

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

State of Ohio ex rel. Lindsey Wallace,	:	
Relator,	:	
v.	:	No. 11AP-897
Industrial Commission of Ohio and	:	(REGULAR CALENDAR)
Accurate Plumbing Inc.,	:	
Respondents.	:	

---

D E C I S I O N

Rendered on March 19, 2013

---

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

*Michael DeWine, Attorney General, and Colleen C. Erdman, for respondent Industrial Commission of Ohio.*

---

IN MANDAMUS  
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

CONNOR, J.

{¶ 1} Relator, Lindsey Wallace, the dependent child of claimant, Gary E. Wallace, II, filed this original action seeking a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its order denying an additional award for the claim. The claimant died in a work-related fatal motor vehicle accident, and the claim has been duly approved for his death. Relator now seeks an additional award for scheduled loss of use of both of claimant's legs arising out of injuries suffered in the same motor vehicle accident.

{¶ 2} A district hearing officer ("DHO") denied relator's claim for loss-of-use benefits. A staff hearing officer ("SHO") affirmed the DHO's order. Relator then filed for the present writ of mandamus seeking to set aside the commission's decision. We 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 has issued a decision, including findings of fact and conclusions of law, which is appended hereto. The magistrate recommends that this court deny the requested writ of mandamus. Relator has filed objections to the magistrate's decision and the matter is now before us for our independent review.

{¶ 3} As reflected in the facts given in the magistrate's decision, which will only be briefly summarized here, the claimant was involved in a serious work-related motor vehicle accident in which he was ejected from the vehicle. When paramedics arrived at the scene, they observed the claimant lying with his head in a ditch and a bystander providing mouth-to-mouth resuscitation. The paramedics found no pulse and upon transportation to the hospital medical personnel again found no vital signs. The paramedic dispatch was entered at 4:08 p.m., and arrival at Mount Carmel St. Ann's Hospital was noted at 4:42 p.m. Resuscitation efforts at the hospital were fruitless, and at 5:36 p.m. the emergency room physician pronounced the claimant dead. The coroner's report gives the time of death as 5:07 p.m. An autopsy performed by a forensic pathologist revealed multiple internal injuries in the chest area, including a transection of the third thoracic vertebra.

{¶ 4} R.C. 4123.57 provides that compensation is payable to an employee when the employee suffers the loss of a body part that is listed on a schedule set forth in the statute. The Supreme Court of Ohio has held that "loss" as used in R.C. 4123.57(B) is equivalent to "loss of use." *State ex rel. Gassmann v. Indus. Comm.*, 41 Ohio St.2d 64 (1975). Compensation is thus payable either for loss of a limb through amputation or for permanent and total loss of use due to paralysis, because such loss constitutes a loss " '[f]or all practical purposes \* \* \* to the same effect and extent as if [the limb] had been amputated or otherwise physically removed.' " *State ex rel. Walker v. Indus. Comm.*, 58 Ohio St.2d 402, 403-04 (1979), quoting *Gassmann* at 67.

{¶ 5} In reliance on the Supreme Court of Ohio's later decision in *State ex rel. Moorehead v. Indus. Comm.*, 112 Ohio St.3d 27, 2006-Ohio-6364, relator contends that

the claimant survived the fatal accident long enough to suffer a "loss of use" due to paralysis of his legs. Relator stresses that *Moorehead* expressly rejects any requirement of a specific duration of survival after the loss of use, and also rejects any requirement of actual cognizance by the claimant of the injury prior to death. Relator bases the likely paralysis upon the spinal injury noted in the autopsy. Relator bases the likely interval of survival upon the time of death stated in the coroner's report, which is approximately one hour after the dispatch of the first EMS squad to the accident scene and, therefore, at least one hour after occurrence of the accident.

{¶ 6} The medical report of Bienvenido D. Ortega, M.D., prepared for the commission, opined that loss of use was not warranted because the loss of use of the claimant's legs was part of the cardiac arrest that resulted in his death. Relator submitted a contrasting report from Russell Uptegrove, M.D., who reviewed the autopsy findings and concluded that the claimant had died from significant chest trauma but had no injuries that could be classified as immediately lethal. Based upon this conclusion and the injury to the thoracic vertebra that would cause paralysis, there was a significant survival interval according to Dr. Uptegrove under which the claimant would have suffered the loss of use of his legs before death.

