is ordered to vacate the staff hearing officer's order of February 3, 2010 denying the PTD application, and to enter a new order that adjudicates the PTD application in a manner consistent with the magistrate's decision.

Writ of mandamus granted.

TYACK and CONNOR, JJ., concur.

_____

[Cite as *State ex rel. Vansickle v. Indus. Comm.*, 2011-Ohio-4982.]

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Rodney L. Vansickle,	:	
Relator,	:	
v.	:	No. 10AP-852
Industrial Commission of Ohio et al.,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on May 31, 2011

Connor, Evans & Hafenstein, *LLP*, and *Katie W. Kimmet*, for relator.

Michael DeWine, Attorney General, and *Robert Eskridge, III*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶4} In this original action, relator, Rodney L. Vansickle, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order denying him permanent total disability ("PTD") compensation, and to enter an order granting the compensation.

Findings of Fact:

{¶5} 1. On May 25, 1998, relator injured his lower back while employed as an "operator" for respondent Inland Products, Inc., a state-fund employer. The industrial claim (No. 98-540321) is allowed for:

> Sprain lumbosacral; L5-S1 disc protrusion; lumbosacral spondylosis; lumbar degenerative disc disease L4-5; disc bulge L4-5.

{¶6} 2. Relator received temporary total disability ("TTD") compensation from August 23, 2001 through November 4, 2003 when the commission determined that the industrial injury had reached maximum medical improvement ("MMI").

{¶7} 3. Relator also received TTD compensation beginning July 1, 2004 based upon the commission's finding of new and changed circumstances.

{¶8} 4. Effective September 26, 2005, the commission again terminated TTD compensation on grounds that the industrial injury had reached MMI.

{¶9} 5. Earlier, on July 15, 2003, according to an operative report from Adil O. Katabay, M.D., relator underwent a nerve root block on the left at L4 and L5.

{¶10} 6. On August 12, 2003, according to another operative report from Dr. Katabay, relator underwent another nerve root block on the left at L4 and L5.

{¶11} 7. On December 30, 2003, according to another operative report from Dr. Katabay, relator again underwent a nerve root block on the left at L4 and L5.

{¶12} 8. On January 27, 2004, according to another operative report from Dr. Katabay, relator underwent a nerve root block on the left at L5 and S1.

{¶13} 9. On October 19, 2004, according to another operative report from Dr. Katabay, relator underwent "[b]ilateral diagnostic medial branch blocks at L3, L4, L5, and S1."

{¶14} 10. On November 2, 2004, according to an operative report from Dr. Katabay, relator underwent "[b]ilateral diagnostic medial branch blocks at L3, L4, L5, and S1."

{¶15} 11. On October 25, 2005, according to an operative report from Dr. Katabay, relator underwent "[l]umbar radiofrequency to the medial branches at L3, L4, L5, and S1."

{¶16} 12. On November 8, 2005, according to an operative report from Dr. Katabay, relator underwent another lumbar radio frequency treatment.

{¶17} 13. On February 6, 2008, according to an operative report from Bruce Massau, D.O., relator underwent a procedure described as "caudal epidural with fluoroscopy." The February 6, 2008 operative report states in part:

> POSTOPERATIVE DIAGNOSIS(ES) – Failure to fill on the L5-S1 on the left, a huge central disk filling, a huge filling defect at L5-S1 where there is a central protrusion. The canal on distal filling on distal high-pressure epidurogram fills lateral to the disk. Interesting to note that the patient fills a little bit on the L5-S1, however, no filling was appreciated at L3-L4, L4-L5 bilaterally.

{¶18} 14. On February 13, 2008, according to an operative report from Dr. Massau, relator underwent a "caudal epidural steroid injection with fluoroscopy."

