

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio ex rel. Charles Wyrick,	:	
Relator,	:	
v.	:	No. 11AP-653
Industrial Commission of Ohio and	:	(REGULAR CALENDAR)
Commerical Drywall Systems, Inc.,	:	
Respondents.	:	

D E C I S I O N

Rendered on September 11, 2012

*Butkovich & Crosthwaite Co., LPA, Joseph A. Butkovich, and
Dana R. Lambert, for relator.*

*Michael DeWine, Attorney General, and Patsy A. Thomas,
for respondent Industrial Commission of Ohio.*

IN MANDAMUS
ON OBJECTION TO THE MAGISTRATE'S DECISION

SADLER, J.

{¶ 1} In this original action, relator, Charles Wyrick, requests a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its order denying his February 5, 2010 motion for R.C. 4123.57(B) scheduled loss compensation for the alleged loss of use of his left upper extremity and to enter an order granting said compensation.

{¶ 2} Pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth District Court of Appeals, this matter was referred to a magistrate who issued a decision, including findings

of fact and conclusions of law, which is appended hereto. The magistrate concluded that the commission did not abuse its discretion in denying relator's request for scheduled loss compensation. Accordingly, the magistrate recommended that this court deny the requested writ of mandamus.

{¶ 3} No objections have been raised regarding the findings of fact set forth in the magistrate's decision. Following an independent review of the record, we adopt those findings of fact as our own.

I. RELATOR'S OBJECTION

{¶ 4} Relator has filed an objection to the magistrate's decision. Without presenting a specific objection, relator, in essence, challenges the magistrate's conclusion that the commission did not abuse its discretion in denying his request for scheduled loss compensation. Specifically, relator contends Dr. D. Ann Middaugh's report does not constitute some evidence upon which the commission can rely, and the magistrate's conclusion is inconsistent with *State ex rel. Alcoa Bldg. Prods. v. Indus. Comm.*, 102 Ohio St.3d 341, 2004-Ohio-3166. This objection contains the same argument made to and addressed by the magistrate.

{¶ 5} As recently explained by the Supreme Court of Ohio in *State ex rel. Kroger Co. v. Johnson*, 128 Ohio St.3d 243, 2011-Ohio-530, with the exceptions of hearing and sight, scheduled loss compensation was originally limited to amputation. *Id.* at ¶ 10. Coverage has been expanded, however, to include loss of use without severance where the effect is the same as if there had been amputation or other physical removal of the limb. *Id.* " '[I]t is not necessary that the injured member of the claimant be of absolutely no use in order for him to have lost the use of it for all practical intents and purposes.' " *Id.* at ¶ 11, quoting *Alcoa* at ¶ 13.

{¶ 6} In this case, Dr. Middaugh rendered a four-page narrative report. While noting Dr. George D.J. Griffin's finding that, for all practical purposes, relator's left upper extremity was nonfunctional, Dr. Middaugh found that relator "has significant remaining function of his left upper extremity including no limitation in use of the forearm, wrist and hand so long as the elbow is maintained at the waist level. This allows use of the left upper extremity in an assist manner as well as full use of the wrist and hand albeit limited in scope relative to upper arm and elbow positioning." (Magistrate's Decision, Finding of

Fact No. 5.) However, because Dr. Middaugh proceeded to conclude that relator's left upper extremity is not "useless for all purposes," rather than concluding it is not useless for all "practical" purposes, relator contends Dr. Middaugh used an incorrect legal standard, and, therefore, the commission could not have relied on her report to deny loss of use compensation.

