

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Mike Coleman, :
 :
 Relator, :
 :
 v. : No. 10AP-287
 :
 Industrial Commission of Ohio and : (REGULAR CALENDAR)
 The Shurtleff & Andrews Corp., :
 :
 Respondents. :
 :

D E C I S I O N

Rendered on April 26, 2011

Agee, Clymer, Mitchell & Laret, and Robert M. Robinson, for relator.

Michael DeWine, Attorney General, and Sandra E. Pinkerton, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

SADLER, J.

{¶1} Relator, Mike Coleman, filed this original action seeking a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its order denying his August 7, 2009 motion for statutory permanent total disability ("PTD") compensation under former R.C. 4123.58(C) and to enter an order granting said compensation.

{¶2} Pursuant to Civ.R. 53 and Section (M), Loc.R. 12 of the Tenth Appellate District, this matter was referred to a magistrate who considered the action on its merits and issued a decision, including findings of fact and conclusions of law, which is appended hereto. The magistrate found that, pursuant to former R.C. 4123.58(C), the doctrine of collateral estoppel compelled the commission to enter an award of statutory PTD. Therefore, the magistrate recommended that this court issue a writ of mandamus ordering the commission to vacate its staff hearing officer's ("SHO") order of December 1, 2009, and to enter a new order that grants relator's August 7, 2009 motion for statutory PTD compensation under R.C. 4123.58(C).

{¶3} No party has filed objections to the magistrate's findings of fact; however, the commission has filed the following two objections with respect to the magistrate's conclusions of law:

[1.] The magistrate erred in finding that a scheduled loss of use award for an anklylosed shoulder mandates an award of statutory permanent total disability absent medical evidence that the claimant suffered an actual loss of use of two body parts.

[2.] The magistrate erred in finding that the number of weeks the bureau awarded under R.C. 4123.57(B) rather than the actual language of the award, controls the future application of the bureau's order.

{¶4} As set forth in the findings of fact, at issue here is the SHO's August 1, 2008 order that found a 100 percent loss of use of the right shoulder ankylosis and awarded permanent partial compensation for 225 weeks. Approximately one year later, relator moved for statutory PTD under former R.C. 4123.58(C), which provided:

The loss or loss of use of both hands or both arms, or both feet or both legs, or both eyes, or of any two thereof,

constitutes total and permanent disability, to be compensated according to this section. Compensation payable under this section for permanent total disability is in addition to benefits payable under division (B) of section 4123.57 of the Revised Code.

{¶5} The magistrate, relying primarily on *State ex rel. Thomas v. Indus. Comm.*, 97 Ohio St.3d 37, 2002-Ohio-5306, determined the SHO's order of August 1, 2008 must be given a binding effect such that an award of statutory PTD under the above-cited statute is compelled. In its first objection, the commission contends that in reaching his conclusion, the magistrate misapplied *Thomas*. We disagree.

{¶6} In *Thomas*, the claimant argued that "because he has been awarded a total loss of use of the right arm, that necessarily means that he has a total loss of use of the right hand and right arm which would then constitute the loss of two limbs and qualify him for statutory and permanent total disability." *Id.* at ¶3. Though the commission rejected this argument, the Supreme Court of Ohio agreed "with the reasoning provided by the court of appeals" that the claimant was indeed entitled to statutory PTD and a writ of mandamus ordering an award of the same. *Id.* at ¶6. In *State ex rel. Internl. Paper v. Trucinski*, 106 Ohio St.3d 203, 2005-Ohio-4557, the Supreme Court of Ohio declined to overrule *Thomas* and, instead, reiterated that if the commission has declared a total loss of use of an extremity a claimant is entitled to statutory PTD. *Id.* at ¶8.

{¶7} Accordingly, the commission's first objection is overruled.

{¶8} In its second objection, the commission contends the magistrate erred in finding the number of weeks awarded under R.C. 4123.57(B) is controlling. Contrary to the commission, we find the number of weeks was not controlling but, rather, was one of several factors in the record from which the magistrate based his conclusion.

{¶9} Accordingly, the commission's second objection is overruled.

{¶10} Upon review of the magistrate's decision, an independent review of the record, and due consideration of the commission's objections, we find that the magistrate has properly determined the pertinent facts and applied the appropriate law to those facts. Therefore, the commission's objections to the magistrate's conclusions of law 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 its SHO's order of December 1, 2009, and to enter a new order that grants relator's August 7, 2009 motion for statutory PTD compensation under former R.C. 4123.58(C).

