[Cite as *State ex rel. Snyder v. Indus. Comm.*, 2012-Ohio-2032.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Betty Snyder,	:	
Relator,	:	
v.	:	No. 11AP-292
Industrial Commission of Ohio and Doctors Hospitals,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on May 8, 2012

William A. Thorman, III, for relator.

Michael DeWine, Attorney General, and *Cheryl J. Nester*, for respondent Industrial Commission of Ohio.

Baker & Hostetler LLP, *R. Christopher Doyle* and *Karen E. Sheffer*, for respondent Doctors Hospitals.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

FRENCH, J.

{¶1} Relator, Betty Snyder ("relator"), filed an original action, which asks this court to issue a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its order exercising continuing jurisdiction, ultimately finding that relator had improperly been paid permanent total disability ("PTD") compensation,

and making a finding of fraud, and to order the commission to reinstate her entitlement to PTD compensation.

{¶2} This matter was referred to a magistrate pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate issued a decision, which includes findings of fact and conclusions of law and is appended to this decision, recommending that this court deny the requested writ. No party objected to the magistrate's findings of fact, and we adopt them as our own.

I. BACKGROUND

{¶3} As detailed in the magistrate's decision, relator suffered a work-related injury in 1996. Relator received temporary total disability ("TTD") compensation until 2004, when it terminated because her allowed conditions had reached maximum medical improvement. She later pursued vocational rehabilitation, but her case was closed on December 6, 2004, after relator conveyed that she could not continue due to pain and depression that prevented her from getting out of the house on a regular basis.

{¶4} Relator applied for PTD on December 13, 2004. In support, relator submitted the report of Jeffrey R. Blood, M.D. After a hearing in June 2005, and relying on Dr. Blood's report, a staff hearing officer ("SHO") awarded PTD, beginning on April 20, 2004, the date of the report.

{¶5} An investigation conducted in 2009 revealed that relator received payment for performing cleaning services for various businesses during 2004, 2005, 2007, and 2008. Following a hearing in March 2010, a district hearing officer determined that relator had been overpaid TTD compensation from March 22 through April 5, 2004, but also determined that relator's employer, respondent Doctors Hospitals ("employer"), had not met its burden of proving that relator committed fraud. The same officer, sitting as an SHO, denied employer's request to terminate relator's PTD compensation.

{¶6} The commission granted employer's motion for reconsideration of the March 2010 order concerning PTD. Following a hearing, the commission determined that employer had met its burden of showing that relator committed fraud and found an overpayment for the entire period of compensation, beginning in 2004. As noted, on relator's complaint for a writ of mandamus, the magistrate recommended that we deny

the requested writ. The magistrate concluded that the commission did not abuse its discretion by (1) exercising continuing jurisdiction, (2) applying the standard for termination of PTD compensation or (3) making a finding of fraud.

II. OBJECTIONS

{¶7} Relator has filed three objections to the magistrate's decision. In her first objection, relator contends that the magistrate incorrectly focused on the June 2005 order granting PTD compensation instead of the March 2010 order denying employer's motion to terminate PTD compensation. More specifically, she argues that the magistrate erred by determining the commission properly found a mistake of fact as a basis for exercising continuing jurisdiction. In relator's view, the commission's exercise of continuing jurisdiction was only a disagreement as to the evidence before the SHO. We disagree. In the March 2010 order, the SHO continued to rely on the report of Dr. Blood, which was based on relator's mischaracterization of her physical abilities, as demonstrated by the investigatory results. As the very facts on which the March 2010 order was based were false, the commission did not abuse its discretion by exercising continuing jurisdiction on this basis, and the magistrate did not err in this respect. Accordingly, we overrule relator's first objection.

{¶8} In her second objection, relator contends that the magistrate erred by not concluding that the commission used the wrong standard in terminating PTD compensation. In making this argument, relator contends that the magistrate acted as a "'super commission'" by interpreting the evidence. We disagree with relator's characterization of the magistrate's decision. The question before the magistrate, as before us, is whether the commission abused its discretion by terminating PTD compensation, i.e., whether some evidence exists to support that termination. The magistrate articulated the correct standard for determining whether PTD should be awarded and then reviewed the record to determine what evidence exists. We agree with the magistrate's thorough analysis of this issue. We overrule relator's second objection.

{¶9} In her third objection, relator contends that the magistrate erred by concluding that the commission performed an adequate analysis of fraud. Relator's only

specific point in this respect is her contention that the commission lacked evidence to support its finding of fraud. We disagree. The magistrate carefully examined each element necessary for a finding of fraud and found evidentiary support for each of those elements. We agree with the magistrate's thorough analysis of this issue. We overrule relator's third objection.

III. CONCLUSION

{¶10} Following an independent review, and having overruled relator's objections, we adopt the magistrate's decision, including the findings of fact and conclusions of law contained in it, as our own. Accordingly, we deny the requested writ.

Objections overruled;
writ denied.

BROWN, P.J., and SADLER, J., concur.

A P P E N D I X

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Betty Snyder,	:	
Relator,	:	
v.	:	No. 11AP-292
Industrial Commission of Ohio and Doctors Hospitals,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on January 24, 2012

William A. Thorman, III, for relator.

Michael DeWine, Attorney General, and *Cheryl J. Nester,* for respondent Industrial Commission of Ohio.

Baker & Hostetler LLP, R. Christopher Doyle and *Karen E. Sheffer,* for respondent Doctors Hospitals.

