[Cite as *State ex rel. Richardson v. Indus. Comm.*, 2012-Ohio-5660.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Pamela D. Richardson,	:	
Relator,	:	
v.	:	No. 11AP-678
Industrial Commission of Ohio and Licking County,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on December 4, 2012

Agee, Clymer, Mitchell & Laret, and *Eric B. Cameron*, for relator.

Michael DeWine, Attorney General, and *John Smart*, for respondent Industrial Commission of Ohio.

Michael Soto, for respondent Licking County.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

DORRIAN, J.

{¶ 1} Relator, Pamela D. Richardson ("relator"), filed an original action seeking a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order denying relator's motion requesting a loss of use award for her left foot and ankle and to enter an order granting an award for the loss of use of her left foot and ankle.

{¶ 2} Relator was employed by respondent Licking County ("employer") and filed a workers' compensation claim after suffering an injury at work on May 15, 2007. Relator's claim was initially allowed for substantial aggravation of pre-existing degenerative disc disease at the L4-5 level with radiculopathy and compression of the left L5 nerve root. Relator subsequently filed a motion requesting that the claim also be allowed for the condition of left foot drop, and that condition was allowed. Relator also filed a motion requesting that her claim be allowed for a loss of use award for her left foot and ankle. In support of her motion, relator provided reports from Nancy Renneker, M.D., and John C. Cook, D.O. After filing the motion, relator was also examined by Robin G. Stanko, M.D. ("Dr. Stanko"). As detailed more fully in the magistrate's decision, the commission ultimately denied relator's request for a loss of use award for her left foot and ankle.

{¶ 3} This court referred the matter to a magistrate pursuant to Civ.R. 53(C) and Loc.R. 13(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 requested writ.

{¶ 4} Relator timely filed two objections to the magistrate's decision:

> OBJECTION 1: The Magistrate improperly applied the Richardson decision, which is contrary to Alcoa.
>
> OBJECTION 2: The Magistrate incorrectly interpreted Dr. Stanko's report as some evidence upon which the commission relied upon.

{¶ 5} Pursuant to Civ.R. 53(D)(4)(d), we undertake an independent review of the objected matters "to ascertain that the magistrate has properly determined the factual issues and appropriately applied the law."

{¶ 6} In her first objection, relator argues that the magistrate improperly applied this court's decision in *State ex rel. Richardson v. Indus. Comm.*, 10th Dist. No. 04AP-724, 2005-Ohio-2388, in determining whether the commission abused its discretion by denying relator's loss of use request. Relator argues that *Richardson* is contrary to the Supreme Court of Ohio's decision in *State ex rel. Alcoa Bldg. Prods. v. Indus. Comm.*, 102 Ohio St.3d 341, 2004-Ohio-3166, and further argues that the magistrate should have

applied this court's precedent in *State ex rel. Sears Roebuck & Co. v. Campos*, 10th Dist. No. 04AP-1266, 2005-Ohio-5700.

{¶ 7} In *Alcoa*, the Supreme Court rejected an "absolute equivalency" standard that would require a claimant to have absolutely no use of an injured bodily part in order to obtain a loss of use award. *Alcoa* at ¶ 14. Rather, the court focused on whether the claimant lost the use of the injured bodily part "for all practical intents and purposes." *Id.* at ¶ 12. Applying this standard, the court upheld a loss of use award for the claimant's left arm, despite the fact that only the portion of the arm below the elbow had been amputated. The medical evidence demonstrated that the claimant suffered from hypersensitivity, pain, and tenderness that prevented the use of a prosthesis. *Id.* at ¶ 15. Although the employer presented evidence showing that the claimant could use the remaining portion of his left arm to push open a car door or hold papers that he had tucked under the arm, the court concluded that this sort of residual use would not preclude an award for loss of use. *Id.* at ¶ 11.

{¶ 8} In *Richardson*, this court applied *Alcoa* to a claim seeking a loss of use award for the claimant's left foot. The court concluded that "the proper inquiry is whether, taking into account both medical findings and real functional capacity, the body part for which the scheduled loss award is sought is, for all practical purposes, unusable to the same extent as if it had been amputated or otherwise physically removed." *Richardson* at ¶ 7. The claimant in *Richardson* suffered chronic pain, numbness, weakness, and lack of flexion in his left foot, along with a significant limp, but could walk with the help of a brace. *Id.* at ¶ 8-9. Thus, the court concluded that the claimant retained the "paramount use" of his foot and was not entitled to a loss of use award. *Id.* at ¶ 10.

{¶ 9} By contrast, the *Campos* case, which relator argues should be applied in assessing her claim, involved a claim for loss of use of the claimant's right hand and arm. *Campos* at ¶ 1. The evidence demonstrated that the claimant retained, at best, residual capacity in his right hand and arm. He could produce an illegible signature on a form "with great difficulty," and could place a piece of fruit or utensil in his right hand, but could not eat the fruit from his hand or use the utensil to eat. *Id.* at ¶ 43. Adopting a magistrate's decision, this court concluded that the commission's order allowing the loss

of use claim was supported by some evidence and based on the correct legal standard. *Id.* at 21.

{¶ 10} This court rejected the application of *Campos* in a recent case where the claimant sought a loss of use award for his left foot. *State ex rel. Bushatz v. Indus. Comm.*, 10th Dist. No. 10AP-541, 2011-Ohio-2613. The evidence demonstrated that, similar to *Richardson*, the claimant in *Bushatz* suffered a foot drop condition but was able to walk with the use of a brace and cane. *Id.* at ¶ 30. The analogy to *Campos* was rejected because the claimant could still use his foot for its primary function of walking; whereas, the claimant in *Campos* had a hand that was essentially useless. *Id.* at ¶ 39. *See also State ex rel. Childers v. Indus. Comm.*, 10th Dist. No. 11AP-621 (Sept. 11, 2012) (memorandum decision).

{¶ 11} As detailed in the magistrate's decision, relator retained the ability to walk using her left foot, albeit with the assistance of a brace. Similar to the claimants in *Richardson* and *Bushatz*, she has not lost the use of her left foot for the primary function of walking. Thus, the magistrate did not err in applying the *Richardson* decision and did not err in concluding that the commission applied the proper standard in evaluating relator's claim.

{¶ 12} Accordingly, relator's first objection is overruled.

