[Cite as *State ex rel Old Dominion Freight Line, Inc. v. Indus. Comm.* , 2012-Ohio-2403.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Old Dominion Freight Line, Inc.,	:	
Relator,	:	No. 11AP-350
v.	:	(REGULAR CALENDAR)
Industrial Commission of Ohio and Robert L. Mason,	:	
Respondents.	:	

D E C I S I O N

Rendered on May 31, 2012

Eastman & Smith Ltd., *Mark A. Shaw*, and *Garrett M. Cravener*, for relator.

Michael DeWine, Attorney General, and *Eric Tarbox*, for respondent Industrial Commission of Ohio.

Connor, Evans & Hafenstein, LLP, *Nicole E. Rager*, and *Katie W. Kimmet*, for respondent Robert L. Mason.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

BROWN, P.J.

{¶ 1} Relator, Old Dominion Freight Line, Inc. ("Old Dominion"), 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 that awarded permanent total disability ("PTD") compensation to respondent, Robert L. Mason ("claimant"), and to enter an order denying said compensation.

{¶ 2} This matter was referred to a court-appointed magistrate pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate issued the appended decision, including findings of fact and conclusions of law, and recommended that this court grant Old Dominion's request for a writ of mandamus. The commission and claimant have filed objections to the magistrate's decision.

{¶ 3} We will address the commission's first and second objections and claimant's first objection together, as they are related. The commission argues in its first objection that its failure to send copies of medical reports submitted by Old Dominion to Drs. John Malinky and William Fitz until after their medical examinations did not prejudice Old Dominion. The commission argues in its second objection that the Ohio Administrative Rules allow it to cure oversights by submitting reports after an examination and requesting an addendum report. Claimant argues in his first objection that the magistrate erred when he concluded that the commission failed to follow its own rule when it did not submit Old Dominion's reports to its examining physicians prior to their independent medical examinations.

{¶ 4} Ohio Adm.Code 4121-3-34(C)(4)(b) provides:

> The employer shall be provided fourteen days after the date of the industrial commission acknowledgment letter provided for in paragraph (C)(2) of this rule to notify the commission if the employer intends to submit medical evidence relating to the issue of permanent total disability compensation to the commission. Should the employer make such written notification the employer shall submit such medical evidence to the commission within sixty days after the date of the commission acknowledgment letter unless relief is provided to the employer under paragraph (C)(4)(d) of this rule. Should the employer fail to make such written notification within fourteen days after the date of the commission acknowledgment letter, the employer shall be provided sixty days after the date of the commission acknowledgement letter to submit medical evidence relating to the issue of permanent total disability compensation to the commission, but the scheduling of the injured worker for appropriate medical examinations by physicians selected by the commission under paragraph (C)(5)(a)(iii) of this rule will proceed without delay.

{¶ 5} In a related manner, Ohio Adm.Code 4121-3-34(C)(5) provides, in pertinent part:

> (a) Following the date of filing of the permanent and total disability application, the claims examiner shall perform the following activities:
>
> * * *
>
> (iii) Schedule appropriate medical examination(s) by physician(s) to be selected by the commission provided that the scheduling of said exams shall not be delayed where the employer fails to notify the commission within fourteen days after the date of the commission acknowledgment letter that it intends to submit medical evidence to the commission relating to the issue of permanent total disability compensation.

{¶ 6} In his first objection, claimant argues that there is no mention in Ohio Adm.Code 4121-3-34(C)(4) that the submission of the medical reports must be prior to the date of the examinations. Claimant contends the magistrate impermissibly added language to this rule when he found it was implicit in the rule that the medical examinations must be delayed where the employer provides notice within the 14-day period provided in that provision.

{¶ 7} In support of its objections, the commission points to the portion of Ohio Adm.Code 4123-3-34(C)(4)(b) that indicates that, when an employer fails to provide written notification of an intent to provide medical records, the employer must be provided 60 days to submit medical evidence, but the scheduling of the injured worker for appropriate medical examinations by physicians selected by the commission will proceed without delay. The commission's contention is that, because this section of Ohio Adm.Code 4123-3-34(C)(4)(b) permits a doctor to review medical evidence after the doctor performs the examination, the commission should also be permitted to forward medical evidence to the doctor after the examination under circumstances such as those here, where the commission mistakenly failed to forward the medical evidence prior to the examination.