IN MANDAMUS

{¶11} Relator, Betty Snyder, has filed this original action requesting that this court issue a writ of mandamus ordering respondent Industrial Commission of Ohio

("commission") to vacate its order exercising its continuing jurisdiction and ultimately finding that relator had improperly been paid permanent total disability ("PTD") compensation and also making a finding of fraud and ordering the commission to reinstate her entitlement to PTD compensation.

Findings of Fact:

{¶12} 1. Relator sustained a work-related injury on June 23, 1996, and her workers' compensation claim has been allowed for the following conditions: "LEFT SIDED LOW BACK STRAIN; HERNIATED NUCLEUS PULPOSUS L5-S1; S1 RADICULOPATHY; DYSTHMIC DISORDER."

{¶13} 2. Relator received temporary total disability ("TTD") compensation until April 6, 2004 when it was terminated because relator's allowed physical and psychological conditions had reached maximum medical improvement ("MMI").

{¶14} 3. Shortly thereafter, relator pursued vocational rehabilitation with the Bureau of Workers' Compensation ("BWC"). However, her case was closed on December 6, 2004 because "Ms. Snyder stated that she is unable to go any further with services as she does not feel that she can get out of the house on a regular basis due to pain and depression. Ms. Snyder was advised that her file would be closed immediately."

{¶15} 4. Relator submitted her application for PTD compensation on December 13, 2004. At the time she filed her application, relator was 48 years old. She had graduated from the twelfth grade and ended her schooling when she began working. Relator indicated further that she had filed for Social Security Disability benefits

but that she was not yet receiving those benefits and that she could read, write, and perform basic math.

{¶16} 5. In support of her application, relator submitted the April 20, 2004 report of Jeffrey R. Blood, M.D., who opined that she was permanently and totally disabled as follows:

> I completed the medical report form regarding her physical capacity evaluation. I believe it would be very difficult for Betty to become gainfully employed as she has tolerances for less than sedentary level of work. Specifically, she cannot tolerate lifting more than 10 pounds, she does not tolerate sitting more that 20 minutes or standing more than 10 minutes, and she needs to change position frequently. I feel that she is permanently and totally disabled. I do not see her ever returning to gainful employment. * * *

{¶17} 6. Relator was examined for her psychological condition by three doctors. In his October 5, 2004 report, Michael E. Miller, M.D., opined that relator had a class two mild impairment of 20 percent. In his February 8, 2005 report, Lee Howard, Ph.D., opined that relator's allowed psychological condition had reached MMI, that she would be capable of returning to her previous type of employment from a psychological standpoint, and that she could perform at the simple, moderate, complex task range as well as the low to moderate stress range. He opined that she had a seven to ten percent permanent partial impairment due to the allowed psychological condition. In his February 28, 2005 report, Michael A. Murphy, Ph.D., concluded that relator's allowed psychological condition had reached MMI, assessed a 22 percent impairment and opined that relator's psychological condition was not work prohibitive.

{¶18} 7. The record contains two additional reports concerning relator's allowed physical conditions. In his January 6, 2005 report, Gerald F. Steiman, M.D., noted that relator had been out of work since September 1996. After identifying the medical records which he reviewed and providing his physical findings upon examination, Dr. Steiman opined that relator's allowed physical conditions had reached MMI, assessed a 13 percent permanent partial impairment, and opined that relator was capable of performing light-duty job activities. The record also contains the March 2, 2005 report of Terrence B. Welsh, M.D., who opined that relator's allowed physical conditions had reached MMI, assessed a 25 percent whole person impairment, and opined that, while relator was unable to return to her former position of employment, she was nevertheless capable of sustained remunerative activity.

{¶19} 8. Relator's application was heard before a staff hearing officer ("SHO") on June 22, 2005. The SHO relied on the medical report of Dr. Blood, who indicated that relator was permanently and totally disabled. As such, there was no discussion of the nonmedical disability factors. PTD compensation was awarded beginning April 20, 2004, the date of Dr. Blood's report.

{¶20} 9. On December 18, 2006, the BWC Special Investigations Unit ("SIU") received an anonymous allegation indicating that relator was performing domestic work, cleaning residences and businesses, while collecting disability benefits. It appears that the investigation did not begin until July 6, 2009, when Agent Tomlin interviewed Diane Destphen at the Appalachia Realty office. Destphen identified relator and confirmed that she cleaned the Appalachia Realty office during the period of 2004 to July 2005. She

worked on Saturdays, and her duties included running the vacuum, mopping, dusting, and general cleaning. At some time, relator changed her cleaning day from Saturday to Sunday.

{¶21} That same day, Agent Tomlin interviewed Dr. Kent White, who confirmed that relator had been employed by him performing general cleaning duties on a bi-monthly to monthly period for six to eight months from 2007 through 2008.

{¶22} Agent Tomlin also interviewed Nea Henry, the previous owner of Appalachia Realty, who confirmed that relator was hired to perform general cleaning work from March 2004 to December 2005. Henry provided copies of checks from March 22, 2004 to December 13, 2004, indicating that relator was paid approximately $1,584 in 2004.

{¶23} Agent Tomlin also interviewed Harold Howe who indicated that relator had performed occasional cleaning work for him at his residence and that he paid her between $20 to $40 per cleaning visit. Howe indicated further that relator helped clean his basement after he suffered water damage following a storm.

{¶24} Agent Tomlin also interviewed Jeremy Eisnaugle, the new owner of Appalachia Realty, who confirmed that relator had been employed with him from January 1, 2006 to November 1, 2006, and that he was unaware of any physical limitations relator had. Eisnaugle indicated that relator cleaned one evening every other week. Eisnaugle provided five checks indicating that relator was paid $1,635 in 2006.

