[Cite as *State ex rel. Wike v. Indus. Comm.*, 2015-Ohio-681.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Judy Wike,	:	
Relator,	:	
v.	:	No. 14AP-213
Suiza Dairy Group, LLC and Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on February 26, 2015

The Mikulka Law Firm, LLC, and *Angela J. Mikulka*, for relator.

Dinsmore & Shohl, LLP, Brett L. Miller and *Gregory P. Mathews*, for respondent Suiza Dairy Group, LLC.

Michael DeWine, Attorney General, and *Andrew J. Alatis*, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

KLATT, J.

{¶ 1} Relator, Judy Wike, commenced this original action in mandamus seeking an order compelling respondent, Industrial Commission of Ohio ("commission"), to vacate its order denying her request for a scheduled loss award for the loss of use of her left foot, and to order that she be granted said award.

{¶ 2} Pursuant to Civ.R. 53 and Loc.R. 13(M) of the Tenth District Court of Appeals, we referred this matter to a magistrate who issued a decision, including findings of fact and conclusions of law, which is appended hereto. The magistrate found that the

report of Dr. DeChellis constitutes some evidence upon which the commission could rely in determining that relator's ability to walk with a brace precludes her from receiving the scheduled loss award pursuant to *State ex rel. Alcoa Bldg. Prods. v. Indus. Comm.*, 102 Ohio St.3d 341, 2004-Ohio-3166, and *State ex rel. Richardson v. Indus. Comm.*, 10th Dist. No. 04AP-724, 2005-Ohio-2388. Therefore, the magistrate has recommended that we deny relator's request for a writ of mandamus.

{¶ 3} Relator has filed objections to the magistrate's decision. In her first objection, relator contends that the magistrate erred in relying on *Richardson*. We disagree. Although there are some factual differences between the case at bar and *Richardson*, the magistrate relied on *Richardson* for the applicable legal standard (i.e., examining the functional capacity of the body part at issue in determining whether there has been a loss of use for all practical purposes). The magistrate did not err in citing *Richardson*. Therefore, we overrule relator's first objection.

{¶ 4} In her second objection, relator contends that the magistrate erred in not following the holding in *State ex rel. Kroger Co. v. Johnson*, 128 Ohio St.3d 243. Again, we disagree. The magistrate's decision is not inconsistent with *Kroger*. Although a loss of use claim is not automatically defeated merely because a limb has some residual function, the commission did not abuse its discretion when it determined that relator had not lost the use of her left foot for all practical purposes because she retained significant functional capacity. Accordingly, we overrule relator's second objection.

{¶ 5} In her third objection, relator contends that the magistrate erred in not distinguishing *State ex rel. Isaacs v. Indus. Comm.*, 96 Ohio St.3d 82, 2002-Ohio-3613. In *Isaacs*, the court upheld the denial of a scheduled loss award for the loss of use of a foot in part because the claimant retained the ability to move his toe. For the reasons noted in addressing relator's first objection, relator's contention is misplaced. The magistrate cited and correctly applied the proper legal standard and was not required to expressly distinguish *Isaacs*. The degree to which a limb can be moved is certainly a factor, but is not dispositive, in assessing functional capacity. For these reasons, we overrule relator's third objection.

{¶ 6} In her last objection, relator contends the magistrate erred in finding that Dr. DeChellis' report constitutes some evidence supporting the commission's determination that relator's loss of use was not the result of her 2011 injury. This

objection is premised on relator's assertion that she sustained the loss of use of her left foot for all practical purposes. Because that premise is flawed, the objection is without merit. As noted above, the commission did not abuse its discretion in determining that relator retained significant functional capacity in her left foot, and therefore, had not lost its use for all practical purposes. Accordingly, we overrule relator's last objection.

{¶ 7} Following an independent review of this matter, we find that the magistrate has properly determined the facts and applied the appropriate law. Therefore, 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 relator's request for a writ of mandamus.

Objections overruled; writ of mandamus denied.