{¶ 8} Old Dominion counters that it is only in the situation where the employer fails to timely notify the commission of its intent to submit medical evidence that the rule

permits the commission's medical examinations proceed "without delay." To the contrary, here, Old Dominion points out, it complied with Ohio Adm.Code 4123-3-34(C)(4)(b), so the exception that allows the medical examinations to proceed without delay is not applicable.

{¶ 9} Although we agree with Old Dominion that the above-quoted provision in Ohio Adm.Code 4123-3-34(C)(4)(b) specifically applies only when the employer fails to timely notify the commission of its intent to submit medical evidence, we believe it also demonstrates, as a general proposition, that it is not prejudicial for a doctor to be asked to consider additional medical records after the doctor has performed the examination. If the commission's rules specifically permit a doctor to consider additional evidence after the examination when the employer fails to file a timely notice of intent to submit medical records, we see no reason why a doctor should not be permitted to consider supplemental evidence after the examination when the commission, in good faith, fails to timely submit all medical evidence to the doctor prior to the examination. If the rules allow the former without any prejudicial effect, then the rules should also permit the latter without any prejudicial effect.

{¶ 10} Although it would be more efficient for the commission to submit all medical evidence to the medical examiner at the same time prior to the examination, we can find no specific rule prohibiting the commission from submitting supplemental evidence when its failure to do so was due to an honest error on its behalf. In this respect, we note that we are not concluding herein that the commission should make it a practice to submit evidence piecemeal to the medical examiners when the employer has timely filed its notice to submit medical evidence. We agree with the claimant insofar as he contends it is the better practice for the commission to submit all available evidence to the medical examiners prior to the examinations; however, there is simply nothing in Ohio Adm.Code 4123-3-34(C)(4)(b) that requires such. Furthermore, we note that it is common for physicians to issue addendum reports upon receiving additional medical records after their initial examination. *See, e.g., State ex rel. Ellinwood v. Honda of Am. Mfg., Inc.*, 10th Dist. No 11AP-169, 2012-Ohio-1372, ¶ 28; *State ex rel. Cowley v. Indus. Comm.*, 10th Dist. No. 11AP-4, 2011-Ohio-6663, ¶ 32; *State ex rel. Kish v. Kroger Co.*, 10th Dist. No. 10AP-882, 2011-Ohio-5766, ¶ 22, 28 (multiple addenda). Therefore, we

sustain the commission's first objection, the commission's second objection, and claimant's first objection.

{¶ 11} Having found that it was not prejudicial for the commission to submit the supplemental evidence to its medical doctors until after their initial examinations, we must address claimant's second objection. Claimant argues in his second objection that the magistrate erred when he concluded that the total failure of the commission to submit Dr. Richard Clary's report to Dr. Fitz was prejudicial. Claimant asserts the file review conducted by Dr. Clary, a psychiatrist, was immaterial to and could not have any bearing on Dr. Fitz's independent medical examination, which addressed claimant's physical capabilities and did not address claimant's psychological conditions.

{¶ 12} Ohio Adm.Code 4123-3-34(C)(5) provides, in pertinent part:

> (a) Following the date of filing of the permanent and total disability application, the claims examiner shall perform the following activities:
>
> * * *
>
> (ii) Copy all relevant documents as deemed pertinent by the commission including evidence provided under paragraphs (C)(1) and (C)(4) of this rule and submit the same to an examining physician to be selected by the claims examiner.

{¶ 13} Accordingly, pursuant to Ohio Adm.Code 4123-3-34(C)(5)(a)(ii), it is undisputed that the commission should have submitted Dr. Clary's report to Dr. Fitz, and it was error not to do so. The question we must then address is whether the commission's error prejudiced claimant. It is axiomatic that the complaining party must demonstrate that it has been prejudiced by the judgment of the lower tribunal. *State ex rel. Whirlpool Corp. v. Indus. Comm.*, 10th Dist. No. 09AP-380, 2010-Ohio-255, ¶ 10, citing *Haendiges v. Haendiges*, 82 Ohio App.3d 720, 723 (3d Dist.1992).

