



Ohio ("commission"), to vacate its order that denied relator his request for an award for the total loss of use of his left foot, and to enter an order granting that award.

{¶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 writ.

{¶3} As detailed in the magistrate's decision, relator's claim arises from an injury he suffered when a tow motor ran over his left foot. Relator sought a scheduled loss award for the loss of use of his foot. The commission denied relator's request. The magistrate concluded that the commission did not abuse its discretion by doing so.

{¶4} Relator makes the following objections to the magistrate's decision:

1. A LOSS OF USE CLAIM THAT HAS BEEN BROUGHT UNDER R.C. §4123.57 DOES NOT REQUIRE PROOF THAT THE INJURED APPENDAGE IS COMPLETELY USELESS.
2. IN A MANDAMUS PROCEEDING, THE COURT MAY NOT REFUSE TO CONSIDER EVIDENCE THAT WAS PROPERLY FURNISHED TO THE INDUSTRIAL COMMISSION PRIOR TO THE FINAL ADMINISTRATIVE RULING.
3. THE MAGISTRATE'S DETERMINATION THAT DOCTOR GHANMA'S OPINIONS SHOULD BE AFFORDED CREDENCE IS UNTENABLE.
4. THE MAGISTRATE ERRED IN DETERMINING THAT NO ABUSE OF DISCRETION HAD BEEN COMMITTED WHEN THE LOSS OF USE BENEFITS WERE DENIED.
5. THE MAGISTRATE SHOULD HAVE FOUND THAT ONLY DR. STEARNS HAD FURNISHED A COMPETENT AND RELIABLE OPINION WITH REGARD TO THE ISSUE

OF WHETHER RELATOR HAD SUSTAINED A  
FUNCTIONAL LOSS OF USE OF HIS LEFT FOOT.

{¶5} In his first and fourth objections, relator contends that the magistrate applied an overly-strict standard for evaluating loss-of-use claims brought under R.C. 4123.57. Applying the correct standard, relator argues, would result in an award of benefits to relator. We disagree.

{¶6} As adopted by the Supreme Court of Ohio, in order to show entitlement to a loss-of-use award under R.C. 4123.57(B), a claimant must show that the body part was amputated or that "the claimant suffered the permanent loss of use of the injured bodily member for all practical intents and purposes." *State ex rel. Alcoa Bldg. Prods. v. Indus. Comm.*, 102 Ohio St.3d 341, 2004-Ohio-3166, ¶12. Applying this standard, the magistrate concluded that the commission had some evidence to support its determination that claimant had not lost the use of his left foot for all practical intents and purposes. Rather, there was medical evidence to show that relator is able to bear weight on his foot and can use that foot to assist him with walking. We conclude that the magistrate applied the correct standard, and we agree with the magistrate's conclusion that the commission did not abuse its discretion when it denied relator's request based on this standard. Therefore, we overrule relator's first and fourth objections.

{¶7} In his second objection, relator contends that the magistrate erred by not considering a partial transcript of a deposition of Manhal A. Ghanma, M.D., taken in a case before the Cuyahoga County Court of Common Pleas and involving a different claimant. We conclude, however, that the magistrate did not err by declining to

consider information the commission did not have before it when it issued its denial of relator's request. Further, the issue relator attempts to raise through this transcript—that Dr. Ghanma is not an impartial medical expert—tests the credibility and reliability of Dr. Ghanma's reports. The commission has the discretion to weigh the evidence before it. *State ex rel. Teece v. Indus. Comm.* (1981), 68 Ohio St.2d 165, 169. Thus, even if the commission had considered, and rejected, relator's claims regarding Dr. Ghanma, we would not disturb that exercise of discretion. We overrule relator's second objection.

{¶8} In his third objection, relator contends that Dr. Ghanma's report was not credible and should not have been used as evidence. In his fifth objection, relator contends that the commission should have relied only on the report of Kim Stearns, M.D. For the reasons stated by the magistrate, however, we decline to reweigh the evidence before the commission. We overrule relator's third and fifth objections.

{¶9} In summary, we overrule relator's objections to the magistrate's decision. Based on our independent review of the record in this matter, we adopt the magistrate's decision, including the findings of fact and conclusions of law contained in it, as our own. Accordingly, we deny the requested writ of mandamus.

