[Cite as *State ex rel. Chrysler L.L.C. v. Indus. Comm.*, 2010-Ohio-85.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Chrysler LLC,	:	
Relator,	:	
v.	:	No. 08AP-1005
The Industrial Commission of Ohio and Lois J. Robinson,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on January 14, 2010

Taft Stettinius & Hollister LLP, and *Andrew R. Thaler*, for relator.

Richard Cordray, Attorney General, and *Colleen C. Erdman*, for respondent Industrial Commission of Ohio.

E.S. Gallon & Associates, *Joseph R. Ebenger* and *Corey L. Kleinhenz*, for respondent Lois J. Robinson.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

McGRATH, J.

{¶1} In this original action, relator, Chrysler LLC, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order awarding respondent Lois J. Robinson ("claimant") a 22-percent increase in her percentage of permanent partial disability compensation ("PPD") pursuant to R.C.

4123.57(A) and to enter an order that offsets a prior R.C. 4123.57(B) scheduled loss award against any award of an increase in her percentage of PPD.

{¶2} This matter was referred to a magistrate of this court pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate examined the evidence and issued a decision, including findings of fact and conclusions of law, which is appended to this decision. Therein, the magistrate concluded the commission's award of a 22-percent increase in the percentage of PPD includes double recovery for the loss of claimant's five toes on her left foot. Based on this conclusion, the magistrate recommended that this court issue a writ of mandamus ordering the commission (1) to vacate the August 25, 2008 order of its staff hearing officer ("SHO"), that affirmed a 22-percent increase in PPD, (2) to obtain corrected medical reports from the relied-upon doctors, and (3) to enter an new order that eliminates double recovery.

{¶3} Both claimant and the commission filed objections to the magistrate's decision. Claimant submits the following objections:

> [1.] THE COMMISSION DID NOT ABUSE ITS DISCRETION IN ITS AUGUST 25, 2008 SHO ORDER BY AWARDING CLAIMANT A 22% INCREASE IN HER PPD AWARD UNDER R.C. 4123.57(A) SINCE THIS AWARD COMPENSATED CLAIMANT FOR IMPAIRMENT DUE TO ALLOWED CONDITIONS WHICH WERE *NOT PREVIOUSLY COMPENSATED FOR IN HER PRIOR AWARD* UNDER R.C. 4123.57(B).
>
> [2.] THE MAGISTRATE FAILED TO APPLY THE APPROPRIATE STANDARD OF REVIEW IN RECOMMENDING THIS COURT ISSUE A WRIT OF MANDAMUS ORDERING THE COMISSION TO VACATE ITS AUGUST 25, 2008 SHO ORDER.
>
> [3.] THE MAGISTRATE MISAPPLIES THE LAW WHEN HE STATES "COMMISISON RELIANCE UPON DR. KAKDE'S

> 44 PERCENT IS FATAL TO THE COMMISSION'S 22 PERCENT DETERMINATION *IN THE ABSENCE OF ANY EXPLANATION IN THE COMMISSION'S ORDER* AS TO HOW THE COMMISSION ARRIVED AT 22 PERCENT" SINCE IT IS WELL SETTLED LAW THAT THE COMMISSION IS NOT REQUIRED TO EXPLAIN THE BASIS FOR ITS PPD AWARDS WITHIN THEIR ORDERS.

(Emphasis sic.)

{¶4} The commission submits the following objection:

> The magistrate erred in restricting the commission as to what evidence it must rely on in the remand of an issue on appeal to the SHO.

{¶5} This cause is now before the court for a full review. No party has filed objections to the magistrate's findings of fact, and upon an independent review of the same, we adopt them as our own.

{¶6} In her first objection, claimant contends the magistrate erred in finding the commission abused its discretion when it awarded a 22-percent increase in the percentage of PPD because, contrary to the magistrate's conclusion, claimant was not compensated for the same condition. According to claimant, even if the required offset was applied here, based on the record, the commission could have arrived at the same percentage determination. The magistrate's concern, however, is that the record is free from *any* indication that the required offset was applied in this case. Thus, claimant's suggestion that even with the offset the commission could have arrived at the same percentage determination is purely speculative. For this and the reasons set forth in the magistrate's decision, we do not find claimant's position well-taken.

