

[Cite as *State ex rel. Carter v. Indus. Comm.*, 2009-Ohio-5547.]

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

State of Ohio ex rel. David C. G. Carter,	:	
Relator,	:	
v.	:	No. 09AP-30
Industrial Commission of Ohio	:	(REGULAR CALENDAR)
and D & D Enterprises, Inc.,	:	
Respondents.	:	
State of Ohio ex rel. Davyne Carter,	:	
Relator,	:	
v.	:	No. 09AP-71
Industrial Commission of Ohio	:	(REGULAR CALENDAR)
and D & D Enterprises, Inc.,	:	
Respondents.	:	

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D E C I S I O N

Rendered on October 20, 2009

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*Agee, Clymer, Mitchell & Laret, Eric B. Cameron, C. Russell Canestraro, and Robert M. Robinson, for relator David C. G. Carter.*

*Heinzerling & Goodman, LLC, and Mark Heinzerling, for relator Davyne Carter.*

*Richard Cordray, Attorney General, and Sandra E. Pinkerton, for respondent Industrial Commission of Ohio.*

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IN MANDAMUS  
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

FRENCH, P.J.

{¶1} Relators, David C. G. Carter and Davyne Carter, dependent children of David E. Carter ("decedent"), each filed an original action in mandamus requesting this court to issue a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its order to the extent that it denied R.C. 4123.57(B) scheduled-loss compensation for the alleged loss of use of decedent's upper extremities and left lower extremity during a period of chemically induced paralysis that ended at his death.

{¶2} This court referred this matter to a magistrate pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate issued a decision, which includes findings of fact and conclusions of law and is appended to this decision, recommending that this court deny the requested writs. Relators filed objections to the magistrate's decision. Through these objections, relators contend that (1) the magistrate defined "permanent" inappropriately for purposes of determining whether a loss of use is permanent under R.C. 4123.57(B), (2) misapplied applicable case law, and (3) relied on speculation instead of medical evidence.

{¶3} As detailed in the magistrate's decision, decedent sustained a gunshot wound while employed as a nightclub bouncer. In the course of his treatment, his right leg was amputated. He also was sedated and chemically paralyzed. Relators argued

that decedent suffered a permanent loss of use, not only of his right leg, but also of his upper extremities and left leg. Specifically, they argued that the induced paralysis caused a loss of use, which became permanent upon his death. The commission awarded loss-of-use compensation for his right leg, but denied loss-of-use compensation related to his upper extremities and left leg. The magistrate concluded that the commission had not abused its discretion by doing so. We agree.

{¶4} First, we reject relators' arguments that the magistrate defined "permanent" inappropriately for these purposes. Because R.C. 4123.57 does not define the term "permanent," the magistrate looked to other helpful, but not controlling, definitions of the term. The magistrate did not err by doing so.

{¶5} Second, we agree with the magistrate that *State ex rel. Moorehead v. Indus. Comm.*, 112 Ohio St.3d 27, 2006-Ohio-6364, is distinguishable from this case. While the evidence in *Moorehead* showed that the decedent had suffered permanent, albeit brief, paralysis prior to his death, the evidence here indicates that decedent's induced paralysis was a temporary measure designed to aid in his recovery. There is no evidence that, but for decedent's death, the paralysis would have been permanent.

{¶6} Finally, we reject relators' contention that the commission and the magistrate relied on conjecture to conclude that decedent's paralysis was only temporary. An applicant bears the burden of proving entitlement to compensation. *State ex rel. Yellow Freight Sys., Inc. v. Indus. Comm.*, 81 Ohio St.3d 56, 57, 1998-Ohio-654. As applied here, relators bore the burden to show that decedent's loss of use was permanent. Relators did not meet that burden, and the commission properly denied compensation.

{¶7} For all these reasons, we overrule relators' objections. Having conducted an independent review of the evidence, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained in it. In accordance with the magistrate's decision, we deny the requested writs.