*Objections overruled;  
writ of mandamus denied.*

BROWN and DORRIAN, JJ., concur.

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IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Terrance Tichy,	:	
	:	
Relator,	:	
	:	
v.	:	No. 10AP-477
	:	
Industrial Commission of Ohio	:	(REGULAR CALENDAR)
and General Motors Corporation,	:	
	:	
Respondents.	:	
	:	

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MAGISTRATE'S DECISION

Rendered on January 31, 2011

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*Plevin & Gallucci, Frank Gallucci, III, and Bradley E. Elzeer, II; Paul W. Flowers Co., L.P.A., and Paul W. Flowers, for relator.*

*Michael DeWine, Attorney General, and Elise Porter, for respondent Industrial Commission of Ohio.*

*Greiner & Carolin, and Thomas M. Carolin, for respondent General Motors Corporation.*

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IN MANDAMUS

{¶10} Relator, Terrance Tichy, 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 his request for a total loss of use of his left foot and ordering the commission to find that he is entitled to that award.

Findings of Fact:

{¶11} 1. Relator sustained a work-related injury on March 7, 2002 when a tow motor ran over and crushed his left foot. Relator's workers' compensation claim was originally allowed for "amputation of left foot<sup>1</sup>. Contusion multiple sites left lower leg. Contusion right foot. Superficial injury foot; left medial malleolar fracture, left tibial plateau fracture and subcutaneous degloving of the left heel."

{¶12} 2. In his report dated December 15, 2006, John K. Sontich, M.D., noted that relator had "developed progressive posttraumatic arthritis of the left knee, and degenerative meniscal tears of the left knee, both the medial and lateral side which are directly related to his original trauma."

{¶13} 3. In May and June 2007, relator filed motions seeking a scheduled loss award for loss of use of his left foot as well as certain additional conditions. Relator's motion was supported by the February 28, 2007 report of M.P. Patel, M.D. In his report, Dr. M.P. Patel noted the following symptoms:

Mr[.] Tichy reports constant pain and stiffness in his left foot[.] Pain extends to the left ankle[.] Amputation stumps remain sensitive to touch[.] He develops frequent swelling of the left foot and ankle[.] He complains of weakness in the left foot-ankle[.] He has difficulty with activities of daily living such as standing, walking and climbing stairs[.]

{¶14} As part of his examination, Dr. M.P. Patel noted that relator walked with an "antalgic gait," that in the standing position, "flattening of longitudinal and transverse arch," as well as "[a]mputation left foot toes three, four and five at metatarsophalangeal

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<sup>1</sup> It is undisputed that relator's left foot was not actually amputated. In fact, relator's claim would eventually be additionally allowed for deformed left second toe and chronic ulcerations left second toe.

joint are noted." His examination further revealed swelling of the foot and ankle, as well as "[s]ignificant fibrosis secondary to subcutaneous degloving of the left heel." Based upon his pain and total loss of mobility in his ankle and foot, Dr. M.P. Patel opined that relator had sustained a total loss of functional capacity of his left foot.

{¶15} 4. Manhal A. Ghanma, M.D., issued a report dated July 23, 2007. Following his examination findings, Dr. Ghanma determined that relator had a 26 percent whole person impairment.

{¶16} 5. Thereafter, Dr. Ghanma was asked to prepare an addendum to his report. In that addendum report, dated August 2, 2007, he opined that relator had developed post-traumatic knee arthritis as a late consequence of his work injury and that he also developed medial and lateral meniscus tears as a result of the work injury. However, Dr. Ghanma opined that, while relator had some functional loss of the left foot related to the amputation of the lateral three toes and to his sensory deficits, relator did not have a total loss of function of his left foot. Dr. Ghanma opined that relator had a 14 percent whole person impairment for the loss of use of his left foot and that, from a "functional stand-point, he is still able to put full weight on the left foot. He has not had an amputation of the entire foot, but only of the lateral three toes. Amputation of toes affects his ability to push-off with his foot, but does not impair regular walking to any great degree."