{¶7} In her second objection claimant contends the magistrate failed to apply the appropriate standard of review, and in her third objection claimant contends the

magistrate misapplied the law by requiring the commission to explain the basis for its PPD percentages within its order. Upon review, and for the reasons set forth in the magistrate's decision, we find no merit to these objections.

{¶8} Accordingly, claimant's objections to the magistrate's decision are overruled.

{¶9} In its sole objection, the commission challenges the magistrate's recommendation that the writ of mandamus order the commission to obtain corrected medical reports from the doctors upon which it administratively relied to determine the percentage of PPD award. We find the commission's position well-taken. While we agree with the magistrate's conclusion that it is necessary to issue a writ ordering the commission to vacate its SHO's August 25, 2008 order that affirmed the district hearing officer's ("DHO") determination of a 22-percent increase in PPD, we do not agree that the commission must "obtain corrected medical reports from the relied upon doctors" in order to adjudicate the application. Rather, we conclude that the commission should have the ability to obtain new medical reports, if such are needed, and not be bound solely to corrected medical reports from the relied-upon doctors. Therefore, we sustain the objection of the commission.

{¶10} Following an independent review of the matter, we find that the magistrate has properly determined the facts and applied the appropriate law, but erred in restricting the commission's discretion to adjudicate the matter on remand. Therefore, the claimant's objections to the magistrate's decision are overruled, and the commission's objection to the magistrate's decision is sustained. We adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein with the

exception of the direction given to the commission that it obtain and rely solely on corrected medical reports from the relied-upon doctors.

{¶11} In accordance with the magistrate's decision, we grant the requested writ of mandamus and order the commission (1) to vacate the August 25, 2008 order of its SHO affirming the DHO's determination of a 22-percent increase in PPD, (2) to obtain corrected medical reports from the relied-upon doctors, or to obtain other evidence to delineate a setoff for amputation award, and (3) in a manner consistent with this decision, enter a new order that eliminates the issue of double recovery.

Claimant's objections overruled;
commission's objection sustained;
writ of mandamus granted.

KLATT and CONNOR, JJ., concur.

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APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Chrysler LLC,	:	
Relator,	:	
v.	:	No. 08AP-1005
The Industrial Commission of Ohio and Lois J. Robinson,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on September 30, 2009

Taft Stettinius & Hollister LLP, and *Andrew R. Thaler*, for relator.

Richard Cordray, Attorney General, and *Colleen C. Erdman*, for respondent Industrial Commission of Ohio.

E.S. Gallon & Associates, *Joseph R. Ebenger* and *Corey L. Kleinhenz*, for respondent Lois J. Robinson.

IN MANDAMUS

{¶12} In this original action, relator, Chrysler LLC, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order awarding to respondent Lois J. Robinson ("claimant") a 22 percent increase in her

percentage of permanent partial disability ("PPD") pursuant to R.C. 4123.57(A), and to enter an order that offsets a prior R.C. 4123.57(B) scheduled loss award against any award of an increase in her percentage of PPD.

Findings of Fact:

{¶13} 1. On September 29, 1998, claimant sustained an industrial injury when her left foot was run over by a forklift driven by a co-worker. She sustained a crushing injury that resulted in "trans-metatarsal" amputations of all her toes. On the date of injury, claimant was employed by relator, a self-insured employer under Ohio's workers' compensation laws.

{¶14} 2. The industrial claim (No. 98-546029) was initially allowed for "laceration left ankle; crushing injury left foot; fracture left metatarsal."

{¶15} 3. Following a February 10, 2000 hearing, a district hearing officer ("DHO") issued an order awarding claimant R.C. 4123.57(B) scheduled loss compensation for the loss of all five toes of her left foot. The DHO's order of February 10, 2000 awards 70 weeks of compensation for the loss of the toes. Apparently, the DHO's order was not administratively appealed, and relator, as a self-insured employer, paid the award.

{¶16} 4. Later, the industrial claim was additionally allowed for "Depressive Disorder NEC" and "Major Depressive Disorder, Recurrent."

{¶17} 5. On March 14, 2007, at relator's request, claimant was examined by Paul T. Hogya, M.D., who issued a six-page narrative report dated April 3, 2007. In his report, Dr. Hogya opined: "[T]here IS objective medical evidence to substantiate the diagnosis of 'left chronic plantar foot ulcer.' " (Emphais sic.) He further opined that the allowed

physical conditions of the claim had reached maximum medical improvement. Dr. Hogya further wrote:

> * * * With regard to Ms. Robinson's medical conditions, I am able to establish a degree of Permanent Partial Impairment, including the chronic left plantar foot ulcer. The claimant indicates she has already received an amputation award in the claim, so Permanent Partial Impairment for Amputation is not warranted within this impairment rating as it would be duplicative. For skin loss with grafting and active drainage of the foot, she is allowed **10% whole person impairment** per Table 17-36 of the *AMA Guides to the Evaluation of Permanent Impairment, 5th Edition*.