BROWN, P.J., and TYACK, J., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Judy Wike,	:	
Relator,	:	
v.	:	No. 14AP-213
Suiza Dairy Group, LLC and Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on October 31, 2014

The Mikulka Law Firm, LLC, and *Angela J. Mikulka*, for relator.

Dinsmore & Shohl, LLP, Brett L. Miller and *Gregory P. Mathews*, for respondent Suiza Dairy Group, LLC.

Michael DeWine, Attorney General, and *Andrew J. Alatis*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶ 8} Relator, Judy Wike, has filed this 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 her a total loss of use of her left foot and ordering the commission to find that she is entitled to that award.

Findings of Fact:

{¶ 9} 1. Relator sustained a work-related injury on May 15, 1999 while employed by Advantage Sales and Marketing and her workers' compensation claim was allowed for the following physical conditions:

> Sprain (L) Ankle (845.00); Joint Derangement Left Ankle (718.87); Sural Neuritis, Left Lower Leg, Ankle, Foot (719.2); Villanoid Synovitis (L) Ankle (719.27); Nerve Entrapment Left Lower Leg, Ankle, Foot (355.79).

{¶ 10} 2. As a result of this 1999 injury, relator underwent five surgical procedures on her left ankle and foot.

{¶ 11} 3. Medical records pertinent to the 1999 injury include the following:

(a) The August 8, 2008 report of Thomas A. Thomas, D.C., who examined relator for the purpose of determining her permanent partial disability and specifically noted that relator walked with an abnormal gait favoring her left lower extremity, was unable to toe-heel walk due to pain, and assessed a 41 percent whole person impairment.

(b) The November 25, 2008 report of Jason R. Delatore, M.D., who noted that relator had multiple surgeries over the years and essentially had a neuropathic foot with minimal feeling.

(c) The April 24, 2009 office note of Mark A. Quintero, M.D., who noted that relator's gait was within normal limits, she was unable to walk on her toes but could walk on her heels. Relator complained of pain which she described as aching, exhausting, trying, miserable, and unbearable, in which she rated as an eight out of ten at its best and a ten out of ten at its worst. Relator told Dr. Quintero that nothing made her pain better.

(d) The April 27, 2009 report of Eric H. Williams, M.D., who noted that relator's pain continued and that she indicated she had problems walking, frequently fell, had difficulty raising her foot, and had to significantly concentrate in order to make her foot move. Dr. Williams further noted that relator did not overtly complain of a foot drop. In order to help alleviate her pain, Dr. Williams performed two diagnostic nerve blocks and recommended a further surgical procedure.

(e) The June 7, 2009 office note of Dr. Quintero, who noted that relator requested narcotic medication which he did not believe was medically indicated.

(f) The January 20, 2011 office note of Lawrence A. DiDomenico, D.P.M., who noted relator had numbing, tingling, and burning sensations, that her pain was a nine out of ten, that she was walking without any type of gait, and that by the end of the day her legs were swollen.

{¶ 12} 4. Relator sustained a second injury to her left ankle on February 24, 2011 and that claim has been allowed for the following physical conditions related to her ankle:

> Left foot contusion; left ankle sprain/strain; * * * tenosynovitis left ankle; edema with tenderness of the left ankle; * * *.

{¶ 13} 5. The only medical reports in the record from 2011 are the August 31 and December 6, 2011 reports of Michael P. Stanich, D.O., who noted that relator did not go to the emergency room nor did she have x-rays taken following the February 24, 2011 injury. Instead, she followed up with her family physician approximately two weeks later and was sent to pain management for her foot, ankle, and back. He noted further that relator had been undergoing weekly treatments from her podiatrist consisting of physical therapy, Unna Boot compression, pain medicine, and she was using a Cam Walker. Dr. Stanich noted relator was able to return to her former position of employment following the February 24, 2011 injury and continued to work at that job until March 10, 2011 when she was laid off due to restructuring of the company. During the evaluation, relator would not remove the Unna Boot. Dr. Stanich noted pain on attempted motion of the ankle and pain on inversion/eversion, but noted that he could not aptly evaluate relator's subjective pain due to the boot. He noted further that relator ambulated with an antalgic limp with the left lower extremity, relator's allowed conditions following the 2011 injury had reached maximum medical improvement ("MMI") and that she would have no work-related restrictions, temporary or permanent. He opined that the symptoms relator was currently suffering from were related to the 1999 injury and not the 2011 injury. In his December 6, 2011 report, Dr. Stanich noted that he had reviewed additional medical records, but that his opinion did not change.

