SLIP OPINION NO. 2023-OHIO-2975

THE STATE EX REL. KIDD, APPELLEE, *v.* INDUSTRIAL COMMISSION, APPELLANT, ET AL.

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *State ex rel. Kidd v. Indus. Comm.*, Slip Opinion No. 2023-Ohio-2975.]

Workers' compensation—Permanent-total-disability compensation—Ohio Adm.Code 4123-3-34(B)(2)(a)—Work restrictions outlined in doctor's report constitutes some record evidence that workers' compensation claimant's capacities to sit, stand, and walk may be combined, rendering claimant capable of performing sedentary work in some environments and, when combined with claimant's nonmedical disability factors, support a determination that claimant is capable of sustaining remunerative employment—Court of appeals' judgment reversed and writ denied.

(No. 2022-0340—Submitted February 7, 2023—Decided August 29, 2023.)

APPEAL from the Court of Appeals for Franklin County,

No. 20AP-364, 2022-Ohio-450.

Per Curiam.

{¶ 1} Appellant, the Industrial Commission of Ohio, denied appellee Donna J. Kidd's application for permanent-total-disability ("PTD") compensation on the basis that Kidd is capable of sustained remunerative employment at a sedentary level. Kidd sought a writ of mandamus from the Tenth District Court of Appeals ordering the commission to vacate its order and enter a new order that complies with that court's holding in *State ex rel. Libecap v. Indus. Comm.*, 10th Dist. Franklin No. 96APD01-29, 1996 WL 506724 (Sept. 5, 1996), *aff'd.*, 83 Ohio St.3d 178, 699 N.E.2d 63 (1998). The Tenth District concluded that the commission had abused its discretion by relying on a medical report that outlined limitations on Kidd's capabilities that are "seemingly inconsistent" with the definition of "sedentary work" in Ohio Adm.Code 4121-3-34(B)(2)(a). 2022-Ohio-450, ¶ 10. The Tenth District granted the writ, and the commission appealed. We reverse the Tenth District's judgment and deny the writ.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Application for PTD Compensation

{¶ 2} In September 2013, Kidd injured her back while working as a warehouse and production employee for Tronair, Inc. Her workers' compensation claim was allowed for various lumbar-spine medical conditions. Kidd returned to work with restrictions until March 31, 2014. In February 2015, she underwent spinal surgery, which was unsuccessful in relieving her symptoms. After Kidd received 27 weeks of vocational rehabilitation, the Bureau of Workers' Compensation determined that she demonstrated the ability to continue her job search, independent of the bureau. Kidd eventually obtained part-time employment in 2017 as a school-cafeteria server. After approximately eight months, Kidd terminated her employment because of increasing pain in her low back and legs and increased difficulty with standing, bending, and lifting.

{¶ 3} In September 2018, Kidd applied for PTD compensation. In her application, Kidd reported that she used a back brace and that she could lift "up to 10" pounds daily. Kidd further reported that she could sleep five hours each night, drive a vehicle for one hour at a time, walk one-half mile at a time, stand for 30 minutes at a time, and sit for 30 minutes at a time. She reported swimming, walking, and using a stationary bike or elliptical for therapy. Kidd noted that she requires assistance to lift and carry heavy items when doing laundry or grocery shopping and that she could "slowly trim grass with [a] weed eater" but that she takes "many breaks over time." Her job skills before working for Tronair include using a cash register, entering data into a computer, and answering customer-service phone calls.

{¶ 4} In support of her application for PTD compensation, Kidd submitted a report from chiropractor Mickey E. Frame, D.C., who examined Kidd in March 2018. Dr. Frame reported that Kidd "needs to have the ability to change her position from sit[ting], stand[ing] and [lying] on a frequent basis, [that] she is unable to sit greater than 15-20 minutes without having to change positions, [and that] she has difficulty standing greater than 10-15 minutes due to increasing left leg pain." Dr. Frame noted his "professional opinion that [Kidd] is unable to return to gainful employment due to worsening of her lumbar disc condition and radicular leg complaints" and that Kidd "would be considered permanently and totally disabled due to her allowed conditions."