{¶19} 15. On February 27, 2008, according to an operative report from Dr. Massau, relator underwent a "epidural steroid injection." The report states in part:

> A 22-gauge needle was inserted into the sacral hiatus under direct fluoroscopy. At this point in time we moved the fluoro machine into an AP position and injected our contrast. It was noted that he had a little bit of filling in the L4-L5 and L5-S1 which was appreciated, however, for the most part he continues to have nonfilling in the L4-L5, L5-S1. We did appreciate a little bit of filling in the L5-S1 bilaterally but nothing that you would look at and say that this is impressive. At this point in time we mixed a concoction of 15

> ml of normal saline, 5 ml of Marcaine, and 120 mg of Depo-Medrol. This was injected into the sacral hiatus. As noted above, no appreciably flow was noted in the distal nerve runoff in the distal roots.

{¶20} 16. Earlier, by letter dated December 9, 2005 from the Ohio Bureau of Workers' Compensation ("bureau") relator was informed that he was ineligible for vocational rehabilitation. The bureau's letter states:

> You have been referred for consideration of vocational rehabilitation services. Based upon our current information you are not eligible at this time. A review of your claim indicates THERE ARE NO CURRENT JOB RESTRICTIONS PROVIDED BY THE PHYSICIAN OF RECORD.
>
> If you or your employer disagree with this decision, you have 20 days from the date you receive this letter to appeal the decision.

(Emphasis sic.) The record does not indicate that the December 9, 2005 decision was administratively appealed.

{¶21} 17. On March 3, 2009, Dr. Massau completed a C-9 on which "Vocational Rehabilitation" was requested.

{¶22} 18. Dr. Massau's C-9 prompted the following memorandum from the Managed Care Organization:

> [One] Is injured worker medically stable to actively participate in vocational rehabilitation services geared toward [return to work]? Yes (THIS IS FROM A FILE REVIEW PERSPECTIVE)
>
> [Two] Are there opportunities for TW or does alternative work exist at the injured worker's employer? Unknown
>
> [Three] What is this injured worker's significant impediment for [return to work]? [Physician of record] has not released him to return to work
>
> [Four] Is this a re-referral for vocational rehabilitation? (Yes) If yes, what are the new or changed circumstances now

> making the injured worker feasible for vocational rehabilitation services geared toward [return to work]? Nothing
>
> [Five] Other relevant information: File is active; injured worker address and attorney are current. He has a 26% ppd award and his last TT compensation was 9/26/05. His last day worked was 8/22/01 and he has a total of 2 claims. [Physician of record] Office visit note of 2/20/09 indicated [physician of record] feels injured worker is capable of light duty work but injured worker "claims to an illiterate, not only illiterate of spoken but also illiterate in computer technology." A C9 was submitted for "a meeting with bureau vocational rehabilitation." A call has been placed to the POR office to attempt to clarify the difference between the Bureau of Vocational Rehabilitation and vocational rehabilitation under a Worker's Comp claim. Restrictions have also been requested as I was unable to locate any current restrictions to clarify what Dr. Massau means by light duty.
>
> This injured worker appears to be eligible for vocational rehabilitation. Yes
>
> Please verify eligibility or ineligibility

(Emphasis sic.)

{¶23} 19. By letter dated March 6, 2009 from the employer's third-party administrator "Sheakley UniComp," relator was informed:

> This letter is to inform you that your rehabilitation file will be closed effective March 06, 2009 by Sheakley UniComp for the following reasons:
> *Not feasible for a return to work focused program as evidenced by injured worker's report that therapy was not helpful and Injured worker states he is illiterate both of spoken and computers.*

(Emphasis sic.)

{¶24} 20. Earlier, on March 26, 2008, at relator's own request, he was examined by orthopedic surgeon Richard M. Ward, M.D. In his two-page narrative report, Dr. Ward opines:

> Based on the history and my examination, I believe he was injured on 8-25-98. As a result of that injury he has the allowances of lumbosacral sprain/strain, L5-S1 disc protrusion, lumbosacral spondylosis, lumbar degenerative disc disease at L4-5 and L4-5 disc bulge. The significance is he has not had surgery. He continues to have severe low back pain that radiates into the posterior left thigh and sometimes into his calf. He has involuntary muscle spasm with marked loss of lumbar spine motion.
>
> Taking into account the specific allowances from the injury that occurred as described on 8-25-98 and my physical findings and based upon a reasonable medical probability, it is my opinion that as a direct result of the allowances from the injury that occurred on 8-25-98, he is not capable of returning to substantial gainful employment because there really is no combination of sit, stand, walk option that would add up to a normal 8 hour work day for him. He also has severe postural limitations, limitations on his ability to lift and carry; he cannot use his legs to operate foot controls and he cannot use his arms for any pushing and pulling. I did fill out a physical capacities evaluation to the best of my ability, again taking into account the specific allowances from the injury that occurred on 8-25-98 and my physical findings.
>
> To reiterate, based upon all of the above and a reasonable medical probability, it is my opinion that he cannot return to substantial gainful employment because of the specific allowances from the injury that occurred on 8-25-98. Because of this, in my opinion, he should be granted permanent total disability.

{¶25} 21. On August 19, 2009, relator filed an application for PTD compensation. In support, relator submitted the March 26, 2008 report from Dr. Ward.

{¶26} 22. Under the "Education" section of the PTD application, relator indicates that the ninth grade was the highest grade of school completed. He has not received a certificate for the General Educational Development ("GED") test. He has received no trade school or special training.

{¶27} 23. Among the information sought, the application form posed three questions: (1) "Can you read?" (2) Can you write?" and (3) "Can you do basic math?"

Given the choice of "yes," "no," and "not well," relator selected the "no" response to all three inquires.

{¶28} 24. On October 1, 2009, at the commission's request, relator was examined by William R. Fitz, M.D. In his three page narrative report, Dr. Fitz opines that relator has a 22 percent whole person impairment from all the allowed conditions in the claim.

{¶29} 25. October 1, 2009, Dr. Fitz completed a physical strength rating form. On the form, Dr. Fitz indicates by his mark that relator is capable of "sedentary work."

{¶30} 26. Relator requested an "employability assessment" from vocational expert Beal D. Lowe, Ph.D. In his three-page narrative report dated November 16, 2009, Dr. Lowe states:

> Mr. Vansickle reports that he was in Special Education classes, that he "flunked" several years and that he "flunked" the 9th grade twice before I quit".
>
> TEST RESULTS:
>
> The WRAT-3 and a Short Form of the WAIS-R were administered to Mr. Vansickle to assess his reading abilities and general intellectual abilities. He was observed to put full effort into this testing. Response on the WRAT-3 indicate that he is reading at the 3rd Grade level. His performance on the Short Form of the WAIS-R indicates that he is functioning at the Low end of the Borderline range of intelligence (lowest 5%).
>
> SYNTHESIS OF BACKGROUD INFORMATION:
>
> Mr. Vansickle is a 43 year-old man who last worked in 1998 and all of whose work experience has been semi-skilled labor in the Heavy range which has not provided him with any transferable skills. He reports having last attended school in the 9th Grade, having been in Special Education classes and having failed several years of school. Educational testing conducted as part of the present examination finds him to be reading at the 3rd Grade level.

> Intellectual screening as part of the present assessment finds him to have a full-scale IQ at the Low end of the Borderline range (lowest 5%). * * *
>
> VOCATIONAL REHABILITATION EXPERENCE:
>
> Referral materials do not indicate that Mr. Vansickle has ever been involved in vocational rehabilitation.
>
> TRANSFERABLE SKILLS ANALYSIS:
>
> A computerized search with Skilltran found no Sedentary occupations feasible for a man with Mr. Vansickle's low intelligence and 3rd Grade level reading abilities.
>
> DISCUSSION/CONCLUSIONS[:]
>
> This assessment finds Mr. Vansickle to be permanently and totally disabled from all employment as a result of his physical restriction, at best, to Sedentary employment, and with consideration given to his Borderline intelligence, 3rd Grade level reading, past failures in academic settings and his inability, because of his intellectual deficiencies, to improve his employability through education or rehabilitation.