*Objections overruled;
writ of mandamus granted.*

BRYANT, P.J., and DORRIAN, J., concur.

A P P E N D I X

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Relator,	:	
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v.	:	No. 10AP-287
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Industrial Commission of Ohio and	:	(REGULAR CALENDAR)
The Shurtleff & Andrews Corp.,	:	
	:	
Respondents.	:	
	:	

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

Rendered on January 28, 2011

Agee, Clymer, Mitchell & Laret, and Robert M. Robinson, for relator.

Michael DeWine, Attorney General, and Sandra E. Pinkerton, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶11} In this original action, relator, Mike Coleman, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order denying his August 7, 2009 motion for statutory permanent total disability ("PTD") compensation under former R.C. 4123.58(C) and to enter an order granting said compensation.

Findings of Fact:

{¶12} 1. On January 12, 1994, relator was severely injured when he fell from a ladder while employed as a boilermaker mechanic for a state-fund employer.

{¶13} 2. The industrial claim (No. 94-301254) is allowed for "closed fracture C-7 vertebra; closed fracture of T3 vertebrae; aggravation of pre-existing disc bulging at C4-C5; cervical spinal stenosis; cervical spondylosis; C5-C6 herniated disc; C4-C5 herniated disc; C3-C4 herniated disc; depressive disorder; bilateral rotator cuff tear; sprain bilateral shoulder; tendonitis bilateral shoulder; degenerative joint disease, bilateral shoulder."

{¶14} 3. On February 9, 2008, at the request of the Ohio Bureau of Workers' Compensation ("bureau"), relator was examined by Robert E. Frank, Jr., M.D., who specializes in internal medicine. In his six-page narrative report, Dr. Frank states:

Discussion: This individual was injured in 1994. He had cervical fusion surgery performed in 2003. His neck problem was complicated by a motor vehicle accident with further cervical spine fractures in 2006. Between the two of them, he has developed chronic neck pain which is stable. He does not appear to have any ongoing radiculopathy, although he does have hyperactive DTRs in the upper extremities with positive [illegible word] in the left hand. He has also had right shoulder surgery on several occasions, which has turned out to be a total failure. He is left with chronic pain in the right shoulder and markedly decreased range of motion. He also has some problems with the left shoulder, with allowed conditions of tear of rotator cuff and tendonitis. His symptoms are consistent with that. At one time surgery was contemplated but is not going to be performed. I agree with this decision not to operate on the left shoulder. Although he has some mild pain, he can elevate his left arm above the level of his head and reach back behind him. Any attempt to operate on the left shoulder, they will cause him to have worse pain and worsening range of motion compared to what he has now. As

such, trying to control his pain especially in the left shoulder with nonsurgical measures is most appropriate.

* * *

To specifically answer the questions asked, it should be noted that his recovery does fall outside the normal period of time for recovery, and this is related to the poor surgical outcome of the right shoulder. In some cases surgery is not successful. Since he had total shoulder replacement and the surgery was not successful, which sometimes happens, the shoulder is as good as it is going to get. Recovery is abnormal because of the failure of his surgical result. As far as his neck goes, chronic pain is not unusual in somebody who has had multilevel fusion surgery, which was then complicated by further cervical spine injury from the accident. As a result, chronic neck pain with some ongoing myelopathy is not unexpected. The recovery here is not considered to be abnormal, in fact he has made reasonable recovery, as much as one could expect, based upon the severity of his injuries. Regarding his left shoulder, he does have a stable degree of pain which is consistent with his allowed conditions of tendonitis and rotator cuff tear. Since no definitive surgery has been performed for this, his expected degree of pain fits the pain that he has. So recovery here is normal and expected.

In your medical opinion, has the injured worker reached a treatment plateau where he can be considered stabilized and MMI? I believe the answer is yes. The right shoulder is as good as it is going to get. Nothing will make the pain any better on a permanent basis. The neck is also stable and is as good as it is going to get. Lastly, since left shoulder surgery is not going to be performed, this is also as good as it is going to get. I feel he is definitely MMI from all of his allowed conditions.

This injured worker cannot return to his former position of employment and this is a permanent restriction. He will never be able to do strenuous type of work again because of his neck and bilateral shoulder problems.

