

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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|--|---|--------------------|
| The State ex rel. Huntington National Bank, | : | |
| | : | |
| Relator, | : | |
| | : | |
| v. | : | No. 16AP-475 |
| | : | |
| Elizabeth Lapinta | : | (REGULAR CALENDAR) |
| and | : | |
| Industrial Commission of Ohio, | : | |
| | : | |
| Respondents. | : | |
| | : | |

D E C I S I O N

Rendered on November 2, 2017

On brief: *Michael Soto*, for relator.

On brief: *David P. Thomas*, for respondent Elizabeth Lapinta.

On brief: *Michael DeWine*, Attorney General, and *Andrew J. Alatis*, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

LUPER SCHUSTER, J.

{¶ 1} Relator, Huntington National Bank ("Huntington"), initiated this original action requesting that this court issue a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order granting a scheduled loss award in favor of respondent, Elizabeth Lapinta, based on the permanent and total loss of use of Lapinta's left arm, and to enter an order finding that she is not entitled to that award.

{¶ 2} This matter was referred to a magistrate of this court pursuant to Civ.R. 53(C) and Loc.R. 13(M) of the Tenth District Court of Appeals. The magistrate issued the appended decision, including findings of fact and conclusions of law. The magistrate determined that the commission did not abuse its discretion in granting Lapinta's application for a scheduled loss award based on the permanent and total loss of use of her left arm. Thus, the magistrate recommends this court deny Huntington's request for a writ of mandamus.

{¶ 3} Huntington has filed three objections to the magistrate's decision. In its first and second objections, Huntington argues the magistrate erred in finding the commission did not abuse its discretion in relying on Dr. Hong Shen's March 16, 2010 report, which described Lapinta's physical restrictions, and Lapinta's testimony before the commission, which conveyed her personal observations regarding her inability to use her left arm. Huntington argues that it was an abuse of discretion for the commission to rely on Dr. Shen's March 16, 2010 report because it does not contain objective findings based on a contemporaneous physical examination of Lapinta. Regarding Lapinta's testimony before the commission, Huntington contends the magistrate erred in not finding it was improper for the commission to rely on that testimony because it was self-serving and no objective medical evidence supported it. We disagree with these arguments.

{¶ 4} R.C. 4123.57(B) authorizes compensation to a claimant for the total loss of a body part, such as the total loss of an arm. To qualify for compensation under R.C. 4123.57(B), the "claimant must demonstrate with medical evidence a total loss of use of the body part at issue for all practical purposes." *State ex rel. Varney v. Indus. Comm.*, 143 Ohio St.3d 181, 2014-Ohio-5510, ¶ 16, citing *State ex rel. Alcoa Bldg. Prods. v. Indus. Comm.*, 102 Ohio St.3d 341, 2004-Ohio-3166. However, a claimant may qualify for a total loss of use award under R.C. 4123.57(B) even if the body part retains some residual function. *Id.*, citing *Alcoa*. "[T]he pivotal question is how much function remains." *State ex rel. Kroger Co. v. Johnson*, 128 Ohio St.3d 243, 2011-Ohio-530, ¶ 15. It is not necessary for medical evidence to contain the phrase "for all practical purposes," in reference to the alleged loss of use, to constitute some evidence in support of a total loss of use award. *State ex rel. Gwiazda v. Indus. Comm.*, 10th Dist. No. 15AP-882, 2016-Ohio-5153, ¶ 10.

{¶ 5} As the magistrate explained, Dr. Shen's March 16, 2010 report, which Dr. Shen completed for the purpose of submitting a medical status update to Lapinta's disability benefits provider, includes his objective observations regarding Lapinta's functional use of her left arm and hand. According to Huntington, Dr. Shen's March 16, 2010 report was deficient because Dr. Shen had not detailed Lapinta's functional capacity in his office notes completed contemporaneously with Lapinta's office visits, and because it was not based on a current physical examination of Lapinta. However, the fact that Dr. Shen did not detail the functional capacity of Lapinta's left arm in his office visit notes did not preclude the commission from relying on Dr. Shen's observations that he made in response to a specific inquiry from Lapinta's disability benefits provider. Instructions on the status update form directed Dr. Shen to indicate Lapinta's functional capacity based on his "knowledge of the patient." (Aug. 16, 2010 Unum Disability Status Update at 2.) In connection with his treatment of Lapinta for her injured left arm, Dr. Shen had physically examined her numerous times prior to his completion of the March 16, 2010 report, with the most recent examination occurring on February 16, 2010. In his March 16, 2010 report, Dr. Shen noted Lapinta's complete inability to lift anything with her left arm, to perform fine finger movements with her left hand, to perform hand-eye coordinated movements on the left side, or to push and pull with her left arm. After completing the March 16, 2010 report, Dr. Shen continued to periodically physically examine Lapinta. On March 4, 2011, Dr. Shen opined that the total functional capacity restrictions of Lapinta's left arm were permanent.¹

