[Cite as *State ex rel. Keebler Co., v. Indus. Comm.* , 2012-Ohio-2402.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Keebler Company, nka Kellogg's Snack Division,	:	
Relator,	:	No. 11AP-267
v.	:	(REGULAR CALENDAR)
Industrial Commission of Ohio and Nancy C. Kuhn,	:	
Respondents.	:	

D E C I S I O N

Rendered on May 31, 2012

Taft Stettinius & Hollister LLP, and *Cynthia C. Felson*, for relator.

Michael DeWine, Attorney General, and *Patsy A. Thomas*, for respondent Industrial Commission of Ohio.

Brown, Lippert & Laite, and *James W. Lippert*, for respondent Nancy C. Kuhn.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

SADLER, J.

{¶ 1} Relator, Keebler Company, nka Kellogg's Snack Division ("relator"), filed this original action seeking a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its order awarding permanent total

disability ("PTD") compensation to respondent, Nancy C. Kuhn ("claimant"), and to enter an order denying said compensation.

{¶ 2} Pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth District Court of Appeals, this matter was referred to a magistrate who issued a decision, including findings of fact and conclusions of law, which is appended hereto. The magistrate found relator failed to demonstrate the commission abused its discretion in awarding PTD compensation to claimant. Therefore, the magistrate recommended that this court deny the requested writ of mandamus.

{¶ 3} No objections have been filed to the magistrate's findings of fact; however, relator has filed the following three objections to the magistrate's conclusions of law:

> 1. Keebler was not required to request that the SHO view the surveillance video for a specific observation.
>
> 2. The Magistrate erred in finding that Dr. Lutz's failure to correctly observe [the] video is a minor discrepancy.
>
> 3. The Magistrate erred in refusing to review the video surveillance disc.

{¶ 4} In its first objection, relator challenges the following statement from the magistrate's decision:

> Relator cannot properly ask this court to view the video if relator did not ask the SHO to view the video to determine whether Dr. Lutz correctly observed something in the video.

{¶ 5} According to relator, it was not required to expressly request that the SHO view the surveillance video taken of claimant in July and August 2005. We agree. The video is evidence in this case and was the very impetus for Dr. Lutz's May 23, 2006 deposition. Indeed, when determining disability, it is the commission's duty to review relevant evidence within the record. *State ex rel. Basham v. Consolidation Coal Co.*, 43 Ohio St.3d 151, 152 (1989) (affirmative duty on the commission to consider relevant disability evidence within the record regardless of by whom it is presented). Thus, relator is correct that after raising a challenge to Dr. Lutz's credibility on the basis of the surveillance video, relator was not required to specifically request that the SHO view the

video. To the extent the magistrate's statement can be construed as creating such a requirement, we sustain relator's first objection.

{¶ 6} In the second objection, relator contends it was error for the magistrate to indicate that Dr. Lutz's alleged failure to correctly observe the surveillance video constitutes a minor discrepancy. Specifically, relator contends claimant's movements, as described by Dr. Lutz, are not actually depicted in the video, therefore, more than a "minor discrepancy" is presented. The magistrate's language that relator challenges is "[e]ven if Dr. Lutz did fail to correctly observe something in the video on his first and only viewing of the video, that factor would necessarily be weighed by the SHO in determining the credibility of Dr. Lutz's ultimate opinion. Minor discrepancies do not compel elimination of a doctor's report. *State ex rel. Warnock v. Indus. Comm.*, 100 Ohio St.3d 34, 2003-Ohio-4833." (Magistrate's Decision, ¶ 62.)

{¶ 7} Initially, we note the magistrate did not view the video nor did the magistrate make any findings regarding whether or not Dr. Lutz correctly viewed the video. Secondly, we construe the challenged statements of the magistrate's decision as a recognition of the commission's responsibility for assessing both the weight and credibility of evidence, and that when assessing Dr. Lutz's credibility, the SHO could find his medical opinion credible "[e]ven if Dr. Lutz did fail to correctly observe something in the video." Accordingly, relator's second objection is overruled.

{¶ 8} In the third objection, relator contends the magistrate erred in refusing to review the video. We agree. As recognized under our disposition of relator's first objection, the video is evidence within this record and to the extent it is relevant, it is subject to consideration when determining whether the commission abused its discretion in awarding PTD compensation. Therefore, we sustain relator's third objection.

{¶ 9} However, though we have sustained two of relator's objections, we do not find that relator is entitled to the requested writ of mandamus because we conclude Dr. Lutz's report does constitute some evidence upon which the commission can rely to award PTD compensation to claimant.

