

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

[State ex rel.] Carlos Galdamez, :
Relator, :
v. : No. 10AP-594
The Industrial Commission of Ohio : (REGULAR CALENDAR)
and The New Genesis Company, :
Respondents. :
:

D E C I S I O N

Rendered on June 28, 2011

Edward J. Cox, Jr., Ronald J. Koltak, and Peter J. Gibson,
for relator.

Michael DeWine, Attorney General, and Andrew J. Alatis, for
respondents.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

SADLER, J.

{¶1} Relator, Carlos Galdamez, filed this original action seeking a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate

its order denying his motion requesting an award for the loss of use of his left arm 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 reports of Drs. Rammohan and Monge do constitute some evidence upon which the commission could rely, and, therefore, the commission did not abuse its discretion in relying on the same to deny relator's requested award for loss of use of his left arm. Accordingly, the magistrate recommended that this court deny the requested writ of mandamus.

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

[1.] The Magistrate improperly found that file review of Dr. Rammohan (06.02.2008) constituted some evidence upon which the Industrial Commission could rely.

[2.] The Magistrate improperly found that the report of Dr. Monge accepted the allowed conditions in the claim as required by State, ex rel. Domjancic v. Indus. Comm., 69 Ohio St.3d 693, 1994-Ohio[-]95.

{¶4} In his first objection, relator contends Dr. Rammohan's report is not some evidence upon which the commission could rely because he did not review the reports of Dr. Juarez that were done subsequent to Dr. Rammohan's review. As the magistrate concluded, notwithstanding the fact that Dr. Juarez's reports were not prepared at the time of Dr. Rammohan's review, Dr. Juarez's reports do not contain objective clinical

findings that Dr. Rammohan would have been required to accept. Consequently, relator's first objection is overruled.

{¶5} In his second objection, relator contends it was error for the commission to rely upon the report of Dr. Monge because he failed to document his awareness of the allowed conditions. We, however, agree with the magistrate's conclusion that review of Dr. Monge's report indicates he did consider the allowed condition of reflex sympathetic dystrophy, and, therefore, Dr. Monge's report does constitute some evidence upon which the commission could rely. Consequently, relator's second objection is overruled.

{¶6} To summarize, we conclude relator's objections fail to raise any new issues and simply reargue the contentions that were 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.

{¶7} Accordingly, for the reasons set forth in the magistrate's decision, 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.*

KLATT and FRENCH, JJ., concur.

A P P E N D I X

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

[State ex rel.] Carlos Galdamez,	:	
	:	
Relator,	:	
	:	
v.	:	No. 10AP-594
	:	
The Industrial Commission of Ohio	:	(REGULAR CALENDAR)
and The New Genesis Company,	:	
	:	
Respondents.	:	
	:	

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

Rendered on February 24, 2011

Edward J. Cox, Jr., Ronald J. Koltak, and Peter J. Gibson,
for relator.

Michael DeWine, Attorney General, and Andrew J. Alatis, for
respondents.

IN MANDAMUS

{¶8} Relator, Carlos Galdamez, 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 motion requesting compensation for

loss of use of his left arm and ordering the commission to find that he is entitled to that compensation.

Findings of Fact:

{¶9} 1. Relator sustained a work-related injury on September 5, 2002 and his workers' compensation claim was allowed for the following conditions: "Open wound of left second finger; reflex sympathetic dystrophy upper limb, left."

{¶10} 2. Relator requested that his claim be additionally allowed for the loss of use of his left hand.

{¶11} 3. A hearing was held before a district hearing officer ("DHO") on November 17, 2006 and was granted.

{¶12} 4. The Ohio Bureau of Workers' Compensation ("BWC") appealed and the matter was heard before a staff hearing officer ("SHO") on January 8, 2007. The SHO modified the prior DHO's order and allowed the claim for loss of use of the left index finger of the left hand. The SHO relied on the August 22, 2006 report of J. Mark Hatheway, M.D., who examined relator and concluded that relator's fingers, other than the left index finger, as well as his wrist and thumb, had full range of motion. While acknowledging that relator had significant loss of function in the balance of his left hand, the SHO concluded that the loss of use of the hand was not complete.

{¶13} 5. Relator's appeal was refused by order of the commission mailed January 30, 2007.

