[Cite as *State ex rel. Davis-Hodges v. Indus. Comm.*, 2010-Ohio-5871.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Lavetta Davis-Hodges,	:	
Relator,	:	
v.	:	No. 10AP-183
The Industrial Commission of Ohio et al.,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on December 2, 2010

Isaacson & Johnson, LLC, Melissa S. Johnson, and *Arnold M. Isaacson*, for relator.

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

IN MANDAMUS

BROWN, J.

{¶1} Relator, Lavetta Davis-Hodges, 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 denied her application for permanent total

disability ("PTD") compensation and ordering the commission to find that she is entitled to that compensation.

{¶2} This matter was referred to a magistrate of this court, pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate issued a decision which is appended to this decision including findings of fact and conclusions of law, and recommended that this court deny relator's request for a writ of mandamus. No objections have been filed to that decision.

{¶3} As there have been no objections filed to the magistrate's decision, and it contains no error of law or other defect on its face, based on an independent review of the evidence, this court adopts the magistrate's decision. Relator's request for a writ of mandamus is denied.

Writ of mandamus denied.

CONNOR and RINGLAND, JJ., concur.

RINGLAND, J., of the Twelfth Appellate District, sitting by assignment in the Tenth Appellate District.

_____

[Cite as *State ex rel. Davis-Hodges v. Indus. Comm.*, 2010-Ohio-5871.]

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Lavetta Davis-Hodges,	:	
Relator,	:	
v.	:	No. 10AP-183
The Industrial Commission of Ohio and Cleveland Metropolitan School District,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on August 31, 2010

Isaacson & Johnson, LLC, Melissa S. Johnson, and *Arnold M. Isaacson*, for relator.

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

IN MANDAMUS

{¶4} Relator, Lavetta Davis-Hodges, 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, which denied her application for permanent total

disability ("PTD") compensation and ordering the commission to find that she is entitled to that compensation.

Findings of Fact:

{¶5} 1. Relator sustained a work-related injury on September 21, 1995. At the time, relator was a school bus driver and her injury occurred when students threw a glass bottle at her right knee. Ultimately, relator's workers' compensation claim would be allowed for the following conditions:

> * * * CONTUSION RIGHT KNEE; SPRAIN OF RIGHT KNEE/LEG; CHONDROMALACIA PATELLAE, RIGHT; DISLOCATION OF THE RIGHT PATELLA; OSTEOARTHRITIS RIGHT PATELLA FEMORAL JOINT; CHONDRITIS OF THE MEDIAL FEMORAL CONDYLE AND CHONDRAL FRACTURE OF THE LATERAL TIBIAL PLATEAU; ADJUSTMENT DISORDER WITH ANXIETY AND DEPRESSED MOOD; LUMBAR SPRAIN; LEFT KNEE SPRAIN; AGGRAVATION OF PRE-EXISTING DEGENERATIVE DISC DISEASE AT L4-5 AND AGGRAVATION OF PRE-EXISTING SACROILITIS.

{¶6} 2. Relator's allowed physical conditions were found to have reached maximum medical improvement ("MMI") in May 2007 and her allowed psychological conditions were found to have reached MMI in February 2008. At that time, relator's temporary total disability ("TTD") compensation was terminated.

{¶7} 3. On June 4, 2008, relator filed her application for PTD compensation. Relator's application was supported by the reports of her treating physicians, Timothy Morley, D.O., and Ken Gerstenhaber, Ph.D., both of whom opined that relator was permanently and totally disabled due to the allowed physical and psychological conditions in her claim.

{¶8} 4. In his May 12, 2008 report, Dr. Morley provided a brief history, his physical findings upon examination, and concluded:

> * * * This claimant has undergone a long and complicated course however she remains significantly symptomatic with multiple pathologies as outlined above[.] The pain is such that it affects her ability to perform even simple routine ADLs[.] Subsequent to the pain, she has also been diagnosed with the depressive disorder as well[.] The depression does interfere with her ability to concentrate and relate to others which would indeed adversely affect her ability to perform even sedentary duty[.]
>
> Given the history of the injuries as outlined above and the objective findings on physical examination, I can state to a reasonable degree of medical certainty that secondary to the above outlined injuries the claimant is unable to perform any remunerative activity[.] As such the claimant is considered permanently and totally disabled[.]

