

[Cite as *State ex rel. Woodhull v. Indus. Comm.*, 2011-Ohio-4921.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Glenna Woodhull,	:	
	:	
Relator,	:	
	:	
v.	:	No. 10AP-821
	:	
Industrial Commission of Ohio and	:	(REGULAR CALENDAR)
D & S Distribution, Inc.,	:	
	:	
Respondents.	:	
	:	

D E C I S I O N

Rendered on September 27, 2011

Philip J. Fulton Law Office, and Michael P. Dusseau, for relator.

Michael DeWine, Attorney General, and Charissa D. Payer, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

FRENCH, J.

{¶1} Relator, Glenna Woodhull, filed an original action in mandamus requesting this court to issue a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its order that denied relator's motion for an alleged loss

of use of the whole thumb under R.C. 4123.57(B) and to enter an order granting that motion.

{¶2} This court referred this matter to a magistrate pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate issued a decision, which includes findings of fact and conclusions of law and is appended to this decision, recommending that this court deny the writ.

{¶3} In his decision, the magistrate concluded that Antony M. George, M.D., applied the wrong legal standard in issuing his report. Specifically, Dr. George considered whether relator's injury resulted in the total loss of use of her thumb, rather than whether the injury resulted in a loss greater than 50 percent. Nevertheless, the magistrate concluded that the district hearing officer ("DHO") and the staff hearing officer ("SHO") both applied the correct legal standard; therefore, the commission did not abuse its discretion in denying relator's motion.

{¶4} No party has objected to the magistrate's findings of fact, and we adopt them as our own. Relator filed the following objections to the magistrate's conclusions of law:

[I.] WHILE THE MAGISTRATE CORRECTLY DETERMINED DR. GEORGE APPLIED THE WRONG LEGAL STANDARD FOR LOSS OF USE OF THE THUMB AND THE COMMISSION RELIED UPON THAT REPORT, THE MAGISTRATE ERRED WHEN HE DETERMINED THERE WAS NOT AN ABUSE OF DISCRETION.

[II.] PURSUANT TO THE RECENTLY DECIDED OHIO SUPREME COURT CASE, *STATE EX REL. KROGER V. JOHNSON* (2011), 128 OHIO ST.[3D 243, 2011-OHIO-530], AT A MINIMUM, A LIMITED WRIT SHOULD BE GRANTED AS IT IS POSSIBLE DR. GEORGE WOULD HAVE COME TO A DIFFERENT CONCLUSION HAD HE APPLIED THE CORRECT STANDARD.

{¶5} We will address relator's objections together.

{¶6} Relator contends that the magistrate should have concluded that the commission abused its discretion in denying relator's motion for a loss-of-use award because the commission relied on the report of Dr. George, which all parties appear to agree applied an incorrect legal standard. In his report, Dr. George answered the following question: "In your medical opinion, has the allowed injury resulted in total and permanent loss of use to such a degree that the affected body part does not keep performing most of the functions for its use for which it commonly performed?" The correct test is whether, where ankylosis is proven, "a claimant has lost more than half the use of a thumb, not just whether a thumb is 'useless.'" *State ex rel. Rodriguez v. Indus. Comm.*, 10th Dist. No. 08AP-910, 2009-Ohio-4834, ¶6. Dr. George's application of an incorrect standard, relator contends, eliminates his report as "some evidence" upon which the commission could rely.

{¶7} The commission does not defend Dr. George's report as evidence. Rather, the commission contends that there is additional evidence in the record to support its decision. Specifically, the commission directs our attention to the September 17, 2009 operative note by Gregory Hill, D.O. The note shows that relator's thumb was fully ankylosed at that time. Ankylosis alone is not determinative, however. *State ex rel. Riter v. Indus. Comm.*, 91 Ohio St.3d 89, 93, 2001-Ohio-290. The note does not discuss whether relator has suffered a greater-than-fifty-percent loss of her thumb. Therefore, we conclude that Dr. Hill's operative note, standing alone, does not support denial of relator's motion.