{¶14} 6. Subsequently, relator filed an application for permanent total disability ("PTD") compensation. In support, relator submitted the June 20, 2007, report of Dr. Orlando Rodolfo Ramos Juarez, the physician who was treating him in Guatemala. Dr.

Juarez's report was submitted in Spanish and was, thereafter, translated. In his report, Dr. Juarez opined that relator was unable to work.

{¶15} 7. Steven Altic, D.O., reviewed the report of Dr. Juarez and, in a report dated October 12, 2007, agreed with Dr. Juarez's conclusion that relator was permanently and totally disabled from all gainful remunerative employment due to the allowed condition of reflex sympathetic dystrophy ("RSD") of the left upper limb.

{¶16} 8. Relator was examined in Guatemala by Dr. Byron Leonel Lopez Maldonado. Dr. Maldonado's March 5, 2008 report was also written in Spanish; however, an English translation is contained in the record. Dr. Maldonado never opined whether relator was permanently and totally disabled; however, he provided the following information upon examination:

Upon physical examination, the patient was found to have limited active and passive mobility of the shoulder, elbow, wrist and hand, because of pain. There is pain at the level of the humeral head, on the posterior surface of the middle third of the distal portion of the arm, at the level of insertion of the epitrochlear and epicondyle muscles (hand extensors and flexors). There is pain and hypersensitivity in the first to the third fingers. There is a positive Tinel's sign (indicative of nerve injury).

{¶17} 9. A medical file review was performed by Kottil W. Rammohan, M.D. In his June 2, 2008 report, Dr. Rammohan identified the medical reports he reviewed in order to ascertain the objective findings. Specifically, Dr. Rammohan identified the following records:

* * * [E]valuations by Dr. Stephen Altic, D.O.; a report submitted to Dr. Altic by a physician in Guatemala, Dr. Juarez; a report of an IME conducted 08/22/06 by Dr. Mark Hatheway, M.D.; IME conducted by Dr. Tom Reynolds on 03/17/05; operative reports from Dr. Nikesh Batra on

11/01/04; Dr. Robin Stanko, who did an IME on 03/08/04; Dr. Michael Orzo, who conducted a stellate ganglion block on 07/30/03; and Dr. Daniel Clinchot, who evaluated him on 06/17/03. Additional evaluations also include the numerous letters on file by Dr. Charles May, D.O., and Dr. Desmond Stutzman, who performed the incision and drainage of the abscess on 09/19/02.

{¶18} Of those reports which are contained in the record, the magistrate specifically notes that the reports of doctors Hatheway, Reynolds, and Stanko do, in fact, contain objective findings related to relator's allowed conditions. After reviewing those records, Dr. Rammohan noted the following:

The objective abnormalities are confined to the left upper extremity. The injured worker's pain was considered to be suggestive of regional pain disorder, such as reflex sympathetic dystrophy. The left hand was cooler than the right arm. The left arm was cooler than the right arm and manifested increased sensitivity to touch and pain. Additional abnormalities documented include limited mobility of the left index finger at the metacarpal phalangeal joint. The restriction was to 30 degrees of flexion. Otherwise, examination did not identify any areas of abnormality, and the open wound appears to have completely healed.

In summary, this injured worker has abnormalities from the work-related injury where he was injured by a nail gun that deposited a nail into the dorsal aspect of the left index finger. Since then, he has been left with a left index finger that is ankylosed at 30 degrees of flexion, and also has reflex sympathetic dystrophy affecting the non-dominant left upper extremity.

{¶19} Dr. Rammohan concluded that relator's allowed conditions had reached maximum medical improvement ("MMI"), assessed at 18 percent whole person impairment, and opined that while relator could not return to his previous occupation requiring manual labor, he could perform as follows:

* * * [H]e can do a light type of occupation, requiring lifting of a maximum of 20 lbs. occasionally, and carrying 10 lbs. frequently. It would also be appropriate for the injured worker to avoid using power tools, hazardous machinery, or being in situations where he could potentially hurt himself or others around him, since he may require the use of narcotics for relief of pain, which can impair his ability to react appropriately. Additional functional limitations are not indicated.

{¶20} Dr. Rammohan opined that relator had a "Class II impairment of his non-dominant" left upper extremity, indicating that the "individual can use the involved extremity for self-care and can grasp and hold objects with difficulty, but has no digital dexterity."