{¶9} 5. In his March 21, 2008 report, Dr. Gerstenhaber noted that relator had been treating with him since June 2005 and that she continues to have symptoms, including depressed mood, anxiety, irritability, concentration difficulties, and variable appetite and sleep disturbances. Because he considered that her activities of daily living, concentration, persistence and pace, socialization, and adaptation were all severely impaired, Dr. Gerstenhaber opined that relator was permanently and totally disabled.

{¶10} 6. Relator had been examined by Gordon Zellers, M.D., in 2007. In his April 3, 2007 report, Dr. Zellers provided his physical findings upon examination, identified the diagnostic testing, treatment, and medical records which he reviewed, and concluded that relator was unable to return to her former position of employment. Dr. Zellers opined that relator could return to sedentary labor activities with the following physical restrictions: "[a] 10 lb. maximum lifting limited on an occasional, as-tolerated basis only";

"[n]o prolonged sitting, standing or ambulating"; "[t]his patient must be permitted to change body positions on a frequent basis"; "[n]o climbing activities"; "[n]o above groundwork should that environment pose a threat to the patient's safety"; "[n]o significant bending activities"; "[n]o squatting activities"; "[n]o repetitive activities involving the lower extremities"; "[t]his patient should not be exposed to excessive vibratory stimuli"; "[t]his patient should not be required to subject the anterior surface of her knees to direct pressure"; and "[t]his patient should not be permitted [to] perform safety sensitive activities while under the influence of sedative type medications."

{¶11} 7. At the time Dr. Zellers examined relator in April 2007, her claim had not yet been allowed for "AGGRAVATION OF PRE-EXISTING DEGENERATIVE DISC DISEASE AT L4-5" and "AGGRAVATION OF PRE-EXISTING SACROILITIS." Those conditions were allowed in November 2007.

{¶12} 8. The commission referred relator to Scott E. Singer, M.D., for an independent medical evaluation concerning her allowed physical conditions. Dr. Singer correctly listed all the allowed conditions at the outset of his report, including the conditions that were allowed in November 2007. Dr. Singer provided his physical findings upon examination, identified the medical records which he reviewed and concluded that relator's allowed physical conditions had reached MMI, assessed a 27 percent whole person impairment, and concluded that relator was capable of performing sedentary work.

{¶13} 9. Relator was also referred to Robert L. Byrnes, Ph.D., who evaluated relator for her allowed psychological conditions. In his September 2, 2008 report, Dr. Byrnes opined that relator's psychological conditions had reached MMI and concluded

that her activities of daily living, social functioning, as well as concentration, persistence, and pace were mildly impaired, and that her deterioration or decompensation in work-like settings were mildly to moderately impaired. Dr. Byrnes assessed a 17 percent whole person impairment and opined that relator was capable of returning to work with no restrictions.

{¶14} 10. A vocational assessment was prepared by Mark A. Anderson, M.S., CDMS, LPC. In his October 15, 2008 report, Mr. Anderson concluded that relator had no return to work potential, that she was capable of performing less than the full range of sedentary activities, and that based on her physical and emotional limitations, as well as her difficulties with reading and math comprehension, she was not a candidate for vocational rehabilitation. With regards to vocational factors, Mr. Anderson noted that relator had no clerical aptitude, her math aptitude was at the fifth-grade level, and her reading was at the mid fifth-grade level, she had no transferrable skills from her previous work experience, and his past attempts at vocational rehabilitation had been unsuccessful.

{¶15} 11. According to the statement of facts prepared relative to the filing of relator's application, the following was noted: "REHABILITATION INVOLVEMENT WITHIN THREE YEARS OF IC-2 FILING"; "Closure Report dated 08/07/05: Medically unstable to participate"; "Closure Report dated 12/26/05: Not interested in participation; injured worker feel that she was medically unable to participate at that time"; "Closure Report dated 08/07/05: Medically unstable to participate."