{¶ 7} We agree with the magistrate's conclusion that, when read as a whole, Dr. Middaugh's failure to use the word "practical" does not constitute use of an incorrect legal standard or misapplication of *Alcoa*. " 'Nothing in *Alcoa* suggests that the talismanic use of the phrase "for all practical purposes" is required in determining a loss of use claim.' " *State ex rel. Kish v. Kroger Co.*, 10th Dist. No. 10AP-882, 2011-Ohio-5766, ¶ 13, quoting *State ex rel. Wheeling-Pittsburgh Steel Corp. v. Indus. Comm.*, 10th Dist. No. 06AP-43, 2007-Ohio-757, ¶ 4. Moreover, when read as a whole, it is clear Dr. Middaugh was of the opinion that relator's left upper extremity "has significant remaining function" such that relator does not have loss of use to the same effect and extent as if there had been an amputation or other physical removal. Consequently, we agree with the magistrate's ultimate conclusion that Dr. Middaugh's report does constitute some evidence upon which the commission could rely. *Alcoa* at ¶ 10, citing *State ex rel. Gassmann v. Indus. Comm.*, 41 Ohio St.2d 64 (1975), and *State ex rel. Walker v. Indus. Comm.*, 58 Ohio St.2d 402 (1979).

{¶ 8} Accordingly, we overrule relator's objection to the magistrate's decision.

II. CONCLUSION

{¶ 9} Following an independent review of this matter and due consideration of relator's objection, we find the magistrate has properly determined the facts and applied the appropriate law. Therefore, we overrule relator's objection to the magistrate's decision and adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein. In accordance with the magistrate's decision, we deny relator's request for a writ of mandamus.

*Objection overruled;
writ of mandamus denied.*

BROWN, P.J., and DORRIAN, J., concur.

APPENDIX
IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio ex rel. Charles Wyrick,	:	
Relator,	:	
v.	:	No. 11AP-653
Industrial Commission of Ohio and	:	(REGULAR CALENDAR)
Commercial Drywall Systems, Inc.,	:	
Respondents.	:	

MAGISTRATE'S DECISION

Rendered on April 24, 2012

Butkovich & Crosthwaite Co., LPA, Joseph A. Butkovich, and Dana R. Lambert, for relator.

Michael DeWine, Attorney General, and Patsy A. Thomas, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶ 10} In this original action, relator, Charles Wyrick, requests a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its order denying his February 5, 2010 motion for R.C. 4123.57(B) scheduled loss compensation for the alleged loss of use of his left upper extremity and to enter an order granting the compensation.

Findings of Fact:

{¶ 11} 1. On March 8, 2006, relator fell from scaffolding while employed as a carpenter for respondent, Commercial Drywall Systems, Inc., a state-fund employer.

{¶ 12} 2. The industrial claim (No. 06-812237) is allowed for:

Closed dislocation left shoulder; superficial injury left hand; cellulitis left fourth finger; cellulitis and abscess left; tear left rotator cuff; disc herniation at C5-6.

{¶ 13} 3. On January 19, 2010, treating physician, George D.J. Griffin, III, M.D., wrote:

As you know, I have been treating Charles Wyrick since 16 December 2008. Mr. Wyrick underwent an arthroscopic surgery on 20 August 2009.

At the time of surgery, it was demonstrated that Mr. Wyrick essentially had no rotator cuff present. He has suffered a massive rotator cuff tear with complete retraction of the muscles and no ability exists to repair this.

As a result of this, Mr. Wyrick has essentially lost the functional use of his left upper extremity. The patient is right handed. He is able to use his left hand only if he props or braces his left lower arm below the level of the elbow. Essentially for all practical purposes, Mr. Wyrick's left upper extremity is non-functional.

It is my opinion, to a reasonable degree of medical certainty that Mr. Wyrick's left upper extremity is only slightly better than if it had been completely amputated surgically.

{¶ 14} 4. On February 5, 2010, relator moved for R.C. 4123.57(B) scheduled loss compensation for the alleged loss of use of his "left upper extremity." In support, relator submitted the January 19, 2010 report of Dr. Griffin.