(Emphasis sic.)

{¶18} 6. Following an April 9, 2007 hearing, a DHO additionally allowed the claim for "left foot ulcer" based upon the report of Dr. Hogya. The DHO also awarded temporary total disability ("TTD") compensation for a closed period ending with the date of Dr. Hogya's March 14, 2007 examination.

{¶19} 7. Earlier, on June 9, 2006, claimant filed an application for the determination of her percentage of PPD.

{¶20} 8. Claimant's application prompted the Ohio Bureau of Workers' Compensation ("bureau") to request an evaluation from psychologist Giovanni M. Bonds, Ph.D. Following his November 6, 2006 examination, Dr. Bonds opined:

> The percentage of permanent partial impairment due to the allowed conditions of Depressive Disorder NEC and Major Depressive Disorder, recurrent is 10 percent of the body as a whole based upon the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, Table 13-8. * * *

{¶21} 9. On November 16, 2006, at the bureau's request, claimant was examined by Alan R. Kohlhaas, M.D., for the allowed physical conditions of the claim. In his report, Dr. Kohlhaas opined:

> Issue #1: Has the injured worker sustained a percentage of permanent partial impairment as a result of the allowed injuries?
>
> Response: Yes, but due to the fact that she's not at MMI with an open wound, it's unable to be determined at this time, therefore her impairment rating in my opinion, is 0%, based on the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition.
>
> Ms. Robinson has a 0% whole person impairment for the allowed conditions of injury date 9-29-98, based on the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, since she's not at MMI due to an open wound on her left foot.

{¶22} 10. On November 27, 2006, the bureau issued a tentative order finding that claimant has ten percent PPD based upon the report of Dr. Bonds. Relator objected to the bureau's order.

{¶23} 11. On January 31, 2007, a DHO heard relator's objection to the bureau's order. Thereafter, the DHO issued an order finding that claimant has ten percent PPD based upon the report of Dr. Bonds. Apparently, relator did not move for re-consideration of the DHO's order.

{¶24} 12. On May 9, 2007, claimant filed an application for a determination of an increase in her percentage of PPD.

{¶25} 13. Claimant's May 9, 2007 application prompted the bureau to request an examination of claimant by Susheel Kakde, M.D.

{¶26} 14. Following a September 6, 2007 examination, Dr. Kakde issued a report:

> * * * [I]t is my opinion that the patient has 20% whole person impairment for the newly allowed conditions of 707.15 Ulcer of Other Part of Foot Left, in the claim. She has 18% WPI

> increase in the impairment due to the newly allowed condition of 707.15 Ulcer of Other Part of Foot Left. * * *

{¶27} 15. Apparently, on October 5, 2007, the bureau issued a tentative order regarding claimant's application to which relator objected.

{¶28} 16. Following a December 4, 2007 hearing, a DHO issued an interlocutory order referring the application back to the bureau for a "new orthopedic examination" because Dr. Kakde's report of September 6, 2007 fails to consider all allowed conditions of the claim. The DHO's order of December 4, 2007 instructed the bureau:

> The new report is to consider all the allowed orthopedic conditions allowed in this claim including LACERATION LEFT ANKLE, CRUSH INJURY LEFT FOOT, FRACTURE LEFT METATARSAL, and LEFT FOOT ULCER. The report is also to consider any percentage of permanent partial award for the conditions AMPUTATION OF THE LEFT BIG TOE, LEFT SECOND TOE, LEFT THIRD TOE, LEFT FOURTH TOE AND LEFT FIFTH TOE over and above the previous award for loss of use pursuant to Ohio Revised Code 4123.57(B).
>
> Once this report is on file, please reset this matter on a percentage of permanent partial docket.

(Emphases sic.)