{¶25} Because relator had been working while receiving TTD compensation, and was working at the time she was examined by the various doctors, the BWC filed a

motion asking the commission to declare an overpayment of all the TTD compensation and PTD compensation that had been paid to relator. Further, the BWC attached copies of warrants endorsed by relator indicating that if she was working, she was not entitled to the benefits and should return the warrants to the BWC immediately or face criminal felony prosecution. The BWC also submitted five TTD contact letters sent to relator in 2005, 2006, 2007, and 2008 which indicate that relator indicated she was not working while receiving TTD benefits.

{¶26} 10. The SIU forwarded its findings to both the employer, Doctors Hospitals, and to the commission. Doctors Hospitals filed a motion requesting the following:

> That the payment of permanent total disability compensation be terminated effective 4-20-04. That all compensation paid of temporary total from 3-22-04 to 4-5-04, of permanent total disability from 4-20-04 to present, and of the lump sum attorney fee paid on 10-10-05 be declared overpaid. That a finding be made that the overpayments are due to fraud.

{¶27} 11. On March 3, 2010, Hearing Officer B. Smith adjudicated the matter acting as both a district hearing officer ("DHO") and a staff hearing officer ("SHO"). Two separate orders were issued from this hearing:

(1) The DHO determined that relator had been overpaid TTD compensation from March 22 through April 5, 2004. However, the DHO determined that Doctors Hospitals did not meet its burden of proving that relator purposely and with intent to conceal her work activity over any of the above period and did not find fraud.

(2) Sitting as an SHO, the commission denied the request to terminate relator's PTD compensation, find an overpayment, and fraud. The SHO determined that there was insufficient evidence that the activities relator performed were of a sufficient nature or done for a sufficient amount of time weekly to repudiate the medical evidence relied on in granting PTD compensation or that the amounts paid to relator constituted remunerative employment. Specifically, the SHO stated:

> The evidence presented in the 12/01/2009 Bureau of Workers' Compensation Special Investigations Department Report of Investigation (SIU) does not specify how many hours the Injured Worker spent the one-time per week she cleaned the Appalachia Realty Office in 2004 and 2005 or the one-time every other week to monthly she cleaned the office in 2006, or how long it took to clean Dr. White's residence the one-time per month for 6 to 8 months in 2007/2008. It could have been a relatively minimal amount of time. Also, minimal specifics of the activities performed have been provided. It must be remembered that the medical reports finding the Injured Worker incapable of working for purposes of permanent total disability are dealing with sustained remunerative employment, not any and all physical activity. Here the specifics provided (see affidavits of Nea Henry, Diane Destphen and Jeremy Eisnaugle) indicate the activities included some mopping, running a vacuum cleaner, light dusting, cleaning doors and general cleaning. There is no evidence showing that such activity would exceed sedentary activity. The fact a person may be capable of sedentary activity for a few hours a week, or possibly less here, after which they would have plenty of time to recover, does not mean they are capable of sustained remunerative employment of the same nature on a full or part-time basis. Here the activities described indicate activities similar to routine household chores. Just as performing such routine chores for a couple of hours at home would not be considered sufficient to show the ability to perform sustained remunerative sedentary employment on a medical basis, such activity here is not found to

> demonstrate such, and done for such a short period one day a week it is not found to repudiate the medical report relied upon by the Staff Hearing Officer finding the Injured Worker incapable of sustained remunerative employment. No party has submitted a medical report from a physician who has reviewed the evidence and indicates otherwise.
>
> There was no case law provided indicating what types or amount of income are needed before an activity is considered remunerative. As prior cases have shown, the mere fact that money was made is alone not sufficient. Here the 12/07/2009 SIU report documents earnings totaling approximately $5,688.00 over a period of approximately 32 months from 04/20/2004 to 11/01/2006 for Appalachia Realty, and approximately $200.00 over the 8 months from Dr. White. (No specifics as to how often, the hours worked, or the amount paid, for the house cleaning performed for Harold and Kay Howe is provided, therefore, it is not found persuasive or reliable.) This comes to a total of approximately $5,888.00 over approximately 40 months. Such a minimal amount of earnings indicates even for less than a part-time job which, at the minimum wage of $5.00 an hour for part-time hours of 20 hours per week, over 40 months, would equal approximately $16,000.00. Considering that the earnings involved are well below part-time earnings and would be below the poverty level for earnings for a single person, and the lack of proof of significant hours worked during the one day per week in 2004 and 2005 and even less days in 2006 and 2007, it is found the Employer has not proven that the Injured Worker's activities amounted to remunerative employment so as to justify invoking the Industrial Commission's continuing jurisdiction, the revocation of the original award of permanent total disability, a finding of fraud, or a finding of an overpayment of said compensation since the award on 04/20/2004.

{¶28} 12. The employer filed a motion for reconsideration from the SHO's order determining that relator was not fraudulently overpaid TTD compensation. The employer argued strenuously that relator was engaged in work activities at the time she requested vocational rehabilitation services, TTD compensation, and PTD compensation. As the

employer stated, relator did not inform any of the doctors who examined her that she was working and her vocational rehabilitation file was closed specifically because "Ms. Snyder stated that she is unable to go any further with services as she does not feel that she can get out of the house on a regular basis due to pain and depression." The employer argues that relator's failure to disclose her work activity during the time that she was applying for TTD and PTD compensation demonstrates fraud.