{¶ 10} During his deposition, Dr. Lutz testified that at the request of the commission, he examined claimant on December 27, 2005. After such examination, Dr. Lutz opined claimant suffers a 59 percent whole person impairment and indicated she is

incapable of work. At his deposition, Dr. Lutz reviewed portions of the video and testified that his opinion regarding the extent of claimant's disability had not changed. In addition to the subjective findings made, Dr. Lutz explained the objective findings, including "an area of isolated spasm on the right side of her neck," the "surgical scarring over her right forearms," and the "interphalangeal joint of her right thumb was ankylosed in the neutral position." (Deposition, 29, 30.) The portion of the deposition with which relator takes issue occurred as follows:

> Q. Dr. Lutz, I started to ask a question of you, and that is that the video showed the claimant riding a lawn mower, which she was steering a steering wheel using both of her arms. And she was steering the wheel, shifting into reverse and back again, with her right arm, on several occasions; would you agree?
>
> A. Yes.
> Q. And also during the riding of the lawn mower, when she was shifting into reverse, she was turning her neck and did not appear to have any problems with the rotation of her neck?
>
> A. I would not necessarily agree with that.
>
> Q. Okay. Well, why don't you tell me what you would -- what you observed on the videotape.
>
> A. I agree that she turned her neck to some extent, but she also largely turned -- turned her torso and essentially was looking down. So it was largely an upper body move in looking down, with the minimal movement of the neck.
>
> Q. Would you say that the videotape shows a woman who has constant pain on a scale of five to eight in her upper extremities?
>
> A. Possibly, yes.
>
> Q. Okay. And did she exhibit any pain behavior that you could tell from the videotape?
>
> A. I believe that I did see her take her right hand off the steering wheel prematurely long before she needed to change gears, and sort of flick her hand or rub it against her torso, as

> if she was trying to get feeling back into her hand. I believe I witnessed that at least once.

(Deposition, 23-24.)

{¶ 11} According to relator, the video contains no such depiction. Thus, relator contends the SHO should have noted whether Dr. Lutz's testimony comports with the video and the SHO's failure to do so leaves open the question of whether the video was observed by the SHO. We disagree with both contentions.

{¶ 12} Initially, we note "there is a presumption of regularity that attaches to commission proceedings, [therefore] the commission's failure to list the evidence considered or rejected does not imply that the commission has failed its duty to consider and weigh that evidence." *State ex rel. Donohoe v. Indus. Comm.*, 10th Dist. No. 08AP-201, 2010-Ohio-1317, ¶ 77, citing *State ex rel. Lovell v. Indus. Comm.*, 74 Ohio St.3d 250 (1996). Accordingly, we presume the SHO reviewed the challenged evidence.

{¶ 13} The allegation presented to the SHO was that the video evidence was inconsistent with the findings made by Dr. Lutz. At the deposition, Dr. Lutz testified about what he believed he witnessed on the video and about his interpretation that some of claimant's actions were consistent with "pain behavior[s]." (Deposition, 24.) In accordance with our independent review of the record, this court has reviewed the video and Dr. Lutz's deposition testimony. The video depicts an approximate 25-minute period in which claimant engages in the use of both a riding lawn mower and a pool skimmer. The video is evidence the commission could, and presumably did, consider in assessing Dr. Lutz's credibility. In our view, and contrary to relator's position, the video does not render Dr. Lutz's report and deposition testimony evidence upon which the commission could not rely when adjudicating claimant's claim.

{¶ 14} The commission presumably considered the video in addition to Dr. Lutz's report and deposition testimony. "The commission is exclusively responsible for assessing the weight and credibility of evidence." *State ex rel. George v. Indus. Comm.*, 130 Ohio St.3d 405, 2011-Ohio-6036, ¶ 11, citing *State ex rel. Burley v. Coil Packing, Inc.*, 31 Ohio St.3d 18 (1987). It need only cite evidence in support of its decision, and the presence of contrary evidence is immaterial. *Id.*; *State ex rel. West v. Indus. Comm.*, 74 Ohio St.3d 354 (1996). It cannot, however, rely on a medical opinion that is equivocal or

internally inconsistent. *State ex rel. Eberhardt v. Flxible Corp.*, 70 Ohio St.3d 649 (1994); *State ex rel. Lopez v. Indus. Comm.*, 69 Ohio St.3d 445 (1994). Because we conclude Dr. Lutz's report and deposition testimony constitute some evidence upon which the commission could rely to award PTD compensation in this case, we conclude relator is not entitled to the requested writ of mandamus.

{¶ 15} Upon review of the magistrate's decision, an independent review of the record, and due consideration of relator's objections, we find that, except as discussed in our disposition of relator's first and third objections, the magistrate has properly determined the pertinent facts and applied the appropriate law. Therefore, excluding paragraphs 61 and 62 of the magistrate's decision, we adopt the magistrate's decision as our own. Accordingly, relator's first and third objections are sustained, relator's second objection is overruled, and the requested writ of mandamus is hereby denied.

Objections overruled in part and sustained in part;
writ of mandamus denied.

BROWN, P.J., and FRENCH, J., concur.

A P P E N D I X

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Relator,	:	
v.	:	No. 11AP-267
Industrial Commission of Ohio and Nancy C. Kuhn,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on December 16, 2011

Taft Stettinius & Hollister LLP, and *Cynthia C. Felson*, for relator.

Michael DeWine, Attorney General, and *Patsy A. Thomas*, for respondent Industrial Commission of Ohio.

Brown, Lippert & Laite, and *James W. Lippert*, for respondent Nancy C. Kuhn.