{¶ 7} The magistrate examined the medical evidence and other facts and concluded that, pursuant to *Moorehead* and R.C. 4123.57(B), loss of use compensation was not payable. The magistrate concluded that the facts in the present case indicated that emergency personnel arriving at the scene of the accident and treating the decedent thereafter never observed the decedent to either breathe on his own or have his heart beat on its own. The magistrate therefore declined to rely exclusively on the coroner's time of death at 5:07 p.m. The magistrate also observed that the medical evidence did not conclusively establish a spinal cord injury that would have caused paralysis of the lower extremities, since the autopsy refers to a transection of the third thoracic vertebra, but does not specifically observe a corresponding transection of the spinal cord.

{¶ 8} Relator objects to the magistrate's application of R.C. 4123.57(B) as interpreted by *Moorehead*. Relator also objects to the magistrate's conclusions on the ground that R.C. 313.19 provides that the cause of death and manner and mode of death

as delivered by the coroner and incorporated in the coroner's verdict shall be the legally accepted manner and mode in which a death occurred.

{¶ 9} With respect to the conclusive effect of a coroner's report, the Supreme Court of Ohio has held that R.C. 313.19 creates only a "nonbinding, rebuttable presumption" that may be overcome by reference to developed evidence. *Vargo v. Travelers Ins. Co., Inc.*, 34 Ohio St.3d 27 (1987), paragraph one and two of the syllabus. A finder of fact can weigh the evidence and determine whether the presumption has been rebutted and find a different time and cause of death. *Melvin v. Ohio State Univ. Med. Ctr.*, 10th Dist. No. 10AP-975, 2011-Ohio-3317, ¶ 10-16. We accordingly find that the magistrate properly concluded that the coroner's report of itself did not establish a significant period of survival under which the claimant could have experienced a loss of use of his legs.

{¶ 10} Going beyond the coroner's report, we find that the evidence summarized above supports the commission's assessment of the evidence regarding the likelihood of a discernable period of survival following the accident. While *Moorehead* rejects a minimum duration of survival, the relator was required to present persuasive evidence that the claimant in fact survived the crash. *See State ex rel. Sagraves v. Indus. Comm.*, 10th Dist. No. 10AP-1030, 2012-Ohio-1010, ¶ 8. We find that the magistrate properly considered and weighed the medical evidence regarding the likelihood of any survival. In light of this, the discussion with respect to the summary of Dr. Ortega's report concerning the likelihood of paralysis becomes immaterial to our ultimate conclusion that loss-of-use compensation is not payable in the present case.

{¶ 11} We adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein, we overrule relator's objections and deny the requested writ of mandamus.

*Objections overruled;  
writ of mandamus denied.*

TYACK and SADLER, JJ., concur.

---

## APPENDIX

### IN THE COURT OF APPEALS OF OHIO

#### TENTH APPELLATE DISTRICT

State of Ohio ex rel. Lindsey Wallace,	:	
	:	
Relator,	:	No. 11AP-897
	:	
v.	:	(REGULAR CALENDAR)
	:	
Industrial Commission of Ohio and	:	
Accurate Plumbing Inc.,	:	
	:	
Respondents.	:	

---

### MAGISTRATE'S DECISION

Rendered on May 22, 2012

---

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

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

---

### IN MANDAMUS

{¶ 12} Relator, Lindsey Wallace, the dependent child of Gary E. Wallace, II ("claimant"), has filed this original action requesting that this court issue a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order which denied relator's motion seeking an award for the scheduled loss of use of both of claimant's legs following the motor vehicle accident which resulted in his death and ordering the commission to find that claimant would be entitled to such an award.

**Findings of Fact:**

{¶ 13} 1. On July 6, 2009, claimant was involved in a motor vehicle accident.

{¶ 14} 2. Emergency Medical Service ("EMS") personnel were dispatched to the scene of the accident at 16:08, arrived on the scene at 16:13, left for the hospital at 16:23, and arrived at the hospital at 16:42.

{¶ 15} 3. According to the EMS report, when personnel arrived on the scene (at 16:13) claimant was found lying with his head in a ditch and bystanders were performing mouth-to-mouth resuscitation. Claimant had no pulse, was placed on a backboard with a manual c-spine and placed in the back of the squad. Suction was used to clear an airway before bagging began. Two attempts to intubate claimant failed. A "KING airway" was used and lung sounds were detected.