{¶8} The Supreme Court of Ohio discussed a similar scenario in *State ex rel. Kroger Co. v. Johnson*, 128 Ohio St.3d 243, 2011-Ohio-530, which relator cites. There were two medical reports at issue in *Kroger*. The court eliminated as evidence the one report relied upon to support the loss-of-use award at issue because the report was internally inconsistent. Rather than concluding that the commission abused its discretion by granting the award, however, the court considered the remaining evidence, which included the report of Dr. Perry N. Funk. While Dr. Funk had concluded that the claimant did not have a total loss of use of his hand, he had used an incorrect legal standard to reach that conclusion. The court stated: "Given the severity of the restrictions noted by Dr. Funk, it is possible that he might have reached a different conclusion had he realized that residual use does not necessarily bar an award. For this reason, we grant a writ and return the cause to the commission for further consideration." *Id.* at ¶22.

{¶9} The commission seeks to distinguish *Kroger*, contending that, here, additional evidence (Dr. Hill's operative note) supports denial of relator's motion. We have already concluded, however, that, standing alone, Dr. Hill's note does not support denial of the award because it does not establish that relator suffered a greater-than-fifty-percent loss of her thumb.

{¶10} To us, the key principle applicable here is the court's remedy in *Kroger*. Once the court determined that Dr. Funk had used an incorrect legal standard, the court did not eliminate that report as evidence. Rather, the court (1) acknowledged that Dr. Funk might have reached a different conclusion if he had applied the correct standard, (2) granted a writ, and (3) returned the matter to the commission for further

consideration. We apply that remedy here. Because Dr. George might have reached a different conclusion if he had realized that the loss need only be greater than 50 percent, and not a total loss, we return the matter to the commission for further consideration.

{¶11} In returning this matter to the commission, we acknowledge that both the DHO and the SHO articulated the correct legal standard. Applying that standard, the SHO rejected the conclusions of Timothy Lee Hirst, M.D., who considered whether relator's loss was greater than 50 percent, concluded that relator's thumb was ankylosed, and concluded that her loss of use was 74 percent. The SHO concluded, "Dr. Hirst's report does not support the conclusion that the Injured Worker has more than a 50% loss of the thumb." Turning to Dr. George's report, however, the SHO did not note Dr. George's use of an incorrect legal standard, nor did the SHO expressly conclude that Dr. George's findings support the conclusion that relator has less than a 50-percent loss. In light of Dr. George's application of the incorrect standard, and the Supreme Court's remedy in *Kroger*, we decline to infer any further analysis by the SHO.

{¶12} For all these reasons, we overrule relator's first objection and sustain her second objection. We adopt the magistrate's findings of fact as our own. We adopt the magistrate's conclusions of law as our own, except that we decline to adopt the conclusions of law reflected at paragraphs 40-44 on page 18. Accordingly, we grant a writ and return this matter to the commission for further consideration.

*Objections overruled in part, sustained in part;
writ of mandamus granted.*

KLATT and DORRIAN, JJ., concur.

A P P E N D I X

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Glenna Woodhull,	:	
Relator,	:	
v.	:	No. 10AP-821
Industrial Commission of Ohio and	:	(REGULAR CALENDAR)
D & S Distribution, Inc.,	:	
Respondents.	:	

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

Rendered on June 13, 2011

*Philip J. Fulton Law Office, and Michael P. Dusseau, for
relator.*

*Michael DeWine, Attorney General, and Charissa D. Payer,
for respondent Industrial Commission of Ohio.*

I N M A N D A M U S

{¶13} In this original action, relator, Glenna Woodhull, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order denying her December 18, 2009 motion for an R.C. 4123.57(B) award for an alleged loss of use of the whole thumb and to enter an order granting the award.