{¶ 14} 6. There are several medical reports in the record which address various issues concerning relator's left ankle following the 2011 injury. Those reports include:

(a) The February 29, 2012 report of John L. Dunne, D.O., who performed a 90-day exam. Dr. Dunne noted that relator's left ankle had been in an Unna Boot and

she had been utilizing the Cam Walker for approximately one year, it was recommended she see a specialist at the Cleveland Clinic, and that she obtain a new MRI. Dr. Dunne opined that the current medical treatment relator was receiving was necessary and appropriate, that an MRI should be obtained, relator was restricted to sedentary work only, she had not yet reached MMI, and recommended she be reexamined in 90 days.

(b) The July 11, 2012 report of Bina Mehta, M.D., who discussed the recent MRI:

> MRI of the left ankle performed on May 30, 2012, significant for hypertrophic changes of the posterior tibialis tendon with peritendinitis associated with a type 1 accessory navicular, plantar, fasciitis [sic], low-grade, without fascial tear, mild Achilles peritenonitis, and postsurgical changes within the distal fibula and calcanens from prior calcaneofibular graft which appears intact.

Thereafter, Dr. Mehta provided his physical findings on examination and opined that relator's allowed conditions related to her foot had reached MMI. Based solely on the allowed conditions in the 2011 claim, Dr. Mehta opined relator could return to her former position of employment performing light to medium-duty work with functional limitations only of limiting standing and walking to one-hour intervals. Concerning relator's ongoing pain and other problems with her left foot, Dr. Mehta attributed them to the 1999 injury, stating:

> This injured worker has extensive history of multiple surgeries of the left foot and ankle with past diagnosis of reflex sympathetic dystrophy. This most likely is the cause of her ongoing symptomatology and would not be related to the injury of February 24, 2011.
>
> * * *
>
> Based solely on the allowed physical conditions in this claim, the injured worker is not disabled from employment; however, she is unable to work currently due to her ongoing pain which is not related to the soft tissue injury in this claim nor the previous injury in claim #99-472921. Her on going pain appears to be related to her diagnosis of fibromyalgia as well as reflex sympathetic dystrophy of the left foot. I do not believe RSD was an allowed condition in the 99-472921 claim. The injured worker has reached maximum medical improvement for the allowed conditions in this claim.

(c) The August 29, 2012 file review of S.S. Purewal, M.D., who discussed the history of both the 1999 and 2011 claims. Dr. Purewal opined that relator's ongoing problems with her ankle were directly related to the 1999 claim and that relator's request to have tenosynovitis and edema with tenderness allowed in the 2011 claim was not supported by the evidence. Instead, he opined that those two diagnoses were related to the preexisting conditions and ongoing chronic complaints in the 1999 claim.

(d) The September 20, 2012 report of Robert J. Nickodem, Jr., M.D., who notes that the 1999 injury caused relator pain on the dorsum and lateral aspect of her foot with the reflex sympathetic dystrophy, but that the 2011 injury has caused persistent pain along the medial aspect of the left ankle. As such, he opined that relator's current problems were related to the 2011 injury. He stated that the allowed conditions in the 2011 claim have not reached MMI, specifically noting relator "has been locked up in a brace for one and a half years, which has left her with an extremely stiff left foot and ankle." Dr. Nickodem opined further that relator needed a significant amount of physical therapy to improve the range of motion of her ankle, noting she may require cortisone injections as well. He also opined that the conditions of tenosynovitis and edema with tenderness of her left ankle should be allowed in the 2011 claim.