{¶ 14} Here, we find no prejudice. We agree with claimant that any error was harmless because there is no indication in the record that Dr. Clary's psychological report would have had any effect on Dr. Fitz's medical examination. Dr. Fitz examined claimant with regard to his ability to sustain remunerative employment based upon his allowed physical conditions. There is no indication in the record that Dr. Fitz would have been

competent to render any opinion related to claimant's psychological conditions, and Dr. Clary's report makes no mention of any physical findings that might have impacted Dr. Fitz's report. Thus, we find any error, in this respect, was harmless, and the magistrate erred when he found it prejudicial. Therefore, claimant's second objection is sustained.

{¶ 15} Having found the commission committed prejudicial error, the magistrate did not reach Old Dominion's argument that the commission improperly relied upon the medical reports of Drs. Charles May, Richard Ward, and Lee Howard in evaluating the credibility of Drs. Fitz and Malinky. To afford Old Dominion with the full review available in mandamus, we remand the matter to the magistrate to determine the outstanding arguments that remain.

{¶ 16} After an examination of the magistrate's decision, an independent review of the evidence, pursuant to Civ.R. 53, and due consideration of claimant's and the commission's objections, we sustain the commission's first and second objections and claimant's first and second objections. The matter is remanded to the magistrate for proceedings consistent with the above decision.

Objections sustained and cause remanded.

SADLER and FRENCH, JJ., concur.

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APPENDIX

N THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Old Dominion Freight Line, Inc.,	:	
Relator,	:	No. 11AP-350
v.	:	(REGULAR CALENDAR)
Industrial Commission of Ohio and Robert L. Mason,	:	
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

Eastman & Smith Ltd., *Mark A. Shaw*, and *Garrett M. Cravener*, for relator.

Michael DeWine, Attorney General, and *Eric Tarbox*, for respondent Industrial Commission of Ohio.

Connor, Evans & Hafenstein, LLP, *Nicole E. Rager*, and *Katie W. Kimmet*, for respondent Robert L. Mason.

IN MANDAMUS

{¶ 17} In this original action, relator, Old Dominion Freight Line, Inc., requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order awarding permanent total disability ("PTD") compensation to respondent Robert L. Mason ("claimant"), and to enter an order denying the compensation.

Findings of Fact:

{¶ 18} 1. On January 18, 2005, claimant sustained an industrial injury while employed as a truck driver for relator, a self-insured employer, under Ohio's workers' compensation laws. The industrial claim (No. 05-806440) is allowed for:

> Hip fracture; left trochanteric femur fracture; left femoral neck fracture; depressive disorder; left short leg syndrome; lumbar strain; post-traumatic stress disorder.

{¶ 19} 2. On September 25, 2007, treating physician Charles B. May, D.O., wrote to claimant's counsel:

> [I]t is my medical opinion that Mr. Mason will not be able to return to his previous employment as a truck driver on a permanent basis as a direct and proximate result of the allowed physical conditions in this claim. Furthermore, it is my medical opinion that Mr. Robert Mason is, in fact, permanently and totally disabled from any form of substantial gainful employment as a direct and proximate result of the allowed physical conditions in this claim. I have completed the physical capacity form that you have enclosed as well as the physician statement of permanent and total disability as you have requested.

{¶ 20} 3. On another document captioned "Statement of Physician Permanent Total Disability" dated September 26, 2007, Dr. May indicated that relator cannot return to his former position of employment and that he is "permanently and totally disabled."

{¶ 21} 4. On January 28, 2008, at claimant's request, claimant was examined by orthopedic surgeon Richard M. Ward, M.D. In a two-page narrative report, Dr. Ward opined:

> [I]t is my opinion that as a direct result of the physical allowances from the injury that occurred on 1/18/05, he is not capable of returning to substantial gainful employment and should for this reason be granted permanent total disability.

{¶ 22} 5. On April 1, 2008, at claimant's request, he was examined by psychologist Lee Howard, Ph.D. In his 17-page narrative report, Dr. Howard opines that claimant is "an appropriate candidate for permanent total disability."

