[Cite as *State ex rel. Franklin Cty. Bd. of Commrs. v. Indus. Comm.*, 2010-Ohio-2728.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Franklin County Board of Commissioners,	:	
Relator,	:	
v.	:	No. 09AP-379
Industrial Commission of Ohio and Susan L. Kempf,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on June 15, 2010

Ron O'Brien, Prosecuting Attorney, and *Denise L. DePalma*, for relator.

Richard Cordray, Attorney General, *Latawnda N. Moore*, and *Sandra E. Pinkerton*, for respondent Industrial Commission of Ohio.

Baran, Piper, Tarkowsky, Fitzgerald & Theis Co., L.P.A., and *John Tarkowsky*, for respondent Susan L. Kempf.

IN MANDAMUS

FRENCH, J.

{¶1} Relator, Franklin County Board of Commissioners, has filed an original action in mandamus requesting this court to issue a writ of mandamus ordering

respondent, Industrial Commission of Ohio, to vacate its order that awarded permanent total disability compensation to respondent, Susan L. Kempf, and to enter an order denying that compensation.

{¶2} This court referred this matter 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 objections to the magistrate's decision have been filed.

{¶3} Discerning no error on the face of the magistrate's decision, we adopt that decision, including the findings of fact and conclusions of law contained in it, as our own. Accordingly, we deny the requested writ.

Writ of mandamus denied.

BROWN and SADLER, JJ., concur.

A P P E N D I X

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	:	
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v.	:	No. 09AP-379
Industrial Commission of Ohio and Susan L. Kempf,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on October 22, 2009

Ron O'Brien, Prosecuting Attorney, and *Denise L. DePalma*, for relator.

Richard Cordray, Attorney General, *LaTawnda N. Moore* and *Sandra E. Pinkerton*, for respondent Industrial Commission of Ohio.

Baran, Piper, Tarkowsky, Fitzgerald & Theis Co., L.P.A., and *John Tarkowsky*, for respondent Susan L. Kempf.

IN MANDAMUS

{¶4} In this original action, relator, Franklin County Board of Commissioners, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order awarding permanent total disability ("PTD") compensation to respondent Susan L. Kempf ("claimant") and to enter an order denying said compensation.

Findings of Fact:

{¶5} 1. Claimant has five industrial claims which will be described in order of their chronology.

{¶6} 2. On February 28, 1999, claimant sustained an industrial injury while employed with relator. The claim (No. 99-340012) is allowed for "[c]ontusion of right hand."

{¶7} 3. On October 28, 2000, claimant sustained an industrial injury while employed as a therapeutic program worker for Columbus Developmental Centers. The claim (No. 00-555549) is allowed for "[n]ose contusion; nose abrasion; nasal bone fracture-closed."

{¶8} 4. On December 19, 2000, claimant sustained an industrial injury while employed as a therapeutic program worker for Columbus Developmental Center. The claim (No. 00-600480) is allowed for "[c]ontusion of left hand; contusion of left hip; closed fracture 1st metacarpal base left thumb * * *; carpal tunnel syndrome left * * *; reflex sympathetic dystrophy upper left limb; tendonitis left wrist."

{¶9} 5. On March 16, 2005, claimant sustained an industrial injury while employed as a teacher's assistant for Franklin County Board of Mental Retardation and

Developmental Disability ("MRDD"). Relator is the employer under this claim (No. 05-816739) which is allowed for "[s]prain or strain right trapezius muscle."

{¶10} 6. On May 10, 2005, claimant sustained an industrial injury while employed as a teacher's assistant for MRDD. Relator is also the employer under this claim (No. 05-354197) which is allowed for "[r]ight wrist sprain, left groin sprain, left hip sprain and left knee sprain * * *; degenerative joint disease left hip."

