

{¶2} This court referred the matter to a magistrate pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The parties filed a stipulated record and merit briefs. The magistrate issued a decision, including findings of fact and conclusions of law, which is appended to this decision. In the decision, the magistrate recommended that this court deny relator's request for a writ.

{¶3} Relator has filed a timely objection to the magistrate's decision. The commission has filed a memorandum in support of the magistrate's decision. The matter is therefore before this court for a full, independent review.

{¶4} In its objection, relator presents the same substantive arguments previously raised before and cogently addressed by the magistrate. Specifically, relator argues that the commission abused its discretion by relying on evidence that was internally inconsistent and contradictory. As a result, relator argues the evidence could not be used by the commission to support its decision. We disagree and instead follow the well-reasoned analysis set forth by the magistrate on this issue.

{¶5} After an examination of the magistrate's decision, as well as an independent review of the record and relevant law, we conclude that the magistrate has sufficiently discussed and determined the issues raised by relator. We therefore overrule relator's objection to the magistrate's decision and adopt the appended decision as our own, including the findings of fact and conclusions of law set forth therein. As a result, we deny relator's request for a writ of mandamus.

Objection overruled; writ denied.

TYACK, P.J., and BROWN, J., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Homer Masters,	:	
	:	
Relator,	:	
	:	
v.	:	No. 09AP-894
	:	
Nationsway Transport Service, Inc.,	:	(REGULAR CALENDAR)
and	:	
Industrial Commission of Ohio,	:	
	:	
Respondents.	:	

MAGISTRATE'S DECISION

Rendered on March 12, 2010

Butkovich & Crosthwaite Co., L.P.A., Joseph A. Butkovich, and Erin C. Enderle, for relator.

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

IN MANDAMUS

{¶6} Relator, Homer Masters, 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 his application for permanent total

disability ("PTD") compensation and ordering the commission to grant him that compensation.

Findings of Fact:

{¶7} 1. Relator sustained a work-related injury on January 5, 1997, and his claim has been allowed for "SPRAIN LUMBAR REGION; DEGENERATIVE DISC DISEASE L5-S1."

{¶8} 2. Relator received temporary total disability compensation for approximately one year.

{¶9} 3. In November 2001, relator filed an application for PTD compensation.

{¶10} 4. Relator was examined by Luis A. Loimil, M.D. In his September 9, 1999 report, Dr. Loimil made the following findings: flexion of 59 degrees; extension of 15 degrees; left lateral bending of 31 degrees; and right lateral bending of 26 degrees. Dr. Loimil opined that relator had reached maximum medical improvement ("MMI"), assessed a ten percent permanent partial impairment, and noted that relator had, at that time, returned to his pre-injury job.

{¶11} 5. Relator was examined by Vincent E. Wardlow, D.C. In his October 9, 2000 report, Dr. Wardlow made the following findings: flexion 40 degrees; extension 20 degrees; left lateral bending 20 degrees; and right lateral bending 25 degrees. Dr. Wardlow also indicated that relator had severe pain and restriction with flexion, extension, and left lateral bending, and moderate pain and restriction with right lateral bending. In that report, Dr. Wardlow also stated:

* * * I feel that the recovery time for this injury has magnified due to the complexity of the complicating factors including Mr. Masters' weight and pre-existing degenerative and arthritic findings, etc., including the above x-rays and MRI

reports. I don't feel the injured worker is capable of any sustained employment and it is my professional opinion that he is not a candidate for Vocational Rehabilitation, work conditioning, work hardening, or any job search program.
* * *

* * * I would recommend three months of treatment including manual traction with moist heat or ultrasound applied with a proper diet and a therapeutic exercise regime done at home.
* * * If there is no improvement after the first three months of treatment, it is my professional opinion that Mr. Masters should be sent or a permanent partial disability rating at that time. Due to the fact that Mr. Masters is a 62-year-old, severely obese male in poor overall health condition, it was recommended that if he did not improve in the above timeframe that he may want to start the proceedings for filing Social Security disability. * * *

{¶12} 6. Relator was also examined by George Orphanos, M.D. In his November 28, 2000 report, Dr. Orphanos made the following findings: flexion was 55 to 60 degrees; extension 30 degrees; left lateral bending 28 degrees; and right lateral bending 25 degrees. Dr. Orphanos concluded that relator had reached MMI, that, in all likelihood, he would not be able to return to his former position of employment as a truck driver and assessed a 12 percent whole person impairment.

