

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. The Kroger Company, :  
Relator, :  
v. : No. 09AP-89  
Dan C. Johnson and Industrial : (REGULAR CALENDAR)  
Commission of Ohio, :  
Respondents. :  
:

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D E C I S I O N

Rendered on November 3, 2009

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*Bugbee & Conkle, LLP, Janelle M. Matuszak and Mark S. Barnes, for relator.*

*Agee, Clymer, Mitchell & Laret, Robert M. Robinson and Gregory R. Mitchell, for respondent Dan C. Johnson.*

*Richard Cordray, Attorney General, and Charissa D. Payer, for respondent Industrial Commission of Ohio.*

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IN MANDAMUS  
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

McGRATH, J.

{¶1} In this original action, relator, The Kroger Company, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its award of R.C. 4123.57(B) scheduled loss compensation to respondent Dan C.

Johnson ("claimant"), for a total loss of use of his right hand, and to enter an order denying said compensation.

{¶2} This matter was referred to a magistrate of this court pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate examined the evidence and issued a decision, including findings of fact and conclusions of law, which is appended to this decision. Therein, the magistrate concluded the report of Nancy Renneker, M.D., was inconsistent such that it could not constitute some evidence upon which the commission could rely and, with the elimination of said report, there was no expert medical opinion in the record to support the commission's order. Therefore, the magistrate recommended that this court issue a writ of mandamus ordering the commission to vacate the October 24, 2008 order of its staff hearing officer ("SHO"), that awarded R.C. 4123.57(B) compensation for loss of use of the right hand and to enter an order denying said compensation.

{¶3} The commission has filed the following objection to the magistrate's decision:

The commission already weighed the evidence regarding Dr. Renneker's opinion in this case and it determined that Dr. Renneker's reports are some evidence on which the commission could rely to grant Johnson a loss of use award for the loss of use of his right hand.

{¶4} Claimant has also filed objections to the magistrate's decision. Though not delineating specific objections, it is claimant's position that the magistrate substituted his judgment for that of the commission and impermissibly reweighed the evidence. Claimant also contends the magistrate erred in determining that the medical evidence was inconsistent.

{¶5} This cause is now before the court for a full review. No party has filed objections to the magistrate's findings of fact, and upon an independent review of the same, we adopt them as our own.

{¶6} At issue here is Dr. Renneker's June 20, 2008 report and the addendum thereto and whether the addendum created an ambiguity or inconsistency, thereby removing the reports' evidentiary value. As noted by the magistrate, Dr. Renneker initially opined that claimant has a "total 27% right hand impairment" that translates to a 24 percent right upper extremity impairment. In the same report, Dr. Renneker goes on to state there is "an additional 30% right upper extremity impairment, for a combined total 47% right upper extremity impairment, or a 28% whole person impairment" from the work-related injury. In her addendum, Dr. Renneker states claimant "sustained a functional loss of use in his right hand" from the work-related injury. As found by the magistrate, *State ex rel. Toledo Hosp. v. Indus. Comm.*, 10th Dist. No. 03AP-581, 2004-Ohio-3315, supports the magistrate's finding that Dr. Renneker's impairment rating for the right hand is so inconsistent with her addendum opinion of a functional loss of use that Dr. Renneker's reports cannot constitute some evidence upon which the commission can rely.

{¶7} Despite claimant's argument to the contrary, the magistrate did not substitute his judgment for that of the commission but, rather, found the commission abused its discretion in relying on an internally inconsistent and/or equivocal medical opinion. To find in favor of claimant in this instance would require us to assume Dr. Renneker's June 20, 2008 report means something different than what it expressly states. This, of course, we cannot do.

{¶8} Following an independent review of the matter, we find that the magistrate has properly determined the facts and applied the appropriate law. Therefore, the commission's and claimant'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 grant the requested writ of mandamus and order the commission to vacate the October 24, 2008 order of its SHO awarding R.C. 4123.57(B) compensation for loss of use of the right hand, and to enter an order denying said compensation.

