

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio ex rel. Stanley Batista,	:	
Relator,	:	
v.	:	No. 11AP-685
Industrial Commission of Ohio and Red Robin International, Inc.,	:	(REGULAR CALENDAR)
Respondents.	:	
	:	

D E C I S I O N

Rendered on December 13, 2012

Nager, Romaine & Schneiberg Co., L.P.A., Jerald A. Schneiberg, Christopher B. Ermisch, Jennifer L. Lawther and Michael A. Liner, for relator.

Michael DeWine, Attorney General, and Eric Tarbox, for respondent Industrial Commission of Ohio.

Hanna, Campbell & Powell, LLP, Timothy C. Campbell and J. Anthony Coleman, for respondent Red Robin International, Inc.

IN MANDAMUS
ON OBJECTION TO THE MAGISTRATE'S DECISION

CONNOR, J.

{¶ 1} Relator, Stanley Batista ("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 his motion for scheduled loss

compensation pursuant to R.C. 4123.57 for the alleged loss of use of his right thumb and to enter an order granting said compensation.

{¶ 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 relator failed to meet his burden of proof to show that neither the report of Gerald Yosowitz, M.D., nor relator's own testimony, as relied upon by the staff hearing officer in denying the request for compensation, provided some evidence to support the commission's decision.

{¶ 3} Specifically, the magistrate found relator failed to show that the report of Dr. Yosowitz was required to be eliminated from consideration under the rule established in *State ex rel. Wallace v. Indus. Comm.*, 57 Ohio St.2d 55 (1979). The magistrate also rejected relator's assertion that Dr. Yosowitz's report failed to reference his disabling pain. Finding that relator had failed to successfully challenge the report of Dr. Yosowitz, the magistrate further found it was unnecessary for the court to consider relator's assertion that his own hearing testimony did not support the denial of his motion for loss of use compensation.

{¶ 4} Relator filed an objection to the magistrate's decision. The commission filed a memorandum opposing the objection. This cause is now before the court for a full review regarding relator's objection.

{¶ 5} Relator's objection is set forth as follows:

The Magistrate erred in finding that there was some evidence to support the Industrial Commission's decision to deny Relator's motion for R.C. 4123.57(B) scheduled loss compensation for Loss of Use (Right Thumb).

{¶ 6} Relator argues that the commission erred in relying upon the medical review conducted by Dr. Yosowitz because Dr. Yosowitz failed to comply with the *Wallace* rule. Relator contends that Dr. Yosowitz's failure to reference either the report or the findings of David Copp, D.C., one of relator's examining physicians, suggests that Dr. Yosowitz overlooked the report and failed to accept Dr. Copp's findings. Relator submits the magistrate's reliance upon the case of *State ex rel. Sturgill v. P & G Sheet Metal, Inc.*,

10th Dist. No. 08AP-649, 2009-Ohio-3749, to allow consideration of Dr. Yosowitz's report is improper, arguing that the instant case more closely resembles the case of *State ex rel. Masters v. Nationsway Transport Serv., Inc.*, 174 Ohio App.3d 526, 2008-Ohio-295 (10th Dist.). We disagree.

{¶ 7} Relator seems to suggest that under *Masters*, a non-examining physician must expressly refer to each and every examining physician by name and indicate that his or her findings were expressly accepted; otherwise, the report does not constitute some evidence upon which the commission could rely. However, in *Sturgill*, we determined that *Masters* does not stand for that proposition.

{¶ 8} In *Masters*, we found that where there was an obvious failure to reference a certain examining physician's report *and* the reviewing/non-examining physician's report did not contain an indication (express or implied) that he accepted the findings (but not the opinions drawn therefrom) of the examining physician, such a failure suggested the reviewing physician had overlooked the report. In such a scenario, we determined the non-examining physician's report did not constitute "some evidence" upon which to rely.