{¶ 23} 6. On July 7, 2009, Dr. Howard completed a form captioned "Statement of Physician." On the form, Dr. Howard indicates by his mark that the claimant cannot return to his former position of employment and he is permanently and totally disabled.

{¶ 24} 7. On July 22, 2009, claimant filed an application for PTD compensation. In support, claimant submitted the reports of Dr. May, the reports of Dr. Howard, and the report of Dr. Ward.

{¶ 25} 8. On July 24, 2009, the commission mailed a "Permanent Total Application Acknowledgment Letter" that notified the parties of the July 22, 2009 filing of the PTD application. The acknowledgment letter further stated:

> Employers may submit additional medical evidence relating to this issue, including reports from Employer requested examinations. Medical evidence must be submitted by 09/22/2009. Employers must notify the Industrial Commission in writing of their intent to submit medical evidence by 08/07/2009, if the evidence is to be considered by the Industrial Commission specialist(s).

{¶ 26} 9. By letter dated July 28, 2009, relator timely notified the commission of its intent to submit medical evidence.

{¶ 27} 10. On August 31, 2009, at relator's request, claimant was examined by Oscar F. Sterle, M.D. In his ten-page narrative report dated September 8, 2009, Dr. Sterle opined:

> As related to the physical allowed conditions in the claim, the only residual impairment under this claim is a short-leg syndrome, which has been addressed with a lift. I find no other physical condition that would preclude Mr. Mason from sustaining remunerative employment.
>
> The remaining allowed conditions in the claim have resolved and are considered to be at maximum medical improvement.

{¶ 28} 11. At relator's request, psychiatrist Richard H. Clary, M.D., conducted a file review. In his two-page narrative report dated September 3, 2009, Dr. Clary states:

> Review of medical records indicate that the first physician of record released Mr. Mason to return to work on light duty in January of 2006. He later changed his opinion and said that Mr. Mason could return to sedentary work in March of 2006.

> Accepting the objective medical findings in the file, it is my opinion that Mr. Mason is able to perform sedentary work which is appropriate with his allowed physical conditions. In my medical opinion, the allowed psychiatric conditions would not prevent him from working a sedentary job. In my medical opinion, the psychiatric conditions do not cause permanent total disability.

{¶ 29} 12. On September 8, 2009, at relator's request, claimant was examined by psychologist Michael A. Murphy, Ph.D. In his ten-page narrative report, Dr. Murphy opines:

> **Opinion:** The following opinion is based on a reasonable degree of psychological certainty.
>
> **Question 1: Based solely on the allowed psychological conditions of "Depressive Disorder" and "Post-Traumatic Stress Disorder," what restrictions, if any, would you place on Mr. Mason's work activities?**
> In my opinion, this Injured Worker's depression is mild. He has never attempted a psychotropic.
>
> His condition of Post-Traumatic Stress Disorder is of mild severity as well. He denies symptoms of startle responses, psychic numbing, and he does continue to drive. His primary complaints with respect to post-traumatic stress are that of nightmares and flashbacks.
>
> This Injured Worker drives, travels, handles his finances, uses a scooter when shopping, does laundry, cooks one meal a day, and performs light housework.
>
> His appetite is normal, libido is normal, and his energy level is normal (see MCMI-III).
>
> The Injured Worker's cognitive functions are fully intact with no short or long-term impairment.
>
> Recall that his functioning is also reduced by unrelated factors (i.e., obesity, cardiac, sleep apnea, and other factors).
> In my opinion, his DSM-IV psychological conditions would not preclude his former position.
>
> **Question 2: Is Mr. Mason precluded from all sustained remunerative employment as a result of the**

> **residual impairment, from the allowed psychological conditions of "Depressive Disorder" and "Post-Traumatic Stress Disorder"?**
> In my opinion, the allowed DSM-IV conditions are not work-prohibitive. His conditions are mild and do not require medication. Many of his symptoms fall in the normal range. His cognitive functions are intact, alert, and in the normal limit range. This does not account for the effects of his medications (related/unrelated).

(Emphasis sic.)

