

[Cite as *State ex rel. Sagraves v. Indus. Comm.*, 2012-Ohio-1010.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Sherry Sagraves, guardian of Jessica N. Lowery, minor and Sherry Sagraves, guardian of Anthony M. Lowery, minor,	:	
Relator,	:	
v.	:	No. 10AP-1030
Industrial Commission of Ohio and Pike Sanitation, Inc.,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on March 13, 2012

Agee, Clymer, Mitchell & Laret, Eric B. Cameron, C. Russell Canestraro, and Robert M. Robinson, for relator.

Michael DeWine, Attorney General, and Gerald H. Waterman, for respondent Industrial Commission of Ohio.

Bricker & Eckler, LLP, and Thomas R. Sant, for respondent Pike Sanitation, Inc.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

FRENCH, J.

{¶ 1} Relator, Sherry Sagraves ("relator"), filed an original action in mandamus. Relator is the guardian of two minor children of Larry Lowery ("decedent"), who died

from an industrial accident. Relator asks this court to issue a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its order that denied relator's motion for scheduled-loss compensation under R.C. 4123.57(B) for the alleged loss of decedent's legs and to enter an order granting that compensation.

{¶ 2} This matter was referred to a magistrate pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate issued a decision, which includes findings of fact and conclusions of law and is appended to this decision, recommending that this court deny the requested writ. No objections have been filed concerning the magistrate's findings of fact, and we adopt them as our own.

I. BACKGROUND

{¶ 3} As detailed in the magistrate's decision, decedent was struck by a vehicle while working behind a sanitation truck, and he died from his injuries. The matter before us concerns whether, and if so, for how long, decedent may have survived the crash and whether he lost the use of his legs during that survival period.

{¶ 4} Before the commission, relator presented the report of Forensic Pathologist Russell Uptegrove, M.D., who concluded that "decedent in all medical probability did suffer the loss of use of both of his legs as a result of the accident" and that he experienced "a short survival interval after these injuries were sustained." The commission also had before it contrary medical reports that concluded decedent did not suffer the loss of use of his legs prior to his death.

{¶ 5} Following review by a district hearing officer and a staff hearing officer, the commission granted reconsideration. First, the commission found that the claim had been allowed for "death," not "instantaneous death." Second, however, the commission denied relator's request for a loss-of-use award. The commission concluded "that the evidence fails to establish either that the Decedent survived for a discernible period of time, or that the Decedent suffered a permanent loss of use of his legs."

{¶ 6} On mandamus, the magistrate concluded the following: (1) the commission did not misapply *State ex rel. Moorehead v. Indus. Comm.*, 112 Ohio St.3d 27, 2006-Ohio-6364; (2) the report of Thomas E. Forte, D.O., was some evidence on

which the commission could rely; and (3) Dr. Forte's report is not internally inconsistent.

II. RELATOR'S OBJECTIONS

{¶ 7} Relator filed the following objections to the magistrate's decision: (1) the magistrate erred in finding that the commission did not misapply *Moorehead*, and (2) the magistrate erred in finding that Dr. Forte's report is some evidence on which the commission could rely. On both counts, we disagree.

III. DISCUSSION

{¶ 8} First, we reject relator's contention that the magistrate and the commission misapplied *Moorehead*. As carefully explained in the magistrate's decision, in *Moorehead*, the Supreme Court of Ohio concluded that "R.C. 4123.57(B) does not specify a required length of time of survival after a loss-of-use injury before benefits pursuant to R.C. 4123.57(B) are payable." *Moorehead* at ¶ 14. Nor did the commission require one here. Rather, the commission found that relator had not presented persuasive evidence that decedent survived the crash. That important fact distinguishes this case from *Moorehead*, where the evidence showed that the decedent had survived his fatal fall, if only for 90 minutes.

{¶ 9} Importantly, the commission also found that relator had not presented persuasive evidence that decedent's injuries, even if survivable, would have caused the permanent loss of use of his legs. In *Moorehead*, the evidence showed that the decedent would have been a quadriplegic if he had survived. In contrast, here, the commission relied on Dr. Forte's report, which found "no evidence that the injured worker would have had loss of use of both legs due to the injury sustained." Therefore, even if we were to remove the commission's conclusion concerning a discernible survival period, the commission's conclusion concerning a lack of evidence to support a permanent loss would remain to support its denial of an award.

{¶ 10} Second, we reject relator's contention that the magistrate erred by concluding that Dr. Forte's report was some evidence on which the commission could rely. Relator's contention arises from Dr. Forte's statement of the allowed claim as "instantaneous death," rather than "death." As the magistrate explained, Dr. Forte's

misstatement did not alter his analysis, which examined the very question of whether decedent died instantly or survived the crash.

{¶ 11} For all these reasons, we overrule relator's objections.