{¶ 9} In the instant case, however, like in *Sturgill*, the non-examining physician made a general statement indicating he accepted the objective findings of the examining physicians. Here, Dr. Yosowitz stated the following: "Conclusions: I have reviewed the claimant's medical records and I have accepted the findings of the claimant's examining and treating physicians." (R. T2.); *see also* magistrate's decision at ¶ 8.

{¶ 10} Although Dr. Yosowitz did explicitly reference the reports of examining and/or treating physicians Michael W. Keith, M.D., and Teresa Kay Larsen, D.O., and he did not specifically reference the report of Dr. Copp, we do not find this to be an "omission" which implies that Dr. Copp's report was "overlooked," given the fact that Dr. Yosowitz stated he had accepted the findings of the examining and treating physicians.

{¶ 11} Nor do we find this case to be distinguishable from *Sturgill* simply because the reports of the named examining physicians in *Sturgill* incorporated the opinions of the unnamed examining physician. As we stated in *Sturgill*, a review of the reports of the named examining physicians most certainly would have revealed the existence of the unnamed examining physician's report, if indeed the non-examining physician was unaware of its existence, but that observation does not require the conclusion that the

reviewing physician accepted the unnamed examining physician's findings only by way of the reports of the two named examining physicians. *Id.* at ¶ 10. We further found that "[g]iven the unrebutted presumption of regularity in these proceedings, we support the view that [the non-examining physician] properly followed the *Wallace* rule." *Id.* at ¶ 11, citing *State ex rel. Lovell v. Indus. Comm.*, 74 Ohio St.3d 250, 252 (1996).

{¶ 12} Consequently, it is at least implicit in Dr. Yosowitz's report that he reviewed and accepted the findings contained in the reports of all of the examining physicians, including Dr. Copp. Thus, consideration of Dr. Yosowitz's report was not improper and we find the record contains "some evidence" to support the commission's findings. Therefore, where the record contains "some evidence," there is no abuse of discretion and mandamus will not lie. *State ex rel. Lampkins v. Dayton Malleable, Inc.*, 45 Ohio St.3d 14, 15 (1989), citing *State ex rel. Burley v. Coil Packing, Inc.*, 31 Ohio St.3d 18 (1987).

{¶ 13} Furthermore, we agree with the magistrate's conclusion that because relator failed to successfully challenge Dr. Yosowitz's report, we need not consider the argument that relator's hearing testimony cannot support denial of his motion for scheduled loss compensation for the alleged loss of use of his right thumb.

{¶ 14} 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 objection to the magistrate's decision is 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.

*Objection overruled;
writ of mandamus denied.*

TYACK and SADLER, JJ., concur.

A P P E N D I X

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Relator,	:	
v.	:	No. 11AP-685
Industrial Commission of Ohio and	:	(REGULAR CALENDAR)
Red Robin International, Inc.,	:	
	:	
Respondents.	:	
	:	

MAGISTRATE'S DECISION

Rendered on May 24, 2012

Nager, Romaine & Schneiberg Co., L.P.A., Jerald A. Schneiberg, Christopher B. Ermisch, Jennifer L. Lawther *and* Michael A. Liner, *for relator.*

Michael DeWine, Attorney General, and Eric Tarbox, for respondent Industrial Commission of Ohio.

Hanna, Campbell & Powell, LLP, Timothy C. Campbell *and* J. Anthony Coleman, *for respondent Red Robin International, Inc.*

IN MANDAMUS

{¶ 15} In this original action, relator, Stanley Batista, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order denying his January 27, 2011 motion for R.C. 4123.57(B) scheduled loss compensation for

the alleged loss of use of his right thumb, and to enter an order granting the compensation.

Findings of Fact:

{¶ 16} 1. On December 12, 2008, relator injured his right thumb while employed as a cook at a restaurant operated by respondent Red Robin International, Inc., a state-fund employer.

