[Cite as *State ex rel. Varney v. Indus. Comm.*, 2012-Ohio-4904.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Dennis E. Varney,	:	
Relator,	:	No. 11AP-585
v.	:	(REGULAR CALENDAR)
Industrial Commission of Ohio and Total Image Specialists LLC,	:	
Respondents.	:	

D E C I S I O N

Rendered on October 23, 2012

Philip J. Fulton Law Office, and *Chelsea J. Fulton*, for relator.

Michael DeWine, Attorney General, and *Kevin J. Reis*, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

BROWN, P.J.

{¶ 1} Relator, Dennis E. Varney ("claimant"), has filed this original action requesting that this court issue a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its order that denied a total loss of use award for his left index, ring, and little fingers, and ordering the commission to find that he is entitled to that award.

{¶ 2} This matter was referred to a court-appointed magistrate pursuant to Civ.R. 53(C) and Loc.R. 13(M) of the Tenth District Court of Appeals. The magistrate issued the appended decision, including findings of fact and conclusions of law, and recommended

that this court deny claimant's request for a writ of mandamus. Claimant has filed objections to the magistrate's decision.

{¶ 3} Claimant argues in his first objection that the magistrate erred when she distinguished *State ex rel. Rodriguez v. Indus. Comm.*, 10th Dist. No. 08AP-910, 2009-Ohio-4834. In *Rodriguez*, the issue was the loss of use of the whole thumb under R.C. 4123.57(B). This court in *Rodriguez* found that the correct test, where ankylosis is proven, is whether "a claimant has lost more than half the use of a thumb, not just whether a thumb is 'useless.' " *Id.* at ¶ 6. In the present case, the magistrate found that *Rodriguez* did not apply because *Rodriguez* involved the total loss of use of the thumb, whereas the present case involves the total loss of use of fingers, and the thumb and fingers are completely different functionally, citing *State ex rel. Riter v. Indus. Comm.*, 91 Ohio St.3d 89 (2001). Claimant contends this distinction is irrelevant, because R.C. 4123.57(B) already accounts for the anatomical difference between the finger and the thumb. Claimant asserts that, here, neither the commission nor the magistrate evaluated whether he lost more than two-thirds of the use of his fingers but only whether he sustained a total loss of use of each of the fingers, which is not specific enough under *Rodriguez*.

{¶ 4} We agree with claimant that our reasoning in *Rodriguez* applies with equal force to the present case. Although the thumb and fingers are different in function, there is no basis to have different analyses for each with regard to determining total loss of use. The magistrate in *Rodriguez* discussed the anatomical differences between the thumb and fingers and reviewed *Riter* for purposes of determining at which thumb joint a loss of use should be considered total. Our conclusion, that the proper standard for determining total loss of use is whether ankylosis rendered more than one-half of the thumb useless, was based upon the language of R.C. 4123.57(B) and was independent of the discussion related to the differences between the thumb and fingers. Just as R.C. 4123.57(B) explicitly provides that "the loss of more than one half of such thumb is considered equal to the loss of the whole thumb[,]" R.C. 4123.57(B) also explicitly provides that "[t]he loss of more than the middle and distal phalanges of any finger is considered equal to the loss of the whole finger." If in *Rodriguez* we concluded that R.C. 4123.57(B) requires the commission to determine whether more than one-half of the thumb is useless and not merely determine whether the thumb is totally useless, we must conclude similarly that

R.C. 4123.57(B) requires the commission to determine whether more than two-thirds of a finger is useless and not merely whether the finger is totally useless. As the commission's staff hearing officer found only that claimant's fingers had less than a total loss of use and never determined whether claimant's fingers were more than two-thirds useless, we must find the commission utilized the wrong standard. For these reasons, claimant's first objection is sustained.

{¶ 5} Claimant argues in his second objection that the magistrate erred as a matter of fact and law when analyzing Dr. Jeremy Burdge's medical report. Claimant first points out that the magistrate erred in her factual finding in ¶ 24 when she stated that Dr. Burdge found in his October 28, 2010 report that claimant's index finger had a 60 percent impairment, when Dr. Burdge actually stated that the index finger had a 69 percent impairment. We agree that the magistrate erred in this respect. However, because we have found the commission used the wrong standard to analyze the present case, and we must return the matter to the commission for a re-determination using the correct standard, we decline to address the remainder of claimant's legal argument regarding Dr. Burdge's report. Therefore, we sustain claimant's second objection with regard to the magistrate's erroneous finding of fact but find moot the remainder of his second objection. We also find moot claimant's third objection, which relates to the application of res judicata and Dr. Nancy Renneker's report.