{¶ 30} 13. In keeping with the September 22, 2009 deadline for submission of medical evidence as set forth in the commission's acknowledgment letter, on September 22, 2009, relator timely submitted to the commission the reports of Drs. Sterle, Clary, and Murphy.

{¶ 31} 14. On September 23, 2009, the commission mailed a "medical examination referral" letter to William R. Fitz, M.D. The letter informed Dr. Fitz that he was scheduled to perform an examination of the claimant on October 7, 2009. The letter also recites "pertinent medical records are enclosed." Apparently, with the letter, the commission sent copies of claimant's medical records, but not relator's medical records.

{¶ 32} 15. On October 5, 2009, the commission mailed a "medical examination referral" letter to psychiatrist John M. Malinky, M.D. The letter informed Dr. Malinky that he was scheduled to examine claimant on October 21, 2009. The letter also recites "pertinent medical records are enclosed." Apparently, with the referral letter, the commission sent copies of claimant's medical records, but not relator's medical records.

{¶ 33} 16. On October 7, 2009, at the commission's request, claimant was examined by Dr. Fitz. In his three-page narrative report, Dr. Fitz opined that claimant has a "37% impairment to the body as a whole."

{¶ 34} 17. On a physical strength rating form dated October 7, 2009, Dr. Fitz indicated by his mark "[t]his Injured Worker is incapable of work."

{¶ 35} 18. On October 21, 2009, at the commission's request, claimant was examined by Dr. Malinky. In his eight-page narrative report, Dr. Malinky opines:

> **ASSESSMENT OF SEVERITY IN TERMS OF FUNCTIONAL LIMITATIONS DUE TO MR. MASON'S**

DEPRESSIVE DISORDER AND POST-TRAUMATIC STRESS DISORDER. (According to AMA Guides, 5th Ed.):

1. **Activities of daily living,** including cleaning, shopping, cooking, paying bills, maintaining his residence, caring appropriately for his grooming and hygiene, using telephone and directories. **Class 3, moderate impairment.**
2. **Social functioning,** his ability to get along with others; avoid altercations, fear of strangers, avoidance of interpersonal relationships and social isolation. **Class 3, moderate impairment.**
3. **Concentration, persistence, and pace** with respect to completing tasks in a timely manner and being able to concentrate and attend to that to which he is doing. **Class 3, moderate impairment.**
4. **Decompensation in work or work-like settings;** capacity to adapt to stressful circumstances including the ability to make decisions, attend to obligations, make schedules, complete tasks, interact with supervisors and peers. **Class 3, moderate impairment.**

   The American Medical Association Guide to Evaluation of Permanent Impairment 5th Edition was utilized. The best estimate of the whole person impairment based only on the allowed Depressive Disorder and Post-Traumatic Stress Disorder is 30%.

3. Complete the enclosed occupational activity assessment. Based solely on the impairment resulting from the allowed mental and behavioral condition in this claim within my specialty and with no consideration to the injured workers age, education or work training: This injured worker is incapable of work.

   The injured worker would not be able to deal with the public. This individual would not be able to handle the stress of a normal workday or workweek. He would have difficulties sustaining and persisting at tasks.

(Emphasis sic.)

{¶ 36} 19. On October 21, 2009, Dr. Malinky completed a form captioned "Occupational Activity Assessment, Mental and Behavioral Examination." On the form, Dr. Malinky indicated by his mark "[t]his injured worker is incapable of work."

{¶ 37} 20. On November 10, 2009, relator moved for leave to take the depositions of Drs. Fitz and Malinky.

{¶ 38} 21. Following a September 17, 2009 hearing, a staff hearing officer ("SHO") issued separate orders denying relator's motions for leave to depose the doctors. One of the orders states:

> The Employer has requested to depose to Dr. Malinky, regarding the report written on 10/21/2009.
>
> The Staff Hearing Officer finds that the request is unreasonable, because the reports submitted by the Employer from Drs. Murphy and Clary were not reasonably available to be included in the packet of information sent to Dr. Malinky prior to his examination of the Injured Worker. The lack of citation to all of the Employer's medical evidence is not a basis to grant the request to depose Dr. Malinky, and any potential defect can be remedied by the Employer by other means.