IV. CONCLUSION

{¶ 12} Having conducted an independent review of this matter and overruled relator's objections, we adopt the magistrate's decision, including the findings of fact and conclusions of law contained in it, as our own. Accordingly, we deny the requested writ.

Writ of mandamus denied.

KLATT and TYACK, JJ., concur.

A P P E N D I X

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Sherry Sagraves, guardian of Jessica N. Lowery, minor and Sherry Sagraves, guardian of Anthony M. Lowery, minor,	:	
	:	
Relator,	:	
	:	
v.	:	No. 10AP-1030
	:	
Industrial Commission of Ohio and Pike Sanitation, Inc.,	:	(REGULAR CALENDAR)
	:	
Respondents.	:	

MAGISTRATE'S DECISION

Rendered on September 20, 2011

Agee, Clymer, Mitchell & Laret, Eric B. Cameron, C. Russell Canestraro and Robert M. Robinson, for relator.

Michael DeWine, Attorney General, and Gerald H. Waterman, for respondent Industrial Commission of Ohio.

Bricker & Eckler, LLP, and Thomas R. Sant, for respondent Pike Sanitation, Inc.

IN MANDAMUS

{¶ 13} Relator, Sherry Sagraves, is the guardian of the two minor children of Larry Lowery ("decedent") who died from an industrial accident. The minor children are Jessica N. and Anthony M. Lowery.

{¶ 14} In this original action, relator requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order that denied relator's January 27, 2010 motion for R.C. 4123.57(B) scheduled loss compensation for the alleged loss of use of decedent's legs, and to enter an order granting the compensation.

Findings of Fact:

{¶ 15} 1. On July 28, 2009, decedent was killed while employed as a sanitation worker for respondent Pike Sanitation, Inc., a state-fund employer. On that date, while emptying a trash container onto the rear of his truck, decedent was struck by a Ford Ranger truck traveling at a high rate of speed.

{¶ 16} 2. Thereafter, the Ohio Bureau of Workers' Compensation ("bureau") allowed the industrial claim (No. 09-835627) for "as a death claim." Apparently, the bureau's claim allowance was not administratively appealed.

{¶ 17} 3. On July 29, 2009, a postmortem examination or autopsy was performed on decedent's body by the Montgomery County Coroner's Office which issued an eight-page narrative report dated September 2, 2009.

{¶ 18} 4. The record contains a "Traffic Crash Report" prepared by the Ohio State Highway Patrol. The traffic report lists 12:42 p.m. as the time of the crash. Under "Sequence of Events," the report states in part:

1246 Hours Post received a call from the Adams County Communications Center advising of a possible fatal crash on SR 41 near Mile Post 25. Tpr. D.S. Edgington dispatched to the crash.

1255 Hours Tpr. D.S. Edgington on scene. Peebles Police, Fire, and EMS units already on scene along with Adams County Sheriff's Deputy K. Cross. Tpr. D.S. Edgington advised Post 8 of one confirmed fatality and one injury. * * *

The traffic report further states:

A fatal crash occurred on SR 41 near MP 25. It occurred on 07/28/09 at approximately 1242 hours. A Ford Ranger had rear ended a stopped garbage truck. The sanitation employee was at the rear of the truck. He was attempting to empty a trash can. The employee was crushed between the rear of the garbage truck and the front of the Ford Ranger.

The Ford Ranger was towed by Barnett's Towing of Winchester, Ohio. The damage analysis was done on 07/29/09 at Barnett's Towing.

{¶ 19} 5. On December 17, 2009, at the request of relator's counsel, Forensic Pathologist Russell Uptegrove, M.D., performed a so-called file review, stating in its entirety:

I have been asked to perform a file review on the above-named individual for his Worker's Compensation claim #09-835627[.] I accept the findings of the examining physician(s), if any, but not necessarily their conclusions[.] This claim is allowed for Death Claim and I accept the allowed conditions in the claim[.]

The decedent was killed when he was struck by a 1993 Ford Ranger truck while standing behind the garbage truck he was working on. He was subsequently declared dead at the scene[.] An autopsy showed multiple injuries which included multiple bilateral rib fractures, an epicardial contusion on the left ventricle of the heart, lacerations of the pericardial sac and both lungs, a large laceration involving the abdomen and back with focal extrusion of the abdominal contents,

lacerations of the liver, spleen, small intestines and mesentery, a disarticulation fracture of the L2/L3 vertebra, pelvic fracture, a focal contusion in the right parietal lobe of the brain, multiple abrasions, contusions, and lacerations of the legs and bilateral fractures of the tibias and fibulas[.]

Even though the decedent did sustain significant injuries in this accident, none of these injuries can be proven to be immediately lethal[.] The fact that the kidneys had pale tan cortical surfaces is indicative of shock kidneys[.] This phenomenon is caused by hypovolemic shock due to massive blood loss[.] The decedent had some survival interval after the accident occurred[.] A 50 ml hemo-pericardium was also described[.] This also indicates that the decedent did have a pulse for some unknown time interval[.] The disarticulation fracture at the level of lumbar vertebra 2/3 more likely than not would have caused paralysis of the lower extremities[.] Just the bilateral tibia/fibula fractures would have caused a loss of functional use of both of the legs[.]