{¶ 6} We also concur with the magistrate's rejection of Huntington's challenge to the commission's reliance on Lapinta's personal observations regarding her inability to use her left arm. Because Lapinta's testimony was consistent with the objective observations and medical findings of Dr. Shen regarding her left arm and hand, it was not improper for the commission to cite her personal observations in support of its determination regarding her eligibility for a scheduled loss award. While Lapinta's own personal observations would not have independently provided the necessary evidence to

¹ In granting Lapinta's application for a scheduled loss award, the commission relied on both Dr. Shen's March 16, 2010 report and his March 4, 2011 report. The magistrate did not directly analyze the March 4, 2011 report, and Huntington does not present a specific objection for our review concerning that report.

support her request for a scheduled loss award, the commission reasonably viewed her testimony as being consistent with the medical reports it found persuasive.

{¶ 7} In its third objection, Huntington argues the magistrate erred in not finding that the commission abused its discretion in rejecting the report of Dr. Michael Keith, who opined that Lapinta had not sustained a total loss of use of her left arm. This objection is premised on Huntington's contention that Dr. Keith's report is the only medical evidence in the record that sufficiently addresses the applicable total loss of use standard. However, because the medical evidence from Dr. Shen provided a sufficient basis for the commission to find that Lapinta suffered a total loss of use of her left arm, Huntington's objection concerning Dr. Keith's report lacks merit.

{¶ 8} Following our independent review of the record pursuant to Civ.R. 53, we find the magistrate correctly determined that Huntington is not entitled to the requested writ of mandamus. The magistrate properly applied the pertinent law to the salient facts. Accordingly, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein. We therefore overrule Huntington's objections to the magistrate's decision and deny its request for a writ of mandamus.

*Objections overruled;
writ of mandamus denied.*

TYACK, P.J., and SADLER, J., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

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| Industrial Commission of Ohio, | : | |
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| Respondents. | : | |
| | : | |

MAGISTRATE'S DECISION

Rendered on June 30, 2017

Michael Soto, for relator.

David P. Thomas, for respondent Elizabeth Lapinta.

Michael DeWine, Attorney General, and *Andrew J. Alatis*,
for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶ 9} Relator, Huntington National Bank, seeks a writ of mandamus ordering respondent the Industrial Commission of Ohio ("commission") to vacate its order granting a scheduled loss award in favor of respondent Elizabeth Lapinta based on the permanent and total loss of use of Lapinta's left arm.

Findings of Fact:

{¶ 10} 1. Lapinta sustained an injury on September 19, 2006 in the course of and arising out of her employment with relator.

{¶ 11} 2. The injury occurred when Lapinta, through her employer, engaged in volunteer construction work at a Habitat for Humanity project, during which she suffered a fall and broke both bones in her left forearm.

{¶ 12} 3. On September 21, 2006, two days after the fall, Lapinta underwent surgery for reduction of the fractures and fixation through plates and screws on both bones.

{¶ 13} 4. Lapinta continued to experience pain and restricted mobility in her left arm. Lapinta consulted a surgeon, William M. Seitz, Jr., M.D., regarding these problems. Dr. Seitz noted as follows in his December 19, 2006 clinical notes after the consultation:

The patient has a complex problem. She had a severe both bone forearm fracture which was well fixed with stable internal fixation but she appears to have developed a postoperative compartment syndrome with resultant Volkmann's ischemic contracture with marked dysfunction of all three major nerves with almost complete loss of radial function and spotty loss of median and ulnar function.

(Stip. Evid. at 122.)