{¶21} 10. Relator's application for PTD compensation was heard before an SHO on August 6, 2008 and was denied. The SHO relied on the report of Dr. Rammohan and, after considering the non-medical disability factors, determined that, given his relatively young age of 42 years, relator had the potential to benefit from rehabilitation services and that he could perform at least one-handed work. With regard to relator's ability to use his hand/arm, the SHO stated:

A review of all of the medical evidence leads to a conclusion that this injured worker does have significant difficulties with his left upper extremity. It is always difficult to evaluate claims with an allowed condition of reflex sympathetic dystrophy, and that is even more so the case in this claim, with the injured worker residing in Guatemala. However, giving the injured worker the benefit of the doubt, it is found reasonable to conclude that he does have very limited, if any, use of his left hand and left upper extremity due to the allowed conditions.

{¶22} 11. Thereafter, relator filed a second motion requesting a scheduled loss of use award for his left arm. A report and a questionnaire completed by Dr. Juarez

were submitted in support. In his report dated December 1, 2008¹, Dr. Juarez noted that upon physical examination, relator was found to have "limitation of active and passive movements in the shoulder, elbow, wrist and left hand" and that this represented "a total disability of the superior left limb."

{¶23} 12. On the July 12, 2008 questionnaire to which Dr. Juarez was asked to respond, he specifically responded affirmatively to the questions asking whether or not relator had suffered a permanent loss of use of the injured left arm for all practical intents and purposes.

{¶24} 13. The BWC obtained an evaluation from Dr. Carlos Del Valle Monge. In his July 15, 2009 report, Dr. Monge first identified the purpose of his exam: "Loss of Use: left upper extremity." Thereafter, Dr. Monge noted the following objective findings upon examination:

He walked in with his non-dominant left upper extremity close to the chest wall, elbow bent at 90 degrees wrist in [15 degrees] extension, hand with metacarpo phalangeal and inter-phalangeal joints in extension.

I saw no fixed contractures or ankyloses from hand to shoulder.

The hand was slightly sweatier than the opposite one, temperature was normal.

There was no interosseous, thenar or hypothenar atrophy; [likewise], the forearm showed no atrophy, biceps [were] also in seemingly good condition, triceps as well. Deltoid muscle showed no atrophy.

¹ None of Dr. Juarez's reports, written in Spanish, indicate the date they were written. While the translations are dated, the commission did not use the dates of translation to identify these reports. Instead, it appears that the parties are in agreement as to the dates. As such, the magistrate is using the dates set forth in the stipulation table of contents which were also used by the commission.

When requested to perform motion, (active rom) the inter-phalangeal joints of the hand would flex, not fully, but at least 30 degrees each, with patient complaining of severe pain and discomfort.

The metacarpo phalangeal joints would flex 40 degrees.

The wrist extends actively [45 degrees] and flexes [25 degrees].

The elbow actively flexes [100 degrees] and extends fully; forearm pronates [30 degrees] and supinates [45 degrees].

The shoulder flexes [90 degrees] extends [45 degrees], abducts [90 degrees]. Internal rotation [45 degrees], external rotation [25 degrees].

The passive range of motion of the joints of the upper extremity could not be performed due to patient complaint of pain and discomfort.

Motor strength, for the same reason could not be tested.

Dr. Monge also stated:

I could not find, the fixed contractures, ankyloses or muscle atrophy expected in longstanding useless upper extremity (from [S]ept 05 2002).

Since pain, abnormal sensation, CRPS (RSD) can not be objectively quantified but the objective findings related to this problem do.

* * *

From these findings the patient does not fulfill the criteria to have/suffer CRPS (RSD). **AT THE PRESENT TIME, THEREFORE, NO [DISABILITY] CAN BE ALLOWED.**

REGARDING to the loss of motion of hand joints, the index finger. Extends fully [flexed] 40 degrees at MP joint, PIP joint, DIP.

[Disability] of finger	45%
[Disability] of hand	9%

Whole person 5%

(Emphasis sic.)

{¶25} 14. Relator's motion was denied in a BWC order mailed July 30, 2009.

The administrator relied on the report of Dr. Monge.

{¶26} 15. Relator's appeal was heard before a DHO on August 27, 2009. The DHO relied on the reports of Dr. Juarez as well as statements relator made on the IC-2 application and granted the award:

* * * As the Injured Worker is not present to testify, the District Hearing Officer finds the next best evidence to be his statements on the IC-2 application. The Injured Worker certified that these statements are true: "I can't use my left arm"; "I can't even tie my own shoes"; and "I must do everything with one hand."

