

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

|                                     |   |                    |
|-------------------------------------|---|--------------------|
| State of Ohio ex rel.               | : |                    |
| Florence Robinette,                 | : |                    |
|                                     | : |                    |
| Relator,                            | : | No. 12AP-502       |
|                                     | : |                    |
| v.                                  | : | (REGULAR CALENDAR) |
|                                     | : |                    |
| Industrial Commission of Ohio and   | : |                    |
| Columbus Schools aka Columbus Board | : |                    |
| of Education,                       | : |                    |
|                                     | : |                    |
| Respondents.                        | : |                    |

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D E C I S I O N

Rendered on June 13, 2013

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*Portman & Foley LLP, and Frederic A. Portman, for relator.*

*Michael DeWine, Attorney General, and LaTawnda N. Moore, for respondent Industrial Commission of Ohio.*

*Loren L. Braverman, for respondent Columbus City Schools.*

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IN MANDAMUS  
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

CONNOR, J.

{¶ 1} Relator, Florence Robinette ("relator"), 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 denying her application for a total loss of use award and ordering the commission to find that she is entitled to a total loss of use award for her right leg.

{¶ 2} The court referred this 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, including findings of fact and conclusions of law, which is appended to this decision. Therein, the magistrate concluded the commission did not abuse its discretion in denying her application for the total loss of use of her right leg.

{¶ 3} Specifically, the magistrate found relator failed to demonstrate the commission abused its discretion in denying her motion for a scheduled loss of use award because the addendum report of Seth H. Vogelstein, D.O., constitutes some evidence upon which the commission could rely.

{¶ 4} Relator filed objections to the magistrate's decision and essentially re-argued the same points she previously raised. The commission filed a memorandum opposing the objections. Respondent Columbus City Schools also filed a memorandum opposing the objections. This cause is now before the court for a full review regarding relator's objections.

{¶ 5} Relator objects to the magistrate's decision on the grounds that the magistrate erred in failing to address the ultimate factual issue of whether or not relator, who had a below the knee amputation, can walk with a prosthesis. Relator contends the commission erred by relying on Dr. Vogelstein's report because his examination failed to determine whether or not relator could use her prosthesis to ambulate. Because Dr. Vogelstein did not attempt to have relator stand or walk with the prosthesis, relator argues the report should not be considered "some evidence" upon which the commission could rely to deny the total loss of use award. Without that evidence, relator contends there is uncontroverted evidence that she is entitled to a total loss of use award.

{¶ 6} In *State ex rel. Alcoa Bldg. Prods. v. Indus. Comm.*, 102 Ohio St.3d 341, 2004-Ohio-3166, the Supreme Court of Ohio established that in a non-amputation loss of use case, the inquiry is whether the injured worker has suffered the permanent loss of use of the injured body part for all practical intents and purposes. *Id.* at ¶ 12. Relator contends Dr. Vogelstein did not attempt to examine relator's ability to stand or walk with her prosthesis because he was unsure about her ability to do so, and as a consequence, his report does not answer the ultimate question of whether or not she can stand or walk with

the prosthesis, and thus, whether she has suffered the permanent loss of use of her right leg for all intents and purposes.

{¶ 7} As the magistrate noted, Dr. Vogelstein's addendum provided the reasons why he believed relator had not sustained a total loss of use of her right leg. Those reasons were: (1) her stump was well-healed and non-tender, (2) she was able to fully flex her right knee and had good strength at that knee (i.e., a functional right knee), (3) she had decent strength and movement of her right hip (i.e., a functional right hip), and (4) she specifically informed the doctor that she was afraid to ambulate because her mother and grandmother had both fractured their hips and thus, she decided to remain in the wheelchair and declined to seek further evaluation or treatment. As a result, Dr. Vogelstein concluded relator had only a partial loss of use of her right leg.

{¶ 8} The magistrate also noted that Richard M. Ward, M.D., simply stated in his report that relator was "not a functional prosthetic user," *not* that she could not use the prosthetic device. Furthermore, as Dr. Vogelstein's report indicates, "[t]here is a distinct and significant difference between making a decision to not ambulate and actually not being able to ambulate."

{¶ 9} We find Dr. Vogelstein's report does constitute some evidence upon which the commission could rely to determine relator did not sustain a total loss of use of her right leg.

{¶ 10} Following an independent review pursuant to Civ.R. 53, we find the magistrate has properly determined the pertinent facts and applied the appropriate law. Therefore, relator's objections to the magistrate's decision are overruled and we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein. In accordance with the magistrate's decision, we deny the requested writ of mandamus.