IN MANDAMUS

{¶ 16} In this original action, relator, Keebler Company, nka Kellogg's Snack Division ("relator" or "Keebler"), requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order awarding permanent

total disability ("PTD") compensation to respondent Nancy C. Kuhn ("claimant") and to enter an order denying the compensation.

Findings of Fact:

{¶ 17} 1. Claimant has four industrial claims arising out of her employment with Keebler, a self-insured employer under Ohio's workers' compensation laws. Claimant sustained industrial injuries on January 24, 1979, February 7, 1995, October 31, 1997, and February 6, 1999.

{¶ 18} 2. At the time of her February 6, 1999 injury, claimant was employed as a "sanitizer" for Keebler. On her application for workers' compensation benefits, claimant describes this accident:

> I was blowing out a line when my right hand got caught in a conveyor belt and pulled it into the roller. I attempted to remove my right hand when my left hand was caught and pulled into the line.

{¶ 19} 3. The February 6, 1999 injury (claim No. 99-326647) is allowed for:

> Right intra-articular distal radius fracture, right intra-articular distal radius ulnar fracture, right P1 thumb fracture, left radial shaft fracture, left distal ulnar fracture, right elbow strain, right shoulder strain, aggravation of pre-existing depression, aggravation of pre-existing bilateral carpal tunnel syndrome, right cubital tunnel syndrome, left cubital tunnel syndrome, left thoracic outlet nerve compression, herniated cervical disc at C5-6.

{¶ 20} 4. Claimant has not worked since the February 6, 1999 industrial injury.

{¶ 21} 5. On March 15, 2005, claimant filed an application for PTD compensation. In support of the application, claimant submitted a report from Bruce F. Siegel, D.O., dated August 3, 2004. In his eight-page narrative report, Dr. Siegel opines:

> * * * [I]t is my medical opinion that solely due to the claims listed on this report, Ms. Kuhn is unable to return and engage in sustained, remunerative employment and has been rendered permanently and totally disabled. * * *

{¶ 22} 6. In further support of her application, claimant submitted the opinion of her treating psychiatrist Kode Murthy who opined that claimant "is totally permanently disabled now [and] has been so for several years."

{¶ 23} 7. On June 22, 2005, at relator's request, claimant was examined by Steven Wunder, M.D. In his ten-page narrative report, Dr. Wunder opines that claimant is capable of sustained remunerative employment and is "capable of light occupations."

{¶ 24} 8. On November 10, 2005, at relator's request, claimant was examined by psychologist Lee Howard, Ph.D. In his 20-page narrative report, Dr. Howard opines:

> She should be able to perform at the simple to moderate task range but not at the complex task range. She should be able to perform at the low to low moderate or moderate stress range but not at the high moderate or high stress range. * * *

{¶ 25} 9. Earlier, on July 5, 2005, Keebler requested surveillance on claimant to be performed by Matrix Investigations and Consulting, Inc. ("Matrix"). Matrix issued an eight-page written report of its surveillance during four days in July and August 2005.

{¶ 26} The Matrix report contains a summary:

> On Friday, July 15, 2005 surveillance was conducted on the subject from approximately 2:42 PM until 5:21 PM. Neither the subject nor her registered vehicle was observed throughout the surveillance.
>
> On Monday, July 18, 2005 surveillance was conducted on the subject from approximately 7:10 AM until 2:57 PM. The subject was not observed throughout the surveillance, however, her registered vehicle was observed in the driveway. Several pretext telephone calls were placed to the

> subject's residence throughout the surveillance. Each telephone call was forwarded to an answering machine.
>
> On Saturday, July 23, 2005 surveillance was conducted on the subject from approximately 7:41 AM until 12:45 AM [sic]. The subject was observed mowing the lawn at her residence with a riding lawn mower. The subject was continuously observed steering the mower with both of her arms and shifting the mower from forward to reverse with her right hand/arm. The subject was also observed using a pool skimmer and closing a shed door with her right arm.
>
> On Saturday, August 6, 2005 surveillance was conducted on the subject from approximately 8:59 AM until 12:57 PM. Neither the subject nor her registered vehicle was observed throughout the surveillance.

{¶ 27} The Matrix report describes the surveillance on Saturday, July 23, 2005:

> 7:41 AM Surveillance was initiated at the subject's residence[.] * * * The subject's vehicle was parked in the driveway of her residence along with the white sedan. The investigator established a fixed surveillance position with a clear view of the subject's residence. VIDEO
>
> 11:55 AM The subject exited her residence, climbed onto a riding lawnmower and mowed her front and side lawn. The subject was described as a white female, approximately 57 years of age, brown hair, and 160 lbs. The subject continued to mow her lawn for the next approximately twenty five (25) minutes. The subject was continuously observed steering the mower with both of her arms/hands and shifting the mower from forward to reverse with her right hand/arm. VIDEO
>
> 12:20 PM The subject parked the lawn mower in a shed in the backyard of her residence. The subject closed the door of the shed with her right arm/hand. The subject approached the pool in the backyard of her residence and used a pool skimmer to skim the water. The subject was observed bending over, reaching and using both of her arms and hands to operate the pool skimmer. VIDEO
>
> 12:24 PM The subject appeared to be acting in a suspicious manner, therefore the investigator departed the area and

> established a temporary surveillance position and would conduct periodic drive bys of the subject's residence.
>
> 12:45 PM Surveillance was ceased for the day.