After review of the traffic crash report and autopsy report, it is my opinion that the decedent in all medical probability did suffer the loss of use of both of his legs as a result of the accident[.] I also believe that he did experience a short survival interval after these injuries were sustained[.]

{¶ 20} 6. On January 27, 2010, citing *State ex rel. Moorehead v. Indus. Comm.*, 112 Ohio St.3d 27, 2006-Ohio-6364, relator moved for R.C. 4123.57(B) scheduled loss compensation for decedent's alleged loss of use of both legs. In support, relator submitted the December 17, 2009 report of Dr. Uptegrove and the September 2, 2009 autopsy report.

{¶ 21} 7. On March 30, 2010, the bureau requested that Thomas E. Forte, D.O., prepare a report answering four questions:

Based on your review of the medical documentation, consideration of the history of the industrial injury, and your clinical expertise, please give your opinion, based on a

reasonable degree of medical probability of the following questions:

[One] Within a reasonable degree of medical probability, is there evidence showing the [decedent] survived immediately following this accident?

[Two] If there is evidence of a survival interval, what is the approximate length of time the [decedent] survived?

[Three] If there is evidence of a survival interval, to a reasonable degree of medical probability, is there evidence the [decedent] would have had a loss of use of both legs due to the injuries sustained?

[Four] If there is evidence of a survival interval and if your answer to question 3 is "yes," is there evidence that the loss of use of both legs, due to the injuries sustained, would result in a permanent and total loss of use of both legs?

Please discuss the mechanism of injury in your response and elaborate on the answers to the above questions. * * *

{¶ 22} 8. In response to the bureau's March 30, 2010 request, Dr. Forte issued a four-page narrative report in which he concludes:

In this reviewer's opinion, the described lower extremity fractures would not generally lead to permanent loss of use of the lower extremities as orthopedic fixation is standardly performed for the lower extremity fractures described in mobility is usually restored.

In this reviewer's opinion, the available documents in the electronic file indicate the injury of record resulted in instantaneous death based upon the multiplicity and severity of the physical autopsy findings described. Of note is the fact that there was no medical intervention identified as having occurred at the scene (reference page 4 of the autopsy report), and a maximum 9-minute interval is documented between the time the initial call was received regarding the possible fatality and the confirmation of the fatality by Trooper Edgington. (Note: The report of Trooper Edgington indicates that when he

did arrive that fire, EMS and other law enforcement personnel were already on the scene, and the autopsy report indicated no medical intervention had occurred.) Furthermore, no significant collection of blood was identified in any body cavity and the scene and the injured worker's clothing were not identified as having any significant collection of the deceased blood products.

Dr. Uptegrove opined, "The fact that the kidneys had pale tan cortical surfaces is indicative of shock kidneys. This phenomenon is caused by hypovolemic shock due to massive blood loss".

However, it is noted that the pathologists who performed the autopsy did not list hypovolemic shock due to massive blood loss as one of their pathological diagnoses, and in fact, as it relates to the kidney, as well as multiple other organs the pathologist stated "no significant histopathologic abnormality in sections examined" (autopsy report. Page 8). In this reviewer's opinion, the statement of the pathologist performing the autopsy would not support Dr. Uptegrove's opinion.

In this reviewer's opinion, further evidence not favoring Dr. Uptegrove's opinion is the following: The deceased worker was reported to weigh 142 pounds which would give him an estimated intravascular volume of approximately 4550cc. The autopsy report indicated 50cc blood in the pericardium. The deceased worker was received in clothing and there was no description that the clothing was blood stained, blood saturated, or blood encrusted. There was no report of blood collection in the cranial cavity, thoracic cavity, the abdominal cavity, or the pelvic cavity. Superficial capsular lacerations were noted of the liver and spleen. Extensive ecchymosis was described in the soft tissues of the pelvis and psoas muscles and a slight to moderate amount of blood and frothy fluid exuded from the pulmonary parenchyma (lung). The described lower extremity fractures would not generally lead to permanent loss of use of the lower extremities as orthopedic fixation is standardly performed for the types of lower extremity fractures described. No spinal cord injury was reported in the autopsy report and there was no report

of vertebral body fragmentation, vertebral body retropulsed fragment into the spinal canal, or spinal cord injury.

In response to the questions posed, the following opinions are based upon the rationales detailed above. The mechanism of injury described is basically a body crush injury from the upper thorax distally based upon the autopsy report, and in this reviewer's opinion would be unsurvivable.

[One] It is this reviewer's opinion, that within a reasonable degree of medical probability, that there is insufficient medical evidence and it is unlikely that the injured worker survived immediately following the injury of record.