{¶ 17} 2. The industrial claim (No. 08-389862) is allowed for: "Open wound right thumb; depressive disorder; right trigger thumb."

{¶ 18} The claim is disallowed for: "Adjustment disorder with mixed emotional features; inflammatory arthritis of the right thumb; RSD, right hand."

{¶ 19} 3. On October 16, 2009, relator was examined by orthopedic and hand surgeon Michael W. Keith, M.D., pursuant to a consult request from relator's treating physician. Following the examination, Dr. Keith issued a two-page narrative report stating:

He was injured on 12/12/08. At that time he was cleaning and had a puncture wound or impact to his right thumb at the MCP joint. He developed a swelling which was biopsied and was treated with a surgical decompression and open wound. I don't have records that indicate a bacteria or if this was a serious infection. He has continued to have pain since then. He also reports triggering of his middle finger which contributes to his inability to use the hand. There is no allowance for triggering of the middle finger in his workers' compensation claim. The current allowed diagnosis is for an open wound of the right thumb.

Physical examination shows pain with any range of motion of the MCP joint of the right thumb. It is held in flexion at about 40 degrees similar to the posture of his left thumb. No collateral ligament instability is present. Thumb IP flexion and extension are present. The middle finger does have an active triggering mechanism. Sensation is intact. There is no redness or swelling indicative of an acute pyogenic process. The patient takes Percocet for pain, smokes occasionally under stress and otherwise is healthy.

* * *

Medical Decision Making: The plan for Mr. Batista is placing him in a cast, withdrawing his narcotic medication, getting his insurance certified for coverage of his trigger release, resting the hand completely although I have allowed him to go back to work at a one-handed restriction, he is anticipating not being allowed to have an accommodated position in which case he will be on temporary total pending the outcome of this management.

He will be in a cast for one month and then report back. I will take an x-ray out of plaster of his thumb MP joint and determine if there are any abnormalities. If there are none either his synovitis has gone away or it comes back after he mobilizes the thumb. If his pain goes away he will be given a splint and allowed to return to work at full duty. If his pain is still present we will draw blood tests, decide if he has a latent infection and plan on arthrodesing his thumb. He may not have narcotic pain medication.

{¶ 20} 4. The record indicates follow-up visits with Dr. Keith on November 13 and December 7, 2009, and March 12 and July 20, 2010.

{¶ 21} 5. On November 15, 2010, at the request of the Ohio Bureau of Workers' Compensation ("bureau"), relator was examined by Teresa Kay Larsen, D.O. In her four-page narrative report, Dr. Larsen states:

CHIEF COMPLAINTS:

Pain and not able to straighten the right thumb.

HISTORY:

45 year old right-handed male cook was standing on a stepladder cleaning a vent when he lost his balance and cut his right thumb on a screw on 12/12/08. He sought initial evaluation and treatment at Chagrin Highlands Urgent Care on the date of injury where the wound was cleaned and he received a tetanus shot and antibiotics. He followed up with Dr. Robert Salamon on 12/24/08 who found limited thumb motion due to pain and x-rays showing osteoarthritic changes at the right 1st CMC joint, and he was referred to therapy. On 2/9/09, Dr. Salamon noted pain at the MCP joint and recommended surgery. On 2/27/09, he underwent right thumb tenotomy, capsulectomy, chondroplasty, synovectomy and excision of nars of the right thumb by Dr. Salamon, which was later reported as a ganglion cyst. On 3/20/09 a history of a broken right third diptendon was noted. On his 5/18/09

follow up, he still had thumb pain and limited MP motion and right third finger triggering was also noted. A thumb A1 pulley injection was performed as well as an injection at the middle finger. An MRO was obtained on 9/9/09 which revealed mild soft tissue edema of the right thumb tuft. He was evaluated by Dr. Keith at the Metrohealth on 10/16/09.