{¶ 28} 10. On August 18, 2005, relator filed the Matrix report for placement into the industrial claim file.

{¶ 29} 11. On December 27, 2005, at the commission's request, claimant was examined by James T. Lutz, M.D., who is board certified in occupational medicine. In his five-page narrative report, Dr. Lutz opines that claimant suffers a 59 percent whole person impairment.

{¶ 30} 12. On December 27, 2005, Dr. Lutz completed a physical strength rating form on which he indicated by his mark, "[t]his injured worker is incapable of work."

{¶ 31} 13. On January 12, 2006, relator moved for leave to depose Dr. Lutz.

{¶ 32} 14. Following a March 20, 2006 hearing, a staff hearing officer ("SHO") issued an order granting relator's January 12, 2006 motion:

> The employer has requested authorization from the Industrial Commission to depose Dr. Lutz, who examined the injured worker at the direction of the Industrial Commission with respect to the issues raised by the pending application for permanent and total disability compensation. The employer had submitted surveillance evidence, including an investigation report chronicalling [sic] the injured worker's activities in July and August, 2005 and a video tape documenting the surveillance. The employer alleges that the surveillance evidence is inconsistent with findings made by Dr. Lutz following his examination of the injured worker. The employer further alleges that there is a substantial disparity in the opinions of Dr. Lutz and Dr. Wunder, who performed an examination of the injured worker at the request of the employer.
>
> The Staff Hearing Officer finds that the requested deposition is a reasonable forum for determining whether the findings

> made by Dr. Lutz following his medical examination of the injured worker are inconsistent with the surveillance evidence conducted on the employer's behalf. The Staff Hearing Officer further finds that the disability hearing is not an equally reasonable option for resolution of this issue.
>
> Accordingly, the employer's request to depose Dr. Lutz is granted. The Staff Hearing Officer directs that the employer conduct the deposition in accordance with the rules as provided by the Industrial Commission.

{¶ 33} 15. On May 23, 2006, Dr. Lutz was deposed by Keebler and claimant through their respective counsel. Also at the deposition was commission hearing officer Norman Litts, Esq. During the examination of Dr. Lutz by Keebler's counsel, the following exchange occurred:

> [Relator's counsel] Okay. Dr. Lutz, I brought with me the copy of the DVD video that was submitted to the file, and it's probably best for us to just go off the record, and I can show you the video, and just ask you a couple of questions relative to that.
>
> [Dr. Lutz] Okay.
>
> [Relator's counsel] Okay.
>
> (A recess was taken from 1:29 to 1:43.)
>
> [Relator's counsel] Mr. Litts is asking that we stop the video of the deposition, and put on the record the length of time that the woman - -, the claimant, Ms. Nancy Kuhn, is engaging in activity of riding lawn mower, using her hands, turning her neck.
>
> And I - - I am objecting to that, but obviously he's in charge of the deposition, and he wants to move to the end of the tape, so we are going to - -
>
> Mr. Litts: Well, I want to move to the end of this particular activity. We've been viewing a lady sitting on a riding lawn mower for ten minutes now.

[Claimant's counsel] Well - -

Mr. Litts: So - -

[Relator's counsel] Well - -

[Claimant's counsel] Maybe this will accommodate all parties, hopefully. We have viewed this tape. The tape shows - - we will stipulate the tape shows the same activity that has been depicted from the time they started the lawn mower mowing session up to - - the time is now 12:04. We'll also stipulate that these activities continued for approximately 15 to 20 minutes.

[Relator's counsel] It's about 25 minutes, but - -

[Claimant's counsel] We would stipulate that, but the activities are as depicted. And if that stipulation is good - - and I'm not - - I'm not the hearing officer - - we can move forward.

Mr. Litts: That would be great. Thank you, Mr. Lippert [Claimant's counsel].

* * *

[Relator's counsel] Dr. Lutz, I started to ask a question of you, and that is that the video showed the claimant riding a lawn mower, which she was steering a steering wheel using both of her arms. And she was steering the wheel, shifting into reverse and back again, with her right arm, on several occasions; would you agree?

[Dr. Lutz] Yes.

[Relator's counsel] And also during the riding of the lawn mower, when she was shifting into reverse, she was turning her neck and did not appear to have any problems with the rotation of her neck?

[Dr. Lutz] I would not necessarily agree with that.

[Relator's counsel] Okay. Well, why don't you tell me what you would - - what you observed on the videotape.

[Dr. Lutz] I agree that she turned her neck to some extent, but she also largely turned - - turned her torso and essentially was looking down. So it was largely an upper body move in looking down, with the minimal movement of the neck.

[Relator's counsel] Would you say that the videotape shows a woman who has constant pain on a scale of five to eight in her upper extremities?

[Dr. Lutz] Possibly, yes.

[Relator's counsel] Okay. And did she exhibit any pain behavior that you could tell from the videotape?

[Dr. Lutz] I believe that I did see her take her right hand off the steering wheel prematurely long before she needed to change gears, and sort of flick her hand or rub it against her torso, as if she was trying to get feeling back into her hand. I believe I witnessed that at least once.