(e) The December 22, 2012 file review of Daniel N. Huelsman, D.C., who opined that Dr. Thomas' request for physical therapy at a frequency of three times per week for six weeks did not comply with the Miller Criteria and should be denied. He noted further that the allowed conditions in the 2011 claim would have been expected to have resolved by this time and that the request for treatment is an acute type of treatment plan which does not correlate with the chronic nature of the 2011 work injury.

(f) The February 26, 2013 medical evaluation of E.A. DeChellis, D.O., who noted that relator's left ankle revealed no active range of motion and appeared to be ankylosed at zero degrees. Dr. DeChellis reviewed the medical records, gave a brief summary of each one, specifically stated that the allowed conditions in the 2011 claim did not explain the fact that relator has no active range of motion of her left ankle, and opined that relator does not have a total loss of use, stating:

> In respect to the request for loss of use of the left foot, in reviewing the allowed conditions in this claim, they cannot explain why Ms. Wike does not have range of motion in the left ankle. Range of motion testing is subjective at best, and

> although Ms. Wike does not actively move her left ankle, she does have significant atrophy of the left calf with the left calf measuring 33.5 cm and the right calf measuring 35 cm.
>
> However based solely and only upon the allowed conditions in this claim, there is lack of any conditions which would result in ankylosis of the left ankle.
>
> I have duly noted that this injured worker has had five prior surgeries to the left foot and ankle before the date of injury in this claim.
>
> Therefore, I am unable at this time to state with any degree of medical certainty and probability that Ms. Wike has a total loss of use of the left foot as a result of the workplace accident of 02/24/2011 by way of direct causation, flow-through or substantial aggravation of a pre-existing condition.
>
> The allowed conditions in this claim are not likely to result in a total loss of use of the left foot. However, Ms. Wike does not have active range of motion in the left ankle which could be construed as a subjective finding. She does however have objective documentation of left calf atrophy of 1.5 cm which could be secondary to the Unna boot/Cam walker and lack of weightbearing on the left lower extremity.
>
> If further objective documentations [are] available to substantiate why Ms. Wike does not have range of motion in the left foot, then further consideration can be given as a total loss of the left foot.
>
> On prior examinations by independent medical evaluators for the BWC, there has been noted to be range of motion in the left ankle. On today's examination there was a lack of active motion in the left ankle. Therefore, based upon these inconsistent findings, I cannot state with any degree of certainty and probability that Ms. Wike does have total loss of use of the left ankle secondary to only the allowed conditions in this claim.

{¶ 15} 7. On August 7, 2013, relator filed a motion asking the commission to grant her a total loss of use of her left foot.

{¶ 16} 8. In support of her motion, relator submitted the May 9, 2013 report of Dr. Thomas, who opined that relator had a total loss of use, stating:

> For the loss use of left ankle/foot to be applicable, the injury must result in a total permanent loss of use to such a degree that the ankle/foot is useless for all practical purposes and is not capable of performing MOST of the functions for which it commonly performs. The examination revealed that there is a **100% LOSS in Dorsi-Flexion; a 100% LOSS in Plantar Flexion, and a 100% LOSS in both Inversion and Eversion.** There is also evidence of sensory deficits in the ankle and foot as well as significant muscle atrophy in the left calf and ankle.
>
> * * *
>
> After reviewing the previous results of the physical examination of May 8, 2013, and based upon the patient's continued subjective complaints, objective findings and mechanism of injury, it is my medical opinion, within a reasonable degree of medical certainty, that, as a result of her injuries of February 24, 2011, Ms. Wike has sustained **permanent loss** of USE OF HER LEFT ANKLE/FOOT in that it is useless in all practical purposes, in the ability to perform **most** of its functions that it commonly performs. When evaluating the now total loss of range of motion, muscle atrophy and sensory deficit of the left ankle/foot it is my medical opinion that she has sustained a **100% Total Permanent Impairment** of her left ankle/foot.