Findings of Fact:

{¶14} 1. On September 7, 2005, relator injured her right thumb while employed with respondent D & S Distribution, Inc., a state fund employer. Currently, the industrial claim (No. 05-859943) is allowed for:

Sprain or strain, right thumb; dislocated finger closed, right thumb; sprain interphalangeal, right thumb; substantial aggravation pre-existing osteoarthritis, right thumb, right; ankylosis interphalangeal joint thumb, right finger 1.

{¶15} 2. On September 17, 2009, relator underwent right thumb surgery which was performed by orthopedic surgeon, Gregory Hill, D.O. In his operative report, Dr. Hill indicates that he performed a surgical procedure described as "[a]rthrodesis of the IP joint of the right thumb using a fusion screw by Acumed." Dr. Hill describes both the pre-operative and post-operative diagnosis as "[o]steoarthritis of the interphalangeal joint of the right thumb."

{¶16} 3. On October 22, 2009, the Ohio Bureau of Workers' Compensation ("bureau") mailed an order awarding relator R.C. 4123.57(B) compensation for loss of one-half of the thumb. The bureau's order states reliance upon the September 17, 2009 operative report.

{¶17} Apparently, prior to the bureau's order, the claim was not officially recognized for "ankylosis interphalangeal joint thumb" because that condition is not among the allowed conditions listed on the bureau's order.

{¶18} 4. On December 15, 2009, at relator's request, she was examined by Timothy Lee Hirst, M.D., who issued a five-page narrative report, which states in part:

Discussion

The right thumb has ankylosis of the PIP, other motion abnormalities, it is chronically swollen, has neurological deficits and a very major loss of strength.

* * *

16% Whole Person Combined Right Thumb

Has the claimant suffered an ankylosis of the Interphalangeal joint of the right thumb?

Yes ... the PIP joint is ankylosed at 0 degree.

Has she suffered more than the loss of one-half of the right thumb?

The loss of the thumb is 16% whole person.

The thumb has a value of 21.6% whole person so this represents a 74% loss of the thumb.

The substantial aggravation of the preexisting osteoarthritis of the right thumb caused more than the loss of one half of the right thumb.

Yes 74% loss of the right thumb.

The PIP joint is a solid boney mass. It is ankylosed because of the..

The substantial aggravation of the preexisting osteoarthritis of the right thumb caused more than the loss of one half of the right thumb.

This opinion is based on examination of the patient, pertinent records and reference to the AMA Guides to the Evaluation of Permanent Impairment, 5th Edition[.]

{¶19} 5. On December 18, 2009, citing this court's decision in *State ex rel. Rodriguez v. Indus. Comm.*, 10th Dist. No. 08AP-910, 2009-Ohio-4834, and Dr. Hirst's report, relator moved for an R.C. 4123.57(B) award for the alleged loss of use of the

whole thumb. She also moved that the claim be additionally allowed for "ankylosis of the interphalangeal joint of the right thumb."

{¶20} 6. On February 20, 2010, at the bureau's request, relator was examined by Antony M. George, M.D., who issued a two-page narrative report dated March 3, 2010. The report states:

Physical Examination: On physical examination, the right thumb is noted to have a surgical scar with dorsal hyperesthesia very tender to light touch and [illegible] with light contact. The range of motion of the interphalangeal joint (IP) flexion is 0 degrees and IP extension is also 0 degrees. The MP flexion is 40 degrees and MP extension is 10 degrees. CMP radial abduction is 60 degrees, adduction is 2.5 cm, opposition is 7 cm. In review of the records, it was also found that strength testing was performed showing a 50% deficit in grip strength. There is significant tenderness of the [illegible] flexor and [illegible] extensor muscles up into the forearm as well as flexor and extensor digitorum muscles and flexor and extensor carpi muscles. There are positive trigger points with shooting pain into the thumb and hand when tested. Using a hand-held dynamometer, it was found that there was approximately a 16-17 kg grip strength on the right and 26-28 kg strength on the left. In utilizing the AMA Fifth Edition Guidelines of Impairment, this range of motion would represent an 8% impairment for ankylosis loss of flexion and extension and 3% impairment of the MP joint loss of flexion and extension, UE (upper extremity). Grip strength impairment is a 50% loss of grip strength. This represents a 20% impairment of the upper extremity and neurologic deficit and hyperesthesia represents a 5% impairment of the upper extremity.