{¶16} Regarding rehabilitation efforts more than three years before the filing of relator's PTD application, it is specifically noted that relator's rehabilitation file was closed

effective January 21, 2000, when relator completed rehabilitation services and returned to her former job with her original employer. It is also noted that relator again participated in vocational rehabilitation in April 2003. Her file was closed on December 12, 2003, because it was determined that she was currently medically unable to participate, and she was awaiting an MRI and follow-up medical appointments to determine whether to undergo surgery.

{¶17} 12. Relator's application was heard before a staff hearing officer ("SHO") on January 15, 2009. The SHO granted relator's application as follows:

> Permanent and total disability compensation is awarded from 02/09/2008 for the reason that this is the date after the last payment of temporary total compensation.
>
> The cost of this award is apportioned as follows: 100% in claim # 95-503942.
>
> This apportionment is based upon the report(s) of Dr. M.P. Patel, it is found that the Injured Worker is unable to perform any sustained and remunerative employment solely as a result of the medical impairment caused by the allowed condition(s). Therefore, pursuant to State ex. rel. Speelman v. Indus. Comm. (1992), 73 Ohio App. 3d 757, it is not necessary to discus[s] or analyze the Injured Worker's non-medical disability factors.

This order was mailed on January 29, 2009.

{¶18} 13. It is undisputed that there is no report from Dr. Patel contained in the record.

{¶19} 14. The SHO issued a corrected order mailed February 12, 2009, again granting PTD compensation, but referencing the report of Dr. Morley.

{¶20} 15. Prior to the date the SHO mailed the corrected order, the bureau of workers' compensation ("BWC") filed a motion for reconsideration based upon the SHO's

reliance upon the report of Dr. Patel, which was not in the record. The BWC also argued that PTD compensation should be denied because relator had refused to participate in vocational rehabilitation.

{¶21} 16. In an order typed May 13, 2009, the commission issued an interlocutory order finding that the BWC had presented evidence of sufficient probative value to warrant granting the request for reconsideration based upon the citation to a report which was not in evidence. It was ordered that the matter be set for a new hearing.

{¶22} 17. The matter was heard before the commission on August 20, 2009, and, at that time, the commission indicated that the matter would be taken under advisement for further review and discussion.

{¶23} 18. Thereafter, on October 14, 2009, the commission exercised its continuing jurisdiction and vacated the order from the January 15, 2009 hearing, which had been mailed January 29, 2009. At the outset of the commission's order, the commission correctly identified all the allowed conditions in relator's claim. Thereafter, the commission proceeded to deny relator's application for PTD compensation. At this time, the commission again set forth the allowed conditions in relator's claim; however, the commission omitted the allowed conditions of lumbar sprain and left knee sprain. The commission relied on the reports of Drs. Zellers, Singer, and Byrnes, and concluded that relator was capable of performing sedentary work with no work limitations related to the allowed psychological condition. Thereafter, the commission considered the non-disability factors and relator's rehabilitation efforts as follows:

Non-Medical Disability Factors

The Injured Worker is 53 years old. Her age is considered a positive factor for re-employment. The Injured Worker has several years of potential employment before she reaches any typical retirement age, and is capable of learning new tasks or duties related to entry-level, unskilled, sedentary employment. The Injured Worker has about a sixteen (16) year work history, of which eight (8) years the Injured Worker worked as a bus driver. While in college, the Injured Worker worked at Republic Steel as an accounts receivable clerk, at temporary jobs and as a school monitor before she worked as a bus driver at the time of her injury. The Commission finds that the Injured Worker's sixteen (16) year work history is a neutral factor toward re-employment.

The Injured Worker is a high school graduate, and has additional education at a community college and university. The Injured Worker was in regular classes and had no apparent learning disabilities. The Injured Worker enrolled at Cuyahoga Community College and also spent two (2) semesters at Cleveland State University. Overall the Injured Worker completed over two (2) years towards a marketing degree. The Injured Worker also received training in electronics and computers. The Commission finds her educational background is also a positive factor toward obtaining sustained remunerative sedentary employment. The Injured Worker has demonstrated her ability to learn at the high school and on a college level, which is a positive factor for obtaining entry-level unskilled work. Most unskilled entry-level work only requires brief instruction or a short period of training to perform.