{¶29} 13. In an interlocutory order mailed May 4, 2010, the commission granted the employer's motion for reconsideration stating:

> It is the finding of the Industrial Commission that the Employer has presented evidence of sufficient probative value to warrant adjudication of the request for reconsideration regarding the alleged presence of a clear mistake of fact in the order from which reconsideration is sought, and fraud.
>
> Specifically, it is alleged that the Injured Worker failed to disclose her participation in a cleaning business to Jeffrey Blood, M.D., whose report was relied on to grant permanent total disability compensation, which renders the medical evidence invalid. It is further alleged that the Injured Worker's participation in the cleaning business after she was declared permanently totally disabled amounts to fraud. Finally, it is alleged that the Injured Worker's participation in a cleaning business exceeds sedentary activity, and contradicts her statements to physicians and rehabilitation personnel that she was not able to "get out of the house on a regular basis due to pain and depression."
>
> Based on these findings, the Industrial Commission directs that the Employer's request for reconsideration, filed 03/22/2010, is to be set for hearing to determine whether the alleged mistake of fact and fraud as noted herein are sufficient for the Industrial Commission to invoke its continuing jurisdiction.

> In the interest of administrative economy and for the convenience of the parties, after the hearing on the question of continuing jurisdiction, the Industrial Commission will take the matter under advisement and proceed to hear the merits of the underlying issue(s). The Industrial Commission will thereafter issue an order on the matter of continuing jurisdiction under R.C. 4123.52. If authority to invoke continuing jurisdiction is found, the Industrial Commission will address the merits of the underlying issue(s).

{¶30} 14. A hearing was held before the full commission on July 15, 2010. The commission determined that the employer met its burden of proving that the March 6, 2010 SHO order contained a clear mistake of fact and that there was evidence of fraud. Specifically, the commission noted that relator failed to disclose her active participation in a cleaning business to Dr. Blood upon whose report the commission relied to find that relator is permanently and totally disabled based solely on the allowed physical conditions. The commission determined that relator's failure to disclose this information to Dr. Blood rendered Dr. Blood's report invalid and, as such, it did not constitute some evidence upon which the commission could rely to grant relator PTD compensation. Specifically, the commission stated:

> The Commission finds that prior to filing the Application for Compensation for Permanent Total Disability (IC-2), the Injured Worker had been referred to BWC Vocational Rehabilitation on 10/28/2004 to determine whether the Injured Worker was a candidate for rehabilitation because at the time of her application the Injured Worker was only 48 years of age and a high school graduate. The Injured Worker had an interview with vocational counselor Roxanne Benoit, and completed an interest test. After assessing the test, Ms. Benoit noted that the results indicated a strong interest in the health care industry and suggested volunteer work as means of getting out of the house. The Injured Worker stated to Ms. Benoit that "she is unable to go any further with services as she does not feel that she can get out of the house on a

regular basis due to pain and depression." The Injured Worker's rehabilitation file was closed immediately as set forth in the rehabilitation closure letter, dated 12/06/2004.

On 12/13/2004, the Injured Worker filed an IC-2 and in support of her application submitted a medical report from Dr. Blood, dated 04/20/2004. He opined, "I believe it would be very difficult for Betty to become gainfully employed as she has tolerance for less than sedentary level of work…I feel that she is permanently and totally disabled."

The Injured Worker indicated on her IC-2 that she last worked in January, 1997, with the Employer of record. The Commission and the Employer scheduled the Injured Worker for examinations on the issue of permanent total disability of her allowed physical and psychiatric conditions. The Commission finds that the Injured Worker told these physicians that she had not been able to work since September, 1996, or January, 1997. These statements are noted in the reports of Gerald S. Steiman, M.D., dated 01/16/2005, Lee Howard, Ph.D., dated 02/08/2005, Michael A. Murphy, Ph.D., dated 02/28/2005, and Terrence B. Welsh, M.D., dated 03/02/2005.

A Staff Hearing Officer order, issued 06/25/2005, granted permanent total disability compensation in claim number 96-427653 starting on 04/20/2004 based on medical factors alone on the report of Dr. Blood, and did not address disability factors. The Staff Hearing Officer noted the Injured Worker had not been employed since January, 1997, and had been unsuccessful in her attempt to find employment through job search. The Staff Hearing Officer further found that based solely upon the allowed physical conditions in the claim the Injured Worker was permanently and totally disabled.

The Injured Worker was further granted an $8000.00 lump sum advance for attorney fees from the self-insuring Employer by Staff Hearing Officer Ex Parte order issued 08/06/2005. The Injured Worker was also found to be eligible for DWRF benefits. Each year for five years BWC sent the Injured Worker a contact letter to verify whether the Injured Worker had obtained employment. The Injured Worker consistently responded "no" on the letters. The Injured

> Worker also received warrants from BWC for DWRF benefits that included language on the back of the warrant stating "do not sign if working, warrant should be returned if working or risk criminal prosecution." All the warrants appear to have been consistently endorsed by the Injured Worker.

After brief reference to the SIU investigation report, the commission made the following findings:

> The Commission finds that the evidence BWC presented establishes that the Injured Worker was working at the time of her vocational rehabilitation referral, the filing of her IC-2, the examinations for permanent total disability, at the time of the Staff Hearing Officer hearing which granted permanent total disability compensation, and while she was receiving compensation and benefits.
>
> The Commission finds that the Injured Worker is not entitled to the compensation and benefits because she was engaged in activities inconsistent with a finding of permanent total disability.