{¶ 16} 4. Upon arrival at St. Ann's Hospital in Westerville, Ohio, claimant was non-responsive, his pupils were fixed and dilated, no breath sounds were detected with bagging, no cardiac activity was noted, his abdomen was distended, his extremities were cool, and claimant had no carotid or femoral pulses. After it was noted that claimant did not have a DNR (do not resuscitate) order, hospital personnel continued CPR and other measures; however, claimant's condition did not improve. After some resuscitation efforts, cardiac activity was noted; however, pulses were not palpable. Claimant was pronounced dead at 17:36.

{¶ 17} 5. The autopsy report, dated July 8, 2009, performed by Steven S. Sohn, M.D., forensic pathologist, reveals the following final pathologic diagnoses:

[One] Blunt force injury of the thorax:

- a. Transection of the sternum
- b. Transection of the third thoracic vertebra
- c. Extensive perivertebral hematoma
- d. Multiple bilateral rib fractures (right 3 - 10 ribs; left 2 - 11 ribs)
- e. Bilateral hemothorax (right 400 cc; left 250 cc)
- f. Posterior mediastinal hematoma (200 gm)
- g. Multiple abrasions, contusion and laceration, torso.

[Two] Blunt force injuries of the extremities:

- a. Multiple lacerations, contusions and abrasions of the lower extremities[.]

Cause of death was listed as: "Multiple blunt force injuries due to motor vehicle crash."

The autopsy report reveals the following further relevant evidence:

**Blunt force injury of the thorax:**

On dissection, the sternum shows multiple comminuted fractures of the body of the sternum. \* \* \* There are extensive paravertebral hematomas of the thoracic vertebrae.

\* \* \*

The calvarial skull is intact. Examination of the soft tissues of the neck, including strap muscles and large vessels, reveals no abnormalities. The hyoid bone and larynx are intact.

{¶ 18} 6. The coroner's report notes the time of death as 17:07. The immediate cause of death is noted to be multiple blunt force injuries as a consequence of a motor vehicle crash and the time interval is noted to be minutes.

{¶ 19} 7. A physician review was conducted by Bienvenido D. Ortega, M.D. In his July 15, 2010 report, Dr. Ortega was asked whether or not an additional allowance for loss of use of bilateral lower legs should be granted. Dr. Ortega answered in the negative, stating:

It is my opinion within a reasonable degree of medical certainty that the allowed conditions of cardiac arrest, specified effusion except tuberculous, traumatic pneumothorax, closed were causally and directly related to the injury. The request for additional allowance for loss of use of bilateral lower legs should be denied simply because this is part of the cardiac arrest that resulted in the condition called death.

{¶ 20} 8. The record also contains two reports from Russell Uptegrove, M.D. In his August 20, 2010 report, Dr. Uptegrove responded to Dr. Ortega's opinion that claimant did not suffer a loss of use of bilateral lower legs, by stating:

The problem I have with Dr. Ortega's report is that he opines the cause of death is cardiac arrest. \* \* \* Once an individual has no discernible cardiac activity they are declared dead. Some circumstances happen quickly such as a shotgun blast of the head or massive chest trauma. Other circumstances may take longer such as multiple drug intoxication, myocardial infarction, overwhelming infection or chronic renal failure. Based on the autopsy findings, it is clear that

the decedent died from significant chest trauma. Based on the accumulation of blood and air in the pleural cavities, he certainly did have a survival interval. He had no injuries that could be classified as immediately lethal. The location of the transection of his thoracic vertebra (T3) would have likely caused a transection of the spinal or at least compression with resulting paralysis of both lower extremities.

To summarize: 1) the decedent was involved in a motor vehicle crash, 2) he sustained significant injuries of his chest wall and internal organs, 3) he had a short survival interval, 4) these injuries resulted in his death, 5) the vertebral transection at T3 would more likely than not have caused paralysis of the lower extremities.

{¶ 21} 9. In his November 19, 2009 report, Dr. Uptegrove stated further, as follows:

The decedent was transported to the emergency room. On arrival, a left-sided chest tube was placed. A rush of air along with 1100 ml of blood was expelled. A right-sided chest tube produced a rush of air along with 40 ml of blood. Resuscitative measures were unsuccessful and he was pronounced dead 59 minutes after the accident had occurred.