{¶11} 7. On July 31, 2007, orthopedic surgeon Richard M. Ward, M.D., examined claimant at the request of claimant's counsel. Dr. Ward then issued a three-page narrative report which indicates he examined for four industrial claims. Claim No. 05-816739 is not among the claims listed in the report. The body of the report states in its entirety:

> I saw Susan Kempf in the office today for the purpose of a disability evaluation. She is now 60 years old.
>
> She has had 4 industrial injuries as listed above. After she fractured her nose on 10-28-00[,] she had to have 2 surgical procedures done to treat the fractured nose. She last worked on 6-5-05. On 4-14-06[,] she had a left total hip replacement done, covered by Claim no. 05-354197.
>
> At the present time[,] she continues to have severe burning pain in the left forearm, wrist and hand. She continues to have pain in her right hand. She notes weakness of grip strength in both hands. These symptoms are aggravated by trying to use her hands for any type of repetitive or forceful activity. She wears full time bilateral wrist splints. She continues to have pain in her left hip; this causes her to limp when she walks. She cannot be up on her feet for significant periods of time; she also has a difficult time sitting because of increased hip pain. She can sit for about ½ hour at a time. She is followed by a doctor with medication. She denies ever having had problems with her right hand prior to the injury that occurred on 2-28-99; with her face prior to the injury that

occurred on 10-28-00, with her left hand and left upper extremity prior to the injury that occurred on 12-29-00 [sic], nor with her left knee or hip prior to the injury that occurred on 5-10-05.

She is 5' 2" tall, weighs 180 lbs and is right handed. On examination[,] she limps because of pain in her left knee and especially her left hip. She has a surgical scar from the total hip replacement. She has a range of motion from 0 to 90 degrees of flexion, accompanied by pain. She has minimal rotation. She does have a full range of motion in her left knee. She has burning pain over the distal left forearm, wrist and hand. She has pain in her right wrist. The Tinel's test is positive on both sides; the wrist flexion test is positive on both sides. Sensation is intact in both hands. She is able to make a full fist with each hand. Using the dynamometer, based on an average of 3 tries and with what I feel is a maximal effort on her part, she only has 6 kg of grip strength in her dominant right hand and 7 kg in the non-dominant left hand. From the 5th Edition of the AMA Guidelines, Table 16-32, normal grip strength for a female in her age group in the dominant right hand should be 22 kg and in the non-dominant left hand, 18 kg.

Based on the history and my examination, I believe she was injured on the 4 occasions discussed above. As a result of those injuries[,] she has had a left total hip procedure done; she has had a less than good result. She has a limp when she walks and she only has 90 degrees of flexion and she has minimal internal and external rotation. She has severe weakness of grip strength in both hands.

Taking into account the specific allowances from the 4 injuries discussed above and my physical finding and based upon a reasonable medical probability, it is my opinion that she is not capable of returning to substantial gainful employment because there really is no combination of sit, stand, walk option that would add up to a normal 8 hour work day for her. She also has severe limitations on the use of both arms. I did fill out a physical capacities evaluation to the best of my ability, again taking into account the specific allowances from the injuries on the 4 occasions discussed above and my physical findings. This indicates that she is not capable of returning to substantial gainful employment

> and in my opinion, should be granted permanent and total disability.
>
> Again, this opinion is based upon a reasonable medical probability.

{¶12} 8. Dr. Ward also completed a "Physical Capacity Evaluation" form dated July 31, 2007. The form provides the following instructions to the physician:

> Please answer the questions and give the limitations that you believe are imposed upon the claimant referred to above by keeping in mind that we are asking you to assume in answering these questions with regard to limitations, is a work setting where a person would be required to work eight hours a day, day after day, on a substained [sic] and regular basis. If[,] in your opinion, there is a medical basis for this claimant's pain, please consider that as a factor in this claimant's ability to do the following items[.]

{¶13} Following the instructions, the form presents 11 questions to be answered by marking the appropriate choice as preprinted on the form.

{¶14} Question No. 1 states: "In an 8 hour work day and in [a] work situation claimant can stand." Given a choice of 1 hour increments from "[l]ess than 1" to "8," Dr. Ward marked "[l]ess than 1."

{¶15} Question No. 2 states: "In an 8 hour work day and in a work situation, claimant can walk." In response, Dr. Ward marked "[l]ess than 1."

