



its order denying him an award for the total loss of use of his left foot and ordering the commission to find that he is entitled to that award.

{¶2} Pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth District Court of Appeals, this matter was referred to a magistrate who issued a decision, including findings of fact and conclusions of law, which is appended hereto. The magistrate found that the commission properly applied the law and did not abuse its discretion by refusing to evaluate relator's loss of use without consideration of the correction provided by the foot brace. Accordingly, the magistrate recommended that this court deny the requested writ of mandamus.

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

The Magistrate improperly applied the [State ex rel.] Richardson [v. Indus. Comm., 10th Dist. No. 04AP-724, 2005-Ohio-2388] decision, which is contrary to [State ex rel.] Alcoa [Bldg. Prods. v. Indus. Comm., 102 Ohio St.3d 341, 2004-Ohio-3166], rather than applying the [State ex rel. Sears Roebuck & Co. v.] Campos [10th Dist. No. 04AP-1266, 2005-Ohio-5700] decision, which properly clarifies Alcoa.

The Magistrate misinterpreted the relator's argument regarding loss of vision cases.

{¶4} These objections, however, fail to raise any new issues and simply reargue the contentions presented to and sufficiently addressed by the magistrate. Upon review of the magistrate's decision, an independent review of the record, and due consideration of relator's objections, we find the magistrate has properly determined the pertinent facts and applied the appropriate law. We, therefore, adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein.

{¶5} Accordingly, relator's objections to the magistrate's decision are overruled and the requested writ of mandamus is hereby denied.

*Objections overruled;  
writ of mandamus denied.*

BRYANT, P.J., and KLATT, J., concur.

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**APPENDIX**

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Ronald Bushatz,	:	
	:	
Relator,	:	
	:	
v.	:	No. 10AP-541
	:	
Industrial Commission of Ohio and	:	(REGULAR CALENDAR)
Hanson Aggregates Davon, Inc.,	:	
	:	
Respondents.	:	
	:	

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MAGISTRATE'S DECISION

Rendered on January 31, 2011

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*Agee, Clymer, Mitchell & Laret, and Eric B. Cameron, for relator.*

*Michael DeWine, Attorney General, and Derrick Knapp, for respondent Industrial Commission of Ohio.*

*Dinsmore & Shohl, LLP, Brett L. Miller, Christen S. Hignett and Gregory P. Mathews, for respondent Hanson Aggregates Davon, Inc.*

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IN MANDAMUS

{¶6} Relator, Ronald Bushatz, has filed this original action requesting that this court issue a writ of mandamus ordering respondent Industrial Commission of Ohio

("commission") to vacate its order which denied him an award for the total loss of use of his left foot and ordering the commission to find that he is entitled to that award.

Findings of Fact:

{¶7} 1. Relator sustained a work-related injury on September 9, 1993, and his workers' compensation claim has been allowed for the following conditions:

Lumbar disc displacement; re-exploration and posterior lumbar interbody fusion; lumbar disc degeneration failed arthrodesis L4-5 and L5-S1; left foot drop; failed arthrodesis L4-5, L5-S1.

{¶8} 2. On July 10, 2008, relator filed a motion seeking an award for the total loss use of his left foot. In support of his motion, relator submitted the June 3, 2008 report of Nancy Renneker, M.D. With regards to his left foot, Dr. Renneker noted the following complaints:

Ronald Bushatz complains of \* \* \* constant paresthesia about left ankle and Ronald Bushatz reports that he has constant "pins and needles" throughout entire left foot. Ronald Bushatz reports that by the end of his day his left lower leg-left ankle and foot is "red". Ronald Bushatz denies any left lower leg swelling. \* \* \* Ronald Bushatz is able to stand for a maximum interval of 10 minutes, able to walk a maximum distance of 40 to 50 yards on a level surface and Mr. Bushatz needs at least one sturdy railing to negotiate steps. Ronald Bushatz is unable to run and Ronald Bushatz reports that the further he walks that he [sic] more difficult it is to continue to walk due, in part, to left lower leg-left ankle and foot weakness.