*Objections overruled,  
writs of mandamus denied.*

TYACK 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. David C. G. Carter,	:	
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Relator,	:	
	:	
v.	:	No. 09AP-30
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Industrial Commission of Ohio	:	(REGULAR CALENDAR)
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Respondents.	:	
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State of Ohio ex rel. Davyne Carter,	:	
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v.	:	No. 09AP-71
	:	
Industrial Commission of Ohio	:	(REGULAR CALENDAR)
and D & D Enterprises, Inc.,	:	
	:	
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 July 22, 2009

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*Agee, Clymer, Mitchell & Laret, Eric B. Cameron, C. Russell Canestraro and Robert M. Robinson, for relator, David C. G. Carter.*

*Heinzerling & Goodman, LLC, and Mark Heinzerling, for relator, Davyne Carter.*

*Richard Cordray, Attorney General, and Sandra E. Pinkerton, for respondent Industrial Commission of Ohio.*

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IN MANDAMUS

{¶8} Relators<sup>1</sup>, David C. G. Carter and Davyne Carter, are the dependent children of David E. Carter ("decedent") who died October 17, 2006 as a result of a gunshot wound sustained October 14, 2006 while decedent was employed as a nightclub bouncer/security guard. Relators request a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order to the extent that it denies R.C. 4123.57(B) scheduled loss compensation for the alleged loss of use of decedent's upper extremities and left lower extremity during a period of chemically-induced paralysis that ended at his death.

Findings of Fact:

{¶9} 1. On October 14, 2006, decedent received a gunshot wound while employed as a bouncer/security guard at a nightclub operated by D & D Enterprises, Inc., a state-fund employer. On that date, decedent was transported to Grant Medical Center ("Grant") for emergency treatment.

{¶10} 2. An October 14, 2006 Grant emergency department note states, in pertinent part:

The patient is a 25-year-old male who presents to the emergency department[.] \* \* \* He has sustained a gunshot wound to the mid abdomen.

\* \* \*

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<sup>1</sup> On July 20, 2009, amended complaints were filed. The Estate of David E. Carter was deleted as a co-relator.

He arrives appearing slightly agitated. He is profusely diaphoretic. He is able to move all extremities.

The patient was intubated given his hypotension and agitation.

{¶11} 3. A Grant "progress note" dated October 14, 2006 states: "Out from [operating room], beginning to wake up and attempts made to pull [at endotracheal tube], soft wrist restraints applied."

{¶12} 4. Another Grant record dated October 14, 2006 states: "[Patient] paralyzed [and] sedated. \* \* \* [Patient] chemically paralyzed [and] sedated."

{¶13} 5. Another Grant record dated October 15, 2006 states: "[Patient with] chemical paralysis."

{¶14} 6. Another Grant record dated October 16, 2006 states: "[Patient] Chemically paralyzed."

{¶15} 7. On October 16, 2006, decedent underwent a "[r]ight knee disarticulation," which is described in a Grant operative report dated October 16, 2006. Authored by the physician who assisted with surgery, the operative report states in part:

The patient is a 25-year-old male who had a gunshot wound to the abdomen on 10/14/06 that caused damage to his external iliac artery. He had operative repair by vascular surgery but had prolonged ischemia of his right leg. This necessitated compartment releases in the leg. Several hours later, orthopedics was consulted for compartment releases in the thigh. The patient was then admitted to the ICU and has since developed rhabdomyolysis with large amounts of myoglobin and acute renal failure secondary to this. It was felt that his leg had sustained ischemic damage and after obtaining the family's consent, he was brought to the [operating room] for evaluation of this and then performance of a through the knee amputation. \* \* \*

\* \* \* [W]e are very concerned about the risk of multi-system organ failure and eventual death and we will follow the patient closely with the ICU team.