Please see the physical capacity worksheet. Based upon this, I feel he is capable of many types of sedentary to light activity type of work. He can sit for prolonged periods of time. He can use his right arm at his side, although he cannot do any

forceful pushing or pulling, heavy lifting or lifting his arm above the level of his head. He is able to do most activities with his left arm except for heavy lifting and not using his arm above the level of his head. As a result, all types of sedentary to light activity type of work should be well tolerated by this individual. I feel he is an acceptable candidate for vocational retraining.

Is the current treatment necessary and appropriate for the medical conditions? The answer is yes. The medications are medically necessary and appropriate for his allowed conditions. In addition, the pain specialist may be changing some of his medications; I would have no problems with that. He is going to require various types of pain control measures such as medications for the remainder of his life.

{¶15} 4. On April 24, 2008, at relator's own request, he was examined by

W. Jerry McCloud, M.D. In his two-page narrative report, Dr. McCloud states:

Mr. Coleman has had a difficult time since the time of his incident with surgery on his neck as well as multiple surgeries on his right shoulder. He was employed as a boilermaker and related to me that he fell a distance of some 10 feet from a ladder and landed on a propane tank on the back of his neck extending towards his shoulder. As indicated, he has had considerable difficulty since that time. Regarding the right shoulder, he did have a right shoulder decompression done on March 1, 2006, but at the time it was not possible to repair the rotator cuff because the subscapularis portion of the rotator cuff had retracted so far that it could not be recovered. He did participate in a long interval of physical therapy but did so without any significant relief. By his estimation, and actually this can be confirmed from review of the notes of postoperative office visits he had more difficulty with the shoulder after the surgery than he did prior to the surgery. For that reason he was seen by Dr. Rosenberg who felt that his presentation was consistent with degenerative changes of the right shoulder, which is a condition that is allowed in the claim. On September 19, 2006, Dr. Rosenberg did a reverse total shoulder arthroplasty on the right side. I did review that operative note and it was a very difficult procedure, but Dr. Rosenberg was essentially pleased with the outcome and his motion following the procedure. Mr. Coleman again participated in a physical therapy program and actually

regained some of the motion of the shoulder that he has lost but not all. His primary complaints at this time are those related to loss of shoulder motion and the perception of weakness of his right upper extremity. He also has lost many functions associated with his right upper extremity, although he still retains some ability to participate in his activities of daily living and can participate in some activities that can be done basically at bench or waist level, but these are restricted as well.

On physical evaluation, there are several well-healed surgical scars over the right shoulder and there is obvious atrophy of the deltoid muscle and also obvious atrophy of both the suprascapular and subscapular muscles, and these are two of the muscles that constitute the rotator cuff. Because of the magnitude of the deltoid atrophy it is a little bit difficult to tell, but I think that he has had some avulsion of the deltoid muscle itself at its origination along the acromion and on back to the scapula. In any event, he does have abduction of the shoulder to approximately 70°. However, adduction is limited to 10° and it is noted that he has only 10° of both internal and external rotation, and this is with the shoulder in abduction as well as adduction. He will forward flex the shoulder some 90° and has extension to 10°. He cannot get his right hand to the top of his head as one would anticipate in combing his hair without using his left hand to further elevate the shoulder. When he does this he does not have any increase in the abduction of the shoulder, but rather the motion is coming at the scapula. Consistent with his history, he does have reasonable and comfortable motion with the elbow flexed at 90° or in activities that could be done basically at bench or waist level.

In summary, Mr. Coleman has considerable loss of motion and function of the shoulder with loss of the integrity of the shoulder muscles about the shoulder girdle. This is demonstrated primarily by the lack of adduction of the shoulder as well as lack of internal and external rotation. The latter finding becomes particularly important, as he would not be capable of any activities that would require that he would elevate his arm approaching shoulder level, and he cannot elevate his arm above shoulder level. As indicated, he cannot get his right hand to the top of his head without assistance from his left hand. He can do some things at bench level through roughly 20° of internal and external rotation of the

arm but would not be able to feed himself, as even if he could handle food at bench level he would be unable to get it to his mouth with his right hand. I think that he probably could open and close doors but would not have the strength to push the door open or to close the door even if he had the ability to operate the door knob. Therefore, he does have some very limited function of his right upper extremity, but for all practical purposes he does have functional loss of use of his right upper extremity. This opinion is based on his inability to perform many of his activities of daily living such as shaving, combing his hair, brushing his teeth, or moving food from table level up to his mouth, and then to adequately dress himself in an appropriate fashion. As indicated, he does have some functional capacities remaining in his right upper extremity, but the weight of the medical evidence would indicate that for all practical purposes he does have functional loss of use of the right upper extremity.