{¶ 13} In her second objection, relator argues that the magistrate erred by concluding that Dr. Stanko's report constituted some evidence on which the commission could rely to deny relator's loss of use request. Relator argues that the commission cannot rely on a medical opinion that is "equivocal or internally inconsistent," citing the Supreme Court of Ohio decision in *State ex rel. George v. Indus. Comm.*, 130 Ohio St.3d 405, 2011-Ohio-6036, ¶ 11. Relator asserts that Dr. Stanko's report is inconsistent and unreliable because it does not discuss relator's complete medical history, including a surgery performed in 2004. Relator also disputes the reliability of Dr. Stanko's report based on an affidavit relator submitted asserting that, contrary to Dr. Stanko's report, she was unable to stand on her heels during the examination.

{¶ 14} In the *George* decision, the Supreme Court reviewed its precedents in *State ex rel. Eberhardt v. Flxible Corp.*, 70 Ohio St.3d 649 (1994), and *State ex rel. Lopez v. Indus. Comm.*, 69 Ohio St.3d 445 (1994). The court explained that equivocation "occurs

'when a doctor repudiates an earlier opinion, renders contradictory or uncertain opinions, or fails to clarify an ambiguous statement.' " *George* at ¶ 15, quoting *Eberhardt* at 657. Although Dr. Stanko's failure to mention relator's 2004 surgery constitutes an incomplete medical history, this does not make the report equivocal under the definition set forth in *George*. Likewise, the omission does not render the report internally inconsistent.

{¶ 15} With respect to relator's affidavit disputing whether she was able to stand on her heels during the examination, as the magistrate notes, "the [c]ommission is exclusively responsible for assessing the weight and credibility of evidence." *George* at ¶ 11, citing *State ex rel. Burley v. Coil Packing, Inc.*, 31 Ohio St.3d 18 (1987). The commission had the opportunity to review relator's affidavit and found Dr. Stanko's report to be credible. Accordingly, the magistrate did not err in concluding that Dr. Stanko's report constituted some evidence on which the commission could rely.

{¶ 16} Relator's second objection is overruled.

{¶ 17} Following an independent review of the record, we find that the magistrate has properly determined the facts and applied the appropriate legal standard. Therefore, we overrule both objections and adopt the magistrate's decision as our own, including the findings of fact and conclusions of law. In accordance with the magistrate's decision, we deny relator's requested writ of mandamus.

Objections overruled; writ denied.

KLATT and FRENCH, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Pamela D. Richardson,	:	
Relator,	:	
v.	:	No. 11AP-678
Industrial Commission of Ohio and Licking County,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on July 11, 2012

Agee, Clymer, Mitchell & Laret, and *Eric B. Cameron*, for relator.

Michael DeWine, Attorney General, and *John Smart*, for respondent Industrial Commission of Ohio.

Michael Soto, for respondent Licking County.

IN MANDAMUS

{¶ 18} In this original action, relator, Pamela D. Richardson, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order denying her motion for an R.C. 4123.57(B) scheduled loss award for an alleged loss of use of her left foot, and to enter an award for loss of use of her left foot.

Findings of Fact:

{¶ 19} 1. Relator has filed five industrial claims, including the claim No. 07-841127 at issue here. One of the other claims, No. 04-822054, must be addressed here.

{¶ 20} 2. Claim No. 04-822054 is a disallowed claim regarding an alleged January 29, 2004 injury.

{¶ 21} Initially, on May 20, 2004, the Ohio Bureau of Workers' Compensation ("bureau") allowed claim No. 04-822054 for "lumbar radiculitus" and the employer administratively appealed.

{¶ 22} On June 15, 2004, Rebecca Brightman, M.D., performed a "right L4-5 hemilaminotomy and discetomy."

{¶ 23} Subsequent to the June 15, 2004 surgery, claim No. 04-822054 was disallowed by the commission. Relator appealed to the Franklin County Court of Common Pleas under R.C. 4123.512, but the case was dismissed and never re-filed.

{¶ 24} 3. On May 15, 2007, relator sustained the industrial injury at issue here while employed as a "work shop specialist" for respondent Licking County, a state-fund employer ("employer").

{¶ 25} 4. On June 28, 2007, relator filled out a form provided by the bureau captioned "First Report of an Injury, Occupational Disease or Death" (FROI-1). The FROI-1 asks the injured worker to describe the accident. In the space provided, relator states: "Client fell into employee when aggressively trying to get item behind her. Employee's lower back & tailbone fell onto hard arm of chair."

{¶ 26} 5. On August 2, 2007, the bureau mailed an order allowing claim No. 07-841127.

{¶ 27} 6. The employer administratively appealed the bureau's order.

{¶ 28} 7. Following an October 3, 2007 hearing, a district hearing officer ("DHO") issued an order that disallowed the claim and vacated the bureau's order. The DHO's order explains:

> The District Hearing Officer finds that the claimant has failed to demonstrate a new injury or occupational disease occurring within the course and scope of her employment.
>
> The District Hearing Officer further finds that evidence in file does not support the allowance of a compensable industrial claim occurring on or about 05/15/2007.

> The District Hearing Officer notes that on 06/14/2004, the injured worker underwent a discectomy and hemilaminectomy of the L4-5 level. The District Hearing Officer further finds that the claimant has a 2002 claim, claim no. 02-802826, which was denied in 2003 for the condition, "sprain lumbosacral." The District Hearing Officer further finds that in 2004, the claimant sustained another injury which is the subject of claim no. 04-822054, which was disallowed for the condition, "lumbar radiculitis."

{¶ 29} 8. Relator administratively appealed the DHO's order of October 3, 2007.

{¶ 30} 9. Following a November 5, 2007 hearing, a staff hearing officer ("SHO") issued an order that allows the claim and vacates the DHO's order of October 3, 2007. The SHO's order explains:

> It is the finding of the Staff Hearing Officer that the claimant sustained an injury in the course of and arising out of her employment when one of her patients tried to obtain something behind her and she fell, striking her back on the arm of a chair and causing the injury of record. She reported the accident immediately to the employer and filled out an injury report.
>
> It is the finding that the claim is allowed for "substantial aggravation of pre-existing degenerative disc disease at the L4-5 level with radiculopathy" and "compression of the left L5 nerve root."

{¶ 31} 10. Apparently, the SHO's order of November 5, 2007 was not administratively appealed.