Discussion relating to this report is to address the following issues:

#1. In your medical opinion, has the allowed injury resulted in total and permanent loss of use to such a degree that the affected body part does not keep performing most of the functions for its use for which it commonly performed?

Answer: No. The patient has been working since the date of injury and although there has been some compromise in function necessitating the use of a brace before surgery and

after surgery, she was still able to work and achieve gainful employment. Unfortunately, she does have pain and requires the need to take Tramadol which is a synthetic narcotic, however, not a strong narcotic in the realm of medications. It does also affect her in her personal life as mentioned above and has had some compromise in some of her previous habits that she apparently enjoyed and does affect ones that she does continue to perform in cooking and, as stated, in the use of her computer but does have the ability to perform much of these tasks.

If [sic] identifying loss of total use of the thumb in light of her ability to work and perform duties as she has for the last four years, it is not an appropriate correlation that the findings or history would support total loss of use of the thumb. With the records revealing previous evaluations for function which have shown similar findings and symptoms, the patient should continue her work with the use of a brace and restriction. Of note, I have found that it was mentioned that the patient did not have physical therapy after the surgery and this would be a recommendation that could be offered by the surgeon that could improve her function and reduce some of her symptoms.

{¶21} 7. Following an April 26, 2010 hearing, a district hearing officer ("DHO") issued an order stating:

It is the order of the District Hearing Officer that the C-86 Motion, filed by Injured Worker on 12/18/2009, is denied in part and moot in part.

It is noted that the request for ANKYLOSIS OF THE INTERPHALANGEAL JOINT OF THE RIGHT THUMB is moot as this condition has previously been allowed in this claim in the Bureau of Workers' Compensation order dated 10/22/2009.

The Injured Worker in this claim has previously been awarded thirty weeks for a fifty percent loss of use of the right first finger under O.R.C. 4123.57(B).

It is ordered that the request for total loss of use of the right first finger is denied. The request for the balance of weeks totaling thirty weeks under Ohio Revised Code Section 4123.57(B) is denied.

The evidence in this claim establishes that in an operative procedure on 09/17/2009 the interphalangeal joint was rendered fully ankylosed. The Injured Worker still has use of the thumb due to the unique nature of this digit. It has not been established by a preponderance of the evidence that there is more than a fifty percent loss of use of the right thumb. The medical evidence establishes that the thumb was not entirely useless and its usefulness [sic]¹ does not exceed fifty percent.

In State ex rel. Riter v. Industrial Commission of Ohio, [91 Ohio St.3d 89, 2001-Ohio-290,] the Supreme Court of Ohio held that although an inability to bend a finger might justify an award of total loss of its use, the thumb had two functions, use similar to the use of a finger, and grasping and gripping, in opposition to fingers. The Court stated that the claimant still enjoyed the latter critical function. This Hearing Officer finds that in the instant case this Injured Worker still enjoyed the latter critical function discussed in Riter.

Further relied upon is the opinion of Dr. George dated 03/03/2010.

{¶22} 8. Relator administratively appealed the DHO's order of April 26, 2010.

{¶23} 9. Following a May 26, 2010 hearing, a Staff Hearing Officer ("SHO")

issued an order affirming the DHO's order. The SHO's order explains:

It is the order of the Staff Hearing Officer that the District Hearing Officer's order issued 04/28/2010 is affirmed. Therefore, the Injured Worker's C-86 Motion, filed 12/18/2009, is granted in part and moot in part.

That portion of the Injured Worker's motion that requests additional allowance of this claim for ANKYLOSIS OF THE INTERPHALANGEAL JOINT OF THE RIGHT THUMB is moot as this condition has already been allowed in this claim by Bureau of Workers' Compensation order dated 10/22/2009.