* * *

PHYSICAL EXAMINATION:

Examination of his right hand reveals a 4.5 cm linear surgical scar over the dorsal 1st MCP joint and severe hypertrophic thickening of the first MCP joint consistent with arthritic change. There is no soft tissue swelling or discoloration. The 1st MCP joint is very tender to palpation and he withdraws due to pain however there is no tenderness in the right hand or upper limb outside of the areas of the 1st MCP joint, 1st CMC joint and the third trigger finger at the flexor tendon A1 pulley. There are no skin texture changes abnormal hydrosis, or temperature change. There is no muscle atrophy. Motor strength testing in the hand is limited by thumb pain but is otherwise normal in the right upper limb. Sensation is normal to light touch throughout the right upper limb. [Range of motion] of the right thumb reveals the MCP joint held at 40 flexion with inability to extend but ability to flex further to 60 degrees. The thumb IP joint [range of motion] reveals extension to plus 30 degrees with flexion to 40 degrees limited by pain. There is no thumb triggering demonstrated but this is limited by guarding behavior. He is able to demonstrate 3rd finger triggering and a mild DIP flexion contracture is noted. Overall, he appears comfortable sitting, standing and walking in the office today, and his gait pattern is normal.

Questions presented to this examiner:

Does the injured worker suffer from the requested condition(s) as noted on the exam letter?

The injured worker does not suffer from the requested condition of RSD of the right hand. There are no findings to suggest RSD on examination today. There is evidence of significant right thumb MCP joint arthropathy, including sever[e] hypertrophic joint changes, limited motion, pain reproduced with motion, and joint tenderness. His symptoms of right thumb pain and limited motion are explained by the right MCP joint arthropathy/arthritis. His orthopedic hand surgeon had opined that the had inflammatory arthritis of the

right thumb and recommended arthrodesis surgery. There is no evidence of active joint inflammation on examination today. However, this specialist followed his condition for several months and did not suspect RSD in this individual. Rather, Dr. Keith suggested surgery for arthrodesis of the joint and surgery would normally be contraindicated in any individual suspected of having RSD. This history and his examination today indicate that there is no evidence of RSD of the right hand or right upper limb in this injured worker.

{¶ 22} 6. On January 20, 2011, at relator's request, he was examined by chiropractor David Copp, D.C. In his two-page narrative report, Dr. Copp states:

On 12/12/08 he was at work cleaning a duct area and a nail cut his dorsal right thumb, causing much bleeding. He then went to the hospital and received a tetanus shot. Afterward he returned to the doctor complaining of more pain so he was sent to Bedford ER. He then had therapy and saw his doctor again who performed surgery in March 2009. He was still having problems after this, so he has been told by Dr. Keith that he needs another surgery, and he might indeed need this. He was told this in January 2010. He had a cast to wear but couldn't wear it much due to his thumb swelling. He then came to us and we provided therapy, which was helping, but not completely curing his condition. He then had his treatment denied.

Present Complaints

He has had symptoms of right thumb, hand and wrist pain stiffness, weakness and swelling. Due to this he has been unable to use his thumb or hand to grasp objects because it increases his pain. He has difficulty sleeping also due to the pain.

Social and Medical History

He is 44 years old and has four children.

Physical Examination

Mr. Batista has a 6 cm scar over the right dorsal thumb MP joint with swelling over his right thumb dorsal MP. His thumb is stuck in a flexion contracture. He also exhibits trigger finger of the thumb and right middle finger.

Right wrist range of motion compared with normal is: 35°/60 flexion, 45°/60 extension, 10°/20 radial deviation and 10°/30

ulnar deviation with pain. Joint dysfunction is noted in the right wrist and hand.

Right thumb range of motion compared to normal is: 25°/60 MP flexion contracture, 20°/40 MP extension (flexion contracture), 60°/80 IP flexion, 40°/30 IP extension, 10°/50 abduction, 1/8 cm adduction and 1/8 cm opposition with pain.