An autopsy performed on the decedent showed multiple lacerations, contusions and abrasions on the lower extremities. Several significant injuries were identified internally and included: transection of the sternum, multiple bilateral rib fractures, transection of the thoracic aorta, bilateral hemothoraces, transection of the third thoracic vertebra, extensive perivertebral hematoma of the thoracic vertebra and a posterior mediastinal hematoma. There was no mention of any trauma to the underlying spinal cord. With the degree of trauma present, I would expect that there would be either a complete transection or at least significant compression of the spinal cord adjacent to the transection of the vertebral body. A spinal cord injury at the level of thoracic vertebra #3 will cause paralysis of the lower extremities. I believe that Mr. Wallace did lose volitional control of his legs before he was subsequently pronounced dead.

The cause of death was determined to be multiple blunt force injuries due to motor vehicle crash. The manner of death was



ruled accidental. The decedent had a survival interval of 59 minutes from the onset of the injury to the time of death. The presence of bilateral hemopneumothoraces is consistent with the decedent experiencing some degree of survival after the crash. There were no injuries documented that were serious enough to have caused immediate death. The injuries that Mr. Wallace sustained while driving from a job site are quite commonly seen in motor vehicle crashes.

{¶ 22} 10. Claimant's workers' compensation claim was allowed for "death."

{¶ 23} 11. The motion for scheduled loss of use of both legs was heard before a district hearing officer ("DHO") on August 23, 2010. The DHO explained why relator's medical evidence was not found to be persuasive:

Counsel for the Dependent-Daughter has argued that the medical reports from Dr. Uptegrove are persuasive evidence that the transection of the Decedent's vertebra (T3) caused a transection (or, at least, a compression) of the the [sic] spine with resulting paralysis of both lower extremities.

After reviewing treatment records from the Plain Township EMS, the emergency room report from Mount Carmel St. Ann's Hospital, and the 07/08/2009 Autopsy Report, the District Hearing Officer finds there is no persuasive evidence that the Decedent survived the motor vehicle accident for any length of time.

The Dependent-Daughter relies on the 11/19/2009 and 08/20/2010 reports of Dr. Uptegrove. In his 11/19/2009 report, Dr. Uptegrove states that the Decedent "had a survival interval of 59 minutes following the industrial accident." The District Hearing Officer does not find this to be persuasive. The fact that the Decedent was pronounced dead 59 minutes later is not persuasive evidence that he had temporarily survived for 59 minutes after the car accident.

Dr. Uptegrove further states in his 11/19/2009 report that "the presence of bilateral hemopneumonthoraces is consistent with the decedent experiencing some degree of survival after the crash" and that "there were no injuries documented that were serious enough to have caused immediate death." In the 08/20/2010 report, Dr. Uptegrove also states that the Decedent had a "survival interval" as a result of "the accumulation of blood and air in pleural cavities."

In light of the following findings, the District Hearing Officer does not find that Dr. Uptegrove's statements support a finding by the preponderance of the evidence that there was some degree of survival following the motor vehicle accident. Upon arrival at the scene of the crash, EMS personnel found the Decedent "lying with his head in the ditch and bystanders doing mouth to mouth." The force of the crash had resulted in the Decedent being ejected from his car. The paramedics found that the Decedent had "no pulse upon arrival." On two occasions, the paramedics attempted intubation but were unsuccessful "due to trauma." Notes indicate that "CPR was continued throughout transport." The decedent was found to be "unresponsive" when he arrived at the emergency room of St. Ann's Hospital. Emergency room physicians continued chest compressions and the Decedent was given "ACLS meds without pulse" and it was noted that the Decedent was "in asystole" upon arrival. The emergency room physicians checked respiration and found "no breath sounds noted with bagging" and "sub Q air diffusely across the chest sternum with crepitus." With regards to cardiac activity, the ER found "no activity noted beside US shows standstill" and "no carotid or femoral pulses" on the Decedent's extremities.

{¶ 24} Thereafter, the DHO noted reliance on the findings made by Dr. Sohn stating:

Finally, the District Hearing Officer relies upon the findings made by Dr. Sohn, who performed the autopsy on 07/08/2009. Not only was the force of the accident severe enough to cause a "transection of the third thoracic vertebra," it also resulted in a "transection of the sternum" and, most significantly (as noted in the section of the report entitled "Blunt force injury of the thorax") a "transection of the thoracic aorta."