{¶16} 8. The record contains a Grant "discharge summary" authored by Frank Moskos, M.D., for Stuart J. Chow, D.O. The report states:

#### HOSPITAL COURSE

The patient was taken to the operating room per trauma services for exploratory laparotomy, repair of inferior vena cava with saphenous vein graft to the artery and vein per Dr. Chow and Dr. Franz. The patient was then transferred to the ICU for further monitoring and resuscitation. Further workup also revealed a right thigh compartment syndrome and orthopedics was called to evaluate the patient and was taken to the operating room for right thigh fasciotomy. The patient later became unstable and coded and was resuscitated appropriately. It was decided that the patient would need full anticoagulation and assessment for myonecrosis, given his symptoms. The patient was found to be in rhabdomyolysis and a Mahurkar dialysis catheter was then placed. Overall the patient was found to be hemodynamically labile and required aggressive resuscitation and also had a climbing creatinine. The patient was maintained on mechanical ventilation on pressors and was weaned off as tolerated. The patient was found to have acute tubular necrosis secondary to ATM. The patient was then taken to the operating room again for a through the knee amputation per orthopedics. The patient then coded again. The patient was in aysstole and required resuscitation. It was discussed with the family the patient's code status and they wanted the patient to be taken off life support if he coded again. Chest tubes were then placed for a large hemothorax after the code, and the patient was then maintained on pressor agents. The patient then became pulseless and arrested again and was pronounced at 1519 on 10/17/06.

{¶17} 9. The industrial claim (number 06-893758) is allowed for "gunshot wound to the abdomen."

{¶18} 10. On October 12, 2007, counsel moved for R.C. 4123.57(B) scheduled loss compensation for the alleged loss of use of both arms and legs. However, the motion failed to indicate that it was made on behalf of David C. G. Carter.

{¶19} 11. Following a February 13, 2008 hearing, a district hearing officer ("DHO") issued an order finding a lack of jurisdiction over the request for compensation because the October 12, 2007 motion failed to indicate that it was made on behalf of David C. G. Carter as decedent's dependent. The DHO's order explains, in pertinent part:

There was no application filed by a dependent or a person with standing within one year of the date of death. The C-86 Motion only listed the decedent, David Carter, as the applicant for this award.

{¶20} 12. David C. G. Carter administratively appealed the DHO's order of February 13, 2008.

{¶21} 13. Following a March 27, 2008 hearing, a staff hearing officer ("SHO") issued an order that vacates the DHO's order of February 13, 2008.

{¶22} The SHO's order of March 27, 2008 finds that the October 12, 2007 motion was timely filed on behalf of David C. G. Carter who was born April 18, 2007, following decedent's death. The order also finds that David C. G. Carter is decedent's wholly dependent son.

{¶23} The SHO's order awards to David C. G. Carter scheduled loss compensation for the loss of use of decedent's right leg, but denies such compensation for the alleged loss of use of decedent's upper extremities and left leg.

{¶24} Mailed May 17, 2008, the SHO's order of March 27, 2008 explains:

It is the finding of the Staff Hearing Officer that the decedent sustained a loss of use of his right leg and it is the order of the Staff Hearing Officer that the decedent is entitled to 200 weeks of compensation pursuant to ORC 4123.57(B). The decedent had a through the knee amputation of his right leg on 10/16/2006. The amputation was related to the injury in this claim. The above finding is based on the operative report of 10/16/2006 and the Grant Medical Center records of 10/14/2006 to 10/17/2006.

It is the further order of the Staff Hearing Officer that a loss of use award is denied in regard to the decedent's left leg and both arms. The Staff Hearing Officer finds the evidence does not document a functional loss of use of those body parts. Based on the 10/14/2006 emergency room report, the decedent was able to move all extremities at the time of his admission. Surgery was performed on 10/14/2006 to repair the decedent's gunshot wounds. Post-operatively the decedent developed a compartment syndrome and additional surgery was performed. That surgery was not successful and the decedent had another surgery that resulted in the amputation of his right leg. Following that procedure, the decedent was chemically paralyzed and placed on a ventilator in an effort to stabilize his condition and to save his life. He never regained consciousness and died while still chemically paralyzed.

The applicant's attorney argues that the decedent had a functional loss of his left leg and both arms during the period he was chemically paralyzed, and that the condition became permanent when the decedent died. Counsel cites to the case of [*State ex rel. Moorehead v. Indus. Comm.*, 112 Ohio St.3d 27, 2006-Ohio-6364] to support the above position. The Staff Hearing Officer does not agree. In Moorehead, the injured worker fell 15 to 20 feet onto concrete. He sustained a spinal cord injury and was immediately rendered a quadriplegic. He never regained consciousness following his injury and it was determined an injured worker does not need to regain consciousness in order to be eligible for a loss of use award. That is not the situation here as the injured worker in Moorehead had a documented permanent loss of use prior to his death, not a temporary loss.