{¶16} Question No. 3 states: "In an 8 hour work day and in a work situation, claimant can sit." In response, Dr. Ward marked "3," indicating 3 hours.

{¶17} Question No. 4 states: "Claimant can stand, walk and sit at one time without interruption." In response, Dr. Ward indicated that claimant can "[s]tand 1/12 hour(s)," "[w]alk 1/12 hour(s)," and "[s]it 1/2 hour(s).

{¶18} Question No. 5 asks the physician to estimate lifting capacity. Dr. Ward indicated lifting capacity at "10 lbs."

{¶19} Question No. 6 asks the physician to indicate whether lifting can be performed "[n]one," "[o]ccasionally," "[f]requently," and "[c]ontinously." Dr. Ward indicated that lifting can be performed only "[o]cassionally."

{¶20} Question No. 7 asks whether claimant can use hands for repetitive (1) simple grasping, (2) pushing and pulling, and (3) fine manipulation. In response, Dr. Ward marked "no" to all three queries.

{¶21} At question No. 8, Dr. Ward indicates that claimant cannot use her feet for repetitive movements as in operating foot controls.

{¶22} At question No. 9, Dr. Ward indicates that claimant cannot bend, squat, crawl, or climb ladders. However, she can climb stairs occasionally.

{¶23} At question No. 10, Dr. Ward indicates that claimant is able to reach above shoulder level.

{¶24} Question No. 11 asks: "Is claimant's condition likely to deteriorate if placed under stress, particularly stress associated with a job?" In response, Dr. Ward marked "no."

{¶25} 9. On August 16, 2007, claimant filed an application for PTD compensation. In support, claimant submitted the July 31, 2007 narrative report of Dr. Ward along with his "Physical Capacity Evaluation."

{¶26} 10. The PTD application prompted relator to obtain a medical report from Robert F. Shadel, M.D. Following a September 19, 2007 examination, Dr. Shadel

issued a four-page narrative report. His report indicates that he examined for only three industrial claims, i.e., for the allowed conditions in claim Nos. 05-354197, 05-816739, and 99-340012. Significantly, there is no indication that Dr. Shadel examined for the allowed conditions in claim Nos. 00-555549 and 00-600480. In his report, Dr. Shadel opined:

> * * * Ms. Kempf has no disabling allowed conditions from the 3 above claims. The sprain right wrist, sprain left hip/thigh, sprain left knee/leg, sprain left pelvis/groin, strain right trapezius muscle, and contusion right hand have all resolved.
>
> Ms. Kempf has residual pain left hip area postoperatively from the treatment of condition of aggravation of left hip DJD, and does have limitations for her activity, which are not disabling. She needs restrictions for the aggravation of left hip DJD due to postoperative weakness and pain left hip, and an unallowed condition of left hip bursitis. Restrictions pertinent to bursitis are decreased walking through workday of no more than 50-100 feet at a time, and only occasional walking through work day. She needs to be able to shift positions from a sitting position every 30 minutes. She should not be climbing ladders and only 1 flight of stairs at a time, and only rarely through a workday. This equates to a sedentary level of work. These restrictions are temporary until hip bursitis subsides—a period of 1-2 months.
>
> Restrictions for allowed hip conditions include occasional walking and stairs, but no ladders – a light duty level of work for 1-2 months until left hip postoperative weakness is resolved.
>
> There does not appear to be any permanent significant limiting conditions from left hip, as Ms. Kempf has had successful left hip replacement that appears to be functioning well.
>
> * * *

> * * * In my medical opinion, Ms. Kempf is unable to return to "Teacher's Assistant", with the necessary walking, bending, twisting, lifting and stairs. This is due to her unallowed bursitis condition and due to allowed conditions that include postoperative weakness. As noted under #1, restrictions for bursitis are limiting her to sedentary work. She can work many other remunerative jobs that do not entail so much prolonged sitting, walking too far or stairs as noted under #1.
>
> When her unallowed bursitis is resolved, I believe that Ms. Kempf will be able to return to her position as "Teacher's Assistant," within 1-2 months, as her allowed conditions will be resolved by that time with strengthening of her post-operative weakness.
>
> In my medical opinion, I do not believe Ms. Kempf is permanently and totally disabled from all forms of sustained remunerative employment, when considering all of the allowed conditions in these claims.