The other order states:

> The Employer has requested to depose Dr. Fitz, regarding the report written on 10/07/2009.
>
> The Staff Hearing Officer finds that the request is unreasonable because the Employer's evidence from Dr. Sterle, Murphy and Clary was filed on either 09/22/2009 or 09/23/2009, and the examination with Dr. Fitz was scheduled by letter mailed 09/23/2009. The lack of inclusion of the Employer's medical reports in the evidence cited by Dr. Fitz is not found to be sufficient reason to grant a deposition of Dr. Fitz.
>
> Therefore, the request is denied.

{¶ 39} 22. On February 20, 2010, the commission mailed orders denying relator's requests for reconsideration of the SHO's orders denying leave to depose.

{¶ 40} 23. Relator requested a prehearing conference with the Columbus hearing administrator. Following a February 4, 2010 conference, the hearing administrator issued a compliance letter stating:

> The medical reports submitted by the Employer, Dr. Clary's, 9/3/2009 report, Dr. Murphy's 9/8/2009 report and the report of Dr. Sterle, dated 9/8/2009 will be submitted to Dr. Fitz and Dr. Malinky to obtain an addendum to their reports so that they can opine as to whether or not the Employer's medical reports changes their original opinions. After these reports are processed and in file, the claim will be forwarded to docketing to reschedule the hearing on the issue of Injured Worker's application to be declared permanently and totally disabled.

{¶ 41} 24. In response to the compliance letter, the commission mailed two letters, each dated February 4, 2010, to Dr. Malinky. One letter states:

> Thank you for your report dated 10/21/2009. The Industrial Commission inadvertently omitted two timely filed reports by Dr. Michael Murphy and Dr. Oscar Sterle for your review and are asking whether or not this changes your original opinion. If there are any changes, please describe below and if not, state as such.

In response, Dr. Malinky wrote in his own hand:

> I have reviewed the report of Dr. Murphy dated 9/8/2009 and the report of Dr. Sterle dated 8/31/2009. My opinion remains the same as stated in my report of 10/21/2009.

{¶ 42} 25. The second letter to Dr. Malinky dated February 4, 2010 states:

> Thank you for your report dated 10/21/2009. The Industrial Commission inadvertently omitted the timely filed report by Dr. Richard Clary for your review and are asking whether or not this changes your original opinion. If there are any changes, please describe below and if not, state as such.

In response, Dr. Malinky wrote in his own hand:

> I have read Dr. Clary's report dated 9/3/2009. My original opinion has not changed.

{¶ 43} 26. In response to the compliance letter, the commission mailed one letter dated February 4, 2010 to Dr. Fitz. The letter states:

> Thank you for your report dated 10/7/2009. The Industrial Commission inadvertently omitted two timely filed reports by Dr. Oscar Sterle and Dr. Murphy for your review and are asking whether or not this changes your original opinion. If there are any changes, please describe below and if not, please state as such.

In response, Dr. Fitz wrote in his own hand:

> These two reports were reviewed and do not change the opinions expressed in my report.

{¶ 44} 27. Following a March 16, 2010 hearing, an SHO issued an order awarding PTD compensation starting September 25, 2007. The SHO's order explains:

> Permanent and total disability compensation is awarded from 09/25/2007 for the reason that this is the date of Dr. May's report supporting the award.
>
> It is the finding of the Staff Hearing Officer that the Injured Worker is permanently and totally disabled as the result of the medical effects of his allowed physical and psychological injuries. The Injured Worker has been prevented from returning to any form of sustained remunerative employment as a consequence of each of these two categories of medical condition. Such a finding mandates an award of permanent total disability compensation without further consideration of the "Stephenson" factors. In reaching this conclusion, the Staff Hearing Officer relies upon the independent medical examinations and evaluations performed at the direct[ion] of the Industrial Commission: William R. Fitz, M.D., who examined with respects to the allowed physical injuries, and John M. Malinky, Ph.D., who examined with respects to the allowed psychological conditions. In evaluating the credibility of these reports, the Staff Hearing Officer particularly notes the 01/28/2008 report of Dr. Ward, the two reports of Dr. May of 09/25/2007 and 09/26/2007, and the 07/07/2009 report of Dr. Howard. The Staff Hearing Officer further particularly notes that the Injured Worker has a claim which is allowed for a very serious left hip fracture, and also for psychological conditions, notably post traumatic stress disorder, together with some physical conditions related to the allowed hip fracture.