{¶29} 17. On January 18, 2008, at relator's request, Dr. Hogya issued an addendum to his April 3, 2007 report of his March 14, 2007 examination:

> OPINION: After having the opportunity to review the available medical documentation, including my prior independent medical examination, I will now address your specific questions based on a reasonable degree of medical probability.
>
> *Question 1: Please report what percentage of permanent partial impairment you would attribute to the allowed conditions of laceration left ankle, crush injury left foot, fracture left metatarsals (1st through 3rd) and left foot ulcer. Also consider any percentage of permanent partial awarded*

> *for the conditions amputation of the left big toe, left second toe, left third toe, left fourth toe and left fifth toe over and above the previous award for loss of use awarded to the claimant of 35% WPI.*
>
> The whole person impairment for the allowed conditions of "laceration left ankle, crush injury left foot, fracture left metatarsals (1st through 3rd) and left foot ulcer" is 10%. That adequately takes into account any discretionary pain award.
>
> There is 0% whole person impairment above and beyond the previously awarded 35% whole person impairment for "loss of use" relative to the amputation award for "amputation of the left big toe, left second toe, left third toe, left fourth toe and left fifth toe."
>
> These assessments are based upon direct examination of the claimant for the allowed conditions and criteria as set forth by the *AMA Guides to the Evaluation of Permanent Impairment, 5th edition*.

(Emphasis sic.)

{¶30} 18. On March 12, 2008, pursuant to the interlocutory order, Dr. Kakde reexamined claimant for all the allowed physical conditions of the claim:

> Discussion/ Summary:
>
> The patient injured at work close to 10 years ago at the height of her productive years She has had gone through several left foot operations. Due to her non healing ulcer of the left foot she has left antalgic stance and has to use [a] cane routinely at home. Even thought the patient has allowance of all toe amputations, the patient actually has transmetatatarsal amputation of the left foot. She has continued problem with non healing pressure ulcer of the left foot and needs treatment on time to time basis. He left foot is disfigured and she can not use any dress shoes. She can not go back to work where she has to be on her feet. The patient needs intermittent treatment when there is re-currence of ulcer. Being on the base of left foot the ulcer does impact her activities of daily living as she tries hard not to get the recurrent ulcer and the infection that goes with it.
>
> Impairment evaluation:

> For the allowed conditions in the claim the patient has 16% WPI for the trans-metatarsal amputation of the left foot according [to] Table 17-32 of page 545 of AMA Guide 5th Edition For the decreased ROM of the left ankle the patient has for the planter flexion of 15 degrees 3% WPI and dorsiflexion of 10 degrees 3% WPI. For the nonexistent Inversion and eversion the patient has 2 and 1% WPI as per Tables 17-11 and 17-12 of page 537 of AMA Guide 5th Edition. For the recurrent ulcer of the left foot the patient has Class II skin impairment that equals to 24% WPI as per Table 8-2 of page 178 of AMA Guide 5th Edition For her chronic pain will allow 3% WPI. The combined total impairment is 24X16X9X3= 44% WPI as per combined value chart of page 604 of AMA Guide 5th Edition.
>
> Assessment/ Opinion:
>
> After reviewing all available medical records and performing a history and physical examination, it is my opinion that the patient has 44% whole person impairment for the allowed medical conditions in the claim. * * *

{¶31} 19. The bureau requested a medical file review from John M. Barton, M.D. On March 18, 2008, Dr. Barton wrote:

> This is not a simple combined effects review. There are problems, especially with the exam of 3/12/08[.] Amputation at the hip = total loss of lower extremity = 40% WPI from T17-32[.] This is a horrible injury but it is to her foot and is far from loss of the lower extremity[.] The 44% WPI is excessive as from T17-32, amputation of the whole foot is 25% WPI[.] The ulcer should have been impaired using T17-36[.] Also, impairments should have been combined at the foot level, not at the WPI level. Gait derangement is of last resort and only to be used if there are not more specific methods available for impairment[,] * * * which there are in this case.
>
> Finally, was there an amputation award as indicated by Dr[.] Hogya? If so, how much? The final impairment for the physical conditions needs to be corrected for any amputation award there may have been[.]