{¶27} 11. On January 4, 2008, at the commission's request, claimant was examined by John W. Cunningham, M.D. In his six-page narrative report dated January 18, 2008, Dr. Cunningham lists the claim numbers and their allowances for all five industrial claims. Dr. Cunningham opines:

> OPINION: In my medical opinion, in regard to all five of these claims individually and/or in combination, this individual indeed has attained maximum medical improvement and level of permanency and she has reached a treatment plateau that is static or well stabilized at which no fundamental, functional or physiological change can be expected despite continuing medical or rehabilitative procedures.
>
> * * * [T]his individual has a 45% whole person permanent partial impairment in regard to these five claims in combination. * * * In my medical opinion, this individual is capable of sedentary work with ambulation for personal needs, i.e. bathroom breaks and meals because of her left hip. She also has limited use of the left upper extremity.

{¶28} 12. On January 4, 2008, Dr. Cunningham completed a physical strength rating form. On the form, Dr. Cunningham indicated by his mark that claimant is capable of sedentary work. In the space provided for describing "[f]urther limitations," Dr. Cunningham wrote: "Ambulation personal needs only."

{¶29} 13. Relator requested an "Employability Assessment" report from Craig Johnston, Ph.D., a vocational consultant. On March 4, 2008, Johnston issued a five-page narrative report.

{¶30} 14. Following an April 18, 2008 hearing, a staff hearing officer ("SHO") issued an order awarding PTD compensation beginning July 31, 2007, based exclusively upon the reports of Dr. Ward. The SHO's order explains:

> Permanent and total disability compensation is awarded from 07/31/2007 for the reason that the Injured Worker requested said date, and the report from Richard M. Ward, M.D. dated 07/31/2007, supports a finding of permanent and total impairment as of said date.
>
> The cost of this award is apportioned as follows: 60% in claim #05-354197, 40% in claim #00-600480, 0% in claim #99-340012, 0% in claim #05-816739, and 0% in claim #00-555549.
>
> This apportionment is based on the relative severity of the conditions in each claim, and the resulting impact on the Injured Worker's ability to engage in employment activities.
>
> Based upon the reports of Dr. Ward as cited above, it is found that the Injured Worker is unable to perform any sustained remunerative employment solely as a result of the medical impairment caused by the allowed conditions. Therefore, pursuant to State ex rel. Speelman v. Indus. Comm. (1992), 73 Ohio App. 3d 757, it is not necessary to discuss or analyze the Injured Worker's non-medical disability factors.

{¶31} 15. On June 27, 2008, the three-member commission mailed an order denying relator's motion for reconsideration of the SHO's order of April 18, 2008.

{¶32} 16. On April 14, 2009, relator, Franklin County Board of Commissioners, filed this mandamus action.

Conclusions of Law:

{¶33} Two main issues are presented: (1) whether the reports of Dr. Ward constitute some evidence upon which the commission can rely, and (2) whether the commission abused its discretion in failing to determine that claimant failed to engage in a good-faith effort at reemployment.

{¶34} The magistrate finds: (1) Dr. Ward's reports do constitute some evidence upon which the commission can and did rely, and (2) the commission did not abuse its discretion in failing to determine that claimant failed to engage in a good-faith effort at reemployment. Accordingly, it is the magistrate's decision that this court deny relator's request for a writ of mandamus, as more fully explained below.

{¶35} Turning to the first issue, relator presents two arguments challenging the evidentiary value of Dr. Ward's report. In summary, those two arguments are: (1) that Dr. Ward was unaware or ignored that relator was babysitting for a family member's children, and (2) that Dr. Ward fails to opine a capacity for part-time work when that capacity is allegedly evident from his "Physical Capacity Evaluation."

{¶36} Turning to the first argument under the first issue, we do not have a transcript of the April 18, 2008 hearing because, apparently, the hearing was not recorded. However, in relator's memorandum in support of reconsideration of the

April 18, 2008 SHO's order, relator's counsel asserts: "Claimant testified at the hearing she spends her afternoons caring for her 10 year old and 5 year old grandchildren. If Claimant is capable of caring for two young children then she is also capable of returning to sedentary employment."