Rehabilitation Efforts

The Injured Worker was referred for rehabilitation services on three (3) occasions. The rehabilitation case was first closed on 06/20/2004 because the Injured Worker was medically unstable to participate. The Injured Worker was again referred for vocational rehabilitation on 04/12/2005. This case was closed on 08/07/2005 because the Injured Worker was medically unstable to participate because of conditions unrelated to her claim. The Injured Worker's last vocational rehabilitation on 10/05/2005 was closed on 12/26/2005 because the Injured Worker was no longer

> interested in vocational rehabilitation and return to work services and was going to pursue disability retirement.
>
> The Commission finds that pursuant to State ex rel. Cunningham v. Indus. Comm. (2001), 91 Ohio St.3d 261, State ex rel. Bowling v. National Can Corp. (1996), 77 Ohio St.3d 148, it is not unreasonable to expect an Injured Worker to participate in return-to-work efforts to the best of his or her abilities, or to take the initiative to improve re-employment potential. While extenuating circumstances can excuse an Injured Worker's participation in re-education or retraining efforts, injured workers should no longer assume that a participatory role or lack thereof will go unscrutinized.
>
> The Commission finds that permanent total disability compensation is a "compensation of last resort," to be awarded only after failure of all reasonable efforts to return to sustained remunerative employment, State ex rel. Wilson v. Indus. Comm. (1997), 80 Ohio St.3d 520.

Conclusion

> The Commission finds that, based on the reports of Dr. Zellers 03/21/2007, Dr. Singer 09/02/2008, Dr. Byrnes 09/02/2008 and the Injured Worker's age, education and work history, the Injured Worker maintains the ability to obtain and engage in entry-level unskilled sedentary work, and the ability to obtain and maintain long term employment. Therefore, as the Injured Worker is found to have the ability to engage in sustained remunerative employment, her IC-2 Application for Permanent Total Disability is denied.

{¶24} 19. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶25} In this mandamus action, relator raises the following issues: (1) the report of Dr. Zellers does not constitute some evidence upon which the commission could rely because he did not recognize all the allowed conditions; (2) the report of Dr. Singer does not constitute some evidence upon which the commission could rely because he simply checked the box indicating she could perform sedentary work without any additional

explanation; (3) the commission failed to consider all her allowed conditions as evidenced by the commission's omission of her lumbar sprain and left knee sprain from page two of its August 20, 2009 order; and (4) the commission indicated that she had only participated in vocational rehabilitation three times when, in fact, she had participated in vocational rehabilitation five times.

{¶26} The magistrate finds that the commission did not abuse its discretion as follows: (1) Dr. Zellers' report issued before relator's claim was additionally allowed for aggravation of pre-existing degenerative disc disease at L4-L5 and aggravation of pre-existing sacroilitis, does constitute some evidence upon which the commission could rely where, as here, the commission relied upon other medical reports as well; (2) Dr. Singer's report was not deficient and does constitute some evidence upon which the commission could rely; (3) the commission's failure to include the allowed conditions of lumbar sprain and left knee sprain when listing, for the second time, relator's allowed conditions, does not prove that the commission failed to consider those conditions; and (4) the commission's reference to relator's vocational efforts within three years of the filing of her application for PTD compensation instead of noting all of her attempts at vocational rehabilitation within the 13 years since the date of her injury does not constitute grounds to vacate the order.

{¶27} Relator first challenges the report of Dr. Zellers arguing that it cannot constitute some evidence upon which the commission could rely because Dr. Zellers did not consider all the allowed conditions when he opined that she could perform sedentary activities with the following physical restrictions: "[a] 10 lb. maximum lifting limited on an occasional, as-tolerated basis only"; "[n]o prolonged sitting, standing or ambulating";

"[t]his patient must be permitted to change body positions on a frequent basis"; "[n]o climbing activities"; "[n]o above groundwork should that environment pose a threat to the patient's safety"; "[n]o significant bending activities"; "[n]o squatting activities"; "[n]o repetitive activities involving the lower extremities"; "[t]his patient should not be exposed to excessive vibratory stimuli"; "[t]his patient should not be required to subject the anterior surface of her knees to direct pressure"; and "[t]his patient should not be permitted [to] perform safety sensitive activities while under the influence of sedative type medications."