*Objections overruled; writ granted.*

KLATT and CONNOR, JJ., concur.

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**APPENDIX**

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. The Kroger Company, :

Relator, :

v. : No. 09AP-89

Dan C. Johnson and Industrial : (REGULAR CALENDAR)

Commission of Ohio, :

Respondents. :

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MAGISTRATE'S DECISION

Rendered on June 30, 2009

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*Bugbee & Conkle, LLP, Janelle M. Matuszak and Mark S. Barnes, for relator.*

*Agee, Clymer, Mitchell & Laret, Robert M. Robinson and Gregory R. Mitchell, for respondent Dan C. Johnson.*

*Richard Cordray, Attorney General, and Charissa D. Payer, for respondent Industrial Commission of Ohio.*

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IN MANDAMUS

{¶9} In this original action, relator, The Kroger Company, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its award of R.C. 4123.57(B) scheduled loss compensation to respondent Dan C.

Johnson ("claimant") for a total loss of use of his right hand, and to enter an order denying said compensation.

Findings of Fact:

{¶10} 1. On August 13, 2007, claimant sustained an industrial injury while employed as a meat cutter for relator, a self-insured employer under Ohio's workers' compensation laws. The industrial claim (No. 07-860005) is allowed for "right upper extremity embolism."

{¶11} 2. On October 18, 2007, claimant underwent right hand surgery performed by Paul A. Cook, M.D. In his operative report, Dr. Cook states that four procedures were performed:

1. Excision aneurysm ulnar artery, right hand.
2. Sympathectomy, superficial arch, right hand.
3. Sympathectomy, third common digital artery, right hand.
4. Sympathectomy, fourth common digital artery, right hand.

{¶12} The operative report also describes the pre-operative and post-operative diagnoses as "[h]yperthenar hammer syndrome, right hand."

{¶13} 3. On January 23, 2008, Dr. Cook wrote: "He returns today for evaluation of his hand[.] He continues to have numbness in his ring and small fingers[.] He has improved capillary refill[.] He still has cold intolerance and has discontinued his current work regimen."

{¶14} 4. On March 12, 2008, claimant was examined by Steven M. Dean, D.O., who practices vascular medicine. Dr. Dean reported:

\* \* \* [H]e continues to complain of classic Raynaud's symptomatology in his right third, fourth, and fifth digits. Unremitting numbness persists as well.

\* \* \* He has still been unable to return to work[.] Dan participates in hand related physical therapy exercises at home[.]

\* \* \* Limited examination is remarkable for mild flexion contractures of his right fourth and fifth digits. His RD 3, 4, and 5 are palpably cooler than the remaining digits, but without distal tropic changes, ulcerations, or splinter hemorrhages. The right radial pulse remains bounding. His palmer incisional induration has definitely regressed. Profound hypesthesia is noted along the ulnar nerve distribution/RD 3, 4, and 5 digits.

{¶15} 5. On June 20, 2008, claimant was examined by Nancy Renneker, M.D. Dr. Renneker is board certified in physical medicine and rehabilitation. In her three-page narrative report dated June 20, 2008, Dr. Renneker opined:

EXAMINATION:

\* \* \* Skin exam of right upper extremity is remarkable for a healed 20 cm in length surgical scar extending from volar radial distal right forearm, crossing volar right thumb and this surgical scar courses the entire length of the distal ulnar crease of right hand to Dan Johnson's right 5th finger.

