

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio ex rel. Richard R. Parzych,	:	
Relator,	:	
v.	:	No. 08AP-906
Industrial Commission of Ohio	:	(REGULAR CALENDAR)
and Graham Ford, Inc.,	:	
Respondents.	:	

D E C I S I O N

Rendered on June 16, 2009

Willis & Willis Co., L.P.A., C. Stanley Willis, II, Kelly A. Willis,
and Todd Fitz, for relator.

Richard Cordray, Attorney General, and *Stephen D. Plymale,*
for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

SADLER, J.

{¶1} Relator, Richard R. Parzych ("relator"), has filed this original action requesting that this court issue a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its orders denying him a scheduled loss award under R.C. 4123.57(B), and to issue a new order granting the requested award.

{¶2} Pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth Appellate District, this matter was referred to a magistrate who rendered a decision, including findings of fact and conclusions of law, which is appended to this decision. Therein, the magistrate concluded that the commission did not abuse its discretion and recommended that this court not issue the requested writ of mandamus. Relator filed objections to the magistrate's decision, and the commission filed a memorandum opposing the objections. This cause is now before the court for a full review.

{¶3} Pursuant to R.C. 4123.57, relator filed an application for a scheduled loss award based on amputation of his right leg and disarticulation of his right hip. He filed the application during the pendency of the employer's appeal, pursuant to R.C. 4123.512, of relator's right to participate for the conditions of "disarticulation right hip" and "amputation right lower extremity." Because the appeal of the underlying conditions was still pending, the commission denied the scheduled loss application, finding payment under R.C. 4123.57 should be stayed until the 4123.512 appeal is resolved.

{¶4} In proceedings before the magistrate, relator argued that R.C. 4123.512(H) prohibits the commission from staying payment of a scheduled loss award. R.C. 4123.512(H) provides that a 4123.512 appeal to court "shall not stay the * * * payment for subsequent periods of total disability * * * during the pendency of the appeal." Relator

argued that because he lost his entire leg, he has suffered a "total disability" within the meaning of R.C. 4123.512(H).

{¶5} The magistrate disagreed. Citing *State ex rel. Saunders v. Indus. Comm.*, 101 Ohio St.3d 125, 2004-Ohio-339, the magistrate concluded that R.C. 4123.512(H) applies only to payments of temporary total disability compensation (under 4123.56), and permanent total disability compensation (under 4123.58), but not to any form of *partial* disability compensation under R.C. 4123.57. In *Saunders*, the Supreme Court of Ohio held, "[b]ecause the word 'disability' is modified by the word 'total,' we read the statute as authorizing the commission to stay the payment of *partial* disability compensation during pending litigation." (Emphasis sic.) Id. at ¶21.

{¶6} Relator objects to the magistrate's conclusion, arguing again that because he has sustained a *total loss* of his leg, he has suffered a *total disability* within the meaning of R.C. 4123.512(H). For this reason, he argues, *Saunders* does not apply. We disagree.

{¶7} Relator is erroneously conflating the concepts of "loss of function" and "disability." "Disability" is defined as " 'the effect that the medical impairment has on the claimant's ability to work.' " *State ex rel. DaimlerChrysler Corp. v. Indus. Comm.*, 121 Ohio St.3d 341, 2009-Ohio-1219, ¶5, quoting *Meeks v. Ohio Brass Co.* (1984), 10 Ohio St.3d 147, 148. "[T]he issue of impairment * * * is a concern separate and distinct from the issue of disability." *State ex rel. Elliott v. Indus. Comm.* (1986), 26 Ohio St.3d 76, 79. Here, total loss of one leg is a physical impairment, but does not automatically equate to a

total disability.¹ Indeed, relator's application for a scheduled loss award is an application for *partial disability* compensation. It was submitted pursuant to R.C. 4123.57, which is entitled "Partial Disability" and begins with the phrase, "Partial disability compensation shall be paid as follows."

{¶8} Relator objects to the magistrate's conclusion that R.C. 4123.512(H) only prohibits staying payment of total disability compensation and does not prohibit staying of partial disability compensation. But that is precisely what the court held in *Saunders* – that partial disability compensation may be stayed during the pendency of a court appeal relating to the allowance of the underlying conditions.