{¶16} 5. In early June 2008, relator filed a motion stating:

Now comes claimant, * * * and requests compensation for 100% total loss of functional use of the right arm. Dr. McCloud indicates that the claimant has lost the use of his right arm for all practical purposes. Dr. Frank previously evaluated for the BWC and indicates the claimant has no function of the right arm due to the allowed conditions in this claim. Therefore, claimant has lost the functional use of his right arm.

{¶17} In support of the motion, relator submitted the February 9, 2008 report of Dr. Frank and the April 24, 2008 report of Dr. McCloud.

{¶18} 6. On July 16, 2008, at the bureau's request, relator was examined by Ralph G. Rohner, Jr., M.D., who issued a three-page narrative report stating:

The examination shows an alert man who moves frequently. He had difficulty holding his pen and as a result of this, the office help filled out some of his papers because of his difficulty in writing. Axial load to the top of the head produced pain in his neck. Posterior cervical musculature though not spastic was tender with the tenderness extending down into the mid thoracic area as well. The upper extremity reflexes were intact, and his grasp though not strong was equal. Cervical motion was diminished in all areas. He had 15° of

flexion and 10° of extension. Rotation to the right and left was symmetrical at 10° as was lateral flexion at 5°. A surgical scar was present in his neck in relation to the fusion. His lower extremity reflexes were intact. The left shoulder had full active motion in flexion, extension, abduction, internal and external rotation. There was crepitation to the shoulder with motion and discomfort. He also had pain to palpation of stressing of the rotator cuff function. On the left, surgical scars were present with muscular atrophy. Active and passive range of motion of the shoulder was equal. There was 40° of flexion and abduction. Extension was 20°, and there was no rotation – internal or external. Motion of the shoulder especially if I tried to force the passive range of motion markedly increased the discomfort in his shoulder area.

I have reviewed the operative note from Dr. Rosenberg in reference to the total shoulder arthroplasty as well as the one from Dr. Mavian in reference to the fusion. He also has present in his chart numerous x-ray reports of the shoulder and neck and MRI studies confirming the diagnoses as allowed.

* * *

In my medical opinion, has the allowed injury resulted in total permanent loss of use to such a degree that the affected body part is useless for all practical purposes and is not capable of performing most of the functions for which is commonly performed as a result of the allowed conditions in this claim? Yes. This man is a heavy laborer and requires full motion and strength of his right shoulder as well as the ability to move the position of his neck frequently to do those duties. At the present time, he has significant limitation of motion involving both his neck and his right shoulder. He has significant weakness of the shoulder girdle musculature on the right with visible atrophy and no ability to raise the arm above the levels as listed in the exam. His neck motion is significantly restricted to the point that he in essence can only see that which is directly in front of him further limiting his ability to pursue substantial gainful employment in his field of occupation.

{¶19} 7. On August 1, 2008, the bureau mailed an order stating:

The Ohio Bureau of Workers' Compensation (BWC) has made the following decision:

The injured worker has sustained a 100% LOSS OF USE of the RIGHT SHOULDER ANKYLOSIS. It is ordered that the injured worker be awarded permanent partial compensation for 225 weeks at the rate of \$ 482.00 from 07/16/2008 to 11/06/2012. The total award is \$ 108,450.00.

* * *

This decision is based on:

[T]he report by Dr. Rohner dated 7/16/08 and BWC rules and guidelines.

{¶20} 8. The August 1, 2008 bureau order was not administratively appealed.

{¶21} 9. On August 7, 2009, relator moved for statutory PTD under former R.C.

4123.58(C). In his motion, relator asserted:

* * * Claimant was granted 100% loss of use of his right hand and arm. Therefore pursuant to 4123.57 and considering this is a 1994 claim my client is entitled to statutory permanent total disability compensation.

{¶22} In support of the motion, relator cited to the bureau's August 1, 2008 order and the reports of Drs. Frank and McCloud.