{¶13} 7. Relator was also examined by Clifford H. Carlson, M.D. In his February 10, 2002 report, Dr. Carlson made the following findings: flexion of 19 degrees; extension of 17 degrees; left lateral bending of 20 degrees; and right lateral bending of 24 degrees. Dr. Carlson opined that relator had reached MMI, assessed an eight percent whole person impairment, and recommended that relator could stand and walk for four hours or sit for four hours, cumulative. At any one time, he opined that relator could only sit for one-half hour or stand and walk for 20 minutes.

{¶14} 8. A file review was completed by James H. Rutherford, M.D. In his February 7, 2005 report, Dr. Rutherford listed the medical records which he reviewed and made no mention of the report of Dr. Wardlow. Dr. Rutherford concluded that relator was capable of performing sedentary activities.

{¶15} 9. Relator's application was heard before a staff hearing officer ("SHO") on July 13, 2005, and was denied. In that order, the SHO noted relator's serious health issues:

* * * The injured worker suffers from numerous non-allowed medical conditions, including morbid obesity, hypertension, chronic bronchitis and emphysema, carotid artery disease, and degenerative arthritis in multiple joints. In addition, he suffered a major stroke in early 2003, which has left him paralyzed on the left side, incontinent of bowel and bladder, and confined to a bed/wheelchair/power scooter.

{¶16} 10. The commission relied on the report of Dr. Rutherford in concluding that relator was not entitled to PTD compensation.

{¶17} 11. Relator filed a mandamus action in this court and, in *State ex rel. Masters v. Nationsway Transport Serv., Inc.*, 10th Dist. No. 07AP-167, 2008-Ohio-295, this court granted a writ of mandamus ordering the commission to conduct further proceedings regarding relator's PTD application based upon this court's finding that Dr. Rutherford's report did not constitute some evidence upon which the commission could rely because of his failure to indicate that he had reviewed and accepted the objective findings of Dr. Wardlow.

{¶18} 12. Following this court's direction, the commission had a file review conducted by Robin G. Stanko, M.D. In his September 4, 2008 report, Dr. Stanko listed the reports of each of the aforementioned doctors' reports, which were relevant to a

determination of whether relator was permanently and totally disabled. Dr. Stanko noted the physical findings with regards to flexion, extension, and left and right lateral bending for each of those reports, with the exception of Dr. Wardlow. With regard to the report of Dr. Wardlow, Dr. Stanko stated:

* * * Dr. Wardlow reports that the claimant states that anything, such as sitting, standing, lifting or bending, increases his spinal discomfort and he complains of numbness and tingling in his leg. The claimant reported that his walking tolerance is one block. Dr. Wardlow indicates that x-ray reports dated 12/21/99 and 2/1/00 reported degenerative disc disease found at L5 and S1 with no disc herniation. Dr. Wardlow reported that Mr. Masters is a 63-year-old who is severely obese and in poor overall health condition.

In the discussion portion of his report, Dr. Stanko stated:

* * * In reviewing the medical record, it appears that the biomechanics of the original injury was consistent with a muscle strain. * * * X-rays indicated mild degenerative changes of the lumbosacral spine. An MRI of the lumbosacral spine done three years after the injury demonstrated no disc herniation with mild degenerative change at the L5-S1 level, and indicated that the other remaining lumbar levels were normal. This MRI finding would be fairly common and consistent with the natural aging process. In my opinion, his lumbosacral MRI findings were minor and considering his obesity, I would have expected more disc bulging and degenerative changes in the lumbosacral spine.