Joint dysfunction is noted in the right thumb and hand with palpatory pain in the right thumb and hand. Orthopedic testing was performed and Finklestein's test caused right thumb and hand pain. Hypoesthesia numbness was found over the right thumb at his scarred area. Muscle spasms were noted in the brachioradialis, pronator teres, wrist flexor and extensors. Muscle strength was reduced to grade 3/5 over the right wrist flexor and extensor muscles and his hand and finger flexor and extensor muscles. Grip strength muscle testing with dynamometer was performed. He is right hand dominant. Grip strength measured is: Left Wrist 45 kg and Right Wrist 5 kg indicating a severely weak right hand.

Assessment

Mr. Batista sustained a work related injury where he injured his right thumb.

The diagnosis for his 12/12/08 work related injury at Red Robin is:

727.03 Right Thumb Trigger Finger, 882.0 Right Hand/Thumb Open Wound, and 311 Depressive Disorder

Upon considering the mechanism of injury and the current complaints and objective clinical findings, it is my professional opinion, within a reasonable degree of chiropractic certainty, that Mr. Batista suffered a right hand/thumb open wound and resultant right thumb trigger finger, which are directly and causally related to his 12/12/08 work related accident at Red Robin.

Opinion

Due to the mechanism of injury, the subjective complaints and the objective clinical findings, it is my professional opinion, within a reasonable degree of chiropractic certainty

that Mr. Batista has a 100% loss of use of his right thumb due to the injury he sustained on 12/12/08 at Red Robin.

{¶ 23} 7. On January 27, 2011, relator moved for R.C. 4123.57(B) scheduled loss compensation for the alleged loss of use of his right thumb. In support, relator submitted the report of Dr. Copp.

{¶ 24} 8. On January 31, 2011, the bureau requested a medical file review from Gerald Yosowitz, M.D. Dr. Yosowitz reported:

Questions(s) to address: Based on your review of the medical documentation, consideration of the history of the allowed industrial injury, and your clinical expertise, please give your opinion, based on a reasonable degree of medical probability, of the following: DOES THE [Injured Worker] HAVE A LOSS OF USE OF THE RIGHT THUMB?

* * *

Physician's Narrative:

Analysis: Claimant was injured on 12/12/08 when he sustained a laceration over the right 1st. MCP joint of his right thumb. I have reviewed this claimant's medical records on 6/17/10 and reference should be made to this review. The claimant has had continued pain and swelling of his right 1st. MCP joint and limited motion of his right thumb. When the claimant was seen by Dr. Keith on 10/16/09 Dr. Keith noted that the claimant held his right 1st MCP joint at about 40 degrees of flexion, "similar to the posture of his left thumb. Thumb IP flexion and extension are present." Dr. Keith felt that the claimant had a trigger finger of his right thumb and this condition has been allowed in the 12/12/08 injury. Inflammatory arthritis of the claimant's right 1st. MCP joint has not been allowed in the 12/12/08 industrial injury.

The claimant had an IME performed by Dr. Larson [sic] on 11/15/10. Exam of the claimant's right thumb revealed the flexion contracture at the right 1st. MCP joint with further flexion to 60 degrees, IP joint motion of lack of 30 degrees extension, flexion to 40 degrees, and no noted triggering.

Conclusions: I have reviewed the claimant's medical records and I have accepted the findings of the claimant's examining and treating physicians. The claimant injured his right thumb

on 12/12/08 that has been allowed for a right trigger thumb and open wound of the right thumb (right 1st. MCP joint). The claimant had an apparent flexion contracture at the right 1st. MCP joint prior to his 12/12/08 injury as evidenced by a similar contracture of his left 1st. MCP joint.

Based on the allowed conditions of the 12/12/08 injury it is my medical opinion that there is insufficient objective medical evidence to indicate that the claimant has a loss of use of his right thumb as a direct and proximate result of the 12/12/08 injury.