{¶ 5} Sanjay S. Shah, M.D., a certified independent medical examiner, examined Kidd at the commission's request. Dr. Shah opined that Kidd has reached maximum medical improvement and has 23 percent whole-person impairment. He noted that Kidd "is limited with standing for approximately 20 minutes, sitting for 20-30 minutes with change in position and [that she] is able to walk ½ mile." He further noted: "She requires rest periods. She has difficulty lifting due to [her] low back pain." Dr. Shah concluded: "[Kidd] can work at a sedentary level with

additional restrictions of no bending, twisting, [or] squatting, avoid[ing] overhead activities, and avoid[ing] activities that require increased balance, including [using] ladders. *Allow rest periods every 15-20 minutes for 1-2 minutes as needed during standing, sitting, or walking*." (Emphasis added.)

{¶ 6} Kidd was also evaluated by a vocational consultant, Anne Savage Veh. Veh disagreed with Dr. Shah's opinion that Kidd could work at a sedentary level, stating that Dr. Shah's "list of restrictive barriers is *less* than a sedentary level and [that] no employer will accommodate a break every 15 minutes due to being non-productive and inefficient for most job tasks. These restrictions are so limiting that Ms. Kidd would find it very difficult to find an employer willing to accommodate such requirements." (Emphasis added.) Veh also noted the following:

> Additionally, while sitting in this position for 15 minutes, Ms. Kidd is in pain and this affects her concentration. At home, she is able to change positions frequently. At a job, she would not have this opportunity because alternating between sitting, standing, and walking around would impact her ability to complete job tasks in a timely manner.
>
> Additionally, she participated in vocational rehabilitation and wanted to go back to work. Unfortunately, finding an employer who would accommodate her at the restrictive level such as she requires could not be identified, even after vocational rehabilitation services that included job seeking skills training, job development, job coaching and working with an employment specialist.

{¶ 7} Veh opined that Kidd is "100% totally unemployable" and concluded that when considering her "age (57—vocationally advanced), physical and

exertional limitations, unrealistic restrictions as with a break every 15 minutes, chronic pain, and [lack of] transferable skills" along with the residual effects of her allowed conditions, Kidd "does not retain the capacity to engage in sustained, remunerative employment."

B. The Commission's Orders

{¶ 8} A staff hearing officer ("SHO") denied Kidd's application for PTD compensation "based particularly upon" Dr. Shah's report.

{¶ 9} The SHO found that Kidd's testimony and the information she provided in her application for PTD compensation were "consistent with Dr. Shah's findings and restrictions" and with the definition of "sedentary work" in Ohio Adm.Code 4121-3-34(B)(2)(a). The SHO also found that "modern innovations in office equipment, such as sit/stand desks and wireless telephone technology, as well as work-from-home options, offer[] workers the ability to change positions at their convenience." Further, the SHO found that Kidd "is at maximum medical improvement for the allowed physical conditions" and that she "is capable of performing work activities at the sedentary level as a result of injury-induced restrictions."

{¶ 10} Regarding the nonmedical disability factors, the SHO deemed Kidd's age at the time of the hearing (58 years) to be a neutral factor and her education (high-school graduate with vocational training), work history, and work ethic to be positive factors. The SHO noted that the presence of transferable skills stemming from Kidd's experience with data entry as early as 1989, her training as a typist, and her ability to use a smartphone would make her "well-suited for sedentary work."

{¶ 11} Considering Kidd's degree of medical impairment in conjunction with her nonmedical disability factors, the SHO concluded that although Kidd's work restrictions prevent her from returning to her prior position of employment,

she "is capable of returning to sustained remunerative employment and is not permanently and totally disabled."

{¶ 12} The commission denied further administrative review.

C. The Mandamus Action

{¶ 13} Kidd filed a complaint in mandamus with the Tenth District Court of Appeals, alleging that the commission had abused its discretion by relying on Dr. Shah's report. Kidd also argued that the SHO's analysis of the nonmedical factors relating to her alleged disability status was flawed and that the SHO failed to consider how Kidd's need to telework or utilize modern office innovations would hinder her ability to find employment.