[Two] The fact that a maximum 9 minute interval between the time the call was made regarding the fatality and the time Trooper Edgington arrived at the scene and confirmed the fatality, and considering that when Trooper Edgington arrived at the scene there were already law enforcement, fire and EMS personnel at the scene, in conjunction with the autopsy pathologist reporting that no medical intervention occurred, the available documentation would indicate that the injured worker's death was instantaneous and there was no survival interval.

[Three] In this reviewer's opinion, there is no evidence that the injured worker would have had loss of use of both legs due to the injury sustained. The deceased worker has no documentation of spinal cord contusion, transection, or partial transection, and no documentation of retropulsed bone fragment into the spinal canal, based upon the autopsy report, and the described lower extremity fractures are typically seen in orthopedic trauma and treated with orthopedic fixation and mobility recovered.

[Four] Not applicable.

(Emphasis sic.)

{¶ 23} 9. At the request of relator's counsel, Dr. Uptegrove was asked to evaluate Dr. Forte's report. In a two-page narrative report, dated April 11, 2010, Dr. Uptegrove wrote:

I stated in my original report that the kidneys were described as having pale, tan cortical surfaces. In most of the autopsies in which I see pale tan kidneys, significant trauma and blood loss has occurred. I guess there may be some rare people who have congenitally pale kidneys. The fact that no histologic abnormalities were described in the kidneys is consistent with an extremely short survival interval after the injury was sustained. The fact that hypovolemic shock was not mentioned as a pathological diagnosis is not surprising. Physiologic consequences of injuries are usually not listed on the front sheet. Another example would be listing cardiac arrhythmia on the front sheet due to the fact that a cardiac contusion was identified. After review of the autopsy photographs, I saw that blood was present on the decedent's shirt, underwear, jeans and socks. It is not standard protocol to describe in an autopsy report how much blood is present on someone's clothing. I have never seen any scene photographs and cannot comment on the amount of blood at the scene. In more than one occasion, Dr. Forte refers to the maximum 9 minutes interval between the time the call was made regarding the fatality and the time that Trooper Edgington arrived at the scene. This really is immaterial because I believe that the decedent was dead long before the squad or Trooper arrived. The fact that no medical intervention was present on the body is not a surprise. What is the exact time interval between onset of injury and death? Nobody knows for sure. However, another finding that supports at least a very brief survival interval is subarachnoid hemorrhage located over the right cerebral hemisphere. It was not listed on the pathologic diagnoses but it was described on page 8 of the autopsy report. It can also be seen in the autopsy photographs. There were no scalp lacerations or skull fractures described. The injury is caused by internal movement of the brain striking the inner table of the skull. The injury to the head is not consistent with an immediately lethal injury. I have seen hundreds of cases of gunshot wounds of the head as well as severe blunt force head injuries. In some cases, especially with shotgun blasts which completely macerate the brain matter or blunt force trauma which causes atlantooccipital subluxation with complete transection of the brainstem, there is essentially no hemorrhage within the brain parenchyma because of the interval being immediate. The fact that Mr. Lowery had a cerebral contusion and a localized area of subarachnoid

hemorrhage is evidence that he did experience at least a very short survival interval.

One thing I do agree with is that bilateral fractures of the tibias and fibulas would not usually lead to a permanent loss of use. However, I was under the opinion as related to me by legal counsel that permanent loss of use was not required for a Moorehead ruling. Question #3 asks (3) If there is evidence of a survival interval, to a reasonable degree of medical probability, is there evidence the [decedent] would have had a loss of use of both legs due to the injuries sustained? Mr. Lowery would have certainly lost the use of his legs during whatever very short interval he survived. As for question #4, it is possible that Mr. Lowery could have regained the use of his legs as a result of orthopedic surgery if he had not suffered all of the other internal injuries. I will be the first to admit that I don't really understand how the Moorehead ruling came to be and if it is really relevant [sic]. However, the bottom line is Mr. Lowery suffered a tragic accident which ended his life. He did sustain massive trauma while on the job. The findings are indicative of at least a very short survival interval. I do not believe he experienced an instantaneous death.

* * * Even though seconds may seem trivial, that would refute the definition of instantaneous. Using the criteria of reasonable medical probability, it is more likely than not he did have a brief survival interval. The fractures to his legs and pelvis would have caused him to lose the use of both lower extremities during what little time he had left.

{¶ 24} 10. Earlier, on March 10, 2010, relator's January 27, 2010 motion was heard before a district hearing officer ("DHO") who thereafter issued an order granting the motion. The DHO's order indicates that the claim is allowed for "instantaneous death."

{¶ 25} 11. The bureau administratively appealed the DHO's order of March 10, 2010.

{¶ 26} 12. Following an April 13, 2010 hearing, a staff hearing officer ("SHO") issued an order that vacated the DHO's order of March 10, 2010 and denied relator's January 27, 2010 motion. The SHO's order indicates that the claim has been previously allowed for "instantaneous death; total loss of use of both legs."