At the hearing, relator's counsel argued that the activities she was performing were not inconsistent with her restrictions and that the amount of money she earned did not demonstrate that she was capable of performing sustained remunerative employment. In response, the commission stated:

> At hearing, Counsel for the Injured Worker argued that the activities that the Injured Worker performed were activities of daily living such as sweeping, running a vacuum, and cleaning rooms. This activity did not amount to activity inconsistent with a finding of permanent total disability. Counsel also argued that the amount of money that the Injured Worker earned over a 40 month period was such a minimal amount as not to be sustained remunerative employment.
>
> Based on the foregoing, the Commission rejects these arguments. Operating a cleaning business and performing commercial or residential cleaning activities for pay, even

> part–time, clearly demonstrates the Injured Worker's ability to perform sustained remunerative employment and precludes a finding of permanent total disability.

Thereafter, the commission addressed the issue of fraud stating:

> The Commission finds that the Employer has presented reliable, probative and substantial evidence, demonstrating that the Injured Worker knowingly used deception to secure payment of permanent total disability compensation, specifically the Bureau of Workers' Compensation (BWC) Special Investigations Prima Facie Elements of Fraud dated 12/07/2009 and Report of Investigation dated 12/01/2009. The prima facie elements of fraud are:
>
> 1. A representation, or where there is a duty to disclose, concealment of fact;
> 2. Which is material to the transaction at hand;
> 3. Made falsely, with the knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred;
> 4. With the intent of misleading another into relying upon it;
> 5. Justifiable reliance upon the representation or concealment; and
> 6. A resulting injury proximately caused by the reliance.
>
> * * *
>
> * * * The Injured Worker had a duty to disclose to the BWC, the Commission and the self-insuring Employer that she was employed. Instead, the Injured Worker concealed employment. The Injured Worker was present at the Staff Hearing Officer hearing on 06/05/2005 and did not state to parties present that she was working. The Injured Worker did not notify her own treating physician and other examining physicians that she was engaged in a cleaning business. The concealment of this information was material to the issue of permanent total disability. If the Injured Worker had disclosed she was working, the Commission would not have found her permanently and totally disabled. The Injured Worker falsely informed providers that the last time she was

> employed was in either September, 1996, or January, 1997, when she in fact was working at the time she was examined for permanent total disability. Her application for permanent total disability stated the last date of employment of January, 1997. The Injured Worker concealed her activity with the intent to mislead BWC, the Commission, and the self-insuring Employer. The Commission relied upon evidence that included false statements and concealed work activities to find the Injured Worker permanently and totally disabled due to the allowed conditions in the claim.

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

Conclusions of Law:

{¶32} Relator argues the commission abused its discretion (1) when it exercised its continuing jurisdiction and reconsidered its previous final order simply because of an evidentiary disagreement; (2) inappropriately applied the standard for terminating TTD compensation when terminating relator's PTD compensation; and (3) making a finding of fraud in the absence of some evidence.

{¶33} It is this magistrate's decision that the commission (1) properly exercised its continuing jurisdiction because there was a clear mistake of fact since relator did not disclose her activities at the time of the vocational rehabilitation exam and when she was examined by Dr. Blood; (2) applied the proper standards in terminating relator's PTD compensation; and (3) properly made a finding of fraud.

{¶34} In order for this court to issue a writ of mandamus as a remedy from a determination of the commission, relator must show a clear legal right to the relief sought and that the commission has a clear legal duty to provide such relief. *State ex rel. Pressley v. Indus. Comm.* (1967), 11 Ohio St.2d 141. A clear legal right to a writ of mandamus exists where the relator shows that the commission abused its discretion by

entering an order which is not supported by any evidence in the record. *State ex rel. Elliott v. Indus. Comm.* (1986), 26 Ohio St.3d 76. On the other hand, where the record contains some evidence to support the commission's findings, there has been no abuse of discretion and mandamus is not appropriate. *State ex rel. Lewis v. Diamond Foundry Co.* (1987), 29 Ohio St.3d 56. Furthermore, questions of credibility and the weight to be given evidence are clearly within the discretion of the commission as fact finder. *State ex rel. Teece v. Indus. Comm.* (1981), 68 Ohio St.2d 165.

{¶35} Pursuant to R.C. 4123.52, "[t]he jurisdiction of the industrial commission and the authority of the administrator of workers' compensation over each case is continuing, and the commission may make such modification or change with respect to former findings or orders with respect thereto, as, in its opinion is justified." In *State ex rel. B & C Machine Co. v. Indus. Comm.*, 65 Ohio St.3d 538, 541-42, 1992-Ohio-75, the court examined the judicially-carved circumstances under which continuing jurisdiction may be exercised, and stated as follows:

> R.C. 4123.52 contains a broad grant of authority. However, we are aware that the commission's continuing jurisdiction is not unlimited. See, *e.g., State ex rel. Gatlin v. Yellow Freight System, Inc.* (1985), 18 Ohio St.3d 246, 18 OBR 302, 480 N.E.2d 487 (commission has inherent power to reconsider its order for a reasonable period of time absent statutory or administrative restrictions); *State ex rel. Cuyahoga Hts. Bd. of Edn. v. Johnston* (1979), 58 Ohio St.2d 132, 12 O.O.3d 128, 388 N.E.2d 1383 (just cause for modification of a prior order includes new and changed conditions); *State ex rel. Weimer v. Indus. Comm.* (1980), 62 Ohio St.2d 159, 16 O.O.3d 174, 404 N.E.2d 149 (continuing jurisdiction exists when prior order is clearly a mistake of fact); *State ex rel. Kilgore v. Indus. Comm.* (1930), 123 Ohio St. 164, 9 Ohio Law Abs. 62, 174 N.E. 345 (commission has continuing jurisdiction in cases involving fraud); *State ex rel. Manns v. Indus. Comm.* (1988),