{¶ 25} 9. Following a March 25, 2011 hearing, a district hearing officer ("DHO") issued an order denying relator's January 27, 2011 motion. The DHO's order explains:

District Hearing Officer denies the request for an award per ORC 4123.57 for scheduled loss due to loss of use of the right thumb. The report from Dr. Gerald Yosowitz, 01/31/2011, is relied upon. There is insufficient evidence weight to establish that Injured Worker has a loss of use use [sic] of the right thumb as a direct result of the 12/12/2008 allowed injury. The physician notes that Injured Worker has an apparent flexion contracture at the right 1st MCP joint prior to his 12/12/2008 injury as evidenced by a similar contracture in the uninvolved left 1st MCP joint. The claim has previously been denied for "INFLAMMATORY ARTHRITIS OF THE RIGHT THUMB." Flexion and extension are reported to be still present in the thumb. Dr. Yosowitz finds that there is insufficient objective evidence in the medical record to support that Injured Worker has experienced a loss of use attributable to the allowed conditions in the claim. This opinion is found to be credible.

{¶ 26} 10. Relator administratively appealed the DHO's order of March 25, 2011.

{¶ 27} 11. Following a May 18, 2011 hearing, a staff hearing officer ("SHO") issued an order affirming the DHO's order. The SHO's order explains:

Staff Hearing Officer denies the request for a Revised Code 4123.57 award for complete loss of use of the right thumb as not being supported by sufficient supporting objective medical evidence. Further Staff Hearing Officer finds that the injured worker has failed to meet his burden of proof in support of this request. This part of the order is made based on the 1/31/11 report and opinions of Dr. Yosowitz and is based on the injured worker's testimony at hearing that he

does not move the thumb in different directions due to the pain he experiences with the movement of this digit, not as a result of an inability to do so. It is unclear from the testimony provided exactly at what level the injured worker's right thumb mobility lies.

{¶ 28} 12. On June 11, 2011, another SHO mailed an order refusing relator's administrative appeal from the SHO's order of May 18, 2011.

{¶ 29} 13. On August 15, 2011, relator, Stanley Batista, filed this mandamus action.

Conclusions of Law:

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

{¶ 31} R.C. 4123.57(B) provides for scheduled loss compensation to be paid for a specified number of weeks for a specific body part. That statute provides:

For the loss of a first finger, commonly known as a thumb, sixty weeks.

* * *

For ankylosis (total stiffness of) or contractures (due to scars or injuries) which makes any of the fingers, thumbs, or parts of either useless, the same number of weeks apply to the members or parts thereof as given for the loss thereof.

{¶ 32} In *State ex rel. Wallace v. Indus. Comm.*, 57 Ohio St.2d 55, 59 (1979), the Supreme Court of Ohio states:

In light of the frequent use of medical opinions of non-examining physicians in processing claims for disability compensation, the Court of Appeals for Franklin County has developed an analogy that is employed to insure the reliability of those opinions. The court considers the physician's opinion tantamount to a response to a hypothetical question.

Applying the analogy to a hypothetical question, it follows that the non-examining physician is required to expressly accept all the findings of the examining physicians, but not the opinion drawn therefrom. If a non-examining physician fails to accept the findings of the doctors or assumes the role of the Industrial Commission, the medical opinion that is rendered does not constitute evidence to support a subsequent order of the commission.

(Footnote omitted.)

{¶ 33} Following the decision in *Wallace*, the Supreme Court of Ohio subsequently relaxed the express acceptance requirement and permitted reliance upon a non-examining physician's report where the report impliedly accepted the findings of the examining physicians. *State ex rel. Lampkins v. Dayton Malleable, Inc.*, 45 Ohio St.3d 14, 15 (1989).