{¶28} It is undisputed that an examining physician must accept all the allowed conditions of the claim in order to render an opinion or a report on the extent of disability that will constitute some evidence upon which the commission can rely. However, acceptance of the allowed conditions does not compel the examining physician to find an impairment related to those conditions, nor does it even compel the examining physician to find that an allowed condition still exists. This legal proposition was extensively discussed and applied in *State ex rel. Middlesworth v. Regal Ware, Inc.*, 93 Ohio St.3d 214, 2001-Ohio-1331, wherein the court stated:

> This controversy centers on Dr. Demeter's conclusion that "[a]t the present time I find no evidence to support the claim of interstitial pulmonary fibrosis with bilateral apical lung disease." The court of appeals interpreted this language as the doctor's refusal to accept the claim's allowed conditions. We disagree. Instead, we find our opinion in *State ex rel. Domjancic v. Indus. Comm.* (1994), 69 Ohio St.3d 693, 635 N.E.2d 372, to be dispositive.
>
> In *Domjancic*, an examining physician noted "[n]o evidence of a herniated disc L4-5 on the right"—the claim's allowed condition. That claimant, in turn, offered the very argument that Middlesworth presents. In rejecting that position, the *Domjancic* court concluded that "Dr. Gonzalez's report, at the outset, outlines *all* allowed conditions, substantiating his

> awareness of what the claimant's recognized conditions were. That the doctor, upon examination, found no evidence of a herniated disc, does not amount to a repudiation of the allowance. As the referee insightfully stated:
>
> " 'Dr. Gonzalez was not required to merely parrot the allowed conditions as his medical findings. It was Dr. Gonzalez's duty to report his actual clinical findings. Obviously, the doctrines of *res judicata* and *collateral estoppel* do not apply to limit what a doctor may find during his examination.' " (Emphasis *sic*.) *Id*. at 695-696, 635 N.E.2d at 375.
>
> Obviously, Dr. Demeter knew that a pulmonary condition was at issue. He referred to "interstitial lung disease" three times in his report. "Interstitial fibrosis" and "interstitial infiltrates" are also mentioned, and again, the allowance is quoted verbatim in his report. However, according to Dr. Demeter, the condition no longer existed. This is not a situation where the doctor acknowledged the condition's existence but refused to accept the commission's prior determination of industrial causal relationship. In this case, it is immaterial whether Dr. Demeter believed that the claim was correctly or incorrectly allowed years ago. What matters is how the condition was affecting claimant's ability to work *at the time of the examination*, and Dr. Demeter found no impact. Accordingly, the commission, as the sole evaluator of evidentiary weight and credibility, did not abuse its discretion in citing Dr. Demeter's report as "some evidence" of a capacity for sustained remunerative employment. *State ex rel. Burley v. Coil Packing, Inc.* (1987), 31 Ohio St.3d 18, 31 OBR 70, 508 N.E.2d 936.

(Emphasis sic.)

{¶29} Relator argues that Dr. Zellers' report indicates: (1) that he did not render an opinion as to all the allowed conditions because new conditions were subsequently allowed, and (2) that he failed to accept all the allowed conditions when he opined that relator's sprains of lumbar and left knee regions represented simple soft tissue injuries that typically stabilize and/or resolve within several weeks to several months and do not result in chronic subjective complaints and/or long-standing objective physical

examination findings nor symptoms. Applying the rationale from *Middlesworth*, the fact that Dr. Zellers opined that relator's lumbar and knee sprains had resolved and were not currently disabling does not establish that he failed to consider all the allowed conditions. As such, this argument fails.

{¶30} Relator also contends that Dr. Zellers' report cannot constitute some evidence upon which the commission could rely because two significant conditions were allowed in relator's claim after Dr. Zellers examined her and issued his report. If Dr. Zellers' report was the only report upon which the commission relied to find that relator's allowed physical conditions did not prevent her from performing some sedentary employment, then relator's argument would have merit. However, the commission also relied on the report of Dr. Singer, which, as will hereinafter be explained, does constitute some evidence upon which the commission properly relied to find that relator was capable of performing at a sedentary work level. Further, Dr. Zellers cannot be expected to anticipate the allowance of additional claims in the future and, given that his report contained objective findings and an opinion relative to the then allowed conditions, Dr. Zellers' report, in combination with Dr. Singer's report, does constitute some evidence upon which the commission could properly rely. Pursuant to *State ex rel. McEndree v. Indus. Comm.*, 10th Dist. No. 01AP-1013, 2002-Ohio-3503, even if Dr. Zellers' report did not constitute some evidence upon which the commission could rely, because the report of a second doctor (here Dr. Singer) indicated that relator was capable of performing at a sedentary work level, the commission's ultimate conclusion is supported by some evidence in the record. Again, relator's argument lacks merit.