* * *

[Relator's counsel] With regard to the cleaning of the pool, did you observe the claimant bending over from her waist to clean the pool?

[Dr. Lutz] Yes.

[Relator's counsel] Did she bend her knees?

[Dr. Lutz] I don't recall.

* * *

[Dr. Lutz] I don't recall, from my observation, whether she bent her knees or not.

[Relator's counsel] Okay. Did she appear to have any restrictions with regard to using her - - her right arm to clean the pool?

[Dr. Lutz] Not obviously, no.

> [Relator's counsel] Would you say that the videotape indicated - - of her cleaning the pool indicated - - was the picture of a person who was having low back problems, when she bent over to clean the pool?
>
> [Dr. Lutz] Not obviously, no.

(Tr. 19-25.)

{¶ 34} 16. During the examination of Dr. Lutz by claimant's counsel, the following exchange occurred:

> [Claimant's counsel] Did - - did your examination of Ms. Kuhn lead you to believe, in any measure or regard, that she was not being honest with you with respect to the reporting of symptomatology and sensation upon testing?
>
> [Dr. Lutz] No.
>
> [Claimant's counsel] Would you say the balance of your exam indicated that she was consistent in her reporting as far as test results of her subjective complaints?
>
> [Dr. Lutz] Yes, I would.
>
> [Claimant's counsel] You reach a conclusion on the - - it's numbered page 1, but it's the eighth page of your report. You express an opinion that this injured worker is - - is incapable of working; is that correct?
>
> [Dr. Lutz] That is correct.
>
> * * *
>
> [Claimant's counsel] Would viewing that DVD change your opinion with respect to whether or not Ms. Kuhn was incapable of engaging in sustained remunerative work activity?
>
> [Dr. Lutz] No, it would not.

(Tr. 30-31.)

{¶ 35} 17. Following a September 20, 2006 hearing, an SHO mailed an order on November 4, 2006 awarding PTD compensation. The SHO's order explains:

> All of the relevant medi[c]al and vocational reports on file were reviewed and considered in arriving at this decision. This order is based upon the report of [Dr.] Lutz and the deposition of Dr. Lutz.
>
> The application for Permanent and Total Disability, filed 03/15/2005, has been filed in four industrial claims. The first claim has a date of injury of 01/24/1979. The injury occurred when the injured worker was employed as a parker. The injured worker injured her right arm and shoulder and her neck when she slipped and fell on ice. The injured worker was off work for more than six years as the result of this injury. The injured worker did however, return to work.
>
> The second claim has a date of injury of 02/07/1995. At the time of this injury the injured worker was employed as a head mixer. This low back injury resulted [from] heavy lifting. Treatment in this claim was conservative with medication, therapy and home exercise. The injured worker was off work for several months after this injury but the injured worker did return to work.
>
> The third claim has a date of injury of 10/31/1997. At the time of this injury the injured worker was employed as a laborer. The injured worker was injured when she was struck by a forklift. As a result of this injury the injured worker sustained sprains to the cervical and lumbosacral spine and aggravated degenerative changes of the lumbar spine. To treat the allowed conditions in this claim the injured worker engaged in extensive physical therapy, medication management and home exercise. The injured worker missed time from work after this injury, but was able to return to work and continue working until 02/06/1999.
>
> On 02/06/1999 the injured worker sustained the injury that is recognized in claim number 99-236647 when she was employed as a sanitizer. This injury occurred when the injured worker's hands became caught and pulled into a rolling machine. This claim is allowed for many injuries to the hands and arms and the cervical spine. This claim has also been allowed for a psychological condition. The injured

worker required surgical intervention to treat her right arm. The injured worker has also been treated with physical therapy and medication management in this claim. The injured worker has not been able to return to work since the date of injury in her 1999 claim.

The claim file contains surveillance evidence compiled by Matrix Investigations in July and August of 2005. The relevant evidence was filmed on 07/23/2005. The DVD made on that date shows the injured worker mowing her lawn with a riding lawnmower. This activity is performed over a period of approximately 25 minutes. The injured worker is observed driving the lawnmower, using her right hand to shift gears and turning to look back over her shoulder. The evidence on this date also shows the injured worker bending to use a small pool skimmer to remove debris from her swimming pool. The pool skimmer appears to be less than 18 inches long and very light weight.

Dr. James Lutz, Occupational Medicine, examined the injured worker on 12/07/2005 at the request of the Industrial Commission. Dr. Lutz examined the injured worker for each of the four industrial claims in which the application for Permanent and Total Disability has been filed. To Dr. Lutz the injured worker complained of constant pain of the right and left distal forearms, wrists and hands with radiation of pain down to the finger tips and up to the elbows. The injured worker also complained of intermittent numbness and tingling of both hands and swelling of both wrists and hands. Regarding her elbows, the injured worker complained of constant pain with intermittent radiation of pain and numbness and tingling down the ulnar side of both forearms to the finger tips. The injured worker advised that all of these symptoms are aggravated with significant use of the upper extremities and weather changes. Regarding her right shoulder, the injured worker complained of constant pain which is aggravated by use of the right upper extremity and weather changes. Regarding her neck, the injured worker complained of constant pain with radiation of pain upward to the back of the head and into both shoulders. The injured worker advised that these symptoms are aggravated with significant use of the upper extremities, certain head movements and weather changes. Regarding her low back, the injured worker complained of constant pain with frequent

radiation of pain and numbness and tingling down the right leg to the toes.