> 39 Ohio St.3d 188, 529 N.E.2d 1379 (an error by an inferior tribunal is a sufficient reason to invoke continuing jurisdiction); and *State ex rel. Saunders v. Metal Container Corp.* (1990), 52 Ohio St.3d 85, 86, 556 N.E.2d 168, 170 (mistake must be "sufficient to invoke the continuing jurisdiction provisions of R.C. 4123.52"). Today, we expand the list set forth above and hold that the Industrial Commission has the authority pursuant to R.C. 4123.52 to modify a prior order that is clearly a mistake of law. * * *

{¶36} In the order following the June 25, 2005 hearing, an SHO granted relator's application for PTD compensation based solely on the allowed physical conditions. In the present case, relator had allowed physical and psychological conditions. The SHO relied on the reports of Drs. Howard and Murphy, who opined that relator's allowed psychological condition was not work prohibitive. Thereafter, the SHO found that relator was permanently and totally disabled based solely on the allowed physical conditions. In reaching this decision, the commission relied exclusively on the April 20, 2004 report of Dr. Blood. While Dr. Blood's conclusion is referenced in the findings of fact, his report goes into significantly more detail. Specifically, Dr. Blood noted the following:

> * * * Betty is not doing well and is developing more and more problems now with symptoms into the right side. * * *
>
> Currently, Betty indicates that she has pain extending into both legs, mainly a burning sensation. Her legs have been giving away and she has fallen on occasion, she noted in a note she gave me that she fell twice in one day. She has been using a cane and that seems to help some, and her husband installed a shower rail for greater stability. Betty has constant lower back pain. She feels worse sitting more than 15 minutes, laying more than 30 minutes, or walking more than 10 minutes. Standing, in particular, seems to make her feel worse quickly. She has noticed she feels better taking her analgesic medication. She has numbness in the left lateral and posterior thigh, calf, and down to the lateral aspect of the left foot. She has no incontinence of bowel or

> bladder, but she has had problems with constipation because of her analgesic medicine.
>
> * * *
>
> On physical exam, Betty appears in moderate distress. She has decreased sensation in a left S1 distribution. She has absent left ankle reflex with slightly decreased reflexes elsewhere in the lower limbs. There appears to be some mild weakness with toe walking or the left side, no weakness was noted on the right. Straight leg raising is positive when seated on the left at 50° and on the right at 80°. She is quite tender diffusely in the lumbosacral region. She demonstrated about 10° of extension and 20° of forward flexion of her lower back.

Thereafter, Dr. Blood concluded:

> I completed the medical report form regarding her physical capacity evaluation. I believe it would be very difficult for Betty to become gainfully employed as she has tolerances for less than sedentary level of work. Specifically, she cannot tolerate lifting more than 10 pounds, she does not tolerate sitting more than 20 minutes or standing more than 10 minutes, and she needs to change position frequently. I feel that she is permanently and totally disabled. I do not see her ever returning to gainful employment. * * *

{¶37} According to the SIU report, relator was performing cleaning services in March 2004. Dr. Blood saw relator in April 2004. In spite of the fact that she was performing housecleaning services including vacuuming, mopping, dusting, and general cleaning of the Appalachia Realty office as well as Harold Howe, relator did not disclose this activity to Dr. Blood. Instead she informed him that she was having very significant problems just standing. Although relator argues now that those activities are actually sedentary and must be performed in her own home, the magistrate finds that relator misunderstands the commission's decision.

{¶38} Relator's rehabilitation file was closed in December 2004 for one reason: "Ms. Snyder stated that she is unable to go any further with services as she does not feel that she can get out of the house on a regular basis due to pain and depression." However, relator was working at that time. Based upon the evidence gathered and contained in the SIU report, relator was getting out of the house on a regular basis and neither her pain nor her depression was preventing her from performing the housecleaning services for various clients. Further, relator told Dr. Blood that her legs have been giving away causing her to fall, she has been using a cane, and her pain is increased when standing or walking for more than ten minutes. However, relator was working at the time of that report, driving her own vehicle to various locations and performing the aforementioned housecleaning services. Because relator was engaged in activities which she claimed she was incapable of performing at the time her vocational rehabilitation file was closed, and at the time Dr. Blood examined her, the commission properly found that Dr. Blood's report no longer constituted some evidence upon which the commission could properly rely to award relator PTD compensation. When the SHO at the March 3, 2010 hearing found that the employer did not meet its burden, the SHO did not discuss the two key pieces of evidence supporting the granting of PTD compensation: the reports of Dr. Blood and the vocational expert. Without those reports, PTD compensation could only have been granted after consideration of the nonmedical disability factors. Further, the magistrate finds that the commission's reasoning for exercising its continuing jurisdiction was sufficient. The commission specifically pointed out that Dr. Blood's report and the report of the vocational expert

were key to the decision. As neither report upon which the SHO relied at the March 3, 2010 hearing, the commission exercised its continuing jurisdiction and granted the employer's motion for reconsideration. This was not a disagreement as to the interpretation of the evidence; instead, the very facts upon which relator was initially granted PTD compensation were false. As such, it is this magistrate's decision that the commission properly exercised its continuing jurisdiction when it heard the employer's motion to terminate relator's compensation, finding an overpayment, and to consider fraud.

{¶39} Relator also contends that the commission inappropriately applied the standard for terminating TTD compensation and failed to apply the correct standard for terminating PTD compensation. Relator contends that the fact that relator was engaged in some degree of work for remuneration does not automatically satisfy the standard for terminating PTD compensation.