{¶ 27} 13. On May 18, 2010, another SHO mailed an order refusing relator's administrative appeal from the SHO's order of April 13, 2010.

{¶ 28} 14. On May 25, 2010, relator moved for reconsideration of the SHO's order of April 13, 2010. In her motion, relator alleged that the SHO's order of April 13, 2010 erroneously indicates that the claim is allowed for "instantaneous death." Relator also alleged that the SHO made a clear mistake of law in finding that the *Moorehead* case is not controlling.

{¶ 29} 15. On July 9, 2010, the three-member commission mailed an "interlocutory order," stating:

It is the finding of the Industrial Commission that the Dependents have presented evidence of sufficient probative value to warrant adjudication of the request for reconsideration regarding the alleged presence of a clear mistake of fact in the order from which reconsideration is sought, and a clear mistake of law of such character that remedial action would clearly follow.

Specifically, it is alleged that the Staff Hearing Officer made a clear mistake of law by finding State ex rel. Moorehead v. Indus. Comm., 2006-Ohio-6364, 112 Ohio St.3d 27 is not applicable, and by not addressing State ex rel. Alcoa Bldg. Products v. Indus. Comm., 2004-Ohio-3666, 102 Ohio St.3d 341. In addition, the Staff Hearing Officer made a clear mistake of fact by finding that this claim has been properly allowed for "instantaneous death," and by not recognizing and addressing the correct allowed condition in this claim.

* * *

Based on these findings, the Industrial Commission directs that the request for reconsideration, filed by Injured Worker's Dependents on 05/25/2010, is to be set for hearing to determine whether the alleged mistakes of fact and law as noted herein are 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).

{¶ 30} 16. Following an August 10, 2010 hearing, the three-member commission unanimously concurred in the issuance of the following order mailed October 5, 2010:

* * * [I]t is the finding of the Industrial Commission that the Dependent Children have met their burden of proving that the Staff Hearing Officer order, issued 04/23/2010, contains a clear mistake of law of such character that remedial action would clearly follow. Specifically, the Staff Hearing Officer found that the claim had been allowed by the Bureau of Workers' Compensation (BWC) for "instantaneous death," when in fact the 07/31/2009 BWC order allowed this claim simply as a "death claim." Additionally, the Staff Hearing Officer found that State ex rel. Moorehead v. Indus. Comm., 112 Ohio St.3d 27, 2006-Ohio-6364, is not applicable to the case at hand. Therefore, the Commission exercises continuing jurisdiction pursuant to R.C. 4123.52 and State ex rel. Nicholls v. Indus. Comm. (1998), 81 Ohio St.3d 454, State ex rel. Foster v. Indus. Comm. (1999), 85 Ohio St.3d 320, and State ex rel. Gobich v. Indus. Comm., 103 Ohio St.3d 585, 2004-Ohio-5990, in order to correct these errors.

The Dependent Children's request for reconsideration, filed 05/25/2010, is granted. The Dependent Children's appeal, filed 04/26/2010, from the Staff Hearing Officer order, issued 04/23/2010, is denied. It is further ordered that the Staff Hearing Officer order, issued 04/23/2010, is vacated.

* * *

Notwithstanding the granting of the Dependent Children's request for reconsideration, it is the order of the Commission that the Dependent Children's C-86 Motion, filed 01/27/2010, requesting a scheduled loss of use award pursuant to R.C. 4123.57(B) for bilateral loss of use of legs, is denied.

As Counsel for the Dependent Children has argued, compensation for loss of use does not depend on duration of survival or cognizance requirements. Moorehead, supra. Moorehead and R.C. 4123.57(B) do, however, contemplate some period of survival of the Decedent to qualify dependents for loss of use benefits.

It is the finding of the Commission that the Dependent Children did not present persuasive evidence that the Decedent survived his injury in order to establish their entitlement to an award for loss of use pursuant to Moorehead. Specifically, there is no persuasive medical evidence to establish that, following the incident, the Decedent survived for any discernible amount of time. Furthermore, there is no persuasive evidence that the Decedent did not die on impact. The Commission also finds that there was no persuasive medical evidence presented proving the Decedent suffered a bilateral loss of use of his legs.

The traffic report completed by the State of Ohio Highway Patrol indicates that the Decedent was operating a refuse sanitation truck on State Route 41. He had exited the truck and was behind the vehicle emptying refuse cans. An extended cab Ford Ranger pickup truck, traveling approximately 50-55 miles an hour, struck the Injured Worker and crushed him between the rear of the sanitation truck and the front of the Ford Ranger.

The Commission finds that the Supreme Court in Moorehead contemplated at least some discernible period of survival, following an injury that leads to an Injured Worker's death, as a prerequisite for granting any scheduled loss award. In the instant claim, the Commission finds that the evidence fails to establish either that the Decedent survived for a discernible period of time, or that the Decedent suffered a permanent loss of use of his legs.