{¶32} 20. The bureau requested another medical file review from Dr. Barton. On April 10, 2008, Dr. Barton wrote:

> Records reviewed[.] Objective findings accepted See review dated 3/18/08 for exam details[.] There has been no impairment awarded to date in this claim and there has been no amputation award as per OBWC Notes 4/10/08[.]
>
> * * *
>
> This is a horrible injury but it is confined to the foot. One would now look at T17-32 and see that total amputation of the foot is 25% WPI[.] The physical impairment in this case will be high but must be less than 25% WPI[.] Now one looks at T17-2 and ankle [sic]/hind foot ROM can be used with amputation as the amputation is the toes and the ROM is the ankle[.] From T17-2 one can combine ROM, amputation, skin loss and [peripheral] nerve injury = 57% with 41% with 35% with 14% = 86% foot [impairment] from p 604. From T16-32, 86% x 62% = 53% lower extremity = 21% WPI from T71-3[.] There is no added pain impairment as an impairment for peripheral nerve loss is allowed[.]
>
> Whole person impairment by body part[:] 21% WPI physical with 10% psychological (Dr[.] Bonds) = 29% from p 604[.]
>
> A Final combined whole person impairment for this claim number derived by the medical review physician using AMA *Guides to the Evaluation of Permanent Impairment, Fifth Edition* 29%
>
> B Current Percentage of Permanent Partial Award (claim file) 0%
>
> C Additional Percentage Award (A-B) [Enter 0% if less than 0%] 29%
>
> Based on the findings of the examining physician(s), [a]bove, in the cited report which I hereby accept, it is my opinion that the additional percentage impairment derived above is an accurate reflection of the additional impairment resulting from the allowed conditions in this claim[.]

{¶33} 21. Following a June 23, 2008 hearing, a DHO issued an order awarding claimant a 22 percent increase in her percentage of PPD:

> The District Hearing Officer finds from proof of record that the injured worker's percentage of permanent partial

> disability has increased and is now 32%, which is an increase of 22%, and injured worker is therefore entitled to an additional award of compensation for a period of 44 weeks. This award is to be paid in accordance with the applicable provisions of the Ohio Revised Code, including Section 4123.57.
>
> This order is based upon the report(s) of Dr(s). Kakde and Hogya.

{¶34} 22. Relator moved for reconsideration of the DHO's order of June 23, 2008 pursuant to R.C. 4123.57(A).

{¶35} 23. Following an August 25, 2008 reconsideration hearing, a staff hearing officer ("SHO") issued an order affirming the DHO's order. The SHO's order states: "This order is based upon the reports of Drs. Kakde (03/12/2008), Barton (04/10/2008), and Hogya."

{¶36} 24. On October 8, 2008, the three-member commission mailed an order denying further reconsideration.

{¶37} 25. On November 17, 2008, relator, Chrysler LLC, filed this mandamus action.

Conclusions of Law:

{¶38} Because the commission's award of a 22 percent increase in the percentage of PPD includes double recovery for the loss of the five toes, it is the magistrate's decision that this court issue a writ of mandamus, as more fully explained below.

{¶39} R.C. 4123.57(B) (formerly R.C. 4123.57(C)) provides a schedule for compensation for enumerated losses. For the loss of a great toe, 30 weeks of compensation is awarded. For the loss of one of the toes other than the great toe, ten

weeks of compensation is awarded. Obviously, for the loss of all five toes, 70 weeks of compensation is awarded.

{¶40} R.C. 4123.57(A) (formerly R.C. 4123.57(B)) provides for the determination of the percentage of PPD. Thereunder, the claimant shall be compensated "for the number of weeks which equals the percentage of two hundred weeks."

{¶41} In *State ex rel. Maurer v. Indus. Comm.* (1989), 47 Ohio St.3d 62, the syllabus states:

> A claimant who has received a permanent partial disability award pursuant to former R.C. 4123.57(B), for an injury which subsequently deteriorates to the point of a total loss of use of an appendage or other condition qualifying for a scheduled award, may not be awarded scheduled benefits pursuant to former R.C. 4123.57(C) without an offset of the benefits received under division (B).

{¶42} Recently, in *State ex rel. Honda of America MFG., Inc. v. Indus. Comm.*, 10th Dist. No. 08AP-899, 2009-Ohio-4210, this court succinctly summarized the *Maurer* case:

> In *Maurer*, the claimant sustained a workplace injury and his claim was allowed for "left knee, leg and ankle." As a result, claimant received a PPD award pursuant to R.C. 4123.57(B) (now R.C. 4123.57(A)). A number of years later the claimant lost the use of his left leg due to the deterioration of the injuries he originally sustained. The claimant applied for a scheduled loss of use award under R.C. 4123.57(C) (now R.C. 4123.57(B)). The *Maurer* court held that a claimant who has received a PPD award under division (B) (now division (A)) for an injury that subsequently deteriorates to the point of a total loss of use of an appendage or other condition qualifying for a scheduled award under division (C) (now division (B)), may not be awarded scheduled benefits without an offset of the prior PPD award. *Id.* at paragraph one of the syllabus. The court interpreted R.C. 4123.57 as permitting a division (B) (now division (A)) award *or* a division (C) (now division (B)) award—but not both. The court reasoned that to hold otherwise would permit a double recovery for a single

> injury, contrary to the language and purpose of R.C. 4123.57.