{¶9} Regarding his leg and foot, Dr. Renneker noted the following findings upon examination:

\* \* \* Ronald Bushatz has an air cast on his left ankle and foot at time of this evaluation and with the air cast and his shoes in place, Mr. Bushatz has a limp with gait on level surfaces as Mr. Bushatz at times must use excessive left hip flexion in

order to clear left ankle and foot during left swing phase of gait. When Mr. Bushatz' ambulation is observed without shoes and socks i.e. when barefoot, Ronald Bushatz has a noticeable left foot slap with gait. Bilateral shoe inspection is remarkable for a scuffed left anterior toe box. \* \* \* Mr. Bushatz notes an increase in low back, left buttock and left posterior lateral leg pain extending into dorsal left foot-left great toe. Bilateral lower extremity strength, deep tendon reflexes and sensation are within normal limits with the exception of: Mr. Bushatz' left ankle and foot rests in a position of 25 degrees of left ankle plantar flexion and 10 degrees of left hind foot inversion and Ronald Bushatz has no active/volitional left ankle dorsiflexion, no active left hind foot eversion and 0/5 strength is also noted in left EHL, left great toe and left 4 small toe abduction-adduction.

Absent pin prick sensation is noted distal to left ankle i.e. throughout entire left foot. Absent left ankle deep tendon reflex is also obtained and 1+ right ankle deep tendon reflex is noted on exam of this date.

{¶10} Dr. Renneker gave the following opinion:

Based on medical records reviewed and my exam of this date, it is my medical opinion that Ronald Bushatz is entitled to an award of total loss of use of left ankle and foot due to the following: (1) no volitional motion is noted at left ankle, left great toe, nor left 4 small toes (2) absent pin prick sensation distal to left ankle i.e. throughout entire left foot, and (3) absent left ankle deep tendon reflex.

{¶11} 3. Dr. Renneker prepared an addendum wherein she stated:

Based on medical records reviewed and my exam of this date, Ronald Bushatz is entitled to a total loss of use of his left ankle and foot. Due to persistent/chronic ongoing left lower extremity radiculopathy with left foot slap with gait, it is my medical opinion that Ronald Bushatz would benefit from prescribed custom molded right AFO (ankle-foot-orthosis) with a dorsi-assist. Without this custom made brace, Ronald Bushatz is at risk for a flow-through type injury as Mr. Bushatz must use excessive hip flexion in order to clear his left ankle and foot during swing phase of gait and Mr. Bushatz could easily trip if he does not clear his left toes and he could then sustain a fall resulting in a pending injury.

{¶12} 4. Dr. Renneker provided an additional addendum dated September 22, 2008. In that addendum, Dr. Renneker provided the following additional opinion:

Based on medical records reviewed and my exam it is still my medical opinion that Ronald Bushatz is entitled to a total loss of use of his left ankle and foot due to persistent/chronic ongoing left lower extremity radiculopathy with left foot slap with gait. Ronald Bushatz has lost the ability to perform many activities of daily living due to this condition and his left foot and ankle due [sic] not perform as one would expect a functional foot to perform. The foot is not missing so it is capable of being a helper device in standing and walking but it [is] functionally useless in performing these activities on a regular basis. It is still my medical opinion that Ronald Bushatz would benefit from a prescribed custom molded right AFO (ankle-foot-orthosis) with a dorsi-assist. Without this custom made brace, Ronald Bushatz is at risk for a flow-through type injury as Mr. Bushatz must use excessive hip flexion in order to clear his left ankle and foot during swing phase of gait and Mr. Bushatz could easily trip if he does not clear his left toes and he could then sustain a fall resulting in a pending injury.

{¶13} 5. The record also contains the May 21, 2008 report of Herbert A. Grodner, M.D. Dr. Grodner noted the following complaints:

He has a left foot drop. He has to use an ankle brace. He also has weakness and atrophy of the left calf. \* \* \* He has difficulty with any kind of weight bearing such as walking, standing and walking on uneven surfaces and also change of weather causes him to have problems.

{¶14} Dr. Grodner provided his findings upon physical examination and opined that relator had a 30 percent whole person impairment.

{¶15} 6. Relator's motion was heard before a district hearing officer ("DHO") on August 26, 2008 and was denied. The DHO provided the following reasoning:

There is no question that claimant has very serious limitations on the use of his left foot due to the allowed

condition of foot drop. However, claimant is still able to bear weight on the foot and can walk (albeit with a limp). District Hearing Officer agrees with self-insured employer that this situation is similar to that in Oswald v. I.C. (10th C.A., 2005), 2005 Ohio 2993, where despite severe limitations, that claimant retained some functional use of the hand. The ability to walk and bear weight is a functional use for a foot.