{¶40} In *State ex rel. Lawson v. Mondie Forge,* 104 Ohio St.3d 39, 2004-Ohio-6086, ¶16*,* the Ohio Supreme Court stated:

> PTD pivots on a single question: Is the claimant *capable* of sustained remunerative employment? *State ex rel. Stephenson v. Indus. Comm.* (1987), 31 Ohio St.3d 167, 31 OBR 369, 509 N.E.2d 946. Payment of PTD is inappropriate where there is evidence of (1) actual sustained remunerative employment, *State ex rel. Kirby v. Indus. Comm.,* 97 Ohio St.3d 427, 2002-Ohio-6668, 780 N.E.2d 275; (2) the physical ability to do sustained remunerative employment, *State ex rel. Schultz v. Indus. Comm.,* 96 Ohio St.3d 27, 2002-Ohio-3316, 770 N.E.2d 576; or (3) activities so medically inconsistent with the disability evidence that they impeach the medical evidence underlying the award. See *State ex rel. Timmerman Truss, Inc. v. Indus. Comm.,* 102 Ohio St.3d 244, 2004-Ohio-2589, 809 N.E.2d 15, ¶26.

(Emphasis sic.)

{¶41} If there is some evidence contained in the record which satisfies any one of the above three situations, then the payment of PTD compensation is inappropriate. In the present case, it is quite clear that the commission found that relator was engaged in activities so medically inconsistent with the disability evidence that they impeached the medical evidence underlying the award. Specifically, as the commission stated, relator was performing these housekeeping duties at the time she was receiving TTD compensation and at the time she applied for PTD compensation. Relator did not disclose any of this evidence to any of the doctors or to the vocational rehabilitation specialist. In awarding her PTD compensation, the commission specifically relied on the medical report of Dr. Blood who opined that relator was capable of performing less than sedentary work based, in part, on her self-report of her physical limitations.

{¶42} In *State ex rel. Schultz v. Indus. Comm.,* 96 Ohio St.3d 27, 2002-Ohio-3316, the Supreme Court of Ohio held that evidence of irregular employment can support the presumption that a claimant is capable of performing sustained remunerative employment. The court also stated that engaging in an ongoing pattern can constitute sustained activity and further that one need not be paid for such activity.

{¶43} In *Mondie Forge,* Donald E. Lawson had performed heavy labor throughout his working career. At the same time, Lawson had been a city council member for the village of West Elkton, Ohio. Lawson was awarded PTD compensation in 1994 after the commission determined that the low-stress sedentary jobs to which Lawson was limited were foreclosed to him because of his lack of skills and education.

{¶44} In 2001, the BWC reopened Lawson's case and presented documentation of 207 activities Lawson engaged in between 1993 and 2001, primarily for the benefit of the village. The predominate activity listed was refuse disposal, for which Lawson drove the truck (sedentary work within his physical restrictions). Lawson also put up flags, plowed snow, purchased hardware and gas, and hauled gravel. Based on the information presented, the commission terminated Lawson's PTD compensation, found an overpayment, and made a finding of fraud.

{¶45} Ultimately, the Ohio Supreme Court granted a writ of mandamus and ordered the commission to reinstate PTD compensation. In so finding, the court found that of the 207 confirmed activities, none of them contain sufficient information to conclusively establish that any of them conflicted with Lawson's restrictions. Further, the court noted that Lawson's activities were minimal (between June 30, 1997 and March 30, 1998, Lawson made five trips to the landfill; the same was true for May 31, 1996 and November 30, 1996 and July 31, 2000 to March 1, 2000). Lawson plowed snow three times between 1994 and 2001; Lawson purchased gas and hauled gravel 12 times in that time period.

{¶46} In finding that the commission abused its discretion in terminating Lawson's PTD compensation, the court stated:

> 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 chauffer 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 law 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.

Id. at ¶20-21.

{¶47} While the factual situation and holding from *Lawson* are instructive, the magistrate finds that this case is distinguishable. Specifically, Lawson was found to be permanently and totally disabled based on his limitations and after consideration of the nonmedical disability factors. Here, relator was found to be permanently and totally disabled based solely on the allowed physical conditions. Further, the activities which Lawson was performing were within his physical restrictions. Here, the activities relator was performing were outside her physical restrictions and do not correspond with the information she provided to any of the physicians who examined her. Specifically, relator informed Dr. Miller, who examined her on October 5, 2004 and considered her allowed psychiatric condition, that her daily activity includes:

> * * * She tends to stay in bed through the morning and then gets up for lunch. Ms Snyder reported that she piddles about the house and occasionally goes shopping. She does see

> her mother. The claimant watches some television, but says that she is pretty inactive otherwise. * * *

Likewise, relator described her normal daily routine to Dr. Howard, who also examined her for her allowed psychological conditions on February 8, 2005, and described her daily routine as follows:

> A normal daily routine is described as:
>
> Morning: "(I get up) about noon."
>
> Afternoon: "Watch t.v."
>
> Evening: "Watch t.v."
>
> Hobbies/Special Interests: None.
>
> Socialization Patterns. Once per week with one of her children and once per week to once per month with her mother.
>
> Church, Clubs or Organizations: None.
>
> Exercise: None.
>
> Housework: Once per week.
>
> Meals/Cooking: Once per day.
>
> Driving: One to two times per week.
>
> Bathes/Changes Clothes: Daily or every other day.

Relator informed Dr. Murphy, who examined her on February 28, 2005, for her allowed psychological condition that her daily activities include:

> * * * The Injured Worker's daily activities include driving, watching television, shopping (a few times a month), dining out (seldom), and attending medical appointments. She states, "My daughter does things. She cooks and gives us frozen meals." She is able to care for her basic needs and

> drive independently. Her husband handles her personal finances. She does not take vacations. She follows medication prescriptions and is aware of safety precautions. She is able to leave her home.