The Commission relies upon the medical review of Thomas Forte, M.D., dated 03/30/2010, the State Highway Patrol traffic report, dated 07/28/2009, and the Moorehead decision to deny the Dependent Children's C-86 motion.

{¶ 31} 17. The commission's order of August 10, 2010 correctly indicates that the claim has been previously allowed for "death."

{¶ 32} 18. On October 29, 2010, this mandamus action was filed. On November 24, 2010, an amended complaint was filed bringing this action in the name of Sherry Sagraves as guardian of decedent's two minor children.

Conclusions of Law:

{¶ 33} Three issues are presented: (1) whether the commission misapplied the legal principle regarding scheduled loss compensation as set forth in the *Moorehead* case; (2) whether the report of Dr. Forte can constitute evidence upon which the commission can rely even though he indicates incorrectly that the claim is allowed for "instantaneous death"; and (3) whether Dr. Forte's report must be removed from evidentiary consideration because it is allegedly internally inconsistent.

{¶ 34} The magistrate finds: (1) the commission did not misapply the legal principles set forth in the *Moorehead* case; (2) Dr. Forte's report constitutes some evidence upon which the commission can rely even though he incorrectly indicates the claim is allowed for "instantaneous death"; and (3) Dr. Forte's report has not been shown to be internally inconsistent.

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

{¶ 36} R.C. 4123.57(B) provides a compensation schedule for the loss of enumerated body members, designating a number of weeks of compensation for loss of each member. *State ex rel. Welker v. Indus. Comm.*, 91 Ohio St.3d 98, 99, 2001-Ohio-292. The only compensable loss of use under R.C. 4123.57(B) is a permanent and total loss of use. *Id.*

{¶ 37} Originally, scheduled awards under R.C. 4123.57(B) were confined to amputations. *State ex rel. Alcoa Bldg. Prods. v. Indus. Comm.*, 102 Ohio St.3d 341, 2004-Ohio-3166, ¶10. However, through case law, loss has been construed to include loss of use without severance. *Id.* *Alcoa* clarified that a loss of use can be compensable if there is a loss "for all practical purposes." *Id.* Thus, the *Alcoa* court approved the all practical intents and purposes test. *Id.* at ¶13.

{¶ 38} R.C. 4123.57(B) provides for 200 weeks of compensation for the loss of a leg.

First issue – the *Moorehead* case

{¶ 39} According to relator, the commission inappropriately applied the *Moorehead* case to deny relator compensation. Thus, a review of the *Moorehead* case is in order.

{¶ 40} William Moorehead fell approximately 15 to 20 feet head first onto a concrete floor while working on a raised platform at his job site. Upon impact, he suffered severe spinal cord and other injuries. Unrebuttable evidence established that the spinal cord injury rendered him a quadriplegic. Moorehead never regained consciousness and died 90 minutes after the fall.

{¶ 41} Moorehead's widow applied for death benefits and also for scheduled loss compensation based on loss of use of both arms and legs. The commission denied the application for scheduled loss compensation, observing that scheduled loss benefits may be awarded only to injured workers who experience both a physical and sustained loss of use and also consciously perceive and experience the physical suffering and hardship caused by the loss of use of a body part in the period between injury and death. The commission stated that "the widow-claimant's application for such benefits must fail, as the decedent did not sustain the loss of his extremities, because he was comatose, and completely unaware of the extent of his injuries, for the brief period between the accident and his death." *Id.* at ¶3.

{¶ 42} In *Moorehead*, the Supreme Court of Ohio issued a writ of mandamus explaining, at ¶14-20:

The commission concluded that the decedent's loss of use "was contingent upon his survival." It further concluded that the "decedent did not survive." But Moorehead did survive the fall, albeit for only a short period, as it is undisputed that he did not die upon impact. R.C. 4123.57(B) does not specify a required length of time of survival after a loss-of-use injury before benefits pursuant to R.C. 4123.57(B) are payable.

We have long recognized that neither administrative agencies nor this court "may legislate to add a requirement to a statute enacted by the General Assembly." *Wheeling Steel Corp. v. Porterfield* (1970), 24 Ohio St.2d 24, 27-28, 53 O.O.2d 13, 263 N.E.2d 249. Rather, in interpreting statutes "it is the duty of this court to give effect to the words used, not to delete words used or to insert words not used." *Columbus-Suburban Coach Lines, Inc. v. Pub. Util. Comm.* (1969), 20 Ohio St.2d 125, 127, 49 O.O.2d 445, 254 N.E.2d 8. We therefore cannot condone the commission's addition of a requirement that a worker survive for some extended

period of time, left unspecified by the commission or the General Assembly, when considering the worker's entitlement to a scheduled loss benefit.