Full active range of motion is noted at right thumb and right index finger. *Active range of motion of right middle finger:* MP 10-80 degrees, PIP 20-90 degrees and DIP 10-50 degrees. *Active range of motion of right ring finger:* MP 10-70 degrees, PIP 30-90 degrees and DIP 10-50 degrees. *Active range of motion of right little finger:* MP 10-70 degrees, PIP 40-90 degrees and DIP 10-60 degrees. A total transverse sensory loss with 2 point discrimination greater than 15 mm is noted distal to MP joint of right middle, ring and right 5th finger. 3+/5 strength is noted throughout right middle, ring and right 5th finger. Decreased right grip with increased strength loss index is also seen. Normal right (dominant hand) grip strength in a male greater than 50 years of age equals 45 kg; Dan Johnson's averaged right grip in 3 trials equaled 10 kg and this corresponds to a 78% strength loss index. No palpable ulnar pulse is noted at right palm and right middle, ring and right 5th finger are cold to all touch.

## RATIONALE:

Based on the 5th Edition of the AMA Guides to the Evaluation of Permanent Impairment, Dan C. Johnson has a 28% whole person impairment due to: (A) a 27% right hand impairment due to: (1) a 67% right middle finger impairment due to: (a) decreased active range of motion of right middle finger represents a 33% right middle finger impairment and (b) a total transverse sensory loss distal to MP joint of right middle finger represents an additional 50% right middle finger impairment, for a combined total 67% right middle finger impairment, or a 13% right hand impairment (2) a 70% right ring finger impairment due to: (a) decreased active range of motion of right ring finger represents a 40% right ring finger impairment and (b) a total transverse sensory loss distal to MP joint of right ring finger represents an additional 50% right ring finger impairment, for a combined total 70% right ring finger impairment, or an additional 7% right hand impairment and (3) a 70% right little finger impairment due to: (a) decreased active range of motion of right little finger represents a 39% right little finger impairment and (b) a total transverse sensory loss distal to MP joint of same finger represents an additional 50% right little finger impairment, for a combined total 70% right little finger impairment, or an additional 7% right hand impairment. This 7% right hand impairment due to right little finger impairment is added to the above other listed hand impairments, for a total 27% right hand impairment, or a 24% right upper extremity impairment and (B) decreased right grip with a 78% strength loss index represents an additional 30% right upper extremity impairment, for a combined total 47% right upper extremity impairment, or a 28% whole person impairment for this work related injury of 8-13-07.

## OPINION:

Dan C. Johnson has a 28% whole person impairment for this claim, (Claim no. 07-860005).

(Emphases added.)

{¶16} 6. On July 17, 2008, claimant moved for R.C. 4123.57(B) scheduled loss compensation for an alleged "functional loss of use of right hand." In support of the

motion, claimant submitted Dr. Cook's October 18, 2007 operative report and office visit notes, Dr. Dean's March 12, 2008 report, and Dr. Renneker's June 20, 2008 report.

{¶17} 7. On August 26, 2008, at relator's request, claimant was examined by Perry N. Funk, D.O. In his five-page narrative report, Dr. Funk wrote:

CURRENT STATUS: Mr. Johnson continues to complain of constant numbness affecting the right ulnar palmar aspect of his right hand, extending to the palmar aspect of right third, fourth, and fifth digits. He describes a sensation of "coldness" affecting these areas, which is worse in the winter time. He states he avoids exposure to extreme warm or cold. Mr. Johnson further describes an "achiness" at the ends of the third, fourth, and fifth digits. He states the right ring finger is the worst. Mr. Johnson states he has lost the use of a good grip and has been instructed to avoid putting pressure on the hypothenar aspect of the right palm. Mr. Johnson mainly uses his right index finger opposed by right thumb for gripping activities including writing activities. He states he is currently taking Pletal, Norvasc, and aspirin therapy.

\* \* \*

According to the enclosed records, the allowed condition of this claim is hypothenar hammer syndrome, right hand/ring finger.

What is the current extent of impairment present as it relates to the claimant's right ring finger/right hand in terms of the claimant's objective physical findings? Please provide a detailed explanation for your opinion.