{¶31} 27. Following a February 3, 2010 hearing, a staff hearing officer ("SHO") issued an order denying relator's PTD application. The SHO's order explains:

> The Injured Worker is a 44 year old male with a 9th grade education, and a work history including experience as a farm laborer, factory worker, and general laborer. The Injured Worker was injured on 05/25/1998 when he fell approximately 17 to 20 feet onto a platform landing on his back. The Staff Hearing Officer notes that the Injured Worker has not had any surgical procedures relating to the allowed conditions in the claim. Currently the Injured Worker sees his physician for medication monitoring. According to his IC-2 Application, the Injured Worker last worked on 08/22/2001.
>
> The Injured Worker was examined by Industrial Commission Specialist William R. Fitz, M.D. on 10/01/2009. Based upon a review of the medical documentation contained in the claim file along with a physical examination of the Injured Worker, Dr. Fitz opined that the allowed conditions in the claim have reached maximum medical improvement. Dr. Fitz opined that the Injured Worker has a 22% whole person

impairment as a result of the allowed conditions in the claim. In addition, Dr. Fitz opined that the Inured Worker was capable of sedentary work activity. The Staff Hearing Officer notes that the Injured Worker's treating physician, Bruce A. Massau, D.O., opined on 09/18/2009 that the Injured Worker could perform light duty work. The Staff Hearing Officer relies upon the medical report of Dr. Fitz to find that when only the impairment arising from the allowed conditions of a claim is considered, the Injured Worker has the residual functional capacity to perform sedentary work activity. Furthermore, when his degree of medical impairment is considered in conjunction with his non-medical disability factors, the Staff Hearing Officer finds that the Injured Worker is capable of sustained remunerative employment and is not permanently and totally disabled.

The Staff Hearing Officer considers the Injured Worker's age to be a strong vocational asset with regard to his potential for returning to the work force. Individuals of the Injured Worker's age have more than sufficient time to acquire new job skills, at least through informal means such as short-term or on-the-job training, that could enhance their potential for re-employment. In this regard, the Staff Hearing Officer finds no evidence on file to support a finding that in the time that has past [sic] since his departure from the work force in 2001 the Injured Worker has made any effort forward pursuing rehabilitation or re-training. As set forth in State ex rel. Speelman v. Indus. Comm. (1992) 73 Ohio [A]pp. 3d 757, and more recently in State ex rel. Cunningham v. Indus. Comm. (2001) 91 Ohio St.3d 261, the Commission when considering a claim for permanent total disability, may consider not only past employment skills, but those skills which may reasonably be developed. Accordingly, the Commission may take into account the lack of effort by an Injured Worker to pursue new skills that may have led to a return to employment.

The Staff Hearing Officer finds that the Injured Worker's education to be somewhat of a barrier with regard to future employment. However, the Staff Hearing Officer finds that the Injured Worker's education would not in and of itself preclude him from obtaining and performing work activity at the level described by Dr. Fitz in his report. The Staff Hearing Officer finds that the Injured Worker would be able to obtain and perform entry-level, unskilled types of employment consistent with the restrictions set forth in the medical report of Dr. Fitz. These entry-level unskilled types

> of employment would not require any transferable skills, or even a high school education. Rather, these jobs can be learned and performed by individuals while on-the-job and within a matter of days. The Staff Hearing Officer finds the Injured Worker's prior work history to be a neutral vocational asset. The Injured Worker has work experience as a farm laborer, factory worker and general laborer. The Injured Worker has through his prior work history demonstrated the ability to perform work that involves a wide variety of tasks and duties. The Staff Hearing Officer finds that the Injured Worker's work history would assist him in obtaining and performing work activity at the level described by Dr. Fitz in his report.
>
> Therefore, because the Injured Worker has the residual functional capacity to perform sedentary work activity, when only the impairment arising from the allowed conditions of the claim is considered, because he is qualified by age, education, and work history to obtain and perform work at that level, and because he has the capacity to acquire new job skills, at least through informal means, that could enhance his potential for re-employment, the Staff Hearing Officer finds that the Injured Worker is capable of sustained remunerative employment and is not permanently and totally disabled. Accordingly, the IC-2 Application filed 08/19/2009 is denied.