{¶17} 6. Relator's motions were heard before a district hearing officer ("DHO") on September 7, 2007. Based upon the reports of Drs. Sontich and Ghanma, the DHO concluded that relator's claim should be additionally allowed for "post traumatic arthritis

left knee; medial meniscal tear left knee; and lateral meniscal tear left knee." However, the DHO concluded that relator failed to establish with sufficient evidence that he had incurred a loss of use of his left foot to the extent that it could be considered useless and non-functional. The DHO noted that relator was able to ambulate with the use of a cane, and that he does have some balance problems; however, he noted that relator was able to use his foot for all necessary purposes.

{¶18} 7. Relator appealed the DHO's order and the matter was heard before a staff hearing officer ("SHO") on October 24, 2007. The SHO affirmed the DHO's order allowing relator's claim for the additional conditions, but denying his request for loss of use award for the following reasons:

The request for a scheduled loss award per Ohio Revised Code 4123.57 for loss of foot due to loss of use is denied. There is insufficient evidence to establish that claimant has experienced loss of use of the left foot to the extent as to be deemed completely useless and non-functional. Claimant retains the ability to ambulate with a cane. Although he displays some balance problems, he is able to use the foot for necessary purposes.

{¶19} 8. Relator's further appeal was refused by order of the commission mailed December 4, 2007.

{¶20} 9. Earlier, in October 2007, relator filed a motion seeking additional allowances. In support, relator attached the October 8, 2007 report of Lisa S. Roth, D.P.M., who opined as follows:

\* \* \* This patient is diabetic with a history of previous amputation of toes 3-5 on the left foot. He has had a lot of problems with the 2nd toe left foot as it is long and contracted with chronic ulcerations occurring at the tip of the toe. This problem has been going on for the past several



months and is not improving. There is a surgical procedure that can be done to remove the tip of the toe so that it does not continue to get hit on the shoes/ground. This should prevent this problem from continuing to happen and the ulceration to get infected down to the bone.

{¶21} 10. Relator's motion was heard before a DHO on December 3, 2007 and his claim was additionally allowed for "deformed left second toe and chronic ulcerations left second toe."

{¶22} 11. Thereafter, relator again sought a total loss of use award for his left foot. In support, relator attached the January 30, 2009 report of T.M. Patel, M.D.<sup>2</sup> Dr. T.M. Patel noted the following complaints:

Mr. Tichy indicated that pain left knee was progressively increasing and extending from hip to toes. He described pain as sharp, burning and circumferentially over left lower extremity. He complained of frequent swelling knee and ankle joint. He reported persistent open wound left foot with frequent episodes of infection. He reported significant difficulty with walking or standing. He complained of increasing weakness left lower extremity.

{¶23} Thereafter, Dr. T.M. Patel provided his physical findings upon examination and opined that relator had sustained a total loss of use of his left foot. Dr. T.M. Patel authored a second report, dated August 5, 2009, after he reviewed the reports of Drs. Sontich and Ghanma. Dr. T.M. Patel noted that relator complains of frequent swelling of his knee and ankle joint as well as a persistent open wound on his left foot which frequently is infected. He noted further that relator complained of increasing weakness in his left lower extremity as well as significant difficulty with activities of daily living such as walking, standing, climbing, or descending stairs. Thereafter, Dr. T.M. Patel

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<sup>2</sup> M.P. Patel, M.D., and T.M. Patel, M.D., both work for M.P. Patel, M.D. Inc.

provided his physical findings upon examination and concluded that, based on all the allowed conditions, relator was permanently and totally disabled from engaging in any gainful employment.

{¶24} 12. Dr. Ghanma also submitted an addendum dated September 9, 2009. Dr. Ghanma opined that, in spite of the additional report of "Dr. M.P. Patel,"<sup>3</sup> Dr. Ghanma noted that, although relator does not have three lateral toes on his left foot, he is still using his left foot and does not have a total loss of use.