In evaluating relator's physical strength, Dr. Stanko stated:

In evaluating a physical strength rating, I considered his work related injury allowed conditions, not his general medical condition. Medical records from 1/7/97 indicate he weighed 355 lbs. Medical records indicate that he also had hypertension and COPD (chronic bronchitis and emphysema), carotid artery disease, as well as degenerative joint disease of the neck, shoulders, and knees. Later medical records indicate he had a stroke. A functional capacity examination in May 2000 indicates the claimant had

a lifting/carrying maximum of 10 lbs. Dr. Wardlow on 10/9/00 reported that if he did not improve with therapy in three months that the claimant should consider filing for Social Security Disability insurance given that he was a "severely obese male in poor overall health condition."

With regard to all of relator's conditions, both allowed and non-allowed health issues,

Dr. Stanko stated:

SSDI disability considers all medical problems including his non-work related problems. One issue with the functional capacity exam, in my opinion, is that it does not discriminate between poor cardiopulmonary endurance (resulting from obesity, hypertension, and COPD) versus impaired musculoskeletal strength and endurance. In addition, his FCE does not distinguish impaired function with respect to the allowed musculoskeletal condition versus impaired function from the non-work related cervical, shoulder and knee arthritis. Given that the original injury is consistent with a muscle strain, in my opinion, a work restriction of medium work activity is appropriate with respect [to] the allowed conditions in the BWC claim. An exam by Dr. Luis Loimil done 8/26/99, approximately two and a half years following his injury, opined that he could do medium physical demand classification of work. (However his actual work capacity currently would be much less when considering his various non-work related medical conditions.)

Ultimately, Dr. Stanko opined that relator had reached MMI, assessed a five percent whole person impairment with respect to the allowed conditions of sprain lumbar region and degenerative disc disease L5-S1, and concluded that relator could perform activity at medium work levels, lifting up to 20 pounds frequently and 50 pounds occasionally.

{¶19} 13. Relator's application was re-heard before an SHO on October 31, 2008. In a corrected order, the commission relied on the report of Dr. Stanko and denied relator's application for PTD compensation. Based upon that report, the commission determined that, based solely upon the allowed conditions in the claim, relator could

perform at a medium work level. Thereafter, the commission considered the non-medical disability factors as follows:

The injured worker is 70 years old. The Staff Hearing Officer finds that the injured worker's age is not a positive factor toward reemployment. However, age alone is not determinative on the issue of permanent total disability. The injured worker has a 10th grade education, a GED, and has the ability to read, write and do basic math. The Staff Hearing Officer finds the injured worker's education is a positive factor toward reemployment. The injured worker possesses the educational background to learn the duties to perform entry-level work in the medium or less range. The injured worker has a 30 year work history in a variety of jobs that include skilled and semi-skilled light to medium work. He has demonstrated a steady work history, working some jobs for at least 15 years. The injured worker has demonstrated the ability to learn and maintain long-term employment. The Staff Hearing Officer finds that the injured worker's work history is also a positive factor toward reemployment. Although the injured worker would no longer be able to drive a truck, he could use prior experience to perform work such as a dispatcher or insurance salesman, or in the alternative, he could learn the tasks necessary to perform entry-level unskilled work in the medium or less exertional range. Such work usually requires only a brief explanation or demonstration or minimal training. Therefore, considering only the allowed conditions in this claim, the Staff Hearing Officer finds the injured worker retains the ability to engage in sustained remunerative employment in the medium or less exertional range.

