



total loss of use of his left leg, and to order the commission to enter an order granting that compensation.

{¶2} We referred this case to a magistrate of this court pursuant to Loc.R. 12(M) and Civ.R. 53. On April 28, 2009, the magistrate issued a decision, a copy of which is attached to this decision, recommending denial of relator's request for a writ of mandamus. Relator filed objections to the magistrate's decision.

{¶3} Relator sustained a work-related injury on July 31, 2001. His claim had been allowed for "fracture calcaneus – closed, left; ankle enthesopathy, left; peroneal tendonitis, left ankle; depressive disorder." In May 2005, relator filed a motion requesting that he be awarded compensation for the total loss of use of his left leg. A staff hearing officer ("SHO") denied the motion, and the commission upheld the SHO's decision. Relator filed an action in this court seeking a writ of mandamus. We denied the writ, finding that the commission did not abuse its discretion in denying the requested compensation. *State ex rel. Paneto v. Indus. Comm.*, 10th Dist. No. 05AP-694, 2006-Ohio-3107.

{¶4} On November 16, 2007, relator sought an award for permanent total disability ("PTD"). The commission granted the application based on the allowed conditions. After he was awarded PTD, relator filed another motion seeking scheduled loss compensation for the total loss of use of his left leg. A district hearing officer ("DHO") denied the motion, finding that: (1) the issue was res judicata, based on the previous denial of scheduled loss compensation and the lack of any change in circumstances warranting the commission's exercise of continuing jurisdiction; (2) there was a lack of medical evidence supporting the claim that relator had experienced a total loss of the use

of his leg; and (3) that the degree of the injury did not rise to the level necessary to support a scheduled loss award.

{¶5} After a hearing, the SHO affirmed the DHO's decision. The commission denied relator's appeal of the SHO's decision. Relator then filed this action.

{¶6} In her decision, the magistrate analyzed the medical evidence in the record and concluded that the evidence had not changed in the time since relator's last application for scheduled loss compensation was denied. As a result, the magistrate concluded that *res judicata* precluded relitigation of relator's claim. In reaching this conclusion, the magistrate rejected relator's argument that the commission's award of PTD constituted a change in circumstances such that relator's claim for scheduled loss compensation may be revisited.

{¶7} The magistrate also concluded that the medical evidence showed that relator did not suffer a total loss of the use of his left leg. In reaching this conclusion, the magistrate stated that the commission "did not abuse its discretion in concluding that relator had not demonstrated that his loss of use is functionally equivalent to an amputation."

{¶8} In his objections, relator argues that the magistrate applied an incorrect legal standard by concluding that, in order to support a claim for scheduled loss compensation for the total loss of use of his left leg, relator had to show that the injury to his leg was functionally equivalent to an amputation. Relator further argues that, assuming that this was the proper legal standard, the magistrate failed to properly consider how the evidence applied to that standard.

{¶9} Relator's objections do not address the magistrate's conclusion that res judicata applies because there has been no showing that a change in circumstances justifies revisiting the previous denial of relator's claim for scheduled loss compensation. We have reviewed the magistrate's decision regarding that issue, and conclude that the magistrate correctly decided that the grant of PTD to relator does not, in and of itself, constitute a change in circumstances that would permit consideration of relator's claim for scheduled loss compensation, and no other evidence in the record supports a conclusion that a change in circumstances has occurred. Because relator has not challenged this wholly dispositive determination, his objections to the other aspects of the magistrate's decision are moot. Therefore, we need not address them.

{¶10} Consequently, we adopt that portion of the magistrate's decision concluding that res judicata precludes further consideration of relator's claim for a scheduled loss award, overrule relator's objections as moot, and deny the requested writ of mandamus.

*Objections overruled as moot;  
writ of mandamus denied.*

BRYANT and CONNOR, JJ., concur.

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

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Luiz A. Paneto,	:	
	:	
Relator,	:	
	:	
v.	:	No. 08AP-926
	:	
Sergio Matos, Matos General Contracting and The Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
	:	
Respondents.	:	
	:	

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

Rendered on April 27, 2009

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*Shapiro, Marnecheck & Reimer, Philip Marnecheck and  
Matthew A. Palnik, for relator.*

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

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IN MANDAMUS

{¶11} Relator, Luiz A. Paneto, has filed this original action requesting that this court issue a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order which denied relator's application for total loss of use of his left leg, pursuant to R.C. 4123.57(B), and ordering the commission to find that he is entitled to that award.

Findings of Fact:

{¶12} 1. Relator sustained a work-related injury on July 31, 2001, when he fell off a roof to the ground and landed on his left foot. Relator's workers' compensation claim has been allowed for "fracture calcaneus – closed, left; ankle enthesopathy, left; peroneal tendonitis, left ankle; depressive disorder."