Claimant failed to meet his burden of proof.

This order is based on the report of Dr. Grodner (05/14/2008).

{¶16} 7. Relator appealed and the matter was heard before a staff hearing officer ("SHO") on September 24, 2008. The SHO vacated the prior DHO's order and granted relator's request for a total loss of use of his left foot as follows:

The injured worker testified that he has no feeling in his left foot up to his mid-calf area. He has a severe left foot drop to the extent that without his current brace, he would only be able to walk by raising his left hip and knee high enough so as to clear the distance to the next step. Since he has no feeling in his foot, he cannot tell whether the foot is safely settled in position; therefore, putting weight on his left foot is problematic.

The injured worker now wears a brace that extends up to his mid-calf and keeps his foot in one stable, flexed position. With his brace, he can walk (though still with [a] lot of hip and knee involvement), stand and bend down. Better stated, "but for" his brace, he would be unable to walk, balance, or stand.

Accordingly, it is concluded that the injured worker's mobility relies exclusively upon his brace, as if his foot did not exist at all.

{¶17} 8. Respondent Hanson Aggregates Davon, Inc.'s ("employer") appeal was refused by order of the commission mailed October 9, 2008. The employer filed a



request for reconsideration and, in an order mailed November 21, 2008, the commission explained why it was exercising its continuing jurisdiction:

It is the finding of the Industrial Commission that the Employer has presented evidence of sufficient probative value to warrant adjudication of the request for reconsideration regarding the alleged presence of a clear mistake of law of such character that remedial action would clearly follow.

Specifically, it is alleged that in granting an award for total loss of use of the left foot, the Staff Hearing Officer misapplied the holdings in State ex rel. Walker v. Indus. Comm. (1979), 58 Ohio St.3d 402 and State ex rel. Alcoa Building Products v. Indus. Comm., 102 Ohio St.3d 341, 2004-Ohio-3166, failed to apply the holding in State ex rel. Richardson v. Indus. Comm., 2005 WL 1155899 (Ohio App. 10 Dist.), and failed to apply the "for all practical purposes" test for loss of use.

The order issued 10/09/2008 is vacated, set aside and held for naught.

{¶18} 9. Thereafter, the employer's request for reconsideration was heard before the commission on January 13, 2009. The commission determined that the SHO had misapplied R.C. 4123.57 and the holding in *State ex rel. Alcoa Bldg. Products v. Indus. Comm.*, 102 Ohio St.3d 341, 2004-Ohio-3166, and failed to apply the holding in *State ex rel. Richardson v. Indus. Comm.*, 10th Dist. No. 04AP-724, 2005-Ohio-2388. The commission explained the reasons it was denying relator's request for loss of use award as follows:

It is undisputed that the Injured Worker is able to walk, with the left foot, as long as a foot-drop brace is utilized. This fact pattern is substantially similar to the fact pattern in the Richardson decision wherein the 10th District Court of Appeals could not "imagine a more paramount use for a foot than the activity of walking," Id. at page 3.

The Commission further finds that the correct standard, in an alleged "loss of use" situation, is whether the Injured Worker has suffered the permanent loss of use of the injured bodily member, for "all practical intents and purposes." State ex rel. Alcoa Building Products v. Indus. Comm. (2004), 102 Ohio St.3d 341. The Commission finds the Injured Worker retains significant, if not complete functional use of the left foot, and in accordance with the Alcoa decision, the Commission finds the Injured Worker is not entitled to compensation for the total loss of use of the left foot.

The Injured Worker argued that his foot is only functional through the use of a foot-drop brace and that his entitlement to loss of use compensation should be evaluated without consideration given to the corrective device. The Commission rejects this argument. R.C. 4123.57(B) does not equate the loss of use of an extremity with its unaided/uncorrected use. While compensation for loss of vision is limited to that attributable to "uncorrected" vision, no such limitation is enumerated for the loss of a foot. The rules of statutory interpretation dictate that the Commission not read into the statute a meaning not specifically enumerated therein.