{¶25} 13. Relator's motion was heard before a DHO on September 21, 2009. The SHO concluded that relator had established new and changed circumstances warranting the commission's exercise of continuing jurisdiction. However, the DHO concluded that relator's motion for a scheduled loss of use award should be denied for the following reasons:

\* \* \* The District Hearing Officer finds per review of the medical documentation provided by Dr. [T.M.] Patel dated 01/30/2009, that there is insufficient evidence to support a total loss of use of the left foot. Dr. [T.M.] Patel indicates in the 01/30/2009 report that Injured Workers' most recent surgery occurred on 09/26/2006. However, that is incorrect as Injured Worker's most recent surgery was in 2008. Dr. [T.M.] Patel does not mention that surgery anywhere in the body of the report, suggesting an unfamiliarity with Injured Worker's recent medical history. The District Hearing Officer further notes that Dr. [M.P.] Patel initially examined the Injured Worker on the issue of a scheduled loss on 02/28/2007, and at that point opined a total loss of functional capacity is evident with severe pain and total loss of mobility of the left ankle and foot. Contrasting that to the 2009 report wherein Dr. [T.M.] Patel opines only a significant restriction in mobility of the left ankle joint which would suggest an improvement from the total loss of function to a significant restriction in function. Dr. [T.M.] Patel then goes on to

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<sup>3</sup> The January 30, 2009 report was actually authored by Dr. T.M. Patel.

conclude that after a review of the history and clinical course as well as diagnostic studies and examination findings, the Injured Worker taking into consideration the new conditions of deformed left second toe and chronic ulcerations of the left second toe, there is a scheduled loss of use of the left foot however there is no basis stated in the body of the report for the opinion. There are no clinical exam findings relative to the newly allowed conditions in the claim in the body of Dr. [T.M.] Patel's report.

Dr. Ghanma who reviewed Dr. [T.M.] Patel's January 2009 report concludes in the 09/08/2009 narrative that based on his previous examination findings in conjunction with Dr. [T.M.] Patel's newest report his opinion is unchanged that the Injured Worker to date has not sustained a total loss of the left foot despite the severe injury sustained. Dr. Ghanma notes that the Injured Worker is still using his left foot for ambulatory purposes.

{¶26} 14. Relator obtained a report from Kim L. Stearns, M.D. In her October 15, 2009 report, Dr. Stearns noted the following:

He continues to complain of burning pain in his left foot and lower leg. He requires a cane to ambulate. He is presently not working. He has discomfort at rest and with all weightbearing activities. He describes chronic ulcerations on the plantar aspect of his left foot that is exacerbated by standing and walking and requires constant attention to the skin on the plantar aspect of his foot. \* \* \*

{¶27} Ultimately, Dr. Stearns concluded that relator had sustained a total loss of use of his left foot as follows:

Based upon the history obtained from Mr[.] Tichy, his physical exam and review of the records, it is my opinion that he does suffer from a functional loss of use of his left foot based upon the allowed conditions and the multiple surgeries and amputations he has undergone. He does require use of a cane to ambulate and while the foot does provide him with a support for his ambulation, his amputation, loss of sensation, significant weakness and deformity all make the foot essentially a total loss as far as

use goes. He is unable to use his left foot for anything other than a partial support while he ambulates. He certainly cannot perform any motor tasks with that foot or use it for any significant leisure activity, recreational activity or gainful employment.

{¶28} 15. Relator's appeal was heard before an SHO on November 30, 2009.

The SHO modified the prior DHO's order, yet denied relator's request for a total loss of use award as follows:

\* \* \* Staff Hearing Officer finds that, the Injured Worker has failed to meet his burden of proving the statutory requirements in support of this request. The Injured Worker still has not established that, for all practical purposes, he has sustained a loss of use of his left foot, as a result of the allowed conditions herein. The 01/30/2009 report of Dr. [T.M.] Patel, one of the physicians of record, reflects an improvement in the use of the Injured Worker's left foot, when compared to the findings in [Dr. M.P. Patel's] 2007 report. The 10/15/09 report of Dr. Stearns, also prepared at the request of the Injured Worker, demonstrates findings that, the Injured Worker can ambulate and stand, despite the severity of his left foot injuries. This report, like that of Dr. [T.M.] Patel's, does not demonstrate a statutory loss of use of the left foot in the objective findings of Dr. Stearns, that are noted. Therefore, the 09/09/2009 report and opinions of Dr. Ghanma are found to be persuasive and are relied upon in concluding that, the Injured Worker has not demonstrated that he has experienced a statutory loss of use of the left foot.