The thoracic aorta is defined by the website Medicine.Net as "a section of the aorta, the largest artery in the body, within the chest" and the thoracic aorta "gives off numerous branches that supply oxygenated blood to the chest cage and the organs within the chest." "Transection" is defined by Dorland's Pocket Medical Dictionary as "a cross section" or "division by cutting transversely." With respect to thoracic aortic injuries, the website Trauma.org states as follows: "Up to 15% of all deaths following motor vehicle collisions are

due to injury to the thoracic aorta. Many of these patients are dead at scene from complete aortic transection. Patients who survive to the emergency department usually have small tears or partial-thickness tears of the aortic wall with pseudoaneurysm formation."

Given the these [sic] findings, the District Hearing Officer does not find that Dr. Uptegrove has provided a persuasive explanation behind his opinion [sic] that the Decedent survived the motor vehicle accident for 59 minutes or any length of time. As such, the District Hearing Officer does not find that the Dependent Daughter's request for compensation pursuant to Revised Code 4123.57(B) for Decedent's loss of use of the lower extremities is well-supported.

{¶ 25} 12. Relator's appeal was heard before a staff hearing officer ("SHO") on September 28, 2010. The SHO affirmed the prior DHO's order. First, the SHO noted the following standard of review:

It is the finding of the Staff Hearing Officer that the Decedent's dependent daughter has not presented sufficient persuasive evidence to establish that the Decedent survived his injury and that injury caused loss of use [of] lower extremities in order to establish her entitlement to an award of lost use pursuant to State ex rel. Moorehead v. Indus. Comm. (2006) 112 Ohio St.3d. 27. Moorehead held that ORC 4123.57(B) does not specify a length of time of survival after a loss of use before benefits can be paid. There is no requirement that the Injured Worker be consciously aware of his paralysis in order to qualify. However, Moorehead does contemplate at least some discernible period following an injury along with proof of loss of use of body part to receive benefits pursuant to ORC. 41[2]3. 57.

{¶ 26} 13. Thereafter, the SHO cited the medical evidence relied upon and denied the request, as follows:

The evidence on filed document[s] that the Decedent was involved in a MVA which resulted in him being ejected from his car, that the EMS upon arrival at the scene found the Decedent in a ditch with a bystander giving mouth to mouth. The paramedics found no pulse on arrival and attempted to intubate the Decedent without success. The paramedics continued CPR during transport and the decedent was

asystole upon arrive to Mt. Carmel hospital. The Emergency Room Doctors observed that the decedent had no breath sounds with bagging, no pulses carotid or femoral.

The [Staff Hearing Officer] relies upon the medical records of Mr. Carmel/St. Ann's, dated 07/06/2009, Autopsy report prepared by Dr. Sohn, forensic pathologist, dated 07/09/2009, wherein he opines that blunt force to the thoracic caused transection of the thoracic aorta. The Staff Hearing Officer also notes the article about rupture of the thoracic aorta.

{¶ 27} 14. Relator's appeal was refused by order of the commission mailed December 1, 2010.

{¶ 28} 15. Relator filed a request for reconsideration which the commission took under advisement, and then, in an order mailed March 1, 2011, denied.

{¶ 29} 16. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶ 30} For the reasons that follow, it is this magistrate's decision that this court should deny relator's request for a writ of mandamus.

{¶ 31} In order for this court to issue a writ of mandamus as a remedy from a determination of the commission, relator must show a clear legal right to the relief sought and that the commission has a clear legal duty to provide such relief. *State ex rel. Pressley v. Indus. Comm.*, 11 Ohio St.2d 141 (1967). A clear legal right to a writ of mandamus exists where the relator shows that the commission abused its discretion by entering an order which is not supported by any evidence in the record. *State ex rel. Elliott v. Indus. Comm.*, 26 Ohio St.3d 76 (1986). On the other hand, where the record contains some evidence to support the commission's findings, there has been no abuse of discretion and mandamus is not appropriate. *State ex rel. Lewis v. Diamond Foundry Co.*, 29 Ohio St.3d 56 (1987). Furthermore, questions of credibility and the weight to be given evidence are clearly within the discretion of the commission as fact finder. *State ex rel. Teece v. Indus. Comm.*, 68 Ohio St.2d 165 (1981).