{¶31} Relator next contends that Dr. Singer's report cannot constitute some evidence upon which the commission could rely because he simply checked a box indicating that relator was capable of performing at a sedentary work level without providing any further explanation. Relator fails to cite any case law in support of this argument.

{¶32} It is undisputed that Dr. Singer correctly identified all the allowed physical conditions in relator's claim, including the newly allowed conditions of aggravation of pre-existing degenerative disc disease L4-5 and aggravation of pre-existing sacroilitis. It is undisputed that Dr. Singer provided an accurate history of relator's injury and treatment and identified the reports which he reviewed. Dr. Singer provided his physical findings upon examination, concluded that relator's allowed conditions had reached MMI, assessed a 27 percent whole person impairment and then indicated on the physical strength rating form that relator was capable of performing sedentary work. This court specifically rejected a similar argument in *State ex rel. Boone v. Indus. Comm.*, 10th Dist. No. 04AP-607, 2005-Ohio-1531, wherein this court stated, at ¶9, 13-14:

> In his second objection, [claimant, Harry Boone] argues that the narrative report and the Physical Strength Assessment Form that Dr. Lutz completed are not "some evidence" supporting the commission's order because Dr. Lutz failed to provide "an explanation of the claimant's medical capacity as determined by the physician's medical findings."
>
> * * *
>
> On the Physical Strength Rating Form, which the commission required him to fill out in connection with his examination of [Boone], Dr. Lutz placed an "X" next to the statement, printed in bold letters, "This injured worker is capable of physical work activity as indicated below." He also placed an "X" immediately below the foregoing statement, next to the title,

> "Sedentary Work." Printed immediately below that title is the definition of "sedentary work." It is clear that Dr. Lutz opines that [Boone] is physically capable of engaging in any activity that falls within the parameters of the definition of "sedentary work" found on the form. This clearly indicates that Dr. Lutz believes [Boone] capable of performing all jobs that comport with the features of the definition provided. If he did not, he would not have so indicated on the form. Any further assessment of the appropriateness of any particular jobs in the sedentary category is appropriate for a vocational expert report, and any ultimate determination of such is to be made by the commission, not a physician.
>
> [Boone] argues that when the physician's classification of an injured worker's residual functional capacity is expressed primarily through the use of "X" marks on a preprinted form, the order denying PTD compensation is not supported by "some evidence." This court has previously rejected the identical argument on two occasions. See *State ex rel. Dreyer v. Anderson Twp.,* 10th Dist. No. 04AP-461, 2005-Ohio-366, at ¶ 4-5. See, also, *State ex rel. Poneris v. Indus. Comm.,* 10th Dist. No. 02AP-712, 2003-Ohio-2184, at ¶ 47-49.

(Footnotes omitted.)

{¶33} As such, this argument of relator is likewise not well-taken.

{¶34} Relator's third argument is that the commission failed to consider all of her allowed conditions when determining that she could perform some sustained remunerative employment at a sedentary work level. As noted in the findings of fact, when the commission exercised its continuing jurisdiction and vacated the prior order which had granted relator PTD compensation based upon the report of a physician which was not in evidence, the commission set forth the allowed conditions in relator's claim two times. The first time, the commission correctly identified all the allowed conditions, and the second time, the commission omitted relator's lumbar and left knee sprains. Given that the original order granting her PTD compensation was vacated based upon what

relator contends was a simple clerical error, relator contends that this simple clerical error must be considered significant and the order should be vacated. This magistrate disagrees.