Id. at ¶4. (Emphasis sic.)

{¶43} In *Maurer*, the PPD award preceded the scheduled loss award.

{¶44} In *Honda*, a PPD award for partial paralysis of the left hand preceded a scheduled award for loss of use of portions of the four fingers of the left hand (which the commission erroneously held to be a loss of the entire hand because of the loss of two fingers). In *Honda*, this court applied *Maurer* to support the issuance of a writ ordering the commission to eliminate the double recovery by determining the appropriate offset: "[B]ecause the same injury gave rise to the two awards, permitting a scheduled loss of use award for the claimant's four fingers without deducting the prior PPD award, would result in a double recovery." Id. at ¶7.

{¶45} In *Honda*, this court rejected the argument that, under *Maurer*, there would be no double recovery until the claimant had lost the use of his left hand, and that an offset would thus be premature.

{¶46} Here, claimant argues that there is no double recovery because, unlike *Maurer*, the scheduled loss award preceded the PPD award.

{¶47} It is difficult to see how this distinction can make a difference. Regardless of which award precedes the other, there is still a double recovery problem to be resolved. Moreover, relator's argument for distinguishing *Maurer* is undermined by *State ex rel. King v. Indus. Comm.*, 77 Ohio St.3d 252, 1997-Ohio-47, a case that claimant discusses in her brief. In *King*, the claimant was awarded scheduled loss compensation for total loss of right eye vision prior to his application for the determination of his percentage of PPD based upon an alleged partial impairment of his right eye vision. In

King, the court held: "[W]e find that King cannot recover under R.C. 4123.57(A) and (B), as amended, for the same condition and that the commission properly drew this conclusion." Id. at 254.

{¶48} Based upon the above authorities, the magistrate concludes that claimant's scheduled award for loss of the five toes of her left foot presented a double recovery problem to be appropriately resolved in the commission's determination of the percentage increase in PPD.

{¶49} As earlier noted, the SHO's order of August 25, 2008 states reliance upon reports from three doctors in affirming the DHO's determination that the percentage of PPD has increased 22 percent. The SHO's order states reliance upon the March 12, 2008 report of Dr. Kakde and the April 10, 2008 file review of Dr. Barton. The order also states reliance upon Dr. Hogya without specifying the date of the report. Presumably, reliance was placed upon Dr. Hogya's January 18, 2008 report.

{¶50} In his March 12, 2008 report, Dr. Kakde opined that claimant has a 44 percent whole person impairment ("WPI"). In his January 18, 2008 report, Dr. Hogya opined: "There is 0% whole person impairment above and beyond the previously awarded 35% whole person impairment for 'loss of use' relative to the amputation award." In his April 10, 2008 file review, Dr. Barton opines that claimant has an "additional percentage impairment" of 29 percent.

{¶51} The DHO's order determining a 22 percent increase in PPD states reliance upon the reports of Drs. Kakde and Hogya. There is no mention of Dr. Barton's file review. Presumably, the DHO arrived at her 22 percent determination without reliance upon Dr. Barton's report.

{¶52} Neither the DHO's order of June 23, 2008 nor the SHO's order of August 25, 2008 explains how the 22 percent increase was determined from the relied upon reports.

{¶53} Ordinarily, when the relied upon reports themselves do not present fatal evidentiary flaws, the commission's determination of the percentage of PPD, absent an explanation of how the evidence supports the percentage determined, is not an abuse of discretion.

{¶54} This court has repeatedly held that it is within the commission's discretion to fashion a PPD award by choosing a percentage of impairment within the range of percentages contained in the medical reports upon which it has relied. *State ex rel. Core Molding Technologies v. Indus. Comm.*, Franklin App. No. 03AP-443, 2004-Ohio-2639; *State ex rel. Wrenn v. [The] Kroger Co.*, Franklin App. No. 03AP-14, 2003-Ohio-6470. In that situation, there is no requirement that the commission explain why it selected the percentage chosen.