{¶ 15} 5. On May 25, 2010, at the request of the Ohio Bureau of Workers' Compensation ("bureau"), relator was examined by D. Ann Middaugh, M.D., who specializes in internal medical and occupational medicine. In her four-page narrative report, Dr. Middaugh opines:

Charles Wyrick is a 52 year old man referred for a loss of use examination. His physician of record, Dr. George Griffin has

submitted a report from 1-19-10 stating that Mr. Wyrick had essentially lost the functional use of his left upper extremity. He was able to use his left hand only if he propped or braced the left lower arm below the level of the elbow and essentially for all practical purposes the left upper extremity was nonfunctional. Dr. Griffin felt that to a reasonable degree of medical certainty the left upper extremity was only slightly better than if he had been completely amputated surgically.

* * *

At this point he is able to use his left forearm and hand if he holds his arm next to his body with the elbow at the waist level. He is unable to abduct or flex the arm in a functional manner relative to the completely deficient rotator cuff. He has no limitation in fingering, use of his hand or wrist or forearm so long as the elbow is at the waist level. He notes that passive range of motion is present. He is able to hold his left arm with his right arm. He is unable to maintain any elevated posture of the left arm unassisted.

* * *

Discussion: Charles Wyrick is a 52 year old man who sustained a rotator cuff tear with anterior dislocation of the left shoulder when he fell from scaffolding on 3-8-06. While the dislocation was successfully reduced he sustained a complete tear of the rotator cuff. He underwent surgery which was ultimately unsuccessful and Mr. Wyrick has a completely deficient rotator cuff involving the left shoulder. This results in severe limitation in range of motion and function. He has applied for loss of use of the left upper extremity.

While there is clear loss of use of the entire rotator cuff relative to the left shoulder, Mr. Wyrick has significant remaining function of his left upper extremity including no limitation in use of the forearm, wrist and hand so long as the elbow is maintained at the waist level. This allows use of the left upper extremity in an assist manner as well as full use of the wrist and hand albeit limited in scope relative to upper arm and elbow positioning. Therefore the objective documentation and physical examination does not support total permanent loss of use of the left upper extremity to the degree that the involved body part is useless for all purposes.

{¶ 16} 6. Following an April 28, 2010 hearing, a district hearing officer ("DHO") issued an order denying relator's motion. The order explains:

The Injured Worker's motion requesting an award pursuant to O.R.C. 4123.57 for the total loss of use of the left upper extremity is denied.

The [DHO] finds that the Injured Worker has not suffered the total loss of use of his left upper extremity based upon the report of Dr. Middaugh dated 03/25/2010.

Specifically, Dr. Middaugh finds that the Injured Worker retains significant functioning in his left forearm, wrist, and hand.

All evidence on file was reviewed.

This order is based upon the report of Dr. Middaugh dated 03/25/2010.

{¶ 17} 7. Relator administratively appealed the DHO's order of April 28, 2010.

{¶ 18} 8. Following a June 22, 2010 hearing, a staff hearing officer ("SHO") issued an order stating:

The order of the [DHO], issued 04/28/2010, is affirmed with additional reasoning.

It is the order of the [SHO] that the Injured Worker's C-86 motion filed 02/05/2010 be denied.

The Injured Worker's C-86 motion filed 02/05/2010 requests authorization and payment of an award for a loss of the left upper extremity pursuant to Ohio Revised Code 4123.57.

The Hearing Officer finds that the Injured Worker has not suffered a loss of use of his left upper extremity which would support an award pursuant to Ohio Revised Code 4123.57.

Specifically, the Hearing Officer finds that for all practical purposes, the Injured Worker has not lost the use of his left upper extremity to the same effect and extent as if it had been amputated or otherwise physically removed.

In coming to this conclusion, the Hearing Officer relies on the report of Dr. Middaugh dated 03/26/2010. Dr. Middaugh indicated that the Injured Worker is able to use his left forearm and hand if he holds his arm next to his body with the elbow at waist level. She stated that the Injured Worker has no limitation in fingering, using his hand, wrist, or forearm so long as the elbow is at the waist level. She indicated that while the Injured Worker has a clear loss of use of the entire rotator cuff relative to the left shoulder, the Injured Worker has significant remaining function of his upper extremity including no limitation in the use of his forearm, wrist and hand so long as the elbow is maintained at the waist level.