In the instant case, there is medical evidence that the decedent had the use of his extremities following the injury. There was no instantaneous loss of the use of any extremity nor a loss of consciousness. While hospitalized, a complication developed that resulted in the amputation of his right leg. The amputation was clearly causally related to the injury and resulted in the permanent loss of use of that body part. Following the amputation, the decedent's medical condition continued to deteriorate. At that time, his doctors made a medical decision to chemically paralyze him and place him on [a] ventilator in an effort to stabilize his condition and to save his life. Their effort was unsuccessful.

At the time the decedent was chemically paralyzed, there is no medical evidence that he had any permanent loss of use or function of his left leg or either arm. Those extremities were rendered artificially non-functional due to chemicals. Consequently, up until the point in time that the decedent died, there is no medical evidence that the decedent had any permanent loss of use, functional or otherwise, of those body parts. The evidence only supports a finding of a temporary loss of function due to the chemicals administered. This does not meet the requirements of ORC 4123.57(B) that the decedent had to sustain a permanent loss of use of the body parts being requested to be eligible for a loss of use award. Therefore, a loss of use award for the left leg and both arms is denied.

{¶25} 14. Earlier, Davyne Carter moved that she be declared a wholly dependent daughter of decedent. On May 29, 2008, the Ohio Bureau of Workers' Compensation issued an order finding Davyne Carter to be wholly dependent upon decedent.

{¶26} 15. In June 2008, citing the SHO's order of March 27, 2008 awarding compensation to David C. G. Carter, Davyne Carter moved that she be awarded one-half of the compensation awarded to David C. G. Carter.

{¶27} 16. The SHO's order of March 27, 2008 was administratively appealed.

{¶28} 17. On June 4 and 12, 2008, another SHO mailed orders denying the administrative appeals from the SHO's order of March 27, 2008.

{¶29} 18. On June 24, 2008, the commission issued an order vacating the SHO's refusal orders of June 4 and 12, 2008.

{¶30} 19. On August 8, 2008, the three-member commission issued an interlocutory order stating that the administrative appeals from the SHO's order of March 27, 2008 are accepted and will be heard by a commission deputy.

{¶31} 20. Following an October 8, 2008 hearing, a commission deputy issued an order, mailed November 6, 2008, stating that the SHO's order of March 27, 2008 is "modified." The deputy's order was unanimously approved by the three-member commission.

{¶32} The deputy's order of October 8, 2008 finds that David C. G. Carter and Davyne Carter are the wholly dependent children of decedent and the order apportions the award so that each dependent receives 50 percent of the award.

{¶33} The deputy's order grants in part and denies in part the October 12, 2007 motion for scheduled loss compensation. The order explains:

The request for total loss of the right leg by amputation under R.C. 4123.57(B) is granted to the extent that 200 weeks are awarded to wholly dependent children to be divided as designated in this order. The decedent was originally injured when he was shot in the abdomen while working as a bouncer/security guard for a night club on the near west side of Columbus, Ohio. Multiple medical conditions developed as a result of the gun-shot wound eventually resulting in the amputation of the right leg while attempting to save the injured worker's life. This finding is based on the operative report from Grant [M]edical Center dated 10/16/2006 and medical center records from 10/14/2006 to 10/17/2006.

\* \* \*

It is further the finding of the Deputy that the request for an award for total loss of use of the left and right arms in addition to the total loss of use of the left leg under RC 4123.57(B) is denied. A review of the Grant Medical Center reports/records between the date of injury and date of death fail to show the decedent suffered a functional loss of use of these extremities. The Grant Medical Center emergency room record dated 10/14/2006 indicated the decedent was able to move all of his extremities. The gun-shot wound was surgically repaired, however, medical complications developed to the extent that the decedent's right leg was amputated, the decedent was eventually placed on chemical paralysis to try to save his life, but, he died without regaining consciousness. Although he could not move his extremities while on chemical paralysis, he was able to move his upper extremities and the left lower extremity before the induced paralysis and was expected to have full use of the extremities after he came out of the induced paralysis. Therefore, the dependents are not entitled to a scheduled loss under RC 4123.57 (B) for the upper two extremities and the left leg.