Similarly, there is no language in R.C. 4123.57(B) requiring that an injured worker be consciously aware of his paralysis in order to qualify for scheduled loss benefits. In an analogous case the Supreme Court of New Hampshire considered a scheduled loss application filed on behalf of a worker whose injury left him in an irreversible vegetative state. *Corson v. Brown Prods., Inc.* (1979), 119 N.H. 20, 397 A.2d 640. The application was denied administratively solely because Corson's vegetative state made him unaware of his loss. The New Hampshire Supreme Court vacated that decision and awarded scheduled loss compensation, writing:

"What is of paramount importance in this case is that words such as 'awareness' or 'consciousness' cannot be added under the guise of legislative history to a statute which clearly states that '[t]he scheduled awards under this section accrue to the injured employee simply by virtue of the loss or loss of the use of a member of the body.' * * * When the language used in a statute is clear and unambiguous, its meaning is not subject to modification by construction." *Id.*, 119 N.H. at 23, 397 A.2d 640.

The same rule of statutory construction applies here. When "the meaning of the statute is unambiguous and definite, it must be applied as written and no further interpretation is necessary." *State ex rel. Savarese v. Buckeye Local School Dist. Bd. of Edn.* (1996), 74 Ohio St.3d 543, 545, 660 N.E.2d 463. R.C. 4123.57(B) does not say that compensation is dependent upon a claimant's conscious awareness of his or her loss, whether resulting from amputation or paralysis. Rather, where the requisite physical loss has been sustained, the statute directs that scheduled loss compensation shall be paid.

This court should not graft duration-of-survival or cognizance requirements to R.C. 4123.57(B), because the statute has no text imposing them. Public-policy arguments relative to the requisites of scheduled loss benefits pursuant to R.C. 4123.57 are better directed to the General Assembly, including arguments that a specified time of survival should

be mandated after a paralyzing injury and that a worker be cognizant of his or her loss before loss-of-use benefits are payable.

The appellant proffered medical evidence establishing that William Moorehead sustained the physical loss of use of his limbs as a result of his fall. Consciousness of that loss during an extended period of survival is not required by R.C. 4123.57(B), and the commission therefore incorrectly applied the statute when it denied the appellant's application on that basis.

{¶ 43} According to relator, in contravention of the legal principle set forth in *Moorehead*, the commission here "introduced a required length of survival" for obtaining R.C. 4123.57(B) scheduled loss compensation. As evidence of this proposition, relator points to the commission's statement in its order that the *Moorehead* court "contemplated at least some discernible period of survival, following an injury that leads to an [i]njured [w]orker's death, as a prerequisite for granting any scheduled loss award."

{¶ 44} To emphasize her point, relator here asserts "[n]owhere in R.C. 4123.57 is there a requirement of survival for some 'discernable period of time.' " (Relator's brief, at 5.)

{¶ 45} The magistrate disagrees with relator's contention that the commission misapplied *Moorehead* to the instant case.

{¶ 46} Implicit at paragraph 14 of *Moorehead* is the proposition that survival of the injury's initial impact is a requirement for obtaining scheduled loss compensation. While R.C. 4123.57(B) does not specify a required length of time for survival after a loss

of use injury, survival must occur even though it exists for only a short period of time. As the *Moorehead* court states, William Moorehead "did not die upon impact."

{¶ 47} Moreover, the burden of proving survival for some length of time following impact lied with relator at the commission proceedings. Relying upon the report of Dr. Forte, the commission, in essence, found that relator failed to prove that decedent survived the impact. Again, the commission stated in its order:

* * * Dependent Children did not present persuasive evidence that the Decedent survived his injury in order to establish their entitlement to an award for loss of use pursuant to Moorehead. Specifically, there is no persuasive medical evidence to establish that, following the incident, the Decedent survived for any discernible amount of time. Furthermore, there is no persuasive evidence that the Decedent did not die on impact. * * *

{¶ 48} In *Moorehead*, it was undisputed that William Moorehead survived for 90 minutes after the fall, albeit in an unconscious state. Here, survival was in dispute. Dr. Uptegrove opined in his December 17, 2009 report that decedent "did experience a short survival interval after these injuries were sustained." On the other hand, Dr. Forte disagreed with Dr. Uptegrove's analysis of the medical evidence supporting Dr. Uptegrove's opinion. According to Dr. Forte, "there is insufficient medical evidence and it is unlikely that the injured worker survived immediately following the injury of record."

{¶ 49} The commission is exclusively responsible for evaluating evidentiary weight and credibility. *State ex rel. Fairfield City Schools v. Indus. Comm.*, 129 Ohio St.3d 312, 2011-Ohio-2378, ¶20, citing *State ex rel. Burley v. Coil Packing, Inc.* (1987), 31 Ohio St.3d 18, 20-21.

{¶ 50} Clearly, it was within the commission's fact-finding discretion to determine that Dr. Forte's report was persuasive. *Id.*

{¶ 51} In short, contrary to relator's contention, the commission did not misapply the *Moorehead* case.