{¶ 14} The Tenth District concluded that the SHO's reasoning "was flawed as to the law's application to the facts of this matter." 2022-Ohio-450 at ¶ 7. Applying its prior decision in *Libecap*, 1996 WL 506724, the court held that the commission's decision constituted an abuse of discretion because Dr. Shah's report contains restrictions that are "seemingly inconsistent" with the definition of "sedentary work" in Ohio Adm.Code 4121-3-34(B)(2)(a). 2022-Ohio-450 at ¶ 10. The court further determined that advancements in workplace technology and Kidd's potential proficiency in that regard are not factors that distinguish this case from *Libecap*. 2022-Ohio-450 at ¶ 10. The Tenth District granted the writ, directing the commission to vacate its order denying Kidd's application for PTD compensation and to enter a new order adjudicating Kidd's application in a manner consistent with the court's decision. *Id.* at ¶ 11.

{¶ 15} The commission appealed.

II. LEGAL STANDARDS

A. Mandamus Standard

{¶ 16} An order of the commission that grants or denies PTD compensation concerns the extent of a claimant's disability and, as such, is not subject to appeal. *State ex rel. Gen. Motors Corp. v. Indus. Comm.*, 42 Ohio St.2d 278, 281, 328

N.E.2d 387 (1975); *see also* R.C. 4123.512(A). Kidd is entitled to a writ of mandamus if she establishes a clear legal right to the requested relief and a clear legal duty of the commission to provide it. *State ex rel. Zarbana Industries, Inc. v. Indus. Comm.*, 166 Ohio St.3d 216, 2021-Ohio-3669, 184 N.E.3d 81, ¶ 10. To do so, Kidd must demonstrate that the commission abused its discretion by entering an order that is not supported by "some evidence" in the record. *State ex rel. McCormick v. McDonald's*, 141 Ohio St.3d 528, 2015-Ohio-123, 26 N.E.3d 794, ¶ 11.

{¶ 17} The commission is the exclusive finder of fact and has the sole responsibility to evaluate the weight and credibility of the evidence. *State ex rel. Perez v. Indus. Comm.*, 147 Ohio St.3d 383, 2016-Ohio-5084, 66 N.E.3d 699, ¶ 20. "Where a commission order is adequately explained and based on some evidence, even evidence that may be persuasively contradicted by other evidence of record, the order will not be disturbed as manifesting an abuse of discretion." *State ex rel. Mobley v. Indus. Comm.*, 78 Ohio St.3d 579, 584, 679 N.E.2d 300 (1997).

B. PTD Compensation

{¶ 18} " 'Permanent total disability' means the inability to perform sustained remunerative employment due to the allowed condition(s) in the claim(s)." Ohio Adm.Code 4121-3-34(B)(1). Permanent total disability shall be compensated when "[t]he impairment resulting from the employee's injury * * * prevents the employee from engaging in sustained remunerative employment utilizing the employment skills that the employee has or may reasonably be expected to develop." R.C. 4123.58(C)(2).[1] Work is considered "sustained" when it consists of an "ongoing pattern of activity." *State ex rel. Bonnlander v. Hamon*, 150 Ohio St.3d 567, 2017-Ohio-4003, 84 N.E.3d 1004, ¶ 15, citing *State ex rel.*

1. R.C. 4123.58 has been modified since Kidd filed her application for PTD compensation, but the applicable language has not changed. *Compare* 2006 Am.Sub.S.B. No. 7 *with* 2022 Am.Sub.H.B. No. 281 (effective Apr. 6, 2023).

Kirby v. Indus. Comm., 97 Ohio St.3d 427, 2002-Ohio-6668, 780 N.E.2d 275, ¶ 10, citing *State ex rel. Schultz v. Indus. Comm.*, 96 Ohio St.3d 27, 2002-Ohio-3316, 770 N.E.2d 576, ¶ 63. The work need not be regular or even daily; it may be intermittent and occasional, and it may be part-time. *Bonnlander* at ¶ 15.

{¶ 19} Section 4121-3-34(B)(2) of the Ohio Administrative Code classifies work that a claimant may be found capable of performing based on its physical demands. "Sedentary work involves sitting most of the time, but may involve walking or standing for brief periods of time. Jobs are sedentary if walking and standing are required only occasionally and all other sedentary criteria are met." Ohio Adm.Code 4121-3-34(B)(2)(a). Work is also sedentary if it involves "exerting up to ten pounds of force occasionally ([i.e.,] up to one-third of the time) and/or a negligible amount of force frequently ([i.e.,] from one-third to two-thirds of the time)." *Id.*

{¶ 20} Each application for PTD compensation based on physical limitations or impairments must be supported by medical evidence from a physician. Ohio Adm.Code 4121-3-34(C)(1). If the commission determines that the claimant is medically incapable of returning to his or her former position of employment but is medically able to perform other work, the commission must also consider nonmedical disability factors. Ohio Adm.Code 4121-3-34(D)(2)(b). These include

> the injured worker's age, education, work record, and all other factors, such as physical, psychological, and sociological, that are contained within the record that might be important to the determination as to whether the injured worker may return to the job market by using past employment skills or those skills which may be reasonably developed.