{¶37} A review of Dr. Ward's three-page narrative report fails to indicate that he was aware that claimant allegedly babysits her ten and five year old grandchildren. Thus, the question relator poses is whether that omission destroys the evidentiary value of the medical opinions contained in the reports. Clearly, it does not.

{¶38} Relator's argument incorrectly suggests that an examining physician has an absolute duty to question, or even investigate, the claimant as to whether he or she has engaged in any activities outside the examination room that might conceivably be inconsistent with disability. Relator cites to no authority supporting such suggestion that such duty is imposed upon the examining physician. Rather, the case law strongly suggests other than what relator is suggesting.

{¶39} In *State ex rel. Midmark Corp. v. Indus. Comm.* (1997), 78 Ohio St.3d 2, the claimant, Billy Sergent, was examined on June 8, 1989 by Dr. John W. Cunningham who assessed a 50 percent permanent partial impairment. Suspicious of Sergent's abilities, Midmark hired a private investigation firm to monitor Sergent's activities.

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

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

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

Id. at 7.

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

{¶43} On August 15, 1991, the first of three PTD hearings took place. At no point during this hearing did Midmark's counsel ask that Dr. Gatens be required to view the tape. However, the August 15, 1991 hearing was quickly adjourned and reset following allegations by claimant's counsel that the tapes had been prejudicially edited.

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

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

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

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

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

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

> First, the material does not establish a medical capacity for work greater than sedentary. It simply shows claimant walking unassisted or doing fairly unstrenuous domestic chores. Moreover, the objective, documented presence of spondylolisthesis and herniated disc, as discussed by Dr. Gatens, belies an assertion that his opinion was based solely on claimant's exaggerated subjective complaints. Interestingly, Dr. Cunningham, who evaluated claimant on Midmark's behalf, saw the videotape and still assessed a fifty-percent permanent partial impairment—only ten percentage points removed form Dr. Gatens's sixty-percent figure.
>
> Second, these documented activities, even if deemed inconsistent and work-amenable, do not establish that claimant can do *sustained* remunerative employment. Midmark's investigation spanned approximately fifteen months, yet it could show only five days in which claimant was performing allegedly questionable activities. There is no evidence of claimant's performing even any medium-exertion labor, nor is there any evidence of claimant's doing the recorded activity on anything other than rare occasions. The surveillance package, therefore, proved very little. As such, the commission did not abuse its discretion in accepting the Gatens report as valid.
>
> Midmark's assertion of commission error is further undermined by Midmark's own inaction. Midmark, pursuant to Ohio Adm.Code 4121-3-09(B)(5), could have moved to depose Dr. Gatens in an effort to clarify his perceptions. It did not do so. Midmark's response that its investigation was not finished when Gatens issued his report ignores that the first period of surveillance was complete at that time. Thus, evidence of alleged medically inconsistent activity already existed and could have prompted a timely request. Surveillance information from the first period alone was enough to generate a video review by Dr. Cunningham. Midmark could have done the same with Gatens.
>
> We thus find that the commission did not abuse its discretion in not requiring that Dr. Gatens view the videotape and in relying on his report. The report is "some evidence" supporting the commission's order.

Id. at 11. (Emphasis sic.)

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

{¶50} It would seem that, if the commission, in *Midmark*, had no duty to order Dr. Gatens to review the videotape and render an amended report, there can be no duty imposed upon Dr. Ward in this case to inquire into the possibility that claimant may have performed activities outside the examination room that might be inconsistent with the claimed disability.

{¶51} In *State ex rel. Lawson v. Mondie Forge*, 104 Ohio St.3d 39, 2004-Ohio-6086, the court found that the commission abused its discretion in terminating PTD compensation based upon the claimant's physical activity during receipt of PTD compensation. The *Lawson* court pronounced:

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

> their potential for payment. We instead compared the activities with claimant's medical restrictions to determine whether they were so inconsistent as to impeach the medical evidence underlying the disability award.