Moreover, the Richardson Court's evaluation did not hinge upon the uncorrected use of the foot. Like the circumstances herein, Richardson could not ambulate without a foot-drop brace on his left foot. The Court considered whether the foot was unusable as if it had been amputated, the Alcoa test, but did not exclude from that consideration the aid rendered by the brace.

Accordingly, the Commission finds the Injured Worker has not lost the total use of his left foot, as evidenced by his ability to walk with a brace. Compensation for loss of use of the left foot is denied.

{¶19} 10. Thereafter, relator filed the instant mandamus action in this court.

#### Conclusions of Law:

{¶20} The issues raised by this mandamus action are: (1) whether the commission properly applied the holding from *Alcoa*, and this court's decision in

*Richardson* instead of applying *State ex rel. Sears Roebuck & Co. v. Campos*, 10th Dist. No. 04AP-1266, 2005-Ohio-5700, and (2) whether the commission abused its discretion by refusing to evaluate his loss of use without considering the "correction" provided by the foot brace.

{¶21} The magistrate finds that the commission did not abuse its discretion. Specifically, (1) the commission properly applied *Alcoa* and *Richardson* and his case is not analogous to the case of the claimant in *Campos*, and (2) the commission did not abuse its discretion by refusing to consider the principles of "corrected" or "uncorrected" that are applied in loss of vision cases to his loss.

{¶22} In the present case, no one denies that relator has significant limitations relative to his left foot. Relator appears to be arguing that, inasmuch as he cannot walk without utilizing a foot-drop brace, he has actually sustained a total loss of use of his left foot.

{¶23} In *Alcoa*, at ¶10, the court set forth the historical development of scheduled awards for loss of use under R.C. 4123.57(B) as follows:

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.3d 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.2d at 403-404, 12 O.O.3d 347, 390 N.E.2d 1190. \* \* \*

{¶24} In *Alcoa*, the claimant, Robert R. Cox, sustained a left arm amputation just below his elbow. Due to continuing hypersensitivity at the amputation site, Cox was prevented from ever wearing a prosthesis. Consequently, Cox filed a motion seeking a scheduled loss of use award for the loss of use of his left arm.

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

{¶26} Alcoa filed a mandamus action which this court denied. Alcoa appealed as of right to the Supreme Court of Ohio.

{¶27} 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 \* \* \*."

{¶28} In *Richardson*, the claimant, John Richardson, sought an award for the total loss of use of his left foot. Richardson complained of paralysis of the left foot and his need to wear a brace to correct the foot drop. Richardson had limitations in walking, biking, negotiating steps, and prolonged standing. Richardson was able to ambulate with the use of a left ankle brace, and the use of a cane.

{¶29} The commission denied Richardson an award for the total loss of use of his foot and this court upheld the commission's order. In denying the requested writ of mandamus, this court stated:

\* \* \* [W]hen a claimant seeks a scheduled loss award, the proper inquiry is whether, taking into account both medical findings and real functional capacity, the body part for which the scheduled loss award is sought is, for all practical purposes, unusable to the same extent as if it had been amputated or otherwise physically removed. \* \* \*

[Richardson] argues that Dr. Wilkey's report did not address the proper body part (that is, the left foot) because Dr. Wilkey focused on the "sciatic nerve lesion" allowance. However, Dr. Wilkey noted subjective and objective findings with respect to pain in [Richardson's] left leg and foot, the fact that [Richardson] walks with a "significant limp," "complete loss of active dorsiflexion and eversion" in [Richardson's] ankle, and lack of dorsiflexion of the toes, as well as the sensations present in [Richardson's] foot. Dr. Wilkey opined that, "[a]lthough this injury is significant and debilitating, it does not constitute a total, permanent loss of use. It clearly does not equate with an amputation."

In his report, Dr. Gibson explicitly indicated that the question posed to him was whether the allowed conditions have resulted in a total, permanent loss of use of the left foot as if amputated. He equated weight-bearing capability with the absence of a total and permanent loss of use. He took into account the lack of flexion in the foot, as well as the pain, numbness and weakness present. However, he noted that with a foot drop brace relator can ambulate. Based upon this capability, Dr. Gibson opined that the foot is functional and

"could not be compared to an amputation or total loss of function of the left foot." The findings in the Wilkey and Gibson reports do not render [Richardson's] situation similar to that in *Alcoa*, where [Cox's] partially amputated arm lacked functional capacity because it could be used for little other than petting a dog or pushing open a car door. This case is also not akin to *Walker*, in which [Walker's] paralyzed legs could not be used except as a resting place for reading material or a plate of food.