{¶32} 28. On September 8, 2010, relator, Rodney L. Vansickle, filed this mandamus action.

Conclusions of Law:

{¶33} Two issues are presented: (1) whether the commission's finding that relator has failed to pursue rehabilitation or retraining can be relied upon as a factor to deny the PTD application, and (2) even if the failure to participate in rehabilitation or retraining cannot be a relied upon factor, can the commission's order nevertheless stand?

{¶34} The magistrate finds: (1) the commission's determination that relator failed to participate in rehabilitation cannot be relied upon as a factor to deny the PTD application, and (2) the commission's flawed determination regarding failure to pursue

rehabilitation cannot be separated from the remainder of the nonmedical analysis to avoid the issuance of a writ.

{¶35} Accordingly, it is this magistrate's decision that this court issue a writ of mandamus, as more fully explained below.

{¶36} Turning to the first issue, the Supreme Court of Ohio has repeatedly addressed the obligation of a PTD claimant to undergo opportunities for rehabilitation. *State ex rel. B.F. Goodrich Co. v. Indus. Comm.* (1995), 73 Ohio St.3d 525; *State ex rel. Bowling v. Natl. Can Corp.* (1996), 77 Ohio St.3d 148; *State ex rel. Wood v. Indus. Comm.* (1997), 78 Ohio St.3d 414; *State ex rel. Wilson v. Indus. Comm.* (1997), 80 Ohio St.3d 250; *State ex rel. Cunningham v. Indus. Comm.* (2001), 91 Ohio St.3d 261.

{¶37} In *B.F. Goodrich*, the court states:

> The commission does not, nor should it, have the authority to force a claimant to participate in rehabilitation services. However, we are disturbed by the prospect that claimant may have simply decided to forgo retraining opportunities that could enhance re-employment opportunities. An award of permanent total disability compensation should be reserved for the most severely disabled workers and should be allowed only when there is no possibility for re-employment.

Id. at 529.

{¶38} In *Wilson*, the court states:

> We view permanent total disability compensation as compensation of last resort, to be awarded only when all reasonable avenues of accomplishing a return to sustained remunerative employment have failed. Thus, it is not unreasonable to expect a claimant to participate in return-to-work efforts to the best of his or her abilities or to take the initiative to improve reemployment potential. While extenuating circumstances can excuse a claimant's nonparticipation in reeducation or retraining efforts, claimants should no longer assume that a participatory role, or lack thereof, will go unscrutinized.

Id. at 253-54.

{¶39} The *Wilson* court thus recognized that extenuating circumstances can excuse a claimant's nonparticipation in rehabilitation or retraining.

{¶40} Illiteracy is a factor that the commission must consider when it analyzes the nonmedical factors in a PTD determination. *State ex rel. Hall v. Indus. Comm.*, 80 Ohio St.3d 289, 292, 1997-Ohio-113 (the court found it "almost impossible to conceive of a sedentary position for which an illiterate person with a background in heavy labor is qualified").

{¶41} Illiteracy may or may not be the result of an intellectual deficit. *State ex rel. Paraskevopoulos v. Indus. Comm.*, 83 Ohio St.3d 189, 1998-Ohio-122 (claimant's illiteracy related more to his status as an immigrant than to any intellectual deficit).

{¶42} As earlier noted, on his PTD application, relator indicated that he cannot read or write, and that he has a 9th grade education with no GED or special training. Dr. Lowe reported that relator informed him that "he was in Special Education classes, that he 'flunked' several years and that he 'flunked the 9th grade twice before I quit.' " Also, after testing, Dr. Lowe determined that relator reads at the 3rd grade level and that his full scale IQ is at the low end of the borderline range.