{¶ 32} 11. On April 29, 2008, relator moved that her industrial claim be additionally allowed for left foot drop.

{¶ 33} 12. On May 2, 2008, the bureau mailed an order additionally allowing the claim for left foot drop.

{¶ 34} 13. Apparently, the bureau's May 2, 2008 order was not administratively appealed.

{¶ 35} 14. Earlier, on March 25, 2008, relator filed an application for the determination of her percentage of permanent partial disability ("PPD").

{¶ 36} 15. At the bureau's request, on June 5, 2008, relator was examined by John C. Cook, D.O., with regard to the March 25, 2008 application. Dr. Cook issued a two-page narrative report dated June 13, 2008 in which he states:

> HISTORY: The claimant is a 39 year-old female that was Injured while employed as a workshop specialist by Licking County. Ms. Richardson was pushed back onto an arm chair and the arm of the chair hit her lower back. She was initially evaluated and treated by Dr. James Dorado. A MRI of the lumbar spine showed a disc herniation on the left at L4-5. Due to severe left leg pain and foot drop that was unresponsive to medical care, claimant underwent a left L4-5 hemilaminectomy and discectomy on 07/13/07. Ms. Richardson was off work for 10 weeks and followed up with physical therapy. She is currently employed and takes Advil as needed.
>
> CURRENT SYMPTOMS: Presently Ms. Richardson complains of daily lower back aches, left leg and buttock pain, and difficulty with her foot.
>
> PHYSICAL EXAMINATION: The claimant's file was read and reviewed and upon examination of the Lumbosacral Spine finds tenderness over the left lumbar and sacral region, a well-healed 7 cm surgical scar over the midline of the lumbar spine, and no muscle guarding or spasms. Claimant is unable to perform left heel walking. Gait is slightly antalgic. There is left calf muscle atrophy noted. Motor shows weakness. Reflexes are +2/4 for the right patellar reflex and +1/4 for the left patellar reflex. Straight leg raises are 90 degrees on the right and 75 degrees on the left with radiculopathy. EHL is 50 degrees on the right and 40 degrees on the left. Claimant wears a left AFO brace due to her left foot drop. There is radiculopathy present that goes to the left ankle, placing this patient in Category III. Using the AMA Guidelines Fifth Edition, Page 384, Table 15-3, the total WPI for this patient is 13%.
>
> IMPAIRMENT RATING: Based upon the AMA Guidelines Fifth Edition Revised, there is a 13% WPI for this claimant.

{¶ 37} 16. On July 2, 2008, the bureau mailed a tentative order finding 13 percent PPD based upon Dr. Cook's report.

{¶ 38} 17. Apparently, no objection was filed to the bureau's July 2, 2008 tentative order.

{¶ 39} 18. On July 28, 2008, at her own request, relator was examined by Nancy Renneker, M.D. In her three-page narrative report, Dr. Renneker states:

> **HISTORY:**
>
> On 5/15/07, while on her job as a workshop specialist for Licking County MRDD adult services, Pamela Richardson reports that on this date an adult client pushed her into an arm chair and table with Pamela Richardson reporting that she noted immediate low back pain[.] Pamela Richardson reports that as the days progressed i[.]e. within one week of this injury she had severe low back pain with radiation of pain/dysesthesia into left buttock region and down left posterior lateral leg extending into dorsal left foot/left great toe and Pamela Richardson reports that her left lower extremity symptoms also progressed to a left foot drop[.] Pamela Richardson was subsequently referred to a neurosurgeon, Dr[.] Rebecca Brightman[,] M.D[.] Dr. Brightman obtained a history of severe left leg pain and by exam, left foot drop unresponsive to medical care. She also obtained a history of a prior low back surgery i[.]e. Pamela Richardson underwent right L4-5 discectomy in 2004 with Pamela Richardson reporting that she had a good response/near full recovery after her low back surgery in 2002 [sic] with Pamela Richardson reporting that she did not have daily low back pain or any leg pain until this new injury of 5/15/07. Dr. Brightman obtained a lumbar spine MRI scan which demonstrated the following (1) left L4-5 disc herniation with free fragment and (2) previous right L4-5 laminotomy[.] After this new lumbar spine MRI scan Dr[.] Brightman recommended surgery[.] On 7/13/07, Dr. Brightman performed low back surgery i.e. Pamela Richardson underwent left L4-5 hemilaminectomy and L4-5 discectomy. Pamela Richardson reports that she noted no improvement in her low back or left leg symptoms with this surgery and in fact, she was "worse" with Pamela Richardson reporting that she woke from that surgery with a left foot drop which has persisted to this date[.] Pamela Richardson currently wears a lace up left ankle brace and a review of available medical records showed a prescription for a custom molded left AFO/ankle/foot/orthoses with a dorsi assist. Pamela Richardson reports that she is still waiting for authorization/approval from the BWC to allow fabrication of

this brace. Pamela Richardson reports that she continues to see Dr[.] Brightman for this claim on an intermittent basis and Pamela Richardson reports that she now sees her primary care physician, Dr[.] Jane Dorado for her everyday/ongoing low back and left leg symptoms. Pamela Richardson currently takes Advil on an as needed basis and Flexeril on an as needed basis for this claim[.] Pamela Richardson reports that at the time of her low back surgery in July 2007 that she was off of work for 9 to 10 weeks and she then returned to work to her same job and Pamela Richardson reports that she is not allowed to have work restrictions on her current job.

PRESENT COMPLAINTS:

Pamela Richardson complains of non constant but daily bilateral low back pain, constant low back stiffness, non constant but daily "severe left lower leg pain" with Pamela Richardson describing this pain as a "pinching sensation" and constant numbness about left great toe. Pamela Richardson reports that she has little active motion of her left ankle and foot. Pamela Richardson notes approximately one hour of low back stiffness on waking, increased pain and stiffness about low back in cold or damp weather and Pamela Richardson is continent of bowel and bladder. Pamela Richardson needs a sturdy railing to negotiate any steps and she must place both feet on same step before proceeding to next step. Of note, Pamela Richardson reports that as much as possible she avoids stair climbing. Pamela Richardson is able to sit or stand for a maximum interval of 1 hour and Pamela Richardson reports that she is able to walk a distance of 50 yards on a level surface, however, Pamela Richardson reports that this distance will be walked with a "limp". Pamela Richardson reports that since this injury and her subsequent low back surgery that she no longer vacuums, scrubs the tub, does yard work or carry baskets of laundry and Pamela Richardson reports that she has help from her 14 year old daughter with all grocery shopping as Pamela Richardson reports that she is unable to do heavy lifting and unable to do bending to obtain grocery items from lower shelves. Pamela Richardson also states that she is limited in her walking tolerance/walking distance and she reports that she is unable to walk the long isles at Wal-Mart[.]