{¶ 34} It has been said that, under the *Wallace* rule, the non-examining physician was required to consider—and accept—the factual findings as of the time of the examinations, of all the examiners who proceeded him. *State ex rel. Dobbins v. Indus. Comm.*, 109 Ohio St.3d 235, 2006-Ohio-2286, ¶ 4, citing *Lampkins* (Dr. Weinerman performed a file review relating to permanent partial disability).

{¶ 35} Analysis begins with the observation that the SHO's order of May 18, 2011 denies R.C. 4123.57(B) compensation based upon the report of Dr. Yosowitz and relator's hearing testimony.

{¶ 36} Under such circumstances, if relator is to prevail in this action, he must show that neither the report of Dr. Yosowitz nor his own hearing testimony provided the some evidence needed to support the commission's decision.

{¶ 37} In his opening merit brief, relator does not challenge the report of Dr. Yosowitz as failing to provide the some evidence supporting the commission's decision. Rather, relator focuses on his hearing testimony in concluding that the commission abused its discretion.

{¶ 38} Not until the filing of his reply brief does relator initiate a challenge to the report of Dr. Yosowitz:

Respondents have offered the report of Dr. Gerald Yosowitz, who merely performed a file review, as "some evidence" supporting the denial of the claimant's request for loss of use, right thumb. A review of Dr. Yosowitz's report, however, yields the finding that he never addressed either the claimant's subjective statements of pain resulting in total loss of use of his right thumb, or the findings by Dr. David Copp (the claimant's physician of record) that the claimant suffers total loss of use in his right thumb. (N/1). Further, because Dr. Yosowitz's report conclusion does not make even a cursory

mention of Relator's disabling pain that led to the filing of his request for loss of use, that report cannot be called "some evidence" and reliance upon it was an abuse of discretion upon which this writ must be granted.

(Relator's reply brief, at 4-5.)

{¶ 39} Because relator's argument is lacking in supporting authority, such as case law, it is not entirely clear what proposition of law relator relies upon in presenting the argument. However, the argument could be construed as an invocation of the *Wallace* rule.

{¶ 40} Indeed, Dr. Yosowitz was a non-examining physician and his report does not specifically mention the report of Dr. Copp as being among the medical reports accepted and reviewed.

{¶ 41} Dr. Yosowitz's report satisfies the so-called *Wallace* rule. In his report, Dr. Yosowitz states, "I have reviewed the claimant's medical records and I have accepted the findings of the claimant's examining and treating physicians." In his report, Dr. Yosowitz does specifically address the reports of Drs. Keith and Larsen. However, specific mention of those reports does not imply that reports of other examining physicians were not accepted and reviewed. *See State ex rel. Sturgill v. P&G Sheet Metal, Inc.*, 10th Dist. No. 08AP-649, 2009-Ohio-3749.

{¶ 42} In short, relator fails to show that the report of Dr. Yosowitz must be eliminated from evidentiary consideration under the *Wallace* rule, assuming that relator's argument merits review under the *Wallace* rule.

{¶ 43} Furthermore, the magistrate rejects relator's assertion that "Dr. Yosowitz's report conclusion does not make even a cursory mention of Relator's disabling pain." (Relator's reply brief, at 5.) In his report, Dr. Yosowitz states, "The claimant has had continued pain and swelling of his right 1st. MCP joint and limited motion of his right thumb." Also, Dr. Yosowitz acknowledges the June 17, 2010 report of Dr. Keith that details relator's pain complaints. Clearly, relator is incorrect to assert or suggest that Dr. Yosowitz failed to consider the evidentiary record relating to pain.

{¶ 44} Given that relator has failed to successfully challenge the report of Dr. Yosowitz, there is no need for this court to consider relator's argument that his hearing testimony cannot support denial of his motion for compensation.

{¶ 45} Accordingly, for all of the above reasons, it is the magistrate's decision that this court deny relator's request for a writ of mandamus.

/s/ Kenneth W. Macke

KENNETH W. MACKE
MAGISTRATE

NOTICE TO THE PARTIES

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