{¶ 6} After an examination of the magistrate's decision, an independent review of the record, pursuant to Civ.R. 53, and due consideration of claimant's objections, we sustain claimant's first objection and part of claimant's second objection. We adopt the magistrate's findings of fact, with the exception of the finding in ¶ 24 related to Dr. Burdge's report, as noted above, but not her conclusions of law. Claimant's writ of mandamus is granted, and the matter is remanded to the commission to determine claimant's eligibility for compensation for total loss of use of his fingers using the correct standard articulated above.

Objections sustained in part and rendered moot in part; writ of mandamus granted, and cause remanded.

DORRIAN, J., concurs.
SADLER, J., dissents.

SADLER, J., dissenting.

{¶ 7} Being unable to agree with the majority's decision to issue a writ of mandamus, I respectfully dissent.

{¶ 8} For organizational purposes, I address the objections out of order. I agree with claimant's assertion that the magistrate's factual findings contain an error as ¶ 24 should read "69 percent" rather than "60 percent," and I would, therefore, correct said finding of fact. After review of the record and Dr. Burdge's report in its entirety, I do not believe this error requires a rejection of the magistrate's conclusions of law or the issuance of a writ of mandamus. Therefore, I would overrule the second objection with the noted correction to the magistrate's finding of fact.

{¶ 9} With respect to claimant's first objection, I disagree with the majority's conclusion that the magistrate misapplied *State ex rel. Rodriguez v. Indus. Comm.*, 10th Dist. No. 08AP-910, 2009-Ohio-4834. Because I agree with the magistrate's treatment of *Rodriguez*, in my view, the magistrate correctly determined the commission applied the appropriate standard. Therefore, I would overrule claimant's first objection.

{¶ 10} Lastly, I would overrule claimant's third objection to the magistrate's decision.

{¶ 11} Accordingly, I would overrule claimant's three objections, adopt the magistrate's decision with the noted correction, and deny the requested writ of mandamus. Because the majority does otherwise, I respectfully dissent.

[Cite as *State ex rel. Varney v. Indus. Comm.*, 2012-Ohio-4904.]

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Dennis E. Varney,	:	
Relator,	:	No. 11AP-585
v.	:	(REGULAR CALENDAR)
Industrial Commission of Ohio and Total Image Specialists LLC,	:	
Respondents.	:	

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

Rendered on April 17, 2012

Philip J. Fulton Law Office, and *Chelsea J. Fulton,* for relator.

Michael DeWine, Attorney General, and *Kevin J. Reis,* for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶ 12} Relator, Dennis E. Varney, 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 seeking a total loss of use award for his left index, ring, and little fingers, and ordering the commission to find that he is entitled to that award.

Finding of Fact:

{¶ 13} 1. Relator sustained a work-related injury on November 15, 1983, while working as a janitor at Vacuform Sign Company. Relator was "operating a 30 ton press brake when his left hand got caught in the press and his left 2nd, 3rd, 4th, and 5th fingers were cut off by the machine." Relator's claim was allowed for the following conditions: "amputation fingers, left second finger; third finger; fourth finger; fifth finger."

{¶ 14} 2. James Nappi, M.D., performed a "successful replantation of the left middle, ring, and left 5th finger and a revision amputation at the DIP level of the index finger."

{¶ 15} 3. Relator returned to the same job with the same employer three months later; however, shortly after he returned to work, relator was laid off from his job. Since that time, relator has worked as a forklift operator.

{¶ 16} 4. In an order mailed August 23, 1985, the Ohio Bureau of Workers' Compensation ("BWC") granted relator one-third loss of his left index finger due to amputation, entitling him to eleven and two-thirds weeks of compensation.

{¶ 17} 5. In an order mailed August 29, 1990, the BWC granted relator two-thirds loss of his left middle finger, two-thirds loss of his left ring finger, and two-thirds loss of his left little finger. Relator was awarded 20 weeks of compensation for his left middle finger, 13 1/3 weeks of compensation for his left ring finger, and 10 weeks of compensation for his left little finger. (Total of 43 1/3 weeks[1]).

{¶ 18} 6. On April 14, 1998, relator filed a C-86 motion seeking a scheduled loss of use award for his left hand. (None of the medical evidence filed in support of this motion is contained in the stipulation of evidence.)

{¶ 19} 7. A hearing was held before a district hearing officer ("DHO") on June 23, 1998. Applying that portion of R.C. 4123.57(B) stating that an injured worker is entitled to more compensation if they have lost two or more fingers due to amputation or ankylosis, the DHO granted relator a loss of use of one-half of his hand. Specifically, the DHO stated:

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[1] Given that relator had already been granted a one-third loss of his left index finger, relator had been awarded a total of 55 weeks of compensation.