EXAMINATION:

> Height 5'1" Weight: 139lbs. Pamela Richardson has a lace up left ankle and foot brace on at time of this evaluation and Pamela Richardson has an audible left foot slap with gait on level surfaces. As stated above, Pamela Richardson is awaiting authorization/fabrication of a custom molded left ankle/foot/orthoses with a dorsi assist. A well healed 3cm in length midline lumbar surgical scar is measured. Active lumbar spine range of motion: flexion 30 degrees with a 25 degree sacral flexion angle, extension 0 degrees, right lumbar lateral flexion 30 degrees and left lumbar lateral flexion 10 degrees with paravertebral muscle spasms noted on attempts at active lumbar spine flexion and extension. Left passive straight leg raise test is possible to 40 degrees of left hip flexion and Pamela Richardson notes an increase in low back, left buttock and left posterior lateral leg pain extending into dorsal left foot/left great toe[.] Right passive straight leg raise test is possible to 40 degrees of right hip flexion and Pamela Richardson reports an increase in low back pain with this test. Bilateral lower extremity skin exam, strength, deep tendon reflexes and sensation are within normal limits with the exception of: (1) absent bilateral ankle deep tendon reflexes (2) absent pin prick sensation in left L5 dermatome (3) 2+/5 strength is noted in left ankle dorsi flexors and left EHL and (4) 1cm left calf atrophy is measured.
>
> **OPINION:**
>
> Based on medical records reviewed, my exam of this date and my medical opinion, Pamela Richardson is entitled to an award of total loss of use of left ankle and foot due to the following (1) lack of antigravity strength in left ankle dorsi flexors and left EHL with Pamela Richardson needing a custom made ankle brace with a dorsi assist to provide this loss of function of her left ankle and foot (2) inability to perform functions of daily activities due to her loss of left foot and ankle function.

{¶ 40} 19. On September 25, 2008, relator moved for R.C. 4123.57(B) scheduled loss compensation. According to her motion, she requested "a loss of use award for the left foot and ankle." In support, relator submitted the July 28, 2008 report of Dr. Renneker and the June 13, 2008 report of Dr. Cook.

{¶ 41} 20. On November 11, 2008, at the bureau's request, relator was examined by Robin G. Stanko, M.D., who issued a three-page narrative report. Dr. Stanko's report states:

> Pamela Richardson is seen in our Newark office today for a loss of use independent medical exam[.] Ms. Richardson was injured at work in May 2007 when she was working with a client with behavioral problems and had to push him back into a chair[.] She states she developed left leg pain and dropfoot[.] She then had a left L4-5 hemilaminotomy and discectomy by Dr[.] Brightman on 7/13/07[.] She states that surgery did help her symptoms with pain[.] She has not had any other back surgery[.] She currently is wearing a fabric laced AFO[.] She reports intermittent low back pain[.] She reports constant pain in her left lower extremity[.] She states no other therapy is planned for her back[.] Intermittently she reports decreased sensation to light touch over her left great toe[.] She reports weakness in her left lateral leg[.] She has not had any recent x-rays or MRI[.] She states she is still working[.] She uses a brace but complains of instability of the left ankle from weakness[.] Medications include Flexeril and pain medication[.] She reports no problems with diabetes or thyroid problems[.]
>
> **PHYSICAL EXAM** The patient is alert and in no acute distress[.] The patient is afebrile. Respirations are 12 per minute, regular and unlabored[.] Pulses are 84 per minute and regular[.] The tibial pulses are intact bilaterally[.] There is no edema of the lower extremities bilaterally[.] There is no costovertebral tenderness bilaterally[.] There is normal percussion of the lungs[.] The abdomen is non-tender with palpation[.] There is no lymphadenopathy[.] The skin shows normal color and temperature of the feet bilaterally[.]
>
> There is 4+/5 strength for left dorsiflexion and 5-/5 strength for left plantar flexion[.] I notice active contraction of the left anterior tibialis. There is 5/5 strength for right foot dorsiflexion and plantar flexion[.] DTR testing shows 1+ reflexes for the knees bilaterally and absent hamstring DTR[']s bilaterally[.] There is a 1+ *left* ankle DTR and an absent right ankle DTR[.] Mid-transverse arch circumference of the foot measures 20 cm bilaterally[.] Left ankle range of motion demonstrates 0◦ dorsiflexion, 50◦ plantar flexion[.] She reports decreased sensation to light touch over the lateral left foot and tingling in the left great toe. She reports

decreased sensation to light touch over the dorsum of the left foot[.] An SLR is negative bilaterally[.] Balance is normal, gait is independent, and she can stand on her toes bilaterally[.] She [is] able to stand on her heels bilaterally as well, but she is not able to dorsiflex her left foot as much as the right foot[.] Sit-to-stand transfers are independent[.] Hip range of motion demonstrates 120◦ of flexion, 45◦ of external rotation and 30◦ of internal rotation bilaterally. Fabere testing is negative bilaterally. There is no tenderness over the greater trochanters bilaterally[.] Back range of motion using an inclinometer demonstrates 45◦ of forward flexion, 15◦ of extension, 20◦ of right lateral flexion and 20◦ of left lateral flexion[.] No clinical scoliosis is noted[.] There is tenderness reported with palpation of the left hip abductor muscles, gluteal muscles or over the sacroiliac joints, but there is no tenderness over the corresponding areas on the right[.] Tenderness is reported with palpation of the lumbar paraspinals bilaterally[.] There is an 8.5 cm well-healed scar over the lumbosacral spine[.]