{¶9} For the foregoing reasons, we overrule relator's objections to the magistrate's decision. Having undertaken an independent review of the record, we find that the magistrate has properly determined the facts and the applicable law. Accordingly, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein, and we deny the requested writ of mandamus.

*Objections overruled,
writ of mandamus denied.*

FRENCH, P.J., and McGRATH, J., concur.

¹The total loss of *both* legs automatically entitles a claimant to permanent total disability compensation. R.C. 4123.58(C)(1).

A P P E N D I X
 IN THE COURT OF APPEALS OF OHIO
 TENTH APPELLATE DISTRICT

State of Ohio ex rel. Richard R. Parzych,	:	
Relator,	:	
v.	:	No. 08AP-906
Industrial Commission of Ohio	:	(REGULAR CALENDAR)
and Graham Ford, Inc.,	:	
Respondents.	:	

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

Rendered on March 16, 2009

Willis & Willis Co., L.P.A., and Nicole E. Rager, for relator.

*Richard Cordray, Attorney General, and Stephen D. Plymale,
 for respondent Industrial Commission of Ohio.*

I N M A N D A M U S

{¶10} Relator, Richard R. Parzych, has filed this original action requesting that this court issue a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its orders denying him a scheduled loss award under R.C. 4123.57(B) in spite of the fact that an appeal pursuant to R.C. 4123.512 is currently pending regarding the conditions for which relator seeks the award.

Findings of Fact:

{¶11} 1. Relator sustained a work-related injury on October 17, 2006, and his workers' compensation claim was originally allowed for "right inguinal hernia."

{¶12} 2. Relator subsequently moved for the allowance of the following additional conditions: "amyand's hernia; necrotizing fascitis, disarticulation right hip; and amputation right lower extremity."

{¶13} 3. In an order mailed April 10, 2008, a staff hearing officer ("SHO") granted relator's request and his claim was allowed for the above indicated additional conditions.

{¶14} 4. Further appeal by the employer, Graham Ford, Inc. ("employer"), was denied.

{¶15} 5. Thereafter, the employer filed a notice of appeal in the Franklin County Court of Common Pleas ("common pleas court") appealing the decision of the SHO additionally allowing relator's claim for the conditions of "amyand's hernia; necrotizing fascitis; disarticulation right hip; and amputation right lower extremity."

{¶16} 6. Thereafter, relator filed a motion requesting that he be awarded statutory loss of use for the conditions of disarticulation of right hip and amputation of the right lower extremity.

{¶17} 7. In an order mailed May 14, 2008, the administrator of the Ohio Bureau of Workers' Compensation ("BWC") concluded that relator had sustained a 100 percent amputation of his right leg and ordered that permanent partial disability ("PPD") compensation be paid to relator from November 9, 2006 to September 8, 2010.

{¶18} 8. The employer appealed and the matter was heard before a district hearing officer ("DHO") on June 26, 2008. The DHO vacated the order of the administrator to the extent that the DHO concluded that the payments were not currently payable as follows:

While an award pursuant to R.C. 4123.57(B) for loss by amputation of the right leg is supported by the medical evidence on file, it is not currently payable pursuant to Hearing Officer Manual Policy E7, due to the fact that the underlying currently allowed condition which supports the payment of the award is on appeal to Court pursuant to R.C. 4123.512. The District Hearing Officer finds that, while the language of Policy E7 speaks only to C92 awards, the Commission's current policy is that Scheduled loss awards, and awards for old paragraph (A) impairment in earning capacity awards also fall within the same policy.

{¶19} 9. Relator's appeal was heard before an SHO on August 5, 2008. The SHO affirmed the prior DHO's order as follows:

The Staff Hearing Officer agrees with the reasoning and decision of the District Hearing Officer in denying the payment of the requested schedule loss award based on Hearing Officer Manual page E7, its interpretive memorandum (chart) and the appeal to court of the issue of additional allowance upon which the award would be premised. In addition to the reasoning of the District Hearing Officer, the Staff Hearing Officer notes that the Industrial Commission chart entitled "Processing of Subsequent Requests for Payment of Compensation and/or Benefits Pending .512 Appeals for Compensation" clearly reflects that all forms of compensation payable pursuant to R.C. 4123.57 are treated alike in these matters, i.e. that they are not payable unless the request is based on a condition from the original allowance. As this is not the case in this claim, the request remains denied at this time.