{¶35} In the original order granting relator's PTD compensation, the SHO cited the report of Dr. Patel as the evidence that relator was unable to perform any sustained remunerative employment and did not consider any of the non-medical disability factors. There is no report of Dr. Patel contained in the evidence. Relator argues that it is obvious that the SHO meant to cite the report of Dr. Morley, rather than the report of Dr. Patel. In considering the BWC's motion asking the commission to exercise its continuing jurisdiction, the commission disagreed with the simple explanation that the SHO had inadvertently cited a doctor's report which was not in evidence. The magistrate finds that it was not an abuse of discretion for the commission to determine that a new hearing should take place under those circumstances.

{¶36} In the commission's order denying her PTD compensation, the commission accurately set out the allowed conditions at the beginning of the order. For whatever reason, the commission omitted those allowed conditions when listing her conditions a second time. It was unnecessary for the commission to list relator's allowed conditions twice in the same order. Although the commission inadvertently omitted relator's lumbar and left knee sprain the second time, the medical reports upon which the commission relied specifically considered those allowed conditions when the doctors rendered their opinions finding that relator was capable of performing at a sedentary work level. When considering the entire order and the medical reports upon which the commission relied,

the magistrate finds that relator is incorrect to argue that the commission clearly failed to consider all the allowed conditions in her claim.

{¶37} Relator's final argument is that the commission abused its discretion by holding her perceived failure to participate fully in vocational rehabilitation against her. Specifically, relator argues that the commission noted that she had only participated in vocational rehabilitation three times when, in fact, she had participated in vocational rehabilitation five times. Further, because her first efforts at rehabilitation were positive and enabled her to return to her former position of employment, relator argues that her efforts were sufficient and constituted positive evidence that she was not capable of returning to work.

{¶38} As noted in the findings of fact, the statement of facts prepared for the hearing on relator's application correctly included diagnostic testing, surgeries, and her rehabilitation involvement *within three years* of the filing of relator's application for PTD compensation. That evidence provided that, within the three years prior to the filing of her application, relator's rehabilitation file was closed twice because she was found to be medically unsuitable to participate in rehabilitation efforts and once because relator indicated that she was not interested in participating, since she did not believe she was medically capable of participating.

{¶39} Relator is correct in stating that she participated in rehabilitation previously and her file was originally closed in January 2000 after she was able to return to her former position of employment. She again attempted rehabilitation services and her file was closed a second time in December 2003 in order that relator could determine whether or not additional medical treatment was appropriate.

{¶40} In its brief, the commission concedes that relator was not able to participate in vocational rehabilitation. However, the commission argues that, because it considered the non-medical disability factors and found that relator was capable of performing some sustained remunerative employment, any error on its part regarding relator's participation in vocational rehabilitation does not constitute grounds for this court to issue a writ of mandamus. This magistrate disagrees.

{¶41} In reviewing the commission's order, the paragraph discussing relator's participation in vocational rehabilitation can be completely removed from the order without affecting the ultimate outcome reached by the commission. Because those paragraphs can be removed without changing the outcome, the magistrate finds that any error on the part of the commission in this regard is immaterial and harmless and relator was not prejudiced or in any other way adversely affected by the commission's statements regarding her participation in vocational rehabilitation. Where the commission provides an alternative rationale for its determination which withstands the scrutiny of mandamus review and provides an independent basis for the commission's decision, the fact that the commission incorrectly applied the law in a separate portion of the order does not constitute grounds for the granting of a writ of mandamus. *State ex rel. Crown Cork & Seal, Co., Inc. v. Indus. Comm.*, 10th Dist. No. 04AP-909, 2005-Ohio-3788; *State ex rel. Kinzer v. Sencorp/Senco*, 10th Dist. No. 02AP-1054, 2003-Ohio-4178. Because the commission's order stands on its own, even after this portion of the order is removed, the magistrate finds that relator is not entitled to a writ of mandamus ordering the commission to grant her PTD compensation.

{¶42} Based on the foregoing, although relator is correct that the commission omitted her early participation in vocational rehabilitation, relator has not demonstrated that the commission abused its discretion by finding that she was capable of performing some sustained remunerative employment at a sedentary work level. Therefore, it is this magistrate's decision that this court should deny relator's request for a writ of mandamus.

/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).