

[Cite as *State ex rel. Lamb v. Indus. Comm.*, 2010-Ohio-792.]

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

State ex rel. Kevin S. Lamb,	:	
Relator,	:	
v.	:	No. 09AP-604
Industrial Commission of Ohio and Fosterville Sparkle Market, Inc.,	:	(REGULAR CALENDAR)
Respondents.	:	

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D E C I S I O N

Rendered on March 4, 2010

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*Urban Co., L.P.A., and Anthony P. Christine*, for relator.

*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} Relator, Kevin S. Lamb, has filed this original action requesting that this court issue a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order which denied him an award for the total loss of use of both legs and ordering the commission to grant him that compensation.

{¶2} This matter was referred to a court-appointed magistrate pursuant to Civ.R. 53(C) and Loc.R. 12(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, and recommended that this court deny relator's request for a writ of mandamus.

{¶3} Relator does not delineate a specific objection, but essentially reargues the same points addressed in the magistrate's decision. Upon review, and for the reasons set forth in the magistrate's decision, we do not find relator's position to be well-taken.

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

*Objections overruled;  
writ of mandamus denied.*

BRYANT and KLATT, JJ., concur.

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**APPENDIX**

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Kevin S. Lamb,	:	
	:	
Relator,	:	
v.	:	No. 09AP-604
Industrial Commission of Ohio and	:	(REGULAR CALENDAR)
Fosterville Sparkle Market, Inc.,	:	
	:	
Respondents.	:	
	:	

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MAGISTRATE'S DECISION

Rendered on November 16, 2009

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*Urban Co., L.P.A., and Anthony P. Christine, for relator.*

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

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IN MANDAMUS

{¶5} Relator, Kevin S. Lamb, has filed this original action requesting that this court issue a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order which denied him an award for the total loss of use of both legs and ordering the commission to grant him that compensation.

Findings of Fact:

{¶6} 1. Relator sustained a work-related injury on April 30, 1993, and his claim has been allowed for "herniated disc L5-S1."

{¶7} 2. In 1996, relator filed an application for permanent total disability ("PTD") compensation.

{¶8} 3. Relator's application was heard before a staff hearing officer ("SHO") on July 7, 1999 and was granted. Specifically, the SHO relied upon the medical reports of Drs. V.G. Raghavan and Frank G. Veres as well as the vocational report from "Mr. Ruth."

{¶9} 4. Dr. Raghavan examined relator on March 31, 1997. In his report, Dr. Raghavan noted that relator was currently using a wheelchair because "[h]e claims he has weakness in both lower extremities making it difficult for him to walk." Dr. Raghavan noted further that relator requires 24-hour nursing care because he feels he cannot take care of his personal hygiene, and he finds it difficult to perform any activity by himself. Relator has gained more than 30 pounds in the two years following his surgery. Dr. Raghavan noted that relator was brought to the examining room in a wheelchair because he indicated he has not walked for the last year or two. Dr. Raghavan was not able to determine relator's low back range of motion because relator could not stand by himself without help. With regard to nonphysical findings, Dr. Raghavan noted:

\* \* \* Light pressure on the skull caused complaints of increased back pain. Internal and external rotation of the leg reproduced pain in his back. Hoover's sign<sup>[1]</sup> is present. Waddel's sign<sup>[2]</sup> for palpatory hypersensitivity was present both with superficial tenderness as well as for nonanatomic tenderness. The pain drawing is suggestive of symptom

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<sup>1</sup> Hoover sign involves a test used when unilateral hysterical paralysis is suspected. In hysterical paralysis, the examiner will feel pressure against the hand under the allegedly paralyzed leg. Here the test was positive.

<sup>2</sup> Waddel signs are a group of physical signs used to detect malingering in patients with back pain.

magnification and does not conform to any dermatomal pattern in the upper or lower extremities.

{¶10} Ultimately, Dr. Raghavan concluded that relator had reached maximum medical improvement, assessed a ten percent whole person impairment, and opined that relator was capable of performing at a sedentary work level where he could sit and perform most of his work in a sitting position without much standing or walking involved.