Please refer to complete physical examination section in this report. Following today's examination and review of medical documentation, it is my opinion, that Mr. Johnson does have an impairment of the right hand at the right third, fourth, and fifth digits, and right palm, ulnar aspect, right hand. Mr. Johnson has been advised against any gripping or grasping activity which would place pressure against the hypothenar aspect of the right palm. Mr. Johnson has displayed limited grip strength of the right hand and sensory impairment along the flexor aspects of third, fourth, and fifth digits. Mr. Johnson also presents with a impairment of the right hand

associated with exposure to excessive temperature changes.

If in your opinion there is evidence of loss of use of the right ring finger/right hand, at what specific level of the finger is the claimant demonstrating evidence of loss of use? Please provide a detailed explanation for your opinion.

Following today's examination, it is my opinion that Mr. Johnson has not displayed "loss of use" of right ring finger/right hand. Today's examination identified an impairment of the right hand and right ring finger as well as right third and fifth fingers. This impairment limits full grip strength and fine manipulation of the right hand.

Specifically to what degree, if any, has the claimant sustained a loss of use of the right ring finger/right hand as a result of the industrial injury? Please provide a detailed explanation for your opinion.

Although no "loss of use" is demonstrated, Mr. Johnson has sustained limited use of the right hand compatible with the restrictions given by Dr. Cook. These permanent restrictions would have Mr. Johnson avoid exposure to hot or cold temperature (ie. maintain room temperature), no use of right hand to grasp, push/pull arm controls, or use of fine manipulation with the right hand.

In summary, has the claimant sustained a total loss of use of his right ring finger/right hand as a direct and sole result of the industrial injury of this claim? Please give a detailed explanation regarding the basis for your opinion.

Based on today's examination and review of medical documentation, it is my opinion that Mr. Johnson has not sustained a total loss of use of his right ring finger/right hand as a direct result of the industrial injury of this claim. Ohio law defines loss of use of an extremity to be the same as if the extremity had been amputated. An individual does not have "loss of use" if he can use the extremity even in a limited capacity. Based on today's examination, it is clear that Mr. Johnson does have use of his right hand and right ring finger even though the use is limited. He does not therefore qualify for total loss of use of the right ring finger/right hand.

{¶18} 8. In an undated addendum to her June 20, 2008 report, Dr. Renneker wrote:

I have received and reviewed the medical report dated 8-26-08 by Perry Funk, DO.

After reviewing this report it is still my medical opinion that Dan Johnson has sustained a functional loss of use of his right hand due to the industrial injury of 8-13-07. Dr. Funk agrees that Mr. Johnson needs to avoid hot or cold temperatures, cannot use his right hand to grasp, push or pull arm controls or use the right hand for fine manipulation.

Based on this information and based on my findings of 6-20-08 noting total sensory loss in the right middle, ring and 5th fingers of the right hand, in my medical opinion he does have a functional loss of use of the right hand and is entitled to that loss.

{¶19} 9. Following a September 10, 2008 hearing, a district hearing officer ("DHO") issued an order denying claimant's July 17, 2008 motion. The DHO's order explains:

In rendering this decision, the District Hearing Officer relies on the 08/26/2008 report from Dr. Funk. Dr. Funk opines that following the examination, the injured worker has not displayed a loss of use of his right hand. Dr. Funk notes that the injured worker does have use of his right hand, even though the use is limited. The injured worker demonstrated at today's hearing that he did have normal functioning of the right index finger in his thumb.

{¶20} 10. Claimant administratively appealed the DHO's order.

{¶21} 11. Following an October 24, 2008 hearing, a staff hearing officer ("SHO") issued an order that vacates the DHO's order and grants the July 17, 2008 motion. The SHO's order explains:

The Staff Hearing Officer finds that the injured worker is entitled to a scheduled loss award under ORC 4123.57(B) for total loss of use of the right hand. The Staff Hearing

Officer relies on the injured worker's testimony at hearing, as well as the 06/20/2008 report of Dr. Renneker in finding the injured worker is entitled to a total loss of use of his right hand.