> O.R.C. 4123.57(B) states that if claimant has had 2 or more fingers amputated, he is entitled to an award not to exceed the amount for loss of the whole hand, if the claimant's job at the time he was hurt would make the loss of fingers "exceed the normal handicap or disability resulting from loss of fingers." In other words, if claimant worked at a job in which he heavily relied on his hands (such as manual labor) he could be entitled to more compensation than someone who's job required little use of hands (such as, for example, a Hearing Officer).
>
> It is undisputed that claimant had a 1/3 amputation of his left index finger and 2/3 amputation of his left middle, ring, and little fingers. For these amputations, claimant was paid 55 weeks of loss of use compensation. Therefore, if DHO finds that claimant's job was of the type which would make the loss of four fingers "exceed the normal handicap," then it may award compensation in addition to the 55 weeks already paid, not to exceed the 175 weeks to which claimant would be entitled if he had lost the entire hand.
>
> Claimant worked as a janitor/maintenance worker when he was injured. There is no question that this is manual labor which would require intensive use of one's hands. Therefore, loss of 2 or more fingers to one in this line of work would "exceed the normal handicap."
>
> The next question is how much in excess of a "normal handicap" is claimant's particular loss.
>
> As previously mentioned, claimant does retain some use of his left hand. Dr. Kightlineger (5-20-98) opines for the Administrator that claimant has lost 30% function of his left hand, while Dr. Nappi (9-3-91) opines for claimant that the impairment to the hand is 60%.

(Emphasis sic.)

{¶ 20} 8. Twelve years later, on September 30, 2010, relator filed a C-86 motion seeking a scheduled loss of use award for his entire left hand.

{¶ 21} 9. In support of his motion, relator attached the September 7, 2010 report and addendum of Nancy Renneker, M.D. Dr. Renneker made the following exam findings related to each finger:

> Examination of left index finger: (a) active range of motion of left index finger: MP 0 degrees – 70 degrees, PIP 0 degrees – 80 degrees, and left index finger is amputated at DIP joint (b) a total transfer sensory loss with 2 point discrimination greater than 15 mm. is noted distal to PIP joint of left index finger and (c) 3+/5 strength is noted throughout left index finger remnant.
>
> Examination of left middle finger: (a) active range of motion of left middle finger: MP 0 degrees – 70 degrees, PIP 0 degrees – 80 degrees, and DIP 20 degrees – 30 degrees (b) a total transfer sensory loss is noted to PIP joint of left middle finger and (c) 3/5 strength is noted throughout available range of motion of left middle finger.
>
> Examination of left ring finger: (a) active range of motion: MP 0 degrees – 70 degrees, PIP 30 degrees – 70 degrees, and DIP joint is ankylosed in 30 degrees of flexion (b) PIP joint of left ring finger is ulnar deviated 20 degrees (c) a total transfer sensory loss with 2 point discrimination greater than 15 mm. is noted distal to PIP joint of left ring finger and (d) 3/5 strength is noted throughout available range of motion of left ring finger.
>
> Examination of left little finger: (a) active range of motion of left little finger: MP 0 degrees – 70 degrees, PIP 30 degrees – 70 degrees, and DIP joint is ankylosed in 30 degrees of flexion (b) PIP joint of left little finger is ulnar deviated 20 degrees and (c) there is hypersensitivity to light touch over distal tip of left little finger.

Dr. Renneker also noted that relator had decreased left grip strength. Thereafter, Dr. Renneker opined that relator had a 25 percent whole person impairment as a result of a 40 percent left hand impairment. Dr. Renneker made this determination after assessing a 66 percent impairment for relator's left index finger, a 67 percent impairment for his left middle finger, a 77 percent impairment for his left ring finger, and a 62 percent impairment for his left little finger.

{¶ 22} 10. In her addendum report, Dr. Renneker opined that her findings entitled relator to a total loss of use award of his left hand. Dr. Renneker stated:

> Dennis Varney is entitled to a total loss of use of his left hand due to the following: (1) left little finger was amputated at PIP joint and as such, this qualifies for a total loss of use of

> left little finger (2) left ring finger was amputated just distal to PIP joint i.e. with no functional bony residual lever and as such, this also qualifies for a total loss of use of left ring finger (3) left middle finger was amputated at level of mid middle phalanx and as such, this amputation is greater that 1/3 loss of use of left middle finger and less than total loss of use of left middle finger i.e. approximately a 2/3 loss of use of left middle finger and (4) left index finger was amputated at DIP joint and this corresponds to a 1/3 loss of use of left index finger. As such, Dennis Varney has the equivalent of total loss of use of three fingers of his left hand and as such he should be awarded a total loss of use of left hand.

{¶ 23} 11. Jeremy Burdge, M.D. examined relator and in his October 28, 2010 report, made the following examination findings:

> Evaluation of his left index finger[:] motion at the MP joint 0-90 degrees * * * PIP joint has 0-95 degrees of motion * * * amputation just proximal to the DIP joint.
>
> Evaluation of the patient's left long[2] finger[:] 0-80 degrees of motion at the MP joint * * * 0-95 degrees of motion at the PIP joint * * * ankylosis of 30 degrees of the DIP joint.
>
> Evaluation of the patient's left ring finger[:] 0-80 degrees of motion at the MP joint * * * 30-95 degrees of motion at the PIP joint * * * ankylosis of the DIP joint at 30 degrees.
>
> Evaluation of the patient's little finger[:] 0-80 degrees of motion at the MP joint * * * 30-95 degrees of motion at the PIP joint * * * ankylosis at the DIP joint of this finger at 30 degrees.