Based on the above, the District Hearing Officer orders that the Injured Worker be paid for the loss of use of the left arm in accordance with the provisions of Ohio Revised Code 4123.57 for a period of 225 weeks, less the compensation previously paid for loss of use of the left index finger. This order is based on the 07/12/2008 and 12/01/2008 reports from Dr. Juarez.

{¶27} 16. The BWC's appeal was heard before an SHO on September 24, 2009. The SHO vacated the prior DHO order and denied relator's request for a loss of use of his right upper extremity as follows:

This decision is supported by the 06/02/2008 report from Dr. Rammohan who did a specialist report on behalf of the Industrial Commission. It appears he was not able to examine the Injured Worker because he is in Guatemala. Dr. Rammohan states that the objective findings were taken from the reports of a number of individuals. He then goes on to state "the objective abnormalities are confined to the left upper extremity. The Injured Worker's pain is considered to be suggestive of Region Pain Disorder, such as reflex sympathetic dystrophy. The left hand was cooler than the

right arm. The left arm was cooler than the right arm and manifested increase[d] sensitivity to touch and pain. Additional abnormalities documented include limited mobility of the left index finger at the metacarpal phalangeal joint. The restriction was to 30 degrees of flexion. Otherwise, examination did not identify any areas of abnormality, and the open wound appears to have completely healed." An [examination] in Guatemala was actually performed on 07/15/2009 by Dr. Carlos Del Valle Monge. He found that the joints of the hand would flex, although not fully, but at least to 30 degrees. The wrist was able to actively extend and flex. The elbow was also able to actively flex and extend and the forearm was able to pronate. All of these motions were obviously limited to some degree. He states "I can not find, the fixed contractures, and ankyloses or muscle atrophy expected in longstanding useless upper extremity (from 09/05/2002)." Based on those two reports, the Staff Hearing Officer denies loss of use of the left upper extremity.

Reports from Dr. Juarez and Altic were reviewed and considered but not relied upon.

{¶28} 17. Relator's appeal was refused by order of the commission mailed October 8, 2009.

{¶29} 18. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶30} Relator argues that the commission abused its discretion by relying upon the reports of Doctors Rammohan and Monge. Specifically, relator argues that the report of Dr. Rammohan cannot be relied upon because it was completed six months prior to the December 1, 2008 report of Dr. Juarez indicating that relator had limitations in both active and passive movements in the joints of the left upper extremity. Relator argues that it was impossible for Dr. Rammohan to accept the physical exam findings of Dr. Juarez and, as such, his report cannot be considered some evidence upon which the commission could rely. With regard to the report of Dr. Monge, relator argues that

report cannot constitute some evidence upon which the commission could rely because Dr. Monge did not accept all the allowed conditions. Once those reports are removed from evidentiary consideration, relator contends that his motion for loss of use of his left upper extremity should be granted based on the reports of Dr. Juarez.

{¶31} The magistrate disagrees with relator's arguments and finds that the reports of Doctors Rammohan and Monge do constitute some evidence upon which the commission could rely. First, regarding the report of Dr. Rammohan, the magistrate notes that aside from the vague reference that relator had active and passive limitations regarding range of motion, Dr. Juarez's report did not contain objective findings which Dr. Rammohan would have had to accept. Further, Dr. Rammohan specifically listed other medical reports he considered and upon which he based his decision where the physicians did specifically set forth objective findings. Second, the magistrate finds that Dr. Monge did accept that relator's claim was allowed for RSD; however, Dr. Monge found that relator was not currently experiencing any disability from that condition.

{¶32} R.C. 4123.57 provides for awards of compensation for partial disabilities. Here, relator sought an award for the loss of use of his arm. Pursuant to R.C. 4123.57(B), relator would have received 225 weeks of compensation had he been successful.

{¶33} In order to qualify for a loss of use award, relator was required to present medical evidence demonstrating that, for all intents and purposes, he had lost the use of his left upper extremity. *State ex rel. Alcoa Bldg. Products v. Indus. Comm.*, 102 Ohio St.3d 341, 2004-Ohio-3166.

{¶34} 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. * * *

{¶35} 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.