{¶55} Although this court's holdings in *Core Molding* and *Wrenn* were not discussed or cited, the Supreme Court of Ohio appears to have adopted this court's rationale in *State ex rel. Yellow Freight Sys., Inc. v. Indus. Comm.*, 97 Ohio St.3d 179, 2002-Ohio-5811, ¶9.

DR. KAKDE'S REPORT

{¶56} As earlier noted, in his March 12, 2008 report, Dr. Kakde opines that claimant has a 44 percent WPI. The 44 percent is premised in part on a 16 percent WPI for the transmetatarsal amputation for which claimant received a scheduled loss award of 70 weeks of compensation.

{¶57} Clearly, commission reliance upon the 44 percent WPI would constitute an abuse of discretion in determining the percentage of PPD because the 44 percent provides a double recovery. There is no indication in the commission's orders at issue that the hearing officers relied upon a lesser percentage based upon elimination of the 16 percent WPI for the transmetatarsal amputation. While subtracting out the 16 percent from the combined values will presumably produce a percentage greater than the 22 percent determination of the commission, that fact cannot save the commission's 22 percent determination because we do not know how the commission used the relied upon medical reports to fashion its 22 percent PPD award.

{¶58} For example, if the DHO and SHO arrived at 22 percent by halving the difference between Dr. Hogya's zero percent and Dr. Kakde's 44 percent, a reduction in Dr. Kakde's percentage would also have reduced the percentage of PPD determination. Thus, commission reliance upon Dr. Kakde's 44 percent is fatal to the commission's 22 percent determination in the absence of any explanation in the commission's order as to how the commission arrived at 22 percent. For that reason alone, the commission's award of 22 percent PPD constitutes an abuse of discretion.

DR. HOGYA'S REPORT

{¶59} As earlier noted, in his January 18, 2008 report, Dr. Hogya found that the allowed conditions, including the "crush injury left foot," produce only a ten percent WPI.

{¶60} Dr. Hogya reduced the ten percent to zero percent in an attempt to eliminate double recovery. However, he improperly calculated the value of the scheduled loss award to be used as the offset.

{¶61} Dr. Hogya mistakenly believed that the scheduled loss award is equatable to a 35 percent WPI. It is not. Apparently, Dr. Hogya halved the 70 weeks of compensation awarded for loss of the five toes and then converted weeks to a percentage of WPI. He thus erroneously concluded that the 70 weeks of scheduled loss compensation translates to a 35 percent WPI.

{¶62} Dr. Hogya's reduction of his own ten percent to zero percent was improperly calculated. Thus, his zero percent opinion does not constitute evidence upon which the commission can rely.

DR. BARTON'S FILE REVIEW

{¶63} In his April 10, 2008 file review, Dr. Barton incorrectly states: "There has been no amputation awarded." Thus, it is clear that Dr. Barton's 21 percent WPI rating includes double recovery. Dr. Barton made no attempt to eliminate double recovery by estimating a percentage of WPI covering just the toe amputations, and then reducing total foot WPI by the toe amputations WPI. (Note that Dr. Kakde estimated toe amputation WPI at 16 percent.)

{¶64} Moreover, Dr. Barton inflated his final estimate of the additional percentage impairment by improperly adding the ten percent PPD already awarded for the psychological conditions.

{¶65} Clearly, Dr. Barton's 29 percent additional percentage impairment is not some evidence upon which the commission can rely in fashioning a PPD award.

{¶66} Presumably, the commission, through its SHO, relied upon Dr. Kakde's 44 percent WPI rating, Dr. Hogya's zero percent WPI rating, and Dr. Barton's 29 percent WPI rating. Given commission reliance upon the final WPI ratings of those doctors, it is clear

that the commission failed to eliminate double recovery arising from the prior scheduled loss award for the loss of the toes of the left foot. Thus, the commission abused its discretion in determining a 22 percent increase in PPD.

{¶67} Accordingly, for all the above reasons, it is the magistrate's decision that this court issue a writ of mandamus ordering the commission to vacate its SHO's order of August 25, 2008 affirming the DHO's determination of a 22 percent increase in PPD, to obtain corrected medical reports from the relied upon doctors in a manner consistent with this magistrate's decision, and to enter a new order that eliminates double recovery.

/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).