{¶20} 10. Relator's further appeal was refused by order of the commission mailed August 19, 2008.

{¶21} 11. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶22} In order for this court to issue a writ of mandamus as a remedy from a determination of the commission, relator must show a clear legal right to the relief sought and that the commission has a clear legal duty to provide such relief. *State ex rel. Pressley v. Indus. Comm.* (1967), 11 Ohio St.2d 141. A clear legal right to a writ of mandamus exists where the relator shows that the commission abused its discretion by entering an order which is not supported by any evidence in the record. *State ex rel. Elliott v. Indus. Comm.* (1986), 26 Ohio St.3d 76. On the other hand, where the record contains some evidence to support the commission's findings, there has been no abuse of discretion and mandamus is not appropriate. *State ex rel. Lewis v. Diamond Foundry Co.* (1987), 29 Ohio St.3d 56. Furthermore, questions of credibility and the weight to be given evidence are clearly within the discretion of the commission as fact finder. *State ex rel. Teece v. Indus. Comm.* (1981), 68 Ohio St.2d 165.

{¶23} In this mandamus action, relator argues that the commission abused its discretion by staying payment of the scheduled loss award during the pendency of the employer's appeal of the allowance of the conditions upon which the scheduled loss award is based. Relator contends that it is not only an abuse of discretion but that the commission's use of Memo E7 and its accompanying chart is improper because neither was properly promulgated in accordance with R.C. Chapter 119. For the reasons that follow, it is this magistrate's decision that this court should deny relator's request for a writ of mandamus.

{¶24} R.C. 4123.57 provides for the payment of PPD compensation. R.C.

4123.57 provides, in pertinent part:

(A) The * * * hearing officer, upon the application, shall determine the percentage of the employee's permanent disability, except as is subject to division (B) of this section, based upon that condition of the employee resulting from the injury or occupational disease and causing permanent impairment evidenced by medical or clinical findings reasonably demonstrable. The employee shall receive sixty-six and two-thirds per cent of the employee's average weekly wage, but not more than a maximum of thirty-three and one-third per cent of the statewide average weekly wage * * * per week regardless of the average weekly wage, for the number of weeks which equals the percentage of two hundred weeks.

* * *

(B) In cases included in the following schedule the compensation payable per week to the employee is the statewide average weekly wage as defined in division (C) of section 4123.62 of the Revised Code per week and shall continue during the periods provided in the following schedule:

* * *

For the loss of a leg, two hundred weeks.

{¶25} Under section (A), the hearing officer reviews the medical evidence presented to determine the percentage of permanent impairment resulting from the injury. Once the hearing officer determines the percentage of impairment, the claimant receives compensation at a rate of 66 and two-thirds percent of the claimant's average weekly wage but not more than a maximum of 33 and one-third percent of the statewide average weekly wage for the number of weeks which equals the percentage of 200 weeks.

{¶26} Under section (B), there is no determination of percentage of impairment for a hearing officer to make. Instead, the legislature has already determined the percentage of impairment caused by the loss of certain enumerated body parts. The legislation has determined the number of weeks of compensation a claimant will receive for the loss of these certain enumerated body parts.

{¶27} Both (A) and (B) are payments of PPD compensation. PPD compensation awarded under either (A) or (B) are benefits which are in the nature of general damages and are awarded irrespective of earning capacity. See *State ex rel. Hammond v. Indus. Comm.* (1980), 64 Ohio St.2d 237.

{¶28} In the present case, relator's claim was originally allowed solely for right inguinal hernia. Thereafter, the commission determined that relator's claim should include the following additional conditions: "amyand's hernia; necrotizing fascitis; disarticulation right hip; and amputation right lower extremity." The allowance of these additional claims is currently being contested by the employer by way of an appeal to the common pleas court pursuant to R.C. 4123.512.

{¶29} Relator's motion for a scheduled loss award under R.C. 4123.57(B) for the total loss of his right leg is requested for a condition the allowance of which is currently pending in the common pleas court. Because of the appeal of the employer contesting the allowance of these additional conditions, the commission determined that an award of PPD compensation was not currently payable.