At the hearing, relator challenged the report of Dr. Stanko, arguing that he did not accept the allowed conditions of degenerative disc disease at L5-S1, and not listing the range of motion findings of Dr. Wardlow, relator argued that Dr. Stanko did not consider those exam findings. The SHO addressed that issue as follows:

In reviewing Dr. Stanko's report, the Staff Hearing Officer finds Dr. Stanko lists Degenerative Disc Disease at L5-S1 as an allowed condition in this claim. He references Dr. Wardlow's report and lists Dr. Wardlow's X-ray findings in regard to degenerative disc disease at L5-S1. In the

discussion section of Dr. Stanko's report, he notes the degenerative changes, refers to the findings as mild, and states he would have expected more changes given the injured worker's obesity. Referring to Dr. Wardlow's 10/09/2000 report, Dr. Stanko notes the finding of decreased sensation in sensory exam in the right L5-S1 distribution. Dr. Stanko then refers to an 11/28/2000 report of Dr. Orphanos who finds normal motor function, etc. Later in the report, Dr. Stanko again references Dr. Wardlow's finding that if the injured worker does not improve with therapy in 3 months, he should pursue Social Security Disability insurance. When giving his opinion, Dr. Stanko states his conclusion is based on the allowed conditions including degenerative disc disease L5-S1.

Although Dr. Stanko does not list the specific range of motion findings of Dr. Wardlow, the Staff Hearing Officer finds multiple references to findings of Dr. Wardlow throughout Dr. Stanko's report. Further, Dr. Stanko specifically includes the allowed degenerative disc disease in reaching his conclusion. The Staff Hearing Officer finds Dr. Stanko's report is not defective and may be relied upon by the Staff Hearing Officer.

{¶20} 14. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶21} For the reasons that follow, it is this magistrate's decision that this court should deny relator's request for a writ of mandamus.

{¶22} In order for this court to issue a writ of mandamus as a remedy from a determination of the commission, relator must show a clear legal right to the relief sought and that the commission has a clear legal duty to provide such relief. *State ex rel. Pressley v. Indus. Comm.* (1967), 11 Ohio St.2d 141. A clear legal right to a writ of mandamus exists where the relator shows that the commission abused its discretion by entering an order which is not supported by any evidence in the record. *State ex rel. Elliott v. Indus. Comm.* (1986), 26 Ohio St.3d 76. On the other hand, where the record

contains some evidence to support the commission's findings, there has been no abuse of discretion and mandamus is not appropriate. *State ex rel. Lewis v. Diamond Foundry Co.* (1987), 29 Ohio St.3d 56. Furthermore, questions of credibility and the weight to be given evidence are clearly within the discretion of the commission as fact finder. *State ex rel. Teece v. Indus. Comm.* (1981), 68 Ohio St.2d 165.

{¶23} The relevant inquiry in a determination of permanent total disability is claimant's ability to do any sustained remunerative employment. *State ex rel. Domjancic v. Indus. Comm.* (1994), 69 Ohio St.3d 693. Generally, in making this determination, the commission must consider not only medical impairments but, also, the claimant's age, education, work record and other relevant nonmedical factors. *State ex rel. Stephenson v. Indus. Comm.* (1987), 31 Ohio St.3d 167. Thus, a claimant's medical capacity to work is not dispositive if the claimant's nonmedical factors foreclose employability. *State ex rel. Gay v. Mihm* (1994), 68 Ohio St.3d 315. The commission must also specify in its order what evidence has been relied upon and briefly explain the reasoning for its decision. *State ex rel. Noll v. Indus. Comm.* (1991), 57 Ohio St.3d 203.

{¶24} Relator first contends that Dr. Stanko did not truly accept all the allowed conditions and that his report is equivocal and internally inconsistent. This magistrate disagrees.