Id.; *accord State ex rel. Stephenson v. Indus. Comm.*, 31 Ohio St.3d 167, 173, 509 N.E.2d 946 (1987) (setting forth these nonmedical disability factors, which are now commonly referred to as "the *Stephenson* factors"). Thus, even if the injured worker is medically capable of some employment, these nonmedical factors may nevertheless support an award of PTD compensation. *See Stephenson* at 172.

III. ANALYSIS

A. The Parties' Arguments

{¶ 21} On appeal, the commission presents one proposition of law: "The Industrial Commission does not abuse its discretion when it considers prevalent workplace accommodations to determine whether a claimant can return to 'sustained remunerative employment' with her medical restrictions."

{¶ 22} The commission maintains that denying Kidd's application for PTD compensation was not an abuse of discretion, because Dr. Shah's report along with Kidd's self-reported physical limitations provide more than just "some evidence" that Kidd is capable of sustained remunerative employment at a sedentary level. The commission argues that advances in workplace accommodations, as acknowledged by the SHO, further support this conclusion.

{¶ 23} Kidd responds that the medical restrictions in Dr. Shah's report are inconsistent with his conclusion that she is capable of sedentary work. She maintains that her need to take 1- to 2-minute rest periods every 15 to 20 minutes so limits her ability to function that she is incapable of engaging in sustained remunerative employment.

B. Dr. Shah's Report

{¶ 24} "A report that is internally inconsistent cannot be some evidence supporting the commission's decision." *State ex rel. Wyrick v. Indus. Comm.*, 138 Ohio St.3d 465, 2014-Ohio-541, 8 N.E.3d 878, ¶ 14, citing *State ex rel. Lopez v. Indus. Comm.*, 69 Ohio St.3d 445, 449, 633 N.E.2d 528 (1994); *accord State ex rel. George v. Indus. Comm.*, 130 Ohio St.3d 405, 2011-Ohio-6036, 958 N.E.2d 948,

¶ 11 (the commission cannot rely on an equivocal or internally inconsistent medical opinion).

{¶ 25} Dr. Shah reported that Kidd "is limited with standing for approximately 20 minutes, sitting for 20-30 minutes with change in position and is able to walk ½ mile." Considering these limitations, Dr. Shah concluded, "[Kidd] can work at a sedentary level with additional restrictions * * *. *Allow rest periods every 15-20 minutes for 1-2 minutes as needed during standing, sitting, or walking*." (Emphasis added.)

{¶ 26} The restrictions on Kidd's capabilities as documented in Dr. Shah's report are consistent with the Ohio Administrative Code's definition of "sedentary work." *See* Ohio Adm.Code 4121-3-34(B)(2)(a) ("sitting most of the time, but may involve walking or standing for brief periods of time" and "exerting up to ten pounds of force occasionally"). But because Ohio Adm.Code 4121-3-34(B)(2) does not mention "rest periods" (or the like), there is no administrative or statutory authority for concluding that Dr. Shah's imposition of a 1- to 2-minute "rest period" restriction is inconsistent with sedentary work. Further, we have previously held that the commission acted within its discretion when it relied on a report that included restrictions similar to Kidd's as evidence that a claimant is capable of sedentary work. *See Bonnlander*, 150 Ohio St.3d 567, 2017-Ohio-4003, 84 N.E.3d 1004, at ¶ 20 (where the physician's report restricted the claimant to "four hours of work a day with multiple breaks"). We therefore conclude that Dr. Shah's report is not internally inconsistent and that the commission was not precluded from relying on it as some evidence that Kidd is medically capable of sedentary work.

C. Advances in Workplace Technology

{¶ 27} In addition to Dr. Shah's report, the SHO also considered that "modern innovations in office equipment, such as sit/stand desks and wireless telephone technology, as well as work-from-home options, offer[] workers the ability to change positions at their convenience."