{¶ 24} Dr. Burdge found the following impairments: index finger 60 percent impairment; middle finger 54 percent impairment; ring finger 59 percent impairment; and little finger 59 percent impairment. Dr. Burdge opined that relator had a 37 percent impairment of his hand due to the above impairments in his respective fingers.

{¶ 25} After reviewing Dr. Renneker's report, Dr. Burdge explained why he disagreed with her ultimate conclusion that relator had sustained a total loss of use of his left hand:

---

[2] On several occasions, Dr. Burdge identifies relator's middle finger as his long finger.

> I disagree with the previous independent medical evaluation by Dr. Ren[n]eker on two counts. First, she mentions that this patient had amputations of all four fingers. This is not accurate. The patient had an amputation of a portion of his index finger, but he had replantation of the long, ring, and little fingers by Dr. Jim Nappi. This replantation of the long, ring, and little finger[s] has resulted in significant impairment to those fingers, as previously mentioned above. However, these are not amputated fingers, and he does retain some function in these fingers.
>
> Second, I disagree with her assessment that he has loss of use of his left hand based upon his history of work. He has returned to work as a forklift driver, and stacking freight and other material utilizing both hands. A cursory evaluation of his grip strength on the left side shows it to be approximately normal to his opposite side.
>
> For all of these reasons, I feel that this patient has a 37% impairment of the hand and not a complete loss of use.

{¶ 26} 12. Relator's motion was heard before a DHO on December 9, 2010. The DHO denied relator's motion finding that res judicata applied and that issue had been determined by the prior DHO order from the June 23, 1998 hearing finding that relator had sustained a one-half loss of use of his hand.

{¶ 27} 13. Relator appealed and the matter was heard before a staff hearing officer ("SHO") on January 27, 2011. The SHO affirmed the prior DHO order and relied on the October 28, 2010 report from Dr. Burdge who opined that relator had not sustained a total loss of use of his left hand. The SHO provided the following alternative reason for denying relator's request:

> In the alternate, the request is denied because the Injured Worker has provided no new evidence showing a basis for an increase above the prior award. This issue was ruled on and denied by the District Hearing Order of 06/23/1998. The only new medical evidence submitted by the Injured Worker is the 09/07/2010 report from Dr. Renneker, whose opinion on the total loss of use of the hand appears to be based solely on the location of the amputations and not any resulting residual loss of motion or function. She makes no comparison to prior findings to show a worsening and makes no mention of such when discussing the total loss of use of

> the hand. Since there has been no previous award of the loss of two or more fingers and no evidence in a change in the functional loss since the 06/23/2008 ruling, the request is denied.

{¶ 28} 14. Relator's appeal was refused by order of the commission mailed February 19, 2011.

{¶ 29} 15. On January 3, 2011, relator filed a C-86 motion seeking a total loss of use award for his index, ring, and little fingers. Relator did not submit any additional medical evidence.

{¶ 30} 16. Dr. Burdge was asked to provide his opinion as to whether or not relator had sustained a total loss of use of each of these fingers. In his February 11, 2011 report, Dr. Burdge opined that relator had not sustained a total loss of use of each of those fingers. Specifically, Dr. Burdge reviewed his previous independent medical evaluation again noting his physical findings upon examination. Dr. Burdge specifically opined:

> [Examination of left index finger:] [P]atient has a 69% impairment due to lack of motion, amputation, and sensory evaluations. However, this is not complete and total loss of use of that finger. * * * This does give him some functional use of his index finger. His primary impairment is due to the amputation of the distal portion of the fingertip. For all of these reasons, I cannot agree that this patient has total and complete loss of use of the left index finger.
>
> [Examination of left long finger:] [P]atient has a 54% impairment of the long finger due to decreased range of motion and decreased sensation. However, this still leaves him with a significant functional use of that left long finger. Therefore, I cannot support a total loss of use of the left long finger.
>
> [Examination of left ring finger:] [I]mpairment of 59% involving lack of motion and decreased sensation in this finger. While this is a significant impairment, it is not a 100% total loss of use of the left ring finger. He clearly continues to have a significant impairment, but continues to have significant functional use of his left ring finger.
>
> [Examination of little finger:] I found that he had a 59% impairment of the little finger. He continues to have significant function at the MP and PIP joints. He continues

> to have some sensation over the length of this finger. For all of these reasons, I could only find that the patient has a 59% impairment of the left little finger. While this is a significant impairment, it is not total loss of use of the left little finger. The patient continues to have some functional use of his left little finger.