The Staff Hearing Officer has considered the prior denial of a permanent and total application in early 2007, the medical submitted on behalf of the Employer, and the Employer's arguments with respect to the sufficiency of the evidence submitted in support of the application. Specifically, the Staff Hearing Officer has considered the Employer's argument that the Injured Worker suffers from multiple unallowed medical conditions which have been improperly evaluated by the medical evidence in support of the application, and has further considered the Employer's arguments with respect to alleged inconsistency in these reports.

It is plain that the Injured Worker does suffer from medical conditions over and above his allowed injuries. In particular, the Injured Worker has multi-level spondylosis in the lower back, which may impact the Injured Worker's loss of function in the lower back, when consideration is being properly given to his allowed lumbar strain. In light of the fact that the medical professionals specifically state that they are considering only allowed conditions, there is no direct evidence of any improper consideration of these unallowed conditions affecting the same body part.

The Employer further argues that the reports of Drs. Howard and May improperly consider the Injured Worker's age, education, work experience, and similar disability factors in reaching their conclusions. Reading the reports in context, they are plainly stating that the Injured Worker has lost the ability to engage in any form of sustained remunerative employment. Further, an error in one of Dr. May's reports which appears to state he is considering a right hip fracture, is plainly merely a clerical error as there is no evidence the Injured Worker ever had a right hip fracture. Finally, the argument that the physical evidence supports the conclusion that the Injured Worker could engage, on a physical basis, in part-time sedentary work is not supported by the reports cited. This is an inference drawn argumentatively, but not stated by the reports under consideration.

In light of the fact that the independent examinations both conclude that the Injured Worker is unable to engage in sustained remunerative employment, solely as the result of the allowed conditions, the weight of the evidence strongly supports the conclusion that the physical and psychological conditions taken together do so. Consequently, an award of permanent total disability compensation is made.

{¶ 45} 28. On May 20, 2010, the three-member commission mailed an order denying relator's request for reconsideration.

{¶ 46} 29. On April 7, 2011, relator, Old Dominion Freight Line, Inc., filed this mandamus action.

Conclusions of Law:

{¶ 47} It is the magistrate's decision that this court issue a writ of mandamus, as more fully explained below.

{¶ 48} Ohio Adm.Code 4121-3-34 provides the commission's rules for the adjudication of PTD applications.

{¶ 49} Ohio Adm.Code 4121-3-34(C) sets forth the commission's rules regarding the processing of PTD applications.

{¶ 50} Ohio Adm.Code 4121-3-34(C)(2) provides that the commission shall serve an acknowledgment letter following the filing of a PTD application:

> At the time the application for permanent total disability compensation is filed with the industrial commission, the industrial commission shall serve a copy of the application together with copies of supporting documents to the employer's representative (if the employer is represented), or to the employer (if the employer is not represented) along with a letter acknowledging the receipt of the permanent total disability application.

Ohio Adm.Code 4121-3-34(C)(4)(b) provides:

> The employer shall be provided fourteen days after the date of the industrial commission acknowledgment letter provided for in paragraph (C)(2) of this rule to notify the commission if the employer intends to submit medical evidence relating to the issue of permanent total disability compensation to the commission. Should the employer make such written notification the employer shall submit such medical evidence to the commission within sixty days after the date of the commission acknowledgment letter unless relief is provided to the employer under paragraph (C)(4)(d) of this rule. Should the employer fail to make such written notification within fourteen days after the date of the commission acknowledgment letter, the employer shall be provided sixty days after the date of the commission acknowledgment letter to submit medical evidence relating