The decedent's representatives argued the dependents are entitled to an award under RC 4123.57 (B) for the upper extremities and the left leg under the precedent established in the case of State ex rel. Moorehead v. Indus. Comm. of Ohio, 2006-Ohio 6364. However, the instant claim is differentiated from the Moorehead case in that William Moorehead fell approximately 15 to 20 feet head first onto a concrete floor and suffered a severe cervical spinal cord injury. It rendered him quadriplegic. He never regained consciousness and died 90 minutes after the accident. The difference with the instant claim is that the cervical trauma caused a permanent loss of use of the respective extremities in the Moorehead case and the loss of use of the upper extremities and left leg in the instant claim was only temporary in nature from a chemical induced paralysis where if he recovered he would have full use of the extremities in question. The paralysis was induced by Grant Medical Center and not as a result paralytic trauma to the body. The loss of use of the extremities was not permanent prior to the time of death.

{¶34} 21. David C. G. Carter moved for reconsideration of the deputy's order.

{¶35} 22. On December 19, 2008, the three-member commission mailed an order denying reconsideration.

{¶36} 23. On January 12, 2009, David C. G. Carter filed the mandamus action in case number 09AP-30.

{¶37} 24. On January 22, 2009, Davyne Carter filed the mandamus action in case number 09AP-71.

{¶38} 25. The two mandamus actions have been consolidated pursuant to the request of relators.

Conclusions of Law:

{¶39} The main issue is whether the commission abused its discretion in determining that any loss of use of decedent's upper extremities and left leg during the period of chemical paralysis up to his death was not permanent within the meaning of R.C. 4123.57(B)'s provision for scheduled loss compensation.

{¶40} Finding that the commission did not abuse its discretion in finding a temporary, rather than permanent, condition of the three extremities at issue, it is the magistrate's decision that this court deny relators' requests for a writ of mandamus.

{¶41} R.C. 4123.57(B) provides a compensation schedule for the loss of enumerated body members, designating a number of weeks of compensation for loss of each member. *State ex rel. Welker v. Indus. Comm.*, 91 Ohio St.3d 98, 99, 2001-Ohio-292. The only compensable loss of use under R.C. 4123.57(B) is a permanent and total loss of use. *Id.*

{¶42} Originally, scheduled awards under R.C. 4123.57(B) were confined to amputations. *State ex rel. Alcoa Bldg. Products v. Indus. Comm.*, 102 Ohio St.3d 341, 2004-Ohio-3166, ¶10. However, through case law, loss has been construed to include loss of use without severance. *Id.* *Alcoa* clarified that a loss of use can be compensable if there is a loss "for all practical purposes." *Id.* Thus, the *Alcoa* court approved the all practical intents and purposes test. *Id.* at ¶13.

{¶43} In *Welker*, the court applied the permanency concept to a claim for scheduled loss compensation involving a successful surgical reattachment of the claimant's thumb. The *Welker* court rejected the claimant's argument that permanency is determined at the point of injury without regard to the subsequent surgical reattachment and the healing period indicating that reattachment was successful. *Id.* at 103. The *Welker* case is cited and discussed by all the parties to these actions.

{¶44} Here, relator Davyne Carter concedes that: "The entire point of the chemical paralysis was to prevent him from moving about in an attempt to dislodge various tubes or otherwise impede his recovery." (Relator's brief, at 10.) Also, relator David C. G. Carter concedes that: "[T]he paralysis was intended to be reversible." (Reply brief, at 5.)

{¶45} While relators concede that the chemical paralysis was intended to be therapeutic and reversible, they nevertheless posit that the paralysis was rendered permanent by the fact that the paralysis continued up to decedent's death.