*Objections overruled;  
writ of mandamus denied.*

TYACK and SADLER, JJ., concur.

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**A P P E N D I X**

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| Industrial Commission of Ohio and   | : |                    |
| Columbus Schools aka Columbus Board | : |                    |
| of Education,                       | : |                    |
|                                     | : |                    |
| Respondents.                        | : |                    |

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

Rendered on October 30, 2012

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*Portman, Foley & Flint LLP, and Frederic A. Portman, for relator.*

*Michael DeWine, Attorney General, and LaTawnda N. Moore, for respondent Industrial Commission of Ohio.*

*Loren L. Braverman, for respondent Columbus City School District.*

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IN MANDAMUS

{¶ 11} Relator, Florence Robinette, 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 request for total loss of use of her right leg and ordering the commission to find that she is entitled to that award.

Findings of Fact:

{¶ 12} 1. Relator sustained a work-related injury on September 18, 1995 when, while working as a teacher, she slipped on some stairs and landed on her back. Relator's workers' compensation claim has been allowed for the following conditions:

Contusion of back; aggravation of pre-existing lumbar arachnoiditis; right foot drop; total loss of use of the right foot.

{¶ 13} 2. Relator has not returned to work since the date of the injury and has been involved in two motor vehicle accidents.

{¶ 14} 3. In 2004, relator underwent a below the right knee amputation ("BKA").

{¶ 15} 4. Following a hearing before a staff hearing officer ("SHO") on June 7, 2005, it was determined that the BKA was causally related to the injury.

{¶ 16} 5. On December 23, 2010, relator filed an application seeking a scheduled loss of use award for her right leg.

{¶ 17} 6. Relator's motion was supported by the December 9, 2010 report of Richard M. Ward, M.D. In that report, Dr. Ward stated as follows:

On 2-17-04 she had a below the knee amputation. She was fitted for a prosthesis but she is not a prosthetic user. She wears the prosthesis for two reasons i.e. one is cosmetic and the second is that it does protect her amputation stump from direct trauma. The prosthesis offers her no further relief. She is confined to a wheelchair. She does even wear the prosthesis in bed at night because this does continue to protect the stump from any type of pressure.

\* \* \*

On examination, she uses a wheelchair. With her right below the knee prosthesis removed she has marked tenderness over the stump. She has knee motion from 90 degrees of flexion to 100 degrees of extension.

\* \* \*

Unfortunately she is not a functional prosthetic user. She is confined to a wheelchair. The only reason she wears a

prosthesis is for cosmetic purposes and because it helps protect the tender stump from any type of pressure.

Therefore, she does have total loss of functional use of her right lower extremity. I believe this is a direct result of the accident that occurred as described on 9-18-95. This opinion is certainly based upon a reasonable medical probability.

{¶ 18} 7. An independent medical examination was conducted by Seth H. Vogelstein, D.O. In his August 9, 2011 report, Dr. Vogelstein correctly identified the allowed conditions; however, he had been misinformed and had been told that the BKA was not related to the allowed conditions in the claim. Dr. Vogelstein provided a detailed history including the following which is pertinent to the issue at hand: p. 17/18

The claimant did have a right below the knee amputation performed on 02/17/04. The postoperative diagnosis was right leg chronic cellulitis along with talipes equinovarus deformity.

Ms. Robinett[e] describes that just prior to this amputation, her cellulitis did become significantly worse and was beginning to involve more and more of her right lower leg. She states that she had her leg amputated because of this cellulitis.

Ms. Robinett[e] states that following the surgery she did participate in multiple periods of PT. She explains that she was however, afraid to ambulate on her own, explaining that both her mother and grandmother had fractured their hips. She states that she did decide to stay in a wheelchair. She states that she has not had any further evaluation or treatment for either her right lower extremity or low back in many years, other than for receiving pain medications from her present family physician, Dr. Peterson.

{¶ 19} Thereafter, Dr. Vogelstein provided his physical findings upon examination, stating:

Ms. Robinett[e] is a 67-year-old female. Her height is 6 feet 1 inch and weight is 195 pounds. She does present to the examination in a wheelchair. She is wearing a right lower extremity below the knee prosthesis. When the prosthesis removed, she is noted to have an amputation at approximately at the level of the right ankle. The stump is well healed and nontender. All incisions are well healed.

There is no evidence of inflammation. She has good strength at the right knee and is able to fully flex the right knee. There is a significant loss of full extension. She does have movement at the right hip and this is moderately limited.