The Staff Hearing Officer finds that per Alcoa Building Products v. Industrial Commission of Ohio, [102 Ohio St.3d 341, 2004-Ohio-3166] the injured worker must show that for all practical intents and purposes, the injured worker has lost the use of his right hand to the same extent as if it had been amputated. The Staff Hearing Officer finds that the injured worker's loss of use of the right hand is for all practical purposes the same extent as if it had been amputated. Per the 06/20/2008 report of Dr. Renneker, Dr. Renneker notes that the injured worker has a total sensory loss of several fingers in his right hand, is unable to grip with three fingers, and cannot be exposed to temperatures below 60 degrees Fahrenheit without thermal protection. The Staff Hearing Officer notes that the employer's own medical report of Dr. Funk dated 08/26/2008 indicates that the injured worker has permanent restrictions that he must avoid exposure to hot or cold temperature, and can not use his right hand to grasp, push/pull arm controls, or do fine manipulation. The injured worker testified at hearing that he does his activities of daily living with his non-dominant left hand. He indicated that he can perform limited writing and does retain pinch of his thumb to finger. However, the mere fact that the injured worker can hold a pen and retains pinching ability between two of his fingers does not bar him from a total loss of use award as the injured worker in the Alcoa case retained the residual utility to hold a newspaper and push a car door open and he was still found eligible for a total loss of use award. The Court noted it is not necessary that the injured worker's injured member be of absolutely no use in order for the injured worker to have lost the use of it for all practical intents and purposes. The permanent restrictions in the instant claim are of such severity as to lead the Staff Hearing Officer to find that the injured worker is entitled to a loss of use of the right hand as for all practical intents and purposes, the injured worker's remaining use of his right hand is as if it had been amputated. The injured worker is awarded 175 weeks of compensation, with the award to begin on 10/18/2007, the last date of surgery in this claim.

{¶22} 12. On November 25, 2008, another SHO mailed an order refusing relator's administrative appeal from the SHO's order of October 24, 2008.

{¶23} 13. On January 26, 2009, relator, The Kroger Company, filed this mandamus action.

Conclusions of Law:

{¶24} The main issue is whether Dr. Renneker's reports constitute some evidence upon which the commission can rely to support its award of R.C. 4123.57(B) scheduled loss compensation for an alleged loss of use of the right hand.

{¶25} Finding that Dr. Renneker's reports do not constitute evidence upon which the commission can rely, it is the magistrate's decision that this court issue a writ of mandamus, as more fully explained below.

{¶26} To begin, the SHO's order of October 24, 2008 correctly notes the standard to be applied in determining total loss of use. In *State ex rel. Alcoa Bldg. Prods. v. Indus. Comm.*, 102 Ohio St.3d 341, 2004-Ohio-3166, the court holds that where amputation is not involved, the claimant may obtain an award by showing loss of use for all practical purposes. The *Alcoa* court rejected the proposition that the claimant must show that his or her loss is absolutely equivalent to an amputation. That the body part for which compensation is sought has some residual utility does not necessarily preclude an award.

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

{¶28} A physician's report can be so internally inconsistent that it cannot be some evidence supporting the commission's decision. *State ex rel. Lopez v. Indus. Comm.* (1994), 69 Ohio St.3d 445, 449; *State ex rel. Taylor v. Indus. Comm.* (1995), 71 Ohio St.3d 582, 585. The *Lopez* holding extends also to substantial inconsistencies between two reports generated by the same medical examination. *State ex rel. M. Weingold & Co. v. Indus. Comm.*, 97 Ohio St.3d 44, 2002-Ohio-5353; *State ex rel. Genuine Parts Co. v. Indus. Comm.*, 160 Ohio App.3d 99, 2005-Ohio-1447.

{¶29} Here, the reports of Dr. Renneker are so internally inconsistent that they cannot constitute the some evidence upon which the commission can and did rely.

{¶30} In her three-page narrative report, Dr. Renneker opines that claimant has a "total 27% right hand impairment" based upon her analysis of middle, ring and little finger impairment. She then states that a 27 percent hand impairment translates to a 24 percent right upper extremity impairment.