Thereafter, Dr. Burdge opined:

> Later in my report, I stated that this patient "had replantation of the long, ring, and little fingers by Dr. Nappi. This replantation of the left long, ring, and little finger has resulted in significant impairment of those fingers, as previously mentioned above. However, there are not amputated fingers, and he does retain some function in these fingers." After reviewing my report and considering the request, I continue to feel that this patient does not have total loss of use of his left index, little, or ring finger. This opinion is supported by the fact that the patient has returned to work as a forklift operator, stacking freight and other material utilizing both of his hands for relatively gross motor function and grip.

{¶ 31} 17. Relator's motion was heard before a DHO on March 21, 2011, and was denied for three reasons. The DHO stated:

> First, there is no legally valid medical report in file which states that the Injured Worker totally lost the functional use of these fingers. The only report in the file that reaches this conclusion is that of Dr. Renneker dated 09/07/2010. However, that report was already rejected by Staff Hearing Officer order dated 01/27/2011. Therefore, under the [*State ex rel. Zamora v. Indus. Comm.*, 45 Ohio St.3d 17 (1989)] case, the District Hearing Officer is forbidden from relying upon that report.
>
> Second, this issue is res judicata. The Bureau of Workers' Compensation order of 08/21/1985 awarded one-third loss of use for the left index finger. The Bureau of Workers' [Compensation] order of 08/29/1990 awarded two-thirds loss of use for the left ring and little fingers. The District Hearing Officer order of 06/23/1998 again made those exact same findings in regards to those fingers in ruling upon the Injured Worker's request for loss of use of the hand. None of those orders were appealed. Therefore, the issue of how much use was lost in these fingers was decided more than

> twenty years ago. No new surgeries, treatments, or other changes in circumstance have been alleged. Therefore, this issue is already decided.
>
> Third, if the District Hearing Officer were able to reach the merits, the most convincing medical evidence in file (regardless of whether or not one considers Dr. Renneker) is the 02/11/2011 report of Dr. Burdge. This report once again finds less than a total functional loss of use in these three fingers. Indeed, he once again finds the loss of use to be the same as it was found to be before, at one-third for the index finger and two-thirds for the other two. Therefore, the Injured Worker failed to meet his burden of proof on the merits.
>
> For all of these reasons, taken either together or separately, this C-86 Motion must be denied.
>
> The District Hearing Officer considered everything that was written in the file and said at the hearing before making this decision.

{¶ 32} 18. Relator's appeal was heard before an SHO on April 27, 2011. The SHO denied the motion stating:

> The Hearing Officer relies on the fact that Dr. Renneker's 09/07/2010 report was rejected by a Staff Hearing Officer on 01/27/2011. Therefore, Dr. Renneker's 09/07/2010 report is rejected pursuant to the Zamora case.
>
> The Hearing Officer also finds previous orders ruled on the loss of use issue regarding these same fingers and have found a loss of use of less than a total loss for each of these fingers (left index, left little, and left ring fingers) per Bureau of Workers' Compensation orders dated 08/21/1985 and 08/29/1990, and per a 6/23/1998 District Hearing Officer order.
>
> In addition, the Hearing Officer relies upon Dr. Burdge's 10/28/2010 and 02/11/2011 reports. Dr. Burdge found a less than total loss of use of the left index finger, left ring finger and left little finger.
>
> Based upon all of these findings, the Hearing Officer denies the C-86 motion filed 01/03/2011.

{¶ 33} 19. Relator's further appeal was refused by order of the commission mailed May 19, 2011.

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

Conclusions of Law:

{¶ 35} 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.*, 11 Ohio St.2d 141 (1967). 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.*, 26 Ohio St.3d 76 (1986). 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.*, 29 Ohio St.3d 56 (1987). 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.*, 68 Ohio St.2d 165 (1981).

{¶ 36} Relator contends that the commission abused its discretion by denying his motion for a total loss of use of his left index, ring, and little fingers. Specifically, relator contends that the commission applied the wrong standard, that the commission improperly rejected Dr. Renneker's report, and that Dr. Burdge's report does not constitute some evidence upon which the commission could rely.

{¶ 37} It is this magistrate's decision that the commission did not abuse its discretion in denying relator's motion seeking a total loss of use of his left index, ring, and little fingers. Specifically, the magistrate finds that the commission applied the correct standard, properly rejected the report of Dr. Renneker, and the report of Dr. Burdge does constitute some evidence upon which the commission could rely.