(Emphasis sic.)

{¶ 17} 9. In response, respondent Suiza Dairy Group, LLC ("employer") had relator examined by Kevin Trangle, M.D. In his September 23, 2013 report, Dr. Trangle discussed both the 1999 and 2011 injuries in significant detail. Concerning relator's ankle, Dr. Trangle noted that she had no voluntary movement and that she expressed pain and would not allow any passive range of motion. He further noted that she had no voluntary range of motion of her toes. Thereafter, Dr. Trangle noted that relator was able to ambulate with the aid of either the brace or the Cam Walker, and, therefore, she had not sustained a total loss of use of her left foot.

{¶ 18} 10. Relator's application was heard before a district hearing officer ("DHO") on January 2, 2014. Relying on the report of Dr. Trangle and his observation that relator was able to walk on her left foot when she uses the Cam Boot and a cane and relying on *State ex rel. Alcoa Bldg. Prods. v. Indus. Comm.*, 102 Ohio St.3d 341, 2004-Ohio-3166,

and *State ex rel. Richardson v. Indus. Comm.*, 10th Dist. No. 04AP-724, 2005-Ohio-2388, the DHO concluded that relator had not sustained a total loss of use of her left foot.

{¶ 19} 11. Relator's appeal was heard before a staff hearing officer ("SHO") on February 12, 2014. The SHO vacated the prior DHO order but still denied relator's request, albeit for different reasons. First, the SHO specifically noted that relator's motion seeking a total loss of use award was confined solely to the 2011 claim and that relator was not relying on the allowed conditions from the 1999 claim. Thereafter, the SHO discussed the medical treatment relative to the 1999 claim and specifically focused on two medical reports. The SHO discussed the April 27, 2009 report of Dr. Williams, who found that relator had significant deficits in her left foot and ankle at that time and recommended she immediately undergo a decompression of the proximal tibial nerve. The SHO also discussed the April 24, 2009 report of Dr. Quintero, who provided a diagnosis of lower extremity sympathetically mediated pain and recommended that relator follow up with her physicians at Johns Hopkins Hospital. The SHO specifically stated: "there is an absence of any medical records in claim number 99-472921 to substantiate any additional medical care for the allowed physical injuries in claim 99-472921 from 04/27/2009 through 02/24/2011 (the date of injury in claim number 11-817653)."

{¶ 20} Thereafter, the SHO discussed the office notes of Dr. DiDomenico as well as the reports of Drs. Thomas, Trangle, and DeChellis, and concluded that there was insufficient documentation to establish by a preponderance of the evidence that relator suffered a total loss of use as a direct and proximate result of the February 24, 2011 injury. The SHO specifically found the report of Dr. Thomas unpersuasive because he did not discuss any of the deficits relator had prior to the 2011 injury to her ankle. Thereafter, the SHO found the report of Dr. DeChellis to be persuasive and that, when considering the medical reports of Drs. Williams, DeChellis, and Quintero, relator had not met her burden of proof to demonstrate that the allowed conditions in the 2011 claim had resulted in a total loss of use of her left foot. Specifically, the SHO stated:

> Rather, the Staff Hearing Officer finds the 02/26/2013 report of BWC Physician, Dr. E.A. DeChellis, D.O., to be persuasive. Dr. DeChellis reviewed the records in claim number 99-472921. Dr. DeChellis considered the past multiple surgical procedures this Injured Worker underwent as part of her treatment for the allowed conditions in claim