{¶31} Dr. Renneker then states: "[D]ecreased right grip with a 78% strength loss index represents an additional 30% right upper extremity impairment, for a combined total 47% right upper extremity impairment, or a 28% whole person impairment for this work related injury of 8-13-07."

{¶32} It is conceivable to this magistrate that the above-quoted statement contains a typographical error. It is conceivable that Dr. Renneker meant to assess additional hand impairment for the decreased right grip strength loss. However, this magistrate cannot rewrite the report.

{¶33} Dr. Renneker's assessment of 27 percent right hand impairment is substantially inconsistent with the addendum opinion of "functional loss of use of the right hand."

{¶34} *State ex rel. Toledo Hosp. v. Indus. Comm.*, 10th Dist. No. 03AP-581, 2004-Ohio-3315, supports the above analysis.

{¶35} In *Toledo Hospital*, the commission awarded scheduled loss compensation for loss of use of the right upper extremity. In so doing, the commission relied upon the reports of Dr. Garner and a report from Dr. Szczesny. In its decision, this court upheld the determination of its magistrate that Dr. Garner's reports were equivocal.

{¶36} In *Toledo Hospital*, the magistrate explains:

In the present action, the commission stated reliance on the April 2001 opinion of Dr. Garner. However, Dr. Garner rendered a new and corrected opinion in May 2001 with respect to the impairment and function of the right upper extremity. In the latter opinion, Dr. Garner stated a different conclusion regarding numerical percentage of impairment, setting it at 74 percent rather than 100 percent and explaining that the new assessment was a "fairer" evaluation of impairment. Accordingly, the May 2001 opinion represented a substantial modification of the impairment opinion.

\* \* \*

\* \* \* At least two material changes were stated in the May report that explicitly altered the prior report—that the right upper extremity was not "100%" impaired but was only "74%" impaired, and that the claimant, rather than having essentially "no" function of the extremity, retained "some" function. At the very least, the new report created a fatal ambiguity as to whether Dr. Garner believed that claimant had sustained a total loss of use of her right upper extremity.

Given Dr. Garner's significant modifications to his impairment/disability opinion in May 2001, the commission acted unreasonably in isolating a single phrase from his April 2001

opinion and asserting it could rely on that phrase simply because Dr. Garner had not expressly retracted it. Essentially, the commission's order proposes that the concepts of impairment and functional use are so different and distinct that a physician's explicit modification of his opinion on "impairment" of a limb can be completely divorced from his opinion on functional "use" of the limb. The commission cites no authority, however, for the proposition that medical "impairment" of an upper extremity is based on something wholly distinct from the functional use of that extremity. Therefore, the commission abused its discretion in concluding that the April opinion as to lost function was unaltered and unequivocal after the May opinion was rendered.

In sum, Dr. Garner's April opinion regarding functional use was rendered ambiguous by his May statements regarding impairment and function, and, therefore, the commission abused its discretion in relying on the April opinion. \* \* \*

Id. at ¶27, 30-32.

{¶37} In *Toledo Hospital*, the court, speaking through its magistrate, rejected the commission's proposition that the concepts of impairment and functional use are distinct. Given that this court has previously rejected such proposition, this magistrate must conclude that Dr. Renneker's impairment rating for the right hand is so inconsistent with her addendum opinion of a functional loss of use that Dr. Renneker's reports cannot constitute some evidence upon which the commission can rely.

{¶38} With the elimination of Dr. Renneker's reports as some evidence upon which the commission can rely, there is no expert medical opinion in the record that claimant has sustained a loss of use of his right hand.

{¶39} Accordingly, it is the magistrate's decision that this court issue a writ of mandamus ordering the commission to vacate the October 24, 2008 order of its SHO

awarding R.C. 4123.57(B) compensation for loss of use of the right hand, and to enter an order denying said compensation.

*/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).