Id. at ¶20-21.

{¶52} Here, assuming, for the sake of argument, the truth of relator's assertion regarding claimant's hearing testimony—that she testified she spends her afternoons caring for her ten and five year old grandchildren—we are told very little, if anything, about the physical activity that claimant might be called upon to perform in caring for her grandchildren.

{¶53} We are seemingly invited here to speculate as to the circumstances of claimant's caring for her grandchildren. Clearly, that invitation should be declined. By itself, relator's assertion regarding the hearing testimony is not evidence of an ability to perform sustained remunerative employment.

{¶54} In short, that Dr. Ward was unaware of claimant's babysitting her grandchildren, or even that he ignored the matter, cannot destroy the evidentiary value of his report.

{¶55} As earlier noted, relator also challenges Dr. Ward's reports on grounds that he fails to opine a capacity for part-time work when that capacity is allegedly evident from his "Physical Capacity Evaluation."

{¶56} According to relator, Dr. Ward's "Physical Capacity Evaluation" evidences a capacity for sustained remunerative part-time employment.

{¶57} According to relator, the "Physical Capacity Evaluation" shows that claimant can perform "at least four hours of sedentary work per day." (Reply brief, at 2.)

Relator points out that Dr. Ward allows claimant to sit for a total of three hours per day but no more than one-half hour at a time. According to relator, during the sitting breaks, claimant could stand or walk for six minute periods. Thus, the standing and walking would allegedly give claimant another hour during the day for employment.

{¶58} Scrutinizing relator's calculation of work time, the magistrate notes initially that Dr. Ward indicated that relator can only stand or walk for 1/12 hour which is five minutes—not the 6 minutes used by relator. There are 6 thirty-minute periods in a 3 hour sitting workday. Combining each 1/2 hour sitting period with a 5 minute stand/walk break produces a 35 minute period for each sit/stand/walk. Multiplying the 35 minute period times 6 produces a 210 minute workday. A 210 minute workday translates to a 3.5 hour workday (210 ÷ 60 = 3.5 hours). Thus, relator's calculation is incorrect. There is no 4 hour workday even under relator's interpretation of the "Physical Capacity Evaluation."

{¶59} In *State ex rel. Toth v. Indus. Comm.*, 80 Ohio St.3d 360, 362, 1997-Ohio-108, the court states that "part-time work constitutes sustained remunerative employment."

{¶60} Seven years ago, and some five years after *Toth*, a magistrate of this court had occasion to succinctly summarize this court's response to *Toth* in *State ex rel. Cale v. Indus. Comm.*, 10th Dist. No. 01AP-1143, 2002-Ohio-2924. In *Cale*, this court, through its magistrate, stated:

> Although the Supreme Court has not defined the term "part-time work" in *Toth,* the courts have provided guidance in unreported opinions. In *State ex rel. DeSalvo v. May Co.*

> (June 29, 1999), Franklin App. No. 98AP-986, unreported (Memorandum Decision), *affirmed* (2000), 88 Ohio St.3d 231, 724 N.E.2d 1147, the court in essence concluded that, where a claimant is capable of working more than four hours per day by combining his abilities to sit, stand and walk, the commission may find the worker capable of sustained remunerative employment.
>
> On the other hand, functional abilities may be so limited that only brief periods of work activities would be possible, which would not constitute sustained remunerative employment. See *State ex rel. Libecap v. Indus. Comm*. (Sept. 5, 1996), Franklin App. 96AP-29, *affirmed* (1998), 83 Ohio St.3d 178, 699 N.E.2d 63. In *Libecap*, the commission found the claimant medically capable of sustained remunerative employment at the sedentary level, relying on a medical opinion stating *inter alia* that claimant could sit for no more than thirty minutes at a time. In mandamus, the court of appeals found that the commission abused its discretion in determining that claimant had the medical capacity to perform sedentary work because sedentary work requires sitting most of the time, whereas the commission relied on a medical report finding claimant incapable of sitting more than thirty minutes at one time. Therefore, regardless of the fact that the physician placed claimant generally in the "sedentary" category, the specific limitations imposed were so restrictive as to preclude sustained remunerative employment.
>
> From decisions such as *Toth, DeSalvo,* and *Libecap,* the magistrate extracts general guidelines. It appears that the commission may find a claimant medically unable to perform sustained remunerative work where there are no jobs reasonably likely to accommodate his combination of medical restrictions, and/or where the claimant can work less than four hours per day. However, where the capacities to sit, stand and walk can be combined to provide, for example, a workday of five or six hours, the claimant may be found to be medically capable of sustained remunerative employ-ment.