Based upon the 03/26/2010 report of Dr. Middaugh, the Hearing Officer finds that the Injured Worker has not suffered a loss of use of his left upper extremity and therefore denies the Injured Worker's C-86 motion filed 02/05/2010.

The Hearing Officer relies on the report of Dr. Middaugh dated 03/26/2010, as well as State ex rel. Alcoa Bldg. Products v. Indus. Comm. (2004) 102 Ohio St.3d 341.

{¶ 19} 9. On July 14, 2010, another SHO mailed an order refusing relator's administrative appeal from the SHO's order of June 22, 2010.

{¶ 20} 10. On August 4, 2010, relator, Charles Wyrick, filed this original action.

Conclusions of Law:

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

{¶ 22} R.C. 4123.57(B) provides for scheduled loss compensation for enumerated body parts. It provides as follows:

For the loss of a hand, one hundred seventy-five weeks.

For the loss of an arm, two hundred twenty-five weeks.

{¶ 23} Under R.C. 4123.57(B), 225 weeks of compensation for an arm necessarily includes compensation for the hand of the same limb. *See State ex rel. Cook v. Zimpher*, 17 Ohio St.3d 236 (1985) (loss of a leg includes loss of the foot; schedule of awards regarding the lower limb are cumulative and not consecutive); *State ex rel. Sears*

Roebuck & Co. v. Campos, 10th Dist. No. 04AP-1266, 2005-Ohio-5700, ¶ 20 (R.C. 4123.57(B) claimant was awarded 225 weeks of compensation for loss of his right hand and arm); *State ex rel. Bradford v. Indus. Comm.*, 10th Dist. No. 06AP-125, 2007-Ohio-424, ¶ 39 (in the context of R.C. 4123.57(B), an arm includes the hand of that arm; citing *Cook*).

{¶ 24} Analysis begins with the observation that R.C. 4123.57(B) does not use the term "upper extremity" in identifying the body parts, the loss of which are compensable. Thus, when relator moved for R.C. 4123.57(B) scheduled loss compensation for the alleged loss of his "left upper extremity," he was, in effect, requesting compensation for the alleged loss of use of his left arm. Moreover, in requesting compensation for the alleged loss of use of his left arm, he was necessarily requesting compensation for the loss of use of the left hand.

{¶ 25} That the alleged loss of an arm necessarily includes the hand of the same limb is significant here because relator's impairment stems from a "completely deficient rotator cuff involving the left shoulder" as Dr. Middaugh indicates. According to Dr. Middaugh, relator has "no limitation in use of the forearm, wrist and hand so long as the elbow is maintained at waist level." Dr. Middaugh also states that relator "has no limitation in fingering" as long as the elbow is at waist level.

{¶ 26} Even attending physician Dr. Griffin reports no impairment with the left hand other than to say "[h]e is able to use his left hand only if he props or braces his left lower arm below the level of the elbow."

{¶ 27} Thus, relator's shoulder injury, i.e. the lack of a functioning rotator cuff, severely limits his ability to position or direct his left hand which, by itself, is fully functional.

{¶ 28} Recently, in *State ex rel. Kroger Co. v. Johnson*, 128 Ohio St.3d 243, 2011-Ohio-530, the court succinctly set forth basic law applicable here:

Scheduled-loss compensation was originally limited to amputation, with the obvious exceptions of hearing and sight. *State ex rel. Gassmann v. Indus. Comm.* (1975), 41 Ohio St.2d 64, 65-66, 70 O.O.2d 157, 322 N.E.2d 660. Coverage later expanded to "loss of use" in the wake of

Gassmann and *State ex rel. Walker v. Indus. Comm.* (1979), 58 Ohio St.2d 402, 404, 12 O.O.3d 347, 390 N.E.2d 1190, which involved paraplegia. These cases construed "loss" for purposes of R.C. 4123.57(B) (formerly R.C. 4123.57(C), 135 Ohio Laws, Part I, 1690, 1701-1702) to include both amputation and loss of use without severance. We reasoned that a paraplegic had "[f]or all practical purposes * * * lost his legs to the same effect and extent as if they had been amputated or otherwise physically removed." *Gassmann* at 67.