{¶ 28} The Tenth District took issue with this consideration, pronouncing that "[a]lthough workspace flexibility has advanced significantly in recent years, the definition for sedentary work in Ohio Adm.Code 4121-3-34(B)(2)(a)" has not changed since *Libecap* was decided in 1996, 2022-Ohio-450 at ¶ 7, and that "advances in technology and Kidd's potential proficiency in that regard * * * do not address Kidd's apparent impediment to sedentary work as that term is defined in the Ohio Administrative Code," *id.* at ¶ 10. The commission contends that this determination by the Tenth District was in error, and we agree.

{¶ 29} The issue before the commission was whether the impairment resulting from Kidd's allowed injury permanently and totally prevents her "from engaging in sustained remunerative employment utilizing the employment skills that [she] has or may reasonably be expected to develop," R.C. 4123.58(C)(2). In making this determination, the commission must consider the doctors' reports and opinions; the claimant's age, education, and work record; and factors of a psychological, psychiatric, and sociological nature; it should also consider "*any other factors* that might be important to its determination of whether this specific claimant may return to the job market by utilizing her past employment skills, or those skills which may be reasonably developed." (Emphasis added.) *Stephenson*, 31 Ohio St.3d at 170, 509 N.E.2d 946; *accord* Ohio Adm.Code 4121-3-34(D)(2)(b). Thus, in determining whether the claimant is capable of returning to the job market, the commission is not precluded from considering whether jobs exist that are reasonably likely to accommodate a claimant's medical restrictions. *See State ex rel. Franklin Cty. Bd. of Commrs. v. Indus. Comm.*, 10th Dist. Franklin No. 09AP-379, 2010-Ohio-2728, ¶ 60, quoting *State ex rel. Cale v. Indus. Comm.*, 10th Dist. Franklin No. 01AP-1143, 2002-Ohio-2924, ¶ 27 (" 'It appears that the commission may find a claimant medically unable to perform sustained remunerative work where there are no jobs reasonably likely to accommodate his combination of medical restrictions * * *' "); *State ex rel. Johnson v. Indus. Comm.*,

10th Dist. Franklin No. 09AP-1158, 2010-Ohio-5866, ¶ 3, 6 (the commission did not abuse its discretion in finding that sedentary jobs exist that meet the claimant's air-quality restrictions).[2]

{¶ 30} Furthermore, "[e]valuation of the weight and credibility of the evidence is left to the discretion of the commission within the context of each case." *Bonnlander*, 150 Ohio St.3d 567, 2017-Ohio-4003, 84 N.E.3d 1004, at ¶ 17. And because workers' compensation cases are largely fact-specific, " 'no one test or analysis can be said to apply to each and every factual possibility.' " *Id.* at ¶ 19, quoting *Fisher v. Mayfield*, 49 Ohio St.3d 275, 280, 551 N.E.2d 1271 (1990). Therefore, we prefer " 'a flexible and analytically sound approach' " that eschews hard-and-fast rules. *Id.* at ¶ 19, quoting *Fisher* at 280. Prohibiting consideration of prevalent workplace accommodations and technology would be antithetical to this flexible approach and to the commission's exercise of discretion within its field of expertise. *See State ex rel. Jackson v. Indus. Comm.*, 79 Ohio St.3d 266, 271, 680 N.E.2d 1233 (1997) (on the issue "whether the claimant is realistically foreclosed from sustained remunerative employment[,] * * * the commission *is* the expert" [emphasis sic]).

{¶ 31} We conclude that Dr. Shah's report is "some evidence" in the record that Kidd's capacities to sit, stand, and walk may be combined, rendering her capable of sedentary work in some environments. Further, despite Kidd's need for frequent yet brief rest periods, the nonmedical disability factors—including prevalent workplace accommodations and telework options—support the commission's determination that Kidd is capable of engaging in sustained remunerative employment.

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2. The commission also refers to Social Security–disability caselaw in which the federal government has concluded that the adjudicator is permitted to consider whether jobs exist that can be performed despite the employee's medical impairments and that allowing an employee to alternate between sitting and standing is a prevalent workplace accommodation. *See, e.g., Jones v. Apfel*, 174 F.3d 692, 694 (5th Cir.1999).