{¶23} 10. Following a December 1, 2009 hearing, a staff hearing officer ("SHO"), issued an order denying relator's August 7, 2009 motion for statutory PTD. The SHO's order explains:

The matter under consideration is not a standard permanent total disability compensation application, but the Injured Worker's C-86 Motion, filed 08/07/2009, seeking an award of compensation under R.C. 4123.58(C) for "statutory" permanent total disability compensation. The Injured Worker's application for such compensation is denied.

At the outset, the Injured Worker argued that the award of compensation made by the Administrator's order, dated 08/01/2008, is conclusive. This order awarded 225 weeks of compensation under R.C. 4123.57(B) for loss of use of the right upper extremity due to right shoulder ankylosis. The Staff Hearing Officer does not find that such an award conclusively requires an award of compensation under R.C. 4123.58(C). While the Supreme Court has not directly addressed the issue of whether an award for loss of use of an extremity is conclusive, in three highly similar matters, they had concluded that awards of compensation under R.C. 4123.57(B) do not conclusively require an award under R.C. 4123.58(C). In State ex rel. Gould v. Industrial Commission (1988), 40 Ohio St.3d 323, an award had been made under the special provision for an increase in an award for loss, or loss of use, of more than two fingers. The Supreme Court held in that case that such an award was not conclusive. Under State ex rel. Szatkowski v. Industrial Commission (1988), 39 Ohio St.3d 320, an award of compensation under R.C. 4123.57(B) for loss of vision was not conclusive in requiring an award under R.C. 4123.58(C), where a correction in vision was present. Finally, in State ex rel. Kincaid v. Allen Refractories Company, 114 Ohio St.3d 129, an award under R.C. 4123.57(B) was held not to be conclusive in requiring an award under R.C. 4123.58(C) where a loss of vision could be corrected. Taken together, the Staff Hearing Officer finds that this authority does stand for [the] proposition that an independent evaluation of the facts is indicated where an application for compensation under R.C. [4123].58(C) is made, even in the presence of a prior award under R.C. 4123.57(B).

An award of compensation under R.C. 4123.58(C) requires a showing by the Injured Worker of a loss, or loss of use, of two of the listed body parts. If a loss of use is being shown, it must be shown that the use has been lost to the point that it is useless for all practical purposes. After a review of the evidence on record, the Staff Hearing Officer finds that the Injured Worker has not shown a loss to that degree.

In support of both this motion and the prior motion for compensation under R.C. 4123.57(B), the Injured Worker submits the 02/09/2008 report of Robert E. Frank, Jr., M.D. Dr. Frank took a history from the Injured Worker in which the Injured Worker states that, "around the house he does most

of the housecleaning, some cooking, and can drive a car although at times this increases his shoulder pain, and he is also able to do light yardwork on a regular basis." Dr. Frank further noted that the Injured Worker stated that, "at times it is hard for him to write with his right hand because his arm can be prone to spasms." Upon examination, Dr. Frank concluded that the Injured Worker can use his right arm at his side, although he cannot do any forceful pushing or pulling, heavy lifting, or lifting his arm above the level of his head.

Also as a part of these applications, the Injured Worker submits the 04/24/2008 report of W. Jerry McCloud, M.D. Speaking of use of the right upper extremity, Dr. McCloud concluded that the Injured Worker, "does have reasonable and comfortable motion with the elbow flexed at 90 degrees or in activities that could be done basically at bench or waist level." Speaking of the right hand, Dr. McCloud stated, "I think that he probably could open and close doors but would not have the strength to push the door open or to close the door even if he had the ability to operate the door knob."

Finally, the Bureau of Workers' Compensation referred the Injured Worker for an examination on 07/16/2008 by Ralph G. Rohner, Jr. Like Dr. Frank and Dr. McCloud, Dr. Rohner came to a conclusory statement that the Injured Worker had a loss of use, but in doing so, Dr. Rohner discussed the Injured Worker's history as a heavy laborer requiring full motion and strength of his right shoulder, and in context does not appear to be answering the question as to whether the Injured Worker has lost the use of his right upper extremity for all practical purposes, or only if he has lost such use for vocational purposes in heavy labor.

Finally, at this hearing, the Injured Worker testified that he continues to be able to drive, although occasionally he experiences difficulty in doing so, and that he does use his right arm in doing so.

Taking all of these factors together, while it is plain that the Injured Worker has substantial loss of use of the right upper extremity, that loss of use does not rise to the level of a permanent and total loss and, consequently, the requested award under R.C. 4123.58(C) is denied.