> number 99-472921. Dr. DeChellis reviewed and discussed the 04/27/2009 medical findings of Dr. E. Williams noted previously in this order. Dr. DeChellis reviewed the treatment notes in claim number 11-817653. Dr. DeChellis examined the Injured Worker as well on 02/19/2013. And after considering the prior medical history flowing from claim number 99-472921 with his examination findings of 02/19/2013, Dr. DeChellis concluded that the allowed conditions in 11-817653 ***"are not the conditions likely to result in a total loss of use of the left foot."*** Dr. DeChellis further opined that, ***"In respect to the request for loss of use of the left foot, in reviewing the allowed conditions in this claim, they cannot explain why Ms. Wike does not have range of motion in the ankle."*** Dr. DeChellis' opinion is found to be persuasive when read in context of the 04/27/2009 report of Dr. E. Williams, and the 04/24/2009 report of Dr. Quintero.
>
> Given the totality of the above findings, the above medical reports of Drs. Williams, DeChellis, and Quintero, the Staff Hearing Officer is not persuaded that the Injured Worker has satisfied her requisite burden of proof in demonstrating that the allowed conditions of claim number 11-817653 ***[Left Foot Contusion; Left Ankle Sprain/Strain; Tenosynovitis Left Ankle; and Edema With Tenderness of the Left Ankle"]*** resulted in the Injured Worker sustaining a total loss of use of her left foot.

(Emphasis sic.)

{¶ 21} 12. Relator's further appeal was refused by order of the commission mailed March 13, 2014.

{¶ 22} 13. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶ 23} Relator contends the commission abused its discretion by denying her motion seeking a total loss of use of her left foot. Relator argues that the report of Dr. DeChellis does not constitute some evidence upon which the commission could rely because it is inconsistent and the majority of the doctors who examined her found that she had no movement in her left ankle and foot.

{¶ 24} The magistrate finds that the report of Dr. DeChellis does constitute some evidence to support the commission's determination and that, consistent with

Richardson, relator's ability to walk with a brace is consistent with a finding that she has not sustained a total loss of use.

{¶ 25} 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).

{¶ 26} 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 left lower extremity. *Alcoa*.

{¶ 27} 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.

{¶ 28} 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.

{¶ 29} 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.

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

{¶ 31} 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 * * *."

{¶ 32} Relator contends that the report of Dr. DeChellis cannot constitute some evidence to support the commission's order because, while Dr. DeChellis agreed that she had no motion in her ankle, he also opined that the allowed conditions in her claim would not result in ankylosis of the ankle. Relator contends that those statements are inconsistent and, citing the report of Dr. Nickodem, relator contends that there is evidence in the record clearly distinguishing between the effects of the allowed conditions in the 1999 claim from the allowed conditions in the 2011 claim.

{¶ 33} Equivocal medical opinions are not evidence. *State ex rel. Eberhardt v. Flxible Corp.*, 70 Ohio St.3d 649, 657 (1994). Equivocation occurs when a doctor repudiates an earlier opinion, renders contradictory or uncertain opinions, or fails to clarify an ambiguous statement. *Id.* A medical report can be so internally inconsistent that it cannot be some evidence upon which the commission can rely. *State ex rel. Lopez v. Indus. Comm.*, 69 Ohio St.3d 445 (1994); *State ex rel. Taylor v. Indus. Comm.*, 71 Ohio St.3d 582 (1995).

{¶ 34} The magistrate finds that Dr. DeChellis' report is neither inconsistent nor equivocal. As noted previously, in the 1999 claim, relator had the following allowed conditions related to her left ankle:

> Sprain (L) Ankle (845.00); Joint Derangement Left Ankle (718.87); Sural Neuritis, Left Lower Leg, Ankle, Foot (719.2); Villanoid Synovitis (L) Ankle (719.27); Nerve Entrapment Left Lower Leg, Ankle, Foot (355.79).

{¶ 35} As a result of the 1999 injury, relator has undergone several surgeries and continues to have medical problems with her foot.

{¶ 36} As a result of the 2011 injury, the following conditions relating to relator's left ankle were allowed:

> Left foot contusion; left ankle sprain/strain; * * * tenosynovitis left ankle; edema with tenderness of the left ankle; * * *.