D. *State ex rel. Libecap v. Indus. Comm.*

{¶ 32} In granting Kidd's request for a writ of mandamus, the Tenth District relied primarily on one of its prior decisions: *Libecap*, 1996 WL 506724. In *Libecap*, the commission found that the claimant was not entitled to PTD compensation based primarily on one medical report and one psychological report. *Id*. at *1. The medical report stated:

> "[T]he claimant would have difficulty in occupations requiring bending and lifting objects from below the level of the knee or any of them involving extreme rotation of the spine or performing over head activities. She would not be able to lift more than 5 or 10 pounds and would have difficulty in any occupation that would involve *sitting or standing for more than 30 minutes.* Frequent breaks and allowing the claimant to change positions would be required. Repetitive activities would not be tolerated in the upper extremities."

(Emphasis sic.) *Id.* at *2. The Tenth District held that the limitations outlined in the medical report were inconsistent with the commission's findings and with the definition of "sedentary work."[3] *Id.* The court recognized that "other professionals" had reported that the claimant was permanently and totally disabled but also acknowledged "some room for interpretation" of the medical and psychological evidence. *Id.* Thus, the Tenth District issued a limited writ of

3. Ohio Adm.Code 4123-3-34(B)(2)(a) did not apply to Libecap's application for PTD compensation, because it went into effect while the application was pending before the commission. *Libecap*, 1996 WL 506724, at *2. Nevertheless, the Tenth District stated: "We do not view [the medical] limitations as consistent with sedentary work as defined in the Ohio Administrative Code or with the general definition of 'sedentary work' utilized before Ohio Adm.Code 4121-3-34(B)(2)(a) became effective." *Id.*

mandamus compelling the commission to vacate its order denying Libecap's application for PTD compensation and to enter a new order either granting or denying the compensation with an appropriate explanation of its decision. *Id.* This court summarily affirmed the Tenth District's decision. *Libecap v. Indus. Comm.*, 83 Ohio St.3d 178, 699 N.E.2d 63.

{¶ 33} Extrapolating a legal holding from the Tenth District's opinion in *Libecap* is difficult because the Tenth District did not address the "some evidence" standard or conclude that the commission had abused its discretion. For this reason alone, *Libecap*, 1996 WL 506724, has no precedential value.

{¶ 34} In later cases, the Tenth District has cited *Libecap*, 1996 WL 506724, for the proposition that the "commission cannot simply rely on a physician's 'bottom line' identification of an exertional category but must base its decision on the specific restrictions imposed by the physician in the body of the report." *State ex rel. Owens Corning Fiberglass v. Indus. Comm.*, 10th Dist. Franklin No. 03AP-684, 2004-Ohio-3841, ¶ 56; *see also State ex rel. Howard v. Millennium Inorganic Chems.*, 10th Dist. Franklin No. 03AP-637, 2004-Ohio-6603, ¶ 9; *State ex rel. Tradesman Internatl. v. Indus. Comm.*, 10th Dist. Franklin No. 13AP-122, 2014-Ohio-1064, ¶ 16. That proposition is irrelevant here because the SHO did not ignore the specific restrictions that were imposed by Dr. Shah and outlined in the body of his medical report. *Libecap*, 1996 WL 506724, is therefore distinguishable from, and inapplicable to, this case.

IV. CONCLUSION

{¶ 35} For the foregoing reasons, we hold that the commission did not abuse its discretion in denying Kidd's application for PTD compensation. The judgment of the Tenth District Court of Appeals is reversed, and Kidd's request for a writ of mandamus is denied.

Judgment reversed.

KENNEDY, C.J., and FISCHER, DEWINE, and DETERS, JJ., concur.

BRUNNER, J., dissents, with an opinion joined by DONNELLY and STEWART, JJ.

BRUNNER, J., dissenting.

{¶ 36} The Tenth District Court of Appeals issued a judgment granting a writ of mandamus sought by appellee, Donna J. Kidd, because it concluded that despite the fact that "workspace flexibility has advanced significantly in recent years" and "advancements in workplace technology and furniture" may permit workers to "change [their] working position at [their] convenience," Kidd's limitations—even according to the expert of appellant, the Industrial Commission of Ohio—do not allow her to perform work meeting the definition of "sedentary work." 2022-Ohio-450, ¶ 7. The majority now reverses that determination.