OPINION

[One] *Your report should identify and discuss your physical findings, including but not limited to range of motion, findings of contracture due to ankylosis, and other physical findings which establish the residual functional capacity of the affected body part and limitations of the function of the body preventing it from functioning as would be expected[.]*

By clinical exam today, Ms[.] Richardson does demonstrate residuals of a left L5 radiculopathy[.] Medical records indicate that an MRI of the lumbosacral spine on 6/25/07 showed a very small disc protrusion at L4-5 putting pressure on the L5 nerve root. Subsequently she had surgery by Dr. Brightman[.] She reports ongoing problems with left footdrop, but is wearing a fabric laced orthosis to give lateral support to the ankle[.] She states she is working at present[.] By clinical exam today, she still has 4+/5 strength for left dorsiflexion[.] She did report decreased sensation over the dorsum of her left foot, but no tenderness was noted when walking on the foot[.] When she was walking, I did not observe her foot slap the ground and she currently had antigravity strength still in her left foot dorsiflexors[.] She does demonstrate decreased range of motion of her back[.] Her overall permanent impairment for the allowed conditions in this claim is consistent with a DRE Lumbar

> Category III impairment, giving her a 10% whole person impairment.
>
> [Two] *In your medical opinion, has the allowed injury resulted in total, permanent loss of use to such a degree that the affected body part is useless for all practical purposes, that is, the body part though present is not capable of performing most of the functions for which it commonly performs as a result of the allowed conditions in this claim? Be specific[.]*
>
> The claimant submitted a motion to request loss of use for the left foot and ankle[.] In my opinion, there is no evidence of permanent loss of use[.] She demonstrated anti-gravity dorsiflexion of the left foot. There is some impairment of strength and sensation in the left foot consistent with residuals of the L5 radiculopathy, but she is able to ambulate independently[.] She was wearing a fabric laced orthosis that strapped around her left ankle which is more designed to provide lateral instability[.] She was not wearing a plastic AFO designed to give dorsiflexion assist[.] She is working at present. No significant Achilles tendons contractures were noted[.] In comparison, a Syme amputation at the left ankle would be a 25% whole person impairment using *The Guides to the Evaluation of Permanent Impairment, Fifth Edition*[.] In considering her impairment from the allowed conditions, she would currently have just a 10% whole person impairment and she still retains considerable function of the left foot and ankle. Consequently, in my opinion, she has not had a total permanent loss of use of the left foot and ankle.

(Emphasis sic.)

{¶ 42} 21. Following a January 6, 2009 hearing, a DHO issued an order denying relator's September 25, 2008 motion. The DHO's order explains:

> It is the finding of the Hearing Officer that the Injured Worker is requesting a scheduled loss of use for the left foot and ankle. Hearing Officer finds that pursuant to the report of Dr. Robin Stanko the Injured Worker is able to walk with a brace and can walk a certain distance without a brace and did not find evidence of a permanent loss of use. It is therefore the order of the Hearing Officer that the Injured Worker's request for a scheduled loss of use of the left foot and ankle is denied.

{¶ 43} 22. Relator administratively appealed the DHO's order of January 6, 2009.

{¶ 44} 23. On January 26, 2009, relator executed an affidavit which was filed February 5, 2009. The affidavit states:

> I, Pamela D. Richardson, as an injured worke[r], attended an examination on November 11, 2008, with Dr. Robin Stanko in regard to the loss of use of my left foot and ankle. Dr. Stanko examined me very quickly and did not perform a thorough examination. During the course of this examination, contrary to what Dr. Stanko has said, I was not able to stand on my heels. Dr. Stanko asked me to stand on my heels, and I was not able to do so. The only walking I did during my exam with Dr. Stanko was approximately three to four feet in a small examining room without shoes on. Like I always do, I bore most of my weight on my right side when that exam took place.
>
> At this point, I am not able to balance on my left foot without holding on to something. I can no longer wear any sort of high-heeled shoes, and I am constantly at risk of falling. I also do not have reflexes in either one of my ankles, and this has been verified by two different doctors. I cannot move my left big toe and other portions of my left foot, and I am significantly limited in downward motions with my other toes on my left foot. I even have difficulty putting slip-on shoes, like slippers, on my left foot. I have to use the wall and push my left foot in with my leg. When I walk up and down stairs, I cannot keep a shoe on my left foot without it falling off or me falling.
>
> This may all seem minor to some, but it means a great deal to me. My lifestyle has changed profoundly as a result of this injury. My daily tasks and activities have changed dramatically since this injury. I have had to make adjustments and use my right foot and leg to bear almost all of my weight to compensate for my left-foot weakness. I cannot perform tasks without having to use the right side of my body to assist me and use my brace. Regarding my AFO brace, it was specially made to fit my left foot by a specialist.
>
> I have done everything in my power to continue to work, despite my surgery and the after effects of my surgery for this drop foot condition. I feel as though I am being punished for everything I have done to try and get back on track after this injury. I would simply ask that whoever decides this matter

> takes these things into consideration along with what little use I do have of my left foot and ankle.

{¶ 45} 24. Following a February 5, 2009 hearing, an SHO mailed an order on February 7, 2009 that vacates the DHO's order and awards R.C. 4123.57(B) compensation. The SHO's order explains:

> Pay the Injured Worker 150 weeks of compensation for the permanent and total loss of use of the left foot. The start date of the loss of use compensation is 06/13/2008.
>
> All evidence was reviewed and considered. This order is based on the 06/13/2008 report of Dr. Cook and the 07/28/2008 report of Dr. Renneker. This order is also based on the persuasive testimony of the Injured Worker at hearing that she cannot walk on her left foot without the use of her custom AFO brace.

{¶ 46} 25. The employer and the bureau administratively appealed the SHO's order of February 5, 2009.

{¶ 47} 26. On February 27, 2009, another SHO mailed an order refusing the appeals.

{¶ 48} 27. Both the employer and the bureau moved the commission to exercise its continuing jurisdiction over the February 5, 2009 SHO's order.

{¶ 49} 28. On April 16, 2009, the three-member commission, on a two-to-one vote, mailed an interlocutory order stating:

> It is the finding of the Industrial Commission that the Administrator and the Employer have presented evidence of sufficient probative value to warrant adjudication of the requests for reconsideration regarding the alleged presence of a clear mistake of law of such character that remedial action would clearly follow.
>
> Specifically, it is alleged that the Staff Hearing Officer did not invoke the proper standard in evaluating the loss of use in violation of the [*State ex rel. Alcoa Bldg. Prods. v. Indus. Comm.*, 102 Ohio St.3d 341, 2004-Ohio-3166] and [*State ex rel. Richardson v. Indus. Comm.*, 10th Dist. No. 04AP-724, 2005-Ohio- 2388] cases.