{¶ 32} R.C. 4123.57(B) provides a schedule authorizing the payment of compensation to a claimant for the loss of specified body members. Specifically, R.C. 4123.57(B) provides, in pertinent part:

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

\* \* \*

For the loss of a leg, 200 weeks.

{¶ 33} It is undisputed that a surviving spouse or other dependant of a claimant who dies as a result of a work-related injury may apply for compensation for which the claimant could have applied had the claimant lived, provided the application is made within one year of the date of death.

{¶ 34} In the present case, relator, as the daughter of claimant, applied for a scheduled loss of use award on behalf of her father. In order to qualify for this compensation, relator needed to demonstrate that claimant sustained a total loss of use of both of his legs as a result of the work-related motor vehicle accident which caused claimant's death.

{¶ 35} In *State ex rel. Moorehead v. Indus. Comm.*, 112 Ohio St.3d 27, 2006-Ohio-6364, the decedent had fallen approximately 15-to-20 feet head first onto a concrete floor. Upon impact, he suffered severe spinal cord and other injuries. It was undisputed that the spinal cord injury rendered him a quadriplegic. Moorehead never regained consciousness and died 90 minutes after the fall. The decedent's widow applied for death benefits and scheduled loss compensation for the decedent's loss of use of both arms and legs. The commission denied the loss of use benefits on the grounds that injured workers must both experience a physical and sustained loss of use and also consciously perceive and experience the physical loss. The decedent's widow filed a mandamus action and ultimately the Supreme Court of Ohio determined that R.C. 4123.57(B) does not specify a required length of time of survival or a cognizance requirement after a loss of use injury before benefits can be paid. The *Moorehead* court, at 30, concluded, stating:

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.

{¶ 36} Relator had the burden of proving that claimant did indeed suffer a total loss of use of his legs and that he actually survived for some period of time. In support of her application seeking a scheduled loss of use award, relator relies on the reports of Dr. Uptegrove. Dr. Uptegrove opined that claimant survived for 59 minutes from the onset of the injury until the time of his death. Dr. Uptegrove based this conclusion on the fact that claimant was pronounced dead 59 minutes after EMS personnel arrived at the scene of the accident. However, as noted in the findings of fact, claimant was non-responsive, not breathing, and lacked a pulse when EMS personnel arrived. While EMS personnel intubated claimant, bagged him, and performed CPR, there is no evidence that claimant either breathed on his own or that his heart beat on its own. As such, the medical evidence does not support Dr. Uptegrove's conclusion that claimant actually lived for 59 minutes after the accident and the commission did not abuse its discretion by finding that this portion of Dr. Uptegrove's report was not credible.

{¶ 37} Further, in both reports, Dr. Uptegrove made certain statements which are not supported by the medical evidence. Specifically, in his August 20, 2010 report, Dr. Uptegrove based his opinion in part on his conclusion that "[t]he location of the transection of his thoracic vertebra (T3) would have likely caused a transection of the spinal or at least compression with resulting paralysis of both lower extremities." Further, in his November 19, 2009 report, Dr. Uptegrove made a similar statement. Specifically, Dr. Uptegrove stated:

With the degree of trauma present, I would expect that there would be either a complete transection or at least significant compression of the spinal cord adjacent to the transection of the vertebral body. A spinal cord injury at the level of thoracic vertebra #3 will cause paralysis of the lower extremities. I believe that Mr. Wallace did lose volitional control of his legs before he was subsequently pronounced dead.

{¶ 38} While the evidence does demonstrate a transection of claimant's thoracic vertebra at T3, there is no evidence of a corresponding spinal cord injury and, stating that his injury "would have likely caused" a spinal cord injury is not an opinion to a reasonable degree of medical certainty. Dr. Uptegrove's reports are based in part on speculation and, as such, Dr. Uptegrove's reports do not constitute some evidence upon which the

commission could rely. Further, the autopsy does not indicate that there was any injury to the spinal cord and Dr. Uptegrove even admits this in his August 20, 2010 report when he said: "There was no mention of any trauma to the underlying spinal cord."