Id. at ¶25-27.

{¶61} The magistrate notes that, more recently, in *State ex rel. Daimler-Chrysler Corp. v. Indus. Comm.*, 10th Dist. No. 06AP-387, 2007-Ohio-1498, this court, in adopting the decision of its magistrate, relied in part upon the above-quoted paragraphs from *Cale.*

{¶62} Applying the principles set forth in *Cale*, it is clear that Dr. Ward's narrative report and his "Physical Capacity Evaluation" can be viewed as some evidence supporting PTD compensation. At best, claimant can only perform less than 4 hours of work per day by combining her capacities for sitting, standing, and walking. Moreover, because claimant's sitting capacity is limited to no more than 30 minutes at a time, the commission could determine, in its discretion, that there are no part-time jobs reasonably likely to accommodate the restriction.

{¶63} In short, contrary to relator's arguments, Dr. Ward's reports are indeed some evidence that the industrial injuries alone preclude all sustained remunerative employment.

{¶64} As earlier noted, the second issue is whether the commission abused its discretion in failing to determine that claimant failed to engage in a good-faith effort at reemployment.

{¶65} The Supreme Court of Ohio has repeatedly held that a "certain accountability" be demanded of the claimant as to any effort to enhance reemployment prospects. *State ex rel. Bowling v. Natl. Can Corp.* (1996), 77 Ohio St.3d 148, 153.

{¶66} In *State ex rel. B.F. Goodrich Co. v. Indus. Comm.* (1995), 73 Ohio St.3d 525, 529, the court stated:

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

{¶67} In *State ex rel. Wilson v. Indus. Comm.* (1997), 80 Ohio St.3d 250, 253-254, the court states:

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

{¶68} The record contains a "Vocational Rehabilitation Closure Report" ("closure report") dated January 27, 2007. The report is signed by claimant's vocational case manager. The report states:

> Ms. Susan Kempf was referred for vocational rehabilitation services on 9/11/06. She is a 59 year old female who reports she sustained an injury to her hip and knee on 5/10/2005. Ms. Kempf was working as a Teacher's Assistant in a Franklin County MR/DD facility at the time of her injury. Her last working day is 5/10/2005. A total hip replacement was performed on 4/14/2006. Dr. Mellaragno released her to return to work effective 8/28/06. He advised Ms. Kempf's [sic] that she will require sedentary employment involving no lifting over 10 lbs, occasional standing and walking. With these restrictions, a return to work in her position as a teacher's assistant is not feasible. The injury employer is

> unable to offer an alternative work position within her abilities. Ms. Kempf will therefore have to return to work in a different job with a different employer. A vocational evaluation was done on 9/21/2006. The vocational evaluation revealed that Ms. Kempf has a good prognosis for successful completion of vocational rehabilitation ending in job placement. She had no potential for direct job placement with her limited physical capabilities. The vocational evaluation revealed Ms. Kempf had no potential of obtaining a work position with an employer that offers on the job training. Retraining was needed to assist Ms. Kempf in competing for employment. Retraining to a sedentary occupation was possible. It was indicated Ms. Kempf could benefit from involvement in a short term vocational training program. Suggested job goals were office clerk, appointment clerk, or credit clerk. Job Seeking skills training, [j]ob placement and job search support were also recommended upon successful completion of short term training to assist her in locating employment.
>
> Ms. Kempf began a clerical training program at Goodwill in Chillicothe on 10/30/06. The Chillicothe program at Goodwill was selected as there were no clerical training programs located in Washington Court House and this was the closest program available. On 12/25/06, Ms. Kempf was transferred to the Columbus Goodwill program per her request. Ms. Kempf's instruction included 14 weeks of training in Windows, Access, Word, Power Point, Outlook, email and general office procedures. All training was completed on 1/26/07.
>
> Having acquired the work skills necessary in her short term training to actively compete for employment in a general office situation, Ms. Kempf was offered the opportunity to begin seeking employment. The job seeking skills training program was scheduled to begin on 1/29/07. This program would be conducted under the guidance of a BWC job placement specialist. On 1/31/07, Ms. Kempf phoned both the case manager and job placement specialist and informed them she did not want to participate in the BWC job search program. Ms. Kempf indicated hip pain and family obligations would prevent her from working at this time. She was informed her vocational rehabilitation file would close and she indicated she was in agreement with this. Both