{¶11} 5. Dr. Veres authored a report dated December 14, 1996, wherein he stated:

Kevin Lamb is obese because his allowed condition prevents him from activity. He is also wheelchair bound secondary to his allowed conditions. His physical capacities form has been completed, and the patient is unable to stand, walk, bend, or lift over 5 pounds for any length of time. He is in constant pain.

He is unable to engage in any remunerative employment. I feel he is permanently and totally disabled without any chance for rehabilitation either physically or vocationally. His education level is poor. He has what I feel is a learning disability with emotional overlay secondary to his injury. Kevin's claim is allowed for lumbar disc displacement, and it is not operable because of his obesity.

{¶12} 6. In February 2009, relator filed a motion seeking a scheduled loss of use award for the loss of use of both legs. Relator's motion was supported by Dr. Veres' signature at the bottom of a letter from relator's attorney asking that Dr. Veres sign the bottom portion of the letter if he agreed that, for all intents and purposes, relator had lost the use of his legs because of his work-related injury.

{¶13} 7. Relator was examined by Dr. Ronald M. Yarab, Jr. In his report dated March 23, 2009, Dr. Yarab stated:

\* \* \* The claimant presented today in a wheelchair. On examination[,] he complained of pain in his legs and back.

Examination of his back revealed a well-healed op scar in the midline. I tried to get him to stand, but he stated that he needs help to stand. When asked about transfers, he stated that he pulls his chair close and can transfer with his lower extremities to the toilet and his bed. Sensation was decreased to pinprick in a stocking net sensory distribution. He has contractures about the knees and hips. The claimant's current allowed conditions include herniated disc L5-S1.

{¶14} Dr. Yarab concluded:

\* \* \* Within the medical records[,] there is no documentation linking his back to why he currently is wheelchair bound at this time. He underwent a S-1 disc removal with L4-L5 foraminotomy and hemilaminectomy, but this in itself should not cause paraplegia or an inability to ambulate. Thus[,] it is my medical opinion that his current state of gait dysfunction is due to a non-allowed condition in the claim. For the allowed condition in the claim of L5-S1 herniated disc, this allowed condition has not caused permanent loss of use to such a degree that the effected body part is useless for all practical purposes. Also, he still can use his legs for transfer with assistance. In his current condition[,] he is unable to perform his previous job duties, but again there is no medical information contained in the records linking his allowed condition of herniated disc at L5-S1 to his current inability to ambulate. He had EMG testing done in the past which revealed a chronic S-1 radiculopathy, but no other abnormalities were noted. Again, that in and by itself should not preclude an individual from ambulating. Thus[,] it is my medical opinion in review of medical records and my current physical evaluation that the request for total loss of use of lower extremities is not substantiated as submitted.

{¶15} 8. Relator's motion for a scheduled loss of use award was heard before a district hearing officer ("DHO") on April 22, 2009 and was denied. The DHO relied on the report of Dr. Yarab who had opined that relator's allowed condition had not caused a permanent loss of use of his legs and that there is no documentation linking his allowed condition to the reason he is in a wheelchair and that the current state of his gait dysfunction is due to nonallowed condition in his claim. The DHO concluded that relator

failed to meet his burden of proof in establishing, by a preponderance of the evidence, that the requested total loss of use of both legs was causally related to the allowed condition in his claim.

{¶16} 9. Relator's appeal was heard before an SHO on May 20, 2009. The SHO affirmed the prior DHO's order and denied relator's request for a scheduled loss of use as follows:

\* \* \* The Staff Hearing Officer concludes that the Injured Worker has failed to demonstrate by a preponderance of the evidence that the Injured Worker has sustained a total loss or a total loss of use of both legs which can be independently attributable to the injury upon which this claim is predicated.

In reaching this conclusion, the Staff Hearing Officer has relied upon the medical review and opinion by Ronald Yarab Jr., M.D. dated 03/23/2009. It is important to note that therein, Dr. Yarab indicated that the allowed condition of HERNIATED DISC L5-S1 would not, in and of itself[,] cause paraplegia or an inability to ambulate.