The injured worker advised that her low back symptoms are aggravated with exertional activities such as lifting, bending, pushing and pulling, prolonged sitting, standing and walking and with weather changes. Regarding the activities of daily living, the injured worker advised that she lives alone in her own home and does light cooking and light laundry but does essentially no house cleaning. The injured worker advised that she is able to carry out light garbage, drive and do light grocery shopping. The injured worker advised that she is able to stand for 15 minutes at a time, walk for 15 minutes at a time and sit for 30 minutes at a time.

Dr. Lutz['s] examination findings are contained in his report. Dr. Lutz opined that the injured worker has reached Maximum Medical Improvement for each of the allowed conditions in each of her industrial claims. Dr. Lutz assigned permanent impairment to the allowed conditions indicating that the injured worker's greatest impairment results from the injuries to her neck and arms. On the Physical Strength Rating Form that is attached to his report, Dr. Lutz indicated that the injured worker is incapable of work.

The self-insured employer requested and was granted authority to depose Dr. Lutz concerning his examination of the injured worker. Dr. Lutz was deposed on 05/23/2006. Dr. Lutz reviewed the surveillance DVD at the deposition. In the deposition Dr. Lutz acknowledged that the injured worker was seen performing some activities without obvious pain. Dr. Lutz also acknowledged an understanding that Permanent and Total Disability is related only to an individuals['] ability to perform sustained remunerative employment. Upon questioning, Dr. Lutz indicated that the injured worker seemed honest in reporting her complaints. Dr. Lutz also advised that viewing the DVD surveillance did not change his opinion on Permanent and Total Disability.

The Staff Hearing [O]fficer finds that the injured worker has reached Maximum Medical Improvement for each of the conditions that are recognized in her industrial claims. The Staff Hearing Officer further finds, based upon the report and deposition of Dr. Lutz, that the industrial injury so severely restricts the injured worker's functional capacity as to render

> her incapable of performing any sustained remunerative employment. The Staff Hearing Officer therefore finds that the injured worker is permanently and totally disabled.
>
> The injured worker's application for Permanent and Total Disability, filed 03/15/2005, is therefore granted.

{¶ 36} 18. On March 18, 2011, relator, Keebler Company, nka Kellogg's Snack Division, filed this mandamus action.

Conclusions of Law:

{¶ 37} Relying upon the report of Dr. Lutz and his deposition transcript, the commission, through its SHO, found that the medical impairment from the industrial injuries prohibits the performance of sustained remunerative employment and, thus, claimant was found to be permanently and totally disabled without reference to the non-medical factors. See Ohio Adm.Code 4121-3-34(D)(2)(a).

{¶ 38} Relator contends that the report of Dr. Lutz and his deposition transcript cannot constitute some evidence upon which the commission can rely. Relator presents three grounds for the evidentiary elimination of the report of Dr. Lutz and his deposition transcript: (1) the commission failed to provide the Matrix report and video to Dr. Lutz at the time of his December 27, 2005 examination of claimant so that Dr. Lutz could have addressed the surveillance in his report; (2) the commission did not permit Dr. Lutz to view the entire video at the deposition; and (3) allegedly, an independent view of the video (i.e., of this magistrate and court) will disclose that claimant did not exhibit the pain behaviors that Dr. Lutz states he witnessed when viewing the video.

{¶ 39} Before addressing the three grounds relator presents in challenging the commission's reliance upon the report of Dr. Lutz and his deposition transcript, the

hypothetical concept of a PTD claimant performing yard work such as mowing the yard and skimming the pool must be placed in proper context. To do so, the commission appropriately presents two cases here that are worthy of some mention. Those two cases are *State ex rel. Lawson v. Mondie Forge*, 104 Ohio St.3d 39, 2004-Ohio-6086, and *State ex rel. Midmark Corp. v. Indus. Comm*., 78 Ohio St.3d 2, 1997-Ohio-247.

{¶ 40} In *Lawson*, at ¶20-21, the Supreme Court of Ohio states:

> One of the most enduring (though not often explicitly stated) misconceptions about PTD is that once it is granted, the recipient must thereafter remain virtually housebound. This is a fallacy. PTD exempts no one from life's daily demands. Groceries must be purchased and meals cooked. Errands must be run and appointments kept. The yard must be tended and the dog walked. Where children are involved, there may be significant chauffeur time. For some, family and friends shoulder much of the burden. Others, on the other hand, lack such support, leaving the onus of these chores on the PTD claimant.
>
> These simple activities can nevertheless often generate considerable controversy. That is because all of these tasks are potentially remunerative. From the school cafeteria to the four-star restaurant, people are paid to prepare meals. People are paid for lawn and child care. Many people earn their living behind the wheel. *State ex rel. Parma Comm. Gen. Hosp. v. Jankowski,* 95 Ohio St.3d 340, 2002-Ohio-2336, 767 N.E.2d 1143, acknowledged this and cautioned against an automatic disqualification from compensation based on the performance of routine tasks, regardless of their potential for payment. We instead compared the activities with claimant's medical restrictions to determine whether they were so inconsistent as to impeach the medical evidence underlying the disability award.