In 2004, we revisited this standard and clarified that " 'it is not necessary that the injured member of the claimant be of absolutely no use in order for him to have lost the use of it for all practical intents and purposes.' " [*State ex rel. Alcoa Bldg. Prods. v. Indus. Comm.*], 102 Ohio St.3d 341, 2004-Ohio-3166, 810 N.E.2d 946, ¶ 13, quoting *Curran v. Walter E. Knipe & Sons, Inc.* (1958), 185 Pa.Super. 540, 547, 138 A.2d 251. In *Alcoa*, we considered the loss-of-use application of a claimant whose left arm had been amputated below the elbow. *Id.* at ¶ 1. Hypersensitivity prevented the claimant from using a prosthesis, but his employer nonetheless opposed compensation for a total loss of use of the arm, arguing that the claimant had been observed tucking a paper under his remaining arm segment and using his arm segment to push open a car door. *Id.* at ¶ 6. *Alcoa* claimed that these functions would be foreclosed to one whose arm had been severed at the shoulder and, under a strict interpretation of *Gassmann* and *Walker*, precluded a total loss award. *Id.* at ¶ 10.

{¶ 29} We rejected *Alcoa's* argument:

"*Alcoa* urges the most literal interpretation of [*the Gassmann* and *Walker*] rationale and argues that because claimant's arm possesses some residual utility, the standard has not been met. The court of appeals, on the other hand, focused on the opening four words, 'for all practical purposes.' Using this interpretation, the court of appeals found that some evidence supported the commission's award and upheld it. For the reasons to follow, we affirm that judgment.

"*Alcoa's* interpretation is unworkable because it is impossible to satisfy. *Walker* and *Gassmann* are unequivocal in their desire to extend scheduled loss benefits beyond amputation,

yet under Alcoa's interpretation, neither of those claimants would have prevailed. As the court of appeals observed, the ability to use lifeless legs as a lap upon which to rest a book is a function unavailable to one who has had both legs removed, and under an absolute equivalency standard would preclude an award. And this will always be the case in a nonseverance situation. If nothing else, the presence of an otherwise useless limb still acts as a counterweight—and hence an aid to balance—that an amputee lacks. Alcoa's interpretation would foreclose benefits to the claimant who can raise a mangled arm sufficiently to gesture or point. It would preclude an award to someone with the hand strength to hold a pack of cards or a can of soda, and it would bar—as here—scheduled loss compensation to one with a limb segment of sufficient length to push a car door or tuck a newspaper. Surely this could not have been the intent of the General Assembly in promulgating R.C. 4123.57(B) or of *Gassmann and Walker*." Id. at ¶ 10-11.

{¶ 30} According to relator, because Dr. Middaugh concludes that relator's left upper extremity is not "useless for all purposes," it is clear that she used an incorrect legal standard for evaluating loss of use.

{¶ 31} Presumably, relator would be satisfied had Dr. Middaugh concluded that the upper extremity is not useless for all *practical* purposes. Thus, the question seemingly raised by relator is whether Dr. Middaugh's failure to use the word "practical" as a modifier to the word "purposes" is fatal to her ultimate opinion that there is no loss of use.

{¶ 32} Interestingly, Dr. Middaugh does not directly discuss the legal standard to be applied. However, she does note at the beginning of her report that Dr. Griffin found that "for all practical purposes, the left upper extremity was nonfunctional."

{¶ 33} In the magistrate's view, the key to Dr. Middaugh's ultimate conclusion is her finding that relator "has significant remaining function of his left upper extremity." If we accept Dr. Middaugh's finding that relator "has significant remaining function of his left upper extremity," there can be no doubt that relator does not have loss of use of his left upper extremity.

{¶ 34} 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).