The Staff Hearing Officer finds that the Injured Worker has also previously been awarded 30 weeks of permanent partial

¹ It appears from the context that the word "uselessness" was intended.

compensation for 50% loss of use of the right thumb pursuant to Ohio Revised Code Section 4123.57(B).

The Injured Worker asserts that the medical evidence establishes she has sustained more than 50% loss of the thumb and therefore is entitled to total loss of the thumb. In support of her position, the Injured Worker relies upon the 12/15/2009 report of Dr. Hirst wherein he concludes the Injured Worker has a 74% loss of the thumb.

The Staff Hearing Officer does not find the Injured Worker's position persuasive; instead, the Staff Hearing Officer relies upon State ex rel. Riter v. Industrial Commission 91 Oh St 3d 89 which held that the inability to bend the thumb at the IP joint in and of itself does not constitute total loss of the thumb. The court noted the thumb was a unique joint having multiple functions. The most significant function was the ability to oppose the thumb to the fingers to execute gripping and grasping with the hand. In Riter the evidence showed that the Injured Worker retained the ability to carry out the opposition of the thumb to the remaining fingers and therefore total loss of the thumb was not found in that case.

In this case, the evidence also shows that the Injured Worker retains the ability to oppose the fingers to the thumb and that she does not have complete and total loss of the thumb. The Staff Hearing officer is aware of the Injured Worker's reliance upon State ex rel. Rodrigue[z] v. Industrial Commission 2009 WL 2941957 (Ohio App. 10th dist.)[.] In that case, the Court of Appeals found that Ohio Revised Code Section 4123.57(B) provided for payment of total loss of the thumb if an Injured Worker had ankylosis and also proved that there was more than 50% of the thumb use that had been lost. This case provided that the Injured Worker need not show 100% of the thumbs use had been lost in order to be compensated for total loss of the thumb.

The Staff Hearing Officer's reading of Dr. Hirst's report does not support the conclusion that the Injured Worker has more than a 50% loss of the thumb. Instead, the Staff Hearing Officer relies upon the 03/03/2010 report of Dr. George who notes the Injured Worker was able to use her thumb with a brace and perform work duties. It would be inconsistent with a finding of total loss of use of the thumb. The Staff Hearing Officer finds that Dr. George's opinion is more in line with the Supreme Court's decision in Riter.

{¶24} 10. On June 18, 2010, another SHO mailed an order refusing relator's administrative appeal from the SHO's order of May 26, 2010.

{¶25} 11. On August 30, 2010, relator, Glenna Woodhull, filed this mandamus action.

Conclusions of Law:

{¶26} It is the magistrate's decision that this court deny relator's request for a writ of mandamus, as more fully explained below.

{¶27} R.C. 4123.57(B) provides a schedule for compensation for loss of enumerated body parts. Pertinent here, the statute reads in part:

(B) In cases included in the following schedule the compensation payable per week to the employee is the statewide average weekly wage as defined in division (C) of section 4123.62 of the Revised Code per week and shall continue during the periods provided in the following schedule:

For the loss of a first finger, commonly known as a thumb, sixty weeks.

* * *

The loss of a second, or distal, phalange of the thumb is considered equal to the loss of one half of such thumb; the loss of more than one half of such thumb is considered equal to the loss of the whole thumb.

* * *

For ankylosis (total stiffness of) or contractures (due to scars or injuries) which makes any of the fingers, thumbs, or parts of either useless, the same number of weeks apply to the members or parts thereof as given for the loss thereof.

{¶28} Both the DHO and SHO discussed and relied upon *State ex rel. Riter v. Indus. Comm.*, 91 Ohio St.3d 89, 2001-Ohio-290. Accordingly, a review of that case is helpful.

{¶29} In *Riter*, Velma J. Riter broke her thumb at work. Five surgeries later, it became clear that Riter's interphalangeal joint was ankylosed and could not bend. The commission denied Riter's motion for R.C. 4123.57(B) scheduled-loss compensation for an alleged loss of use of the whole thumb.