{¶ 14} 5. Pursuant to this diagnosis, on January 12, 2007, Lapinta underwent a second surgery that was described in Dr. Seitz's January 13, 2007 operative report:

Fasciotomy extending from the palm through the forearm of all flexor and extensor compartments, flexor tendon lengthening x 9, resection of necrotic muscle, tendon transfer of the palmaris longus to the flexor digitorum superficialis and removal of deep implant (plates and screws from the ulna), extensive neurolysis from the palm to the elbow of the median, ulnar, and radial nerves.

(Stip. Evid. at 119.)

{¶ 15} 6. Laptina's workers' compensation claim was initially allowed for "left radius and ulna shaft fracture." (Stip. Evid. at 2.)

{¶ 16} 7. Lapinta's claim for the additional condition of "Volkman's Ischemic Contracture" was allowed on September 14, 2007. (Stip. Evid. at 4.)

{¶ 17} 8. Based on a finding of maximum medical improvement, a staff hearing officer ("SHO") upheld the termination of Lapinta's entitlement to temporary total disability ("TTD") compensation effective December 22, 2008. The SHO's order is based on the November 13, 2009 report of Matthew D. McDaniel, M.D., who opined that the fractures had healed and the Volkman's ischemic contracture had become chronic and stable. Dr. McDaniel further opined that Lapinta was capable of restricted-duty employment with restrictions involving "no lifting greater than two pounds with the left arm, limited grasping, pinching, pushing/pulling with the left hand/arm, and no use of tools or operating machinery with the left hand/arm." (Stip. Evid. at 115.) Dr. McDaniel further stated:

Ms. [Lapinta] is at maximum medical improvement for the industrial injury and allowed conditions. The fractures have healed and the Volkman's contracture has become chronic and stable. She is not a candidate for a spinal cord stimulator. No specific treatment beyond periodic office visits and medications appears necessary or planned. No further fundamental, functional, or physiologic change is likely to occur relative to the allowed conditions despite continued treatment and/or rehabilitation.

(Stip. Evid. at 115.)

{¶ 18} 9. An SHO issued an order on November 24, 2009 allowing Lapinta's additional claim for "major depressive disorder, single episode, severe [and] post-traumatic stress disorder." (Stip. Evid. at 29.)

{¶ 19} 10. In an order dated May 18, 2010, an SHO denied Lapinta's application for psychological treatment and TTD compensation for the period between January 15, 2009 and April 12, 2010, for the allowed psychological conditions.

{¶ 20} 11. Lapinta filed an application on March 10, 2011 seeking compensation, pursuant to R.C. 4123.57(B), for permanent and total loss of use of her left arm. The application is supported with the March 4, 2011 report of Hong Shen, M.D.:

I have been seeing [Lapinta] for her chronic left arm pain from work related injury for years. After surgical repair,

physical therapy, acupuncture treatment and medication management, her pain still persists. Her left arm function has not improved since the injury. Ms. [Lapinta] has sustained a total and permanent loss of use of her left arm.

(Stip. Evid. at 66.)

{¶ 21} 12. Michael W. Keith, M.D., examined Lapinta on behalf of relator on April 18, 2011. Dr. Keith observed and noted a full range of motion of the cervical spine without complaint, full range of motion of the left shoulder, and full flexion and extension of the left elbow. Dr. Keith further stated in his July 7, 2011 report:

A physical exam was performed. In this examination I asked the patient to move the arm voluntarily. I did not manipulate it in any way. Because of the apparent pain she expressed and her hesitancy to talk let alone be examined, I felt it was best if I not provoke any complaint in this case. Specifically I asked her to make movements of her right unaffected limbs and then duplicate them with the left starting with the shoulder and neck and moving downward to the hand.

She demonstrated a full range of motion of her cervical spine without any radiating paresthesia or complaints. Her shoulder was difficult to manipulate in the sense that she couldn't follow instructions well but eventually through various positions and trials, she seemed to loosen up and gradually demonstrated a near full range of motion of the shoulder. I think the best I can state is that she is within 30 degrees of full abduction and external rotation. There were no frank dislocation events or apprehension events about posture, but considerable difficulty in getting her to agree to make the movements and then after awhile it became easier. Internal and external rotation of the shoulder was approximately 30 degrees both in abduction and straight-forward flexion.