> MCO and BWC were notified on 1/31/07 that Ms. Kempf has notified this case manager that she does not want to seek employment. The MCO and BWC were informed that vocational rehabilitation file closure was indicated.

{¶69} Citing the above-described closure report but failing to cite the *Bowling, B.F. Goodrich*, or *Wilson* cases, relator argues that the commission abused its discretion in failing to determine that claimant failed to engage in a good-faith effort at reemployment. The argument lacks merit.

{¶70} Ohio Adm.Code 4121-3-34 sets forth the commission's rules for the adjudication of PTD applications. Ohio Adm.Code 4121-3-34(D) sets forth the commission's guidelines for the adjudication of PTD applications. The first paragraph thereunder states that "guidelines shall be followed by the adjudicator in the *sequential* evaluation of applications for permanent total disability compensation." (Emphasis added.)

{¶71} Ohio Adm.Code 4121-3-34(D)(2) states:

> (a) If, after hearing, the adjudicator finds that the medical impairment resulting from the allowed condition(s) in the claim(s) prohibits the injured worker's return to the former position of employment as well as prohibits the injured worker from performing any sustained remunerative employment, the injured worker shall be found to be permanently and totally disabled, without reference to the vocational factors[.] * * *
>
> (b) If, after hearing, the adjudicator finds that the injured worker, based on the medical impairment resulting from the allowed conditions is unable to return to the former position of employment but may be able to engage in sustained remunerative employment, the non-medical factors shall be considered by the adjudicator.

> The non-medical factors that are to be reviewed are the injured worker's age, education, work record, and all other factors, such as physical, psychological, and sociological, that are contained within the record that might be important to the determination as to whether the injured worker may return to the job market by using past employment skills or those skills which may be reasonably developed. * * *
>
> (c) If, after hearing and review of relevant vocational evidence and non-medical disability factors, as described in paragraph (D)(2)(b) of this rule the adjudicator finds that the injured worker can return to sustained remunerative employment by using past employment skills or those skills which may be reasonably developed through retraining or through rehabilitation, the injured worker shall be found not to be permanently and totally disabled.

{¶72} The commission, through its SHO, rendered a determination pursuant to Ohio Adm.Code 4121-3-34(D)(2)(a). That is, based exclusively upon Dr. Ward's reports, the commission determined that the allowed conditions of the industrial claims prohibit claimant from performing any sustained remunerative employment.

{¶73} Given that the commission determined that the industrial claims prohibit all sustained remunerative employment, consideration of the nonmedical factors became unnecessary, including consideration of evidence of any rehabilitation efforts or lack thereof. See *State ex rel. Galion Mfg. Div. Dresser Industries, Inc. v. Haygood* (1991), 60 Ohio St.3d 38.

{¶74} In short, given the sequential evaluation mandated by Ohio Adm.Code 4121-3-34(D), the commission's reliance upon the reports of Dr. Ward rendered unnecessary any further consideration of the January 27, 2007 closure report.

{¶75} Given the above analysis, this magistrate concludes that the commission did not abuse its discretion in failing to determine that claimant failed to engage in a good-faith effort at reemployment.

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

/s/ Kenneth W. Macke
KENNETH W. MACKE
MAGISTRATE

NOTICE TO THE PARTIES

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