{¶30} In *Riter*, the court made some observations regarding finger anatomy and the statute:

The statute also specifies, to some degree, how loss is measured, based on the anatomy of the affected member. For example, proceeding from the base of the finger outward, there is a metacarpophalangeal joint followed by a proximal phalanx. It continues with the proximal interphalangeal ("PIP") joint, the middle phalanx, the distal interphalangeal ("DIP") joint, and finally the third, or distal, phalanx ("DP"). Stedman's Medical Dictionary (26 Ed. 1995) 1030; University of Washington Radiology Webserver (<http://www.rad.washington.edu/RadAnat/HandPALabelled.html>).
* * *

The thumb has one fewer joint and bone. There is no middle phalanx, and the joint connecting the proximal and distal phalanges is simply called the interphalangeal ("IP") joint.
Id. * * *

Id. at 90-91.

{¶31} Riter claimed that IP thumb ankylosis satisfied the statutory requirement for loss of the whole thumb. The commission, however, awarded Riter compensation for one-half loss of use only. Riter's petition to this court for a writ of mandamus was denied. She appealed as of right to the Supreme Court of Ohio.

{¶32} Affirming this court's judgment, the *Riter* court explained:

There is no dispute that claimant's IP joint has no range of motion due to ankylosis. We must determine whether this entitles claimant to compensation for the loss of the whole thumb. We find that it does not.

First, claimant argues that since (1) loss of the distal phalanx is statutorily equated to one-half loss of the thumb and (2) *more* than one-half loss is construed as a full loss, the loss of the IP joint is an addition that pushes claimant over the threshold. She couples this assertion with a reminder that under R.C. 4123.95, the workers' compensation statutes are to be liberally construed in a claimant's favor.

* * *

Appellees' stronger argument lies in the significantly distinct functions of the thumb and fingers. Viewing the hand as a whole, there are two categories of movement of which it is capable: prehensile and nonprehensile. John Napier, *Hands* (1993 Rev. Ed.). Prehensile movements "are those in which an object, fixed or free, is held by a gripping or pinching action between the digits and the palm." *Id.* at 74. Nonprehensile movements, on the other hand, include "pushing, lifting, tapping and punching movements of the fingers, such as typewriting or working the stops of a musical instrument." *Id.*

The thumb is the key to grasping and gripping. *Id.* at 91. John Napier, one of the world's leading primatologists of the last century, has written:

"A hand without a thumb is at worst nothing but an animated fish-slice, and at best a pair of forceps whose points do not meet properly. Without the thumb, the hand is put back sixty million years in evolution terms to a stage when the thumb had no independent movement and was just another digit. One cannot emphasize enough the importance of finger-thumb opposition for human emergence from a relatively undistinguished primate background." *Id.* at 128-129.

Mechanically, the thumb "is the only digit in the hand that has this freedom to rotate or swivel; it is also unique in that all of its movements can take place independent of those of any of the other fingers; as everyone says, the combination of strength, independence and versatility sets it apart.

Because of its unique capabilities * * * the thumb, if need be, can carry on a solo act." Frank R. Wilson, *The Hand*, at 138-139.

The thumb's special properties derive from two sources: (1) the metacarpal bone, which proceeds from the metacarpophalangeal joint at the thumb's base, down towards the wrist, and (2) the metacarpocarpal joint at the base of the hand near the wrist. As Napier observes:

"The thumb metacarpal is unique. Alone amongst the metacarpals, it articulates by means of a freely movable saddle joint with the carpals. The remaining carpals are of the plane joint variety which have very small ranges of movement. The metacarpocarpal joint of the thumb, being of the saddle type, is almost as mobile as a ball and socket joint and has the following movements: adduction-abduction, flexion-extension and medial lateral rotation." *Id.* at 66. Continuing, he reported:

"The functional advantage of a saddle joint is that the two opposing surfaces and their supporting ligaments are so arranged that the stability of the joint is provided without the need for a cuff of bulky muscles disposed around the joint to control and direct its movement, as is the case for other ball-and-socket joints like the shoulder and the hip. Bulky muscles at the root of the thumb would seriously impair its manipulative skill and flexibility." *Id.*

These passages demonstrate that the thumb is truly unique and that evaluating it under standards directed at the fingers just doesn't work. The key to the thumb's uniqueness and utility lies in the metacarpal bone and metacarpocarpal joint. Thus, to say that ankylosis of the IP joint makes the thumb totally useless is wrong.