Id. at ¶7-9.

{¶30} Relator's physical situation here is very similar to the claimant's situation in *Richardson*. Both relator and Richardson suffered a foot drop for which they required the use of a brace in order to ambulate. Both relator and Richardson were able to walk, with difficulty, and with the additional aide of a cane.

{¶31} Just as argued in *Richardson*, relator argues that his loss of use of his left foot corresponds to the same loss of use suffered by Cox in *Alcoa*. This magistrate disagrees.

{¶32} In *Alcoa*, Cox lost his arm, by way of amputation, just below his elbow. In losing that portion of his arm, Cox obviously lost his hand as well. An arm has significantly limited use when there is no hand attached. The majority of activities which an arm performs necessarily involve the hand. As such, without the hand, the arm's usefulness is significantly limited.

{¶33} By comparison, both relator here and the claimant in *Richardson* still have their left foot. It is undisputed that they are unable to use that foot in the same manner in which they used that foot previously. Specifically, both need a brace for their foot, need a cane to ambulate, and their ability to walk is limited. However, the foot itself still serves its main purpose: walking. While that walking is limited, it still exists and does not warrant

the same conclusion reached in *Alcoa*. Further, this court did not misapply the *Alcoa* standard in *Richardson*. The proper standard was cited and applied. Both relator herein and the claimant in *Richardson* retain significant functional use of their foot. As such, the magistrate finds that the commission did not misapply *Alcoa* and *Richardson*.

{¶34} Relator also contends that the proper interpretation of *Alcoa* was explained by this court in *Campos*. In that case, the claimant, Charles Campos, sustained serious industrial injuries following a fall from a ladder. Campos experienced severe tremors in his right hand which caused the hand to assume a stiff claw posture. Further, the muscles were extremely rigid throughout his right arm and hand causing the right arm and hand to shake constantly similar to the tremor experienced when one has Parkinson's disease. It was undisputed that Campos could hold a piece of fruit, grip a doorknob, open a door, and, while holding a pencil, could write his name, albeit poorly. It was undisputed that Campos had some function of both his right arm and hand.

{¶35} Campos filed a motion seeking a loss of use award for the loss of use of his right arm and hand. The commission determined that Campos had lost the use of his dominant right arm and hand because he was unable to perform meaningful functions with his dominant arm/hand.

{¶36} Sears filed a mandamus action arguing that the loss of fine motor functions of the hand did not limit the usefulness of the hand sufficiently to support an award for the total loss of use of arm and hand. Sears argued that Campos' remaining gross motor functions were as important as the fine motor functions which he lacked.

{¶37} In the decision rendered by a magistrate of this court, Sears' argument was set forth as follows:



Because [Campos] has lost the fine motor abilities of his right hand and coordination in the hand and arm, the staff hearing officer ("SHO") concluded he has lost the use of his hand and arm. Nevertheless, the arm and especially the hand, are used for gross motor functions as well as fine motor functions. [Campos] testified he retains gross motor functionality of his right hand and arm as he can use his hand to hold objects, write, grip a doorknob and open a door. \* \* \* Additionally[,] [Campos] demonstrated the strength to lift his right arm and testified he can use the arm to push a door. \* \* \* Arguably, where the hand is concerned, the gross motor functions of the hand are as important as the fine motor functions.

If [Campos] has the strength to grip and turn a doorknob, then he also has the strength to open a shower door and turn on the shower. He would have the strength to operate any household faucet. He would have the strength [to] hold a wash cloth and bathe large parts of his body. He would be able to gather clothing and use the right hand as an assist to fold clothes. He would be able to place utensils, cups, and plates into a dishwasher. He would be able to use the right hand to assist in dressing himself. [Campos] may or may not be able to squeeze a tube of toothpaste, but he would be able to hold the toothbrush while applying the toothpaste with his unaffected left hand.