{¶24} 11. On February 6, 2010, the three member commission, on a two-to-one vote, denied reconsideration of the SHO's order of December 1, 2009.

{¶25} 12. On March 30, 2010, relator, Mike Coleman, filed this mandamus action.

Conclusions of Law:

{¶26} The issue is whether the doctrine of collateral estoppel or issue preclusion compels the commission to enter an award of statutory PTD. Finding that the doctrine does compel an award of statutory PTD, it is the magistrate's decision that this court issue a writ of mandamus, as more fully explained below.

{¶27} On the date of the industrial injury and currently, R.C. 4123.57(B) provides:

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 hand, one hundred seventy-five weeks.

For the loss of an arm, two hundred twenty-five weeks.

{¶28} On the date of the industrial injury, former¹ R.C. 4123.58(C) provided:

¹ Effective June 30, 2006, R.C. 4123.58(C) currently provides:

Permanent total disability shall be compensated according to this section only when at least one of the following applies to the claimant:

(1) The claimant has lost, or lost the use of both hands or both arms, or both feet or both legs, or both eyes, or of any two thereof; however, the loss or loss of use of one limb does not constitute the loss or loss of use of two body parts;

(2) The impairment resulting from the employee's injury or occupational disease prevents the employee from engaging in sustained remunerative employment utilizing the employment skills that the employee has or may reasonably be expected to develop.

The loss or loss of use of both hands or both arms, or both feet or both legs, or both eyes, or of any two thereof, constitutes total and permanent disability, to be compensated according to this section. Compensation payable under this section for permanent total disability is in addition to benefits payable under division (B) of section 4123.57 of the Revised Code.

{¶29} In *State ex rel. Thomas v. Indus. Comm.*, 97 Ohio St.3d 37, 2002-Ohio-5306, it was held that the loss of a hand and arm of the same limb constitutes statutory PTD under former R.C. 4123.58(C). *State ex rel. Adams v. Aluchem, Inc.*, 104 Ohio St.3d 640, 2004-Ohio-6891. The *Thomas* court declared the hand and arm to be distinct body parts for purposes of former R.C. 4123.58(C). *State ex rel. Internatl. Paper v. Trucinski*, 106 Ohio St.3d 203, 2005-Ohio-4557. Consequently, the loss of an entire single extremity can equate to the loss of two body parts and statutory PTD. *Id.*

{¶30} In *Adams*, the court held that its decision in *Thomas* must be applied retrospectively because the *Thomas* court did not expressly state that the decision was to be applied only prospectively.

{¶31} Thus, the *Thomas* court's interpretation of former R.C. 4123.58(C) must be applied retrospectively to the instant case involving the 1994 injury that occurred years prior to the *Thomas* decision. That is, the loss or loss of use of a hand and arm of the same limb constitutes statutory PTD for purposes of relator's industrial claim.

{¶32} In his June 2008 motion for R.C. 4123.57(B) scheduled loss compensation, relator requested compensation for the loss of use of his right arm. Adjudicating the motion, the bureau's August 1, 2008 order awards 225 weeks of scheduled loss compensation which, under R.C. 4123.57(B), is compensation for the loss of an arm. However, under R.C. 4123.57(B), 225 weeks of compensation for an arm necessarily

includes compensation for the hand of the same limb. See *State ex rel. Cook v. Zimpher* (1985), 17 Ohio St.3d 236, cited by *Internatl. Paper* wherein the court, citing *State ex rel. Kaska v. Indus. Comm.* (1992), 63 Ohio St.3d 743, explains "that 'leg' may include the foot for R.C. 4123.57(B) purposes does not compel the same interpretation for [former] R.C. 4123.58(C)." *Internatl. Paper* at ¶7.

{¶33} Clearly, while the *Thomas* court in effect held that the arm does not include the hand of the same limb for purposes of former R.C. 4123.58(C), that holding does not compel the same interpretation for R.C. 4123.57(B).

{¶34} Therefore, it must be recognized that the bureau, in its August 1, 2008 order, effectively awarded R.C. 4123.57(B) schedule loss compensation for the hand and arm of relator's right limb notwithstanding its declaration that relator "has sustained a 100% loss of use of the right shoulder ankylosis." (Emphasis omitted.)

{¶35} Notwithstanding that R.C. 4123.57(B) does not provide for scheduled loss compensation for shoulder ankylosis, the effect of the bureau's August 1, 2008 order was to award 225 weeks of scheduled loss compensation for loss of use of relator's right arm which necessarily includes the hand.