{¶ 37} In his report, Dr. DeChellis did note that relator had no active range of motion in her left ankle. This finding is consistent with the findings of several other doctors who also examined relator. However, despite the fact that Dr. DeChellis found that relator had no active range of motion in her left ankle, he concluded that the allowed conditions in the 2011 claim were not responsible for this physical finding. This was consistent with the report of Dr. Mehta, who opined, in 2012, that relator's symptomology was due to the 1999 injury and not the 2011 injury. Dr. DeChellis' finding that relator lacked active range of motion and opinion that this was caused by the 1999 injury does not demonstrate any inconsistency. To the extent that Dr. Nickodem distinguished the two injuries in his report, the SHO was not required to find that report persuasive. Further, Dr. Nickodem was not asked whether or not relator had sustained a total loss of use of her foot. Instead, he was asked whether or not the requested conditions of tenosynovitis and edema with tenderness of her left ankle should be allowed in the 2011 claim in whether or not additional therapy was recommended for her ankle. As such, the magistrate finds that this argument is not well-taken.

{¶ 38} Relator cites *State ex rel. Kroger Co. v. Johnson*, 128 Ohio St.3d 243, 2011-Ohio-530, in support. Relator asserts that, in *Kroger*, the court noted that loss of use is not automatically defeated merely because a limb has some residual function; instead, the court defined the pivotal question to be how much function remains.

{¶ 39} In *Kroger,* Dan C. Johnson had filed an application for the total loss of use of his right hand. In support of his application, Johnson submitted the report of Dr. Nancy Renneker, who concluded that he had a 27 percent impairment of his right hand, and also concluded that he had a functional loss of use of his right hand.

{¶ 40} Kroger submitted the report of Dr. Perry N. Funk who opined that Johnson's use of his hand was limited, but that he did not qualify for a total loss of use.

{¶ 41} At the hearing, Johnson testified that he performed activities of daily living with his non-dominant left hand and that he could perform limited writing and some pinch of thumb to finger with his right hand. The SHO relied on Dr. Renneker's report and found that Johnson's limited ability to hold a pen and his retention of some pinching ability did not bar him from a total loss of use award. Ultimately, the commission concluded that the permanent restrictions Johnson had were severe enough to entitle him to a loss of use award.

{¶ 42} Kroger filed a complaint in this court alleging that the commission had abused its discretion in granting Johnson a total loss of use award. This court agreed after finding that the commission's order was not supported by any evidence. Specifically, this court found that Dr. Renneker's opinion was not evidence on which the commission could rely because there was too great of an inconsistency between her assessment of a 27 percent hand impairment and her assertion that Johnson had lost all use of that hand.

{¶ 43} Johnson and the commission appealed and the Supreme Court of Ohio agreed with this court that Dr. Renneker's report did not constitute some evidence on which the commission could rely. However, the Supreme Court did issue a writ of mandamus returning the matter to the commission because "[g]iven the severity of the restrictions noted by Dr. Funk, it is possible that he might have reached a different conclusion had he realized that residual use does not necessarily bar an award." *Id.* at ¶ 22.

{¶ 44} One important distinction between the present case and the *Kroger* case is that the present case involves the loss of use of a foot whereas the *Kroger* case involved the loss of use of a hand. This court has stated that the main function of the foot is to allow a person to walk. As such, it is not that relator's foot maintains residual function as had Johnson's hand; instead, relator's foot still performs its major function because she can use it to walk. As in *Richardson*, as long as the injured worker is able to walk, even with a brace, a total loss of use award is denied. By comparison, the hand has many more functions. Loss of use of a hand and loss of use of a foot simply are not comparable. As such, the holding from *Richardson* still applies, and relator's reliance on *Kroger* is misplaced here.

{¶ 45} Based on the foregoing, it is the magistrate's decision that relator has not demonstrated that the commission abused its discretion when it denied her application

for a total loss of use of her left foot and this court should deny her request for a writ of mandamus.

/S/ MAGISTRATE
STEPHANIE BISCA

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).