> The order issued 02/27/2009 is vacated, set aside and held for naught.
>
> Based on these findings, the Industrial Commission directs that the requests for reconsideration, filed 03/11/2009 and 03/16/2009, are to be set for hearing to determine whether the alleged mistake of law as noted herein is sufficient for the Industrial Commission to invoke its continuing jurisdiction.
>
> In the interest of administrative economy and for the convenience of the parties, after the hearing on the question of continuing jurisdiction, the Industrial Commission will take the matter under advisement and proceed to hear the merits of the underlying issue(s). The Industrial Commission will thereafter issue an order on the matter of continuing jurisdiction under R.C. 4123.52. If authority to invoke continuing jurisdiction is found, the Industrial Commission will address the merits of the underlying issue(s).

{¶ 50} 29. Following a July 21, 2009 hearing, the three-member commission, on a two-to-one vote, issued an order that determines that the commission does have continuing jurisdiction, and denies relator's September 25, 2008 motion. The commission's order explains:

> After further review and discussion, it is the finding of the Industrial Commission that the Administrator and the Employer have met their burden of proving that the Staff Hearing Officer order, issued 02/07/2009, contains a clear mistake of law of such character that remedial action would clearly follow. Specifically, the Staff Hearing Officer did not discuss or apply the proper standard to determine the issueof loss of use in this claim. Therefore, the Commission exercises continuing jurisdiction pursuant to R.C. 4123.52 * * *.
>
> It is the order of the Commission that the Injured Worker's C-86 Motion, filed 09/25/2008, requesting a loss of use award for the left foot and ankle, is denied.
>
> The Commission finds that this claim involves a low back injury, occurring on 05/15/2007. This injury caused radiculopathy and compression of the left L5 nerve root resulting in a left foot drop, conditions all recognized in this claim. The Injured Worker did undergo a low back surgery in this claim on 07/13/2007, but the left foot drop condition has persisted.

> The Injured Worker was examined by Robin G. Stanko, M.D., on behalf of the Bureau of Workers' Compensation on 11/11/2008 for a "loss of use" medical exam. On clinical examination of her left foot and ankle, Dr. Stanko found the Injured Worker to have 4+/5 strength for dorsiflexion, with reported decreased sensation over the dorsum of the left foot; however, no tenderness was noted when walking on the foot. Dr. Stanko did not observe the Injured Worker's foot to slap the ground, and she had antigravity strength in her left foot dorsiflexors. Dr. Stanko concluded that there was some impairment of strength and sensation in the left foot, consistent with residuals of the L5 radiculopathy, but that the Injured Worker was able to ambulate independently. Dr. Stanko noted that at the time of this exam, the Injured Worker was wearing a fabric laced orthosis that strapped around her left ankle, not the plastic AFO brace designed to give dorsiflexion assistance. Dr. Stanko concluded that the Injured Worker has a 10% whole person impairment and still retains "considerable function" of the left foot and ankle, and that for all practical purposes, does not demonstrate a permanent loss of use.
>
> The Commission finds that the proper legal standard concerning "loss of use" is whether the Injured Worker has suffered the permanent loss of use of the injured bodily member, for "all practical intents and purposes" pursuant [to] State ex rel. Alcoa Building Products v. Indus. Comm., 102 Ohio St.3d 341, 2004-Ohio-3166. The standard to be applied is whether, for all practical purposes, the Injured Worker has lost the use of the affected body part to the same extent as if it had been amputated. It is the finding of the Commission that the Injured Worker does retain significant functional use of her left foot, with the aid of the brace, and that she has not sustained a permanent loss of use of her left foot" for all practical intents and purposes." Under such circumstances the Injured Worker is not entitled to a scheduled loss of use award of her left foot. See also State ex rel. Richardson v. Indus. Comm., [10th Dist. No. 04AP-724,] 2005-Ohio-2388.
>
> Based on the report of Dr. Stanko, it is found that the Injured Worker has not demonstrated that she has, for all practical purposes, lost the use of her left foot and ankle to the same extent as if they had been amputated. The request for a loss of use award under R.C. 4123.57(B) is therefore denied.

{¶ 51} 30. On August 10, 2011, relator, Pamela D. Richardson, filed this mandamus action.

Conclusions of Law:

{¶ 52} Two issues are presented: (1) whether the report of Dr. Stanko is some evidence upon which the commission can rely, and (2) whether the commission appropriately applied the standard for determining loss of use.

{¶ 53} The magistrate finds: (1) Dr. Stanko's report is some evidence upon which the commission can and did rely, and (2) the commission appropriately applied the standard for determining loss of use.

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

{¶ 55} Preliminarily, the magistrate notes that, exercising its continuing jurisdiction, the three-member commission vacated the SHO's order of February 5, 2009 that had awarded compensation for loss of use of the left foot, and entered an order denying the compensation. The commission's exercise of continuing jurisdiction is not challenged here. Rather, relator only challenges the commission's merit determination of her September 25, 2008 motion for R.C. 4123.57(B) scheduled loss compensation.

{¶ 56} Turning to the first issue, the commission relied exclusively upon the report of Dr. Stanko which relator claims, on multiple grounds, is fatally flawed. The issue is whether Dr. Stanko's report constitutes some evidence upon which the commission can rely.

{¶ 57} According to relator, "most egregiously," Dr. Stanko failed to fully comprehend relator's medical history in that he only acknowledged the July 13, 2007 surgery performed by Dr. Brightman, and then states "[s]he has not had any other back surgery." According to relator, the quoted statement is "false." (Relator's brief, at 4.)

{¶ 58} In support of her claim that the quoted statement is false, relator points to the DHO's order of October 3, 2007 that initially disallowed the claim at issue here (No. 07-841127). In that order, the DHO notes:

> [O]n 06/14/2004, [sic] the injured worker underwent a discectomy and hemilaminectomy of the L4-5 level.

{¶ 59} According to relator, because Dr. Stanko failed to acknowledge the June, 2004 surgery in his report, and he even suggests that the July 13, 2007 surgery is the only surgery relator has had, his report is fatally flawed. This magistrate strongly disagrees.

{¶ 60} At oral argument before the magistrate on June 14, 2012, the magistrate requested that counsel prepare and file a supplemental stipulation of evidence and an agreed statement of facts regarding the multiple industrial claims that relator has filed. That was filed by the parties on June 21, 2012.