Likewise around the elbow at first she held her arm tightly against her chest but eventually demonstrated full flexion and extension of the elbow. The arm showed no voluntary pronation or supination. She said that pain prevented it. Likewise she would not flex or extend her wrist and would not flex or extend her fingers to any reasonable degree either, with time, on command, with demonstration or with a reasonable amount of time to match a pattern on her right

hand. She showed jerky responses and minimal functionality.

* * *

To within a reasonable degree of medical probability, [Lapinta] has not sustained a total loss of use of the left arm solely on the basis of the allowed conditions in the claim. She does not demonstrate a degree of loss of function, motion or other nervous system or musculoskeletal system loss that creates an equivalent to an amputation or complete paralysis of the left upper extremity. She still has mobility in the shoulder and in the elbow.

(Stip. Evid. at 165-67.)

{¶ 22} 13. A district hearing officer ("DHO") held a hearing on the loss-of-use award request on August 17, 2011, which involved admission of the physicians' reports and testimony from Lapinta.

{¶ 23} 14. On August 19, 2011, the DHO issued an order granting Lapinta's request for a scheduled loss of use award. The DHO noted that "[t]he test for establishing whether the Injured Worker is entitled to the award is whether the Injured Worker has lost the use of the left arm for all practical intents and purposes." (Stip. Evid. at 68.) The DHO noted that he relied on Lapinta's testimony that she could not use her left arm to tie her shoes, button her clothes, write, drive, or do her hair. The DHO further relied on Dr. Shen's report indicating that Lapinta could not use her left fingers for any fine movements, for any pushing or pulling, for any hand-eye coordinated movements, and that she could not reach overhead with her left arm.

{¶ 24} 15. An SHO heard relator's appeal from the DHO order, and upheld the loss of use award. The SHO based her findings on the restrictions noted by Dr. Shen in his March 16, 2010 update, and his March 4, 2011 report, and the testimony offered by Lapinta to the DHO.

{¶ 25} 16. The commission refused relator's appeal from the SHO's order. The present action in mandamus ensued.

Discussion and Conclusions of Law:

{¶ 26} In order to be entitled to a writ of mandamus, relator must establish a clear legal right to the relief sought, a clear legal duty on the part of the respondent to perform the requested act, and the lack of an adequate remedy in the ordinary course of law. *State ex rel. United Auto., Aerospace & Agricultural Implement Workers of Am. Region 2-B v. Bur. of Workers' Comp.*, 108 Ohio St.3d 432, 2006-Ohio-1327, ¶ 34; *State ex rel. Pressley v. Indus. Comm.*, 11 Ohio St.2d 141 (1967); *State ex rel. Medcorp, Inc. v. Ryan*, 10th Dist. No. 06AP-1223, 2008-Ohio-2835, ¶ 8. The relator bears the burden in a mandamus case and must submit facts and produce proof that is plain, clear, and convincing. *State ex rel. Doner v. Zody*, 130 Ohio St.3d 446, 2011-Ohio-6117, ¶ 55. The clear legal right to a writ of mandamus exists when the relator has shown that the commission abused its discretion by entering an order that was not supported by some evidence in the administrative record. *State ex rel. Elliott v. Indus. Comm.*, 26 Ohio St.3d 76 (1986). A writ of mandamus will therefore not issue if an order of the commission is supported by "some evidence." *State ex rel. Pass v. C.S.T. Extraction Co.*, 74 Ohio St.3d 373, 376 (1996). A resolution of conflicting or disputing facts lies within the final jurisdiction of the commission, subject only to correction through a writ of mandamus when the relator has shown a gross abuse of discretion. *State ex rel. Allerton v. Indus. Comm.*, 69 Ohio St.2d 396 (1982). This principle is rooted in the commission's considerable discretion in the performance of its duties, and the presumption that its actions are valid and performed in good faith and sound judgment. *State ex rel. Stephenson v. Indus. Comm.*, 31 Ohio St.3d 167, 170 (1987).

{¶ 27} R.C. 4123.57(B) provides a schedule of specific compensation payable to an employee who has suffered the loss of a body part as provided in the statute. An injured worker claiming loss of use under R.C. 4123.57(B) bears the burden of showing that the loss of use is complete and permanent. *State ex rel. Carter v. Indus. Comm.*, 10th Dist. No. 09AP-30, 2009-Ohio-5547. Medical evidence of disability or loss may be impeached by evidence of actual work or other physical activity inconsistent with that assessment. *State ex rel. Schultz v. Indus. Comm.*, 96 Ohio St.3d 27, 2002-Ohio-3316.