{¶29} 16. Relator's further appeal was refused by order of the commission mailed December 30, 2009.

{¶30} 17. Thereafter, relator filed the instant mandamus action in this court.

#### Conclusions of Law:

{¶31} Two issues are presented: (1) whether the commission applied the wrong standard when determining that relator had not sustained a total loss of use of his left

foot, and (2) whether Dr. Ghanma's September 9, 2009 report fails to constitute some evidence upon which the commission could rely since Dr. Ghanma omitted reference to the 2008 surgery, did not consider all the allowed conditions, referred to the report of Dr. M.P. Patel when the report was actually written by Dr. T.M. Patel, and since Dr. Ghanma makes a considerable amount of money performing independent medical evaluations.

{¶32} The magistrate finds: (1) the commission applied the correct standard when determining that relator had not met his burden of proving that he had sustained a total loss of use of his left foot, and (2) the September 9, 2009 report of Dr. Ghanma does constitute some evidence upon which the commission could properly rely.

{¶33} Accordingly, it is the magistrate's decision that this court deny relator's request for a writ of mandamus, as more fully explained below.

{¶34} In *State ex rel. Alcoa Bldg. Products v. Indus. Comm.*, 102 Ohio St.3d 341, 2004-Ohio-3166, ¶10, the court succinctly set forth the historical development of scheduled awards for loss of use under R.C. 4123.57(B):

Scheduled awards pursuant to R.C. 4123.57(B) compensate for the "loss" of a body member and were originally confined to amputations, with the obvious exceptions of hearing and sight. In the 1970s, two cases—*State ex rel. Gassmann v. Indus. Comm.* (1975), 41 Ohio St.2d 64, 70 O.O.2d 157, 322 N.E.2d 660 and *State ex rel. Walker v. Indus. Comm.* (1979), 58 Ohio St.2d 402, 12 O.O.3d 347, 390 N.E.2d 1190—construed "loss," as similarly used in R.C. 4123.58, to include loss of use without severance. *Gassmann* and *Walker* both involved paraplegics. In sustaining each of their scheduled loss awards, we reasoned that "[f]or all practical purposes, relator has lost his legs to the same effect and extent as if they had been amputated or otherwise physically removed." *Gassmann*, 41 Ohio St.2d at 67, 70 O.O.2d 157,

322 N.E.2d 660; *Walker*, 58 Ohio St.3d at 403-404, 12 O.O.3d 347, 390 N.E.2d 1190. \* \* \*

{¶35} In *Alcoa*, the claimant, Robert R. Cox, sustained a left arm amputation just below the elbow. Continued hypersensitivity at the amputation site prevented the claimant from ever wearing a prosthesis. Consequently, the claimant moved for a scheduled loss award for loss of use of his left arm.

{¶36} Through a video tape, *Alcoa* established that the claimant could use his remaining left arm to push open a car door and to tuck paper under the arm. In spite of this evidence, the commission granted the claimant an award for the loss of use of his left arm.

{¶37} This court denied *Alcoa's* complaint for a writ of mandamus and *Alcoa* appealed as of right to the Supreme Court of Ohio.

{¶38} In affirming this court's judgment and upholding the commission's award, the *Alcoa* court explained, at ¶10-15:

*Alcoa* urges the most literal interpretation of this rationale and argues that because claimant's arm possesses some residual utility, the standard has not been met. The court of appeals, on the other hand, focused on the opening four words, "for all practical purposes." Using this interpretation, the court of appeals found that some evidence supported the commission's award and upheld it. For the reasons to follow, we affirm that judgment.

*Alcoa's* interpretation is unworkable because it is impossible to satisfy. *Walker* and *Gassmann* are unequivocal in their desire to extend scheduled loss benefits beyond amputation, yet under *Alcoa's* interpretation, neither of those claimants would have prevailed. As the court of appeals observed, the ability to use lifeless legs as a lap upon which to rest a book is a function unavailable to one who has had both legs removed, and under an absolute equivalency standard

would preclude an award. And this will always be the case in a nonseverance situation. If nothing else, the presence of an otherwise useless limb still acts as a counterweight-and hence an aid to balance-that an amputee lacks. Alcoa's interpretation would foreclose benefits to the claimant who can raise a mangled arm sufficiently to gesture or point. It would preclude an award to someone with the hand strength to hold a pack of cards or a can of soda, and it would bar-as here-scheduled loss compensation to one with a limb segment of sufficient length to push a car door or tuck a newspaper. Surely, this could not have been the intent of the General Assembly in promulgating R.C. 4123.57(B) or of *Gassmann and Walker*.