{¶ 38} R.C. 4123.57(B) provides awards of permanent partial disability compensation for specific scheduled losses due to industrial injury. For these purposes, R.C. 4123.57(B) provides as follows:

> 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 second finger, commonly called index finger, thirty-five weeks.
>
> For the loss of a third finger, thirty weeks.
>
> For the loss of a fourth finger, twenty weeks.
>
> For the loss of a fifth finger, commonly known as the little finger, fifteen weeks.
>
> * * *
>
> The loss of the third, or distal, phalange of any finger is considered equal to the loss of one-third of the finger.
>
> The loss of the middle, or second, phalange of any finger is considered equal to the loss of two-thirds of the finger.
>
> The loss of more than the middle and distal phalanges of any finger is considered equal to the loss of the whole finger. In no case shall the amount received for more than one finger exceed the amount provided in this schedule for the loss of a hand.
>
> * * *
>
> 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.
>
> * * *
> For the loss of a hand, one hundred seventy-five weeks.

{¶ 39} Further, pursuant to R.C. 4123.57(B), the commission may increase the award where an injured worker has sustained the loss or loss of use of two or more fingers by way of amputation or ankylosis, not to exceed the amount of compensation payable for the loss of a hand, under the following circumstances:

> If the claimant has suffered the loss of two or more fingers by amputation or ankylosis and the nature of the claimant's employment in the course of which the claimant was working at the time of the injury or occupational disease is such that the handicap or disability resulting from the loss of fingers, or loss of use of fingers, exceeds the normal handicap or disability resulting from the loss of fingers, or loss of use of fingers, the administrator may take that fact into consideration and increase the award of compensation accordingly, but the award made shall not exceed the amount of compensation for loss of a hand.

{¶ 40} In the present case, following the June 23, 1998 hearing before the DHO, it was determined that relator had sustained a one-third amputation of his left index finger as well as a two-third amputation of his left middle, ring, and little fingers. This qualified relator for 55 weeks of loss of use compensation. Thereafter, the DHO determined that relator's job was the type which would make the loss of his fingers exceed the normal handicap or disability and granted relator additional compensation of 33 weeks after finding that relator's loss was equivalent to the loss of use of one-half of his hand.

{¶ 41} Approximately 12 years later, relator filed his second motion seeking a scheduled loss of use award for his entire left hand. It was at this time that relator submitted the report and addendum from Dr. Renneker. In her report and addendum, Dr. Renneker based her conclusions concerning loss by considering the points at which each finger had been amputated without considering the replantations. As such, her conclusions concerning relator's little and ring fingers (that the loss for each was total) are incorrect. Relator already received awards for two-thirds loss of each of these fingers. Dr. Renneker opined that relator qualified by way of amputation, to a total loss of each of these fingers on grounds that the amputation for his ring finger was greater than two-thirds and that the amputation of the little finger at the PIP joint was greater than two-thirds as well. These findings are incorrect. Ultimately, following a hearing before an SHO on January 27, 2011, the commission rejected the report and addendum of Dr. Renneker and relied on the October 28, 2010 report from Dr. Burdge and further found that relator had not presented evidence demonstrating that his current loss of use was greater than it had been in 1998.

{¶ 42} The same month the SHO determined that relator had not demonstrated an increase in the loss of use of his left hand, relator filed his motion seeking a scheduled loss of use of his left index, ring, and little fingers. As noted previously, relator did not submit any new medical evidence with this motion; however, the commission asked Dr. Burdge to give his opinion concerning whether relator had sustained a total loss of use of those three fingers. Dr. Burdge reiterated his physical findings upon examination from his October 28, 2010 examination and explained the amount of functional use that relator maintained in each of these fingers. In denying relator's motion, the commission determined that it could not rely on Dr. Renneker's report and addendum because those had previously been rejected, and relied on the reports of Dr. Burdge to conclude that relator had not demonstrated that he had sustained a loss of use of those three fingers.

{¶ 43} In order to qualify for a loss of use award, relator was required to present medical evidence demonstrating that, for all intents and purposes, he had sustained a total loss of use of his left index, ring, and little fingers. *State ex rel. Alcoa Bldg. Prods. v. Indus. Comm.*, 102 Ohio St.3d 341, 2004-Ohio-3166.

{¶ 44} In *Alcoa*, at ¶ 10, the court set forth the historical development of scheduled awards for loss of use under R.C. 4123.57(B) as follows:

> Scheduled awards pursuant to R.C. 4123.57(B) compensate for the "loss" of a body member and were originally confined to amputations, with the obvious exceptions of hearing and sight. In the 1970s, two cases—*State ex rel. Gassmann v. Indus. Comm.* (1975), 41 Ohio St.2d 64, 70 O.O.2d 157, 322 N.E.2d 660, and *State ex rel. Walker v. Indus. Comm.* (1979), 58 Ohio St.2d 402, 12 O.O.3d 347, 390 N.E.2d 1190—construed "loss," as similarly used in R.C. 4123.58, to include loss of use without severance. *Gassmann* and *Walker* both involved paraplegics. In sustaining each of their scheduled loss awards, we reasoned that "[f]or all practical purposes, relator has lost his legs to the same effect and extent as if they had been amputated or otherwise physically removed." *Gassmann*, 41 Ohio St.2d at 67, 70 O.O.2d 157, 322 N.E.2d 660; *Walker*, 58 Ohio St.2d at 403-404, 12 O.O.3d 347, 390 N.E.2d 1190.