{¶ 28} This scheduled compensation, originally limited to amputations, has been expanded by the Supreme Court of Ohio to include loss of use that does not include

severance or amputation. *State ex rel. Alcoa Bldg. Prods. v. Indus. Comm.*, 102 Ohio St.3d 341, 2004-Ohio-3166. In *Alcoa*, the claimant suffered an arm injury requiring amputation below the elbow. Sensitivity at the amputation site, and additional shoulder injuries affecting the remaining portion of the limb, led the Supreme Court to conclude that the claimant had for all practical purposes lost the use of the entire arm, similar to the manner in which a paraplegic has lost the use of his or her legs without amputation. *Alcoa* at ¶ 10 citing *State ex rel. Gassmann v. Indus. Comm.*, 41 Ohio St.2d 64, 67 (1975).

{¶ 29} The critical question when assessing complete loss of use for "all practical purposes" pursuant to *Alcoa* and subsequent cases is whether some function is retained, and how much. *State ex rel. Kroger Co. v. Johnson*, 128 Ohio St.3d 243, 246, 2011-Ohio-530. In *Alcoa*, the Supreme Court noted that evidence indicated that the claimant continued to use what remained of his impaired limb for some minor functions: pushing open a car door, and tucking paperwork between the upper arm and chest. *Alcoa* at ¶ 6. These minor residual functions did not preclude a scheduled award. *Id.*

{¶ 30} The magistrate concludes that the commission did not abuse its discretion in relying on medical evidence from Dr. Shen and Lapinta's own testimony when determining that Lapinta was entitled to a scheduled loss of use award, and in preferring this evidence to the conclusions of Dr. Keith.

{¶ 31} While relator alleges that Dr. Shen's March 16, 2010 report lacks the objective findings necessary to support his conclusions, the SHO's order correctly noted otherwise. Dr. Shen noted that Lapinta had no ability to perform fine finger movement or hand-eye coordinated movements, and that her left arm function was not improved through the course of treatment. Similarly, in *Alcoa*, the Supreme Court relied on a medical report in which the objective findings were intertwined with an assessment of the claimant's complaints regarding continuing pain: " '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.' " *Id.* at ¶ 342.

{¶ 32} Relator also objects to reliance on Lapinta's personal observations regarding her inability to use her arm, alleging that Lapinta is not a reliable historian for

these facts, and that her self-serving history must be discounted. Relator cites *State ex rel. Kish v. Kroger Co.*, 10th Dist. No. 10AP-882, 2011-Ohio-5766, *aff'd* 135 Ohio St.3d 451, 2013-Ohio-1931, in which this court denied a writ of mandamus. In *Kish*, the commission gave credence to a medical report finding that the claimant had not suffered total loss of use of her left arm, and rejected the claimant's submitted medical report to the contrary. This court concluded that some evidence existed to support the commission's order denying scheduled loss of use compensation.

{¶ 33} *Kish*, as in the case before us, involved conflicting medical reports. In each case, the commission assessed the evidence and reached a conclusion supported by some evidence. The fact that in *Kish* the commission's conclusion was not superficially consistent with the case before us does not mandate that we issue a writ here ordering denial of the award. As in *Kish*, we find that the commission's order is supported by some evidence. That, rather than similarity in the claimants' medical situations, presents the consistent rule of law to be applied in a mandamus action in which we defer to the expertise of the commission.

{¶ 34} The commission here acted within its discretion and did not find Dr. Keith's report persuasive. "The commission is required to state the evidence upon which it relies and give a brief explanation for the decision. There is no requirement that the commission restate all of the findings in the doctors' reports upon which the commission is relying." *State ex rel. Hall v. Indus. Comm.*, 10th Dist. No. 06AP-788, 2007-Ohio-2186, ¶ 25.

{¶ 35} For the foregoing reasons, the magistrate concludes that the commission did not abuse its discretion when it relied on Lapinta's evidence in preference to that of relator, and relator has not demonstrated that it is entitled to a writ of mandamus ordering the commission to vacate its order. It is accordingly the magistrate's decision that this court will deny relator's request for a writ of mandamus.

/S/ MAGISTRATE
MARTIN L. DAVIS

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).