{¶36} 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.

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

{¶38} 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 * * *."

{¶39} In support of his motion, relator submitted reports from Dr. Juarez. As noted in the findings of fact, none of the reports from Dr. Juarez contain any objective findings regarding relator's ability or inability to use his left upper extremity. Instead, Dr. Juarez simply stated that relator's allowed condition made it totally impossible for him to work and that he had limitations of active and passive movements in the shoulder, elbow, wrist, and left hand which Dr. Juarez considered to be a total disability of the superior left limb.

{¶40} R.C. 4123.57 states in pertinent part: "The district hearing officer, upon the application, shall determine the percentage of the employee's permanent disability, * * * based upon that condition of the employee resulting from the injury * * * causing permanent impairment *evidenced by medical or clinical findings reasonably demonstrable.*" (Emphasis added.)

{¶41} Because Dr. Juarez's report does not contain any medical or clinical findings reasonably demonstrable, it is likely that the commission would not have been

able to rely upon those reports even if they would have been the only reports submitted in evidence. However, the real thrust of relator's argument is that the commission abused its discretion by relying on the report of Dr. Rammohan who could not have accepted the objective findings of Dr. Juarez because Dr. Rammohan's report was written before the reports of Dr. Juarez.

{¶42} Pursuant to *State ex rel. Wallace v. Indus. Comm.* (1979), 57 Ohio St.2d 55, an examining physician is required to expressly accept all the findings of the examining physicians. As the court explained, when a non-examining physician renders an opinion, it is considered to be a response to a hypothetical question. "Applying the analogy to a hypothetical question, it follows that the non-examining physician is required to expressly accept all the findings of the examining physicians, but not the opinion drawn therefrom." *Id.* at 59.

{¶43} As noted in the findings of fact, Dr. Rammohan identified numerous reports which he reviewed and indicated that he obtained the objective findings from those reports. Some of those reports are included in the stipulation of evidence. For example, Dr. Rammohan identified the August 22, 2006 report of Dr. Hatheway. In that report, the magistrate notes that Dr. Hatheway indicated that relator's flexion at both the MP and PIP joints was restricted to 30 degrees, but that he has full extension of both joints. Regarding his other fingers, Dr. Hatheway noted that relator had full range of motion but hyperesthesia to light touch over the dorsal and volar aspects of the index finger. Dr. Rammohan also identified the March 17, 2005 report of Dr. Reynolds who noted that relator had normal range of motion of the left shoulder and elbow except that he lacked approximately 10 degrees of pronation. He noted further that the fifth digit of

relator's left hand lacked approximately 0.5 centimeters, the third digit lacked approximately 2 centimeters and relator had symmetrical and equal thumb range of motion bilaterally. Dr. Reynolds provided circumferal measurements of relator's upper arms and wrists, noted minimal active motion of the left wrist, that the MP joint was held in about 10 degrees of flexion while the PIP was neutral at zero degrees and the DIP joint lacked 5 degrees of extension and was held in about 5 degrees of flexion. Dr. Rammohan also noted the March 8, 2004 report of Dr. Robin Stanko who noted that, with the left index finger MCP joint, relator was able to extend 15 degrees and flex to 30 degrees, the left index PIP joint demonstrated zero degrees extension and 15 degrees of flexion, the left index DIP joint lacked 5 degrees of extension and had 10 degrees of flexion. Regarding the other reports identified therein, those reports either do not have objective findings in them which are as complete as those previously identified or are simply not in the record.

{¶44} A review of Dr. Rammohan's report demonstrates that, as a non-examining physician, he did expressly accept the findings of the other examining physicians from whom he had objective findings to review. While Dr. Juarez's July and December 2008 reports were not yet prepared and could not have been reviewed, those reports do not contain any objective clinical findings which Dr. Rammohan would have been required to accept.

{¶45} It appears that relator is asserting that Dr. Rammohan's report is stale. In *State ex rel. Hiles v. Netcare Corp.*, 76 Ohio St.3d 404, 1996-Ohio-169, the Supreme Court of Ohio stated that an evidentiary finding of staleness should always be approached cautiously. The *Hiles* court noted that the more relevant issue concerned

the content of the report and the question at issue when the report was written. In that case, the *Hiles* court upheld this court's determination that reports, which pre-dated the claimant's permanent partial disability application by 16 and 30 months respectively, were stale and could not constitute some evidence to support the commission's determination.