{¶46} Relator David C. G. Carter asserts that decedent "experienced a Loss of Use for his left leg and both arms because they were paralyzed up to the time of death." *Id.* at 3. Relator further asserts:

If one sustains a loss and that loss is experienced without interruption until the point of death, that loss is permanent. Mr. Carter suffered a loss up to the time of death when his arms and left leg were paralyzed. \* \* \*

Id. at 5.

{¶47} Relator Davyne Carter asserts, in part:

It was argued before the commission by both Relator's [sic] that since Mr. Carter could not voluntarily move his limbs at his death he had suffered a permanent loss.

(Relator's brief, at 14.)

{¶48} Thus, both relators claim that it is decedent's death at the time of the chemically-induced paralysis that is key to a determination of whether the loss was temporary or permanent. Relators offer no authority to support their proposition that death turns an otherwise temporary condition into a permanent one for purposes of applying R.C. 4123.57(B).

{¶49} Relators' reliance upon *State ex rel. Moorehead v. Indus. Comm.*, 112 Ohio St.3d 27, 2006-Ohio-6364, is misplaced.

{¶50} William Moorehead fell approximately 15 to 20 feet head first onto a concrete floor while working on a raised platform at his job site. Upon impact, he suffered severe spinal cord and other injuries. Unrebuttable evidence established that the spinal cord injury rendered him a quadriplegic. Moorehead never regained consciousness and died 90 minutes after the fall.

{¶51} Moorehead's widow applied for death benefits and also for scheduled loss compensation based on loss of use of both arms and legs. The commission denied the application for scheduled loss compensation, observing that scheduled loss benefits

may be awarded only to injured workers who experience both a physical and sustained loss of use and also consciously perceive and experience the physical suffering and hardship caused by the loss of use of a body part in the period between injury and death. The commission stated that "the widow-claimant's application for such benefits must fail, as the decedent did not sustain the loss of his extremities, because he was comatose, and completely unaware of the extent of his injuries, for the brief period between the accident and his death." *Id.* at ¶3.

{¶52} In *Moorehead*, the Supreme Court of Ohio issued a writ of mandamus, explaining:

Similarly, there is no language in R.C. 4123.57(B) requiring that an injured worker be consciously aware of his paralysis in order to qualify for scheduled loss benefits. In an analogous case the Supreme Court of New Hampshire considered a scheduled loss application filed on behalf of a worker whose injury left him in an irreversible vegetative state. *Corson v. Brown Prods., Inc.* (1979), 119 N.H. 20, 397 A.2d 640. The application was denied administratively solely because Corson's vegetative state made him unaware of his loss. The New Hampshire Supreme Court vacated that decision and awarded scheduled loss compensation, writing:

"What is of paramount importance in this case is that words such as 'awareness' or 'consciousness' cannot be added under the guise of legislative history to a statute which clearly states that '[t]he scheduled awards under this section accrue to the injured employee simply by virtue of the loss or loss of the use of a member of the body.' \* \* \* When the language used in a statute is clear and unambiguous, its meaning is not subject to modification by construction." *Id.*, 119 N.H. at 23, 397 A.2d 640.

The same rule of statutory construction applies here. When "the meaning of the statute is unambiguous and definite, it must be applied as written and no further interpretation is necessary." *State ex rel. Savarese v. Buckeye Local School Dist. Bd. of Edn.* (1996), 74 Ohio St.3d 543, 545, 660 N.E.2d

463. R.C. 4123.57(B) does not say that compensation is dependent upon a claimant's conscious awareness of his or her loss, whether resulting from amputation or paralysis. Rather, where the requisite physical loss has been sustained, the statute directs that scheduled loss compensation shall be paid.

This court should not graft duration-of-survival or cognizance requirements to R.C. 4123.57(B), because the statute has no text imposing them. Public-policy arguments relative to the requisites of scheduled loss benefits pursuant to R.C. 4123.57 are better directed to the General Assembly, including arguments that a specified time of survival should be mandated after a paralyzing injury and that a worker be cognizant of his or her loss before loss-of-use benefits are payable.

The appellant proffered medical evidence establishing that William Moorehead sustained the physical loss of use of his limbs as a result of his fall. Consciousness of that loss during an extended period of survival is not required by R.C. 4123.57(B), and the commission therefore incorrectly applied the statute when it denied the appellant's application on that basis.