> to the issue of permanent total disability compensation to the commission, but the scheduling of the injured worker for appropriate medical examinations by physicians selected by the commission under paragraph (C)(5)(a)(iii) of this rule will proceed without delay.
>
> Ohio Adm.Code 4121-3-34(C)(5) provides:
>
> (a) Following the date of filing of the permanent and total disability application, the claims examiner shall perform the following activities:
>
> * * *
>
> (ii) Copy all documents including medical and hospital reports pertinent to the issue of permanent total disability including relevant evidence provided under division (C)(4) of this rule and submit the same to an examining physician to be selected by the claims examiner.
>
> (iii) Schedule appropriate medical examination(s) by physician(s) to be selected by the commission provided that the scheduling of said exams shall not be delayed where the employer fails to notify the commission within fourteen days after the date of the commission acknowledgment letter that it intends to submit medical evidence to the commission relating to the issue of permanent total disability compensation.

{¶ 51} Here, relator timely notified the commission within the 14-day period that it intended to submit medical evidence relating to the issue of PTD compensation. Then, relator timely submitted its medical evidence within 60 days after the date of the commission's acknowledgment letter.

{¶ 52} Under the rules, relator was given the right to have its medical evidence submitted to the examining physicians selected by the commission under Ohio Adm.Code 4121-3-34(C)(5)(a)(ii).

{¶ 53} Under Ohio Adm.Code 4121-3-34(C)(4)(b), the scheduling of the commission's medical examinations will proceed "without delay" where the employer fails to provide the notice within the 14-day period. However, implicit in the rule is that the scheduling of the commission's medical examinations shall be delayed where the

employer provides the notice within the 14-day period. Where notice is given within the 14-day period, the employer has 60 days to provide its medical evidence, and the scheduling of the commission's medical examinations must be delayed to accommodate the 60-day period.

{¶ 54} Here, the commission failed to follow its own rules when it failed to submit relator's timely filed medical evidence to its examining physicians prior to their examinations. Relator had a clear legal right under the commission's rules to have its medical evidence, namely the reports of Drs. Sterle, Clary, and Murphy, submitted to examining physicians Fitz and Malinky prior to their examinations of the claimant.

{¶ 55} Here, the commission endeavored to remedy its failure to follow its own rules by sending relator's medical evidence to examining physicians Fitz and Malinky after they had examined the claimant and issued their reports. As noted earlier, Drs. Fitz and Malinky responded to the commission's February 4, 2010 letters indicating that their review of relator's medical evidence did not change their opinions rendered in their reports. However, as relator here points out, even the commission's remedy was not complete because Dr. Fitz was never sent a copy of Dr. Clary's report. Rather, Dr. Fitz was only sent copies of the reports of Drs. Sterle and Murphy.

{¶ 56} The commission's rules do not provide for addendum reports of the commission's examining physicians when the commission fails to follow its own rules regarding submission of the employer's medical records to the commission's examining physicians. Thus, the commission fashioned a remedy for this occasion in the hope that the addendum reports would cure the problem. In the magistrate's view, the addendum reports do not cure the problem.

{¶ 57} We do not know, and cannot ever know, to what extent the timely receipt of relator's medical evidence by Drs. Fitz and Malinky prior to their respective examinations would have influenced the medical conclusions drawn by those physicians in their reports. We only know that the employer's medical evidence did not change the medical conclusions of Drs. Fitz and Malinky when those doctors were asked to reconsider their conclusions after reviewing the employer's medical records.

{¶ 58} In the magistrate's view, the commission's failure to follow its own rules was prejudicial to relator's right to challenge claimant's PTD application under the rules. It is

well-settled that the commission must follow its own rules as written. *State ex rel. H.C.F., Inc. v. Ohio Bur. of Workers' Comp.*, 80 Ohio St.3d 642, 647, 1998-Ohio-175.

{¶ 59} Accordingly, it is the magistrate's decision that this court issue a writ of mandamus ordering the commission to vacate its SHO's order of March 16, 2010 awarding PTD compensation, and to conduct further proceedings regarding the PTD application after elimination of the reports of Drs. Fitz and Malinky from further evidentiary consideration. The commission shall schedule new appropriate medical examinations, and, in so doing, shall submit to the newly selected physicians the medical evidence of the employer and the claimant as provided by the commission's rules.

s/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).