The opinion of Dr. Yarab is found to be persuasive evidence in this particular matter.

All evidence contained within the record was reviewed and considered in rendering this decision[,] however[,] only that evidence specifically said it [sic] above is found to be persuasive and relied upon.

The Staff Hearing Officer also notes that the Injured Worker has failed to present a medical opinion from Dr. Frank Veres, D.O., wherein said physician provides the rational[e] for his conclusion that the Injured Worker has suffered a total loss of use of both legs due solely to the allowed conditions in this claim. Absent such an explanation and given the opinion of Dr. Yarab to the contrary, the Staff Hearing Officer concludes that the Injured Worker has failed to me[e]t his burden of proof in this matter.

(Emphasis sic.)

{¶17} 10. Relator's further appeal was refused by order of the commission mailed June 10, 2009.

{¶18} 11. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

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

{¶20} Pursuant to R.C. 4123.57(B), a claimant may be entitled to permanent partial disability benefits for a specific scheduled loss due to a work-related injury. R.C. 4123.57(B) provides, in pertinent part:

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

\* \* \*

For the loss of a leg, two hundred weeks.

{¶21} Although the statute speaks only in terms of "loss," the Supreme Court of Ohio has held that "loss" includes not only loss by amputation but, also, loss of use. In *State ex rel. Walker v. Indus. Comm.* (1979), 58 Ohio St.2d 402, 403, the court spoke in terms of a loss to the same effect and extent as if amputated or otherwise physically removed.

{¶22} In the present case, relator contends that the commission abused its discretion by relying upon the report of Dr. Yarab. Specifically, because the commission had provided relator with a wheelchair, Dr. Yarab's report should not be considered as "some evidence" because Dr. Yarab questioned whether relator should be wheelchair bound due to the allowed condition. Relator contends that the doctrine of res judicata applies and argues that the commission has already found that the allowed medical condition has caused relator to be wheelchair bound and, in so finding, has already determined that, for all intents and purposes, relator has lost the use of his legs.

{¶23} For the reasons that follow, this magistrate disagrees.

{¶24} The doctrine of res judicata operates to preclude the relitigation of a point of law or fact that was at issue in a former action between the same parties. *Consumers' Counsel v. Pub. Util. Comm.* (1985), 16 Ohio St.3d 9, 10. In order for res judicata to apply, the same issue under consideration must have been passed upon or conclusively decided in an earlier proceeding.

{¶25} In the present case, although the commission awarded relator PTD compensation based upon his allowed condition, the commission did not determine, at that time, that relator had sustained a loss of use of both legs. The commission had

relied upon the reports of Drs. Raghavan and Veres to grant relator's application for PTD compensation. In his report, Dr. Raghavan noted several times that relator maintains that he cannot stand or walk. Dr. Raghavan did not perform any tests to determine whether or not relator could actually stand or walk.

{¶26} In Dr. Veres' report, he noted that relator was obese and was currently wheelchair bound secondary to his allowed condition. Nothing in that report establishes that relator has lost the use of both legs. As such, relator is mistaken to argue that the medical evidence upon which the commission relied to grant him PTD compensation conclusively established that he had lost the use of his legs.

{¶27} In the present case, all the physicians who examined relator acknowledged that he uses a wheelchair because, in relator's opinion, he cannot walk. There simply is no medical evidence in the record which establishes that relator cannot stand or walk due to his allowed condition. Further, the fact that relator has been provided a wheelchair is likewise not conclusive evidence that he is incapable of standing or walking. Relator simply did not meet his burden of proof and the commission did not abuse its discretion in denying his motion for a total loss of use.

{¶28} Based on the foregoing, it is this magistrate's conclusion that relator has not demonstrated that the commission abused its discretion in denying him an award for the total loss of use of his legs and relator's request for a writ of mandamus should be denied.

/s/ *Stephanie Bisca Brooks*  
STEPHANIE BISCA BROOKS  
MAGISTRATE

**NOTICE TO THE PARTIES**

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