{¶25} A doctor's report, which does not consider all the allowed conditions is fatally flawed and cannot be relied upon by the commission to support the denial of compensation. *State ex rel. Eberhardt v. Flexible Corp.* (1994), 70 Ohio St.3d 649, 657. In *Eberhardt*, the court stated:

* * * [E]quivocation occurs when a doctor repudiates an earlier opinion, renders contradictory or uncertain opinions,

or fails to clarify an ambiguous statement. Ambiguous statements, however, are considered equivocal only while they are unclarified. [*State ex rel. Paragon v. Indus. Comm.* (1983), 5 Ohio St.3d 72]. Thus, once clarified, such statements fall outside the boundaries of [*State ex rel. Jennings v. Indus. Comm.* (1982), 1 Ohio St.3d 101] and its progeny.

Moreover, ambiguous statements are inherently different from those that are repudiated, contradictory or uncertain. Repudiated, contradictory or uncertain statements reveal that the doctor is not sure what he means and, therefore, they are inherently unreliable. Such statements relate to the doctor's position on a critical issue. Ambiguous statements, however, merely reveal that the doctor did not effectively convey what he meant and, therefore, they are not inherently unreliable. Such statements do not relate to the doctor's position, but to his communication skills. * * *

{¶26} At the very beginning of his report, Dr. Stanko correctly listed the allowed condition of sprain lumbar region and degenerative disc disease L5-S1. Relator points to the discussion portion of Dr. Stanko's report, which was included in the findings of fact. In that paragraph, Dr. Stanko stated:

* * * In reviewing the medical record, it appears that the biomechanics of the original injury was consistent with a muscle strain. * * * X-rays indicated mild degenerative changes of the lumbosacral spine. An MRI of the lumbosacral spine done three years after the injury demonstrated no disc herniation with mild degenerative change at the L5-S1 level, and indicated that the other remaining lumbar levels were normal. This MRI finding would be fairly common and consistent with the natural aging process. In my opinion, his lumbosacral MRI findings were minor and considering his obesity, I would have expected more disc bulging and degenerative changes in the lumbosacral spine.

{¶27} Relator contends that the above statements are evidence that Dr. Stanko did not truly consider all the allowed conditions. The magistrate finds that relator is taking those statements out of context because, when taken as a whole, it is clear that Dr.

Stanko considered all the allowed conditions. Dr. Stanko was merely indicating that, because of relator's obesity, he expected to see more disc bulging and degenerative changes than were apparent on the MRI. This goes to the severity of the allowed condition and not to whether he actually considered and accepted the allowed condition. As such, this portion of relator's argument is rejected.

{¶28} Relator also argues that Dr. Stanko's report is equivocal and internally inconsistent. Relator points to the following two statements: (1) "[g]iven that the original injury is consistent with a muscle strain, in my opinion, a work restriction of medium work activity is appropriate with respect [to] the allowed conditions in the BWC claim," and (2) "Based on the *Guides to the Evaluation of Permanent Impairment, Fifth Edition*, in my opinion, the impairments of the claimant place him in DRE Lumbar Category II using Table 15-3 (page 384); giving him a permanent impairment of 5% whole person with respect to the allowed conditions of sprain lumbar region and degenerative disc disease L5-S1. With respect to these allowed conditions, I feel the claimant could perform activity at medium work levels, that is lifting up to 20 lbs. frequently and 50 lbs. occasionally."

{¶29} Relator contends the fact that Dr. Stanko said that the original injury is consistent with a muscle strain and then, in the next paragraph, stated that the allowed conditions are lumbar strain and degenerative disc disease L5-S1 clearly renders his report equivocal and inconsistent. Relator is picking apart Dr. Stanko's report unfairly. Following the sentence, "[g]iven that the original injury is consistent with a muscle strain, in my opinion, a work restriction of medium work activity is appropriate with respect [to] the allowed conditions in the BWC claim," Dr. Stanko pointed to Dr. Loimil's August 1999 report and his opinion that relator could perform medium physical demand classification of

work. Dr. Stanko then indicates that, at this point in time, when considering his various non-work related medical conditions, relator's actual work capacity would be much less than medium. Essentially, what Dr. Stanko is saying is that relator's allowed conditions have remained relatively unchanged over time. There is absolutely nothing equivocal or internally inconsistent about his statements.