{¶ 61} The agreed statement of facts filed June 21, 2012 discloses that indeed, on June 15, 2004, Dr. Brightman performed low back surgery as the DHO's order states. [1] However, the agreed statement of facts discloses that the June 15, 2004 surgery was performed during the pendency of another industrial claim that was ultimately disallowed. In short, the June 15, 2004 surgery was never authorized or paid in the industrial claim at issue (No. 07-841127). This new information significantly clarifies relator's contention that Dr. Stanko made a false statement regarding relator's medical history.

{¶ 62} It is well settled law that non-allowed medical conditions cannot be used to advance or defeat a claim for compensation. *State ex rel. Waddle v. Indus. Comm.*, 67 Ohio St.3d 452 (1993). However, the mere presence of a non-allowed condition does not, in itself, destroy the compensability of the claim, but the claimant must meet his or her burden of showing that an allowed condition independently caused the disability. *State ex rel. Bradley v. Indus. Comm.*, 77 Ohio St.3d 239 (1997).

{¶ 63} The Supreme Court of Ohio has articulated a three-pronged test for the authorization of medical services: (1) are the medical services reasonably related to the industrial injury, that is, the allowed conditions?; (2) are the services reasonably necessary for treatment of the industrial injury?; and (3) is the cost of such service medically reasonable? *State ex rel. Miller v. Indus. Comm.*, 71 Ohio St.3d 229 (1994).

{¶ 64} As Dr. Stanko's report indicates at the outset, relator was seen in his office "for a loss of use independent medical exam." That examination was to be performed

[1] The DHO's order of October 3, 2007 incorrectly describes the surgery as occurring on June 14, 2004 when it actually occurred on June 15, 2004 according to Dr. Brightman's report. Also, the DHO's order of October 3, 2007 incorrectly describes the surgery as a "hemilaminectomy" when it was in fact a "hemilaminotomy."

with respect to claim No. 07-841127. Under such circumstances, it should be no surprise that Dr. Stanko only discusses the surgery performed in the industrial claim at issue, i.e., claim No. 07-841127.

{¶ 65} Moreover, what the DHO's order of October 3, 2007 fails to disclose is that the June 2004 surgery was a "[*R*]*ight* L4-5 hemilaminotomy and discectomy," as indicated in Dr. Brightman's June 15, 2004 operative report. (Emphasis added.) As indicated in Dr. Brightman's July 13, 2007 operative report, the surgery is described as a "[*L*]*eft* L4-L5 hemilaminotomy and discectomy." (Emphasis added.)

{¶ 66} In short, while both surgeries were to the lower back and both involved the L4 area, the earlier surgery was on the right while the latter surgery was on the left.

{¶ 67} Perhaps it can be said that it would have been appropriate for Dr. Stanko to mention the June 2004 surgery in his report. However, there was no legal requirement that he do so.

{¶ 68} It has been said by the Supreme Court of Ohio that the courts should not second-guess the medical expertise of the commission's doctors. *State ex rel. Young v. Indus. Comm.*, 79 Ohio St.3d 484 (1997). That pronouncement seems to be applicable here.

{¶ 69} Based upon the foregoing analysis, the magistrate concludes that Dr. Stanko's report is not fatally flawed simply because he was unaware of relator's June 2004 lower back surgery.

{¶ 70} Next, relator contends that Dr. Stanko's report is flawed because he wrote "[s]he [is] able to stand on her heals bilaterally." Relator points to her affidavit executed January 26, 2008 in which she avers, "[d]uring the course of this examination, contrary to what Dr. Stanko has said, I was not able to stand on my heels. Dr. Stanko asked me to stand on my heels, and I was not able to do so."

{¶ 71} Clearly, that relator avers in her affidavit that something happened at the examination that is contrary to what Dr. Stanko reported does not automatically flaw Dr. Stanko's report. The commission alone is responsible for the evaluation for the weight and credibility of the evidence before it. *State ex rel. Burley v. Coil Packing, Inc.*, 31 Ohio St.3d 18, 21 (1987). The presumption is that the commission found Dr. Stanko's reporting of relator's heal walking to be credible.

{¶ 72} Next, relator contends that Dr. Stanko's report is fatally flawed because his reporting of the so-called "mechanism of injury" differs somewhat from relator's reporting on the FROI-1. (Relator's brief, at 4.)

{¶ 73} Again, Dr. Stanko wrote: "Ms. Richardson was injured at work in May 2007 when she was working with a client with behavioral problems and had to push him back into a chair." As earlier noted, on the FROI-1, relator states: "Client fell into employee when aggressively trying to get item behind her. Employee's lower back & tailbone fell onto hard arm of chair."

{¶ 74} Relator contends that other doctors correctly reported the mechanism of injury. In her report, Dr. Renneker, who examined at relator's request, states: "Pamela Richardson reports that on this date an adult client pushed her into an arm chair and table with Pamela Richardson reporting that she noted immediate low back pain."

{¶ 75} In his June 5, 2008 report, Dr. Cook wrote: "Ms. Richardson was pushed back onto an arm chair and the arm of the chair hit her lower back."

{¶ 76} Relator seems to inappropriately equate the so-called "mechanism of injury" with the allowed conditions of the claim. It is the conditions allowed in the claim that are the basis for compensation. *State ex rel. Jackson Tube Serv., Inc. v. Indus. Comm.*, 99 Ohio St.3d 1, 2003-Ohio-2259. While an acknowledgement by the examining physician of the claimant's description of how the injury or accident occurred can be useful in understanding the allowed conditions, there is no requirement that the examining physician acknowledge the claimant's description of the accident or injury in his report. Clearly, under the circumstances here, it is difficult to see how relator was in any way prejudiced by Dr. Stanko's description of the accident that caused relator's industrial injury.

{¶ 77} Based on the foregoing analysis of relator's multiple challenges to the report of Dr. Stanko, the magistrate concludes that Dr. Stanko's report is indeed some evidence by which the commission can rely.

{¶ 78} The second issue is whether the commission applied the correct standard for determining whether relator has sustained a loss of use of her left foot.

{¶ 79} R.C. 4123.57(B) provides compensation for the loss of body parts specified in the statute's schedule. For the loss of a foot, the statute provides for 150 weeks of

compensation. The schedule does not provide for loss of an ankle, but, presumably, loss of a foot may be the proximate cause of injury to areas of the body other than the foot itself.