Together, gross and fine motor functions comprise the total functionality of the hand. The total and permanent loss of use of the hand, as if by amputation, connotes a loss of both the fine motor and gross motor functions of the hand. All of the above-described gross motor functions demonstrate the residual usefulness of [Campos'] right hand. To find a loss of use based solely on the loss of fine motor functionality, where the evidence shows clear residual gross motor functionality, emasculates the language of R.C. 4123.57(B) and distorts the holdings of [*State ex rel. Gassmann v. Indus. Comm.* (1975), 41 Ohio St.2d 64] and its progeny.

Sears at ¶30.

{¶38} The magistrate found Sears' argument to be unpersuasive and this court agreed. Specifically, the magistrate stated:

\* \* \* To begin, [Sears] seems to suggest that, anatomically, the functions of the hand and arm can be divided into fine and gross motor functions, and that [Campos'] testimony and Dr. Wade's report indicate that [Campos] retains the gross motor functionality of his right hand. [Sears] then claims that gross motor functions are as important as fine motor functions, as if to suggest that the commission's decision is premised solely upon loss of fine motor functionality. In fact, Sears ultimately and incorrectly claims that the commission's award is premised "solely" on the loss of fine motor functionality.

\* \* \* In fact, the terms "gross motor" or "gross motor functionality" are terms that Sears has chosen to use here yet never defines those terms.

\* \* \*

\* \* \* [T]he commission did not find loss of use based "solely" upon loss of fine motor functionality of the right hand and arm.

At best, Sears' arguments point to some residual capacity in [Campos'] right hand and arm. [Campos] can manage, with great difficulty, to produce an illegible signature on a form. He can put an orange or apple in his right hand but he can't eat the orange or apple from his right hand. He can place an eating utensil in his right hand but he cannot use the utensil to eat from his right hand.

As the *Alcoa* case makes clear, it is not necessary that the injured member of the claimant be of absolutely no use in order for the claimant to have lost the use of it for all practical intents and purposes. Thus, that claimant admits some very limited use of his hand and arm does not necessarily detract from the commission's conclusion that claimant has lost the use of his hand and arm.

Id. at ¶32-44.

{¶39} As stated previously, hands and feet have decidedly different functions. A foot is primarily used for walking. The hand, with its opposable thumb, distinguishes humans from the majority of other creatures on this planet. Campos' hand was

essentially useless, while relator's foot is not essentially useless. They are two different body parts with very different functions. A hand has many more uses than a foot has. A foot is used primarily for walking. Relator can still use his foot for its primary function: walking. The loss of use of his hand experienced by Campos and the loss of use of his foot experienced by relator herein are extremely different and that is the significant distinction between these two cases.

{¶40} As above stated, the magistrate finds that the commission did properly apply the standard from *Alcoa*, and that this court did not misapply the *Alcoa* standard in *Richardson*. Further, the situation in *Campos* is not analogous to relator's situation.

{¶41} In his final argument, relator urges this court to apply the same concepts utilized when considering loss of vision when considering his loss of use of his foot. R.C. 4123.57(B) contemplates the loss of sight of an eye. In no case will an award of compensation be made for less than 25 percent loss of uncorrected vision and loss of uncorrected vision means the percentage of vision actually lost as a result of the injury. As relator argues, the Supreme Court of Ohio has held that corneal transplants are corrective and do not restore site. In *State ex rel. Kroger Co. v. Stover* (1987), 31 Ohio St.3d 229, the claimant sustained severe burns to the corneas of both eyes necessitating corneal transplants. The employer wanted the commission to consider the improvement of vision experienced by the claimant following corneal transplants. However, the court rejected the employer's argument because the employer was asking the court to require a finding that corneal transplants are not merely corrective, but that they restore vision permanently. Because the legislature permits awards even when vision loss has been corrected, relator argues that it is unreasonable to punish those workers who have

corrected the loss of their legs or feet, but not punish those who have corrected the loss of their vision.

{¶42} In *Kroger*, and in cases which have followed, such as *State ex rel. Gen. Elec. Corp. v. Indus. Comm.*, 103 Ohio St.3d 420, 2004-Ohio-5585, the main issue was the meaning of the statutory phrase "uncorrected vision." There is no similar provision related to "uncorrected" loss of any other body part. Because of that, there is no rationale under which the court's determination of loss of vision can be equated to loss of use of relator's foot.

{¶43} 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 foot and this court should deny relator's request for a writ of mandamus.

*/s/ Stephanie Bisca Brooks*

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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).