{¶ 20} Dr. Vogelstein opined that relator had not suffered total loss of use of her right leg.

{¶ 21} 8. After being properly informed that the BKA was causally related to the allowed conditions in relator's claim, Dr. Vogelstein prepared an addendum dated October 20, 2011. After specifically accepting that the BKA was related to the September 18, 1995 industrial injury, Dr. Vogelstein explained that his opinion that relator had not sustained a total loss of use of her right leg remained the same:

I do note that it was my medical opinion as expressed in my 08/09/11 report that Ms. Robinett[e] had not sustained a total permanent loss of use of her right leg. I did take into account multiple factors when reaching this conclusion, only one of which involved the right BKA.

I would state that after taking into account this new, accurate information concerning the relationship between the claimant's right BKA and the industrial injury, that my original opinions as expressed in my 08/09/11 report do remain unchanged. As stated, multiple factors were involved, besides the amputation itself, when reaching my conclusions.

For example, on examination, Ms. Robinett[e] was found to have an amputation at approximately the level of her right ankle. Her stump was well healed and nontender. Importantly, she was able to fully flex her right knee and she had good strength at the right knee. She did, however, have a loss of full extension. She did not, however, in my medical opinion have a loss of use of her right knee.

The claimant also had decent strength and movement at her right hip, but again this was somewhat limited. She did not however in my medical opinion have a loss of use of her right hip as a result of this industrial injury.

The claimant, therefore, in my medical opinion does have a functional right knee as well as a functional right hip, which did in large part lead me to the conclusion that she did not have a total loss of use of her right leg.

Another factor involved in my rationale involved the history that Ms. Robinett[e] provided me with. She explained that after her right BKA surgery she did participate in physical therapy. She then went on to explain that she was, however, afraid to ambulate on her own, explaining that both her mother and grandmother had fractured their hips. Ms. Robinett[e] informed me that she did "decide to stay in a wheelchair." She also indicates that she has not had any further evaluation or treatment for either her right lower extremity or low back in many years, other than receiving some pain medication from her [primary care physician].

In my medical opinion, this history as well supports that the claimant did not sustain a total loss of use of her right leg. There is a distinct and significant difference between making a decision to not ambulate and actually not being able to ambulate. So again, it is my medical opinion, within a reasonable degree of medical probability that in large part as a result of the claimant's BKA in conjunction with the other allowed conditions in this claim, she does have a partial loss of use of her right leg. However, based upon her physical examination findings mainly involving her right hip and knee in conjunction with her history following the amputation procedure, it does continue to be medical opinion, within a reasonable degree of medical probability that Ms. Robinett[e] did not sustain a total loss of use of her right leg as a result of this industrial injury and its allowed conditions.

{¶ 22} 9. Relator's motion was heard before a district hearing officer ("DHO") on October 3, 2011. The DHO concluded that relator had not met her burden of proof.

{¶ 23} 10. Relator's appeal was heard before an SHO on April 11, 2012. The SHO vacated the prior DHO order; however, the SHO determined that relator's request for scheduled loss of use award should be denied. The SHO specifically relied on the addendum of Dr. Vogelstein, stating:

The Staff Hearing Officer agrees with the decision of the District Hearing Officer in denying the request for a scheduled loss of use award for the right lower extremity based on the 10/20/2011 addendum report of Dr. Vogelstein. The Staff Hearing Officer finds that the Injured Worker has not met her burden of proving that she has lost the total use of [her] entire lower extremity to the same extent as though it was completely amputated.

{¶ 24} 11. Relator's further appeal was refused by order of the commission mailed May 3, 2012.

{¶ 25} 12. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶ 26} Relator contends that the commission abused its discretion by denying her motion for scheduled loss of use award where the evidence is clear that relator cannot utilize a prosthetic device and that Dr. Vogelstein's report does not constitute some evidence upon which the commission could rely.

{¶ 27} The magistrate finds that relator has not demonstrated that the commission abused its discretion in denying her motion for a scheduled loss of use award finding that the addendum report of Dr. Vogelstein does constitute some evidence upon which the commission could rely.

{¶ 28} The Supreme Court of Ohio has set forth three requirements which must be met in establishing a right to a writ of mandamus: (1) that relator has a clear legal right to the relief prayed for; (2) that respondent is under a clear legal duty to perform the act requested; and (3) that relator has no plain and adequate remedy in the ordinary course of the law. *State ex rel. Berger v. McMonagle*, 6 Ohio St.3d 28 (1983).

{¶ 29} 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).