{¶46} Here, Dr. Rammohan's reports pre-dated Dr. Juarez's reports by one and six months respectively. While the issue was PTD, the content of Dr. Rammohan's reports addressed the function of relator's left upper extremity. As such, the magistrate finds that the report relied on was not stale and did constitute some evidence upon which the commission could rely.

{¶47} Relator also contends the commission abused its discretion by relying on the report of Dr. Monge. Relator argues that Dr. Monge did not accept the allowed conditions in the claim as required by *State ex rel. Domjancic v. Indus. Comm.*, 69 Ohio St.3d 693, 1994-Ohio-95.

{¶48} In *Domjancic*, the claimant's claim had been allowed for herniated disc; however, upon examination, Dr. Gonzalez found no evidence of a herniated disc. In finding that Dr. Gonzalez's report constituted some evidence, the court stated that doctors are to report their actual exam findings and are not required to "merely parrot" the allowed conditions as his physical findings. *Id.* at 695.

{¶49} Relator points to that portion of Dr. Monge's report wherein he stated as follows:

* * * I could not find, the fixed contractures, ankyloses or muscle atrophy expected in longstanding useless upper extremity (from [S]ept 05 2002).

Since pain, abnormal sensation, CRPS (RSD) can not be objectively quantified but the objective findings related to this problem do. * * *

* * *

From these findings the patient does not fulfill the criteria to have/suffer CRPS (RSD). **AT THE PRESENT TIME, THEREFORE, NO [DISABILITY] CAN BE ALLOWED.**

(Emphasis sic.)

{¶50} In isolating this portion of Dr. Monge's report, relator omits other portions which indicate that Dr. Monge was aware that relator's claim was allowed for RSD and that he considered that condition. Specifically, at the outset of his report, Dr. Monge indicated the purpose of his exam as follows: "Loss of Use: left upper extremity."

{¶51} Relator also omits Dr. Monge's physical findings on examination relative to his left upper extremity. Specifically, Dr. Monge noted the following: (1) wrist extends actively 45 degrees and flexes 25 degrees; (2) elbow actively flexes 100 degrees and extends fully; (3) forearm pronates 30 degrees and supinates 45 degrees; and (4) shoulder flexes 90 degrees, extends 45 degrees, abducts 90 degrees, internal rotation of 45 degrees, and external rotation of 25 degrees. While Dr. Monge did note that passive range of motion testing could not be performed due to relator's complaint of pain and discomfort, Dr. Monge noted that he found no fixed contractures, ankyloses or muscle atrophy which he would expect to find if relator's upper extremity had been useless for an extended period of time.

{¶52} This case is distinguishable from other cases dealing with this issue in this regard: none of the reports submitted from any of the physicians in Guatemala

specifically set forth the allowed conditions. The only time Dr. Juarez actually indicates relator's condition of RSD is on the physician questionnaire which was sent to Dr. Juarez and to which he replied. Specifically, Dr. Juarez was asked the following two questions in which the condition of RSD was specifically noted:

1. In your medical opinion has the diagnosed reflex sympathetic dystrophy in Mr. Galdamez's left upper limb progressed since your evaluation in June of 2007?

* * *

3. * * * [I]n your opinion is Mr. Galdamez's permanent loss of use of the injured left arm for all practical intents and purposes a proximate result of the allowed conditions in the claim (open wound finger, reflex sympathetic dystrophy, left upper limb)?

{¶53} With regard to the first question, whether relator's diagnosis of RSD had progressed since Dr. Juarez last evaluated relator in 2007, Dr. Juarez indicated that the condition had not. In response to the question of whether relator's permanent loss of use of his injured left arm was a direct result of the allowed conditions, including RSD, Dr. Juarez responded in the affirmative.

{¶54} Dr. Monge simply did not find any evidence that relator was currently suffering from RSD. When considering the fact that Dr. Monge noted that he was considering whether or not relator had suffered a total loss of use of his left upper extremity along with his detailed findings upon examination, this magistrate finds that Dr. Monge did consider the condition of RSD and his report constitutes some evidence upon which the commission could rely.

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

/S/ Stephanie Bisca Brooks

STEPHANIE BISCA BROOKS
MAGISTRATE

NOTICE TO THE PARTIES

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