Id. at ¶16-20.

{¶53} Contrasting the *Moorehead* case with the instant one, the question in *Moorehead* was whether the commission was authorized to graft upon the statute duration-of-survival or cognizance requirements that are not addressed by the statute itself. Here, by contrast, the question relates to the meaning and application of the permanency requirement of R.C. 4123.57(B).

{¶54} The commission's application of the permanency requirement does not involve the grafting of additional requirements onto the statute because it is well-settled law that R.C. 4123.57(B) requires that the loss of use be permanent. *Welker*. Thus, the statutory construction issue addressed by the court in *Moorehead* is not of particular

relevance here even though decedent did not long survive his injuries nor was he cognizant of his condition during most of the period following his injury. In short, this is a case that delves into the meaning of permanency, unlike the situation in *Moorehead*.

{¶55} While *Welker* holds that a compensable loss of use under R.C. 4123.57(B) must be permanent, the *Welker* court did not offer a definition of permanency.

{¶56} Recently, in *State ex rel. DaimlerChrysler Corp. v. Indus. Comm.*, 121 Ohio St.3d 341, 2009-Ohio-1219, the court had occasion to discuss the meaning of permanency in the context of temporary total disability. There, the court states:

\* \* \* As early as 1944, this court articulated a definition of permanency that foreshadowed the definition of [maximum medical improvement] now in the Administrative Code. *Logsdon v. Indus. Comm.* (1944), 143 Ohio St. 508, 28 O.O. 429, 57 N.E.2d 75, held at paragraph two of the syllabus:

"The term 'permanent' as applied to disability under the workmen's compensation law does not mean that such disability must necessarily continue for the life of a claimant, but that it will, with reasonable probability, continue for an indefinite period of time without any present indication of recovery therefrom."

Common to both *Logsdon* and Ohio Adm.Code 4121-3-32(A)(1) is a probable lack of improvement, which, in the context of the Administrative Code definition, clearly refers to the underlying medical condition. *Logsdon* does, of course, refer to "disability," but it also preceded [*State ex rel. Stephenson v. Indus. Comm.* (1987), 31 Ohio St.3d 167], so it is not clear whether the term was employed purposefully or in a more generic sense.

Id. at ¶9-11.

{¶57} In the magistrate's view, the court's discussion of the meaning of the term "permanent" in *DaimlerChrysler* is helpful to the resolution of relator's claim that decedent's death turned a temporary paralysis into a permanent one.

{¶58} The determination of whether a condition is temporary or permanent, of necessity, involves a determination of the probable future status of the condition based upon current medical information. It is not a determination to be made from hindsight, but a determination of reasonable probability as to the future. *State ex rel. Matlack, Inc. v. Indus. Comm.* (1991), 73 Ohio App.3d 648, 658 ("[C]ourts have held that the permanency is not gauged on the basis of hindsight.").

{¶59} Thus, the relevant inquiry as to whether the chemically-induced paralysis was temporary or permanent is premised upon events at the time that the paralysis was chemically induced, not upon the hindsight view after decedent's death. *Id.*

{¶60} The deputy's order of October 8, 2008 correctly holds that decedent "was expected to have full use of the extremities after he came out of the induced paralysis." This expectancy is supported by the record and it supports the conclusion that the chemical paralysis was a temporary condition, not a permanent one.

{¶61} Relators criticize the deputy's finding of what outcome was expected when paralysis was chemically induced. Relators claim that the deputy engaged in speculation unsupported by evidence. They also claim that, because the medical outcome was not as planned, the paralysis cannot be viewed as temporary.

{¶62} But the definition of "permanent" in *Logsdon v. Indus. Comm.* (1944), 143 Ohio St. 508, undermines relators' arguments. It was not speculation for the deputy to determine the expectancy at the time that paralysis was chemically induced. Moreover, that decedent did not survive his injuries does not turn a temporary condition into a permanent one.

{¶63} Accordingly, for all the above reasons, it is the magistrate's decision that this court deny relators' requests 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).