{¶30} The commission's determination that compensation is not currently payable is supported by R.C. 4123.512(H) which provides in pertinent part:

An appeal from an order issued under division (E) of section 4123.511 of the Revised Code or any action filed in court in a case in which an award of compensation or medical benefits has been made shall not stay the * * * payment for subsequent periods of total disability or medical benefits during the pendency of the appeal.

{¶31} The commission asserts that, pursuant to the rules of construction, R.C. 4123.512(H) expressly prohibits against staying total disability payments (i.e., temporary total and permanent total disability compensation) and does not apply to other or alternative forms of compensation (i.e., partial disability compensation).

{¶32} Relator argues that because his right leg was amputated, he has sustained a total loss of his leg and that, because his loss is "total," R.C. 4123.512(H) prohibits the staying of the payment of his compensation.

{¶33} In *State ex rel. Saunders v. Indus. Comm.*, 101 Ohio St.3d 125, 2004-Ohio-339, the Supreme Court of Ohio determined that a stay of partial disability compensation is authorized by R.C. 4123.512(H). The court's determination was based on the fact that partial disability compensation does not provide the wage replacement stream of income to injured workers and their families which is provided by total disability compensation. As stated previously, PPD awards are in the nature of damages and are not intended to compensate for loss of wages or earning capacity. *Hammond; State ex rel. Doughty v. Indus. Comm.* (1991), 61 Ohio St.3d 736. As such, there is a rational distinction for treating an award of total disability compensation during a right to participate appeal differently from an award of partial disability compensation relative to the stay exemption in R.C. 4123.512(H): the partial disability award is not

wage replacement compensation necessary to support the injured workers and their families.

{¶34} In *Saunders*, the Supreme Court of Ohio also considered whether the commission abused its discretion by applying Memo E7 where the conditions upon which the PPD award were based are currently being appealed to the common pleas court. In that case, the clamant had also argued that Memo E7 had not been properly promulgated under R.C. Chapter 119 and could not be used by the commission to support the stay of the payment. The court concluded that Memo E7 does not expand upon the statute and the case law upon which it is based. Instead, the court noted, in pertinent part, that Memo E7 is based on two things:

First is the established case law that nonallowed conditions can never factor into a compensation award. *State ex rel. Waddle v. Indus. Comm.* (1993), 67 Ohio St.3d 452, 619 N.E.2d 1018. Second is R.C. 4123.512, which states:

"(H) An appeal from an order issued under division (E) of section 4123.511 of the Revised Code or any action filed in court in a case in which an award of compensation has been made shall not stay the payment of compensation under the award or payment of compensation for subsequent periods of *total* disability during the pendency of the appeal." (Emphasis added.)

Because the word "disability" is modified by the word "total," we read the statute as authorizing the commission to stay the payment of *partial* disability compensation during pending litigation.

Id. at ¶19-21. (Emphasis sic.)

{¶35} Based on *Saunders*, with or without consideration of Memo E7 or the corresponding chart, the commission was required to stay the payment of relator's award pursuant solely to R.C. 4123.512(H).

{¶36} Relator bases his argument that this award of PPD compensation is actually an award of "total" disability compensation based upon the fact that his leg has been amputated and his loss is total. However, relator's argument ignores the purpose of payments of PPD compensation. Again, PPD compensation is in the nature of general damages and is not intended to provide the income stream which temporary total disability and permanent total disability compensation provide. While relator's loss of his leg is a "total" loss of the leg, the word "total" in the statute modifies the word "disability" and not any of the enumerated body parts. As such, applying the decision from *Saunders*, and a plain reading of the statute, the magistrate finds that neither Memo E7 nor the corresponding chart needed to be promulgated pursuant to R.C. Chapter 119 and the commission did not abuse its discretion by staying the payment of PPD compensation to relator while the appeal to common pleas court remains pending.

{¶37} Based on the foregoing, it is this magistrate's conclusion that relator has not demonstrated that the commission abused its discretion and relator's request for a writ of mandamus should be denied.

/S/ Stephanie Bisca Brooks
STEPHANIE BISCA BROOKS
MAGISTRATE

NOTICE TO THE PARTIES

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