{¶ 39} Recently, this court reviewed a similar commission order where a claimant died following a motor vehicle accident. In *State ex rel. Sagraves v. Indus. Comm.*, 10th Dist. No. 10AP-1030, 2012-Ohio-1010, Larry Lowery died after he was struck by a vehicle while working behind a sanitation truck. The question before this court centered on "whether, and if so, for how long, [Lowery] may have survived the crash and whether he lost the use of his legs during that survival period." *Id.* at ¶ 3. This court applied *Moorehead* and noted that the commission found that Lowery's family did not present persuasive evidence that Lowery had survived the crash. Further, this court also noted that the commission found that Lowery's family did not present persuasive evidence that Lowery's injuries, even if survivable, would have caused the permanent loss of use of his legs.

{¶ 40} The *Sagraves* case is analogous to the situation presented here. Specifically, in the present case, the commission found that relator failed to meet her burden of proving that claimant "survived his injury and that injury caused loss of use [of his] lower extremities."

{¶ 41} In finding that claimant did not survive the motor vehicle accident for any appreciable amount of time, the commission relied on the evidence from the EMS personnel indicating that, upon arrival, claimant had no pulse and their attempt to intubate claimant was not successful. Further, the commission relied on medical evidence that claimant had no breath sounds with bagging, and no pulses either carotid or femoral, when he presented at the hospital. The commission also relied on Dr. Sohn's statement that the blunt force trauma to the thoracic area caused transection of the thoracic aorta. Both the DHO and SHO referred to a medical dictionary in order to help understand the implications of a transection of the aorta and came to understand that such an injury involves cutting the aorta transversely.

{¶ 42} Relator objects to the commission's reliance on any additional medical evidence which helped the commission to understand the effects of claimant's injuries arguing that the commission imposed its unqualified medical opinion by arbitrarily

choosing evidence from medical reports to reach the conclusion the commission sought to reach. The magistrate disagrees with relator's interpretation.

{¶ 43} In the present case, the commission rejected Dr. Uptegrove's reports. The commission cited medical evidence in the record from which the commission determined that Dr. Uptegrove incorrectly assumed that claimant survived for 59 minutes after the motor vehicle accident. Relator's entire argument was based on Dr. Uptegrove's opinion that claimant had indeed survived the accident. Once Dr. Uptegrove's medical reports are removed from evidence, there is no evidence in the record from which the commission could have determined that claimant survived for any appreciable amount of time. In other words, relator did not meet the burden of proving that claimant had sustained a total loss of use of both of his legs before he died.

{¶ 44} The commission did not need to provide any further explanation; however, both the DHO and SHO did. It is not an abuse of discretion for hearing officers to utilize medical dictionaries or other medical sources to understand statements made in a doctor's report. By doing so, the hearing officers did not impose their unqualified medical opinions. Further, even if it was an abuse of discretion for the hearing officers to use any reference materials to better understand the medical evidence, the result in this case would not change.

{¶ 45} Claimant had no pulse and was not breathing when EMS arrived on the scene. When a person is no longer breathing and lacks a pulse, the person is deceased. Here, EMS personnel did everything they could to resuscitate claimant without success. Because claimant did not have a DNR order, hospital personnel did everything in their power to resuscitate claimant. Resuscitation itself is defined in *Taber's Cyclopedic Medical Dictionary* 1891 (20th Ed.2005), as "[r]evival after apparent death." Based on this definition, an attempt to resuscitate an individual is not synonymous with the act of actually resuscitating an individual. If medical personnel would have been able to resuscitate claimant, he would have been revived after an apparent death, not an actual death. The failure of medical personnel to be able to resuscitate claimant demonstrates that his death was not apparent, it was actual.

{¶ 46} In the present case, the commission cited the medical evidence upon which it relied indicating that claimant was dead by the time that EMS personnel arrived on the



scene. Relator's evidence that claimant survived for 59 minutes is not substantiated by the medical evidence and was properly rejected by the commission. Relator simply failed to meet her burden of proving that claimant survived for any length of time after the accident and the commission did not abuse its discretion in denying the application for total loss of use of both of claimant's legs.

{¶ 47} Based on the foregoing, it is this magistrate's decision that relator has not demonstrated that the commission abused its discretion in denying relator's motion seeking a scheduled loss of use award and this court should deny relator's request for a writ of mandamus.

/s/ Stephanie Bisca Brooks  
STEPHANIE BISCA BROOKS  
MAGISTRATE

#### **NOTICE TO THE PARTIES**

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