Id. at 91-93. (Emphasis sic.)

{¶33} As earlier noted, in her December 18, 2009 motion, relator cited to this court's decision in *Rodriguez* for support of the requested award for an alleged loss of use of the whole thumb.

{¶34} In *Rodriguez*, as in the instant case, two portions of the statute regarding thumb loss were at play. First, the statute provides that "loss of more than one half of such thumb is considered equal to the loss of the whole thumb." Secondly, the statute provides for compensation where ankylosis makes useless the thumb or any part thereof.

{¶35} Citing the two portions of the statute, this court set forth the correct standard where the two statutory provisions are at play:

Together, these provisions require the commission, where ankylosis is proven, to determine whether a claimant has lost more than half the use of a thumb, not just whether a thumb is "useless," in order to determine whether a total loss has occurred.

{¶36} In *Rodriguez*, the commission, through its SHO, determined that the thumb was not entirely useless, but failed to expressly find that the claimant had not lost more than half of its use. The *Rodriguez* court found that the commission had failed to make a required finding, i.e. whether the claimant had lost more than half the use of his thumb. Consequently, this court issued a writ of mandamus so that the commission could evaluate the medical evidence in light of the correct standard as set forth by this court.

{¶37} Here, relator contends that the commission's reliance upon Dr. George's report requires this court to conclude that the commission failed to apply the correct standard as set forth in *Rodriguez*.

{¶38} In his report, Dr. George sets forth the question or issue that he addresses:

In your medical opinion, has the allowed injury resulted in total and permanent loss of use to such a degree that the affected body part does not keep performing most of the functions for its use for which it commonly performed?

{¶39} Relator correctly concludes that Dr. George failed to set forth the correct standard for his evaluation of whole thumb loss.

~~{¶40} But, Dr. George's failure to set forth the correct standard does not necessarily translate into a finding that the commission's hearing officers failed to understand the correct standard for determining whole thumb loss.~~

{¶41} The DHO's order states:

~~[I]n an operative procedure on 09/17/2009 the interphalangeal joint was rendered fully ankylosed. The Injured Worker still has use of the thumb due to the unique nature of this digit. It has not been established by a preponderance of the evidence that there is more than a fifty percent loss of use of the right thumb. The medical evidence establishes that the thumb was not entirely useless and its usefulness [sic]² does not exceed fifty percent.~~

~~{¶42} The DHO's order correctly articulates the standard set forth by the Rodriguez court.~~

~~{¶43} In affirming the DHO, the SHO also indicates that the question was whether relator had sustained "more than 50% loss of the thumb."~~

~~{¶44} Even though Dr. Hirst opined that relator had a 74 percent loss of her thumb (which obviously exceeds 50 percent), the SHO rejected Dr. Hirst's report in favor of the report of Dr. George. The SHO was persuaded that relator has not sustained a loss of thumb in excess of 50 percent because Dr. George observed that relator "was able to use her thumb with a brace and perform work duties."~~

{¶45} Contrary to relator's further suggestion, there is no evidence in the record to show that the commission arbitrarily rejected Dr. Hirst's report. Moreover, the

² It appears from the context that the word "uselessness" was intended.

commission is not required to set forth reasons for finding one report more persuasive than the other. *State ex rel. Bell v. Indus. Comm.*, 72 Ohio St.3d 575, 1995-Ohio-121.

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

/s/ Kenneth W. Macke

KENNETH W. MACKE
MAGISTRATE

NOTICE TO THE PARTIES

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