Further, in his March 2, 2005 report, Dr. Welsh noted that relator told him the following regarding her physical abilities:

> She rates her pain as 9-10/10. She says it is constant. She reports decreased pain with medication, rest, heating pad, and a TENS unit. She reports increased pain with any movements, or with long-standing, sitting, or bending. She reports that she is able to sleep three hours. She reports a standing tolerance of a few minutes, and then she experiences pins and needles in her back and legs. She reports a sitting tolerance of about 10 minutes.

{¶48} At the time that relator was examined by all of the above physicians she was engaged in activities which were outside of her self-professed limitations. Considering the additional medical evidence the commission had before it concerning relator's impairment occasioned by her allowed physical conditions, it appears that the commission should have accepted one of the other reports finding that she could perform at some level and then considered the nonmedical disability factors. Although much of this case is similar to the situation involving Lawson, the magistrate finds that relator's continued mischaracterization of her abilities to every physician who examined her truly invalidates the medical evidence upon which the commission relied. As such, the magistrate finds that the commission did not apply the standard for terminating TTD compensation where even part-time work was remuneration precludes a claimant from receiving PTD compensation. See *State ex rel. Blabac v. Indus. Comm.,* 87 Ohio St.3d 113, 1999-Ohio-249. Instead, the commission found that relator was performing

activities which were outside of her medical restrictions thus satisfying one of the three prongs the Ohio Supreme Court identified in *Lawson.*

{¶49} Relator's final argument concerns the commission's determination that she committed fraud. Relator argues that the commission's analysis was inadequate and that the finding of fraud was not based on some evidence. The magistrate disagrees.

{¶50} The elements of fraud are: (1) a representation or, where there is a duty to disclose, concealment of a fact; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of falsity or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred; (4) with the intent of misleading another into relying upon it; (5) justifiable reliance upon the representation or concealment; and (6) a resulting injury proximately caused by the reliance. *Gaines v. Pearson* (1987), 33 Ohio St.3d 64.

{¶51} In finding fraud, the commission explained as follows:

> * * * The Injured Worker had a duty to disclose to the BWC, the Commission and the self-insuring Employer that she was employed. Instead, the Injured Worker concealed employment. The Injured Worker was present at the Staff Hearing Officer hearing on 06/05/2005 and did not state to parties present that she was working. The Injured Worker did not notify her own treating physician and other examining physicians that she was engaged in a cleaning business. The concealment of this information was material to the issue of permanent total disability. If the Injured Worker had disclosed she was working, the Commission would not have found her permanently and totally disabled. The Injured Worker falsely informed providers that the last time she was employed was in either September, 1996, or January, 1997, when she in fact was working at the time she was examined for permanent total disability. Her application for permanent total disability stated the last date of employment of January, 1997. The Injured Worker concealed her activity with the

> intent to mislead BWC, the Commission, and the self-insuring Employer. The Commission relied upon evidence that included false statements and concealed work activities to find the Injured Worker permanently and totally disabled due to the allowed conditions in the claim.

{¶52} Was there some evidence of a representation or, where there was a duty to disclose, did relator conceal a fact? The answer is yes. Relator was capable of performing activities above the level she informed the physicians. Further, relator was not honest with the vocational rehabilitation division when she informed them she did not feel she could get out of the house on a regular basis due to her pain and depression. At the time she made these representations, she further concealed the fact that she was working. Also, she was performing acts which, according to her self-report to Dr. Blood, she was not capable of performing. As such, the commission properly found that the first element was found.

{¶53} Was there some evidence that the representation or concealment material to a transaction at hand? The answer is yes. The doctors and the vocational specialist relied on her statements as to her abilities and, when asked when she last worked, concealing the fact that she was. The commission relied on medical evidence based upon relator's false statements and found that based solely on the allowed physical conditions, relator was not capable of working. In fact, Dr. Blood indicated that she could perform less than the full range of sedentary work. Knowing relator's true abilities was clearly material.

{¶54} Was there some evidence that the representation or concealment was made falsely, either with knowledge of its falsity or with such utter disregard and

recklessness as to whether it is true or false that knowledge may be inferred? The answer is yes. First, relator indicated on her application for PTD compensation that she left work in January 1997. Further, as previously indicated, relator was not honest with the physicians who examined her concerning her actual abilities. Also, relator signed numerous warrants and annual PTD letters and indicated that she had not been working. However, all the while, relator had been engaged in cleaning services on a regular basis. It is difficult to imagine that relator did not know that the statements she wrote on her PTD application, made to the various physicians, and made to the vocational examiner, were not false.

{¶55} Was there some evidence that relator's representation or concealment was done with the intent of misleading the commission into relying upon it? The answer is yes. Relator was attempting to secure PTD benefits. As such, she needed to demonstrate that she was not capable of performing sustained remunerative employment. The statements that she made to the doctors, put on her application, and made to the vocational rehabilitation specialist demonstrate the intent to mislead.

{¶56} Was there some evidence that the commission justifiably relied on the representations and concealments? The answer is yes. Relator was awarded TTD compensation, an award of attorney fees, PTD compensation, and other compensation.

{¶57} Was there evidence of a resulting injury proximately caused the commission's reliance? The answer is yes. The self-insured employer made the payments of compensation as ordered by the commission. The magistrate finds that the

commission did not abuse its discretion in finding that there was some evidence to support the finding of fraud.

{¶58} As such, relator's request for a writ of mandamus is denied.

/s/ Stephanie Bisca Brooks
STEPHANIE BISCA BROOKS
MAGISTRATE

NOTICE TO THE PARTIES

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