{¶ 41} In *Midmark*, the claimant, Billy Sergent, was examined on June 8, 1989 by Dr. John W. Cunningham who assessed a 50 percent permanent partial impairment.

Suspicious of Sergent's abilities, Midmark hired a private investigation firm to monitor Sergent's activities.

{¶ 42} Midmark showed the surveillance videotape to Dr. Cunningham who then issued a second report. However, Dr. Cunningham still assigned a 50 percent permanent partial impairment for the allowed conditions.

{¶ 43} In the meantime, Sergent applied for PTD compensation. The application prompted an examination by commission specialist Dr. Paul F. Gatens, Jr., on March 23, 1990, who reported that "it was very difficult to evaluate the physical findings since the subjective complaints seemed to outweigh the objective findings." Id. at 6. Dr. Gatens then opined that the industrial claims:

> * * * [D]o prevent him from returning to his former position of employment. In my opinion, this inability to return to his former position of employment is permanent. I do not, however, feel that he has a permanent and total impairment. In my opinion, the claimant could perform work in the sedentary strength physical capacities provided he could be provided with a handicapped parking space within reasonable proximity to his work site. * * *

Id. at 7.

{¶ 44} In November 1990, surveillance again resumed. Sergent was observed pushing a lawn mower and raking leaves in his backyard. The investigators wrote: "He appears to have no difficulty in walking." Id. at 8.

{¶ 45} On August 15, 1991, the first of three PTD hearings took place. At no point during this hearing did Midmark's counsel ask that Dr. Gatens be required to view the videotape. However, the August 15, 1991 hearing was quickly adjourned and reset

following allegations by claimant's counsel that the videotape had been prejudicially edited.

{¶ 46} Midmark's counsel also made no such request at the next hearing on October 16, 1991. During that hearing, the videotape was shown and commentary provided by one of the investigators. Also, Sergent himself testified about his activities as shown on the videotape.

{¶ 47} On January 3, 1992, the commission found Sergent to be permanently totally disabled. Consequently, Midmark filed a mandamus action in this court. Pursuant to the parties' stipulation, this court, on June 26, 1992, dismissed Midmark's complaint and the commission ordered the matter to be rescheduled for a third hearing.

{¶ 48} At the third hearing, Midmark's counsel, for the first time, argued that Dr. Gatens should be required to issue an amended report based upon a viewing of the videotape. The commission ultimately refused Midmark's request and, on October 20, 1992, again found Sergent to be permanently totally disabled. The commission relied upon Dr. Gatens' report and an analysis of the non-medical factors.

{¶ 49} Following the commission's award of PTD, Midmark filed a complaint in mandamus in this court. This court issued a writ ordering a new examination by a commission orthopedic specialist, preferably Dr. Gatens, who would have the videotape available for review. Appeals were then taken to the Supreme Court of Ohio.

{¶ 50} The Supreme Court of Ohio determined that the commission was not compelled to have Dr. Gatens view the videotape and prepare an amended report. The court also determined that the commission did not err in relying upon Dr. Gatens' report. The *Midmark* court explains:

Claimant did exaggerate his incapacity to examining physicians. At least two examiners felt that claimant was not completely forthright in his medical presentation. Surveillance information, moreover, contradicted many of the assertions made in claimant's permanent total disability application. This inconsistency, however, means little unless it contradicts claimant's contention that he cannot work or Gatens's conclusion that he is limited to sedentary work. The surveillance material does neither.

First, the material does not establish a medical capacity for work greater than sedentary. It simply shows claimant walking unassisted or doing fairly unstrenuous domestic chores. Moreover, the objective, documented presence of spondylolisthesis and herniated disc, as discussed by Dr. Gatens, belies an assertion that his opinion was based solely on claimant's exaggerated subjective complaints. Interestingly, Dr. Cunningham, who evaluated claimant on Midmark's behalf, saw the videotape and still assessed a fifty-percent permanent partial impairment—only ten percentage points removed from Dr. Gatens's sixty-percent figure.

Second, these documented activities, even if deemed inconsistent and work-amenable, do not establish that claimant can do *sustained* remunerative employment. Midmark's investigation spanned approximately fifteen months, yet it could show only five days in which claimant was performing allegedly questionable activities. There is no evidence of claimant's performing even any medium-exertion labor, nor is there any evidence of claimant's doing the recorded activity on anything other than rare occasions. The surveillance package, therefore, proved very little. As such, the commission did not abuse its discretion in accepting the Gatens report as valid.

Midmark's assertion of commission error is further undermined by Midmark's own inaction. Midmark, pursuant to Ohio Adm.Code 4121-3-09(B)(5), could have moved to depose Dr. Gatens in an effort to clarify his perceptions. It did not do so. Midmark's response that its investigation was not finished when Gatens issued his report ignores that the first period of surveillance was complete at that time. Thus, evidence of alleged medically inconsistent activity already existed and could have prompted a timely request.