{¶ 37} In so doing, the majority admits that all the experts in this case agree that Kidd lacks the ability to work for more than 15 to 20 minutes at a time without changing position or resting. *See* majority opinion, ¶ 4-7. To quote Kidd's chiropractor, Dr. Mickey E. Frame, Kidd "needs to have the ability to change her position from sit[ting], stand[ing] and [lying] on a frequent basis, she is unable to sit greater than 15-20 minutes without having to change positions, [and] she has difficulty standing greater than 10-15 minutes due to increasing left leg pain." Dr. Sanjay S. Shah, a certified independent medical examiner, concluded that it would be necessary for anyone employing Kidd to "[a]llow rest periods every 15-20 minutes for 1-2 minutes as needed during standing, sitting, or walking." The majority takes note of both of these expert medical opinions. *See id.* at ¶ 4-5. The majority also observes that a vocational consultant, Anne Savage Veh, stated: "[N]o employer will accommodate a break every 15 minutes due to being non-productive and inefficient for most job tasks. These restrictions are so limiting that Ms. Kidd would find it very difficult to find an employer willing to accommodate such requirements." *See id.* at ¶ 6. Nevertheless, the majority concludes that because of

the increased flexibility of sedentary work as discussed by the Tenth District, Kidd is not permanently and totally disabled.

{¶ 38} I agree with the majority's view that it is appropriate to consider

> whether jobs exist that are reasonably likely to accommodate a claimant's medical restrictions. *See State ex rel. Franklin Cty. Bd. of Commrs. v. Indus. Comm.*, 10th Dist. Franklin No. 09AP-379, 2010-Ohio-2728, ¶ 60, quoting *State ex rel. Cale v. Indus. Comm.*, 10th Dist. Franklin No. 01AP-1143, 2002-Ohio-2924, ¶ 27 (" 'It appears that the commission may find a claimant medically unable to perform sustained remunerative work where there are no jobs reasonably likely to accommodate his combination of medical restrictions * * *' "); *State ex rel. Johnson v. Indus. Comm.*, 10th Dist. Franklin No. 09AP-1158, 2010-Ohio-5866, ¶ 3, 6 (the commission did not abuse its discretion in finding that sedentary jobs exist that meet the claimant's air-quality restrictions).

(Footnote omitted.) Majority opinion at ¶ 29. I likewise agree that part of any such consideration should and does involve an honest assessment of the evidence and common-sense observations about the job market, including the "consideration of prevalent workplace accommodations and technology," *id.* at ¶ 30. However, while the majority is quick to conclude that Dr. Shah's report constitutes "some evidence" that Kidd is capable of sedentary work under "prevalent workplace accommodations and telework options," *id.* at ¶ 31, I see this at best as a stretch that reaches an absurd result.

{¶ 39} We can certainly take judicial notice that during the pandemic, *some* workplaces embraced teleworking and that *some* jobs remain amenable to that type of work arrangement. But many employers, even in highly skilled work

environments, have pushed back on that trend and have required employees to return to traditional in-office work postpandemic. The possibility is vanishingly small that Kidd—who was 58 at the time of the hearing on her application for permanent-total-disability benefits and who has a high-school education and some vocational training but lacks transferable skills—has any likelihood of landing a job with an employer that is willing to accommodate her medical condition, which requires rest breaks or position changes every 15 to 20 minutes. As the vocational expert opined and the majority acknowledges, this is such an unlikely prospect that Kidd's chances of obtaining such a job are virtually nil. *See id.* at ¶ 7. It is one thing to recognize that technology and workplace culture have advanced to allow greater work flexibility. It is another to refuse to accept that there are countervailing impulses among employers that will, as expert-opinion evidence in the record establishes, make someone of Kidd's age, training, and physical condition "100% totally unemployable."

{¶ 40} While I agree with much of the majority's opinion and reasoning, I do not believe that Dr. Shah's report, when read in conjunction with the vocational expert's uncontradicted report and considering current workplace trends, constitutes "some evidence" that Kidd is not permanently and totally disabled. Accordingly, I must respectfully dissent from the judgment of the majority opinion.

DONNELLY and STEWART, JJ., concur in the foregoing opinion.

Schaffer & Associates, L.P.A., and Thomas J. Schaffer, for appellee.

Dave Yost, Attorney General, Benjamin M. Flowers, Solicitor General, Mathura J. Sridharan, Deputy Solicitor General, and Anna Isupova, Assistant Attorney General, for appellant.