{¶30} Relator also contends that Dr. Stanko's failure to specifically set forth Dr. Wardlow's objective exam findings clearly establishes that he did not accept the factual findings of Dr. Wardlow and that, pursuant to *State ex rel. Wallace v. Indus. Comm.* (1979), 57 Ohio St.2d 55, his report cannot constitute some evidence upon which the commission could rely. This magistrate disagrees.

{¶31} The following chart sets out the range of motion findings of the doctors from 1997 through 2002:

	Fagerland 1997	Loimil 1999	Orphanos 2000	Wardlow 2000	Carlson 2002
Flexion	20°	59°	55-60°	40°	19°
Extension	5°	15°	30°	20°	17°
Left Lateral	5°	31°	28°	20°	20°
Right Lateral	5°	26°	25°	20°	24°

{¶32} The above table makes it very easy to see that, between 1997 and 2002, the doctors made range of motion findings across a wide spectrum:

Flexion:	19° - 60°
Extension:	5° - 30°
Left Lateral:	5° - 31°
Right Lateral:	5° - 26°

{¶33} When considering the above ranges, and considering that Dr. Wardlow's range of motion findings were in between the lowest and the highest findings found by the

various doctors, the magistrate wonders which objective findings relator actually wanted Dr. Stanko and the commission to consider. Dr. Wardlow's findings were somewhere in between the lowest and the highest range of motions found by the doctors.

{¶34} Dr. Stanko discussed Dr. Wardlow's report and all the other reports he was given to consider. Further, although Dr. Stanko did not list Dr. Wardlow's range of motion findings, relator fails to point out that Dr. Stanko did state that, "a physical exam by Dr. Wardlow on 10/9/00 report[ed] decreased sensation in a sensory exam in the right L5-S1 distribution." Clearly, Dr. Stanko was aware of Dr. Wardlow's findings. The fact that he did not list Dr. Wardlow's objective range of motion findings is not evidence that he did not properly consider Dr. Wardlow's report or his exam findings and, given that Dr. Wardlow's range of motion findings were in between the lowest and highest made by the other doctors, relator's argument is not convincing and the magistrate rejects it.

{¶35} Relator also points out that the SHO issued a corrected order, but argues the SHO did not have the jurisdiction to do so. Relator asserts that this constitutes an abuse of discretion. This magistrate disagrees.

{¶36} The hearing before the SHO was October 31, 2008. On November 16, 2008, the SHO's dictation was received for both the order and the corrected order. On November 21, 2008, both the order and corrected order were typed. For some unknown reason, the order was mailed November 26, 2008, but the corrected order was not mailed until November 29, 2008. The only difference in the two orders is that the corrected order contains two paragraphs addressing Dr. Stanko's report. Those two paragraphs are absent from the original order, which counsel argues did not comply with *Noll*. The corrected order complies with *Noll*, but relator is unhappy with the result.

{¶37} This magistrate cannot think of a good reason to find that the commission abused its discretion by caring what would have been an obvious omission. Counsel asserts that the commission cannot be permitted to do this or they will do it often and claimants will not have final orders.

{¶38} On occasion, this court sua sponte issues nunc pro tunc decisions when an obvious error/omission is discovered. The magistrate cannot find any reason to conclude that the commission cannot do likewise when necessary. Further, relator is not hurt by this action. If anything, the commission's action in issuing a corrected order saves relator the time required for this court to grant a writ ordering the commission to comply with *Noll*. This does not constitute an abuse of discretion warranting the issuance of a writ of mandamus.

{¶39} Based on the foregoing, it is this magistrate's conclusion that relator has not demonstrated the commission abused its discretion by relying on the report of Dr. Stanko and denying relator's application for permanent total disability compensation, and 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).