Pennsylvania defines "loss of use" much as the court of appeals did in the present case, and the observations of its judiciary assist us here. In that state, a scheduled loss award requires the claimant to demonstrate either that the specific bodily member was amputated or that the claimant suffered the permanent loss of use of the injured bodily member for all practical intents and purposes. Discussing that standard, one court has written:

"Generally, the 'all practical intents and purpose' test requires a more crippling injury than the 'industrial use' test in order to bring the case under section 306(c), supra. However, it is not necessary that the injured member of the claimant be of absolutely no use in order for him to have lost the use of it for all practical intents and purposes." *Curran v. Walter E. Knipe & Sons, Inc.* (1958), 185 Pa.Super. 540, 547, 138 A.2d 251.

This approach is preferable to Alcoa's absolute equivalency standard. Having so concluded, we further find that some evidence indeed supports the commission's decision. Again, Dr. Perkins stated:

"It is my belief that given the claimant's residual hypersensitivity, pain, and tenderness about his left distal forearm, that he is unable to use his left upper limb at all and he should be awarded for the loss of use of the entire left upper limb given his symptoms. He has been given in the past loss of use of the hand, but really he is unable to use a prosthesis since he has had the amputation, so virtually he is without

the use of his left upper limb \* \* \*."

In his brief, relator makes the following argument:

As a matter of law, the Commission plainly erred by essentially requiring a full amputation before scheduled benefits can be recovered under R.C. §4123.57 for the loss of a foot. Early on, the DHO and SHO had determined that Relator's ability to "ambulate with a cane" was sufficient to deny benefits. *Stip. Rec. 0022 & 0025*. There was never a dispute that the injured worker was basically balancing himself on what was left of his foot and would never be able to move about regularly without assistance. Nevertheless, the ability to "ambulate" was repeatedly cited as a justification for rejecting the claim. *Id.*

\* \* \*

A claimant is not required to show that the injured appendage is absolutely useless in order to be entitled to scheduled benefits. *State ex rel. Sears Roebuck & Co. v. Campos*, 10th Dist. No. 04AP-1266, 2005-Ohio-5700, 2005 W.L. 2787643 ¶ 44. But that is the precise standard which was imposed by the Commission upon Relator. If anything remains of a foot, it can always "bear weight" and the worker can always "ambulate with a cane." Virtually every other foot-related activity, however, is no longer realistically possible. As a matter of law, the Commission erred by requiring proof that the foot was absolutely useless.

(Relator's brief, at 10-12; emphasis sic.)

{¶39} Relator argues that the commission's decision in this case cannot be reconciled with the precedent set forth in *Alcoa*. However, the magistrate disagrees.

{¶40} In *Alcoa*, the claimant had clearly lost his hand, by way of amputation, and had lost his arm just below the elbow, also by amputation. In reality, the usefulness of an arm is directly linked to the concept that the hand remains. In combination, the arm and hand lift, hold, and carry objects. Together, the hand and arm manipulate various



objects. While an arm with a hand attached certainly can be used to push open a car door and hold papers up against one's side that is not the main purpose or function of an arm.

{¶41} By comparison, the leg and the foot are primarily used for walking and balancing. Obviously, if a foot has been amputated, the person's leg has effectively been shortened and, without a foot, the usefulness of the leg for walking is essentially eliminated.

{¶42} In the present case, while it is undisputed that relator had some toes amputated, his foot remains. According to the medical evidence of Dr. Ghanma, as well as the medical evidence of relator's own doctors, relator is able to bear weight on his left foot and is able to use that foot to assist him with walking. While the lack of toes impedes his ability to push off, as explained by Dr. Ghanma, the foot retains a significant amount of usefulness.