{¶ 80} *State ex rel. Alcoa Bldg. Prods. v. Indus. Comm.*, 102 Ohio St.3d 341, 2004-Ohio-3166, is a seminal case setting forth the standard for determining loss of use of a body part specified at R.C. 4123.57(B). In *State ex rel. Kroger Co. v. Johnson*, 128 Ohio St.3d 243, 2011-Ohio-530, ¶ 10-14, the court had occasion to summarize *Alcoa*:

> 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. 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, 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.' " *Alcoa*, 102 Ohio St.3d 341, 2004-Ohio-3166 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.
>
> 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.

{¶ 81} The commission's order at issue here cites reliance upon this court's decision in *State ex rel. Richardson v. Indus. Comm.*, 10th Dist. No. 04AP-724, 2005-Ohio-2388. Accordingly, that case needs review here.

{¶ 82} In *Richardson*, the claimant, John Richardson, sustained severe injuries when, on November 7, 2001, he fell approximately 40 feet from a cherry picker. Among the allowed conditions was "sciatic nerve lesion" which caused an ambulation disorder called a "foot drop." Id. at ¶ 13, 15.

{¶ 83} *Mosby's Dictionary of Medicine, Nursing & Health Professions* 748 (8th Ed.2009) defines footdrop:

> [A]n abnormal neuromuscular condition of the lower leg and foot characterized by an inability to dorsiflex, or evert, the foot, caused by damage to the common peroneal nerve.

{¶ 84} Richardson moved for R.C. 4123.57(B) scheduled loss compensation for the alleged loss of use of his left foot.

{¶ 85} In August 2003, at his own request, Richardson was examined by Dr. Bruce F. Siegel who wrote:

> He continues ambulation with the use of a left ankle brace, the use of [a] cane and also continues with his home exercises.
>
> * * * He ambulates with the use of a left ankle brace and demonstrates obvious pronation of the left leg. He is unable to squat on the left leg due to weakness of the foot and is unable to step on a stool leading with his left foot without the use of his upper extremity power for stabilization. Without his ankle brace he has an obvious foot drop. There is significant loss of strength in dorsal flexion and eversion of the left foot measured at 1/5.

Id. at ¶ 15.

{¶ 86} In September 2003, Dr. M.E. Gibson performed a file review for the bureau. In his report, Dr. Gibson states:

> He does ambulate and get about with the use of a foot drop brace, and to this extent, the left ankle and foot are functional. Clearly, it could not be compared to an amputation or total loss of function of the left foot. The very fact that ambulation is possible, and certain ankle motions (as plantar flexion) are intact, would not allow for the conclusion that there is total and permanent loss of use of the left foot.

Id. at ¶ 16.

{¶ 87} In October 2003, Richardson was examined at the commission's request by Dr. Keith Wilkey, M.D., who wrote:

> Observation. This patient uses a cane for ambulation. There is a significant limp. An AFO was presented that has considerable wear consistent with prolonged use.
>
> * * *

> Range of motion of knee and ankle. Full passive range of motion is noted. The ankle has complete loss of active dorsiflexion and eversion[.]
>
> Special testing. Positive Tinel's is noted at the popliteal fossa. There is a negative straight leg raise.
>
> N/V testing-there is complete motor loss to the peroneal portion of the sciatic nerve. This means that there is no active dorsiflexion or eversion of the ankle or dorsiflexion of the toes. Interestingly enough, there is near normal sensation to both the superficial and deep branch of the peroneal nerve. The plantar surface of the foot has normal sensation.
>
> Summary
>
> * * * In terms of the major question asked of me, this nerve injury is partial and this patient has protective sensation to the foot and ankle and has a functional platform from which to ambulate. Although this injury is significant and debilitating, it does not constitute a total, permanent loss of use. It clearly does not equate to an amputation. I disagree with Dr. Siegel's findings and concur with Dr. Gibson's narrative.

Id. at ¶ 17.

{¶ 88} In *Richardson*, the commission, through its SHO, denied Richardson's motion for scheduled loss compensation. Relying upon the reports of Drs. Gibson and Wilkey, the commission explained:

> Dr. Gibson advised that the injured worker does ambulate with the use of a foot drop brace and to this extent, the left ankle and foot are functional. Dr. Wilkey opined that although the injured worker's injury is significant and debilitating, the injured worker has a functional platform from which to ambulate. Based upon these findings the Staff Hearing Officer finds that the injured worker's foot retains functional capacity and does not exist as if it had been amputated. Therefore the injured worker's request for compensation for loss of use of the left foot is denied.

Id. at ¶ 21.

{¶ 89} In *Richardson*, this court denied the writ of mandamus, explaining:

> The findings in the Wilkey and Gibson reports do not render relator's situation similar to that in *Alcoa,* where the claimant's partially amputated arm lacked functional capacity because it could be used for little other than petting a dog or pushing open a car door. This case is also not akin to *Walker,* in which the claimant's paralyzed legs could not be used except as a resting place for reading material or a plate of food.
>
> Here, the reports of Drs. Wilkey and Gibson establish that relator *can walk*, albeit with the help of a brace. Thus, the commission did not abuse its discretion in finding that relator has not sustained a total loss of its use. The court cannot imagine a more paramount use for a foot than the activity of walking.

(Emphasis sic.) *Id.* at ¶ 9-10.

{¶ 90} Here, the commission appropriately cited to this court's decision in *Richardson* for support of its decision.

{¶ 91} In fact, relator does not seem to disagree that this court's decision in *Richardson* supports the commission's denial of relator's motion. Rather, relator argues that this court's decision in *Richardson* was wrongly decided. According to relator:

> Despite the clear guidance of Alcoa, the Richardson Court did not follow Supreme Court's reasoning and allowed a result that was not meant to be reached. Thus it is clear that Richardson directly contravenes Alcoa, and should be considered an aberration that should not be applied in this case.

(Relator's brief, at 9.)

{¶ 92} Contrary to relator's assertion, this court's decision in *Richardson* appropriately applied the *Alcoa* standard. This court's decision in *Richardson* is not an "aberration" and does not contravene *Alcoa*.

{¶ 93} Thus, the magistrate concludes that relator has failed to show that the commission failed to apply the correct standard for determining the alleged loss of use of relator's left foot.

{¶ 94} 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).