{¶ 45} In *Alcoa*, the claimant, Robert R. Cox, sustained a left arm amputation just below his elbow. Due to continuing hypersensitivity at the amputation site, Cox was

prevented from ever wearing a prosthesis. Consequently, Cox filed a motion seeking a scheduled loss of use award for the loss of use of his left arm.

{¶ 46} Through videotape evidence, Alcoa established that Cox could use his remaining left arm to push open a car door and to tuck paper under his arm. In spite of this evidence, the commission granted Cox an award for the loss of use of his left arm.

{¶ 47} Alcoa filed a mandamus action which this court denied. Alcoa appealed as of right to the Supreme Court of Ohio.

{¶ 48} Affirming this court's judgment and upholding the commission's award, the Supreme Court explained, at ¶ 10-15:

> Alcoa urges the most literal interpretation of this 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*.

> Pennsylvania defines "loss of use" much as the court of appeals did in the present case, and the observations of its judiciary assist us here. In that state, a scheduled loss award requires the claimant to demonstrate either that the specific bodily member was amputated or that the claimant suffered the permanent loss of use of the injured bodily member for all practical intents and purposes. Discussing that standard, one court has written:
>
> "Generally, the 'all practical intents and purpose' test requires a more crippling injury than the 'industrial use' test in order to bring the case under section 306(c), supra. However, 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." *Curran v. Walter E. Knipe & Sons, Inc.* (1958), 185 Pa.Super. 540, 547, 138 A.2d 251.
>
> This approach is preferable to Alcoa's absolute equivalency standard. Having so concluded, we further find that some evidence indeed supports the commission's decision. Again, Dr. Perkins stated:
>
> "It is my belief that given the claimant's residual hypersensitivity, pain, and tenderness about his left distal forearm, that he is unable to use his left upper limb at all and he should be awarded for the loss of use of the entire left upper limb given his symptoms. He has been given in the past loss of use of the hand, but really he is unable to use a prosthesis since he has had the amputation, so virtually he is without the use of his left upper limb * * *."

{¶ 49} In denying relator's motion, the commission first determined that it could not rely on the report and addendum of Dr. Renneker. Pursuant to *State ex rel. Zamora v. Indus. Comm.*, 45 Ohio St.3d 17 (1989), the commission is prohibited from relying on a medical report that the commission had earlier found unpersuasive. In *Zamora*, the claimant had simultaneously applied to have an additional psychiatric allowance and to have himself permanently and totally disabled. Dr. Kogut examined the claimant and opined that his depression preceded his industrial injury and that the contribution of the industrial injury to the depression was minimal.

{¶ 50} The commission allowed the psychiatric condition and, in so doing, implicitly rejected Dr. Kogut's report. However, ten months later, the commission denied claimant's application for permanent total disability compensation based partially on the report of Dr. Kogut. The claimant challenged the commission's subsequent reliance on that report, arguing that once rejected, the report was removed from evidentiary consideration. The court agreed.

{¶ 51} In the present case, the commission rejected Dr. Renneker's report and addendum when the commission denied relator's motion seeking a loss of use of his left hand. The commission specifically noted that Dr. Renneker did not compare relator's current loss of use to the loss of use that relator had 12 years earlier. Further, as noted previously, Dr. Renneker incorrectly stated that the amputations of relator's ring and little fingers were greater than they were and greater than had already been awarded. Dr. Renneker's ultimate conclusion concerning the loss of use of each finger and of the hand was rejected.

{¶ 52} Relator claims that because his report was first offered in support of his motion for loss of use of his hand and later for loss of use of individual fingers—two different issues, *Zamora* does not apply. However, Dr. Renneker's report and addendum addressed both issues and her conclusions concerning loss of use of each finger was rejected at the same time her opinion concerning loss of use of the hand was rejected. Having rejected that report when denying relator's motion for loss of use of his left hand, the commission was precluded from reviving that report at a later date. As such, the magistrate finds that the commission properly determined that it could not rely on Dr. Renneker's report.

{¶ 53} Relator also contends that the commission applied the wrong standard when it relied on Dr. Burdge's report and that that report did not constitute some evidence upon which the commission could rely. For the reasons that follow, the magistrate disagrees.