{¶13} 2. Relator has undergone multiple surgeries for his left foot and has participated in extensive post-surgery physical therapy.

{¶14} 3. In May 2005, relator filed a motion requesting that he be awarded compensation for the total loss of use of his left leg, pursuant to R.C. 4123.57(B).

{¶15} 4. On October 28, 2005, the commission, through its staff hearing officer ("SHO"), denied relator's request for a total loss of use award as follows:

The Staff Hearing Officer finds, per the 07/12/2005 report of Dr. Mahna, that claimant has failed to establish that he sustained the loss of use of his leg. The Staff Hearing Officer finds that no award under O.R.C. 4123.57(B) is indicated. Both Dr. Mahna and Dr. Mease (04/30/2005 report) find that claimant retains minimal use of his left lower extremity thereby indicating that he has not suffered any loss equal to that which would have been sustained by way of amputation. Additionally, physical therapy notes from as recent as March 2005 through April 2005, indicate that claimant was capable of performing various types of exercises involving his left foot, such as toe and heel raises. The Staff Hearing Officer finds that cumulative evidence on file indicates that claimant has not sustained a complete functional loss of his left lower extremity such as would justify an award under [R.C.] 4123.57(B).

{¶16} 5. Relator filed a mandamus action in this court. In a judgment entry filed December 5, 2006, this court adopted the magistrate's decision and denied the requested writ of mandamus. As such, this court concluded that the commission did not

abuse its discretion in finding that there was some medical evidence in the record to support the finding that relator had not sustained a total loss of use of his leg.

{¶17} 6. On November 16, 2007, relator filed an application for permanent total disability ("PTD") compensation.

{¶18} 7. Relator's application was granted based solely upon the allowed physical conditions. Specifically, the commission relied on the September 25, 2007 report of Ralph Kovach, M.D., and the February 22, 2008 report of Carl V. Metz, M.D.

{¶19} 8. Dr. Kovach concluded:

After reviewing the medical record and performing an examination, it is my medical opinion that he is limited to 100% sit-down work – no walking or standing. I believe that has also been supported in the independent medical evaluations of this patient. If the definition of sedentary work involves standing or walking, I am of the opinion that he meets with a permanent and total disability status. This is my medical opinion within all reasonable certainty. His inability to engage in sustained employment that requires any standing or walking relates directly to this injury.

{¶20} 9. Dr. Metz concluded that relator's allowed physical conditions had reached maximum medical improvement, assessed a 25 percent whole person impairment due to relator's gait derangement, and noting relator's moderate to markedly gait abnormality and his routine use of a cane. Dr. Metz concluded that, from a physical standpoint, relator was incapable of work.

{¶21} 10. Based on the commission's finding that relator's physical condition rendered him permanently and totally disabled, relator refiled his application for a total loss of use of his left leg on May 21, 2008.

{¶22} 11. Relator's motion was heard before a district hearing officer ("DHO") on July 1, 2008. The DHO denied relator's request as follows:

The C-86 Motion filed 05/21/2008 requesting an award for scheduled loss of use of left leg is denied for three reasons. First the District Hearing Officer notes that the issue is res judicata. The District Hearing Officer finds that there are insufficient change in circumstances to warrant continuing jurisdiction. The District Hearing Officer finds the matter was previously adjudicated and denied pursuant to a 10/28/2005 Staff Hearing Officer order. A granting of permanent total disability application is insufficient change in circumstance to warrant reexamining this issue.

The second basis of denial of the scheduled loss of use is based on a medical reason. The District Hearing Officer notes that there is no medical evidence cited by claimant that indicates the claimant has a "total loss of use of left leg". Claimant's counsel concedes the fact that there is no medical evidence meeting the minimal medical standard.

The third basis for denial is based on a legal reason that claimant does not meet the statutory level necessary for a scheduled loss of use. It is well settled law that for a scheduled loss of use award either amputation or a complete functional loss of an extremity akin to an amputation would be necessary to justify a scheduled loss award. The District Hearing Officer notes that while the claimant has a serious left leg condition that has rendered him permanently and totally disabled, he has not met this burden. The claimant for example walked into the hearing room with a cane on the left lower extremity. On February 28, 2008 [sic], the claimant was examined by Industrial Commission Dr. Karl V. Metz. Dr. Metz found that claimant's left hindfoot was fused in the neutral position however he was able to walk without a cane to the examining room and demonstrated a moderately severe limp. Therefore based on this evidence the District Hearing Officer finds that claimant has not had a loss of use that would rise to the level of a scheduled loss award. The motion is denied.

(Emphasis sic.)

{¶23} 12. Relator's appeal was heard before an SHO on September 15, 2008.