{¶ 30} In order to qualify for a loss of use award, relator was required to present medical evidence demonstrating that, for all intents and purposes, she had lost the use of

her right leg. *State ex rel. Alcoa Bldg. Prods. v. Indus. Comm.*, 102 Ohio St.3d 341, 2004-Ohio-3166.

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

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

{¶ 32} In *Alcoa*, the claimant, Robert R. Cox, sustained a left arm amputation just below his elbow. Due to continuing hypersensitivity at the amputation site, Cox was prevented from ever wearing a prosthesis. Consequently, Cox filed a motion seeking a scheduled loss of use award for the loss of use of his left arm.

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

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

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

*Alcoa* urges the most literal interpretation of this rationale and argues that because claimant's arm possesses some residual utility, the standard has not been met. The court of appeals, on the other hand, focused on the opening four words, "for all practical purposes." Using this interpretation, the court of appeals found that some evidence supported the

commission's award and upheld it. For the reasons to follow, we affirm that judgment.

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

Pennsylvania defines "loss of use" much as the court of appeals did in the present case, and the observations of its judiciary assist us here. In that state, a scheduled loss award requires the claimant to demonstrate either that the specific bodily member was amputated or that the claimant suffered the permanent loss of use of the injured bodily member for all practical intents and purposes. Discussing that standard, one court has written:

"Generally, the 'all practical intents and purpose' test requires a more crippling injury than the 'industrial use' test in order to bring the case under section 306(c), *supra*. However, it is not necessary that the injured member of the claimant be of absolutely no use in order for him to have lost the use of it for all practical intents and purposes." *Curran v. Walter E. Knipe & Sons, Inc.* (1958), 185 Pa.Super. 540, 547, 138 A.2d 251.

This approach is preferable to Alcoa's absolute equivalency standard. Having so concluded, we further find that some evidence indeed supports the commission's decision. Again, Dr. Perkins stated:

"It is my belief that given the claimant's residual hypersensitivity, pain, and tenderness about his left distal forearm, that he is unable to use his left upper limb at all and he should be awarded for the loss of use of the entire left upper limb given his symptoms. He has been given in the past loss of use of the hand, but really he is unable to use a prosthesis since he has had the amputation, so virtually he is without the use of his left upper limb \* \* \*."

{¶ 36} Relator contends that Dr. Vogelstein's report cannot constitute some evidence upon which the commission could rely because he never considered the following:

Dr. Vogelstein did not render an opinion as to whether Relator could stand or walk with the prosthetic. Relator claims that she can neither stand nor walk with the prosthetic. What difference does it make if her knee looks good if she cannot use the prosthetic to stand or walk? Inability to stand or walk means she has lost the use of her right leg. (See Relator's affidavit, Stipulated Exhibit 10, Page 27).

(Relator's brief, at 6.)

{¶ 37} The magistrate disagrees with relator's characterization of Dr. Vogelstein's report. In his October 20, 2011 addendum, Dr. Vogelstein explained the reasons why he determined that relator had not sustained a total loss of use of her right leg: (1) relator's stump was well healed and non-tender; (2) relator was able to fully flex her right knee and she had good strength at the right knee; (3) relator had decent strength and movement of her right hip; and (4) relator specifically explained to him that after her BKA surgery she participated in physical therapy; however, she was afraid to ambulate on her own because both her mother and grandmother had fractured their hips—relator had informed Dr. Vogelstein that she decided to stay in a wheelchair and that she had not had any further evaluation or treatment. As Dr. Vogelstein stated: "There is a distinct and significant difference between making a decision to not ambulate and actually not being able to ambulate."

{¶ 38} Although relator indicated in her affidavit that she was unable to walk, stating that if she tried: "I would fall flat on my face. My stump will not support my weight," the commission was not required to find her statement to be credible. Further,

while Dr. Ward noted that relator demonstrated tenderness over the stump area, Dr. Vogelstein specifically noted that the stump area was not tender. Further, Dr. Ward never indicated that relator cannot use the prosthetic device, he only stated that "she is not a functional prosthetic user." As Dr. Vogelstein noted, there is a "distinct and significant difference between making a decision to not ambulate and actually not being able to ambulate."

{¶ 39} Contrary to relator's assertion, Dr. Vogelstein's report does constitute some evidence upon which the commission could rely to determine that she had not sustained a total loss of use of her right leg.

{¶ 40} Based on the foregoing, it is this magistrate's decision that relator has not demonstrated that the commission abused its discretion and that this court should deny her 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).