> Surveillance information from the first period alone was enough to generate a video review by Dr. Cunningham. Midmark could have done the same with Gatens.
>
> We thus find that the commission did not abuse its discretion in not requiring that Dr. Gatens view the videotape and in relying on his report. The report is "some evidence" supporting the commission's order.

Id. at 11. (Emphasis sic.)

{¶ 51} Consequently, the judgment of this court was reversed, and the order of the commission reinstated.

{¶ 52} As earlier noted, relator's first ground for evidentiary elimination of the report of Dr. Lutz and his deposition transcript is that the commission failed to provide the Matrix report and video to Dr. Lutz at the time of his December 27, 2005 examination so that Dr. Lutz could have addressed the video surveillance evidence in his report. Relator's proposition lacks merit.

{¶ 53} Clearly, if the commission in *Midmark* had no duty to order Dr. Gatens to review the videotape and render an amended report, there was no duty upon the commission to have Dr. Lutz review the Matrix report and video at the time of his December 27, 2005 examination.

{¶ 54} As earlier noted, the second ground presented by relator for evidentiary elimination of the report of Dr. Lutz and his deposition transcript is that the commission did not permit Dr. Lutz to view the entire video at the deposition. This ground also lacks merit.

{¶ 55} It is largely undisputed that Dr. Lutz viewed the first 14 minutes of the 25 minute video showing claimant's activities on Saturday, July 23, 2005. Significantly,

relator does not contend that the portion of the video not viewed by Dr. Lutz shows activity any different than that shown during the first 14 minutes of the video:

> Both the Commission and Kuhn argue that the lawn mowing activity was the same throughout the video and therefore it was inconsequential that Dr. Lutz did not review the complete activity. However, it is not simply that the lawn mowing activity might be the same, but the length of time that Kuhn participated in it must also be considered. Watching only ten minutes of the activity versus watching twenty-five minutes of the activity does not provide the viewer with the sense of time that the activity was engaged in. The time factor is crucially relevant in this case given the fact that Kuhn told Dr. Lutz that her upper extremity symptoms are aggravated with any significant use. * * *

(Relator's reply brief, at 4.)

{¶ 56} Clearly, Dr. Lutz was made aware by counsel at the deposition that the video continued to show the same activity depicted during the portion of the video that he was permitted to view. In effect, relator's argument is premised upon the proposition that Dr. Lutz was unable to project in his own mind that the lawn mowing activity continued beyond the 14 minutes. Relator's premise is simply untenable.

{¶ 57} As earlier noted, the third ground relator presents for evidentiary elimination of the report of Dr. Lutz and his deposition transcript is that allegedly an independent view of the video will disclose that claimant did not exhibit the pain behaviors that Dr. Lutz states that he witnessed when viewing the video. At issue is Dr. Lutz's deposition statement:

> * * * I believe that I did see her take her right hand off the steering wheel prematurely long before she needed to change gears, and sort of flick her hand or rub it against her torso, as if she was trying to get feeling back into her hand. I believe I witnessed that at least once.

(Tr. 24.)

{¶ 58} According to relator:

> A review of the complete video surveillance disc reveals no such behavior by Kuhn, and Dr. Lutz's testimony regarding what he witnessed on the video is a complete fabrication. * * *

(Relator's amended brief, at 8.)

{¶ 59} The magistrate declines relator's invitation to view the video. To begin, it was relator who moved to depose Dr. Lutz so that relator could show him the video that relator had made. Upon being granted its motion, it was relator who had Dr. Lutz view the video so that he might reconsider his opinion rendered in his December 27, 2005 report, that claimant is incapable of work. Dr. Lutz observed something on the video that relator says is not there. Thus, relator now endeavors to challenge Dr. Lutz's credibility in this mandamus action.

{¶ 60} Apparently, the September 20, 2006 hearing before the SHO was not recorded, and so we do not have a transcript of that proceeding. We do know that the issue raised here—that Dr. Lutz's observation of pain behaviors is not supported by the video—is not an issue that the SHO addressed in her order. Relator does not argue here that the SHO abused her discretion by failing to find that the video fails to support Dr. Lutz's statement as to what he remembers observing. What relator argues here is that this court should determine whether the video supports Dr. Lutz's deposition statement.

{¶ 61} Relator cannot properly ask this court to view the video if relator did not ask the SHO to view the video to determine whether Dr. Lutz correctly observed something in the video.

{¶ 62} The main issue before the SHO was the credibility of Dr. Lutz's opinion that claimant is incapable of work. Even if Dr. Lutz did fail to correctly observe something in the video on his first and only viewing of the video, that factor would necessarily be weighed by the SHO in determining the credibility of Dr. Lutz's ultimate opinion. Minor discrepancies do not compel elimination of a doctor's report. *State ex rel. Warnock v. Indus. Comm.*, 100 Ohio St.3d 34, 2003-Ohio-4833.

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

/s/ Kenneth W. Macke

KENNETH W. MACKE
MAGISTRATE

NOTICE TO THE PARTIES

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