{¶ 54} Relator argues that the fact his fingers retained some function was an improper basis upon which to deny his motion. Relator cites this court's decision in *State ex rel. Rodriguez v. Indus. Comm.*, 10th Dist. No. 08AP-910, 2009-Ohio-4834, where the injured worker, Dario Rodriguez, had been denied a scheduled loss of use award for the

loss of use of his entire left thumb. This court determined that, in denying Rodriguez's motion, the commission did not articulate the correct standard under R.C. 4123.57(B) where ankylosis is proven. Specifically, this court noted that the statute provides that the loss of more than one-half of a thumb is equal to the loss of the whole thumb and requires payment where ankylosis renders the thumb or any part of the thumb useless. In making its determination that the thumb was not entirely useless, the commission did not expressly considered whether Rodriguez had lost more than half of the use of his left thumb and granted a writ of mandamus ordering the commission to re-evaluate the application.

{¶ 55} In denying Rodriguez's motion, the commission had relied on medical evidence that Rodriguez maintained a certain range of motion of his thumb. Relator contends that the commission likewise abused its discretion here by finding that he maintained a certain range of motion of each of his fingers. However, the loss of use of a thumb is viewed in a different light than the loss of use of a finger. Specifically, this court discussed the distinction in *Rodriguez* by citing from the Supreme Court of Ohio's decision in *State ex rel. Riter v. Indus. Comm.*, 91 Ohio St.3d 89 (2001). In that case, the commission specifically stated:

> The thumb is key to grasping and gripping. * * * 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." * * *
>
> 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." * * *

> 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." * * *
>
> 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." * * *
>
> 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.

(Citations omitted.)

{¶ 56} As the *Riter* court stated, the commission cannot evaluate the thumb under the same standards used to evaluate the fingers. Conversely, fingers cannot be evaluated under the same standards as the thumb. Here, relator's use of his fingers was under consideration and this court's decision in *Rodriguez* is not analogous. Further, to the extent that relator argues that the evidence shows he suffered more than a two-thirds loss of his ring and little fingers (qualifying him for loss of these entire fingers), the evidence demonstrates otherwise.

{¶ 57} Relator also argues that the Supreme Court of Ohio's decision in *State ex rel. Kroger Co. v. Johnson*, 128 Ohio St.3d 243, 2011-Ohio-530, demonstrates that the commission applied an incorrect standard. For the reasons that follow, this magistrate disagrees.

{¶ 58} In *Kroger*, the claimant, Dan C. Johnson, had filed an application for the scheduled loss of use of his right hand. The commission had granted the award based on a report from Dr. Renneker who had concluded that Johnson had a 27 percent impairment of his right hand and stated in an addendum that Johnson had a functional loss of use of his right hand. The employer filed a mandamus action arguing that the commission had abused its discretion. This court agreed and granted a writ of mandamus after finding that Dr. Renneker's opinion that Johnson had suffered a total loss of use of his hand was not reconcilable in her finding that he had sustained a 27 percent hand impairment. This court issued a writ of mandamus ordering the commission to deny Johnson's motion in its entirely.

{¶ 59} On appeal, the Supreme Court of Ohio agreed that Dr. Renneker's report did not constitute some evidence upon which the commission could reply; however, in issuing a writ of mandamus, the court remanded the matter to the commission for further consideration.

{¶ 60} The *Kroger* court indicated that the pivotal question was how much function remained. The court stated at ¶ 15:

> As a general rule, function is expressed in one of two ways—numerically or narratively. As to the former, many medical reports denominate loss as a percentage figure. A 100 percent loss is obviously shorthand for a total loss, but there is no rule that makes 100 percent the only figure that can substantiate a total-loss-of-use award. It is unfathomable that a 98 percent loss of function, for example, would not qualify as a total loss. * * * On the other hand, a high level of impairment does not necessitate a finding of total loss. In *State ex rel. Isaacs v. Indus. Comm.*, 96 Ohio St.3d 82, 2002-Ohio-3613, 771 N.E.2d 852, ¶ 8-9, we upheld the commission's denial of total-loss compensation to a claimant with a 70 percent foot impairment.

{¶ 61} In the present case, Dr. Burdge provided his physical findings upon examination which included range of motion findings for each joint in the respective fingers. Dr. Burdge also concluded that relator's loss of use of his hand constituted a 37 percent impairment of his hand. The commission had already awarded relator a 50 percent loss of use of his hand and, as the commission indicated, relator did not present evidence demonstrating his loss of use of these specific fingers had increased since the commission's last order. Further, as noted in *Kroger*, percentage of impairment does not necessarily indicate percentage of loss of use. Considering both of Dr. Burdge's reports, the commission concluded that the loss was not total. Inasmuch as those reports contained range of motion findings, gross motor function, grip strength, and described relator's current work abilities, Dr. Burdge's reports do constitute some evidence. The evidence does not demonstrate that relator has for all intents and purposes sustained a total loss of use of his index, ring or little fingers and the commission did not abuse its discretion.

{¶ 62} Based on the foregoing, it is this magistrate's decision that relator has not demonstrated that the commission abused its discretion in denying his motion seeking a total loss of use award for his index, ring, and little fingers 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).