The SHO affirmed the prior DHO's order and denied relator's request as follows:

The Staff Hearing Officer notes that the claimant request for a scheduled loss of use was denied previously, by Staff Hearing Officer order dated 10/28/2005. Claimant was subsequently granted a permanent total disability award. The Staff Hearing Officer notes that this granting of a permanent total disability award does not in and of itself indicate that the claimant also has the required disability for a scheduled loss of the left leg. The District Hearing Officer noted in his 07/01/2008 order that the issue is res judicata because of the 10/28/2005 Staff Hearing Officer order. The Staff Hearing Officer at present, affirms this finding, and finds no new or changed circumstances exist since that 10/28/2005 Staff Hearing Officer denial.

If, in fact, the issue is not res judicata, the request for scheduled loss of use is denied based upon the fact that the claimant has not met his burden of proof that claimant's loss is a total loss of use of the left leg. The District Hearing Officer noted in his 07/01/2008 order, that claimant's counsel conceded the fact that there is no medical evidence meeting the minimal medical standard. The District Hearing Officer further denied the request based upon a, "legal reason claimant does not meet the statutory level necessary for a scheduled loss of use."

\* \* \* [F]or claimant to be awarded a scheduled loss of use, the functional loss must be akin to an amputation.

The District Hearing Officer noted that the claimant does in fact suffer a serious left leg condition that has rendered him permanently and totally disabled, but the District Hearing Officer found that the claimant had not met his burden of proof regarding the statutory level necessary for a scheduled loss of use.

The claimant was examined on 02/28/2008 [sic] by Dr. Metz. Dr. Metz found the claimant was able to walk into the hearing room with a cane on the left lower extremity. Dr. Metz found that the claimant's left hind foot was fused in the neutral position, however, he was able to walk without a

cane to the examining room and demonstrated a moderately severe limp.

{¶24} 13. Relator's further appeal was refused by order of the commission mailed October 2, 2008.

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

Conclusions of Law:

{¶26} 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.

{¶27} Relator appears to be arguing that the commission's decision to grant him an award of PTD compensation means that the condition of his left leg is so severe that, if it renders him permanently and totally disabled, it must also constitute a total loss of use. For the reasons that follow, it is this magistrate's decision that relator's arguments lack merit.

{¶28} First, relator's 2005 request for a total loss of use of his left leg was denied based upon evidence that he was still able to use his leg to ambulate. The medical evidence has not changed. Specifically, in his February 22, 2008 report, Dr. Metz noted that relator was able to walk into the exam room without his cane, but that he demonstrated a moderately severe limp. Similarly, Dr. Kovach noted that, while relator is unable to place weight on his left leg and his walking ability is significantly limited, relator is able to stand, walk, and climb although largely impaired. Further, he noted that relator experiences marked pain with ambulation.

{¶29} The current medical evidence in the record has not changed from 2005. Specifically, Dr. Gordon Zellers had noted that relator was able to ambulate with the assistance of both his boot and two crutches. Dr. Donald J. Sherman noted that relator used a cane for ambulatory assistance and appeared to be in moderately severe distress. Dr. Cyril E. Marshall noted that relator had not been able to wear regular shoes since 2002, he cannot place his left heel on the floor, and that he was only partially weight bearing on his left foot. Dr. Elizabeth Mease noted that relator was in no apparent distress, was wearing a lost post-op shoe, had an antalgic gait, favors weight bearing on the right, and that he uses a cane.

{¶30} Res judicata operates to preclude the relitigation of a point of law or fact that was issued in a former action between the same parties and which was passed upon by a court of competent jurisdiction. *Consumers' Counsel v. Pub. Util. Comm.* (1985), 16 Ohio St.3d 9. Both the commission and this court on review upheld the denial of a total loss of use for relator's left leg. The issue has been raised and decided and, since the medical evidence has not changed, res judicata would apply.

{¶31} Relator is correct to argue that if he could demonstrate new and changed circumstances the issue could be revisited. Relator claims that the medical evidence demonstrates that his leg condition has deteriorated and specifically that the commission's order granting him PTD compensation constitutes a change in circumstance.

{¶32} While relator's leg could be said to continue to deteriorate, the medical evidence still demonstrates that relator is able to use his leg in spite of the fact that doing so is painful. The commission relied upon the medical report of Dr. Metz who found that relator's left foot was fused in the neutral position but that he was able to walk without a cane to the examining room with a moderately severe limp. The commission did not abuse its discretion in concluding that relator had not demonstrated that his loss of use is functionally equivalent to an amputation.

{¶33} Based on the foregoing, it is this magistrate's conclusion that relator has not demonstrated that the commission abused its discretion in denying him a loss of use award and this court should deny relator's request for a writ of mandamus.

/s/ Stephanie Bisca Brooks  
STEPHANIE BISCA BROOKS  
MAGISTRATE

### **NOTICE TO THE PARTIES**

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