{¶43} Notwithstanding relator's claim that he is illiterate and intellectually deficient, the SHO's order, early on, simply states that relator has "a 9th grade education" and later on, finds that relator's "education to be somewhat of a barrier with regard to future employment." The SHO's order not only fails to address the illiteracy question, it does not even acknowledge relator's illiteracy claim. This, in of itself, was an abuse of discretion. *Hall;* and *Paraskevopoulos.* While the commission need not accept Dr. Lowe's report, nor place full credence on relator's self-evaluation regarding his reading and writing ability,

see *State ex rel. West v. Indus. Comm.*, 74 Ohio St.3d 354, 1996-Ohio-145, it cannot simply ignore the question presented by the evidence before it.

{¶44} It is in the context of the unresolved illiteracy claim that the magistrate now views the SHO's determination as earlier noted:

> * * * [T]he Staff Hearing Officer finds no evidence on file to support a finding that in the time that has past [sic] since his departure from the work force in 2001 the Injured Worker has made any effort forward pursuing rehabilitation or re-training. As set forth in State ex rel. Speelman v. Indus. Comm. (1992) 73 Ohio [A]pp. 3d 757, and more recently in State ex rel. Cunningham v. Indus. Comm. (2001) 91 Ohio St.3d 261, the Commission when considering a claim for permanent total disability, may consider not only past employment skills, but those skills which may reasonably be developed. Accordingly, the Commission may take into account the lack of effort by an Injured Worker to pursue new skills that may have led to a return to employment.

{¶45} Pointing to the December 9, 2005 bureau letter informing that relator is ineligible for vocational rehabilitation, and the March 6, 2009 Sheakley letter indicating that a return to work program is "[n]ot feasible," relator argues that this is evidence that he was willing to participate in rehabilitation. (Relator's brief, at 7.) Also, relator asserts that it is "contradictory" for the bureau and Sheakley to declare him ineligible for rehabilitation while the commission finds a lack of effort on the part of relator to pursue rehabilitation (Relator's brief, at 8.) According to relator, the commission "cannot blatantly ignore these rehabilitation attempts and then use the lack of participation as a basis" for a denial of PTD. (Relator's brief, at 8.)

{¶46} In the magistrate's view, the SHO's statement that there is "no evidence on file to support a finding" that relator "made any effort toward pursuing rehabilitation or re-training" strongly suggests that the SHO was unaware of the December 9, 2005 bureau

letter and the March 6, 2009 Sheakley letter and therefore failed to consider relevant evidence. *State ex rel. Scouler v. Indus. Comm*., 119 Ohio St.3d 276, 2008-Ohio-3915.

{¶47} But perhaps more importantly, the commission's determination that relator must be held accountable for his lack of efforts at rehabilitation fails to consider evidence that his claimed illiteracy, as well as the industrial injury, prohibited any serious pursuit of vocational rehabilitation. As the court makes clear in *Wilson*, extenuating circumstances can excuse a claimant's non-participation in rehabilitation or retraining.

{¶48} Based upon the above analysis, the magistrate concludes that the commission abused its discretion when it relied upon relator's failure to participate in rehabilitation or retraining as a factor to deny the PTD application.

{¶49} In other cases where the commission has abused its discretion in determining that the PTD applicant has failed to make a satisfactory effort towards vocational rehabilitation, the question has arisen as to whether the commission's flawed determination on rehabilitation efforts can be separated from the remainder of the nonmedical analysis such that the order can be upheld and a writ avoided. See *State ex rel. Barfield v. Indus. Comm.*, 10th Dist. No. 10AP-61, 2010-Ohio-5552, and the cases discussed therein.

{¶50} Here, it is clear that the commission's flawed determination regarding rehabilitation efforts cannot be separated from the remainder of the nonmedical analysis in order to uphold the commission's order. This is particularly so because the commission's order constitutes an abuse of discretion even if the commission had simply not addressed relator's efforts, or lack thereof, towards rehabilitation. That is, the commission abused its discretion in failing to address the illiteracy claim that relates to relator's educational status that must be addressed in its order. *Hall*.

{¶51} Accordingly, for all the above reasons, it is the magistrate's decision that this court issue a writ of mandamus ordering the commission to vacate its SHO's order of February 3, 2010 that denies the PTD application, and, in a manner consistent with this magistrate's decision, enter a new order that adjudicates the PTD application.

/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).