{¶43} The commission cited some evidence in concluding that relator had not established that, for all practical purposes, he had sustained a total loss of use of his left foot. In his January 30, 2009 report, Dr. T.M. Patel noted that relator was still able to stand and walk although with significant difficulty. In his September 9, 2009 addendum, Dr. Ghanma noted that relator was still able to put full weight on his left foot. Lastly, Dr. Stearns' October 15, 2009 report indicates that relator requires a cane to ambulate and that the foot does provide him with support for his ambulation. This is some evidence that relator has not "for all practical purposes" lost the use of his left foot, and relator has not demonstrated that the commission abused its discretion in this regard.

{¶44} Relator challenges the report of Dr. Ghanma in several respects. First, relator argues that, inasmuch as the DHO discounted Dr. T.M. Patel's January 30, 2009 report because he did not mention relator's most recent surgery in 2008, Dr. Ghanma's report should have been discounted to the same extent. However, the DHO's order was appealed, and the matter was heard before an SHO on November 30, 2009. At that time, the SHO modified the prior DHO order and denied relator's request for a loss of use award for distinctly different reasons. As such, relator's argument is without merit.

{¶45} Relator also argues that Dr. Ghanma's report should be excluded from evidence on grounds that Dr. Ghanma did not consider all the allowed conditions. Specifically, relator points out that Dr. Ghanma does not mention the newly allowed conditions of deformed left second toe and chronic ulcerations.

{¶46} Dr. Ghanma's September 9, 2009 report constituted an addendum to his July 23, 2007 report. At the outset of this addendum, Dr. Ghanma indicates that he was specifically asked to respond to the January 30, 2009 report of Dr. M.P. Patel. (The January 30, 2009 report is actually authored by Dr. T.M. Patel.) In that report, Dr. T.M. Patel listed those allowed conditions and, as the commission noted, Dr. T.M. Patel did indicate that relator was capable of walking and standing. In spite of those newly allowed conditions, relator was still able to ambulate with a cane. As such, to the extent that Dr. Ghanma did not list those newly allowed conditions at the outset of his report, the magistrate does not find that to be fatal, especially here where all of the medical evidence indicates that relator is capable of standing and walking albeit with a cane.

{¶47} Relator next argues that Dr. Ghanma's report cannot constitute some evidence because Dr. Ghanma indicated that he reviewed the January 30, 2009 report of Dr. M.P. Patel when, in fact, it was the January 30, 2009 report of Dr. T.M. Patel.

{¶48} The commission argues that both Dr. M.P. Patel and Dr. T.M. Patel work out of the same office, M.P. Patel, M.D. Inc., and both have access to relator's previous medical records. There are four reports in the record from doctors employed by M.P. Patel, M.D. Inc.: the February 28, 2007 report prepared by Dr. M.P. Patel, the January 30, 2009 report prepared by Dr. T.M. Patel, the August 5, 2009 report prepared by Dr. T.M. Patel, and the August 13, 2009 addendum report prepared by Dr. T.M. Patel. Dr. Ghanma identified the correct date of the report. This report was the only report dated January 30, 2009 and authored by a Dr. Patel. The magistrate finds that relator has not demonstrated that Dr. Ghanma did not consider the proper report, and this is not a reason to remove Dr. Ghanma's report from evidentiary consideration.

{¶49} Relator's last argument is that Dr. Ghanma should not be considered a credible witness because he makes a considerable amount of money conducting independent medical examinations. Relator attached certain transcript pages from a video deposition of Dr. Ghanma wherein he indicated that he earned approximately \$500,000 a year by conducting these examinations. Relator contends that this demonstrates an obvious bias in favor of employers and constitutes grounds to remove Dr. Ghanma's report from evidentiary consideration.

{¶50} First, this partial transcript was not presented to the SHO for consideration when the decision was rendered. Second, this is only a partial transcript and, as such,

as the commission argues, there is no direct examination or redirect by which counsel in that case might have explained Dr. Ghanma's testimony. This argument simply was not made at a time when it could have been considered. Its presentation after the fact does not establish an abuse of discretion. Relator has not demonstrated that Dr. Ghanma's report did not constitute some evidence upon which the commission could rely.

{¶51} Based on the foregoing, it is this magistrate's decision that relator has not demonstrated that the commission abused its discretion in denying him an award for the total loss of use of his left foot, 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).