{¶36} Given that the bureau's August 1, 2008 order effectively awarded compensation for the loss of use of relator's entire right upper extremity, the magistrate concludes that the doctrine of collateral estoppel or issue preclusion compels the commission to enter an award of statutory PTD.

{¶37} *State ex rel. Kincaid v. Allen Refractories Co.*, 114 Ohio St.3d 129, 2007-Ohio-3758, a case cited in the SHO's order at issue here, supports the magistrate's

conclusion that the commission must enter an award of statutory PTD, notwithstanding the contrary view of the SHO.

{¶38} In *Kincaid*, the claimant, James Kincaid, sustained an industrial injury that caused Kincaid to suffer, as often as nine times a week, intermittent episodes of total vision loss that last up to 45 minutes. For this vision condition, the bureau awarded Kincaid R.C. 4123.57(B) scheduled loss compensation for "100% bilateral total loss of sight." The bureau's award of compensation was not administratively appealed.

{¶39} One month later, Kincaid applied for statutory PTD compensation under former R.C. 4123.58(C) for the alleged loss of use of both eyes. Denying the application, the commission reasoned that, when Kincaid was not having an ocular disturbance, he was not blind, having 20/80 vision in the right eye and 20/60 vision in the left. Kincaid's mandamus action followed.

{¶40} The *Kincaid* court succinctly sets forth basic law:

A derivative of res judicata, collateral estoppel bars "the relitigation of a point of law or fact that was at issue in a former action between the same parties and was passed upon by a court of competent jurisdiction." It requires "an identity of parties and issues in the proceedings" and applies equally to administrative hearings. * * *

Id. at ¶8. (Citations omitted.)

{¶41} Citing *State ex rel. Szatkowski v. Indus. Comm.* (1988), 39 Ohio St.3d 320, the *Kincaid* court acknowledged that "what is a total loss of use under R.C. 4123.57(B) might not be under R.C. 4123.58(C)." Id. at 18. This is so because R.C. 4123.57(B) refers to "loss of uncorrected vision" while R.C. 4123.58(C) does not. Thus, while later

vision improvement by corrective means is irrelevant to an award of R.C. 4123.57(B), such is not so under R.C. 4123.58(C).

{¶42} The *Kincaid* court reasoned:

Reliance on *Szatkowski* in Kincaid's case is misplaced. The intermittent nature of Kincaid's blindness does not change the fact that he has total loss of sight; there is no evidence that this condition will change.

Kincaid's vision has not improved since his award of permanent partial disability compensation. Kincaid argues that a finding of "100% bilateral total loss of sight" means that he is blind—whether for purposes of his scheduled-loss award akin to damages under R.C. 4123.57(B) or for compensation due to permanent impairment of his earning capacity under R.C. 4123.58(C). We agree that the commission's finding under R.C. 4123.57(B) that Kincaid had "100% bilateral total loss of sight" assumes "loss of uncorrected vision." However, for purposes of R.C. 4123.57(B), the fact that Kincaid is not always having visual interruption does not mean that his sight is effectively corrected.

Dr. George F. Calloway concluded in his January 7, 2004 report supporting the permanent partial award: "I would like to point out that this is only an intermittent complaint but that since he cannot predict or control the timing or the frequency of these attacks, in effect *he is disabled at all times because he could be disabled at any time.*" (Emphasis added.)

There is no evidence that Kincaid's vision has improved or been "corrected" since the award of permanent partial disability. * * *

Id. at ¶20-23.

{¶43} The analysis of the *Kincaid* court compels the conclusion here that the bureau's order of August 1, 2008 must be given a binding effect under the doctrine of collateral estoppel or issue preclusion such that an award of statutory PTD under former R.C. 4123.58(C) is compelled. That is, the loss of use of relator's right upper extremity

cannot be re-litigated in the commission's adjudication of relator's motion for statutory PTD. Significantly, as in *Kincaid*, there is no evidence here that relator's right upper extremity has improved since the bureau's August 1, 2008 award.

{¶44} Accordingly, based upon the above analysis, it is the magistrate's decision that this court issue a writ of mandamus ordering the commission to vacate its SHO's order of December 1, 2009, and to enter a new order that grants relator's August 7, 2009 motion for statutory PTD compensation under former R.C. 4123.58(C).

/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).