Second issue – "instantaneous death"

{¶ 52} As earlier noted, Dr. Forte incorrectly indicates in his report that the industrial claim is allowed for "instantaneous death." According to relator, this error eliminates Dr. Forte's report from evidentiary consideration. The magistrate disagrees.

{¶ 53} In proceedings before the commission, physicians are routinely asked to examine an injured worker for one or more allowed conditions of the claim. Where a physician renders a disability opinion that considers a non-allowed condition, his disability opinion cannot be relied upon to support an award of compensation. *State ex rel. Bradley v. Indus. Comm.*, 77 Ohio St.3d 239, 242, 1997-Ohio-48.

{¶ 54} Here, relator endeavors, unsuccessfully, to apply the above-described rationale to Dr. Forte's error in describing the claim allowance.

{¶ 55} To begin, Dr. Forte is not an examining physician. That is, he did not examine the body of decedent.

{¶ 56} Rather, Dr. Forte provided his analysis of the medical records in the claim—most notably the autopsy report and Dr. Uptegrove's December 17, 2009 report.

{¶ 57} Thus, the true issue before this court is whether Dr. Forte's misstatement of the claim allowance flaws his analysis such that the report is of no evidentiary value

and cannot be relied upon by the commission. The magistrate finds that Dr. Forte's error in misstating the claim allowance is harmless.

{¶ 58} Relator's fixation on the misstated claim allowance perhaps suggests that the misstated claim allowance improperly influenced or even compelled Dr. Forte to conclude that "it is unlikely that the injured worker survived immediately following the injury of record." But a thorough reading of Dr. Forte's four-page narrative report fails to disclose any evidence that Dr. Forte's ultimate conclusions were in any way influenced by the misstated claim allowance.

{¶ 59} In short, relator's second argument must fail.

Third issue – internal inconsistency

{¶ 60} Equivocal medical opinions are not evidence. *State ex rel. Eberhardt v. Flxible Corp.* (1994), 70 Ohio St.3d 649, 657. Equivocation occurs when a doctor repudiates an earlier opinion, renders contradictory or uncertain opinions, or fails to clarify an ambiguous statement. *Id.*

{¶ 61} A physician's report can be so internally inconsistent that it cannot be some evidence supporting the commission's decision. *State ex rel. Lopez v. Indus. Comm.*, 69 Ohio St.3d 445, 449, 1994-Ohio-458; *State ex rel. Taylor v. Indus. Comm.* (1995), 71 Ohio St.3d 582, 585.

{¶ 62} However, in mandamus, courts will not second-guess the medical expertise of the doctor whose report is under review. *State ex rel. Young v. Indus. Comm.*, 79 Ohio St.3d 484, 1997-Ohio-162.

{¶ 63} The evaluation of the weight and credibility of the evidence before it rests exclusively with the commission. *State ex rel. Thomas v. Indus. Comm.* (1989), 42 Ohio St.3d 31, 33, citing *Burley*.

{¶ 64} " 'In general, the court does not "second guess" medical opinions from medical experts and will remove a medical opinion from evidentiary consideration as having no value only when the report is patently illogical or contradictory * * *.' " *State ex rel. Certified Oil Corp. v. Mabe*, 10th Dist. No. 06AP-835, 2007-Ohio-3877, ¶4, quoting *State ex rel. Tharp v. Consol. Metal Prods.*, 10th Dist. No. 03AP-124, 2003-Ohio-6355, ¶67.

{¶ 65} In his December 17, 2009 report, Dr. Uptegrove supports his opinion that decedent "did experience a short survival interval" by noting that the autopsy report described the kidneys as having "pale, tan cortical surfaces." According to Dr. Uptegrove, this is indicative of "shock kidneys" which is a phenomenon "caused by hypovolemic shock due to massive blood loss." (Emphasis omitted.)

{¶ 66} In his March 31, 2010 report, Dr. Forte challenges Dr. Uptegrove's opinion by noting that "the pathologists who performed the autopsy did not list hypovolemic shock due to massive blood loss as one of their pathological diagnoses." (Emphasis omitted.)

{¶ 67} Thereafter, in his April 11, 2010 report, Dr. Uptegrove responds to Dr. Forte by asserting, "[t]he fact that hypovolemic shock was not mentioned as a pathological diagnosis is not surprising. Physiologic consequences of injuries are usually not listed on the front sheet."

{¶ 68} Obviously, Drs. Uptegrove and Forte do not agree on interpretation of the autopsy report. However, that the doctors do not agree does not create an internal inconsistency in either report, as relator seems to suggest.

{¶ 69} Again, the commission is exclusively responsible for evaluating evidentiary weight and credibility. Relator's argument for finding Dr. Forte's report to be internally inconsistent is, in effect, an invitation that this court assume the responsibility of the commission in the evaluation of evidentiary weight and credibility. This court must decline the invitation.

{¶ 70} 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).